Thursday, November 10.

SECOND DIVISION.

[Lord Johnston for Lord Cullen, Ordinary.

BOYD & FORREST *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Contract—Fraud—Recompense—Personal Bar—Misrepresentation Inducing Contract—Quantum meruit—Damages—Action by Contractors with Simple Petitory Conclusion to Obtain Payment Quantum meruit instead of under the Contract Made by them.

A firm of contractors who had completed the formation of a railway for a railway company brought a simple petitory action against the company to recover £106,688. The contractors had already received £271,970, being £28,880 in excess of the lump sum for which, with extras and subject to deductions, they had entered into a contract to complete the work; but they maintained that the contract was inapplicable as the basis of charge for the work executed by them, inasmuch as it had been induced by the defenders' fraud, and they claimed the sum sued for either as the balance still due on the basis of *quantum meruit* or alternatively as damages. The detailed schedule annexed to the contract was based on bores which, the specification stated, had been put down at various parts of the line, and of which a copy of the journals might be seen at the engineers' office. The contractors tendered on the information supplied by the company in the belief that it was based on a genuine journal of bores taken by a responsible borer. The bores had in fact not been taken by a borer, but by railway servants inexperienced in this work. What purported to be a journal of the bores had not been prepared by them, but had been made up in the engineers' office, and was not the exact and complete information supplied him by the borers' notes, but his gloss on or interpretation of that information, and, for example, it classified as "soft" a substance which the borers had described as hard, as rock, and as whinstone. There were, however, in the specification and schedule very wide clauses safeguarding the company from the consequences of any inaccuracy in the information supplied and calling upon the contractors to satisfy themselves. As the work had progressed it had from time to time been found that a great amount of cutting scheduled as in "soft" was in rock. This made the work itself much more costly, and dislocated the contractors' schemes of working.

Held (1) that the misrepresentations by the company's engineer with regard to the bores having been made recklessly, careless whether they were true or false, and without any belief in their truth, amounted to fraud inducing the contract; (2) that the inaccuracies were consequently not covered by the protective clauses of the contract; (3) that the pursuers were therefore not bound by the contract as the basis of charge for the work executed by them, and the defenders were barred from founding upon it; (4) that it was, however, not necessary for the pursuers formally to reduce the contract; but (5) that they could obtain under the action fair and reasonable remuneration for the work done on the basis of *quantum meruit*, or alternatively damages which would fall to be ascertained on a *quantum meruit* basis.

Question (*per* Lord Dundas) if the summons with its simple petitory conclusion was in an appropriate form?

On the 15th November 1907 Messrs Boyd & Forrest, contractors, Kilmarnock, who had completed the formation of the Dalry and North Johnstone Railway for the Glasgow and South-Western Railway Company, brought an action against the Railway Company with a simple petitory conclusion for £106,688, 13s. 11d.

The pursuers, *inter alia*, pleaded—"(2) The pursuers having on the defenders' employment executed the work contained in the account sued for, and the prices charged therefor being fair and reasonable, the pursuers are entitled to decree as concluded for. (3) The contract founded upon by the defenders is inapplicable as the basis of charge for the work executed by the pursuers, and is no longer binding upon the pursuers, in respect (*a*) that said contract was induced by the fraud of the defenders, (*b*) that said contract was entered into by the pursuers under essential error induced by the misrepresentations of the defenders, (*c*) that the work as executed by the pursuers proved to be entirely different from that contemplated by the contract, (*d*) that said contract was by agreement of parties departed from as the basis of charge, and (*e*) that the defenders are by their actings barred from founding on said contract as the basis of charge. (4) Alternatively, the pursuers having suffered loss and damage to the extent of the sum sued for, owing to the fraud, negligence, or breach of contract of the defenders as condescended on, the pursuers are entitled to decree as concluded for."

The defenders, *inter alia* pleaded—"(3) The contract between the parties for the execution of the said work standing unreduced, the pursuers are barred from insisting in the present action. (4) The pursuers having agreed in terms of the contract libelled to execute the work specified in the account sued on for the lump price of £243,090, and the defenders having made payment to the pursuers of the said contract price, the defenders should be assoilzied. (5) *Separatim*—The work specified in the account sued on in so far as falling within the contract between the parties, having been included in the payment by

the defenders of the contract price, and in so far as consisting of extra work having been included in the additional payments condescended on, the defenders are entitled to absolvitor."

The *facts* are given in the *findings* and *opinion* of the Lord Ordinary (JOHNSTON), who, after a proof which had been allowed the pursuers on their third plea-in-law, pronounced this interlocutor — "*Finds* that by missives, dated 19th March and 12th April 1900, bearing reference to relative plans, specification, and schedule of quantities, and by formal contract dated 16th and 18th September 1900 following thereon, the pursuers contracted with the defenders to execute the works necessary for the construction of a line of railway from Dalry to North Johnstone; that the contract was a lump sum contract for execution of the work as detailed in the schedule; that as regards a material part of the work contracted for, the price was based upon calculations of quantities included in the schedule, and that these calculations were based upon the information alleged to be derived from certain borings, an alleged journal of which was submitted by the defenders to the pursuers before they made their offer; that the alleged journal of bores is thus the basis of a material part of the contract: Finds further, that as regards a portion of the line in question, this alleged journal of bores is not a journal in the ordinary acceptation of the term, and as contemplated by the specification, and therefore by the contract, and was not prepared by or issued on the responsibility of the borer; that for this portion of the line, which from the length and the nature of the operations necessary for its formation was a material portion of the line, the alleged journal of bores was constructed by the engineer of the defenders from information afforded by a servant of the defenders, who was not a trained or experienced borer; that such information was defective in itself, and further, was not adopted by the defenders' engineer as it was received, but was interpreted by him according to his personal impression or opinion of what his informant meant: Finds that the defenders' engineer, for whom they are responsible, so acted recklessly and with gross disregard for the interests of the pursuers and other intending offerers: Finds that the consequence of such actings was that the alleged journal of bores essentially misrepresented the nature of the strata through which the last-mentioned portion of the line was to pass; that said misrepresentation materially induced to the contract; that said misrepresentation though directly affecting only a part of the line, indirectly affected the execution of the whole contract; and that the contract so induced has in the execution of the work contracted for involved serious loss to the pursuers: Finds that in these circumstances the defenders are barred from founding upon the clauses in the contract intended to protect them from responsibility for inaccuracies in the information afforded to intending offerers and otherwise; and that the contract itself is not binding upon the pursuers, and does not fix the price to be paid by the defenders to the pursuers: Therefore sustains branches (*a*), (*b*), and (*e*) of the third plea-in-law for the pursuers; and finds that the pursuers having on the defenders' employment executed the work contained in the account sued for, are entitled to reasonable recompense therefor, allowing for payments to account, either in name of *quantum meruit* or, which in the present case is substantially the same thing, of damages, as the same may be ascertained."

Opinion.—"In form this action is a petitory action for £106,688, 13s. 11d., which is the difference between the sum alleged to be due by the defenders, the Glasgow and South-Western Railway Company, to the pursuers, Messrs Boyd & Forrest, contractors, under deduction of sums admittedly paid, for the construction of a short piece of line between Dalry and Johnstone, as *per* the account, which sets out the items in great detail, the ultimate result being as above—

Claim for work done .	£378,658 13 11
Sum admittedly received	271,970 0 0
Balance, being sum sued for	£106,688 13 11

But while this is the form of the action, the real question at issue is, whether the contract under which the work was done is binding, and regulates the payment due by defenders to pursuers, in which case the pursuers have received more than the contract price, viz.—

Sum received . . .	£271,970
Contract price . . .	243,090
Excess of payments .	£28,880

or whether the pursuers rightly demand that the contract be disregarded, and that they be paid a *quantum meruit* for their work. There is also an alternative claim for damages for breach of contract.

"There is no question that the pursuers undertook a work enormously more difficult than was contemplated by either party to the contract, and that they have incurred a ruinous loss, but that of course does not entitle them to set aside the contract, and claim as if it had never been made. They base their main case upon the misleading misrepresentation, made to them in the journal of bores, which was the basis and the sole basis of the important part of the contract between them and the defenders, which was concerned with the cutting and embanking of the line. Unless they substantiate this misrepresentation they cannot succeed on this branch of their case, nor can they, except partially, on the alleged breach of contract. In my opinion they have substantiated it in point of fact. But the effect in relation to the special terms and circumstances of the contract has to be considered before judgment even in point of principle can be given for the pursuers. It would remain, even then, to ascertain the *quantum meruit*, for parties were agreed that the proof should be restricted to the constitution in point of principle of the pursuers' claim.

"I do not at present touch upon the subordinate case of breach of contract.

"The line in question was to be a loop or alternative line from Dalry *via* Kilbirnie, Lochwinnoch, Castle Semple, and Kilbarchan to the north side of Johnstone, where it was to form a junction with the Glasgow and South-Western's Greenock line. From Dalry to Johnstone it ran practically parallel to, and about 1 mile to 1½ miles to the west of the Glasgow and South-Western main line. It was about 12½ miles long.

"As set out on the plan and on the ground, the line was divided into some 217 sections of 100 yards each, marked off by numbered pegs, No. 1 peg commencing at the south or Dalry end. For my purpose it is enough to explain at the outset that the formation of the line involved three main cuttings, known respectively as the Kilbirnie, the Whirlhill, and the Castle Semple cutting, taking them in order from the south cutting northwards, the rest of the work being generally speaking embanking. But as in every piece of railway contracting, the practical execution of the contract and the achievement of profit or realisation of loss, depended upon the relation of the cutting to the embanking, and the proper disposition or laying out of the work to be executed accordingly. This rudimentary fact goes to the root of the present case. It is one of common knowledge, though, if for form's sake that is necessary, it is amply proved by the evidence, and I regard it as necessarily fully in view both of the railway company's advisers and of the contractor, at the inception of the contract. If the basis on which the contractor is led to lay out and prosecute his work is disturbed, the whole operation is thrown out of gear, and his calculations of price are falsified. It is impossible to treat any one or more items of the work in isolation. They are all so correlated that each affects the price of the whole.

"From peg 1 at Dalry to peg 45 going northward formation level was above the surface of the ground, and therefore it was all embankment.

"From peg 45 to peg 67 was the Kilbirnie cutting, the serious part of which was from peg 54 to peg 66. In this latter section were situated, of the bores which were taken, bores Nos. 7 to 12.

"Between pegs 55 and 56 the cutting for the intended line encountered the Paisley main water supply pipe, leading from the reservoir to the distributing system. The water pipe plays a large part in the alternative claim of damages, and was ultimately carried across the line by a bridge, not part of the scheduled works.

"The Kilbirnie cutting ends at peg 57 with the viaduct crossing the Maich water, a considerable stream with steep banks.

"The Whirlhill cutting commenced at the north side of the Maich and extended from peg 68 to peg 86. It contained bores Nos. 13 to 20.

"The Castle Semple cutting commenced with peg 125 and extended to peg 135. It contained bores Nos. 26 to 29.

"What I have now described composed what in working was known as the southern or Dalry section of the contract from pegs 1 to 137. The northern or Johnstone section, from pegs 137 to 217, was shorter and did not present any such marked features, and it is unnecessary to refer to it in detail. It contained bores Nos. 30 to 55. Its cuttings and enbankments were shallower and shorter, and presented in themselves comparatively little difficulty. The evidence is, generally speaking, concerned only with the work on the southern section.

"Turning now to the *contract*. The line had been authorised by Acts of 1897, 1898, and 1899. But advertisements for tenders only appeared on 26th and 28th February, and 2nd and 5th March 1900, and it is essential to note—(1) That plans, sections, and drawings were to be seen, on and after Monday, 5th March 1900, at the office of the company's engineer in Glasgow, 'where copies of the specification, schedule of quantities, and form of tender may be obtained.' In point of fact the specification was not ready for issue till 5th March, for it bears that date. (2) That on 8th March an assistant engineer would meet contractors on the ground and accompany them over it to point out the site of the works. (3) That tenders must be lodged not later than Monday, 19th March 1900.

"I think that it is an essential circumstance, which the Court is entitled and bound to consider when interpreting the contract, that whereas the company had been engaged off and on for four years in taking their bores and preparing their plans and other contract documents, contractors were given fourteen days at most, and a bare ten from the date of the visit to the ground, to master the details of the plans, sections, and drawings and relative specification, and to price the voluminous schedule with a view to their offers.

"The pursuers, Messrs Boyd & Forrest, tendered on 19th March, and their tender was accepted on 12th April 1900. Their tender was 'to construct and maintain the works comprised under the contract for the Dalry and North Johnstone Railway and Dalry Widening, in terms of the specification and according to the relative plans, sections, and drawings, and to the contract to follow hereon, for the lump sum of £243,090.' Though work was begun on faith of the missives in April-May 1900 the formal contract was not signed until 16th and 18th September of that year.

"The next point to note is that the contract was what is known as a 'lump sum contract.' The contractors bound themselves by the formal contract 'for the lump sum hereinafter mentioned, which shall be held as covering everything requiring to be executed under the plans, sections, and drawings' signed as relative to the contract and 'the specification, appendix, and detailed schedule, a print of which' was annexed to the contract and also signed as relative thereto, that they would well and substantially execute, complete, and maintain the whole works necessary for the

formation of the line authorised, 'all as particularly specified and described in and conform to the said specification, appendix, and detailed schedule, and that on the terms and conditions specified in and also according to the true intent and meaning of the said specification, appendix, and detailed schedule and of this contract and according to the foresaid plans' &c.

"The works were to be completed within thirty months from 12th April 1900, under penalty of £10 a day's delay. In consideration thereof the company bound themselves to pay to the contractors 'the lump sum of £243,090 sterling, being the agreed-on price for the construction, completion, and maintenance of the whole works hereby contracted for. And also to make payment' to the contractors 'of any such further sum or sums as may be fixed as the price or value of any extra work or works not embraced under the contract, which "the contractors" may be directed to perform, and shall perform, in terms of the said specification, but subject on the other hand to deduction for and on account of such portions as may not be required or which may be omitted to be done, or may have been withdrawn from the contract or dispensed with, and to deduction also for such alterations and modifications as are less expensive than the works specified.' There follows a reference clause, as is usual in such contracts, but its consideration does not enter into the present question.

"The only incidental provision in the contract which need be noticed, as it bears on the alternative damages claim, is (*Third*)—The contractors 'shall also be responsible for and shall at their own expense repair and make good any injury which may be done to any street, road, tramway, railway, pavement, causeway, drain, gas or water pipes, through their operations, to the satisfaction of the parties having charge of them, and shall also observe all police regulations in connection therewith, and free and relieve' the company 'of any liability arising from failure to do so.'

"The *specification* is, however, the more important document in relation to the present case. It contained the following provisions:—'The contract shall include all excavations, embankments, forming, metalling, and finishing roads and platforms, bridges, culverts, drains, retaining and fence walls, fencing, &c., also rail-laying and ballasting, together with all other works necessary for the completion of the formation of the railway and widening, all as specified herein. . . . . .

"'The whole works shall be executed according to the respective plans, sections, and drawings to this specification, and the contract to follow hereon. A list of the drawings is given at the end of the specification.

"'The plans, sections, and drawings are intended to show the extent and position of the work and the details of its construction; but neither they nor the specification are meant to show or describe every part or portion of the work. Should there be any things omitted, therefore, which may be fairly considered to be necessary for the completion of the work, they shall be held as included in the contract sum, and no advantage is to be taken by the contractor of any apparent or inadvertent errors or omissions.'

"'*Cuttings and Embankments.*

"'Bores have been put down at various parts of the line, the positions of which are shown on the small scale plan, and a copy of the journal of these bores may be seen at the engineer's office, but the company does not in any way guarantee their accuracy, or that they will be a guide to the nature of the surrounding strata. Contractors must therefore satisfy themselves as to the nature of the strata, as the company will not hold themselves liable for any claim that may be made against them on account of any inaccuracy in the journals of the bores.

