section 1 (*a*) (i) refers both to earnings and to average weekly earnings, and I do not think under those circumstances it is possible to suggest that sub-section 2 (*c*) is not applicable.

As regards the construction of sub-section 2 (*c*) I desire to express my entire agreement with what was said by the noble Earl on the Woolsack, and I do not desire to add any words of my own. I must say that I am unable to understand, speaking with all respect of the very learned judges of the Court of Appeal, how they came to the conclusion which perhaps is expressed most clearly in the words of Warrington, L.J., who, after quoting sub-section 2 (*c*), says this —"I think it means this, that you are to regard the period of his employment in the one grade, and for that purpose interruptions by absence from work due to illness or any other unavoidable cause are to be disregarded." I should have thought that on the clear words of sub-section 2 (*c*) absence from work due to illness or any other unavoidable cause was not to be disregarded, but that you had to consider whether interruptions had arisen from either of those causes in considering the continuity of employment by the same employer.

It seems to me that the matter is not one of much difficulty, because if you read the definition in sub-section 2 (*c*) into sub-section 1 (*a*) (i) it reads thus—"a sum equal to his earnings in the employment of the same employer where there has not been interruption by absence from work due to illness or other unavoidable cause." It is clear that there was such interruption in this case, and therefore that portion of the schedule is not applicable.

In my opinion the appeal succeeds.

Their Lordships sustained the appeal.

Counsel for the Appellant—Sir J. Simon, K.C. — Leigh — Fenton. Agents — Shaen, Roscoe, Massey, & Company, for T. A. Needham, Manchester, Solicitors.

Counsel for the Respondents—Swift, K.C. —Eastham. Agents—Nicholson, Graham, & Jones, for Wood & Lord, Manchester, Solicitors.

HOUSE OF LORDS.

Thursday, November 9, 1916.

(Before Earl Loreburn, Viscount Haldane, and Lords Shaw and Parmoor.)

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

HAMPTON *v.* GLAMORGAN COUNTY COUNCIL.

Contract — Building Contract — Principal and Agent—Effect of Sub-Contract.

In a contract for the erection of a school the contract price included £450 for a hot-water installation which the respondents might elect to have or not as they pleased. On the instructions of the respondents' architect the contractor S. ordered a heating apparatus from the appellant. Before payment was completed S. became insolvent. The appellant claimed payment from the respondents.

Held that S. acted as principal in the sub-contract, not as agent for the respondents, and that the action had been rightly dismissed.

Decision of the Court of Appeal, 113 L.T.R. 112, *affirmed.*

The plaintiff appealed.

The *facts* are given in their Lordships' opinions, which were as follows :—

EARL LOREBURN—In this case I think the order appealed from ought to be affirmed, and at the outset I will say a word about the decisions to which reference has been made in the very able arguments which have been addressed to us.

The facts of the case are hardly ever of any value when considering the facts of another case, and the same thing may be said in regard to the construction of one contract which is rarely assisted by reference to the construction of other and different words. When the case goes upon the construction of a contract or upon a decision of fact, the main—I may say, broadly speaking, the whole matter—consists in looking at the point of view from which the learned judge looks at the language or looks at the evidence.

The question in this case is whether the Glamorgan County Council were debtors to the plaintiff. I concede that it is hard upon the plaintiff to have supplied these items and not to have been paid for them; but the County Council have paid, or will have to pay, the creditors of Shail. It is always a misfortune when bankruptcy supervenes. But can the plaintiff say that the County Council owes this money to him? I think not. Certain work had to be done which is described and comprised in the specification. An entire sum was named for the whole, namely, £13,600—but a part of the work stood upon a separate footing—that is to say, the heating apparatus, up to the sum of £450, part of the £13,600, was provisional. There is no special theory of law as to what is meant by a contract. You have to look at the contract and see what it means itself, and in this contract I think it meant that the County Council might prefer to do the work itself, or it might put in a cheaper apparatus than what would cost £450, or it might require Shail to do it up to the £450 cost; and he agreed to it, in which case he, of course, might employ some-one else, just as he might employ any tradesman for the purpose of providing the thing required; and the £450 would be paid as a part of the whole £13,600, or not paid, or short paid, accordingly, by the County Council to Shail.

