the Act of 1870 and in the Act of 1909, the former referring to re-insurances of both kinds, and the latter to re-insurances of company's risks. This view is not noticed by the liquidator in the note appended to his adjudication.

Second, the Welsh Corporation says that as creditors their claim is good because it does not involve in the words of the section 3 (2) already quoted any application of the employers' liability fund "directly or indirectly for any purpose other than those of the class of business to which the fund is applicable." A tradesmen who supplied furnishings or other articles for premises used in whole or in part for the employers' liability business would be entitled to rank on the fund created for and in connection with that business, and would not be bound to submit to a general ranking. If so I do not see any distinction for the present purpose between such a claim and the claim of the Welsh Corporation, who, whether the Glasgow Corporation did or did not issue a policy to them, were certainly parties with the Welsh Corporation to a contract of insurance, which was an ordinary incident of the Glasgow Corporation employers' liability business.

As to the Welsh Corporation's claim for medical and legal expenses, I agree with your Lordships in the views expressed and the course proposed.

The Court recalled the first finding of the Lord Ordinary, affirmed the second finding, and *quoad ultra* remitted the cause to the Lord Ordinary.

Counsel for Reclaimers—Macmillan, K.C. —Black. Agents—Macpherson & Mackay, S.S.C.

Counsel for Respondents—Clyde, K.C.—C. H. Brown. Agents—Alexander Morison & Company, W.S.

Saturday, February 7.

SECOND DIVISION.

[Lord Johnston, for Lord Cullen, Ordinary.

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

(Reported *ante* November 10, 1910, 48 S.L.R. 157, and 1911 S.C. 33; May 16, 1912, 49 S.L.R. 735, and 1912 S.C. (H.L.) 93.)

Contract—Error—Misrepresentation—Restitutio in integrum — Railway Constructed by Contractors under Contract Induced by Innocent Misrepresentation and by Non-disclosure of Information by Railway Engineer—Quantum meruit.

A railway company after inviting tenders entered into a written contract with a firm of contractors for the construction of a railway for a lump sum. The specification attached to the contract and forming its basis stated that bores had been put down at various parts of the line, and that a copy of the journal of these bores might be seen at the engineer's office. It contained clauses against errors and omissions. In the course of the work the contractors found that to a considerable extent the strata consisted of rock or hard material where the journal of bores represented it to be soft. Some of the bores, it turned out, had not been made by professional borers but by servants of the company, and the journal of bores had been prepared by the company's engineer from notes supplied by the borers, omitted bores, and in several instances described the strata as soft where the borers had described it as hard or rock. The contractors found further that the proposed route was traversed by a water-pipe laid under statutory authority, the existence of which was known to the railway company but had not been disclosed.

In an action brought by the contractors against the railway company after the completion of the work to recover the extra expense to which they had been put in carrying it out, *held* (1) (*diss.* Lord Guthrie) that the pursuers had entered into the contract under essential error, induced by the innocent misrepresentations of the defenders, that they were therefore entitled to have the contract rescinded and to a *quantum meruit* for the work done, and that it was no bar to rescission that the contract had been completed and that literal *restitutio in integrum* could not be made, equitable restitution by repayment of the sum received being sufficient; (2) (*diss.* Lord Guthrie) that the defenders (*a*) had been in breach of an essential condition of the contract in failing to give the pursuers material information in their possession relative to the bores, and were therefore barred from founding on the contract as the basis of charge, and (*b*) in respect of their non-disclosure of the water-pipe had been in breach of a condition of the contract, not, however, going to the root of it, but entitling the pursuers to damages, and not merely to payment as for an extra under the contract; but (3) that the work done was not so entirely different in character from the work undertaken in the contract as to make the latter inapplicable as a basis of charge.

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, *pursuers*, brought an action against the Railway Company, *defenders*, with a simple petitory conclusion for payment of £106,688, 13s. 11d., conform to a detailed account lodged by the pursuers. In September 1900 a formal contract had been entered into between the parties, whereby the pursuers undertook to construct the railway for the lump sum of £243,090 within thirty months from 12th April 1900. Extra work not embraced in

the contract was to be paid for separately. The contract provided, *inter alia*, that the pursuers should make good any injury caused by their operations to water-pipes, and should relieve the defenders from any liability arising from failure to do so. A specification signed as relative to the contract provided that the works should be executed according to plans, sections, and drawings, but that no advantage should be taken by the contractor of any apparent or inadvertent errors or omissions. The specification stated further—"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 contractors began the work in April 1900, but did not complete it till May 1905, the delay being due to two main causes—(1) that the nature of the ground for a considerable distance was hard where the journal of bores represented it to be soft, and (2) that the proposed line of railway was, unknown to the pursuers but in the knowledge of the defenders, crossed by the Paisley main water-pipes, and a special bridge had to be built to carry them. The pursuers received payment of the contract price of £243,090, together with £28,880 for extra work, and in the present action the pursuers claimed payment of the difference between the sum already paid and a total amount of £378,658, 13s. 11d., which they alleged the work had cost.

The pursuers pleaded, *inter alia*—"(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, 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; . . . 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 pleaded, *inter alia*—"(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."

On 14th July 1908 the Lord Ordinary (SALVESEN), before answer, allowed to the pursuers a proof of their averments so far as bearing on their third plea-in-law, and to the defenders a conjunct probation.

The defenders reclaimed, and on 13th November 1908 the Second Division adhered and remitted the case to Lord Johnston, Ordinary.

On 20th January 1910 the Lord Ordinary (JOHNSTON), *inter alia*, sustained branches (*a*), (*b*), and (*e*) of the third plea-in-law for the pursuers.

The defenders reclaimed, and on 10th November 1910 the Second Division refused the reclaiming note, sustained branches (*a*) and (*e*), omitting branch (*b*), of the third plea-in-law for the pursuers, and with that variation adhered to the interlocutor of the Lord Ordinary (*see* 48 S.L.R. 157).

The defenders appealed to the House of Lords, and on 16th May 1912 their Lordships ordered that the interlocutors complained of be reversed; found and declared that the respondents had failed to prove that they were induced to enter into the contract by the fraud of the appellants or of anyone for whom they were responsible; and remitted the cause to the Court of Session (1) to repel branch (*a*) of the respondents' third plea-in-law, (2) to repel branches (*b*) and (*e*) of the same plea in so far as founded or maintained on allegations of fraud, and (3) to hear and dispose of the whole pleas and contentions of the parties except in so far as repelled in terms of the foregoing directions (*see* 49 S.L.R. 735).

The case was put out for hearing in the Summar Roll of the Second Division on 17th October 1913 and subsequent days.

Argued for the pursuers—(1) The contract fell to be rescinded in respect that the pursuers had entered into it under essential error induced by the misrepresentations of the defenders. These misrepresentations were (1) that the journal of bores exhibited to the pursuers gave a true account of the strata as reported to the defenders by their borers, which in fact it did not, and in particular that it stated certain portions to be soft when they were really composed of hard material, and (2) that there was no legal obstacle in the way of the execution of the contract, whereas the proposed route was traversed by the Paisley water-pipes, with which the Railway Company had no right to interfere. These pipes had been placed there by statutory authority, and the Railway Act did not repeal the previous