"'The formation level in both cuttings and embankments shall be 1 foot 9 inches below mean rail level.

"'Of the probability of rock existing in any of the cuttings or other excavations to a greater extent than the quantity given in the detailed schedule, the contractor must judge, and also form his own opinion as to the nature of the strata of the material in the various cuttings or excavations and in the base of the embankments, and price the quantities in the detailed schedule accordingly, as no allowance whatever will be made over the lump sum in the detailed schedule for these, although the material may turn out to be different from what is calculated and given in the detailed schedule.

"'On the longitudinal section and cross-sections the hatched brown line shows the assumed surface of rock; where the journal of bores shows loose or broken rock, then the assumed surface of the solid rock is shown by a dotted brown line on the sections. The calculations of the quantities of the cuttings have been made in accordance therewith; all the material in the cuttings above the hatched brown line shown on sections is measured as soft cutting, and the contractor will only be paid for it as such. . . . . .

"'The material required to complete the embankments shall be obtained as may be directed by the engineer during the progress of the work, by flattening the back slopes of the cuttings, or from side cuttings, or from material supplied by the company in waggons, and emptied—either by the company or by the contractor—as may be instructed by the engineer.'

"'*General Clauses.*

. . . . . .

"'The attention of contractors is directed to sections 18, 19, 20, 21, 22, 23, 46, 47, 48, 49, 50, and 51 of the Railways Clauses Consolidation (Scotland) Act 1845, and section 11 of the Glasgow and South-Western Railway Act 1897, as the contractor shall be bound to implement the whole obligations relative to watercourses, water and gas pipes, sewers and drains, roads and streets, ways and communications there laid upon the company, and he

shall be bound to free and relieve the company of all the penalties thereby imposed, as well as of all liabilities, damages, and expenses that may be incurred, and generally the whole consequences that may arise from his failure to implement such obligations.

"'With reference to the Acts above mentioned, the contractor shall provide all such pipes and execute all such works, whether permanent or temporary, as may be necessary to maintain the use of all watercourses, and water and gas pipes, sewers, and drains, during the construction of the works, and the contractor shall be bound to restore to their original line and level all such water and gas pipes, sewers and drains, or as near thereto as may be consistent with the construction of the railway and works. . . . . .

"'The contractor shall not be entitled to execute or begin to execute any extra or altered work, or work which he may consider or intend to claim payment for as such, without first having obtained a written order therefor signed by the engineer. . . . The contractor shall not be entitled to render any claims by time accounts, unless when these are specially permitted or ordered by the engineer during the progress of the works; and in that case the contractor shall be bound to render to the resident engineer, his assistants or inspector, fortnightly statements of said time accounts, and also a complete account for each extra piece of work on its completion; and whenever desired by the engineer, resident engineer, his assistants or inspector, the contractor shall produce his timekeeper's book for examination, and shall afford every facility to enable them to check the time. . . . . .

"'Contractors are required to state a lump sum for the whole work required under the contract, and a separate lump sum for the maintenance of the same, and to accompany their offers with a minutely detailed schedule. To assist them in doing this, detailed schedules of the work specified are provided, and which schedules are believed to be accurate, but at the same time are not warranted as accurate—and no claim of any kind shall be made or allowed though the same shall be found incomplete or inaccurate, the contractor being bound to satisfy himself as to their completeness and accuracy before making any offer; and it is hereby expressly stipulated that the contractor shall not be entitled to set aside the contract to follow hereupon in whole or in part, or to demand any extra price for all or any part of the said works, or otherwise, on the ground of any error in, or omission from, or discrepancy between, the specification, plans, sections, drawings, and detailed schedule, or any of them, or on the ground that the extent and nature of any of the works necessary to be performed in carrying out and completing and maintaining the work contracted for has not been correctly represented in the specification, plans, sections, drawings, and detailed schedule, or some of them. The prices in the detailed schedule shall be used by the engineer in regulating the monthly payments, and the price of any additions to, deductions, exclusions, and dispensations from, or alterations upon the works, whenever the said detailed schedule contains a price applicable to the description of work so added, deducted, excluded, dispensed with, or altered; but it shall be in the power of the arbiter after named—in case of dispute as to the amount of the monthly payments which should be paid, or as to the price proposed by the engineer of any works so added, deducted, excluded, dispensed with, or altered, and provided it shall not be found by the arbiter that the whole work, as specified, accurately measured, and valued by the prices in the said detailed schedule, shall amount to the lump sum in the tender, or that the prices have not been properly put, keeping in view the nature of the work and the lump sum of the tender—to fix prices in lieu of those in the detailed schedule, which will be used in regulating the amounts of the monthly payments, and the prices of additions to, deductions, exclusions, and dispensations from, and alterations upon the works specified.

"'The directors reserve full power, either by themselves or by the engineer, to alter, modify, or add to, exclude or dispense with, any part or parts of the work embraced under this contract, an addition to the lump sum in the tender being made for all additional works, and a deduction for all works excluded or dispensed with, and an addition to or deduction from the said lump sum for and on account of all altered works, according as the alterations may increase or diminish the expense of the works; but in no case shall any compensation for damage, injury, loss of profit, or otherwise, be allowed to the contractor for or on account of any works altered, excluded, or dispensed with, to whatever extent the directors may exercise the powers above reserved.'

"It will be observed that a contract based on this specification was very stringent as regards the contractor, while relatively elastic as regards the Railway Company. For his lump sum price the contractor must do the whole work contracted for, and assumed to be scheduled, though the accuracy of the schedule is not warranted. Neither inaccuracy of the plans nor of the schedule gives him any claim for extra price or other relief. Yet he is liable to have his lump sum price reduced by the withdrawal from him of any part or parts of the work, calculated or valued at his schedule prices.

"This in its bearing on the present question is well illustrated when one comes to examine *the schedule*.

"It commences with this note—'The particular attention of intending contractors is directed to the specification in regard to the following matters: The probability of slips in cuttings and embankments and sites of embankments. The probability of more or less rock or soft material having to be excavated, as no allowance will be made should the material

turn out to be different from what is calculated and given in this schedule.' Now the first matter detailed in the schedule is the assumed amount of material in the cuttings, *e.g.*—

	cub. yds.
(*a*) Between peg 45 and peg 67, soft,	275,560
Do., rock,	41,765
This is the Kilbirnie cutting.	
(*b*) Between peg 67 and peg 87, soft,	146,610
Do., broken or loose rock,	1,875
Do., rock,	60,830
This is the Whirlhill cutting.	
(*c*) Between peg 125 and peg 137, soft,	80,260
Do., broken or loose rock,	21,060
Do., rock	39,105
This is the Castle Semple cutting.	

Now the contractor's price for soft was - - - - - - - 1s. 2½d.
Do. broken rock 2s.
Do. solid rock 3s.

and the price for cutting indirectly included that for embanking, as no separate price is stated for embanking, it being assumed that the operations of cutting and embanking were practically one, the amount of cutting being calculated substantially to provide the amount of embanking required, and the materials got by cutting being only to be disposed or got rid of by the embanking.

"If, then, the 'assumed surface of rock' in say the Whirlhill cutting turns out to be totally erroneous and the figures to be reversed, so that there is found to be 60,830 soft and 146,610 rock in place of 146,610 soft and 60,830 rock, nevertheless if the contract is to receive its natural and full effect the contractors must do the extra rock cutting entailed without redress in price or otherwise.

"Such has happened, not of course to such an extravagant degree as I have supposed, but still to a degree so substantial as entirely to upset the contractor's calculations, and to involve him in serious financial difficulty. The question to be solved is, can the Railway Company stand upon the stringent but express terms of their bargain, or can the contractor find any road of escape. I trust I do no injustice to either party if I say that hard as the contract is for the contractors, no blame is on the one hand to be imputed to the Railway Company's officials, who have their shareholders to consider and who are accustomed to trouble with contractors, if they make their contracts as stringent as contractors can be found to accept, and on the other hand that if contractors, in their competitive eagerness, will accept such stringent terms, blindly hoping that things will turn out all right, they have themselves to thank if they find themselves in the grip of such clauses as I have been at pains to quote. But railway companies cannot look for any benignant construction or application of such clauses, but must expect them and their incidents to be examined and applied, not with hostility indeed, but with that strictness which will give the contractor fair dealing and justice in the end of the day.

"The contract price may be divided roughly into—

"(1) Cutting and embankment	£81,736
(2) Bridge and culvert building	93,873
(3) Sundries, including ballasting	67,481
	£243,090

"One-third of the contract price therefore went in cutting and embanking. Not only then was cutting and embanking a very important part of the contract, but towards the success of the contract it was in my opinion a dominating factor out of proportion to the money involved. Moreover, one thing is beyond question, that herein lay the contractor's material risk, for it involved uncertain elements, whereas the rest of the contract was comparatively plain sailing.

"Hence I agree entirely with Mr Clyde and his client Mr Forrest that the bores on which the calculation of quantities was made are the very basis of the contract. That they were grievously inaccurate wants nothing further to prove it than a reference to the longitudinal and progressive section. A handy and convenient way of ascertaining the general amount of inaccuracy is given in the tracings, which were taken by the pursuers for the purpose of illustration merely, from the above-mentioned authoritative documents—

"Whereas the contract schedule	cub. yds.
called for rock in Kilbirnie cutting	41,765
and in Whirlhill cutting . .	60,830
Total	102,595
There was found according to	cub. yds.
Mr Forrest	76,009
and	86,242
Total	162,251

respectively, or an increase of 60 per cent.

"I do not of course accept Mr Forrest's figures as absolutely accurate, though for my purpose I am satisfied that they are sufficiently so. For I think that it is futile for the Railway Company to attempt to gainsay them against the evidence of (1) the progressive sections of their own engineering staff, and (2) the so-called *ex gratia* payments made by them. I had the feeling throughout the evidence that on this and a good many other points Mr Melville and his subordinates were defending, not merely their company, but their own position, and I cannot say that their evidence impressed me so favourably as it might otherwise have done. Mr Melville is very hard put to it when, in the course of his cross-examination on the subject, he attempts to throw over his own subordinates, the contemporaneous evidence of level books and progressive section, and to meet the evidence against him by the assertion that 'actual top of rock' means no such thing, but only the actual top of what he *ex gratia* paid for as rock. I think that it would have been more to his credit if he had frankly confessed to an egregious blunder at the basis of his calculations, and taken his stand upon the freedom to blunder which the company maintain the contract gives them, for to that it comes in the long run.

"If words could do it, the passages which I have quoted from the various documents which go to form the contract amply confer that freedom upon the company. But the pursuers maintain that the work as actually carried out was so materially different in character and extent from that contemplated, specified, and detailed as to render the original contract wholly inapplicable—*Smail*, 9 D, 1043; *Quin*, 15 R. 776. Notwithstanding the terms of the contract, I do not think that this contention is so manifestly untenable that it would not require very careful consideration, from which, though the inclination of my opinion at present is against the pursuers, I confess that I am not sorry to escape. But the pursuers have another line of attack, whereby, in my judgment, they are able to prevail without pressing the wider question. They say that the bores, which I think were admitted on both sides to be, and I have already explained that I hold were, the basis of the contract, were not merely inaccurate but dishonest—that they were made fraudulently or so recklessly as to be equivalent to fraudulently, or in any view that they involved misrepresentation, for which the company was responsible, and that the essential error induced by this misrepresentation was one of the moving causes to the contract.

"I acquit Mr Melville of intentional fraud, but I cannot acquit him of such recklessness as *æquiparatur dolo*. But apart from this recklessness, which amounts to fraud, he himself is, in my opinion, the responsible author of the misrepresentation founded on.

"When a railway company bases its contract on calculations, and its calculations on a journal of bores, it must, if there is any regard to fair dealing, be implied that it tables the genuine journal of a responsible borer. It represents that bores were taken; that the journal of bores is the borer's record from day to day of his operations; and that from the information thus supplied their calculations are made. No disclaimer of responsibility for accuracy will absolve the company from the responsibility of presenting a concocted document which no borer ever saw, and which contains, not the information given by the borer, but the opinion of their own engineer seated in his office of what the borer must be assumed to have meant.

"The specification says that 'bores have been put down at various parts of the line, the positions of which are shown on the small scale plan, and a copy of the journal of these bores may be seen at the engineer's office.' At an early period in the proof I asked to see the original of this journal, expecting to find it authenticated in some way by the borer. After some trouble I found that there was no such thing in existence as an original journal. Several typed copies were unearthed. But no one could tell exactly from what they had been taken. And all that could be said was that at any rate these typed copies had been laid ready in the engineer's office for intending contractors. But it gradually emerged that in reality the so-called journal of bores had been made up in Mr Melville's office under his instructions. This is sufficiently startling. But the situation is not improved by the history of the genesis of the document.

"It appears that at first no professional borer was employed at all, but that the boring was confided to one of the company's own staff, a man of the name of William Cowan, who was nothing better than a way superintendent, with the assistance of ordinary platelayers, and that it was continued by him or by his son, who seems to have succeeded him in his post, until at any rate all the bores from No. 1 to the end of the Kilbirnie cutting were taken. I believe that he did make some further bores, extending into the Whirlhill cutting, including the important bore No. 16. But absolute precision on this point is not necessary for the purpose of my opinion. For the ground of my judgment it is enough to confine attention to the Kilbirnie cutting. Whether any change would have been made in the arrangements for taking the bores but for Cowan's death I do not know, but on that occurring a professional borer of the name of Brown was employed and took at any rate some of the bores of the Whirlhill cutting, and those in the Castle Semple cutting, and on to the end of the line at Johnstone. It is proved that Cowan had no proper training or experience as a borer. In fact Mr Melville himself says, 'He had not a great experience, any further than putting down bores such as this; he was not a qualified mineral borer.' And his sons, who were responsible for a number of the bores taken prior to Brown's employment, had still less experience. The sons were examined as witnesses, and proved to be honest, responsible men, quite suitable for their proper work, as superintendent surfacemen, but with no higher attainments.

"Not only thus did the company take the responsibility of boring by unqualified members of their own staff, but these men made no journal of bores. What they did was to communicate to Mr Melville in jottings, and brief letters, certain information derived from their borings. These letters, but not the jottings, are produced, and are the most important evidence in the case. And even the scanty information thus derived Mr Melville did not record as it came from them, but, putting his own glosses on their statements, produced, so far as the first portion of the line, including the important Kilbirnie cutting, was concerned, a so-called journal of bores which was a combination of their statements and his own interpretation or conception of what they must have meant. To put the situation curtly. When they reported meeting with 'black ban' or with 'hard black substance,' Mr Melville first translated these expressions into 'blaes,' and then treated all that he so designated 'blaes' as soft material. These returns justify the condemnation of their capacity by the pursuers' skilled witnesses. And their em-

ployment and his subsequent mode of dealing with their returns at his own hand, even to the discarding of information derived from occasional check bores, brings home to Mr Melville unaccountable recklessness in dealing with a matter so vital to the contract. As contended by the pursuers, a contractor in this relation takes his risk on the faith of honest information laid before him, but not on the interpretation which the company's engineer may choose to put on an untrained man's work. To present a document so compiled to contractors as a journal of bores, taken in the sense of the contract, was, as it seems to me, a fraud on intending offerers, and in itself such a misrepresentation as to bar the company founding on the clauses protecting them from responsibility for inaccuracy, if inaccuracy occurred. 'It suffices to say that in my opinion the clauses before us do not admit of such a construction. They contemplate honesty on both sides, and protect only against honest mistakes'—*per* Lord Loreburn, Lord Chancellor, in *Pearson* v. *Dublin Corporation* (1907), A.C. 351, a very analogous case to the present. The learned Dean of Faculty maintained that Mr Melville may have been mistaken, but there was no conscious or intentional dishonesty, and therefore no fraud, founding on Bramwell's, L.J., classic opinion in *Weir* v. *Bell*, L.R., 3 Ex. Div. 238. But the argument ignores the fact that the absence of intentional dishonesty may be supplied by the presence of a reckless disregard of the interests of the opposite contracting party, where these interests must have been or must be held to have been known to be materially affected by the act in question. I refer again to what I have already pointed out, that upon the basis of these so-called bores a continuous line was drawn on the longitudinal section, which line was made by the contract the hard and fast division between soft excavation and rock. And as was provided in the introductory note to the schedule, there was to be no allowance 'should the material turn out to be different from what is calculated and given in the schedule.' On the basis of the bores, and of the line founded upon them, the rock in the Kilbirnie cutting was calculated at 41,765 cubic yards, and that figure was entered in the schedule, and for that and that only could the contractor get rock price. Though the contractor met with nearly double the rock in this cutting, he had to take the rest at the price of soft excavation. To support this contention on a journal of bores so constructed appears to me to be impossible, and I am prepared to sustain the pursuers' contention that the journal of bores was prepared in a fashion so reckless and so regardless of the fair interest of intending offerers that the contract thereby obtained cannot stand. But it is not necessary to carry the case so high, for there is no doubt that through the journal of bores so prepared an essential misrepresentation was made, for which the defenders are responsible, and which induced the contract.