Shail was required to do it, and he employed the plaintiff for this heating apparatus and made a contract with him; he had to obey the architect according to the contract, but the architect had no authority to pledge the County Council's credit, and there

is no evidence that he had any authority of that kind. Had Shail that authority, as is argued, as to this £450 item? There is no evidence of it, unless the terms of the contract which deal with provisions confer that authority. They do not do so in terms. Do those words do so by implication? It is said that they merely require Shail to advance the sum of £450 to the Glamorgan County Council if that was needed. If that be the true construction, I do not see why Shail was to be paid for doing that work at all, because he was merely a lender of money in connection with that work, and yet the contract says that he is to do the work, and he undertakes to do it. He contracted also that he was to be paid for it as part of the whole £13,600, provided that he was required to do it, and that he did do it or got it done. That also is not consistent with his duty being only the duty of advancing money. It is consistent only with the view, which I think is the true view, that he was the contractor as to this heating apparatus, and employed a sub-contractor. Accordingly I think he was not an agent of the County Council to employ the plaintiff, but he was the principal himself, and the plaintiff was the other principal to this contract. And I find that he so treated himself both in his books and in his letters, and in receiving part payment of this money from Shail. While I regret one cannot help being sorry for men who have done honest work and not been paid for it, I am afraid he must suffer as the other creditors of the unhappy bankrupt in this case.

VISCOUNT HALDANE—I agree. As soon as I had satisfied myself that I knew the facts of this case I thought the appeal a hopeless one, and I have continued to think so. In all these cases it is of little use to cite as precedents other contracts which have been construed by other tribunals. There is only one safe way when you are construing a document like this, and that is to take the principle which must govern all cases, to bear it firmly in mind, and in the light of that principle to read through the contract. For that reason I think that the passage from the judgment of Channell, J., in *Crittal Manufacturing Company* v. *London County Council*, 75 J.P. 203, quoted by Horridge, J., may have been a right application of the principle to the particular contract he had before him, or may have been a wrong one, but that it is certainly one which throws no light on the question before us. Nor does the decision in *Hobbs* v. *Turner*, 1902, 18 T.L.R. 235, where the contract was very different. In *Hobbs* v. *Turner*, a case in the Court of Appeal, clause 28 of the contract said that the provisional sum was to be expended as the architect should direct, and was to be paid by the contractor, and the amount paid by the contractor was to be set against all provisional sums, and any balance he had paid was to be added. On that contract the Court of Appeal held—rightly or wrongly I do not know, I have not the argument before me—that applying the principle a relation of privity was established between the plaintiffs and the defendants. That was obviously a decision on the terms of a contract very different from the one we have here.

What have we here? The answer to that question is to be looked for only in the contract. It may well have been possible that if the parties by their correspondence had intended to establish a different relation from that in the contract they could have done so by mutual agreement. But the correspondence, as I have already observed, is a correspondence which certainly does not tend to show that the appellant and the respondents were ever brought into a relation of privity. If there is anything clear from the correspondence, it is that the appellant was told to look to Shail.

Then, turning to the contract itself, the real question that arises—the question that lies *in limine* of the argument addressed to this House by the learned counsel for the appellant—an obstacle to the threshold of that argument which they have to cross before they can enter the threshold at all—is the answer to the inquiry, where is privity to be found in the contract? Certainly not in any clause of the main body of the written documents, but it is said in the expression in the extract before us from the specification, "provide the sum of £450 for a low pressure heating apparatus."

In order to see what that means it is necessary to look at the contract itself. The substance of the contract was that for £13,600 this man Shail, the contractor, was to put up a building complete to the satisfaction of the respondents, and among the things which the building was to include was this heating apparatus which Shail was to get put in to the satisfaction of the architects. The architects had power given them by clause 11 of the contract to direct Shail to omit it if they thought it unnecessary, and in that case the £450 would have been deducted from Shail's lump sum of £13,600; but if they directed him to provide it, and to provide it in a manner of which they were to be the judges as to whether it was satisfactory or not, then Shail contracted to do that. Shail did put in an apparatus the description of which was approved by the architects, and a tender for which was obtained by the architects, but the architects obtained that tender for the purpose of communicating it to Shail, and accordingly Shail, in fulfilment of his lump sum contract, put it in; he put it in out of the £450 which was assigned to it in his lump sum.

If that is so, *prima facie*, the only relation between the appellant and Shail was that of two parties dealing as principals; there is nothing in that contract which establishes a relation of privity between Hampton (the appellant) and the respondents, and there is nothing in the course of dealing which displaces the inference that that is not only the true construction of the contract, but the position in which the parties left themselves. I am therefore of opinion that the appeal fails.