private Act authorising them—*The Queen* v. *South Wales Railway Company*, 1850, 14 Q.B. 902; *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Great Northern Railway Company*, 1851, 9 Hare 284; *Great Northern Railway Company* v. *East and West India Docks*, 1852, 7 Rail. Cas. 356; *Oxford, Worcester, and Wolverhampton Railway Company* v. *South Staffordshire Railway Company*, 1852, 1 Drew. 255; *Dublin and Drogheda Railway Company* v. *Navan and Kingscourt Railway Company*, 1871, 5 Ir. R. Eq. 393; Deas (Ferguson) on Railways, p. 154. The "errors and omission" clause would not protect the defenders in this matter, because it referred to work as described in the specifications, but not to things entirely outside the contemplated work, such as a new bridge, and the fact that there was no power to do a part of the work was not an error or omission from the specification. Neither would the provision that the company did not guarantee the accuracy of the bores protect them where the contractors had been led by them into gross errors which could not be characterised as mere inaccuracies. These misrepresentations went to the root of the contract and caused great delay in carrying out the work, and they were of such a character that if the pursuers had known of them at first they would not have entered into the contract. Fraud being out of the case, it did not matter whether the misrepresentation was of the most reckless or most innocent character, and whether it was overt or tacit—*Freeman* v. *Cooke*, 1848, 2 Ex. 654; *Stewart's Trustees* v. *Hart*, December 2, 1875, 3 R. 192, 13 S.L.R. 105; Kerr on Fraud and Mistake (4th ed.), p. 61. It was true that the pursuers could not recover damages for non-fraudulent misrepresentation, but they were entitled to have the contract rescinded and to recompense in the form of a *quantum meruit* for the work done—*Adam* v. *Newbigging*, 1886, 34 Ch. D. 582, *aff.* 1888, 13 A.C. 308; *Mair* v. *Rio Grande Rubber Estates, Limited*, 1913 S.C. (H.L.) 74, *per* Lord Chancellor at p. 76, and Lord Shaw at p. 82, 50 S.L.R. 876; *Rawlins* v. *Wickham*, 1858, 3 De G. & J. 304; *Whittington* v. *Seale Haynes*, 1900, 16 T.L.R. 181; *Menzies* v. *Menzies*, March 17, 1893, 20 R. (H.L.) 108, *per* Lord Watson at p. 142, 30 S.L.R. 530; *Edgar* v. *Hector*, 1912 S.C. 348, 49 S.L.R. 282; Bell's Prin., sec. 538; Kerr on Fraud and Mistake (4th ed.), p. 61. The fact that this was an executory contract under which the work had been completed was no bar to rescission as no third party rights intervened. It was true it was impossible to give literal *restitutio in integrum*, but that was not necessary if equitable restitution could be made by repayment of the price—*Stewart's Trustees* v. *Hart, cit. sup.*; *Assets Company, Limited* v. *Bain's Trustees*, March 18, 1904, 6 F. 692, 41 S.L.R. 517. Restitution was only impossible where third party rights had intervened and consent was withheld, or where the subject itself had disappeared and not merely depreciated—*Western Bank of Scotland* v. *Addie*, May 20, 1867, 5 Macph. (H.L.) 80, *per* Lord Cranworth at p. 90, 4 S.L.R. 113. Reference was also made to *Louttit's Trustees* v. *Highland Railway Company*, May 18, 1892, 19 R. 791, *per* Lord M'Laren at pp. 799-800, 29 S.L.R. 670, for the circumstances under which an *actio quanti minoris* would lie. (2) On the same facts, the defenders were in breach of essential condition going to the root of the contract, and were therefore barred from founding on it as the basis of payment. The pursuers were therefore entitled to treat it as rescinded, and to claim a *quantum meruit*—*Turnbull* v. *M'Lean & Company*, March 5, 1874, 1 R. 730, 11 S.L.R. 319; *Macbride* v. *Hamilton & Son*, June 11, 1875, 2 R. 775, *per* L.P. Inglis at p. 780, 12 S.L.R. 550; *Wade* v. *Walden*, 1909 S.C. 571, 46 S.L.R. 359. If the conditions could not be treated as so essential as to entitle the pursuers on their breach to rescind the contract, they were at any rate entitled to claim damages for the loss occasioned thereby. (3) In any event, the work as executed by the pursuers was so entirely different from that contemplated by the contract that the contract could not be made the basis of charge — *Bush* v. *Whitehaven Trustees*, 1888, reported only in Hudson on Building Contract (3rd ed.), vol. ii, p. 118; *Smail* v. *Potts*, March 17, 1847, 9 D. 1043; *Quin* v. *Gardner & Sons, Limited*, June 22, 1888, 15 R. 776, 25 S.L.R. 577. The extra rock cutting, the removal of the boulder clay, and the construction of the water-pipe bridge, involved work so peculiar, so unexpected, and so different in character, that it could not be brought under the contract even as additional work—*Thorn* v. *Mayor and Commonalty of London*, 1876, 1 A.C. 120, *per* Cairns (L.C.) at p. 127. The work thus occasioned affected the whole contract, and the pursuers were therefore entitled to a *quantum meruit* for the whole contract—*G. Mackay & Son* v. *The Lord Advocate* (*War Department*), 1914, 1 S.L.T. 33.

Argued for the defenders—(1) The misrepresentations founded on were not established in fact. The defenders were under no obligation to disclose bores which they honestly thought were useless, and they gave no warranty as to the information they gave, nor was such a warranty asked for—*Thorn* v. *Mayor and Commonalty of London, cit. sup.* In any event, the representations in question were not such as the pursuers were entitled to rely on, nor did they induce the pursuers to take up the contract under essential error. The pursuers were therefore not entitled to have the contract reduced—*Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25, *per* Lord Watson at p. 28, 27 S.L.R. 469; *Wood* v. *Tulloch*, March 7, 1893, 20 R. 477, at p. 479, *per* Lord Kyllachy, 30 S.L.R. 497; *Adams* v. *Newbigging, cit. sup.*, *per* Lord Watson at p. 320, foot; *S. Pearson & Son, Limited* v. *Dublin Corporation*, 1907 A.C. 351; *Thorn* v. *Mayor and Commonalty of London, cit. sup.*; *Mackay & Son* v. *Leven Police Commissioners*, July 20, 1893, 20 R. 1093, 30 S.L.R. 919. The extra expense to which the pursuers had been put was not the result of essential error induced by the

defenders, but was simply an incident of such a contract as the present made on the basis of a lump sum to be paid for all the work done. In any event, in the present case, fraud having been negatived, the pursuers' case rested on innocent misrepresentation. His remedy, therefore, was reduction and restoration, not damages—Ersk. Prin. (21st ed.), p. 291; *Manners* v. *Whitehead*, November 25, 1898, 1 F. 171, 36 S.L.R. 94; *Ferguson* v. *Wilson*, June 4, 1904, 6 F. 779, 41 S.L.R. 601; *Derry* v. *Peek*, 1889, 14 A.C. 337; *Angus* v. *Clifford*, [1891] 2 Ch. 449, *per* Lindley, L.J., at p. 463. The remedy, therefore, was an equitable one, and was not necessarily complete. In fraud a complete remedy was provided, but in cases of innocent misrepresentation, where there might be *damnum* without *injuria*, the remedy was conditioned by the possibility of *restitutio in integrum*. Where that was impossible there was no remedy—*Western Bank of Scotland* v. *Addie, cit. sup., per* Lord Cranworth at p. 89; *Hay* v. *Rafferty*, December 15, 1899, 2 F. 302, 37 S.L.R. 221; *Clarke* v. *Dickson*, 1858, E. B. & E. 148; *Houldsworth* v. *City of Glasgow Bank*, March 12, 1880, 7 R. (H.L.) 53, *per* Lord Blackburn at p. 64. 17 S.L.R. 574; *Lagunas Nitrate Company* v. *Lagunas Syndicate*, [1899] 2 Ch. 392; Kerr on Fraud and Mistake (4th ed.), p. 365; Bell's Comm. (M'Laren) i, 466, *note* 2. In an executory contract such as the present, when the work had been done and the money paid, restitution was impossible and a remedy therefore was excluded—*Sharpe* v. *San Paulo Railway Company*, 1873, L.R., 8 Ch. 597. Certain statutory exceptions to this rule had been made where, for example, company directors had been made responsible for the consequences of innocent misrepresentation — Directors Liability Act 1890 (53 and 54 Vict. cap. 64); Companies Consolidation Act 1908 (8 Edw. VII, cap. 69). Restitution must be substantial, not mere payment of damages. Where something had been done that could not be undone restitution was impossible. Parties in the present case could not be restored to the *status quo ante*, because the Railway Company would never have entered into the contract on a *quantum meruit* basis, and mere payment of money would not operate restitution. The intervention of third party interests was not the only thing that made restitution impossible—*Clark* v. *Dickson, cit. sup.; Ferguson* v. *Wilson, cit. sup.* Further, what the pursuers really asked here was partial rescission and that was inadmissible. The contract must be treated as a whole—*Sheffield Nickel Company* v. *Unwin*, 1877, 2 Q.B.D. 214, *per* Lush, J., at p. 223. (2) There had been no breach of any condition-precedent going to the root of the contract such as would bar the defenders from founding on the contract as the basis of charge—*Wade* v. *Waldon, cit sup.; Mersey Steel and Iron Company* v. *Naylor, Benzon, & Company*, 1884, 9 A.C. 434; *Rhymney Railway* v. *Brecon and Merthyr Tydvil Junction Railway*, 1900, 69 L.J. (Ch.) 813. In any event, the pursuers had gone on with the contract and could not now repudiate it. The fact that pursuers had gone on with the contract showed that these breaches did not go to the root of it. Further, the pursuers were not entitled to damages for breach. They had no conclusion for damages in their summons, and no proof had been allowed or led in regard to damages. (3) It could not be maintained that the work done was so materially different in character that the contract was no longer applicable. The rule founded on by the pursuers was only applicable when some entirely new factor emerged in the course of the contract—*Bush* v. *Whitehaven Trustees, cit. sup.; Jackson* v. *Union Marine Insurance Company, Limited*, 1873, L.R., 8 C.P. 572; 1874, 10 C.P. 125. The complaints under this head were (1) that there was more rock than was anticipated, but this was expressly contemplated by the contract; (2) the presence of boulder clay, but this could not wipe out the whole contract, especially when the contractor was to form his own opinion of the nature of the material to be found in the cuttings; (3) bridge 12A was really extra work such as was expressly contemplated under the contract. There were facts in the present case to warrant the application of the doctrine contained in *Bush* v. *Whitehaven Trustees, cit. sup.*

At advising—

LORD JUSTICE-CLERK—This process stands in a somewhat unusual position. The pursuers' case is that they were led to enter into a contract with the defenders to execute certain works of construction of a railway for a lump sum, and that they were led to tender to do the work for a certain price embodied in a contract by the other party, the defenders having through their responsible officials supplied them with information which was in essential particulars misleading information, and that thus they, the pursuers, were induced to enter into the contract by fraud, or otherwise that they were misinformed by an incorrect representation of facts, and were thus under essential error. They claim that the sum to which they were entitled for the work done is much larger than what they have received, and they sue for the excess. There is also a claim in respect of the work when in progress being interrupted and delayed by the failure of the defenders to give notice of a special piece of work relative to a town water supply pipe which crossed the line. They sue for what they maintain is due to them after crediting the defenders with the amount already paid to them, payments having been made, as is usual in the case of such contracts, from time to time as the work proceeded.

