tion to a direction not having been given to the following effect—"In respect that the defender had reasonable ground for believing that the pursuer was attending Mrs Haldane as medical officer, the occasion was privileged"—a direction which I was not asked to give.

I think it right to say, however, that had such a direction been asked I should have refused to give it on the short ground that the mental attitude of a defender can never make an occasion privileged which in point of fact is not so. The matter of privilege depended on the relationship which subsisted between the pursuer and Mrs Haldane. If he attended her as medical officer the occasion was undoubtedly privileged and the defender had a right to intervene. If Mrs Haldane was a private patient the Parish Council had nothing to do with her case, and the defender had no right or duty to communicate with the Parish Council regarding the pursuer's treatment of the case. This was a question which it was my duty to determine, and I directed the jury that on the evidence Mrs Haldane was a private patient of the pursuer, and that accordingly the occasion was not privileged. I remain of opinion that the view I took as to the effect of the evidence was right, and that the consequent direction which I gave to the jury was sound in law.

The authorities quoted at the debate seem to confirm the views I have expressed. The judgments in the case of *Stuart* v. *Bell*, [1894] 2 Q.B. 341, are important, and they lay it down that an occasion is privileged (*a*) if the communication was made in the discharge of some social or moral duty, or (*b*) on the ground of an interest in the party making or receiving it. Applying these principles to the present case I am unable to hold that the defender had any duty or interest to interfere in the matter of a doctor's mode of treating his private patient, and the chairman of the Parish Council had no interest to receive the defender's communication on this topic. Lindley, L.J., makes it plain that the duty or interest must exist as matter of fact and not merely of belief, for at p. 349 he says this—"Both the defendant and Stanley say that the defendant acted under a sense of duty, but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend on the defendant's belief, but on whether he was right or mistaken in that belief."

The case of *Hebditch*, [1894] 2 Q.B. 54, is a direct authority against the Dean of Faculty's contention. That case decided that in order that the occasion upon which a defamatory statement is made may be privileged it is necessary that the person to whom such statement is made as well as the person making it should have an interest or duty in respect of the subject-matter of such statement. It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty. Davey, L.J., expresses the whole matter in a single sentence—"The question whether the occasion on which such publication takes place is privileged depends, in my opinion, on the question whether there is in fact an interest or duty in the person to whom the libel is published. I cannot think that the mistake of the defendant in addressing the communication to the wrong person, or his belief, however honest, that the person to whom it is published has a duty or interest in the matter, can make any difference with regard to the question whether the occasion is privileged."

I am therefore of opinion that the proposition of the Dean of Faculty to the effect that a reasonable belief that an occasion is privileged is equivalent to the occasion being privileged in point of fact is unsound in law, and that accordingly the second exception also fails.

The Court disallowed the exceptions and minute of *res noviter*, made the rule absolute, set aside the verdict of the jury, and granted a new trial.

Counsel for the Pursuer — Watt, K.C.— King Murray. Agents—Patrick & James, S.S.C.

Counsel for Defender—Dean of Faculty (Clyde, K.C.) — Guild. Agents — Guild & Guild, W.S.

Tuesday, February 1.

FIRST DIVISION.

[Lord Dewar, Ordinary.

SMELLIE *v.* CALEDONIAN RAILWAY COMPANY.

Contract—Conditions—Breach—Failure to Give Facilities Stipulated for—Remedy—Waiver—Arbitration Clause—Basis of Payment—Quantum meruit—Bar.

The pursuer in a petitory action, a contractor, by tender and acceptance dated 29th March 1899 agreed to build a railway line for the defenders, a railway company. The work was to be completed in March 1901. Work was begun in March 1899. The formal contract was signed in October 1900, and the work was completed in 1906. The pursuer brought his action in February 1913, alleging that, owing to the faults and failures of the defenders the work done was entirely different from the work contracted for, that certain facilities which were a condition-precedent of his consent to the bargain had not been given to him, and that he was entitled to be paid on the principle of *quantum meruit*. Prior to the raising of the action the pursuer never in any way indicated to the defenders that he repudiated the contract, but continued to do the work and rendered accounts therefor at the contract rates and in terms of the contract, and accepted payments on that basis. The contract contained an arbitration clause of great width, providing for arbitration in the case of any dispute as to the

cost of any additional work or alteration of the work, or any extension of time or delay, or any claim of damages by the contractor, or as to any other matter, claim, demand, or obligation whatever arising out of or in connection with the contract, whether during the execution of the work or after the completion thereof. *Held* that the averments of the pursuer were irrelevant, and action *dismissed.*

On February 10, 1913, John Smellie, *pursuer*, brought an action against the Caledonian Railway Company, *defenders*, concluding for £49,523, 9s. 2d. with interest thereon at 5 per cent. per annum from 11th December 1907 until payment thereof, the amount alleged to be due to him for the construction of a railway over and above the contract price.

