Friday, November 26.

(Before the Lord Chancellor (Buckmaster), Lord Atkinson, Lord Shaw, Lord Parker, and Lord Sumner.)

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

(In the Court of Session, January 26, 1915, 52 S.L.R. 322, and 1915 S.C. 362.)

Cautioner—Contract—Construction—Condition-Precedent—Extinction of Guarantee of Contractors through Failure of Employers to Notify Cautioner of Non-observances of Contract.

An insurance company granted a policy insuring water trustees against loss arising from failure on the part of a contractor duly to complete the laying of certain water-pipes. The policy contained conditions declared to be conditions-precedent to the right of the water trustees to recover thereunder, and, *inter alia*, this—"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."

The contract for laying the water pipes provided for the work being begun on a particular date, that so much should be done each week, and that the whole should be completed within a defined time. The contractor had not begun by the date specified, nor for some months after, and after beginning continued to fall more and more into arrear. No notice of this was sent to the insurance company. When about half the work was done and sometime after the time for completion was passed the contractor became bankrupt. The water trustees took over the work and gave notice of his failure to the insurance company. In an action by the water trustees to recover the amount contained in the policy of insurance, *held* (*aff.* judgment of the First Division) that the contractor's delays were non-observances of the contract of which the insurance company was entitled to notice, that the giving notice was a condition-precedent to the right to recover, and therefore that the insurance company was freed.

This Case is reported *ante ut supra.*

The pursuers appealed to the House of Lords.

At the conclusion of the argument for the appellants—

LORD CHANCELLOR—The question in this case is a simple one of construction, and arises on a bond by which the respondents bound themselves in the sum of £5000 to guarantee the due performance of a contract made between the appellants and a firm known as the Columbian Fireproofing Company, Limited. The circumstances in which the bond was given are associated with the laying of 9½ miles of water-pipe from a point near Burncrooks, in the parish of Drymen, to certain filters at Cochno Lodge, in the parish of Old Kilpatrick, and they are shortly these. The appellants, who are a body corporate with the right and duty of supplying water in the district of Clydebank, in the county of Dumbarton, were anxious in the autumn of 1908 to obtain the laying of a line of specially-constructed water-pipes between the points I have mentioned. They divided the contemplated work into two portions—the one relating to the excavation of the necessary trench, with which this case has no concern, and the other to regulating the conditions for the manufacturing of the pipes, their conveyance to the ground, the placing of them in the trenches, and relaying and joining them in position. To provide for this latter work they prepared and published, on November 21, 1908, a specification of the character of pipe they required, and a set of conditions by which the work was to be regulated, and invited tenders for the work on this footing. Both the construction of the class of pipes to be used and the method to be adopted in the joining of them in the trenches involved the use of cement, and consequently the work could not be conveniently performed during the colder months of winter. The conditions accordingly provided that the laying of the pipes should, as to part thereof, begin before the 1st February 1909, and as to another part not later than the 1st March in the same year, and that the whole of the work should be completed within eleven calendar months from the 1st December 1908. In order to secure the regular performance of the work it was stipulated that not less than 470 yards of pipe should be laid and joined by the contractors in each consecutive week, and this condition was enforced by a provision that in the event of the work not being completed within the eleven calendar months the contractors were to pay to the appellants £12 sterling for each week that might elapse between the said period and the actual time of completion, as certified by the engineers. In order, however, that the hazardous condition of the weather should not impose too heavy an obligations upon the contractors, this provision was modified by a clause which stated that if in the opinion of the engineers the contractors had been seriously delayed on the work of the contract by frost or bad weather, the engineers might grant such an extension of time as would, in their opinion, be justified under the circumstances, and such certificate would exonerate the contractors from liability from loss.

The conditions as to payment need only a brief reference. They provided for monthly payment, on the engineer's certificate, at the rate of £1, 0s. 9d. per lineal yard for the pipes laid, and in addition a payment of 80 per cent. of the value of the pipes manufactured and not laid, and 80 per cent. of the value of other materials delivered at

the yards, with certain provisions as to retention of certain fractions. Finally, in order to provide complete protection for the appellants, the contractors were bound to grant security to their satisfaction for the due fulfilment of the contract.