When the case was formerly before this Court the Lord Ordinary was of opinion that the pursuers had established their averments of fraud and he found accordingly, and this Division refused a reclaiming note against his interlocutor and affirmed his judgment. That being the view of the Court, it was unnecessary to consider the alternative of misrepresentation leading to essential error, as the greater necessarily included the less.

The defenders having appealed to the House of Lords, the judgments finding fraud were held to be erroneous and were reversed, but no decision was given on the other pleas of the pursuers. Thus the case is now before us with that which relates to fraud disposed of finally but nothing else. As the Lord Chancellor expressed it in the discussion as to the form of the order of the House of Lords—"The form of the order will require to be put regularly. The substance is that the House allows the appeal on the question of fraud which alone was argued before them. . . . In this House the only question that the House was asked to adjudicate upon was plea 3, branch (*a*), if I recollect rightly, which is fraud."

The effect of this order was to leave all other questions open; and that this was the intention is plain from what was said by Lord Atkinson, who gave the leading judgment, and from which I think it may be well to quote. Referring to the important questions of the representations of the defenders as to the journals of bores exhibited to the pursuers before they made their tender, he said—"It may well be that under the contract entered into Melville owed a duty to the contractors to prepare this journal of bores with reasonable skill, care, and accuracy, or that a term was by implication introduced into the contract to the effect that the company should appoint, or had appointed to do the work of boring, skilled persons fully competent for that work, or again, that the documents submitted to the contractors for perusal should reasonably answer the description of a journal of bores, or further, that the company warranted that this compilation was correct, or the borers highly skilled, and that an action or several actions against the company for the breach of one or all of these warranties or contractual obligations would on the evidence given at this trial have been sustained; but in my view these matters, so far as they are not proof of Melville's fraud, are wholly irrelevant to the only issue decided upon by the Second Division of the Court of Session from which this appeal has been taken. I accordingly have not formed, and do not express, any opinion upon any of these matters." The Lord Chancellor further states in his brief opinion that he refrains "from expressing any opinion upon other matters that may or may not be open for litigation and decision." It thus plainly appears that the case is remitted back to this Court to deal with it on all matters other than fraud, from which it may be implied that there is matter relevant to be dealt with, and upon which no guidance is given by the Court of supreme instance.

I have been careful to state the position of the case fully, so as to indicate that I hold this Court is absolutely free to consider, and bound to consider, the whole case, now for the second time before us, without being bound by any *obiter dicta* which may have fallen from their Lordships not touching the question of fraud, as this plea only was argued before them, and they plainly state that they do not deal with any other. In every aspect except that of fraud, which the Court has been found to be wrong in affirming, the whole case is open, and the question is whether there are facts proved which will justify a judgment in favour of the pursuers on the pleas stated after deleting that part of the pleading which relates to fraud.

There are two principal matters of fact to be considered—(1) there is the question whether the pursuers have proved that as regards the material to be excavated and dealt with in construction of the railway line for which they took the contract they were misled by incorrect information laid before them as in aid of their deliberations as to the tender they would make for the work and were brought into essential error, under which they were induced to make the tender which they did make, resulting in great loss. (2) As regards the Paisley water-pipe, were the pursuers made to suffer loss by (*a*) omission to inform them of this *opus manufactum*, which was not the property of the company, and could not be tampered with without special arrangements to meet the requirements of the owners; and (*b*) delay caused by the omission hindering the general progress of the construction of the line and making necessary expensive changes in the mode of working, the preparations, plant, &c., provided being rendered inefficient and the scheme of the work being upset?

There are some subsidiary, but in degree unimportant, questions which need not be noticed in the general argument.

If these questions fall to be answered in the affirmative, or either of them, the further questions of law will arise—(1) Are the pursuers entitled to any remedy for the loss they have sustained, and if so, is remedy still open to them in present circumstances? and (2) if there is remedy, what is its proper form?

As regards the first question, which necessarily had to be considered by this Court at the former hearing—because if there was no misrepresentation by statement or concealment there could be no fraud—I have listened with close attention to the very able arguments addressed to us by counsel, and have considered the proof and documents to which attention was called, and I find myself unable to come to any other conclusion than that which was implied in the judgments pronounced in this Court, which have been set aside on the question of fraud, that there was misrepresentation and concealment leading to essential error.

It is obviously impossible, in giving an opinion in this almost unprecedentedly bulky case, to go into elaborate detail, making a full analysis of the evidence, oral and documentary. It is only possible to deal with the salient points, and to state generally the grounds of the opinion formed.

The work for which the pursuers contracted was great in quantity, extending over many miles of railway construction, and the contractors had only a fortnight to consider at what sum they would undertake the contract and to make up the necessary details, the only opportunity for inspection being on 5th March 1900, and the Railway Company calling for tenders to be delivered

by 18th March. Thus it was certain that as regards all calculations as to cutting work they could not inform themselves by any inspection of their own, or conduct any boreing works to make their own tests as to the nature of the material to be taken out and removed. They could not have tendered at all without having some information, and this information the company professed to supply by giving them access to the records of the experiments they had made for the purpose of informing themselves how to lay off the line, so as to provide as much as possible that material to be cut out could be used for sufficient embankment of low-lying land, and that the excavation would provide stone for necessary building work—bridges, &c., and stone for permanent way ballasting. In the circumstances it was evidently contemplated as necessary that the information thus obtained should be given as aid to contractors in tendering, so that they might have a reasonable belief that they were undertaking a work which should yield them a business profit and not subject them to a loss.

The defenders put forward in argument a contention, and strenuously maintained it, that such contractors are engaged in speculation, and that the mere fact that they can show a loss on a particular work in no way entitles them to claim compensation. This is of course quite sound as a general argument. A contractor must judge for himself in making a tender, but this can never imply that where an important part of the necessary information is tendered to him, and which he must have before him in making his calculations, is supplied—as in a case like this it must be, by the party with whom he is invited to contract—it is part of his speculating consideration to speculate as to the accuracy of the information supplied to him, and to discount any material part from it as untrustworthy. He is at least entitled to assume that when he is supplied with what bears to be a record of the result of investigations made, it shall be that result as certified by the person who made the investigations, and not something which he did not record, but is supposed by someone else to be what he ought to have recorded. Now in this case it appears to me to be established beyond question that in material particulars what was laid open to the pursuers as a "journal of bores" was not a record of the person who made the bores, but was a statement made up in form of a journal in which the description of what was found in the bores was in contradiction of information supplied by the borer himself, and this without any explanation or statement on the face of the so-called journal as to how it came about that the borer's report was set aside and words of description substituted which had a different meaning. The word "hard" in the report was struck out, the expressions giving name to substances —"black ban," "rock," "appears to be rock"—disappear, and a different name, "blaes," is put in, this name, we are told, being understood in engineers' and contractors' language to indicate a material which was not hard but soft. The insertion of the word "blaes" was intended to convey to the contractor that the depth of material which the borer called "hard" and "rock" was a soft material. In one case where the borer had given a name to the class of "rock," namely "whinstone," it was assumed without any inquiry either at the borer or by examination that the borer must have made a "clerical" error, and once more the word "blaes" was substituted for "whinstone," the assumption being made that the substance could not be rock and must be "blaes." One would think that if someone reporting was supposed to have used a descriptive word by clerical error the right course would be to find out what it was the reporter intended to say, and not to put down as his a descriptive word he had not used. It is, one would think, a thing without precedent that where a person in a report names something, someone else should strike out the name given and insert another name meaning something totally different, on the footing that he thinks the writer made a clerical error, and assumes that he must have meant another substance not the same in character as regards density and hardness.