The pursuer pleaded—"(1) The contract between the pursuer and the Railway Company being inapplicable as a basis of payment for the work executed by the pursuer in respect that the work so executed proved to be entirely different from what was contracted for and in the contemplation of the parties in extent, character, and duration, and the conditions and circumstances and the mode and seasons of working, all as condescended on, and the prices charged in the accounts now founded on being fair and reasonable remuneration for the work executed, the pursuer is entitled to decree as concluded for."

The defenders pleaded—"(2) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, and the action should therefore be dismissed. (3) In respect that the subject-matter of the present action falls to be determined by arbitration in terms of the contract between the parties, the action should be dismissed, or, in any event, should be sisted pending such arbitration. (4) The pursuer is, in the circumstances condescended on, barred by his actings from maintaining any claim otherwise than before the arbiter under the contract."

The arbitration clause of the said contract was as follows: — "*Arbiter.* — 201. Should any dispute arise as to the true intent and meaning of this specification, and the relative plans, sections, drawings, schedule, and supplementary specification, and the contract to follow hereon, or as to the extent of the works to be formed thereunder, or as to the works having been duly and properly completed, or as to the expense of any additional work, or deduction from that specified, or any alteration which may be more or less expensive than the work specified, or as to the measurements of the works as executed, or as to any extension of time for the completion of the works beyond the date or dates mentioned in the supplementary specification, or as to the liquidated and ascertained compensation payable by the contractor, or in the event of delay in completing the works, or as to any claim of damages or otherwise, at the instance of the contractor against the company, or claim of damages or otherwise, or sett-off, by the company against the contractor, or as to any notices or plans requiring to be served or delivered by the company in compliance with the said Acts, or as to any other matter, claim, demand, or obligation whatever arising out of or in connection with the contract, whether during the execution of the work or after the completion thereof, or as to any other matter specially referred to the arbiter in this or in the supplementary specification (except such matters as are hereinbefore provided to be settled by the engineer solely), the same shall, subject to the special provisions as to arbitration contained in the foresaid sections of the Special Acts, be referred to Sir John Wolfe Barry, K.C.B., civil engineer, Westminster, whom failing to William Robert Galbraith, civil engineer, Westminster, notwithstanding that they are or may be holders of shares in the stock of the company, or hold or may have been or may be appointed to any situation or employment under the company; and the decision, interim or final, of the said arbiter shall be finally binding and conclusive upon both parties; and the arbiter is hereby authorised and empowered to decern for such sum or sums, interim or final, as he may find to be due by the contractor to the company or by the company to the contractor, and also to decide all questions of expenses, interim or final, and to decern therefor."

The *facts* are narrated and the pursuer's *averments* summarised by the Lord Ordinary (DEWAR), who on 27th June 1914 pronounced an interlocutor sustaining the second plea-in-law for the defenders and dismissing the action.

Opinion.—"The pursuer in this action is a contractor who entered into a contract to construct a railway for the defenders at certain specified scheduled rates. He completed the railway in 1906 and was paid the contract price. He now sues for a large additional sum by way of *quantum meruit*, alleging that the contract is inapplicable as the basis of payment, on the ground that the circumstances in which he carried on and completed the contract were entirely different from those under which he entered upon it. The question for decision is whether the averments he sets forth on record are relevant and sufficient to support the conclusions of the summons.

"The railway which the pursuer undertook to construct is known as the Paisley and Barrhead District Railway, about 4 miles 15 chains in length. The contract sets forth that whereas the defenders had prepared plans or drawings and sections and a general specification of works with relative appendix, supplementary specification of works and relative 'schedule, and the pursuer had made a tender to construct and maintain the whole works required under the contract, referred to in the said specification, in accordance with the said drawings and specifications, at the prices set opposite each description of work contained in the schedule relative thereto, the estimate prices amounting in all to £114,000,' and the defenders had accepted said tender, therefore the pursuer agreed that he would supply

all material and labour required for, and should complete on or before 31st March 1901, or on or before such other date as the arbiter might fix, 'the whole of the foresaid works conform to said plans, drawings, and sections, specifications, and schedule of works, and that at the prices set opposite each description of work in the schedule of works relative to the said specification, the total estimated amount of said price being £114,000.' And the defenders agreed to pay the pursuer for the whole of the works executed by him according to the actual quantities of each item in accordance with the said plans or drawings and sections, specification, and schedule of works, or additional plans or orders, at the prices opposite each description of work in the schedule of works, the price 'to be paid by monthly instalments as the work advances and as shall be certified by the engineer.' The contract was not signed till 26th October 1900, but the work had commenced in May 1899, and it was completed in the autumn of 1906. The pursuer did not intimate to the defenders during the progress of the work that he regarded the contract inapplicable as a basis of payment. He accepted payment from month to month as certified by the engineer, and these payments amounted in all to £167,000, 6s. 8d. The pursuer now pleads that the work he actually executed was so entirely different from that which the contract contemplated that it cannot be taken as a basis of payment. He says that a fair *quantum meruit* value for the work done is £217,131, 18s. 11d., and he accordingly sues for the difference between that sum and the sum of £167,000, 6s. 8d. which he has already been paid, viz., £49,523, 9s. 2d.