"I have confined my attention to the Kilbirnie cutting because that is such a material part of the contract in itself, and also so materially affects the scheme and execution of the work as a whole as to give a sufficient basis for my judgment. But if Mr Cowan's boring extended into the Whirlhill cutting, the situation is *a fortiori* of that which I am assuming.

"As regards the rest of the bores, whatever their extent, the case is different. Mr Brown had been employed before by Mr Melville, whose experience of him had not been eminently satisfactory. Still he was an independent trained borer, and he did, I understand, give Mr Melville a formal journal of his bores, and though Mr Melville had not been fully justified in his choice, there is no ground for suggesting that he made more than an error of judgment, or was actuated by a corrupt motive in making it. Had therefore Mr Brown's handiwork only been in question, I think that, hard measure though it might be, the company would have been protected by the conditions of the contract, and the contractors would have taken the risk and would have had to bear the consequences of his inaccuracies.

"In saying this I assume that as regards the part of the journal with which Mr Brown was concerned, the so-called journal of bores was honestly a mere transcript of his returns, though I must say that to me it appears incomprehensible that where the journal of bores played such an all important part in the calculations, which form the basis of the most material part of the contract, the journal should not be found to be a document compiled by the borer himself, given out on his responsibility and authenticated by him.

"The conclusion to which I have been compelled to come on this matter is to my mind strongly supported by a consideration to which I have already adverted, but which I think it well to repeat. I do not think that Mr Forrest is to be gainsaid when he states that, notwithstanding the passage which occurs more than once in the specification to the effect that although the bores were put down and the journal supplied for the information of contractors, contractors must nevertheless satisfy themselves as to the nature of the strata, this was well understood to be a form of words merely, introductory to the protective clauses in favour of the company, and that it was perfectly well understood by all concerned that contractors would not, because they could not, do anything to verify the journal of bores supplied. As I pointed out, the bores, plans, and contract documents had been incubating for months in the office of the company's engineer, but when the time came for taking in tenders, ten days or at most a fortnight was allowed to intending offerers to do all that was necessary for them to make up their offers. When I say that the schedule contains the whole detail of no less than fifty-four bridges, I think it will be seen that an intending offerer had not much time to spare to test and check the work of the

borer. But what is more, if he had wanted to do so and to put down check or test bores of his own, the whole time at his disposal would have been utterly inadequate, and further, he would not have been allowed to do any such thing, for he had no right to go upon the ground. It was therefore well known to the company's engineer that the journal of bores and the calculations, of which they were the foundation, must and would be taken by intending offerers as substantially correct for the purposes of the contract, and that they would actually tender on the faith of the substantial accuracy of the bores and relative calculations. And this circumstance, were it necessary, must be held, I think, to throw an even greater responsibility upon the company's engineer to see that the bores were made and the journal prepared, not in the reckless fashion which was adopted, but with the most scrupulous attention to all the requirements of independent and accurate work.

"The evidence has necessarily been extraordinarily lengthy and the production of documents, I should think, rarely paralleled—they run to nearly 6000 numbers—and I am not going to attempt any analysis of the proof either parole or documentary. I gave my best attention to it while it was being led, and I have since studied those parts which were thought most important, but the result has not been to displace the conclusion to which I had come at the close of the evidence. There are, however, some points to which I think it necessary to advert.

"One of the great controversies in the proof centred round the terms 'blaes' and 'black blaes.' I do not think that anything in the case really turns upon the terms. 'Blaes' is not a definite substance in mining or geological science; it is really a working miner's term of very flexible application. In this case the use of the term means nothing, and it is the nature of the substance to which the term was loosely applied that is the important question.

"Again, in dealing with the Castle Semple cutting there has been an unfortunate misuse of the word 'conglomerate.' What was there found was not the geologists' conglomerate, popularly known as pudding stone, but a bed of very dense and tenacious boulder clay, so tenacious that it could neither be worked with a steam navvy nor by hand, and that even blasting made small and slow impression upon it. That he should not have reported its presence is the chief blot on Mr Brown's boring.

"In the next place it was contended that given that there was inaccuracy in the bores the only result was to increase the quantity of rock and to diminish the quantity of soft, and as the company has *ex gratia* paid as rock for all the rock excavated, the contractor has suffered no injury and loss. Mr Melville is not very successful in his explanation of these *ex gratia* payments. I must say that I think he honestly felt for the contractor in the difficulties into which the inaccuracies of the schedule had landed him, and that these payments for which he was responsible were a *bona fide* attempt, so far as he had power, to redress the injustice. But they do not go far enough. It was, I think, convincingly demonstrated that the mere difference between the prices for rock and for soft excavation was no criterion of the contractor's loss. It was proved up to the hilt that the execution of the contract and the orderly continuity of the work essential to a profitable result was entirely upset, and the whole engineering undertaking thrown out of gear by the difficulties which were thrown in the contractor's way by this unexpected mass of rock, and that consequently his loss has to be estimated on a very different basis than that merely of the relative prices of rock and soft cutting.

"The Railway Company made great efforts by production of cross sections of the line of a very pictorial nature to disprove the existence of the borer's inaccuracies. I cannot say that I was impressed by this line of evidence, and preferred the contemporaneous evidence of the company's own engineers in their progressive longitudinal section and other documents of like nature.

"I wish now to state that in coming to the conclusion that the contract price cannot in the circumstances regulate the pursuers' claim, I am far from satisfied that Messrs Boyd & Forrest will substantiate their demand in its entirety. In particular I am doubtful whether as the difficulties in which they were involved disclosed themselves they uniformly acted with the skill, discretion, and energy required to minimise the effects. One point in particular they seemed to me to have failed in, viz., in handling the water with which they were troubled at so many places.

"I now come to a matter which has given me considerable trouble. As I have stated, the pursuers' grounds for getting behind the contract apply only to the southern portion of the line which includes the Kilbirnie cutting. This, however, if the full consequences were weighed, would justify I think *de plano* throwing over the whole contract and resorting to a *quantum meruit*, but that the whole history of the Kilbirnie cutting is mixed up with that of the Paisley water-pipe, a subject to which I have as yet only indirectly adverted. The main from the reservoir to the distributing centre crossed the proposed line at a point in the Kilbirnie cutting where ultimately bridge 12A was erected. The situation of the pipe had been known to the Railway Company, for it is noticed in their Parliamentary plans and book of reference, but when their engineers came to prepare the contract plans and schedule it was, to be plain, entirely forgotten and the contractor knew nothing about it. As a mere item in the contract what was necessary to supply the omission would be merely extra work for which a price would have been found under the contract. But it was not only in itself a very important work, but it proved a very dis-

turbing element in getting through the Kilbirnie cutting, and directly and indirectly occasioned very much of the loss which that cutting entailed upon the contractor. These consequences the Railway Company endeavour to throw upon the contractor, but in my opinion unjustifiably. The original negligence of omitting to provide for the carrying of these pipes the company made no proper attempt to remedy. The contractor was told that it was his responsibility, and that it was his business to arrange with the local authority, and that the whole consequence of the delay which was occasioned was attributable to him and to the local authority. In my opinion this was not so. The contractor had no *locus standi* with the local authority, and it was the business of the company's engineers instead of wasting months, I might almost say years, in fruitless correspondence, to have redeemed their error and neglect by taking the matter promptly in hand, arranging matters with the local authority, and giving the contractor decided and definite instructions. In this whole matter the conduct of the Railway Company's engineers shows up badly, and apart from any question of the binding nature of the contract would have afforded the contractor a ground for damages. But then this is apart from the consequences of the inaccuracies in the bores, and consequently in the calculation of quantities, and it is difficult to disentangle the two things, for the consequences of the inaccuracies in the quantities are inextricably mixed up with the consequences of the original neglect, and the subsequent failure adequately to remedy that neglect, in regard to the means of carrying these main water-pipes. Still though I think it would be impossible to say how far the contractors' operations were affected purely by the inaccuracies in calculation consequent on the inaccuracies in the bores, I am satisfied that these latter were sufficiently material and essential to justify the contractors' contention that the misrepresentation vitiated the whole contract and debars the company founding upon its conditions, and that even though the company might have been safeguarded, which I do not think it necessary to determine, in relation to the other two cuttings had they only been in question.

"Lastly, it was maintained that the contractor went on under, I think, very specious persuasions by Mr Melville, and completed the work under the contract, and that it is now too late for him to rescind.

"It is necessary, therefore, to consider what is meant by rescission, what is necessary in order to rescind, and what is the result of rescission. Contracts are of such various kinds, and the question of rescission arises under such varied circumstances, that it is impossible to lay down one hard and fast rule which will meet every case. I think that the defenders' argument amounted to this—that to rescind a written contract you must reduce; that so long as the contract stands unreduced it is binding to the letter, and as the work has been contracted for, has been commenced, carried on, and even completed, and so matters cannot be restored, it is impossible to reduce, and therefore incompetent to rescind. I think that the idea of the necessity of reduction may be a good deal attributed to our system of registration, and is only really applicable to cases where the contract involves a registered title or something akin or analogous thereto. I do not think that it has really any place in relation to executorial contracts, unless in the special instance, and even that I doubt, of such contract not having been begun to be executed. Where the contract is executorial the ground of rescission is rarely apparent except as the work proceeds, and I think it is fully acknowledged in Scotland, as it certainly is in England, that where in the course of a contract one of the parties finds that he has been led into the contract by fraud, or under essential error induced by misrepresentation, he is not deprived of his remedy because he has commenced to execute the contract, nor is he bound to stop and take all risks of doing so, but is entitled to proceed, giving notice of his objection, and reserving questions till the end of the day. But I think that rarely in such cases does the objection arise so sharply in the execution of the contract that the contracting party imposed upon is able definitely to take up his position. In a case such as the present the true situation only evolves itself gradually as the work proceeds, and even then, though it may become apparent that there has been mistake, it does not always appear at once that the mistake can be chargeable to misrepresentation, still less to fraud. And the situation which then arises appears to me to be much more properly characterised as one for damages than for rescission. In the present case I think the pursuers gave ample notice during the currency of the work, and I particularly refer to the disputed telegram on the day of the late Queen's funeral, the defenders' attempt to explain away which was a signal and not very creditable failure, having regard to all that Mr Melville knew of the situation.

"In the present instance the pursuers put their case thus—we have done work for the Railway Company, and for that work we are entitled to remuneration *in quantum meruit*. The defence to their claim is—you did the work under contract, you have been paid the contract price, and the contract is a complete answer to your action. The pursuers' reply is—you are debarred from founding on the contract, because you put before the contractor representations false in fact, made by your representatives fraudulently, or so recklessly as to be equivalent to fraudulently, or which in any view occasioned essential error on our part inducing to the contract. But I think that this statement of the case cannot really be distinguished from the pursuers' alternative claim of damages for fraud or misrepresentation inducing to a prejudicial contract. The

matter may admit of different statement according to the point of view from which it is approached, but in reality it is the same thing differently presented. Assume that the pursuers have been induced by fraud or misrepresentation to enter into an executorial contract, which, as it developed in execution, has proved to be inadequately remunerative, and indeed to involve them in ruinous loss at contract price. They claim, and I think justly, that the contract price be discarded, and a *quantum meruit* ascertained and awarded to them as the recompense of their labour and outlay. But assume, on the other hand, that they lay their claim simply for loss and damage occasioned to them by fraud or misrepresentation, the amount of this loss can, I think, only be ascertained on the same principle of *quantum meruit*. It appears to me, therefore, that the pursuers' alternative case is not truly alternative, but the same case differently stated.

"I do not find in the Scotch authorities any direct precedent. The case of *Smail* v. *Potts*, 9 D. 1043, approaches very near to the circumstances, but it differs in this, that though as a minor alternative ground of action misrepresentation as to the nature of the strata to be encountered in the course of operations was averred, the main case for the pursuers was that things turned out so differently from what either party expected, that the contract had to be departed from and the work to be begun again, and that the work actually done was therefore not the contract work, and could only be remunerated by a *quantum meruit*. Moreover, as an authority the case only rests on the charge of Lord President Boyle to the jury, valuable as that charge is. The case of *Quin* v. *Gardner & Sons, Limited*, 15 R. 776, was also a case where, though it was averred that the work executed differed from the work contemplated, to such an extent that the schedule prices did not fairly apply to it, the explanation given of the difference was not the meeting of unexpected difficulties, or a position of matters inconsistent with what was represented, but such a change of plan as made the work a totally different work.

"On the other hand, the case of *Pearson* v. *Corporation of Dublin*, 1907, A.C. 351, which, though arising in the Irish Courts, was ultimately decided by the House of Lords, appears to me to be a direct authority, not only for the purpose for which I have already applied it, viz., for the construction and application of the protective clause of the contract, but also for giving a remedy by means of damages.

"Taking this view of the case, it is not necessary that I deal with the specific and separate question of damages for the defenders' negligence and breach of contract in relation to the carrying of the Paisley water pipes.

"I therefore propose to pronounce an interlocutor containing the following findings, leaving the amount of the *quantum meruit* or damages to be subsequently ascertained."