About all these facts there is no dispute. And it is certain that up to the time of the evidence being taken the pursuers never knew that the information contained in the so-called journals was not in essential particulars in accordance with the reports made by the borers who did the work.

It is abundantly clear that the borers who were at first employed to make the bores were quite incompetent to do so efficiently. This is admitted by the engineer, Mr Melville, and stated as fact by the survivor of the two Cowans, who did the work and supplied the reports. Nothing can make it more plain that they were incompetent than that Mr Melville should be making inquiries and asking for samples of what the borers found. Yet he does not have the bore as to which he wishes further information examined, but he asks the incompetent borer—one whom he describes as "not a qualified mineral borer"—to send him a sample, and he gets this, not from the bore, which could have been well tested by digging down at that spot, but from another bore at some considerable distance, and all he gets is a small chip, which might quite easily have been a chip dropped down into the lower part of the hole from the strata above as the boring proceeded, and, as the borer was incompetent, might not be the same at all as what he had reported on before. But on this Mr Melville thinks himself justified in altering the report as to the other bore. In no way could he more clearly indicate how untrustworthy he considered the borer he employed to be.

Further, he ordered certain check bores, and no journals of these were laid open to the contractors. Thus the information given which professed to be of the bores taken by the company was not complete. It was strenuously argued at the debate that the notice that the journal of bores, which was to be seen at the office, did not

mean "all the bores." I cannot accept this. It was upon the information of all the bores the company necessarily proceeded in their considerations as to the contract. I cannot hold otherwise than that if they gave out that they had taken bores, and that the journals could be seen at the office, that in all fair dealing meant all the bores, not selected bores. Of all the bores, one would at least expect that "check" bores would be most valuable for information, particularly when it is remembered that it is part of the defenders' case that the strata in this line are very variable in their quality, and vary at very short intervals of space. The very fact that it was thought necessary to take check bores indicates that the engineer thought them necessary for his information. But surely, if the bores are for information, and in the case of the check bores for better information, that information should be—as I hold it was professed to be—before the person proposing to tender (who could not tender without such information as to proportions of hard and soft which are of the essence of the matter) that he might judge of it in considering what tender he should make. It would appear from what the defenders maintain that it is not necessary in their view to inform the contractor of what was reported by the borers, but only what the employer of the borers thought should have been in the report, and that a statement of what is called a journal of bores may be an expression of what one who did not take the bores thinks was the material found, the borers having as he thinks made mistakes or written in names by clerical error, and that selected bores may be given as being the bores taken. To that I cannot assent. A journal of bores must be assumed to be a statement of the borer, stating what in his judgment he found, not a statement of someone else of what they think he found. The journal should contain the borer's facts. Any explanation or expression of doubt by anyone else may be appended for consideration, but the contractor is entitled to form his own opinion of the facts stated, and of any explanations or views of others if they think fit to add them. If he was told the borer's statement and an explanation given that it was not supposed to be correct, he would naturally make inquiry and satisfy himself. The judgment of others in the form of a journal which the borer never issued is not to be put before him as being the fact stated by the borer.

It is very plain that if the pursuers had been told that the borers had reported "hard," "rock," "whinstone," they would have considered these reports, and formed their own opinion as to whether their tender should be calculated on taking the strata as hard, or whether they would have been satisfied with the explanations and emendations of the engineer, and tendered on the footing of "soft," or whether they would tender at all—until they had more satisfactory information or facts on which they might proceed with prudent regard to their own interests.

The defenders founded strongly on the clause in the contract whereby the contractor is bound to satisfy himself as to the completeness and accuracy of the schedules, and by which he is made to understand that "no allowance will be made should the material turn out to be different from what is calculated in the schedule." And further, as regards the bores, the notification that "the company does not in any way guarantee their accuracy or that they will be a guide to the surrounding strata."

I cannot think that these are reasonable contentions in the circumstances. Had they supplied journals of bores, stating the facts as the borers stated them, then the clause would have applied, if it turned out that the conclusions, put down by borers of such competency that the defenders might be justified in employing them, were erroneous even to the effect of being detrimental to the contractors. In such a case the only question that could have been raised would be the question whether they had professed to give the reports of competent borers, when they knew that those they had employed were incompetent. But it is difficult to see how this clause can be founded on when what was supplied as "journal of bores," was as regards its most essential part a statement of opinion that the facts contained in the borers' reports were not truly facts, and that they found something else than what they said in their report they had found.

There are two further circumstances in connection with the cutting work which seem to me to be of great importance, and as regards which the defenders present upon the proof anything but a satisfactory case. It is not in dispute that substantial portions of the line in which strata were found, corresponding with the original reports of the borers, were laid off with a batter at the lower part of the cutting, which is the accepted batter for rock, and not for soft material. This was done by directions of the engineers of the company in charge of supervising the work. And accordingly such cuttings were paid for as for rock cutting. The engineer of the line will not admit that this payment was made because rock was found, but declares that this was done *ex gratia*. It is not easy to understand how such an expression can be held to apply in the circumstances. This is certain—that Mr Melville knew that these cuttings were so made with the rock batter; that the line was exhibited to the Board of Trade Inspector with this rock batter; and that the traffic has been carried on on the same footing since the line was opened, with the sides standing at rock batter. The defenders say that there is some deterioration or crumbling on the faces of these cuttings. This may well be. When the material is exposed and is weathered, winter frosts may attack the face where water is percolating from the slope above. But that does not alter the fact that when the cutting was made it was through hard and not soft material, accepted as hard by, and set up as hard at the sides with, the sanction of the railway's engineers. That

when it is exposed change may take place in its consistency cannot affect the question whether it was hard when the operation took place of removing the natural strata as they were deposited underground.

The other circumstance is one relating to the alleged fact that on one occasion when Sir James Bell, the chairman of the company, and Mr Melville, the engineer, were present, a demonstration was given by the pursuers by blasting, showing, as matter of fact, that where "blaes" had been represented to be found there was rock and not soft material. This was clearly deponed to by the pursuers' witnesses as a demonstration which took place before these gentlemen. But, strangely enough, no account of the matter is given by the defenders. Sir James Bell is not called as a witness, and Mr Melville, who was a necessary witness for the defenders, neither admits nor denies the fact. In answer to repeated questions, his statement is one of non-recollection only. I feel bound to accept the evidence for the pursuers, and that evidence is most unfavourable to the defenders.

But it was maintained by the defenders that, supposing their arguments were not to receive any effect as to alteration or withholding of journals, in fact the pursuers failed to show that the amount of hard material was any greater than they had put before them in the bores, schedules, and sections with which they were furnished, seeing that they were paid large sums for rock for what was not rock—not hard material — that while the scheduled quantity was something over 41,000 cubic yards, there were in fact about 8000 yards less and the company nevertheless paid as for 71,000 cubic yards. If this was proved to be so it might of course be fatal to the pursuers' case, even if there had been misrepresentation, if no error causing loss followed. It is difficult to understand, and not easy to accept, the suggestion that the large sums representing the difference between soft price and hard price should have been paid by the company if the truth was that less hard was actually taken out than the scheduled quantity. The case put forward in support of this is that the extra payments were made *ex gratia*, but I confess that an analysis of the evidence leads me to hold that this explanation, the burden of proof of which lies on the defenders, has not been discharged by them.

In considering this matter the progressive section of the work is of importance. It bears on it a line which is named in words as "actual top of rock," and when the case was before the Court here that was held to be conclusive in the pursuers' favour as to the levels throughout at which in the excavation rock was encountered. It was maintained that these words "actual top of rock" did not mean the top of the rock, and that the line referred to was expressive of what consisted of actual rock and also of what *ex gratia* was paid for as rock although it was not rock. And it is remarkable that at one part of the section the line of "actual top of rock" falls below the "assumed" line for a considerable distance. It is difficult to conceive how, if that line was laid off not to indicate the rock as found but in order to give an *ex gratia* line of concession higher up in the strata than was actually the fact, a part of the line called "actual top of rock" should be carried down below the other line. There is no intelligible explanation of this. I find it very difficult to understand how this could be so. Such a progressive section by its very name is intended to be record of the work as it proceeds. It certainly would appear to be a strange way of doing business to put down upon a section a description of a material which was not found in the ground as having been found there, and to say that in paying for it as what it was not the action was *ex gratia*. There is no record of such a thing having been done. Mr Melville says he consulted Mr Cooper, the chief engineer, and the chairman of the company as to paying for what was "not rock as rock." Neither of these gentlemen is called as a witness, and there are no documents in any way tending to support the statement. Indeed, any there are tend rather in the opposite direction, as when Mr Cooper applied to Mr Melville for explanations regarding the large amount of extra payments over contract, Mr Melville expressly in several letters speaks of "rock" encountered at several places contrary to expectation as the cause of the allowances. Thus the case now made to overcome the force of the line on the progressive section showing "actual top of rock" as distinguished from the lower line of "assumed" top of rock seems to me to fail. Without going into detail, I think the other documents tend to corroborate the pursuers. It may be that at this lapse of time Mr Melville is in misrecollection in this matter of the requests for explanation from Mr Cooper, and that he believes he did consult the chairman and Mr Cooper and obtained sanction to allow rock price for what was not rock, but this is certainly not proved; on this point I feel bound to add that without much more clear proof I cannot get over the real evidence of the progressive section.