"The case he presents on record is this—He says that the work he executed was rendered entirely different from that which the contract contemplated by the fault and neglect of the defenders and their engineers. He avers that they continually disregarded their obligations under the contract, and throughout the whole progress of the work, by persistent neglect and delay to give access to land, to furnish plans and drawings, and to give instructions, they completely disorganised the original scheme of work, and rendered different, and much more costly, methods of carrying it out necessary.

"The chief fault of breach of contract upon which the pursuer founds is the defenders' alleged failure to give land which they had undertaken to provide to enable him to lay down a temporary railway—which is referred to on record as an 'overland route'—to afford communication between certain cuttings and embankments. This overland route, he says, was so essential to the scheme of operations that he refused to tender for the work until he had arranged with the defenders' engineer, the late Mr Charles Forman, that it would be provided. The most important portions of the work were the Springhill Cutting, large embankments between Springhill Cutting and Carlibar Cutting, and a large viaduct at Barrhead between Kelburn Street and Cross Arthurlie Street, with bridges over these streets; and the pursuer states that Mr Forman had promised that in the event of a contract being entered into the defenders would provide land alongside the viaduct from Kelburn Street to Cross Arthurlie Street, on which to lay down a temporary through service railway outwith the site of the viaduct, so as to form the 'overland route' affording independent communication between the cuttings and embankments. After an interview with Mr Forman and inspection of the ground the pursuer sent in his tender on 22nd March 1899. Before accepting said tender the defenders asked what security he was prepared to give; and on the 29th March 1899 the pursuer replied stating the proposed security, and adding—'In making this proposal I count upon being put in immediate possession of sufficient land to enable me to connect temporarily by railway between Kelburn Street and Cross Arthurlie Street, so as to get access between the cuttings and embankments.' The pursuer avers, and the defenders deny, that the land here referred to was land for the 'overland route.' By letter dated 29th March 1899 the defenders accepted the tender 'subject to the conditions mentioned in your letter of this date.' And they asked the pursuer to let them know when he would require the land referred to, and he replied on 31st March that he would require the land at once. These letters are referred to in the contract, and it is stated that the tender was accepted subject to the conditions contained in them.

"It is averred that the defenders' failure to provide land for this 'overland route' materially affected the entire contract, and a very large portion of the record consists of averments showing in detail how the difficulty and cost of construction was increased, and the character and extent of the work rendered entirely different from that which parties had contemplated when they entered into the contract. In addition to this the pursuer complains that the defenders' engineers failed to furnish plans and to give necessary instructions, and he avers that their constant neglect and delay and general unmethodical and unbusinesslike habits interrupted and disorganised operations and 'transformed an ordinary piece of work into one fraught with great trouble and expense,' and many illustrations are given on record how these faults, neglects, and failures rendered the work 'entirely different.' These and similar averments, illustrative of the manner in which the work was changed and the cost increased through the fault of the defenders, are set forth in about eighty pages of the record, and finally the case is summarised in condescendence 43 thus:—'In consequence of the Railway Company's failure in regard to the overland route, and owing to the other failures and neglect of the Railway Company and their engineers . . . . the pursuer's arrangements for the execution of the works were completely disorganised, and his scheme of operations rendered impossible of performance, and different methods of carrying out the works,

which were attended with great difficulty, risk, and delay, were rendered necessary, resulting in an excessive prolongation of the period of completion of the works, and involving large additional cost in their execution. The whole conditions under which the pursuer carried out the works were entirely different and so materially changed from what was contemplated by the parties and provided for when the contract was entered into as to render the terms of the contract inapplicable to the works as executed, and the pursuer is entitled to be remunerated for the work executed by him *quantum meruit.*'

"The defenders deny the pursuer's averments and maintain, in addition to a plea of no title to sue, that in any event they are irrelevant. . . .

"On the question of relevancy the defenders do not dispute that where without default of either party the work done by a contractor is of so entirely different a nature from that which was originally contemplated, the written contract may become inapplicable as a basis of charge. But they maintain that it is clear from the pursuer's own averments that this is not a case of that kind. They say that the contract provided adequately for the execution of the work and for every contingency which arose in connection therewith. They explain, and it is admitted, that until the present action was raised the pursuer never suggested that the contract was not binding upon him. He accepted payment at contract rates, and in terms of the contract, from beginning to end. He rendered accounts for the work executed, and these accounts were adjusted by him on the footing that the contract prices were the basis of payment. No question was raised regarding the applicability of the contract at all until fourteen years after it had been entered into and eight years after the work was completed and paid for. They further argued that even if it were true that the work was rendered entirely different through their fault, as is alleged, that would not afford a good reason for disregarding the contract, because the terms of the arbitration clause show that such a contingency was contemplated by parties, and means were provided for dealing with it. If it be true, as is now alleged, that they failed to fulfil their obligations under the contract, the arbiter has power to deal with that and to assess damages therefor either during the execution of the work or after the completion thereof. The pursuer, they say, could have appealed to the arbiter regarding every fault or failure of which he now complains. He may, indeed, have the right to appeal still and to obtain damages for every breach of contract which he can prove. The case of *Bush* v. *Whitehaven Trustees*, on which the pursuer relied, arose in totally different circumstances, and the principle upon which that case is founded has no application here.