The Columbian Fireproofing Company, Limited, tendered on the footing of these conditions, and their tender having been accepted, a formal contract was duly executed on the 17th and 22nd February, which incorporated as part of the terms all the conditions upon which the contract had been based. It also contained a new and independent condition to which it is important to refer. It is in these terms—"Provided always that should the first party"—that is, the Clydebank Water Trustees—"consider that the second party"—that is, the contractor—"is not conducting the work with that diligence which will in their estimation and that of the said engineers ensure its completion within the stated time, or should they be dissatisfied with the work or the manner in which it is being carried out, they shall have it in their power to give the second party fourteen days' notice summarily to take the contract out of their hands and finish the same either by another contractor or by workmen employed by the first party, as they may see fit, and for that purpose may take and use the plant, tools, and materials of the second party, and afterwards sell or dispose of the same as their absolute property, charging the second party with any additional cost thereby incurred above the contract sum; and further, in the event of the second party becoming insolvent or entering into liquidation, whether compulsory or voluntary, or suffering execution for debt in any court of law, or shall commit any act of bankruptcy, the said first party may require the said works to be proceeded with, and if their requisition is not satisfactorily complied with within fourteen days from the date of a notice to that effect from the said engineers, the first party shall have power to suspend all further payments to the second party and take the contract out of their hands, and at once take possession of the works, along with all materials, machinery, plant, and tools, and the first party shall have power to carry on the execution of the work themselves, or to re-let the same to other contractors on any terms they may think proper, with all the privileges of using any patent right which may exist and may be necessary in connection with the manufacture and jointing of said pipes, till the whole work is completed: And the first party shall in the event foresaid be entitled to retain all moneys due to the second party, and neither the second party nor their creditors, nor cautioners, nor any other party acting for them, shall have any right or authority to interfere in any way with the execution of the work." The contract also repeated the condition as to the necessity of obtaining security for performance of the contract. This provision was satisfied by the bond upon which these proceedings were based, and to its terms I will immediately refer; but before doing so it is desirable to point out that the only powers possessed by the engineers with regard to granting exemption to the contractors from the obligations of the contract were the two clauses to which I have already referred—the one which enabled the time for completion to be extended in the special limited circumstances of delay arising due to frost or bad weather, and the other which gave power to the engineers to decide whether or no the work was being conducted with such diligence as would ensure its completion within the appointed time, and in the event of its not being so conducted to enable the powers reserved to the appellants of completing the work to become operative.

The bond to secure performance of the contract was given by the respondents, and is dated the 31st March 1909. By it the Insurance Company bound themselves in the sum of £5000 upon the conditions that the bond should become void if all the covenants and conditions of the contract were truly and faithfully performed and satisfied, or in the event of default if payment were made of the damages that had occurred. The bond then contained the provision that has given rise to this dispute, and it is in the following terms:—"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, 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 contractors shall have failed to perform or observe." That is a clear condition-precedent to any action on the bond, and the question whether that condition has been satisfied in the present case is the only question that arises for decision.

In order to answer this question it is necessary to give some account of the manner in which the contract was executed. No pipes at all were laid by the contractors until the 13th May 1909, and that portion of the pipes which the contractors should have begun to lay by the 1st March were not in fact started until the first week in July. This latter delay is said to be attributable, in part at least if not entirely, to the inability of the appellants to obtain access to the moor by the appointed date, and the question which arises on this delay therefore

may be disregarded in considering the subsequent questions that arise. The time so lost was never regained. At no time throughout the whole of the summer had the contractors fulfilled their obligations under the contract. The extent to which they were in arrear is mentioned in detail in the opinion of Lord Johnston, and there is no necessity to repeat the figures that he gave, which were not disputed before your Lordships.