I must say, further, on this part of the case, that if a contention were to be maintained of *ex gratia* action by the company it was one which ought to have been relevantly specified in the record as notice to the pursuers, and, still further, that it ought to have been put to the pursuers in cross-examination that their account of it might be taken. Instead of this it was never mooted until the pursuers' case was closed.

As regards the further facts relating to the bores, I do not feel it necessary to enter into further detail, which was already done when the case was formerly considered in this Court. Except upon the question as to whether what was done was done fraudulently I see no reason for altering the view I entertained formerly, which was also entertained by the other Judges who considered the case. The evidence convinces me that in placing before the pursuers accounts of bores which were in contradiction of the

borers' reports, as the pursuers were entitled to assume they were, and in withholding the reports of many bores taken, including check bores, made to test the original bores, there was misrepresentation causing essential error.

The other important matter of fact relates to the Paisley water-pipe, and the relative bridge 12a. The pipe of the public water-works of Paisley, which was authorised by statute, crossed the line of the railway in question at a very oblique angle at a part of the line which was to be in deep cutting. Of this fact no notice was given to the pursuers, no plans or specifications were prepared or exhibited showing how the obstruction to the making of the line was to be dealt with, and the attention of the pursuers was never called to it in any way by the engineers. In fact, as was confessed by the officials, the matter was totally forgotten in their preparations for construction although the pipe was mentioned in the book of reference lodged in the Parliamentary proceedings. As it turned out, two things were necessary, that a bridge should be built to carry the water supply across the line, and that the pipe should be reconstructed and have its course altered so as to cross the line at right angles, as to carry the bridge across at the existing angle would be an impracticable mode and would involve a very large unnecessary expense.

When it was discovered long after the works had been going on that this pipe was in the way, the work of construction of the line was necessarily most severely hampered, as nothing could be done to continue the line past the place where the pipe crossed until means could be taken to prevent injury to the Paisley water supply while the works proceeded, and until the officials of the Railway Company should supply the necessary plans and specifications for the permanent carrying of the pipe over the line. That a great deal of time was occupied in the negotiations and operations there can be no doubt, and the evidence proves it sufficiently. Negotiations with the Paisley Water Authority were necessary for the diversion of the pipe from its existing line so as to cross at right angles, and when the proposed works were agreed upon there was further delay in having the necessary pipes made to go round the angles required to obtain the right angle crossing.

The pursuers maintain that this interruption to their freedom to push their works forward involved them in great expense, compelling them to alter their mode of working, both as regards the taking out of the material and its conveyance to the places where it was to be used for embanking, &c. There is evidence, and it appears to be according to common sense, that where such a work has to be done it should be done at first before the general work is begun, and that if the obstruction is only discovered when work is in full progress it will constitute a "very material disturbance," blocking the work and making serious difficulties of drainage. The pursuers also maintain that in the work of building the bridge they found themselves in circumstances which they had not to consider in making their original tender. One important item they found upon is the large amount of work in excavating rock in going down to and preparing the foundations of the piers. They plead that this is not to be treated as mere extra work under the contract to which the schedule prices apply, but must be dealt with as a separate work and not as a mere extra. It is easy to see how such an obstruction as a public supply water-pipe would embarrass a contractor. Until provision was made for carrying it, it must be protected from injury. Thus the work of pushing on the line at that point would be interfered with, if when taking out the material in preparation for the bridge to support it such material could not be taken out easily if hard, as blasting could not be resorted to without risk of injury to the pipe and consequent serious damage to the Paisley water supply and possible consequent danger to health and cause of commercial loss in the town. The removal of material taken, if it had to be carried elsewhere for embankment or building, &c., would also necessarily be much hampered.

It only remains to consider in what manner the pleas-in-law of the pursuers are to be dealt with in detail. Upon the important plea, viz., the third, branch *a* is now out of the case. Branches *b* and *c* fall still to be dealt with, excluding from branches *b* and *c* what formerly stood in them relating to fraud.

Assuming that there was misrepresentation and consequent essential error in the matter of the bores, the defenders maintain that there could be no claim for damages under head *b*, and that if the proposed remedy falls under the class of reduction it is excluded, because the case is one in which there can be no *restitutio in integrum*. I agree that the case, if the views held upon the facts are sound, is not one for which damages are appropriate. The remedy, if there is one, is in equity, and it is by setting aside the contract and not by claiming damages under it that the pursuers must prevail if they are to prevail on the question of the bores. It is plea 3, sub-section *b*, which must be sustained. The practical question comes to be —are the pursuers barred on the ground that *restitutio in integrum* (being an essential preliminary to their obtaining judgment in their favour) is excluded—the effect of which would be that although the defenders had got all the work done that was contracted for, presumably to the contractors' great loss, no remedy was open. This is not by any means the simple case to which *restitutio* applies. It does not resemble a case of a sale of an article, the article delivered, and the form of the article changed so that it cannot be restored, as in a case which was pressed on our attention of a sale of cattle, where the purchaser had turned the cattle into dead meat, and therefore *restitutio in integrum* was impossible. In such a case a purchaser can, before alter-

ing the form of the article, make his own inspection of it to make up his mind whether to make *restitutio* and proceed against the opposite party. Nor does it resemble a case where rights of third parties have intervened. Unless the rule were an absolute one I can conceive of no case more unsuitable for its application than the present. Here the contract is to perform extensive works on lands, with only the possibility of viewing the ground and considering information supplied by the owner of the lands who desired the works to be done. There was no sale or exchange of property in regard to which inspection was open. The contractors, if anything was done to mislead, could not discover the error until the expensive preparations for work were made, and the work had progressed to a stage when it could be for the interest of neither party that the unfinished work should be brought to a stop. It is not suggested that the pursuers have by unnecessary delay barred themselves from seeking a remedy. Is there then no equitable remedy open? Does the fact that the work has been done and taken over by the defenders place them in the position of availing themselves of it, while it is assumed in the argument that they have misrepresented and caused essential error, and therefore are in possession of the lands converted as they desired by contract to have them converted, at a pecuniary advantage to themselves and to the loss of the pursuers? In other words, are the pursuers to be in the same position as they would have been if no misleading representation had been made, viz., that they must suffer all the loss themselves because they chose to tender to do the work for a certain sum? Surely if they were under misrepresentation when they made their tender, their position is very different from what it would be if they could found on no misrepresentation, but were in the position of having proceeded on their own judgment, trusting only to their own experience and skill. If any case had been presented to us resembling in its features the present case, where such a contention had been successfully made, I would of course bow to an authoritative decision. But so far as I am aware there is none, and no one of the cases founded on by the defenders comes in any degree near it. On the contrary, I think there is marked contrast between the cases cited and this case. Here I cannot hold that an equitable remedy is not possible. The fulfilment of the contract consists in certain work being done and a certain sum paid for that work. The pursuers will willingly concede that what they have received should be set off against the amount brought out as due on the footing of *quantum meruit* — reimbursing the defenders if they are found to have been overpaid, or giving a full discharge if, on any difference in excess of payments received being ascertained in their favour, that difference is paid to them. I would therefore sustain branch *b* of the third plea. I think the pursuers can claim readjustment in so far as it can be shown that they can claim it as forming a reasonable result of error caused by the defenders' action in misrepresentation or concealment in the matter of the communications as to the bores.

As regards the water-pipe question, although there is no doubt that the pursuers, when they had proceeded so far with their work, were delayed and their progress seriously hampered by the presence of the water pipe, of which by unfortunate oversight of the Railway Company's officials they got no notice, it is plain that in this matter the failure to give information to the contractors was an inadvertence, and that it falls under the saving clause as to omissions in the contract. There was no real question of legal obstacle, the book of reference having contained notice, and there having been no opposition by the Paisley authorities, the only question they were concerned with being to secure that the work should be done safely and well executed in the interest of their burgh. The contractors being liable to deal with all water-courses and pipes by the reference made to the Railway Clauses Consolidation Act of 1845, I cannot hold that the pursuers are entitled to set aside the contract on the ground that the defenders broke the condition that they should have right in law to do the work. As regards the alleged failure to give immediate access because of the presence of the Paisley pipe, I do not think it can be held, looking to the whole matter, that this gives ground for setting aside the contract. But I think the pursuers have a good claim for damages under this head. This was not an omission of a detail, but a failure to give notice of a great work which absolutely called for plans and specifications to be laid before the contractors before they sent in tenders. But it was contended by the defenders that although the company's failure might not be covered by the clause relating to "inadvertent errors or omissions," the works connected with the pipe and relative bridge were such as fell under "extras" in the contract. Now this was not an extra in the ordinary sense but an entirely new and extensive work, and its execution necessarily involved great disturbance and delay in the general work of the contract. I think the right to make a claim for damages cannot be excluded by force of the clause as to payment for extras. This work on the pipes and bridge 12A was something quite outside what is appropriately named an "extra." I know of no case in which anything the least resembling this, being not specified and described in a contract, has been held to be covered by a clause as to extras. It was a work which it was well known to the defenders was necessary to be executed, and for which they cannot say they would not have supplied plans and specifications but for the fact that they forgot to do so.