"I am of opinion that this argument is well founded.

"I doubt whether it is open to a contractor who has carried out contract work without protest, and who has accepted without comment payment at contract rates, and who has said nothing during the whole progress of the work, to suggest that the contract is not binding upon him—to plead, long after the work has been completed and paid for, that contract prices are not applicable as a basis of charge, and that he is entitled to be paid as if no contract had been entered into. When a contractor has executed work which he undertook to execute under a written contract of a specified price, there is a very strong presumption that the contract price is the basis of payment. To overcome this presumption he must prove that the work was not in fact executed under the contract but under a new agreement, either express or implied, to pay a different price. Now the pursuer does not allege that there was any express new agreement, and I think his averments negative the view that such an agreement can be implied. He does not say that he believed the original contract was at an end, and that he went on with the work on the understanding that he was to be paid on the basis of *quantum meruit.* On the contrary, he admits that it never occurred to him during the progress of the work, nor till years after it was completed, that he was acting under a new implied agreement. Both he and the defenders acted throughout on the assumption that the original contract was binding upon them. Mr Macmillan explained that the pursuer so acted because he had been under a misapprehension as to his rights until they were explained to him by his solicitors long after the work was finished. It may be unfortunate that he did not consult his solicitors at an earlier date, but the defenders ought not to be prejudiced on that account, and I think they would be prejudiced if the pursuer's plea were now entertained. If he had ascertained what he now believes to be his rights, and had intimated to the defenders that he considered the contract to be inapplicable as a basis of charge, and would only continue the work on the understanding that he would be paid *quantum meruit*, the defenders would have had an opportunity of considering whether they would stop the work or permit him to go on. If they had allowed him to proceed, the question whether they had not in the circumstances come under an implied contract to pay him on the basis of *quantum meruit* might have arisen. But I do not see how it can arise when the whole work was executed on the understanding that the original contract was to be the basis of payment.

"It was said that it was the cumulative effects of many neglects and breaches of contract on the defender's part which rendered the work 'entirely different,' and that it was therefore impossible for the pursuer to know at what precise period the contract became inapplicable as a basis of charge. But he does not explain why he did not appeal to the arbiter, who had power to deal with everything of which he now complains. The arbitration clause provides

that if any dispute should arise as to the meaning of the contract, or as to the extent of the works to be formed thereunder, or as to the expense of additional work, or any alterations which may be more or less expensive than the work specified; or as to any claim of damages or otherwise at the instance of the contractor against the Company; or as to any notices or plans requiring to be served or delivered by the Company in compliance with the Acts; 'or as to any other matter, claim, demand, or obligation whatever arising out of or in connection with the contract, whether during the execution of the work or after the completion thereof . . .' the same shall be referred to arbiters named who have power to award damages. Of course if the contract is at an end, the arbitration clause disappears with it, but the defenders say that the terms of the arbitration clause show that the contract is not at an end, because it is clear that parties contemplated the possibility of all the faults and failures occurring on which the pursuer founds, and provided the means of dealing with them. I think they are right. For example, the pursuer avers that the land referred to in his letter of 29th March 1899 is land required for the 'overland route.' The defenders deny this, and maintain that it refers to land required for the permanent railway. That is a dispute as to the true meaning and intent of the contract, which parties agreed should be referred to the arbiter if it arose. It did arise at the very beginning of the work, according to the pursuer's averments, before there was any question of the contract being inapplicable. If he had appealed to the arbiter on this and the other faults and failures he founds on, he would have obtained complete redress *from the arbiter*. That is the way the parties agreed such matters should be dealt with. They were to be adjusted by the arbiter so that the work might not become materially different in respect of them. And in so far as they increased the difficulty and cost, the arbiter had power to award damages. The arbitration clause—which is exceptionally wide—was obviously framed with a view to preventing either party suing the other in Court for a breach of contractual obligations. But that is what the pursuer is really doing in this action. He asks me to decide that the contract is no longer binding upon him, but I cannot determine that question without first considering whether there has been breach of contract, and that appears to me to be a question for the arbiter, who alone has power to deal with it either 'during the execution of the work or after the completion thereof.'

"If I am right in thinking that the contract provided a method of dealing with breaches of contract, and the difficulty and cost arising therefrom, there does not appear to be any particular advantage to the pursuer in disregarding the contract. He can claim, through the arbiter, all he asks from the Court. If the work had been rendered 'entirely different' through unforeseen circumstances, without default of either party, and there was no machinery provided in the contract for dealing with the new situation, and the only means of doing justice between parties was to disregard the contract and award the contractor a fair value for the work actually done, the case would have been different. That, I think, was the ground of judgment in the case of *Bush* v. *Whitehaven Trustees*, upon which the pursuer founds. It is not officially reported, and the precise circumstances in which the claim arose are unfortunately not set forth in Hudson on Building Contracts. But the facts so far as recorded appear to be as follows:—Bush contracted to construct a water-main for a slump sum. His tender was sent in in June, and he was 'given to understand' that he could begin the work at once; but part of the land was not available until October, and consequently the work was thrown into the winter, when operations were more difficult and costly, and this caused great additional expense to the contractor, for which he sued. The case was tried by jury, and one of the questions which both parties asked the judge to put to the jury was—'Were the conditions of the contract so completely changed in consequence of the defenders' inability to hand over the sites of the work as required as to make the special provision of the contract inapplicable?' The answer was 'Yes,' and the jury awarded £600 damages. The defendants appealed, but the Court, while apparently not approving altogether of the jury's findings, refused to interfere. Lord Coleridge said that the findings of the jury enable them to decide the case on the principle '. . . that where a contract is made with reference to certain anticipated circumstances, and when without default of either party it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in contemplation of the parties when the contract was made.'