The defenders reclaimed, and argued—The pursuers had not asked reduction of the contract. It was an ordinary petitory action for payment of a sum of money. The proper course would have been to reduce the contract. The Lord Ordinary, however, left the contract standing, and held that it did not apply to charges. In so far as the case was one for reduction a contract could be reduced through (1) fraud or (2) innocent misrepresentation inducing the contract. As regarded innocent misrepresentation the defenders—as would be shown later—were absolutely safeguarded by the protecting clause in the contract. Accordingly the issue before the Court was an issue of fraud. The defenders were not liable unless they were fraudulent or guilty of such gross negligence as amounted to fraud—*Derry* v. *Peek*, 1889, 14 A.C. 337. There must be wilful misstatement—*mala fides*. To make a false statement carelessly was something different from fraud. It was not the law that a man who had no reasonable ground for making a representation, and yet made it, was fraudulent. It was necessary to go further. The Court must be satisfied that he knew he had no reasonable ground for saying what he did. He might be mentally culpable, *i.e.*, stupid and uninquiring, but that was not enough unless he were shown to be morally culpable — Lord Herschell in *Derry* v. *Peek*, *cit. sup.*, at pp. 359, 366, 369, 373, and 375; *Weir* v. *Bell*, 1878, L.R., 3 Ex. Div. 238, Lord Bramwell at 243; *Brownlie* v. *Miller*, *&c.*, July 16, 1878, 5 R., 1076, Lord Shand at 1091, 15 S.L.R. 718, and June 10, 1880, 7 R. (H.L.) 66, 17 S.L.R. 805; *Sharpe* v. *San Paolo Railway Company*, 1873, L.R., 8 Ch. Ap. 597; *Western Bank* v. *Addie*, May 20, 1867, 5 Macph. (H.L.) 80, Lord Cranworth at 91, 4 S.L.R. 113. In *Pearson* v. *Dublin Corporation*, [1907] A.C. 351, and [1907] 2 I.R. 27 (cited by the Lord Ordinary), it was held that the contract protected against honest mistake, but that there was evidence upon which the jury might find that there was dishonesty, and that the case must go back to the jury—Lord Chancellor at [1907] A.C. 353, and Lord Ashbourne at 359. *Pearson* would be on all fours with the present case if dishonesty were proved here. The *ratio decidendi* both of *Derry* and *Pearson* was that there was protection against honest mistakes, but no protection against dishonesty. The question in this case accordingly was, did Melville really believe that the journal of bores was a fair representation of the bores that had been taken? If such was his honest belief it was not enough for the pursuers' case that he was careless or credulous, or that he deceived himself. As to honest mistake the protecting clause in the contract afforded the defenders a complete answer. If in an action for reduction on essential error induced by innocent misrepresentation there was a clause of relief *in gremio* of the contract, there would be no case to go to a jury. The contractor took the risk of all mistake short of fraud. Moreover, there was no averment of innocent misrepresen-

tation on record. Plea (3) (*b*) was merely a repetition of (3) (*a*) in different language. Furthermore, no action to set aside a contract on the ground of innocent misrepresentation had ever been entertained after the contract had been executed, the misrepresentation having been known from the beginning. *Pearson's* case (*sup. cit.*) did not touch this point; it was a question of fraud. The pursuers maintained, in the third place (plea 3 *c*), that the work executed by them was so entirely different from the contract as to render it inapplicable as the basis of charge. They based their argument, *inter alia*, upon the excess of rock found in the cuttings and the finding of the Paisley water pipes. If the pursuers had dealt with the water pipes in a business-like way, their difficulties would have been much less. This was a typical case of additional work over and above the contract, for which the pursuers were under the contract entitled to extra payment. It could not be maintained that all these elaborate provisions as to extras did not apply to anything important but only to trifles. It might be admitted that if the work done was something else than the contract work the contract price would not apply. But it was not said here that the pursuers had not executed the contract. The Lord Ordinary's observations upon this point were well founded. There was no authority in the law of Scotland for a party being relieved from a contract in respect of the work proving to be different from what he expected. The cases relied on by the pursuers were not in point. In *Smail* v. *Potts*, March 17, 1847, 9 D. 1043, it was not the contract work which had been executed. *Quin* v. *Gardner & Sons, Limited*, June 22, 1888, 15 R. 776, 25 S.L.R. 577, was only a decision on a point of process. In *Bush* v. *Whitehaven Trustees*—Hudson on Building Contracts (3rd ed.), vol. ii, p. 118—there was no law except for *obiter dicta*. The finding of the jury in that case was that the contract executed was so essentially altered that it was not the contract entered into. There was a complete change in the conditions under which the work had to be done. The pursuers must show, which they had not done, that the substratum of the whole contract fell. The principle, which was well recognised in shipping cases, was that the whole venture must be frustrated—*Jackson* v. *The Union Marine Insurance Company* (founded on in *Bush's* case), L.R., 8 C.P. 572, 10 C.P. 125.

Argued for respondents—If fraud in the legal sense was established, then the contract went. The defenders were guilty of fraudulent misrepresentations as regards the bores, for the following reasons—(1) the journal of bores given to the pursuers was not what was supplied to the defenders' engineers by the borers; (2) the defenders kept back material facts as to the bores which it was their duty to disclose; (3) the withholding of these facts made the engineers' representations dishonest and grossly misleading; (4) the misrepresentations as to the bores were made recklessly by the defenders' engineer, careless whether true or false. *Derry* v. *Peek* (*cit. sup.*) was directly in point. It was there held that if fraud was proved, the motive was immaterial. The defenders had done enough if they could show that representations were made which were false. It was not asserted that the defenders' engineer intended to cheat the pursuers. Let it be assumed in his favour that he honestly thought his diagnosis of the bores fairly interpreted the symptoms he was describing, and that he honestly attempted to enter in the journal the information that he thought a competent borer would have supplied. It must be kept in view that he gave it to the contractors knowing that they took it as information really supplied by competent borers. Melville could not be acquitted of making false representations, and of having done so with complete recklessness as to whether they were true. With regard to plea 3 (*b*), it was plain that the pursuers had not contracted themselves out of pleading essential error by the protecting clause. Negligent misrepresentation was clearly proved here. The protecting clause had no application to blunders such as the defenders made. It dealt only with inaccuracies, and assumed care on both sides. There did not seem to be any authority exactly in point, but the pursuers' argument that the protecting clause did not apply to errors such as the defenders' was sound in principle. As regards plea 3 (*c*), the contract had turned out entirely different from what had been contemplated. It took five years to complete instead of two and a half. The variations were such that the contract as a whole could not be executed under the conditions contemplated when it was entered into. *Bush* v. *Whitehaven Trustees* (*sup. cit.*) was absolutely in point. The pursuers also founded on *Jackson* v. *Marine Insurance Company* (*sup. cit.*); *Smail* v. *Potts* (*sup. cit.*); *Quin* v. *Gardner & Son, Limited* (*sup. cit.*) (Lord M'Laren's interlocutor); *Thorn* v. *Mayor and Commonalty of London*, 1 A.C. 120, Lord Chancellor (Cairns) at 127. The pursuers were not too late to set aside the contract. The contract no doubt had been executed, but the defenders' fraud was not discovered—indeed was not discoverable—till the work was well under way. The pursuers were clearly entitled to payment *quantum meruit*.

At advising—

LORD JUSTICE-CLERK—In this case, which relates to a contract for the construction of a railway line, the pursuers maintain that although the contract originally entered into between them and the defenders bound the defenders to pay them a lump sum of £243,000 for the work to be done under the contract, they are entitled to hold themselves as not bound by its terms and to be awarded a sum of upwards of £100,000, over and above sums already paid, which sums are greater by £28,000 than the contract price, and that they are entitled to have the contract set aside as

the basis of settlement of their claim. They base their case on this ground, among others, that the defenders, in supplying the necessary information to enable them to consider what tender they should make, supplied them with untrustworthy information in respect that they did not employ persons of proper skill to conduct the investigations on which the information was to be obtained. Further, they aver that the defenders did not supply the reports of the persons making the investigations; but while professing to supply the reports or journals received from them, they acted unfairly by substituting for the words used in the reports statements expressing what was different from the reports as delivered to them, and professed that what they there supplied were copies of journals, when in fact they were not. The pursuers maintain that they were grossly misled into tendering for the work on the footing that very large parts of the material which they would have to remove in making the cuttings were of soft character, while in point of fact much was hard, and was so described in the reports of the borers who tested the strata. Their case is that this misleading information, while it directly applied only to particular portions of the work, nevertheless so impeded and hampered them in the general execution of the operations, that it involved enormous loss to them, represented by no less than the sum of £106,668. Whether, in the event of their successfully maintaining their right to have the work ascertained and valued on a *quantum meruit* basis, they can prove any such sum, is a question which does not arise at present; but the case has great importance in view of the fact that a very great loss has plainly been incurred, if the pursuers are to be held bound by their contract, for this loss of £106,000 is brought out, notwithstanding the fact that the pursuers have already received payment of a sum exceeding by nearly £29,000 the price agreed on in the contract.

There is another important element in the case, which has not been dealt with by the Lord Ordinary. The pursuers allege that it was found in making one of the cuttings that the large pipe for the supply of water to Paisley crossed the intended line, being a thing which they had no right to touch or interfere with. Of this difficulty it is alleged no information was supplied to the pursuers, and in consequence, as they maintain, great expense in providing for carrying the pipe over, and great delay and disarrangement and hindrance to the work of making the cutting, were caused. There are other minor points which it is unnecessary to notice, as the proof with which the Court has to deal at present was, as the Lord Ordinary says, confined to the constitution in principal of the pursuers' claim, apart from matters of detail.

It is advisable in the first place to state the facts out of which the case has arisen. The line was a new loop from Dalry to the north side of Johnstone, and about 12½ miles long. It was pegged off at intervals of 100 yards. Where cutting was to be done bores were taken by the Railway Company. In Kilbirnie the important bores were Nos. 7 to 12. It was in this cutting also, between pegs 35 and 56, that the Paisley water-pipe crossed the proposed line. In Whirlhill were the bores 13 to 20, and in Castle Semple the bores 26 to 29. All these bores were in the southern section of the line near Dalry, and it is to that section that attention has to be specially directed.

The Railway Company had been engaged for a very long time in making their own preparations. They advertised for tenders, stating where information could be obtained to enable contractors to consider and calculate before making offers, and it is significant as showing that the company considered the information to be ample, and that they expected it would be relied on as a basis for tendering, that while the first advertisement was issued at the end of February and the last on 5th March 1900, tenders were required to be lodged on 19th March, or less than a fortnight after the last advertisement.

The pursuers tendered for a fixed sum, and the contract bears that they did so "for the lump sum hereinafter mentioned," which was £243,090. There was, of course, the usual clause binding the company for payment of extra work not included in the contract, and for taking off any sums representing work not required to be done or omitted to be done. Also the specification had the usual clause declaring that it was not meant to show "every part or portion of the work," and that anything necessary to complete it was to be "held included in the contract sum," the contractor not being entitled to take advantage of any "apparent or inadvertent errors or omissions."

A most important part of the specification in connection with the parties' contentions in the present case is the clause relating to pathways and embankments. It states that bores have been put down, and that a copy of the journals of the bores can be seen at the engineer's office, and this is followed by words to the effect that the company does not "guarantee their accuracy, or that they will be a guide to the nature of the surrounding strata," and it is added that there is to be no claim "on account of any inaccuracy in the journals of the bores." Next follows a clause to the effect that "the contractor must judge and also form his own opinion as to the nature of the strata," as "no allowance will be made . . . although the material turn out to be different from what is calculated and given out in the detailed schedule."

The contractors are also taken bound to do all work as to "water-courses, water and gas pipes, sewers, drains, roads and streets, ways and communications" which the Railway Acts and the company's Private Act imposes on them, and to supply all pipes and do all works necessary to maintain the above during the

carrying out of the works, and to restore them at the conclusion to their original position.

There is a stringent clause against the contractors being entitled to found on error or omissions or discrepancies in the different documents shown to them, but it is unnecessary to go over this clause in detail, as this case does not turn on such matters arising from ignorance or carelessness of the company in drawing up the information laid before the contractors, but on the allegation of fraud or of essential error produced by misrepresentation. The only matter as to which this exempting clause may require to be considered is that relating to the Paisley water-pipe, as to which it may require to be considered whether the exempting clause is available to the defenders to exclude the pursuers' claim.

In the schedule there is a clause which it is necessary to quote, which calls special attention of intending contractors to "the probability of more or less rock or soft material having to be excavated, as no allowance will be made should the material turn out to be different from what is calculated and given in this schedule;" and the schedule sets forth as regards each cutting the estimated quantities of soft, of broken or loose rock, and of rock.

These being the main points of the contract between the parties, it appears from the evidence led that the work turned out to be by no means what it was contemplated by either party that it would be. The defenders have recognised that a very much larger quantity of material which was scheduled as "soft" and so shown in the plans and sections, proved to be of a hard character, and they have paid a large sum beyond the contract price for this, as they say, *ex gratia*. The pursuers, on the other hand, maintain that they were grossly deceived by the defenders by their putting before them as facts ascertained by the borers, statements which the borers never made in their reports, and statements which proved to be untrue in point of fact. They maintain that this false information led them to undertake the work on the footing that it could be done in much greater measure than proved to be possible by comparatively inexpensive methods, whereas the fact was that an enormous number of square yards that on the information supplied were represented as soft were in reality of a very hard description, the result of which was that the removal by mechanical diggers was impossible, and that very extensive blasting operations and pick work and crane lifting had to be resorted to.

The defenders maintain that, however this may be, the clauses of the contract exclude the pursuers from any remedy. The pursuers maintain that they can establish that they were fraudulently deceived by statements known to be false, or at least, being false, so recklessly stated as true as to make those stating them guilty of such gross negligence as equals fraud.

Such being the respective views presented by the parties, the first thing to be ascertained is how the facts as to the representations actually stand. As regards the bores that were taken, it is in my opinion conclusively proved that many of the bores which the Railway Company put forward as information to intending contractors were not taken by persons who could in any sense be held to be competent borers. They were only ordinary railway servants having no skill whatever. They may have been quite competent to work the boring rod, but they were ignorant of materials, which of course was the very matter on which correct information was desired, both for the instruction of the company in drawing up their plans and schedules, and for enabling the contractors to estimate approximately how many cubic yards of soft, of partially hard, and of hard material they would have to excavate. It might therefore be a serious question whether, if journals of bores by such incompetent men were presented to the contractors as information, this did not amount to either a directly fraudulent or at least an inexcusably reckless misleading of the one party by the other. But unfortunately for the defenders, the pursuers do not require to rely upon this view of the matter only, for it is as I think clearly proved that the defenders' own engineer did not rely upon the competency of the borers. For a course was taken which I cannot consider as being other than extraordinary upon the part of the engineer. It appears that on getting from the borer a description of material found on boring down a certain depth which he described as rock, Mr Melville, the engineer, formed his own opinion that it was not rock, but blaes, and it was so represented in the alleged copies of journals to which the contractors here referred. It seems to me that in no way could the engineer more certainly express his want of confidence in his own borer than that he should hold himself justified in substituting "blaes" which would fall under the description "soft," for "rock," which would necessarily fall under "hard." This matter is so important that it may be advisable to quote the documents.

The man who was boring, James Cowan, wrote to Mr Melville on 14th October 1898 as follows—"Dear Sir,—Bore at peg No. 7 on site of Dalry and North Johnstone new line.—A bore has been put down to the depth of 24 feet (the full distance it was to go down) at about 15 feet from the peg on Dalry side. For the first 13 feet it was blue clay and stones, and after that a hard black substance called 'black ban,' but I do not know if this is the proper name for it. We tried to put down a hole at the peg, but only managed to a depth of about 10 feet when we were stopped by stones being in the way.—Yours truly,

"*For* JOHN COWAN—P. M'G."

This therefore described the bore reaching 13 feet through clay and then coming on a hard substance, but does not say whether any depth of this substance was gone through. Later, on 8th November

1898, Cowan writes of another bore at peg 7 —"The above bore has been sunk to the depth of about 26½ feet through about 15 feet of clay and remainder whinstone rock. This completes the bores which were pointed out to be done, and the borers are withdrawn to-night."

This is of course a distinct report that 11½ feet of whinstone rock were bored through. Mr Melville on receiving this writes at the bottom of the letter an instruction—"Keep to the first report of this bore, as the rock here referred to must be the 'black blaes' of 14/10/98;" and accordingly in the schedule the material between pegs 6 and 13, including No. 7, is put down as "soft," although the borer reported it as "whinstone rock." Further, in 14/10/98 there is no expression "black blaes," but, as before quoted, "a hard black substance called 'black ban.'"

Again, as regards peg No. 9, Cowan reported on 18th October 1898 thus—"The bore at peg No. 9 has been put down the full depth of 20 feet, through clay for 12 feet and 8 feet of blackband."

He had already in his letter of 14th October described what he calls black ban as a "hard" black substance.

On 3rd November 1898 Cowan wrote again with reference to bores at peg No. 9 —"We have put down other two bores at above peg, one 5 yards and the other 15 yards from the peg. The first named sunk 13 feet, rock being struck at depth of 11 feet, and the latter sunk 14 feet, rock being struck at 13 feet down." Mr Melville puts a pencil note at the bottom of the letter—"What is called 'rock' in this letter must have been 'black blaes.' See former letter 18/10/98."

He follows this up on 4th November 1908 by reporting another bore at peg 9—"Another bore has been put down 13 yards on the Glasgow side of peg No. 9 to the depth of 17 feet. Hard substance was struck at depth of 12 feet, and what appears to be rock was struck at depth of 16 feet."

Mr Melville again writes a pencil note—"Keep to first bore in letter 18/10/98," thus ordering once more that what Cowan says appears to be rock shall be described as "soft," and it is so described in the schedule.