As regards sub-section (*c*) of the 3rd plea, by which the pursuers ask that it shall be held that the work done by them was entirely different from what the contract contemplated, I cannot see ground for sustaining it. Their contention is based on extra work in Kilbirnie cutting, on the work of bridge 12A, and on a large quantity

of boulder clay, very difficult to work, having been met in Whirlhill cutting, while the bores as reported at that place gave "sand and gravel." I cannot see that there is anything to justify plea sub-section (c) of plea 3 in these matters. Extra work could not justify anything more than payment for extra work as agreed on in the contract. As regards the boulder clay, it appears to me that this was just one of the matters which it lay with the contractor to form his own opinion in making his tender. Being not supplied with any information by the defenders they cannot be held to have made any misrepresentation. It was just a case in which the contractor has to run his risk in forming an opinion. If he judged "hard" in tendering and it turned out "soft" he would profit. The defenders could not claim any deduction from the price because "soft" was come upon where "hard" was expected. Conversely the pursuers cannot claim more than their contract price because they encounter hard. I therefore on this matter cannot give any effect to the pursuers' claim for additional payment in respect of the boulder clay encountered.

As regards the interlocutor to be pronounced, I have had an opportunity of seeing Lord Dundas's opinion, and I content myself with expressing my concurrence with his proposals.

Lord Dundas—On 14th July 1908 a proof before answer was allowed to the parties of their averments so far as bearing upon the pursuers' third plea-in-law. That plea had five branches. The position of matters now is that the House of Lords has finally decided that the pursuers have failed to prove that they were induced to enter into the contract by the fraud of the defenders or anyone for whom they were responsible. Branch (*a*) of the plea has accordingly been repelled, and also branches (*b*) and (*e*) so far as founded or maintained on allegations of fraud. But the House of Lords made it quite clear that they decided no other or further issue than that of fraud, and that the whole remaining pleas and contentions of parties were left open for discussion and decision in this Court. Branch (*d*) of the plea is now abandoned by the pursuers. There remain, therefore, for judgment branches (*b*) and (*e*), so far as not founded on fraud, and also branch (*c*).

Branch (*b*) submits that the contract is inapplicable as the basis of charge for the work executed by the pursuers, and is no longer binding upon them, in respect that the contract was entered into by them under essential error induced by the misrepresentations of the defenders. The pursuers' case on misrepresentation is based principally upon the manner in which the journal of the bores was made up by the defenders and communicated by them to the pursuers. The matter of the bores is one of vital importance; it lies at the very root of the contract. I need not labour the point, which I do not think was seriously disputed, but may refer to and hold as repeated what I said about it in my previous opinion.

The specification stated 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 journals of these bores may be seen at the engineer's office." As matter of fair construction of these words I think the defenders represented to the pursuers, and the pursuers were entitled to believe, that the small scale plan showed the positions of all bores which had been put down on the line; that they could see at the engineer's office the accurate and complete journal of all these bores as reported by the borers to the company; and that the bores had been made by borers whom the defenders considered to be competent. If these conditions were not complied with, I think there was misrepresentation by the defenders to the pursuers, however innocent may have been the motives of the former in editing or revising the borers' actual journals, or in not divulging part of what the borers had in fact reported. Now it seems clear upon the evidence that in regard to several of the bores—Nos. 7 and 9 are, I think, the strongest instances, but they do not stand alone—the "journal" exhibited to the pursuers was not in fact a true report or copy of any journal actually made by a borer; and also that a number of bores which were actually taken and reported were not included at all in the journal exhibited at the office. The only actual journal was the borers' letters; the journal exhibited at the office was what is printed in the appendix. I think that if a railway engineer, however innocent his motives may be, after making a statement such as I have quoted from the specification, exhibits to contractors something which is not in fact the actual and complete journal received from his borers, that is misrepresentation, and the company must take the risk of liability if the result is material error and consequent loss to the contractors. I do not propose to analyse or even summarise the evidence in regard to this matter. It has been reviewed in the previous judicial opinions in the case, and I do not repeat what was there said.

The defenders, however, rely strongly upon certain clauses in the specification as being sufficient to protect them, even assuming (which they deny) that any misrepresentation was innocently made to the pursuers. The clauses, it was conceded, would not avail in the case of fraud, but are, it was contended, amply sufficient to cover that of misrepresentation or concealment short of fraud, however serious the consequences might prove to the contractor. The passage already quoted from the specification is immediately followed by the words—"But the company does not in any way guarantee their," *i.e.*, the borers', "accuracy, or that they will be a guide to 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." Other passages relied on by the defenders' counsel will be found in the appendix. I am unable to see that any of the protecting clauses, comprehen-

sive as their language is, can cover a case where the contractor has, *ex hypothesi*, been led into serious error, involving corresponding loss, by misrepresentation and concealment (though not fraudulent) on the part of the company in regard to the true journal of their bores. The accuracy of the bores is not guaranteed, but I think there was a representation, amounting to an implied guarantee, that the journal exhibited disclosed a full and true account of the borers' reports of all the bores they had put down.

The defenders' counsel next maintained that even if all this were (contrary to their arguments) to be granted, the pursuers have entirely failed to show that any error was occasioned or induced by the journal of bores exhibited to them, or that the quantities of hard material actually encountered by them in the cuttings was any greater than they were led by the bores, sections, and schedule to anticipate. As regards Kilbirnie cutting, one of the defenders' witnesses states that while the scheduled quantity of rock was 41,765 cubic yards, the actual quantity was only about 33,000, though the company has, *ex gratia*, "adopted as rock cutting" and paid for 76,009 cubic yards. The argument thus boldly maintained is a very serious one, for even if misrepresentation were established that would not avail the pursuers unless there was also resulting error of a material character. *Prima facie* the evidence on this point seems to be all against the defenders. The Lord Ordinary referred to the progressive section as being, along with other "contemporaneous evidence," conclusive in the pursuers' favour, and in this Division the same view was unanimously entertained. But the defenders' counsel put forward at our Bar with great vigour an argument which, according to my recollection, confirmed by my notes made at the time, was but faintly presented at the former hearing, to the effect that the progressive section was not in any sense a contemporaneous document, and that the dotted line upon it, bearing to show "rock" or "actual top of rock," does not represent what one would naturally suppose it to mean, but merely indicates the top line of what the defenders, *ex gratia*, as their witnesses say, paid for as rock, though to a very large extent it was not so in fact. I have considered this argument with all the more care because of two circumstances—(1) its somewhat tardy appearance in the fighting line, and (2) the impression it is represented to have made upon the mind of one of the noble and learned Lords (Lord Atkinson) who heard the appeal. I need not say that Lord Atkinson's observations command my high respect. But they were necessarily *obiter dicta*. The whole evidence bearing on the point was not (as I gather from counsel) read to the House of Lords. Lord Atkinson's opinion makes it quite clear that the only question the House considered and decided was that of fraud, and that his Lordship had not formed and did not express an opinion upon any other matter, and indeed if his Lordship (and the House) had intended to hold it proved that Mr Melville's conclusions, as expressed in the journal of bores exhibited to the contractors at his office, were substantially correct, there would have been no need to remit the case to this Court, because even assuming misrepresentation (short of fraud) the pursuers were *ex hypothesi* not under essential error in the matter of the bores. The conclusion I have reached is that the pursuers must be taken to be substantially right upon this point. The burden of proof is, I think, on the defenders, but whether or not, the matter seems to be definitely proved against them. It is not necessary to suggest any lack of honesty or good faith on the part of Mr Melville or his assistants so far as they support him (Mr Stronach scarcely seems to do so); the proof took place a good many years after the period during which the dotted line must have been put on, and recollections may well have faded in the interval. The whole matter of these "*ex gratia*" payments is left, upon the parole evidence, in some obscurity. But I think Mr Melville must be mistaken when he says that he consulted Mr Cooper and the chairman about "paying for what was not rock as rock." Neither of these gentlemen is called to corroborate him on the point, and in 1904 when Mr Cooper wrote on behalf of the chairman for explanation of the large amount of "extras over contract," Mr Melville replied—"*Extra rock in cuttings*, £8000. In the cuttings between Kilbirnie and Lochwinnoch and at Drygate, rock cutting was found instead of soft as expected, and the contractor has been paid for the rock excavated. *Side cutting*, £1600. Owing to the extra rock met with in the cuttings, an increased quantity of side cutting was necessary to make up the deficiency of the embankment. . . . *Road alterations*, £1500. At Whirlhill public road diversion rock cutting was met with instead of soft material as expected." The weight of evidence is I think overwhelming to the effect that what lay below the dotted line was in fact substantially, though not entirely, "hard" material. The cross sections show a line of "actual top of rock" as distinct from and lying up above the original assumed line; and also the rock batter at which in many instances the cutting was formed, instead of the contemplated "soft" slope. The level-books, the correspondence, and—though less uniformly and emphatically—the waggon sheets and reports, are in the pursuers' favour. Again the words on the dotted line upon the progressive section appear to mean what they say, for when "blaes" (and not "rock") is intended, the former word is used, and there is also at least one place where the "actual top" goes for a considerable distance below the line originally assumed. We were also referred to two documents which are produced, though not printed—(*a*) Mr Stronach's diary, in which we were told no record appears of any arrangement for paying upon an artificial or assumed line, or paying for blaes, &c., as if it were rock, and (*b*) a monthly instalment book kept by the defenders, which contains an entry (8th September 1902) of