"There is, no doubt, some resemblance between the two cases. In both the conditions were changed through failure on the part of the employers to give access to the land. But in *Bush's* case there does not appear to have been a breach of any contractual obligation. The changed conditions emerged from circumstances which neither party had foreseen, and without default of either party, and there was no provision in the contract for such an unexpected condition of matters. The work was not in fact done under the original contract, but under an implied new agreement. That is not the pursuer's case at all. He cannot say that the defenders' failure to provide land for the 'overland route' was unforeseen. He anticipated that contingency, and provided himself with a remedy against it in his contract. Bush had no such remedy, and that is why he appealed to the Court. His case, as I understand it, was—that he contracted to execute the work during summer for a specified slump sum; that he was obliged to do it in the winter months, when it cost much more; neither

party had anticipated that this would happen, and there was therefore nothing in the contract about it. The Court held in these circumstances that the contract did not apply. But if his case had been that the defendants undertook by the contract to give possession of the land in time to enable him to complete the work during summer, and that he had anticipated that they might fail in this contractual obligation, and had stipulated and agreed that in such an event the matter should be referred to an arbiter with power to award damages, I think the decision would have been different. It would certainly have been different if he had delayed for fourteen years to bring his action. *Bush's* case was, I think, a very exceptional one, and assuming it to be a binding authority, it can only be applied when the circumstances are similar. In the recent case of *Boyd & Forrest* v. *The Glasgow and South-Western Railway Company*, where it was also argued that the contract was no longer binding in respect that the work executed proved to be entirely different from that contemplated by the contract, Lord Dundas said—'. . . The plea as stated and argued is a bold and rather startling one, and I cannot say that I think the facts proved warrant us in sustaining it. I am not aware of any authority directly in point. The English case of *Bush* (which is only reported in Hudson on Building Contracts) appears to have been a very special one. The learned Judges were hampered by the finding of the jury, which, while I gather that it did not commend itself to them, they did not see their way to set aside or ignore. Neither *Smail* v. *Potts* nor *Quin* v. *Gardner* amounts to a decision on the point. I do not say that a case might not arise so strong upon its facts as to justify (or compel) the success of a plea such as we are now considering, but that case is not, in my judgment, here presented.' That, I think, suggests that averments made in support of a plea of this kind ought to be critically examined. Before the pursuer can succeed he must, I think, prove that the contract became inapplicable owing to emerging circumstances which were not in the contemplation of parties; that the work executed had no relation to the contract, and was not in fact done under it, but under a new agreement, express or implied, to pay him on the basis of *quantum meruit*. I am of opinion that the averments he has made on record are not relevant or sufficient for that purpose.

"I was referred to the case of *Mackay & Sons* v. *The Lord Advocate* (as representing the War Department). But the circumstances there were entirely different; indeed the facts averred and proved do not appear to me to have any resemblance to the averments made in this case.

"On the whole matter I am of opinion that the second plea-in-law for the defenders ought to be sustained, and the action dismissed, with expenses."