In September the appellants appear to have become alarmed as to the stability of the company in case a claim for damages should emerge at the end of the time, and they required further security from the contractors, which they in turn attempted to obtain from the respondents. The respondents accordingly wrote on the 16th September to the appellants and asked their reasons for requiring this added guarantee, and were told in answer on the 18th that the contractors were two months behind their work owing to the defective workmanship in making several joints in one section of their contract. If by this letter it was meant that these defective joints were the sole reason of the delay it was not strictly accurate; but it is quite possible that the appellants had not before them in writing that letter the importance of giving the respondents the fullest possible information with regard to the position of the contractors, and I see no reason to think that they in any way intended to mislead, but rather that they omitted to realise the essential necessity of a complete and detailed disclosure of the failure which had occurred. It is not suggested that this would be regarded as notice of the defaults and breaches that had already occurred within the meaning of the bond, and no other notice was given.

The respondents declined to give further security, and the matter proceeded until the 10th December 1909, when the approach of winter caused the engineers to realise that prosecution of the work during the ensuing months would be a needless expense. Accordingly they arranged with the contractors that the making of the pipes and the joints should be suspended during the remainder of the winter, and proposed that it should be continued at the end of the following March. This was an obvious alteration of the terms of the contract, to which the sureties' assent would be necessary if they were still to remain bound by the obligations of their bond. It may be doubted if any such assent was ever given, for all the sureties did in reply was to acknowledge the receipt of the letter, and to state that they had made a note of the alteration of the date. It is unnecessary, however, to determine whether this amounts to an assent, since for other reasons it is my opinion that the sureties have become discharged.

On the 25th January 1910 the contractor became bankrupt. His representative in bankruptcy declined to complete the work, and the appellants in order to obtain completion were bound to pay a sum exceeding the contract price by £6000, and they accordingly gave due notice of this default and sued the respondents for £5000, the total amount of their bond. These proceedings failed before the Lord Ordinary upon the ground that no notice was ever given of the breaches and default to which I have referred, and that the condition-precedent had not been satisfied. This judgment has been affirmed by the majority of the Judges of the First Division of the Court of Session. The ground upon which the appellants' counsel alleges that these judgments are wrong is this—He says that the condition-precedent must be read in a distributive sense, and only applies to the particular breach in respect of which loss ultimately occurs, and does not cover a breach which might or might not give rise to loss, and is not in fact the breach which is the subject of complaint. In other words, he says that no breach need be made the subject of a notice unless it is of such a character that an action would lie upon it against the contractors. Accordingly he contends that all the earlier delays in the execution of the work need not have been brought to the notice of the Insurance Company, since increased expedition towards the end of the contract might remove all the difficulties so that no loss need have arisen; while no action could be maintained for mere delay until the end of the contract, since the penalties are not made to apply to delay week by week but only to delay when the allotted time has expired, and consequently the present claim, he says, is not a claim that arises in respect of the earlier breaches, but of the final breach of which due notice was given.

Now I think it may be conceded in the appellants' favour that the mere fact that pipes were not laid at the rate specified is not by itself a reason why notice should be given. If, for instance, such delay were due to the act of the trustees themselves it could not possibly involve them in a loss for which the surety would be responsible, since the act of the trustees would prevent the possibility of their being able to claim for any loss at all. The appellants add to this, however, that if the delay be due to frost and bad weather the same results ensue. I am not satisfied that this is so. There is no obligation on the part of the engineer to extend the time owing to delay attributable to these causes. It rests with his discretion, which he might or might not exercise according to other circumstances connected with the execution of the contract. It by no means follows because bad weather has hindered the work that loss might not arise for which the sureties would be responsible. In the present case, however, the appellants add that the engineer is prepared to assert that the delays were due to this cause and that that is sufficient. The answer to that contention is to be found partly in the judgment of the Lord Ordinary by whom the action was tried and in the documents and materials to which our attention has been directed. I can see no reason for limiting the plain meaning of the words of the bond, which provide that in any event from which a claim may emerge notice must be given by

a restricted interpretation, which would mean that notice is only required when the particular claim which emerges is the one in respect of which the notice is given.