Thus Mr Melville did not give the information obtained from his borer, but gave it altered so as to express "soft" while it stated "hard" in the words "hard black substance—rock and whinstone rock."

All this brings out a very extraordinary state of matters. (1) The so-called journals of bores of which the Railway Company professed to exhibit copies to the contractors never existed. The borer Cowan supplied no journal, but only wrote such letters as I have read, and so-called journals were made up in the company's office from them; (2) the journals made up did not give the particulars as stated by the borer, but stated something different, by direction of the company's engineer; (3) Mr Melville in ordering substitution of different terms from those used in the borer's reports must, if he did not do so corruptly, have done so because he was satisfied in his own mind that Cowan had blundered in his descriptions, and felt himself justified in making alterations upon them. It is not pressed against Mr Melville that he was wilfully corrupt, but it is contended that in so doing what he did he felt himself justified in ignoring the facts stated by his own borers, and put forward different statements. It is maintained that he grossly misled the pursuers, and that the facts brought out in evidence prove that his action led to vast masses of material being represented to the pursuers as "soft," in the technical sense in which that word is used in such journals or schedules, while in point of fact the borer reported it as "hard," and it proved in fact to be hard.

I would remark here in passing that in no way could the incompetency of Cowan in Mr Melville's estimation be more clearly shown than in the fact that that gentleman dealt with his reports as he did. It is inconceivable that, if an efficient trained borer sent in his report, any engineer, without asking any explanation, would feel himself justified in putting aside a material part of the report and substituting something different—should in fact alter the report into what he thought it should have been, making it contain not the borer's statements but his glosses and inferences, and then pass it off as the borer's journal.

I come to the conclusion on this part of the case that the defenders acted with culpable recklessness, that they deceived the pursuers into accepting as properly obtained data from bores, data obtained from persons known to them to be incompetent, and that they further deceived the pursuers by putting before them as facts representations as to bores which they did not receive from the borers, presenting their own inferences of what they thought the borers should have said in describing strata.

All this being so, it is not surprising to find on the proof that the pursuers have established that they were deceived, and that in fact the material they had to take out was very different in character from what they were led to believe.

What, then, must be the result if it be, as I have held it is, the fact that the documents professing to be journals of bores were not in fact either the journals or copies of the journals of the borers in essential particulars, and that while they were presented as being bores properly taken, they were, in the knowledge of those supplying the information about them, not bores taken by persons competent for such work, or to be trusted as regards skill to issue reports which could be relied on as guides in calculating the extent of materials of particular qualities, which would require to be worked in making the line to be contracted for.

It is very plain that without some such information as to the character of the ground below the surface no one estimating for such a work could possibly make calculations of price with any reasonable

certainty of bringing out a sum which would be neither hopelessly large for acceptance, on the one hand, nor giving promise of any reasonable profit on the other. The bores are necessarily taken in the first instance for the information of the company desiring to have the line constructed. To them they are important as information as to the many matters in connection with constructive details, and still more are they necessary to enable them to consider estimates; as, of course, unless they have information as to strata of proposed cuttings they cannot judge what estimate it is wise to accept. If they know reasonably that the work cannot be done for a sum in an estimate, and that if accepted it will probably lead to a bankruptcy of the offerer, and consequent loss by delay and dislocation to their plans, then they may not accept such an estimate. On the other hand, if they know reasonably what the work should cost, they will not be misled in accepting offers which appear extravagantly high. To these alternatives information as to the strata is indispensable. And further, as they know that no sensible contractor will, or even can, estimate for the work while he is in absolute ignorance as to the classes of material to be found in the ground to be dug out, and the proportion—to put it shortly—of soft and hard material, it is usual to allow intending contractors to have inspection of the journals of bores taken, so that they in their turn may know generally the information which has been obtained by those asking for estimates. In short, both parties in making their calculations — the one of amount to offer, the other of estimate to accept — are in practice possessed of the same information as to what may be called the hidden part of the work. If it were not the practice for the proposing contractors to have access to the information obtained by the party desiring to have work done, then it would necessarily end in that party—in this case the Railway Company—having to pay twice over for bores. For, having paid their own borers and obtained the necessary information, they would know that unless they communicated that information—expensively obtained—to proposing contractors, these would in turn require to obtain information by making boring investigations of their own, and the expense of this work would necessarily be included in their estimated sum for the work, which of course must be calculated on the estimated cost to them in their business for doing the work, and their reasonable percentage on the cost for their remuneration. I have already pointed out that in this case the time allowed for sending in tenders made any examination of strata by the contractors impossible. It is only common sense that bores having been made they should be at the disposal of those who require to have—indeed must have—the same information as those for whom the bores were made originally. This was undoubtedly what was intended, unless the defenders intended to deceive by the information, which would, of course, not be a view of their conduct which thay would think of tabling.

All this being so, the next question is, What shall be held if the party possessing the information as to the bores professes to give inspection of the information to those who desire to send in estimates for the work? What responsibility do they incur? Here two questions arise. Let it be assumed that the information as sent in by the borers is submitted for inspection fully and fairly as the borers gave it. In that case the clause in the contract that the company do not in any way guarantee the accuracy of the bores, or that they will be a guide to the nature of the surrounding strata, and their stipulation that they are not to be liable for claims "on account of inaccuracy of the bores," would have a certain effect. I should not be prepared to hold that it would protect the company, if in point of fact there was gross discrepancy between the journals and the strata as ascertained. Such a clause might well cover discrepancies of degree, such as a mistake of inches or even a foot in stating the depth at which the borer came upon a particular material, or a mistake as to a foot or so in the depth to which a bore had been carried; and other discrepancies might be imagined, which, having no really substantial bearing on a contract of such great magnitude, could not be allowed to overthrow the contract or to give rise to claims for greater payments than those specified in it. But it would not, as I think, exclude a contractor from a remedy, if he could show that the information furnished to him was absolutely misleading, and gave in no sense a true representation of the actual facts. In other words, the information supplied must be supplied in *bona fide* and must not be grossly misleading. I cannot hold that the clause I have quoted will protect the party supplying the information to any such extent as is maintained by the defenders. Such protecting clauses must be interpreted in a reasonable sense, as applying to such discrepancies or omissions in detail, and not to representations which would mislead so as to affect estimates on a large scale, involving it may be very large sums, from the errors affecting an enormous quantity of the material to be worked out in doing the operations required under the contract. But in this case it is not, as I think, necessary to consider that view of the matter, for here I hold that not only were the so-called copies of journals put before the contractors misleading, but, as I have already said, they were not in fact copies of any journals obtained by the defenders. While professing to supply borers' journals, they supplied statements which the borers had never made. They represented that the borers had reported that at particular places the material bored through was soft, while the fact was that the borer had described it to them as hard. There was therefore not only a misleading of the contractors, there was a deception practised upon them. If instead of making

up statements as of journals of bores and referring the contractors to them, the defenders had laid before them the letters of Cowan, which, whether they could be called "journals of bores" or not, were in fact the only information supplied by Cowan, is it possible to doubt that the pursuers would never have sent in an offer to do the work for the sum contained in their tender? They certainly would not have done so. For I cannot take it off the defenders' hands that it was only *ex gratia* that they have themselves allowed a sum of many thousands of pounds above the sum in the contract, it having turned out, beyond doubt that great masses of hard material had to be removed in places where, according to the information given, the proper designation was soft. This shows that the work was so materially different in character and extent from that originally contemplated, specified, and detailed as to raise the question whether the contract was not, as in the case of *Smail* (9 D.), wholly inapplicable. I confess, if it were necessary to decide the case upon that question, I should have great difficulty in holding that the defenders were entitled to hold the pursuers bound. But it is not, as I think, necessary, for I have come to the conclusion that the acting of the defenders in regard to the information as to the borers was in most essential respects not fair dealing. I agree with the Lord Ordinary in not imputing direct *mala fides* to Mr Melville. But, most unfortunately, he did what he had no right to do—ordered to be written down as being the facts ascertained by the borers, something essentially different from what the borer reported. I have no doubt he thought that he was drawing a sound inference, but he must have known that he was putting forward his inference and passing it off as ascertained fact, stated by the borer, which it was not. I cannot acquit him of legal fraud in doing so. If his inference had been right, no harm might have been done, but his inference is proved to have been wrong, and thus he is in the position of putting forward a false statement as to the result of an inquiry by boring, the statement being his own, and not obtained by boring at all. This was, in my opinion, a most reckless thing to do; although possibly not done in conscious fraud, yet it was equal to dole. He took the risk of deceiving if his inference was wrong, and he did deceive. He used words as describing the material which necessarily led the pursuers to believe that the borer had found a substance of one quality when the borer had distinctly declared it to be of another quality.

Now I am very clearly of opinion that no clauses such as are contained in this contract, excluding contractors from founding on inaccuracies or discrepancies or the like, can protect the party with whom they contract where there is misrepresentation such as we have here. Inaccuracies and discrepancies occurring by honest mistake as to details may well be excluded as grounds of challenge by such clauses. But if there is unfair dealing, as I hold there is here, a party cannot take benefit by his own fraud or reckless conduct, *qui aequiparatur dolo.*

It is impossible in a case of this magnitude to refer to all the points made, and one must confine oneself to those which are more weighty. But there is one to which I have already referred, which had better be noticed in more detail. I mean the matter of the water-pipes of the Paisley Water-works. For there cannot be the slightest doubt that what took place in regard to that matter had a most serious bearing upon the pursuers' position as regards the working out of their contract. The fact is the pursuers never received any information as to the presence of these water-pipes, which was known to the defenders, and they made their preparations and began their works in absolute ignorance of this serious obstruction to the work proceeding in the ordinary way. These pipes crossed the proposed line at a point where a deep cutting had to be made. Nowhere in plans or writing were proposing offerers for the work made aware that any such obstacle stood in the way of the cutting operations—an obstacle consisting of an *opus manufactum* which there was no right to interfere with by the contractors, and which could not be interfered with without causing great loss and damage to the inhabitants of Paisley, unless by arrangement with the town authorities works could be agreed upon and carried out which would preserve the safety of the pipes and maintain the water supply. It became plain that a bridge must be constructed, and as to the direction of the bridge a question arose, as the line of the pipes across the proposed railway line was oblique, and if they were to be maintained at that angle great and unnecessary expense would be incurred in erecting a skew bridge. Delay was caused by the necessary negotiations with the burgh of Paisley as to diverting the pipes so as to cross the line at right angles; and when this was adjusted there was further long delay caused by the necessity of having the pipes made of suitable curves to bring the crossing to the required right angle. The delay, as appears from the proof, exceeded six months, and it is not unreasonable to hold that this must have been a cause of very great loss to the pursuers in hindrance to and even stoppage of their work for a long time: and further, in making the carrying out of the works at that cutting much more difficult and expensive than the pursuers had any reason to expect in making their calculations before tendering. That the pursuers are entitled to be indemnified for this very great damage I cannot doubt, as I hold that it cannot be treated as a mere piece of extra work to be paid for at schedule rates. That would not compensate the contractors for loss caused by the dislocation and delay caused by the defenders, and this forms another strong element against the defenders. I cannot hold that they are entitled to shelter them-

selves under any clauses of the contract limiting their liability when it is plain that by their own reckless carelessness they exposed their contractors to such difficulties and delays.

Upon the facts of the case generally I agree with the Lord Ordinary, and it only remains to be considered what findings in law should follow these facts. Here I must remark that the form of the action is unusual. There are no conclusions for reduction, and there is no declarator, but only a conclusion for payment of a sum of money. The defenders contended strongly that without a reduction the pursuers could not succeed. But considering the fact that this is not a case of pursuers endeavouring to get out of liability to do work under a contract, but a case in which all the work has been done and finished, I do not think that a general action of reduction would be suitable. The case is rather one in which the true question is whether, the work having been completed, the pursuers are debarred from claiming money for work done, over and above the contract sum, on the ground that the work was really different in substantial particulars from that disclosed in the information supplied as a basis for tender. In my opinion reduction is in the circumstances inappropriate. It is to be remembered that in this case there was not and could not be an ascertainment of the grounds of objection to the contract at once. Nothing could be discovered till not only very expensive preparation had been made, but also a very large amount of work had been done. And naturally the discovery of a discrepancy between alleged bores and actual strata at one point would not be a ground for stopping work and raising a reduction. It was only after the greatness of the discrepancy showed itself that action could be taken, and by that time a very great amount of work had been done. As I read the evidence, the pursuers only went on and completed it because they received assurances which led them on.

I come to the conclusion that the pursuers are entitled to substantiate their loss and to obtain a decree for it, and probably the best form in which it can be put is that of loss and damage caused by the defenders by their misleading the pursuers by fraudulent conduct.

I would propose that the Court should affirm the Lord Ordinary's interlocutor, in so far as it sustains branch (*a*) of the third plea-in-law based on fraud, and branch (*e*), to the effect that the defenders are barred by their acting from founding on the contract as the basis of charge.

It does not seem to me in view of branch (*a*) being sustained that there is any need to deal with branch (*b*), which relates to essential error, and as regards branch (*d*) I do not think it has been made out. Branch (*c*) could not, I think, be sustained as worded, as the expression to the effect that the work was "entirely different" from what was stipulated is so comprehensive that I do not think it could be affirmed.

It of course remains to be ascertained how far the pursuers can carry their money claim. The question is still open, and will have to be dealt with by the Lord Ordinary.

LORD ARDWALL—This action arises out of the construction of a railway about twelve miles long, known as the Dalry and North Johnstone Railway, which the defenders obtained power to construct by their Acts of 1897 and 1899.

The pursuers, who are contractors in Kilmarnock, allege that the construction of the railway has cost them £378,658, 13s. 11d., that they have been paid by the defenders £271,970, leaving a balance of £106,688, 13s. 11d., which is the sum they sue for in this action.

The defenders' reply to this is that the pursuers entered into a formal contract with them to construct the line for a slump sum of £243,090, and extras for extra work. That they have already paid to the pursuers, including some *ex gratia* payments to cover unexpected expense in the work, £271,970, and that, accordingly, the pursuers have been overpaid by £28,880.

The pursuers' reply is, first, that they were induced to enter into the contract by fraudulent misrepresentations, that they are entitled to have the contract treated as set aside or reduced, and to be paid the sum sued for, either on the principle of *quantum meruit* for the execution of the work, or as damages for the loss they have sustained by having been induced by fraud to enter into a contract at inadequate prices, which has resulted in a ruinous loss to them. They further plead that, apart from fraud, the work as it actually turned out was so entirely different from that contemplated by either party when the contract was entered into that it would be contrary to equity to hold the pursuers to their contract prices, because these prices are inappropriate to the work actually done.

The plea of fraudulent misrepresentation arises on the following facts:—

The defenders advertised for contractors' estimates in the *Glasgow Herald* of 26th and 28th February, and 2nd and 5th March 1900. The advertisement began with describing generally the railways which were to be constructed, and then proceeded thus—"Plans, sections, and drawings can be seen at the Engineer's Office, St Enoch's Station, Glasgow, on and after Monday, 5th March 1900, where copies of the specification, schedules of quantities, and form of tender may be obtained on payment of £10, 10s., which will be returned to the tenderer after the directors have come to a decision on the tenders, provided the tenderer has sent in a *bona fide* tender. The Assistant Engineer will meet contractors at Dalry Station on arrival of 9·30 a.m. train from St Enoch's, on Thursday, 8th March, to accompany them over the ground and point ont the site of the works." It then provided for sealed tenders being sent in. The pursuers paid the £10, 10s. above mentioned, and in return therefor got a copy of the specification, detailed schedule, and form of tender. The specifi-

cation contains the following statement regarding bores—"Bores have been put down at various parts of the line, the positions of which are shown on the small scale plan; and a copy of the journal of these bores may be seen at the engineer's office, but the company does not in any way guarantee their accuracy, or that they will be a guide to the nature of the surrounding strata; contractors must therefore satisfy themselves as to the nature of the strata, as the company will not hold themselves liable for any claim that may be made against them on account of any inaccuracy in the journals of the bores.