an allowance "for extra rock in Stoneyholm" (*i.e.*, Kilbirnie) "cutting." Lastly, I must say that if the argument as to the true history and meaning of this line of "actual top of rock" was to be maintained as it has latterly been maintained, the point ought in my opinion to have been plainly and specifically put in cross-examination to the pursuers' witnesses. This was not done, and their evidence was allowed to pass unchallenged. It looks to my mind as if the point now urged is somewhat of an afterthought; but however that may be, I hold that it is not proved that the substantial bulk of material below the dotted line was other than "hard," as opposed to "soft" material for the purposes of this contract.

Having listened attentively to the renewed argument at our Bar, I retain the view summarised in my former opinion that it is "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." I consider that the pursuers entered into this contract under essential error, induced by misrepresentation and concealment (though without any fraud) on the part of the defenders in regard to the journal of the bores. If this conclusion is sound it would seem to follow that branch (*b*) of the pursuers' third plea must be sustained. The contract is for a lump sum; it must in that respect stand or fall as a whole. I think it is idle for the defenders to rely on the fact that only a small number, at the worst, out of the total number of the bores was incorrect. It is not a question of how many bores were wrong, but of the result to the pursuers' work of such errors as existed. A small number of bores being wrong might well dislocate the contractors' scheme of operations over a great part or even the whole of his contract. I shall have a few words to say upon this view of the case at a later stage.

But some further contentions were advanced for the defenders in regard to branch (*b*) of the plea which deserve very serious consideration. Mr Macmillan in the course of an admirable argument insisted on the following propositions—(1) that assuming material error induced by non-fraudulent misrepresentation or concealment, the pursuers can have no remedy by way of damages; (2) that their only remedy would be by reduction of the contract; (3) that reduction cannot be granted, because *restitutio in integrum* is now impossible; and (4) that even on the assumption postulated, the pursuers having suffered no legal wrong, are left without any remedy, although the defenders have, *ex hypothesi*, reaped pecuniary advantage as the result of their innocent misrepresentation or concealment. I believe that the first and second of these propositions are substantially correct. As regards the first there is curiously little authority in the law of Scotland. Except the case of *Manners* v. *Whitehead*, 1898, 1 F. 171, I do not think we were referred to any. But in England it seems to have been repeatedly and authoritatively laid down that where a contract has been induced by misrepresentation (not fraudulent), the only remedy open to the person misled is to rescind the contract, and that he cannot claim damages. There has been no legal wrong done to him; his remedy is in equity and not at common law. It is sufficient to refer to *Derry* v. *Peek*, 1889, 14 A.C. 337, and *Angus* v. *Clifford*, [1891] 2 Ch. 449. The decision of the House of Lords in *Derry* v. *Peek* was followed by the Directors Liability Act 1890 (since repealed but substantially re-enacted by the Companies (Consolidation) Act 1908, section 84), which gave a remedy by way of damages in the particular cases dealt with by the statute. It is therefore, I take it, correct to say that the pursuers' remedy (upon the assumptions postulated), if they have one, must be by way of reduction and not of damages. But Mr Macmillan's further propositions seem to be of more doubtful soundness. As a general statement it is no doubt true to say that by our law reduction will not be granted unless *restitutio in integrum* is possible. It is clear that *restitutio in integrum* in an absolutely literal sense is impossible in this case. Parties cannot now be put back into the actual positions they respectively occupied before the contract was entered into. The work has been done and cannot be undone. On the other hand, the pursuers did not and could not have become aware of the misrepresentations under which, in my opinion, the contract was entered into until after the work was substantially completed and literal restitution had become impossible. If Mr Macmillan's argument is sound, the defenders, though they have *ex hypothesi* induced the pursuers to make the railway under ruinous terms and conditions, are entitled to retain the pecuniary advantage arising from their own misrepresentation, merely because the work has been done and cannot be undone. There has been no delay on the pursuers' part to bar them from applying for their remedy, for time could not begin to run for this purpose until the facts were known (or ought to have been known) to them. This result does not commend itself to my mind as a fair or just one. I do not think that equity lies in the direction of refusing all remedy in a case such as this, where equitable restitution is a mere matter of money in account; nor do I know of any law which should compel me to such a conclusion. I am not aware of any case—certainly none was cited—where the remedy of rescission has been refused under circumstances at all closely resembling those here present. The rule, I understand, is a rule of equity—a general but not an absolute or inflexible one. I imagine the theory to be that a pursuer is not entitled to claim the equitable remedy of rescission unless he is able to make restoration or restitution to the defender. This is often impossible where

rights of third parties have intervened or the like. But I do not think that in the present case equitable restitution is impossible. The defenders on their part do not desire or require restoration of the land to its *status quo ante contractum*. They have got a railway constructed which, if the pursuers' contract had been timeously rescinded, they must have had made by some contractor and must have paid for. The pursuers, on the other hand, are able and willing to make restitution. All the payments they have received from the defenders are, so to speak, held in suspense until a proper sum on the basis of *quantum meruit* is ascertained, and will be imputed towards that sum, or reimbursed to the defenders if and in so far as that sum falls short of the amount already paid. There is nothing more to restore. The whole question seems to me to be one absolutely capable of solution by the payment of money; it is the adjustment of a disputed account. I am therefore unable to hold that the pursuers' claim for reduction, if otherwise sound, is in any way barred or impeded by the doctrine of *restitutio in integrum;* and for the reasons now stated I am prepared to sustain branch (*b*) of the pursuers' third plea-in-law. I should add, before leaving this part of the case, that Mr Clyde put forward a serious argument to the effect that essential error induced by misrepresentation and concealment was also present in regard to the matter of the Paisley water-pipes and bridge 12A. I am unable to accept that argument, but I reserve, for what seems to me a more convenient place, what I have to say upon that important point.

If I am right in what I have said, it is sufficient to decide the case substantially in the pursuers' favour—for branch (*b*) being sustained, they would be entitled to be paid for their whole work on the basis of *quantum meruit*, on the footing that the contract must be reduced and the lump sum contracted for must be disregarded. While this is my conclusion, I desire to make it clear that though in my judgment the contract price falls out of count, it does not by any means follow that each and every item of the work done is to be matter for revision and readjustment in the inquiry which (if my view is correct) must follow, and which, by the way, I hope would be instituted, not by way of further proof in this Court, but by a remit to some person of skill. Readjustment would, in my opinion, be necessary and legitimate only in so far as the pursuers can establish that they are entitled to it as a necessary or reasonable consequence of the error into which (on my theory of the case) they were led by the defenders' misrepresentation or concealment in the matter of the bores. A large portion of the work done was probably quite unaffected by this error.