Some exception is taken to the unqualified way in which the Lord Ordinary expresses his views as to the cause of the delay, and I think it may be that in one or two respects those observations might well be modified; but the following facts appear to me to be indisputable. According to a chart of the weather which has been prepared and used by the appellants in this case, it appears that from the 12th April until the 13th May there was no frost at all. A few days were showery, and three days or three days and a-half were very stormy. It would be difficult even in the fairest months of summer to find weather much more favourable than this, and it is obvious that a delay of one month after the frost and storms of winter had passed away, before the contractor began to lay the pipes, could not have been fairly attributable to the conditions upon which, and which alone, the engineer of the company would have been at liberty to extend the time of completion. The appellants, however, urge that the construction of the pipes might have been hindered during the earlier bad weather, and that this would have been a sufficient explanation. It appears to me that even that explanation is not open upon the chart. From the 18th or 19th March down to the 12th April there were only four days when there was frost, and a period of about a week in which the days appear to have been partially frosty. When it is remembered that the contract provided that the work was to be begun in February, and that consequently January would have been the month during which the pipes would in the ordinary way have been manufactured, it seems hard to think that frost to this limited extent could possibly have been the sole justification for the delay in preparation of the pipes.

I do not think it is necessary to pursue the case beyond this point, for a delay in commencing the work so serious in extent could not have been due to frost and bad weather, and must have involved the possibility of the contractors being unable to complete within the proper time, with the resultant claim for damages in favour of the appellants, from which claim the engineer could not have fairly exonerated the contractor by his certificate. That the delay was a breach of the conditions of the contract is of course beyond dispute. It was a breach which in my opinion might have involved loss for which the surety would have been responsible. It might have involved such loss even if the frost and bad weather were really the causes of the delay, and in those circumstances it was essential in order to satisfy the condition-precedent in the bond that due notice should be given to the insurance company that such breach had occurred. In fact the delay was never overtaken, and I cannot help thinking that in these circumstances the subsequent occasions when the pipes were not laid at the contracted rate were also breaches of which notice should have been given to the surety, since in the circumstances of the contract as it then stood any such default made the prospect of completion of the contract become more and more visionary as each default occurred.

For these reasons I think the judgment appealed from is correct; in my opinion this appeal fails, and should be dismissed, with costs.

LORD ATKINSON—I concur, and I have nothing to add.

LORD SHAW—I concur.

LORD PARKER—I concur.

LORD SUMNER—I concur.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants (Pursuers)—Solicitor-General for Scotland (Morison, K.C.)—Morton. Agents—John Hepburn, Clydebank—Douglas & Miller, W.S., Edinburgh—Beveridge, Greig, & Company, Westminster.

Counsel for the Respondents (Defenders)—Wilson, K.C.—MacRobert. Agents—Fife & Littlejohn, Glasgow—Cadell & Morton, W.S., Edinburgh — Broad & Company, London.

COURT OF SESSION.

Tuesday, November 16.

SECOND DIVISION.

[Lord Hunter, Ordinary.

DOUGLAS GARDINER & MILL *v.* MACKINTOSH'S TRUSTEES.

Trust — Marriage Contract — Alimentary Provisions—Arrestment.

A woman, E. F., by her antenuptial marriage contract conveyed all her property to trustees for, *inter alia*, the following trust purpose, viz.—"For payment of the free revenue to arise therefrom to the said E. F. during all the days of her life, exclusive of the *jus mariti* and right of administration, and all other rights of the" (husband), "and exclusive of all rights of her or his creditors, and receipts for such revenue signed by the said E. F. alone shall be sufficient to the said trustees, and after her death, for payment of the said free revenue to" (him) "in the event of him surviving her, and during all the days of his life unmarried after her death, and which revenue shall be alimentary to him, and shall in no way be liable for his debts or deeds, or subject to the legal diligence of his creditors." After the marriage creditors of the wife arrested the income of the trust funds in the hands of the trustees. In an action of furthcoming at their instance against the trustees the Court granted decree, *holding* that the wife's liferent was not pro-