The pursuer reclaimed, and argued—The contract did not regulate the relation of parties, and the pursuer was entitled to be paid a *quantum meruit*, for (1) the work done was not the work which was the subject of the contract; (2) the pursuer stipulated for certain facilities as a condition-precedent to entering into the bargain, and as these were never given him there was no *consensus in idem*. The work was different from what was contracted for; the plans, sections, and drawings embodied in the contract had all been departed from; the variations from them ranged from 25 per cent. to 500 per cent., whereas the contract only allowed 5 per cent. variation. The work took seven years to complete, whereas the contract stipulated for completion in two years. The price was to be £114,000, whereas the defenders admitted liability for £167,000. No doubt it was impossible to say that at any one place the elasticity of the contract had been exceeded, but the accumulated result of the individual variations was to make the work as completed and the carrying out thereof something different from what was contemplated in the contract. The result was that the contract was discharged. It was an express condition-precedent to consent that the overland route should have been provided and an implied condition that facilities should have been given at the bridges. Neither the overland route nor the other facilities were given, and as a result there was no *consensus*. The absence of these facilities had dislocated the whole scheme of work, but the work was now completed, and the defenders had the benefit of it and must pay for it not under the contract but by way of *quantum meruit*. The Lord Ordinary was wrong in holding that the arbitration clause provided a remedy for the circumstances which had come into existence here. The arbitration clause could only apply as between the parties if the contract was binding upon them, but the pursuer averred that the contract either never existed, or at least that it was discharged, and consequently with that discharge the arbitration clause ceased to apply—*North-Western Rubber Company, Limited* v. *Hüttenbach & Company*, [1908], 2 K.B. 907, *per* Fletcher Moulton, L.J., at pp. 919 and 921. The signing of the contract months after the work had begun, and after there had been failure to provide the overland route, was simply to preserve formal evidence of what the contemplated bargain was and could not be pleaded in bar of the pursuer. *Municipal Council of Johannesburg* v. *D. Stewart & Company, Limited*, 1909 S.C. 860, *per* Lord President Dunedin at p. 877, 46 S.L.R. 657, 1909 S.C. (H.L.) 53, *per* Loreburn, L.C., at p. 54, *per* Lord Shaw at p. 56, 47 S.L.R. 20, showed that if the averments were as they were here the contract no longer applied, and that it was irrelevant to consider the scope and operation of the arbitration clause, for in the circumstances it did not apply. The course followed in *S. M'Kay & Son* v. *The Lord Advocate* (War Department), 1914, 1 S.L.T. 34, ought to be taken here; indeed this case was stronger than *M'Kay's* case, for in it there was no fault, but here fault was alleged. *Bush* v. *Whitehaven Trustees*, 1888,

(reported in Hudson on Building Contracts (4th ed.), vol. ii, p. 122), was an authority for the proposition that the conditions of the contract might be so radically changed from what the parties contemplated that the contract no longer applied. *Jackson* v. *Union Marine Insurance Company, Limited*, (1873), L.R., 8 C.P. 572, (1874), L.R., 10 C.P. 125, showed that where a condition suspensive of consent, as was the case here as regards the overland route, was not satisfied, the contract did not apply unless the condition was waived, and there was nothing to indicate waiver here—*Pepper* v. *Burnand*, [1791] Peake, Nisi Prius Reports, p. 103; *Thorne* v. *Mayor and Commonalty of London*, (1876) L.R., 1 A.C. 120, *per* Cairns, L.C., at p. 127. *Boyd & Forrest* v. *The Glasgow and South-Western Railway Company*, 1914 S.C. 472, *per* the Lord Justice-Clerk at p. 491, and Lord Dundas at p. 500, 51 S.L.R. 281, 1915 S.C. (H.L) 20, 52 S.L.R. 205, was not in point, for here the dislocation was due to the active interference of the defenders, not to the nature of the strata and material encountered. *Quin* v. *Gardner*, 1888, 15 R. 776, 25 S.L.R. 577, was consistent with the pursuer's contention. *Smail* v. *Potts*, 1847, 9 D. 1043, decided that where a term had been introduced into a contract by one of the parties to a contract which altered the nature of the contract the other party was released.

Counsel for the defenders was not called on.

At advising—

LORD PRESIDENT — In this action the record is bulky and lengthy, almost if not altogether beyond precedent. The pursuer's averments are certainly not lacking in specification or elaboration of detail—a circumstance which probably explains the reason why their irrelevancy has been brought into such prominent relief.

The pursuer undertook to construct for the defenders a line of railway extending from Paisley to Barrhead, a distance of some four miles and fifteen chains, within two years from 29th March 1899. The contract is expressed in writing, and there are the usual relative specifications, drawings, plans, and schedule of prices. The contract work was completed on 1st June 1905. The estimated contract price was £114,000, but the pursuer has been paid for the work done under the contract £167,000 odd pounds. He says, however, that he is entitled to £49,523, 9s. 2d. more, for work all charged, I suppose, according to schedule prices, outside of and apart altogether from the written contract.

Now the pursuer believed, during the six years that the contract was being executed, that he was duly performing it under and in terms of his written engagement. His belief was shared by the railway company. Both parties remained in that belief for a period of seven years and eight months after the contract was completed. After that long period of years, for some unexplained reason, it suddenly dawned on the pursuer that to the extent of the sum for which he now sues the work was not contract work at all, and accordingly he sues here for payment as for a *quantum meruit*. His success will depend upon his being able to show that the work performed was entirely different from the work contracted for. He certainly so alleges in almost all of the forty-four articles into which his condescendence is divided, and if contract work could be converted into non-contract work by a reiterated assertion that the former was the latter, then his success in this action would be assured.

But when his averments are closely scrutinised, it appears that the additional work for payment of which he now sues was caused by what Mr Moncrieff characterised as the "accumulated dislocations" of his arrangements for the performance of the contract work brought about by the failures and faults of the Railway Company and their servants. By these failures and shortcomings the pursuer alleges that his arrangements for the execution of the works was completely disorganised, and his scheme of operations rendered impossible of performance, and different methods of carrying out the works, which were attended with great difficulty, risk, and delay, were rendered necessary, resulting in a prolongation of the period of the works and involving additional cost in their execution.