"The formation levels in both cuttings and embankments shall be 1 foot 9 inches below mean rail level.

"Of the probability of rock existing in any of the cuttings or other excavations to a greater extent than the quantity given in the detailed schedule, the contractor must judge, and also form his own opinion as to the nature of the strata of the material in the various cuttings or excavations and in the base of the embankments, and price the quantities in the detailed schedule accordingly, as no allowance whatever will be made over the lump sum in the detailed schedule for these, although the material may turn out to be different from what is calculated and given in the detailed schedule.

"On the longitudinal section and cross-sections the hatched brown line shows the assumed surface of rock; where the journal of bores shows loose or broken rock, then the assumed surface of the solid rock is shown by a dotted brown line on the sections. The calculations of the quantities of the cuttings have been made in accordance therewith; all the material in the cuttings above the hatched brown line shown on sections is measured as soft cutting, and the contractor will only be paid for it as such.

"Those parts of the railway where in cutting or on the present surface of the ground shall be 30 feet wide at formation level, except in solid rock cutting where the formation width shall be 28 feet.

"The slopes of all cuttings (except where through solid rock not subject to slip or decay from exposure to the weather) shall be at the rate of one and a half horizontal to one vertical, and where through solid rock at the rate of half horizontal to one vertical. All broken or loose rock shall be taken out to a slope of one and a half horizontal to one vertical. On the top of all solid rock slopes a benching of two feet in width shall be left between the top of the rock and the foot of the slope of the soft material."

Going on to the detailed schedule we find with regard to cuttings that the whole cuttings in the line, which for all practical purposes may be divided into (1) the Kilbirnie cutting, (2) the Whirlhill cutting, and (3) the Castle Semple cutting, are carefully described with reference to the pegs which had been put in along the line of railway, and which are distant 300 feet or 100 yards from each other. It will be noticed that in the schedule the material in the cuttings is described as soft, broken, or loose rock, or solid rock. These three are the only descriptions of material occurring in the schedule. But with regard to the longitudinal section with the hatched line upon it, there were only two descriptions of material, namely, the soft above the hatched line, and the hard or rock below it, while the cross-sections showed the batter at the side of the slopes of the cuttings corresponding to the brown hatched line in the longitudinal section with a broad batter for the soft and a steep batter for the hard.

The manner in which the schedule was to be priced was by the contractors filling up the rates at which they were willing to excavate the various portions of the cuttings, and these entered largely into the total price of the whole work, namely, £81,736 out of £243,090. It was of very great importance, accordingly, that the contractors should be certiorated as nearly as possible of what might be assumed to be found underground.

But the only means of checking the details in the schedule and the plans and sections regarding hard and soft in the cuttings was the so-called journal of bores, a copy of which, it was said, might be seen at the engineer's office, and which was thus really the sole basis of the important part of the contract which was concerned with the cutting and embanking of the line.

Now when the defenders proffered a journal of bores to intending contractors, I think they represented, and must be held to have represented, four things—(1) That the bores mentioned in the journal had been taken, and were all the bores that had been taken; (2) that the copy of the journal of bores to be seen at the office was a copy of the journal of bores within the ordinary and indeed the only meaning of that term—that is, a day by day record made by the persons who took the bores, and giving their description of the material they met with in these bores; (3) that the bores had been taken by persons in whom the defenders themselves had confidence; and (4) that it was from a journal taken by competent borers that the engineers made up the plans and schedules.

Now in point of fact none of these representations were true. In the first place, particularly at bore No. 9, as I shall afterwards point out, there were certain check-bores sunk, the information from which was entirely withheld from offerers. In the next place, so far from the document exhibited being a copy of a journal of bores, there never had been a journal of bores in the true sense of the term. The nearest approach to it, and which for the purposes of this case may be taken to be the journal of bores, is contained in various letters and notes sent to the defenders' engineers by the borers, but the information supplied by these letters and notes was not the information supplied to the pursuers. On the contrary, the so-called journal of bores was a document made up

in the office of the defenders' engineers, and represented not what the borers had reported, but what the engineer thought was the result of their reports. In the third place, so far from the company's engineers having any confidence in the two persons of the name of Cowan who took the bores, as borers, it appears from the proof these persons were known to them to be mere surfacemen and not experienced borers at all, and the best proof that the engineers had no confidence in them was that they disregarded their reports, and substituted for the contents of them what they thought represented the correct state of matters underground at the various bores. If, as I hold, these misrepresentations can be made out upon the evidence they destroy altogether the defenders' defence founded upon the terms of the specification I have above quoted, because, although these exclude all claims made against the company founded upon inaccuracies in the journals of the bores, yet they do not exclude the effects of a fraud, which consisted in representing as a journal of bores what was no such thing, and representing it as an authentic daily record kept by a borer or borers in whom the defenders had confidence.

The document which had been lodged in process under the title of a "journal of bores" is not an original document. Nos. 150 and 4719 are clearly copies, and are not authenticated in any way by the signatures of borers or anyone else. But it has been established by the evidence that these so-called journals of bores, or the original from which they are taken, had been made up in the office of Mr Melville, the engineer of the defenders, and under his instructions. Mr Melville distinctly admits in his evidence that no journal of bores was given him by the persons employed to bore. He says this—"(Q) Did Mr Cowan from first to last ever give you a single journal of a single bore?—(A) He sent his returns regularly to the office. I am referring to the letters that are in process. (Q) Apart from these letters, is it the case that you never got a journal of a single bore given to you?—(A) These were the journals. They were all that I had." These admissions being made by Mr Melville, the company's own engineer, no further evidence need be referred to for the purpose of showing that no journal of bores in the proper sense of that word was ever kept. I shall afterwards refer to the manner in which the pretended journal of bores was made up, and whether it actually represents the information given by the so-called borers' letters. It was on the basis of this pretended journal of bores that a continuous line (hatched brown) was drawn on the longitudinal section of the railway, which line was made by the contract the hard-and-fast division between soft excavation and rock. Following on this, the schedule of quantities was made out, and it was upon this schedule of quantities, purporting to be founded upon a journal of bores properly taken, that the contractors were asked to make offers, and that the contract between the parties was entered into. The prices filled in upon the schedule were filled in by the pursuers, and they filled them in at the figures they did upon the fraudulent misrepresentations that these schedule quantities were founded upon a line drawn on the longitudinal plan separating soft from hard, and which line again was founded on a proper journal of bores, which it was said might be examined at the office. As already pointed out, no true journal of bores ever existed from first to last, and the whole basis of the contract was a fraud, and necessarily, as appears from the passage above quoted, a fraud which was perfectly well known to the defenders' engineers to be a fraud.

It is perhaps convenient at this stage to take one or two of the bores and see how the pretended journal of bores was made up. The averments regarding this are to be found in the closed record, and in my opinion these averments are proved by the evidence, oral and documentary, which has been led in the proof. Taking, for example, bore No. 7, it is stated to consist of "blue clay and stone, 13 feet; hard black blaes, 11 feet." Now the borers' account of this bore is to be found in the print, and there it is said that "A bore has been put down to the depth of 24 feet (the full distance it was to go down) at about 15 feet from the peg on Dalry side. For the first 13 feet it was blue clay and stones, and after that a hard black substance called 'black ban;' but I do not know if this is the proper name for it. We tried to put down a hole at the peg, but only managed to a depth of about 10 feet, when we were stopped by stones being in the way."

And again on 18th November 1898 the following letter was sent—"Dear Sir—Bore at peg No. 7 on site of Dalry and North Johnstone new line.—The above bore has been sunk to the depth of 26½ feet through about 15 feet of clay, and remainder whinstone rock. This completes the bores which were pointed out to be done, and the bores are withdrawn to-night." On this letter there is the following note by the engineers—"Keep to first report of this bore, as the rock here referred to must be the 'black blaes' of 14/10/98."

Now in the longitudinal section and the schedule of measurements the whole of the underground cutting at bore No. 7 is represented as soft, being above the brown hatched line separating soft from hard. It is instructive to see how this happened, and it forms a good illustration of how the contractors came to be misled.

The engineers did not know exactly what this "black ban" meant. It is quite plain that it could not mean blackband ironstone, which is a well-known seam of ironstone, but is never found of the thickness here set forth. Accordingly on 19th October 1898 the engineer asked the man employed at the bores to send a sample, and on 20th October he sent a sample, accompanied by a letter in which he said—"I have to-night sent you a small parcel containing a sample of the substance

designated 'black ban.' The most of it has been churned into the consistency of clay from the working of the chisels in the hole, but there are some chips amongst it which will give you an idea of what kind of stuff it is." The result of the examination of this very unsatisfactory specimen was that the engineers made up their minds that what was called "black ban" in that letter, and "rock" in the letter of 3rd November 1898, to which I shall presently allude, was black blaes. And this also was followed with regard to another bore near peg No. 9. This appears from a note to the letters of 3rd November 1898, 4th November 1898, and 8th November 1898. The note in the last letter is—"Keep to first report of this bore, as the rock here referred to must be the black blaes of 14/10/98." Now "blaes" is proved to be a name given to almost every variety of consolidated black clay in the shale and coal measures. It is proved in this case and is well known to be of every variety and texture, some being hard and some soft. In the present case the engineers of the railway, having called the substance blaes, which it is not proved to have been, in every case proceeded to enter it as soft material in the journal, and to treat it as such in the longitudinal section and schedule of quantities. Now it is very noticeable that the men who were boring, ignorant as they were, never called this substance "blaes." They stated in the letter of 14th October 1898 that it was a hard black substance. In the letter of 3rd November 1898 they called it rock, and in the letter of 4th November 1898 they called it rock again. The engineers translated these terms into "black blaes," and then assumed that it was blaes of a soft description, and entered it as soft material in the longitudinal section and schedule of quantities.

I may here point out that, according to the evidence of the experts on both sides, soft material as opposed to rock is, generally speaking, material which can be taken out, without blasting, by the steam navvy or digger, and which in cuttings requires to be left at a slope of 1½ foot horizontal for each vertical foot. Accordingly when, in addition to the information founded on the alleged journals, and conveyed by the longitudinal section and schedule of quantities, it appeared from the cross vertical sections that on the banks where this material was found by the borers to have occurred the slope was to be left at 1½ to 1, the contractors were bound to assume that it was soft material and not rock, assuming as they did that that information was based on an actual journal of bores kept in the usual way. This No. 7 bore occurred in what was called the Kilbirnie cutting, and a glance at the small plan will show what an enormous quantity of rock there was in that cutting above the brown hatched line, which was supposed to represent the surface of the hard material to be found in the cutting. Practically the same process of converting what the borers represented as hard material into soft material went on with regard to the bore at peg No. 9. In the journal of bores this bore is represented as showing clay 12 feet, black blaes 8 feet—in all 20 feet. Turning to the letters of the borers, which Mr Melville says was all they had in the way of reports from them of the bores, we find that on 3rd November 1898 he reports that two bores had been sunk, the first-named sunk 13 feet, "rock being struck at the depth of 11 feet, and the latter sunk 14 feet, rock being struck at 13 feet down." And again on 4th November 1898, referring to another check bore at peg No. 9, they say, "Hard substance was struck at a depth of 12 feet, and what appears to be rock was struck at a depth of 16 feet." In the journal of bores, it will be observed, there is nothing said either about rock or hard substance. All that is referred to is clay and black blaes. Accordingly we find that the whole is entered as soft in the longitudinal section and schedule of quantities, and is represented as having a batter of 1½ to 1 in the cross sections of the lines.

Generally speaking, what happened was this. The engineers translated rock or hard substance occurring in the borers' letters into "black blaes," and then proceeded to treat that "black blaes" as soft material. It is pretty clear, I think, that if, instead of having the pretended journal of bores, the contractors had had the result of the bores given in the borers' own words, they would not have accepted and tendered for the cutting at bores Nos. 7 and 9 as consisting of soft material. Bores Nos. 7 and 9 are perhaps the most distinct instances of fabrication of the so-called journal of bores, and whatever the engineers may have thought about what was there, they never could honestly believe that they were giving the contractors a journal of the bores. They may not have intended to cheat the contractors, but they certainly had a motive in getting a cheap railway, and at all events in keeping within the limits of estimates which had already been made regarding it, and, as in many other cases, the wish may have been the father to the thought, the wish, namely, that this hard black substance might turn out to be soft and be estimated for and paid for on that footing. But even if the misrepresentations as to the softness or hardness of the material had not been made knowingly, it does not exonerate the defenders' engineer from having represented to the contractors that the information given to them was founded upon a proper journal of bores, which journal might be seen at the office. Counsel for the pursuers referred to as being inaccurate bores 7 and 9 already mentioned, as also 8, 8*a*, 10, 14, and 16.

I may refer to the examination and cross-examination of Mr Melville as practically admitting what I have above set forth. It is noticeable that he admits that blaes, whether black or of any other colour, may be of almost any degree of hardness or softness; but it has to be remembered that in this case the borers had *distinctly* stated it to be "hard," and in some cases had

called it rock or whinstone, and therefore it was a fraudulent travesty of their reports to enter it as soft material in the longitudinal section and schedule of quantities.

But, in the next place, it must be held that the defenders represented that the persons whom they employed to take the bores were competent for that work, and that the defenders themselves considered them competent. Now, without going into the evidence at greater length, this admission is made by Mr Melville—"Mr Cowan had only bored for what we call surface boring—probing to get rock; that was all his experience." Mr John Cowan says—"I had no experience of boring," and Mr William Cowan says, in answer to the Court—"I had had absolutely no experience of boring before I was set to this piece of work." At the commencement of the boring it was directed by the father of John Cowan and William Cowan, who is now dead, and neither the father nor the sons were borers by profession. Mr Cowan senior was superintendent of the permanent way of the defenders' railway, and his son John Cowan succeeded him in that office in June 1898. William Cowan worked both under his father and his brother John, and by their directions their clerk, P. M'G., wrote the letters which are produced. The men who made the bores were, accordingly, men without experience.

In the next place, it is clear that the defenders' engineer did not rely on them. If he had done so he would not have altered their reports when he came to make up what he called the journal of bores, or treated the statements in their letters with the absolute disregard which he did.

On this part of the case I think it is clearly proved that the persons who took the bores were not competent to do so, and, in the next place, that the defenders knew they were not competent to do so, and did not rely on them as being competent, and yet in that state of matters they referred to a journal of bores as if it had been taken by competent men in whom they had confidence, and had been written up by them day by day from their personal observation. All this, in my opinion, constituted fraud.

It is unnecessary for me to go over all the bores with the view of showing all the results set forth in the so-called journal of bores, and with the view of showing how much they differed from the actual reports sent by the borers. The leading and fundamental blunder I have already sufficiently dealt with. It consisted in treating everything that the borers called hard black substance, or rock, or whinstone, as if it were blaes, and entering it as soft material instead of rock in the schedule of quantities and the contract plan.

It is perhaps right that I should advert at this stage to the facts connected with what is called throughout the proof bridge 12A. This is a large bridge which ultimately was constructed for the purpose of carrying two pipes of the Paisley Waterworks across the line of railway. The line of railway crossed these pipes at a very oblique angle, and this would have necessitated a very long and expensive bridge. Accordingly it was found necessary to divert the pipes and put turns in them on both sides so as to permit of a bridge crossing the railway at right angles. Owing to some piece of carelessness on the part of the defenders, the Paisley Water pipe—for originally there was only one pipe—although laid down on the parliamentary plans, was entirely left out of the contract with the pursuers, and did not appear in any form in the plans, sections, or schedules. The result of this was serious. As Mr Carter puts it—and indeed it is nowhere disputed—"It is necessary where a bridge crosses a railway in a cutting, that the contractor should have notice that a bridge requires to be made, and must lay out his cutting with that view and make provision for it. If that is not done delay is certain to be incurred."