LORD SHAW—I agree with the opinion

expressed by the noble Viscount opposite. I should add nothing except that I think it right to call attention to the language used by Channell, J., in the case founded upon in the judgment of Horridge, J., in the present case and cited textually by the latter. Channell, J.'s language would appear, if sound, to have introduced a very serious presumption into the law of contract. "In my view," says the learned judge, "the effect of this clause as to provisional items, which is very common to contracts, is generally to make the building owner a real principal upon the contract under which these things are ultimately supplied." With much respect I cannot assent to the view that that is any part of the contract law of these islands, nor can I assent to the view that there is any presumption under the law of contract to that effect. In a question of the determination of privity of contract, what has to be done by a court of law is to look at the terms of the specific contract and to construe it.

I entirely assent to the view expressed from the Woolsack with reference to the citation of decisions of courts of law upon contracts which are in their specific terms different from the one under construction and argument. An excellent illustration of the fallacy of that procedure is supplied by the citation of the case of *Hobbs* v. *Turner* in the present instance, because an examination of that decision discloses that clause 28 of the contract in *Hobbs* v. *Turner* has no analogue whatsoever in any clause of the contract now before your Lordships.

Coming, therefore, to the specific contract before us, I am of opinion that the argument presented to us was of course right up to a certain point. I refer to the earlier portion of the correspondence by the architects. I am willing to assume for the purpose of the argument presented that the architect in such circumstances is acting as agent for the building owner. As is fairly well known the position of the architect is, that he is charged with the duty of articulately settling what are to be the items supplied under these "specialist" contracts, and making certain selections, and even in certain contracts of nominating certain merchants. In the present case, however, the facts do not stop with that initial correspondence. When, however, the contract stage was being reached, the architect was approached on the subject by Messrs Hampton, and the architect then made perfectly clear his position, which was this—"You must deal with the contractors." Accordingly Messrs Hampton did deal with them, and they obtained, not in express terms, but by what in admission is by its implications equivalent thereto, the acceptance by Mr Shail, the builder, of their (Messrs Hampton's) contract.

There is a further stage in the proceedings, which I think is not without interest. When one half or thereby of the contract price was due, a certificate was applied for to the architects on behalf of the building owner by Messrs Hampton. To this the architects promptly reply that they have nothing to do with a certificate from the building owner, but that Messrs Hampton had to do only with Mr Shail. In those circumstances application was made by Messrs Hampton to Mr Shail, and he, the builder, made a payment of £200, and in his own ledger credited that to himself as a payment made to his merchant, the person whom he was dealing with, namely, Messrs Hampton. That I think is conclusive as to the fact of the persons between whom this contract was made. In those circumstances, fortunate or unfortunate as it may have turned out for the tradesman that he dealt with the builder, he cannot now set up a privity of contract with some-one else, namely, the owner.

LORD PARMOOR—I agree. This was a lump sum building contract for £13,600 in a very usual and common form. A provisional sum was included in the contract, an amount of £450 in reference to an item for a heating apparatus.

The object, and in my view the only object, of including a provisional sum or sums in a lump sum contract is that the employer when he receives a tender for the whole work may receive an inclusive amount, so that he may know that the sum, in this case £13,600, is inclusive of the entire work. There is certainly no inference of agency, such as is suggested, to be drawn here from including in a lump sum contract a provisional sum. I am quite unable to follow the argument that because there is a provision for a lump sum there is any implication of agency as between the building owner and the contractor. The work referred to in the provisional item is, in my view, part of the work which the contractor has accepted the primary obligation to complete within a given time and for a given payment. This obligation is part of the basis of the whole contract where the contract is for a lump sum. It may be optional to the building owner under the terms of the contract to undertake the work to which the provisional sum is referable or to employ a sub-contractor, but in this case, if he had such an option, that option was certainly not exercised. There is no evidence of any privity of contract of any kind between the County Council, who are the building owners, and the appellant. I agree with what Pickford, L.J., says, that you simply have to see in a case of this kind with whom the contract has been made, and I can come to no other conclusion than that the appellant made his contract with the building contractors as principals and not with the building owners or any agent with authority to make them liable.

Appeal dismissed with costs.

Counsel for the Appellant—Colam, K.C. —Fortune. Agents—Bell, Brodrick, & Gray, for Cousins & Botsford, Cardiff, Solicitors.

Counsel for the Respondents—Roche, K.C. —H. Rowlands. Agents—Broad & Son, Solicitors.