Now it needs little argument to demonstrate that contract work remains contract work although it is rendered very operose and very costly on account of failures on the part of one of the contracting parties. It was scarcely argued in this case that if one or two, or it may be three or four, of the acts of failure and fault alleged had caused this additional expense and delay, the pursuer could have said that the work fell outside the contract. But it was suggested, not argued, that at some undefined and undefinable point of time the series of faults and shortcomings had became so lengthy that the work somehow or other ceased to be contract work and became non-contract work. No argument was offered in support of this view, which to me is unintelligible. I am at a loss to understand how the character of work can be altered by adding to its quantity, and, indeed, had it not been for the magnitude of the cost alleged to have been caused by the fault and failing of the defenders and their engineers, and the long delay thus entailed, the pursuer's case would have been barely stateable.

For these reasons, which in more condensed form are the same as those set out in the very full and able opinion of the Lord Ordinary, I am for adhering to his Lordship's interlocutor and dismissing this action.

LORD MACKENZIE—I am of opinion that the judgment of the Lord Ordinary ought to be affirmed, substantially for the reasons given in his opinion.

The tender and acceptance were dated in March 1899. The work was to have been completed in March 1901. It was not until October 1900 that the pursuer signed the

formal contract. The work was commenced in March 1899. It was completed in the autumn of 1906. During the execution of the work the pursuer rendered accounts on the basis of the contract rates, and in terms of the contract. The amounts due were adjusted and certified by the engineer. Payment for work done was accepted by the pursuer on this footing to the amount of £167,000, 6s. 8d. He now sues for an additional sum of £49,523, 9s. 2d. The ground of action is that the work he did was never done under the contract at all, that the rates in the contract are not applicable, and that he ought to be paid the sum sued for on the principle of *quantum meruit*, so as to bring the total payments up to £217,131, 18s. 11d. This position the pursuer only took up in the year 1913, seven years after the railway had been constructed and payment made as above stated, and fourteen years after the contract had been entered into. I am of opinion that he has set forth no relevant case to support his view.

His leading ground of complaint is the failure of the Railway Company to give him land for what is termed in the pleadings the "overland route." This land was, according to his averments, wanted at once. The defenders, according to the pursuer, never provided the land they had contracted to give him, and he was thus denied the reasonable facility that he had stipulated for in his tender, which they accepted. The difficulty which meets the pursuer at the outset is this, that he signed the formal contract eighteen months afterwards, which contained the contract rates, notwithstanding the fact, as he now alleges, that owing to the failure of the Railway Company the work he had been doing was so different in character as not to be under the terms of the contract. The pursuer speaks of repeated complaints which he made of the various failures of the Railway Company, which he avers altered the conditions of the work as contemplated by the parties. But he never until he came into Court with these proceedings gave them any notice that the contract entered into between them was no longer binding. There are other alleged failures set out on record. Condescendences 2-6 deal with the "overland route," and condescendences 7-10 emphasise the serious consequences to the pursuer of the defenders' failure to do their part of the contract by not giving the facilities contracted for. The matter of delay in connection with various bridges, for which delay the pursuer avers the defenders are responsible, is summarised in condescendence 37. Condescendence 22 deals with a typical instance of this. Condescendence 21 deals with the bridge under the joint line. Condescendence 18 deals with the viaduct. The most important cutting is treated in detail in condescendence 12. Additional works are specified in other articles of the condescendence. It is unnecessary to go into the averments in detail. The summary of the pursuer's case is contained in condescendence 43, which is quoted by the Lord Ordinary. This last averment as to the whole conditions under which the pursuer carried out the work being entirely different and so materially changed as to render the terms of the contract inapplicable to the work as executed, is the echo of what is appended to the preceding articles of the condescendence. It is the foundation of the pursuer's first plea-in-law.

In my opinion the averments are not relevant to support the case the pursuer wishes to make. It must be kept in view that article 1 of the specification in the contract is very elastic in its terms. The arbitration clause is in the widest terms, and it must be left to the arbiter to determine the questions between the pursuer and the defenders, which are claims of damages for breaches of contract.

LORD SKERRINGTON—I concur. The pursuer does not allege that the finished work which he handed over to the defenders was different from the work which he was bound to give them by his written contract, but he does allege that the execution of the work was rendered unduly costly and troublesome because the defenders failed to perform their part of the contract in certain respects whereby the conditions under which he had to do the work were materially altered to his prejudice. If the pursuer's averments are well founded in fact he might perhaps have been entitled to treat the defenders as persons who had repudiated their contract, in which case he might have intimated to them that he would not execute the work but would claim damages in respect of their having prevented him from carrying out his contract. But the pursuer was not bound to take this course. He might have been well satisfied with the schedule prices and might have preferred to abide by the contract, and at the end of the day to ask the Court or the arbiter, as the case may be, to award him damages for such loss as he had sustained in consequence of the defenders' breach of contract, and that in addition to the price of the work as fixed by his contract. The pursuer did not at the time intimate to the defenders that he considered himself to be released by their breach of contract from his obligation to do the work at the contract prices, and that if he executed the work conform to the contract specification he would claim a reasonable reward, to be fixed in case of dispute by a court of law. Seeing that the pursuer preserved strict silence in regard to this matter, the defenders were entitled to assume that notwithstanding any breach of contract which they might have committed, the pursuer elected to treat the contract as still binding upon both parties. I therefore think that the pursuer waived his right (if he had such a right) to treat the contract as having been repudiated by the defenders, and *that his* sole remedy is to claim payment of the reward to which he is entitled under his contract, and to claim in addition such damages (if any) as he can persuade the appropriate tribunal to award him.