In the present case the contractors got no notice that there was to be a bridge at this point, or that there was a line of pipes there, until the whole scheme for the cutting through which it passed, namely, the Kilbirnie cutting, was laid out, and the misapprehension under which the contractors were with regard to the relative amount of "soft" and "rock" in that cutting increased their difficulties enormously when they were informed that provision had to be made for this bridge. They had to stop the working with their steam navvies owing to some extent to the delay which occurred in procuring the new pipes, which of course had not been ordered till the work was well advanced, and the defenders' engineer himself admits that the loss of time through the necessity for this bridge 12A, and the crossing of the pipes not having been divulged at the commencement of the contract, caused at least six and a-half months' delay in its execution. It is certain that it aggravated enormously the difficulties of the position the pursuers had been placed in by the misleading information given them as to the proportions of rock and soft in the cutting. The defenders' engineer in his evidence proposes that this bridge should be treated as an extra under the contract—that is to say, I presume, that the excavation, mason work, and other things should be paid for at schedule rates. But it is quite clear that this would never reimburse the pursuers for the loss caused by the failure on the defenders' part to show this bridge on their plans, and to have it contracted for. I am of opinion, therefore, that it does not fall to be treated as a mere extra under the contract, but as something falling outside the contract altogether, for which compensation must be made, not only for the actual cost of the structure of the bridge, but for the loss and damage caused to the contractors through their having been led to suppose, through the negligence of the defenders, that no such bridge was to be there.

I propose now shortly to advert to the question whether the fraud of the defenders which I have already dealt with was

material to the contract and was a material inducing cause to the pursuers to enter into it. I would in the first place draw attention to the important fact that whereas in the Kilbirnie cutting the quantity of rock scheduled was 41,765 cubic yards, and in the Whirlhill cutting 60,830 cubic yards, total 102,595 cubic yards, there was actually excavated according to Mr Forrest in Kilbirnie cutting 76,009 cubic yards and in the Whirlhill cutting 86,242 cubic yards, total 162,251 cubic yards, being a difference of 59,656 cubic feet. While these last are Mr Forrest's figures, they are supported by the progressive sections made by the defenders' own engineering staff and by the reports made by them from time to time, as well as by the amounts of the so-called *ex gratia* payments made by the defenders to the pursuers. Now while it appears that for the additional quantity of actual rock excavated the pursuers have been paid a certain amount, yet this by no means covers the loss that they have sustained, nor is it indeed the most material part of that loss.

A slight consideration of the method by which the work of cutting is done makes this plain. Since the introduction of the various descriptions of machines known as "steam navvies" or "steam diggers," the prices which a contractor enters for the excavation of the material in a cutting depend to a very large extent upon what can be taken out as "soft" by a steam navvy and what has to be taken out by blasting and hand picking as it is called. If there is a considerable depth of soft that diminishes the prices overhead very largely, because the steam navvy is able to do full work. As I understand, the steam navvy requires some 16 to 25 feet of a breast-work in order to do full work, and of course as the amount of soft falls gradually below that figure, so the benefit to be obtained by working the steam navvy diminishes, the expense of working it being the same, until when there are only one or two feet of soft it is not worth while putting on the navvy at all. Now at least at one place in the Kilbirnie cutting, for about a distance of 600 yards, it appeared in the contract plan that there was no rock at all above formation level, whereas as it turned out there were some 8 feet of it, and similarly all through the Kilbirnie and Whirlhill cuttings the contractors were thoroughly misled as to where the actual top of the rock was, and at pegs 75 and 77 of the Whirlhill cutting the cutting was represented to be all in soft, whereas in reality it was all through hard rock with the exception of a few feet immediately below the surface of the soil. The contractors were thus entirely misled as to how much or how little their steam navvies could take out at the various places along the cuttings.

But the evil did not end there, for of course arrangements had to be made in laying out the work as to how the stuff out of the cuttings should be disposed of according as it was rock or soft, and with regard to this the contractors' whole calculations were thrown out, while in the Kilbirnie cutting these difficulties were enormously increased by the introduction of bridge No. 12A, which was not in the contemplation of anyone when the contract was entered into. It is certain that the pursuers would never have filled in the prices they did if they had not been misled by the calculations in the schedules and the hatched lines and other markings on the contract plan and the sections corresponding thereto, and showing the batter at which the cutting was to be left at various places according as the sides of it were supposed to consist of rock or soft. But, say the defenders, the clauses in the contract to the effect that the contractor must judge himself of the quantity given in the detailed schedule and form his own opinion as to the nature of the strata and other similar clauses, particularly the clause that "the company does not in any way guarantee the accuracy of the bores, and that contractors must therefore satisfy themselves as to the nature of the strata, as the company will not hold themselves liable for any claim that may be made against them on account of any inaccuracy in the journals of the bores," protect the company from any claims like the present. I think they do not. It of course was a mere piece of mockery so far as it contains a suggestion that the contractors should test the bores for themselves. As the pursuer Robert Forrest points out, it would be perfectly impossible for them to do so. As he says, "there is no method by which one can ascertain these quantities" (that is, the quantities in the schedules) "except the sections, bores, and quantities supplied by the Railway Company." And again he says—"There is no material except the sections and figures supplied by the Railway Company upon which the contractor can base his estimate." But the contractor in proceeding upon the material supplied by the Railway Company proceeds on the assumption, as he is entitled to do, judging from the terms of the contract, that these calculations and quantities are founded upon an honest and true journal of bores made by a responsible borer; and the fact that the defenders represented that these calculations proceeded upon an honest journal of bores in the ordinary sense of the term was misrepresentation, and, as I hold, a fraudulent misrepresentation, which led the pursuers to rely on the schedule of quantities, the brown hatched line on the plan, and the sections, as truly setting forth the nature of the material to be excavated. On this assumption the pursuers filled up the schedule at the prices they did, based on the calculations which they made on the assumption that the schedule of quantities, plans, and sections were approximately correct as being founded on the genuine journal of a responsible borer. I think this makes it plain that the offer which the pursuers made, and which was accepted and thereafter reduced to the form of a contract, was an offer induced by false and fraudulent misrepresentation on the part of the defenders. In my

opinion the Lord Ordinary summarises the position very well in these words—"When a railway company bases its contract on calculations, and these calculations on a journal of bores, it must, if there is any regard for fair dealing, be implied that it tables the genuine journal of a responsible borer. It represents that bores were taken, that the journal of bores is the borer's record from day to day of his operations, and that from the information thus supplied their calculations are made. No disclaimer of responsibility for inaccuracy shall absolve the company from the responsibility of presenting a concocted document which no borer ever saw, and which contains not the opinion given by the borer, but the opinion of their own engineer seated in his office of what the borer must be assumed to have meant."

Finally, on this part of the case I may, in a word, refer to the enormous discrepancy between the work as anticipated and as it turned out, both as to time and as to cost. With regard to time, it was contemplated it would be finished in two and a half years. It needed five years, and the defenders have failed to make out that this delay was caused to any serious extent by blunders or otherwise on the part of the pursuers. If it was, that of course will be taken into account when the question of damages comes to be considered. In the next place, according to a very carefully drawn out statement by the pursuers, the construction of the railway has cost them £378,658, 13s. 11d., the contract price having been £243,090, showing a difference of £135,568, 13s. 11d. These figures are sufficient to show how far the pursuers were misled by relying, as they did, upon what they believed to be a genuine journal of bores and the calculations founded thereon.

It must now be considered whether the facts I have dealt with amount in law to proof of fraud. I cannot do better in considering this matter than quote the opinion of Lord Herschell in the case of *Derry* v. *Peek*, 14 A.C. 374—"First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

Applying these dicta to the present case, I am of opinion that a false and fraudulent representation was made to the pursuers, inasmuch as it was represented to them that the schedule of quantities, the plans and sections, were founded on a genuine and honest journal of bores, which they were not. That this representation was knowingly made does not admit of a moment's doubt. I have already examined the evidence on the point, and need not go into it again. Mr Melville's own evidence, which I have already referred to, is sufficient to show that he knew perfectly well that the so-called journal of bores was not a genuine journal of bores in any sense of the term, and that it was not made by responsible or competent borers. It goes without saying that the false representations were made without belief in their truth. Proceeding further down the passage quoted, and applying it to the present case, it falls to be remarked that if fraud be proved, as I hold it has been, the motive of the person guilty of it is immaterial. It matters not, accordingly, that there was on Mr Melville's part or on the defenders' part no intention to cheat or injure the pursuers. Whether Mr Melville's motive was what I have already suggested it might be does not signify.

For these reasons I have no difficulty in holding that in this case the pursuers were induced to make the offer on the basis they did and to enter into the contract founded on by the defenders by the fraud of the defenders. I shall now consider what is the appropriate way to deal with the present action.

The summons concludes for the sum of £106,688, 13s. 11d. on the ground that the pursuers executed the work contained in the account sued for; that the prices charged for the work are fair and reasonable, and that the defenders are due to the pursuers the unpaid balance of that account.

I agree with the conclusions arrived at by the Lord Ordinary, that "the contract itself is not binding upon the pursuers, and does not fix the price to be paid by the defenders to the pursuers." But I wish to make it clear what, in my opinion, are the grounds in fact and law on which I hold that the pursuers are entitled to the proof they ask as to the amount of their account.

In my opinion this contract was vitiated by the fraud of the defenders, by their representing as a journal of bores what was, for the reasons I have already stated, nothing of the kind. This led directly to the pursuers' accepting the plans and schedules of quantities as practically correct, which they were not, and this led to their entering into the contract on the terms they did. The work specified in the contract having been completed it would appear that reduction of the contract is not now an appropriate remedy (see *Western Bank* v. *Addie*, 5 Macph., H.L. 80), and that the appropriate remedy is a claim of damages for the loss which the pursuers have sustained through having been led

to enter into the contract by the defenders' fraud, and having suffered loss thereby, the loss, of course, being the difference between what they contracted to do the work for and a sufficient sum fairly to remunerate the pursuers as contractors for the work actually done. And I hold that the pursuers are not now barred from insisting on this claim by having gone on with the work notwithstanding that from time to time it appeared that they had been misled by fraud into making the contract. It was only as the work developed that this became apparent, and they were only induced to persevere with the work by assurances on the part of the defenders that things would be squared up at the end, which assurances were fortified by frequent payments to account at prices exceeding the contract prices.

I accordingly would have been prepared to sustain the fourth plea-in-law for the pursuers, which is stated alternatively, and which makes it plain that, in one aspect at all events, this is an action for damages for fraud, or what seems to be known in England as an action for deceit, and in my view this would embrace the whole case, because although there are matters not dealt with in the contract, such as the building of bridge 12A and other extras, yet all the work connected with these extras arose out of the contract, and any damage or loss that the pursuers may have sustained in respect of such items cannot be regarded as being so remote or consequential as to disentitle the pursuers from recovering as damages the whole of their claim, whether founded upon work expressly specified in the contract, or work extra to it but arising out of it.

The Lord Ordinary, however, has apparently dealt with the action as an action for work done to be estimated on the principle of *quantum meruit*, and he has held, and as I think rightly, that the defenders are barred from founding on the clauses of the contract intended to protect them from responsibility for inaccuracies in the information afforded to the pursuers as offerers for the work, and also from founding on the contract as regulating the prices of the work performed by the pursuers for the defenders. He has so held on three of the grounds set forth in the third plea-in-law for the pursuers. (*a*) That the contract was induced by the fraud of the defenders. Speaking for myself, I should be content to rest my judgment upon this ground alone, because I consider that the contract having been induced by fraud, the defenders are barred from founding on its terms. (*b*) That the said contract was entered into by the pursuers under essential error induced by the misrepresentations of the defenders. While I do not think it is necessary for the decision of the case that this plea should be sustained, I am content that the Lord Ordinary's judgment should not be interfered with. I merely wish to observe that while it is undoubted that the alleged journal of bores and plan and schedules of quantities in one sense induced the contract, the reason why they did so was that the pursuers had been led by the fraud of the defenders to believe that the alleged journal of bores was a genuine journal. While this is so, the representations made by the defenders by means of the plan and schedules of quantities were undoubtedly false and fraudulent, and on the authority of the judgment in the case of *Pearson* v. *Dublin Corporation*, L.R., A.C., 1907, p. 351, I am prepared to hold that the defenders were not protected in making these representations by the clauses in the contract excluding liability for mis-statements as to strata and quantities. As was said by Lord Loreburn in that case, such clauses protect only against honest mistakes. (*c*) With regard to the plea that the defenders are by their actings barred from founding on said contract as the basis of charge, if the expression "actings" refers, as seems to be held by the Lord Ordinary, to the fraudulent acts which I have dealt with in the course of my opinion, I agree with him that this plea may be sustained.

On these grounds, while if I were deciding the case in the first instance I should have been content to sustain the fourth plea for the pursuers and to treat this simply as an action for damages for fraud, I think that the Lord Ordinary's judgment should be affirmed, both because I consider it well founded in fact and law, and because the result is the same whichever way the case be viewed, for the damages must be arrived at by a proof with regard to the work done and the proper price to be charged therefor, and this is the same inquiry which must be made in the action viewed as a claim for *quantum meruit*.

In the view I have taken of the case it is unnecessary to go into the further question which is raised by the plea 3 (*c*), stated by the pursuers, to the effect that the contract founded on by the defenders is inapplicable as the basis of charge for the work executed by the pursuers, and is no longer binding on the pursuers in respect that the work as executed proved to be entirely different from that contemplated by the contract. As an authority for this contention the pursuers referred to the case of *Bush* v. *Whitehaven's Trustees* (2 Hudson on Building Contracts, p. 118) and to the Scottish authorities of *Smail* v. *Potts* (9 D. 1043), and *Quin* v. *Gardner & Sons Limited* (15 R. 770), and I may say that the difference in the present case between the amount and nature of the work contemplated by both parties when the contract was entered into, as contrasted with the work actually carried out, was so great, that if it had been necessary I might have been prepared to hold that the schedule prices and the slump sum made up from them were inapplicable to the contract as executed, and that the pursuers are entitled to be remunerated on the principle of *quantum meruit*. I do not think it necessary, however, to decide this question in the present case.

On the whole matter, therefore, I agree with the view taken by the Lord Ordinary,

and, under reference to the views I have above expressed, I agree with your Lordship that his interlocutor should be adhered to.

LORD DUNDAS—Having given the best consideration I can to this important and interesting case, I have come to the conclusion that the Lord Ordinary's interlocutor is right and ought to be adhered to.

I agree with his Lordship in thinking it clearly proved that the pursuers have carried out a much more difficult task than was contemplated by either party, and with a corresponding pecuniary loss. But these facts alone would not, of course, afford a remedy at law to the pursuers. They must, in order to succeed, show that their loss is due to the fraudulent misrepresentations of the defenders, or bring their case under some other definite category inferring liability on the part of the defenders to pay them money in excess of the lump sum stipulated for in the contract.

The Lord Ordinary has sustained the first and principal ground of the pursuers' action as it is stated in their third plea-in-law, viz., "that the contract founded upon by the defenders (*i.e.*, the formal written contract between the parties) "is inapplicable as the basis of charge for the work executed by the pursuers, in respect (*a*) that said contract was induced by the fraud of the defenders." This plea is based upon allegations in regard to the journal of bores which the defenders held out to the pursuers as the basis of the contract. The pursuers' complaint is that the defenders did not in fact supply them with a true journal of bores; that the so-called journal was not only false in material particulars, but was not really a journal at all, because it was not a copy of any journal of bores taken, and it did not contain, as the pursuers were entitled to believe that it did, an accurate and complete account of information obtained by the defenders from borers in whose capacity they had confidence. The importance of the journal of bores in a matter of this kind is much greater than at first sight it might seem to be; the journal lies near to the root of the whole contract. It represents the extent of parties' knowledge, upon which an assumption of some sort has to be made (for there must always be a good deal of guess-work) as to the probable condition of matters underground where the cuttings are to be made in the formation of the line of railway. The railway engineers, on the one hand, will be largely guided by what their borers report in deciding the route to be adopted. To the contractor, on the other hand, the journal of bores held out to him by the Railway Company is of vital importance. The main risk a contractor runs in tendering for a contract like the present is obviously involved in the formation work of the line, *i.e.*, cutting and banking. In order to make a proper offer he must rely on the information supplied to him as to the probable contents of the cuttings as problematically indicated by the company's bores, the approximate quantities in the cuttings of "hard" and "soft" materials respectively, and the relative situations in regard to each other of these classes of material. The bores are the very foundation of this matter; upon the journal of them are based the sections, longitudinal and cross; and upon these, again, are based the estimated quantities of hard and soft materials respectively contained in the schedule which the contractor is called upon to price. The pursuers' counsel called our attention to what is said in the contract in regard to the bores. It states that "bores have been put down at various parts of the line, . . . and a copy of the journals of these bores may be seen at the engineer's office." The company go on to say that they do not in any way guarantee the accuracy of the bores, or that they will be a guide to the nature of the surrounding strata, and that the company are not to be liable for any claim on account of "any inaccuracy in the journals of the bores." The pursuers' counsel maintained, and I think rightly, that the contractor was entitled to believe from the terms of the contract that he was being afforded access to an accurate and also a complete copy of the journals which the company had actually obtained from borers in whom they had confidence as persons competent to furnish reliable journals of all the bores taken. One must therefore consider whether the pursuers did receive or have access to a journal of bores in this sense. I think with the Lord Ordinary that they did not.

In support of this view, I propose to refer with considerable detail to the so-called journal of two of the bores in question, Nos. 7 and 9 respectively, both in Kilbirnie cutting. They are probably the best instances from the pursuers' point of view, but they do not stand alone. As regards No. 7, the journal to which the pursuers had access stated—"Blue clay and stones, 13 feet; hard black blaes, 11 feet." But when one looks to see upon what ground this entry rests, one encounters a very singular history. It appears that the information actually supplied to the defenders by the borer was first of all on 14th October 1898, that "a bore has been put down to the depth of 24 feet (the full distance it was to go down) at about 15 feet from the peg on Dalry side. For the first 13 feet it was blue clay and stones, and after that a hard black substance called 'black ban,' but I do not know if this is the proper name for it. We tried to put down a hole at the peg, but only managed to a depth of about 10 feet when we were stopped by stones being in the way." Some weeks later, on 8th November 1898, the borer reported—"The above bore has been sunk to a depth of about 26½ feet through about 15 feet of clay, and remainder" (*i.e.*, 11½ feet) "whinstone rock." It seems probable, though not certain, that the words last quoted relate to the completion of the bore announced in the latter part of the letter of 14th October as having been unsuccessfully attempted. Mr Melville, then, had before him at least two reports

from the borer as to No. 7; one of which stated that under 13 feet of blue clay and stone there lay "a hard black substance called 'black ban';" and the other that, under 15 feet of clay "whinstone rock" was found to a depth of 11½ feet. A pencil note (for which Mr Melville is responsible) on the latter report is—"Keep to first report of this bore, as the rock here referred to must be the 'black blaes' of 14/10/98;" and the result was that, as already mentioned, the "journal" of this bore supplied to the pursuers stated that, under 13 feet of blue clay and stones there lay a stratum of "hard black blaes, 11 feet;" and this stratum was scheduled by the railway company as "soft material." The words "must be" strike one as very strange; why, one wonders, should Mr Melville be constrained to conclude that "whinstone rock" was "black blaes," and go on to assume "black blaes' to be a "soft" material? It is worth while to quote a passage from his evidence upon this point. "We thought it was a clerical error on the part of the clerk of Mr Cowan calling that whinstone. (Q) You took your chance of that being correct?—(A) It has turned out right. (Question repeated)—(A) Yes." It seems clear enough that the "journal" of bore No. 7 placed at the pursuers' disposition did not correspond to any report made to Mr Melville by the borer; that it did not give the pursuers the whole information which the borer had given to Mr Melville; and that it was a misleading, as well as an inaccurate account of the matter. It was not a copy of any journal, and it was materially false. Mr Melville's information was that below certain clay and stones lay some hard material, of one kind or another; but he proceeded to schedule it as "soft." Turning now to bore No. 9, an equally surprising history is disclosed. The entry to which pursuers had access was—"clay, 12 feet; black blaes, 8 feet." Now, that is not a copy of any report that Mr Melville ever received. He seems to have got four reports—(1) On 18th October 1898, "at peg No. 9 . . . clay for 12 feet and 8 feet of black ban;" (2) and (3) on 3rd November 1898, "other two bores . . . one 5 yards and the other 15 yards from the peg." In one "rock" was struck at a depth of 11 feet; in the other at 13 feet; (4) on 4th November 1898, at 13 yards from peg, "hard substance was struck at a depth of 12 feet, and what appears to be rock was struck at depth of 16 feet." Mr Melville, however, gave the pursuers, as already stated, only "clay, 12 feet; black blaes, 8 feet;" and he scheduled it all as "soft." The pencil notes are, once more, very curious. On the report of 3rd November the note is—"What is called rock in this letter must have been 'black blaes.' See former letter, 18/10/98;" and on that of 4th November the note is—"Keep to first bore in letter 18/10/98." Here, then, again, the so-called journal of bore No. 9 is not anything that ever was reported to Mr Melville, but apparently his diagnosis of what he supposed the borer to mean; he schedules as "soft" what was in all the reports represented to be something that was "hard;" and he does not think fit to impart to the pursuers the full information which he had at his disposal. It seems that Mr Melville fell into the habit of entering as a "journal" his own idea of what he thought the borer probably meant, taking his chance of being right or wrong in his conjecture. It is significant that the defenders have not produced any sample of the "black blaes" which they maintained was properly scheduled as "soft." Reference may here be made to a passage in Mr Melville's cross-examination where he ultimately admits that, though he scheduled what he called "black blaes" as "soft" material, he has paid for it at rock prices, "*ex gratia*." One must here add that it is quite plain from the letters produced that Mr Melville did not trust the competency of his borer upon the portion of the line presently under consideration, and this is not surprising, seeing that Cowan had no training as a borer. The pursuers' counsel maintained, and I think with justice, that his clients were entitled to suppose that the journals supplied to them were a true and complete account of the information received by Mr Melville from trustworthy borers, whereas it is now proved that in a certain number of instances (of which bores No. 7 and No. 9 are I think the most striking) the so-called journal was not a copy of any report by a borer; that the information supplied to the pursuers was defective and misleading, and that Cowan was not a borer on whom Mr Melville could or did place reliance. The defenders' counsel made much of the point that only a few out of the total number of bores along the whole line were alleged to be materially wrong. It is not, however, a question of the number of bores that are wrong, but of the result to the pursuers in the execution of their work of such errors as existed. A material error in any one bore may, I apprehend, make a very serious difference as regards the execution of the work in a contract like this for a considerable distance on each side of it, and if several bores are substantially wrong the effect may go far towards dislocating the contractors' whole scheme of operations in the most important aspects of his contractual work. In the present case I agree with the Lord Ordinary in thinking it is clearly proved that some at least of the bores were grievously inaccurate. In this connection I may observe that two of the company's bores (No. 9 and No. 16) seem to have been actually discovered by the pursuers, and that both of these were found to be driven in solid rock, a state of matters very different from what was represented by their respective journals. It is, I consider, proved that the errors in the bores did, as might have been expected, very materially falsify the sections which were based on them, and the quantities and the respective allocation of hard and soft materials put forward in the schedule, and that the contractors' actual work, especially in Kilbirnie and Whirlhill cuttings, was

materially and indeed disastrously different from what they had been led to suppose it would be. It would be difficult within reasonable limits to substantiate these conclusions in detail; but I am satisfied (as the Lord Ordinary is) that they are warranted by the evidence. I may add that, like his Lordship, I prefer the contemporaneous evidence of the defenders' own sections, reports, and other documents, to the *ex post facto* testimony of the defenders' skilled witnesses and the attractively compiled diagrams of *strata* observable at the sides of the cuttings.

I hold therefore that in this matter of the bores the pursuers were not in fact fairly dealt with by the defenders, and one must now consider the legal result of the position. It was not disputed that Mr Melville must be treated in this matter as the responsible agent of the Railway Company. I do not for a moment suppose that he had any intention or desire to cheat the pursuers about this contract. At the same time, I think his representations and his concealments—to put the positive and also the negative aspects of the matter in regard to the journal of the bores—must in law be held to amount to fraud. I think the so-called journal contained material representations which were false, and withheld material information which the company were bound to disclose, and that the representations—both inaccurate and incomplete as they were—were made by Mr Melville (to quote Lord Herschell's words in *Derry* v. *Peek*, 1889, 14 A.C. at p. 347) "without belief in their truth, or recklessly, careless whether" they were "true or false." The two phrases, as Lord Herschell points out, do not convey separate ideas, "for one who makes a statement under such circumstances can have no real belief in the truth of what he states." Mr Melville's motive is of course immaterial, for if fraud is proved "it matters not that there was no intention to cheat or injure the person to whom the statement was made." I am accordingly of opinion, upon this crucial point of the case, that the Lord Ordinary was right in sustaining head (*a*) of the pursuers' third plea-in-law.

If this view is correct, it is unnecessary to decide the other matters raised at the debate; and I shall deal with them as briefly as possible. Head (*b*) of the pursuers' third plea, which the Lord Ordinary has also sustained, is based on "essential error induced by the misrepresentations of the defenders." Little or no argument was addressed to us upon this as separate and apart from head (*a*); and the Lord Ordinary did not, in the view which he took of the case, require to emphasise the distinction between the two heads. It seems clear enough that no clauses in the contract could avail to protect the defenders against their own fraud, but it is, I think, unnecessary to discuss or to decide what the result might have been if the defenders' misrepresentations had, in our opinion, fallen short of what the law considers to be the equivalent of *dolus*.

The basis of head (*c*) of the same plea is that "the work as executed by the pursuers proved to be entirely different from that contemplated by the contract." This plea was vigorously maintained, and there is I think a good deal to be said for it. But the postulate "entirely different" is a stringent one, and I doubt if the case comes up on the evidence to its demand. It was in regard to this plea that the matter of bridge 12A and the carrying of the Paisley water-pipes across the railway on the skew was brought in and argued at great length. The boulder clay encountered in Castle Semple cutting was also prayed in aid, and a claim (which did not *prima facie* impress me as a very substantial one) founded on the defenders' alleged delay in furnishing the pursuers with the plans for permanently dealing with watercourses. But I need not discuss head (*c*) if my view of head (*a*) is correct. The pursuers will have an opportunity of establishing if they can their claims under head (*c*) in the course of the inquiry which must follow as to the amount due and payable to them by the defenders.

Head (*d*) maintains that "the contract was by agreement of parties departed from as the basis of charge." At a former stage of the case it was only with great difficulty that this Division allowed the averments in support of this plea to go to probation. Now that the proof has been led, I find it sufficient to say that the pursuers have, in my opinion, failed to establish their averments.

The Lord Ordinary has upheld the remaining head (*e*) of the pursuers' third plea, which is to the effect that "the defenders are by their actings barred from founding on said contract as the basis of charge." This I conceive to be the true view of the matter; in the sense that, though it is not necessary to formally reduce the contract, the defenders are, looking to their misrepresentations about the bores, barred from holding the pursuers to its terms so far as regulating the amount of their charges. I am not sure that head (*e*) of the pursuers' plea was intended by them in the sense I have indicated, but however that may be, the Lord Ordinary was, in my judgment, justified in sustaining it to the effect above mentioned.

In this connection, I desire at this stage to make some comment upon the form of the action, which has all along caused me considerable difficulty. It is a simple petitory summons for a large sum of money; there are no declaratory or reductive conclusions; the whole of this complex and difficult litigation is raised by the simple demand for a pecuniary payment. Mr Clyde told us that this course had been deliberately adopted because, as he frankly explained, the pursuers were anxious that their summons should be unfettered by a multiplicity of conclusions; so that it might square with any of the possible views, favourable to the pursuers, which the Court might come to entertain in fact or in law after the

evidence was led. I appreciate the tactical astuteness of the manœuvre, but I am not sure that it is legitimate, and I should not like it to form a precedent for other actions. The case is a peculiar one, and we are now considering it upon a concluded and very voluminous proof. It is too late to take effective objection to the form of the pursuers' summons; but I must say that it has added considerably to my difficulty in formulating with precision the different issues involved in the case. It is not easy to affirm even now whether the action is or is not intended to be one of reduction, or merely for the recovery of a sum of money; and if the latter, whether by way of a *quantum meruit* or in name of damages. The truth is, it was framed to fit all possible views. The defenders argued strenuously that the pursuers must formally reduce the written contract before they can be heard to claim payment of money otherwise than in accordance with its terms; and they urged with great force that it was out of the question to reduce the contract after the whole works had been finally completed. The pursuers replied that it was not open to them to take action sooner than they did; the existence of fraud and misrepresentation was unknown to them at the outset, and only became apparent to them gradually as the work went on; and they had done their best to keep matters open by making such protests from time to time as the state of their knowledge enabled them to do. I have come to think (as the Lord Ordinary seems to have thought) that it is not necessary for the pursuers formally to reduce the written contract; because, though it may stand as the contract between the parties, the defenders are barred, by reason of their fraudulent misrepresentations, from holding the pursuers to its terms so far as regulating the scale and amount of their payment. Whether that payment ought, strictly speaking, to be regarded as a *quantum meruit* or as damages is probably not a question of real importance, because the amount of damage would fall to be ascertained very much on the basis of *quantum meruit*. It remains to observe that while there must be inquiry into the amount payable, one may be permitted to express the hope that parties do not contemplate a proof at large, but will see their way to agreeing to have the matter determined by some engineer or engineers of eminence. The Lord Ordinary has indicated a doubt whether the pursuers will be able to substantiate their demand in its entirety; and the same doubt is present to my mind, for reasons similar to those pointed out by the Lord Ordinary; but that, of course, is a matter with which we are not at this stage concerned.

The Court pronounced this interlocutor—

"Refuse the reclaiming note: Find in fact in terms of the findings in fact in the interlocutor reclaimed against: Find in law in terms of the findings in law in the said interlocutor reclaimed against, with this variation, Sustain branches (*a*) and (*c*), omitting branch (*b*), of the third plea-in-law for the pursuers: Adhere, with the above variation, to the said interlocutor reclaimed against."

Counsel for Pursuers (Respondents)—Clyde, K.C.—MacRobert. Agents—Pringle & Clay, W.S.

Counsel for Defenders (Reclaimers)—D-F. Dickson, K.C.—Macmillan. Agents John C. Brodie & Sons, W.S.

Wednesday, November 23.

FIRST DIVISION.

[Lord Skerrington, Ordinary on the Bills.

AITCHISON *v.* M'DONALD.

Diligence—Validity of Charge—Club—Party Charged not Party Named in Decree.

A decree for payment of a sum of money was obtained against a Club. A member and official of the Club was served with a charge bearing to be by virtue of the decree. He brought a suspension. *Held* that the charge was without warrant and that the Note must consequently be passed.

Sheriff—Process—Competency of Suspension of Charge in Bill Chamber—Value of Cause—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII., cap.* 51), *sec.* 5 (5), *and sec.* 7.

The Sheriff Courts (Scotland) Act 1907, sec. 5, enacts—"Nothing herein contained shall derogate from any jurisdiction, powers, or authority presently possessed or in use to be exercised by the sheriffs of Scotland, and such jurisdiction shall extend to and include—(5) Suspension of charges or threatened charges upon the decrees of Court granted by the sheriff, or upon decrees of registration proceeding upon bonds, bills, contracts, or other obligations registered in the Books of the Sheriff Court, the Books of Council and Session, or any others competent where the debt exclusive of interest and expenses does not exceed fifty pounds." Section 7—"Subject to the provisions of this Act and of the Small Debt Acts all cases not exceeding fifty pounds in value, exclusive of interest and expenses, competent in the Sheriff Court shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the Court of Session: . . . Provided also that nothing herein contained shall affect any right of appeal competent under any Act of Parliament in force for the time being."

A decree for payment of £36, with interest thereon from a certain date, and expenses, was obtained in the