LORD CULLEN—I concur.

LORD JOHNSTON, who did not hear the argument, delivered no opinion.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—The Solicitor-General (Morison, K.C.)—Moncrieff, K.C. —Carmont. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders—The Dean of Faculty (Clyde, K.C.)—Watson, K.C.—Wark. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, February 2.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

CALLANDER *v.* HARVEY AND OTHERS.

Succession — Heirs-Portioners — Præcipuum — Principles of Determination — Indivisibility—Amenity.

In an action by the eldest of several heirs-portioners against the others and their representatives for determination of the extent of the *præcipuum*, *held* that the mansion-house fell under the *præcipuum*, solely as a result of its indivisible character, and that it carried with it such subjects as were necessary adjuncts of it, but not such subjects as were merely necessary to secure its amenity.

Mrs Alice Louisa Craigie Halkett or Callander, residing at Cramond House, Cramond, Midlothian, wife of George Frederick William Callander, Esquire, of Ardkinglas, Argyllshire, *pursuer*, brought an action in the Court of Session against Mrs Elizabeth Diana Craigie Halkett or Harvey, residing at 10 West Eaton Place, London, wife of Colonel G. S. A. Harvey, Cairo, Egypt, and others, *defenders*, to have it found and declared "that the pursuer, as eldest heir-portioner of the deceased Duncan Craigie Halkett, has the sole and exclusive right *jure præcipui* to those portions of the lands and estates of Cramond and Harthill after described, consisting of the mansion-house of Cramond, together with the offices, lawns, gardens, lodges, avenues, and policies pertaining thereto, all as delineated and coloured red on the Ordnance Survey map herewith produced, or to such portions thereof as shall be determined in the course of the process to follow hereon, and to the rents, maills, and feuduties thereof from and since 31st March 1912, and in all time thereafter, and is entitled to have the custody of the writs and title-deeds of the said lands and estates, which said lands and estates are described in the title-deeds thereof as follows, *videlicet*—[*Then followed a description of the lands*]. . . ."

The pursuer pleaded—"The pursuer as the eldest heir-portioner being entitled to the mansion-house and pertinents specified in the summons, decree should be pronounced in terms of the conclusions of the summons."

The defenders pleaded—"(3) The pursuer having no right *jure præcipui* to the subjects claimed, other than the mansion-house, gardens, and offices occupied along therewith, the defenders are entitled to absolvitor with regard to the remainder of the subjects claimed."

The *facts* of the case appear from the opinion of the Lord Ordinary (ORMIDALE), who on 17th July 1914, after a proof, pronounced this interlocutor:—"Finds and declares that the pursuer as eldest heir-portioner of the deceased Duncan Craigie Halkett has the sole and exclusive right *jure præcipui* to those portions of the lands and estates of Cramond and Harthill described in the summons, consisting of the mansion-house of Cramond and those portions of the lands and estates of Cramond, coloured pink on the plan, together with the poultry run, the south avenue, and the lodge at the south end of said avenue, and to the rents, maills, and duties of said subjects from and since 31st March 1912 and in all time thereafter; and decerns: Finds the defenders entitled to expenses to the extent of three-fourths of the taxed amount thereof," &c.

Opinion.—"This is an action at the instance of Mrs Craigie Halkett or Callander, residing at Cramond House, to have it found and declared that she as eldest heir-portioner of the deceased Duncan Craigie Halkett, has right *jure præcipui* to certain portions of the lands and estates of Cramond and Harthill, all as delineated on a map produced, 'or to such portions thereof as shall be determined in the course of the process to follow hereon.'

"The pursuer's father died on 31st March 1912. By disposition, dated in June 1879, he had disponed to himself in liferent and to his surviving son Duncan, and his heirs and assignees whomsoever, in fee, the lands and estates in question. Duncan having died in March 1889 without issue was succeeded in the fee of the lands by his seven surviving sisters as heirs-portioners. Of these Miss Constance sold her one-seventh share to her father in 1907. Miss Mabel died in June 1912 intestate, her right in the lands devolving upon her sisters equally. Three of the sisters and the executors of the father have lodged defences to the action.

"The subjects claimed by the pursuer are delineated on the plan. They extend to about 103 acres, and include the mansion-house of Cramond, the gardens, stables, and offices, and two avenues, about 86 acres of grass land, and 7 acres of woodland.

"The defenders admit that the pursuer is entitled to the mansion-house, together with the gardens and offices occupied along therewith, and they offer without prejudice to concede the pursuer's right to ground extending to 10 acres, including the site of the mansion-house, gardens, stables, and certain offices adjacent to the house, with the avenue leading to the house from the