But a different aspect of the case was alternatively presented in argument by the pursuers' counsel, upon which I think they would be entitled to succeed. The pursuers maintain, upon the same facts as those on which their contention in support of branch (*b*) is based, a legal argument to the effect that the defenders are in breach of various contractual conditions, express or implied; and that the breaches are of so essential a character as to entitle them to set aside the contract or, otherwise, to bar the defenders from holding to it as a basis of charge. They ask that branch (*e*) of their plea should be sustained. The conditions alleged to have been violated by the defenders are, I understand, principally as follows, viz.—(*a*) that the journal exhibited should be an accurate and complete journal of all the bores that had been taken, not an incomplete one, and partially edited according to Mr Melville's view of what he supposed the borers to have meant; (*b*) that there was no legal obstacle to prevent the contractors from constructing every part of the line; (*c*) that the contractors should get timeous access to the whole ground; and (*d*) that all plans for the works should be timeously delivered to them. I have already dealt with (*a*) under the head of misrepresentation. I think, as above indicated, that upon a fair construction of the specification this was by clear implication a condition of the contract going to the essence of it. The law applicable to the matter is clearly stated by Lord Dunedin in *Wade* v. *Waldon*, 1909 S.C. 571, at p. 576—"It is familiar law, and quite well settled by decision, that in any contract which contains multifarious stipulations, there are some which go so to the root of the contract that a breach of those stipulations entitles the party pleading the breach to declare that the contract is at an end. There are others which do not go to the root of the contract, but which are part of the contract, and which would give rise, if broken, to an action of damages." I consider that we have here a condition contained by clear implication in the contract which goes to the very root of it; and that the defenders having, as I hold, broken that condition, the pursuers are entitled to declare the contract at an end; or (the same thing in other words) that the defenders cannot hold the pursuers to the contract as the basis of charge. The next of the conditions (*b*) is connected with a matter which bulked largely in the evidence and in the arguments. The facts underlying it are summarised by Lord Ardwall. There is dispute as to the actual period of delay caused by the unfortunate forgetfulness of the company, the amount of additional work and trouble imposed on the pursuers thereby, and whether the pursuers themselves did or did not contribute to both of these by mismanagement of the situation. But the affair is undoubtedly a very serious one. I should be prepared to hold that it was an implied and an essential condition of the contract that no legal impediment existed to prevent the construction of the entire line of railway. But I think the pursuers put their case too high when they contend that any such legal impediment existed in fact. The Paisley pipes were scheduled in the defenders' book of reference, and the Paisley authorities were thus notified that the proposed line of railway was to cross their pipes. If they were unwilling to rest

content with the protection afforded them by the general statute law of the land, they might, failing agreement with the promoters, have petitioned Parliament against the Bill, with the view of obtaining a special clause for their protection, but they did not do this. Now by the specification the contractors were expressly referred to various sections of the Railway Clauses Consolidation (Scotland) Act 1845, which formed an appendix to it, and were notified that they would be bound to implement the whole obligations relative, *inter alia*, to water-pipes there laid upon the company. In these circumstances I am unable to hold that there was a breach by the defenders of the implied condition in the contract that the defenders had legal power to construct this part of the works, so as to entitle the pursuers to rescind the whole contract or declare it at an end. (*c*) While I consider that it was an implied condition of the contract that the pursuers should have timeous access to the whole ground, I am not prepared to hold that the circumstances in regard to the Paisley water-pipes and bridge 12A are such as to entitle the pursuers to put an end to the contract. (*d*) This matter arises in connection with alleged delay in furnishing the pursuers with plans for certain aqueducts. I think it is proved that there was such delay, and that that was contrary to proper practice and custom. There was, I think, breach of contract on this head. But I do not dwell upon the point, for it does not seem to me to be one of much magnitude, or going to the essence of the contract. My conclusion therefore on this part of the case is that the pursuers' argument fails upon all the heads of it other than (*a*)—the first and main one —that the defenders having violated an essential condition of the contract, viz., that in relation to the journal of the bores, the pursuers are entitled to declare the contract at an end; or (to express the same result in other words) the defenders are barred from holding the pursuers to the written contract as the basis of charge. On that head the pursuers' alternative case is, I think, well founded, and I am prepared to sustain branch (*e*) of their third plea-in-law.

In order, however, to dispose exhaustively, if possible, of all the contentions of parties, I must now deal with the aspect of the case which would arise if I am wrong in thinking that the contract ought to be reduced on either of the grounds which seem to me to warrant that course. It was contended for the pursuers that upon the theory of the case they are entitled, standing the contract, to damages for various breaches of it by the defenders, viz., those which I have considered in the preceding paragraph of my opinion. The defenders' counsel repudiated any liability for damages. They urged in the first place that no question of damages could arise within the limits of the proof allowed, viz., the averments of parties so far as bearing on the pursuers' third plea-in-law. I am far from applauding the pleadings in this case. I commented upon the summons in my former opinion, and I think the whole pleadings of the parties, embracing the condescendence, defences, and pleas-in-law, are open to much adverse criticism. But I am not prepared to say that a finding that the pursuers are entitled to damages for certain specified breaches of contract would be incompetent, looking to the wide scope of the evidence which has been led, and to the fact that the pursuers have a plea — the fourth — directed to damages, though such averments as they make in support of it were not specifically remitted to proof. As regards head (*a*)—the matter of the bores—I think the defenders would, standing the contract, be liable to the pursuers in damages for breach of a condition (though not, on the assumption now postulated, an essential condition) of the contract. No clause in the contract seems to me to be sufficient to exclude this claim. They would also, in my opinion, be liable under head (*b*)—the Paisley water-pipes and bridge 12A. The defenders' counsel argued that this head of claim was clearly untenable, because it would plainly fall under the provisions of the contract to be dealt with as extra work, and could not be made a basis for damages. He conceded that he could not legitimately pray in aid the clause as to "inadvertent errors or omissions," to the effect of denying the pursuers any additional payment at all over and above the lump sum contracted for. I do not think the provision as to extra works can be fairly held to exclude the pursuers' claim for damages as regards the water-pipes and bridge 12A, and the alleged dislocation of their work arising from the defenders' failure to disclose to them that the line crossed the water-pipes at this point. The minor heads (*c*) and (*d*) seem to afford further grounds for damages, though there is certainly more room in their case for an argument that the contract clauses are sufficient to exclude them. But I am unwilling to devote space and time to detailed consideration of such subordinate and contingent matters. The amount recovered by the pursuers in name of damages would probably be much the same as what they would receive if the contract were reduced and they were paid on the footing of *quantum meruit*, but the legal theory underlying each of the alternative views is of course different.

It only remains to dispose of branch (*c*) of the pursuers' third plea-in-law, viz., that "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 . . . (*c*) that the work as executed by the pursuers proved to be entirely different from that contemplated by the contract." The facts principally founded upon by the pursuers as evidencing the "entirely different" character of the work are (1) the matter of the Paisley pipes and bridge 12A, (2) the boulder clay in Castle Semple cutting, and (3) the excess—enormous as they say, and quite beyond the antecedent contemplation of either party—of rock cutting in Kilbirnie and Whirlhill cuttings. I think the evidence does show that

in regard to each and all of these matters the pursuers had to do a great deal more work, and of a harder character than they expected, and probably than the defenders anticipated, and that the result was to dislocate to a large extent the scheme of their operations. But the plea as stated and argued is a bold and rather startling one, and I cannot say that I think the facts proved warrant us in sustaining it. I am not aware of any authority directly in point. The English case of *Bush* (which is only reported in Hudson on Building Contracts) appears to have been a very special one. The learned Judges were hampered by the finding of a jury which, while I gather that it did not commend itself to them, they did not see their way to set aside or ignore. Neither *Smail* v. *Potts*, 1847, 9 D. 1043, nor *Quin* v. *Gardner*, 1888, 15 R. 776, amounts to a decision on the point. I do not say that a case might not arise so strong upon its facts as to justify (or compel) the success of a plea such we are now considering, but that case is not in my judgment here presented. I am therefore for repelling branch (*c*) of the pursuers' third plea-in-law.

Upon the whole matter, we ought, in my opinion, to sustain branches (*b*) and (*e*) of the said plea, to repel branches (*c*) and (*d*)—branch (*a*) has already been repelled—and to find that the pursuers are entitled to be paid for the work done by them for the defenders upon the footing that the written contract is reduced and the lump sum contracted for falls to be disregarded, and that the basis of payment should, in so far as may be found necessary or reasonable, be a *quantum meruit*, and *quoad ultra* continue the cause for further procedure.

I repeat my expression of hope that if our interlocutor is not appealed against, or if it should be affirmed by the House of Lords, the assessment of *quantum* upon the lines I have endeavoured to indicate would (failing agreement) be arrived at by a remit to a man of skill, and would not be made the subject of further proof in this Court.

LORD SALVESEN—There has already been such a wealth of judicial opinion expressed with reference to the main facts of this case that I hesitate to make any material addition. As, however, I took no part in the former judgment which was appealed to the House of Lords, I think it right that I should state as briefly as I can the conclusions at which I have arrived after thirteen days' argument. As a preliminary point I notice in passing that some trenchant criticism was directed by the defenders' counsel to the averments which bear on those parts of the case that have not as yet been finally disposed of. It is just, however, to keep in view that the precise facts on which the pursuers now found were only ascertained by them after the pleadings had been adjusted and they had executed a diligence to recover documents in the defenders' hands. The Scotch form of pleadings serves two main objects—(1) to enable the parties to challenge the relevancy of the action or the defence, as the case may be, and (2) to give them fair notice of the case which they respectively have to meet. So far as this Court is concerned, it has been finally decided that the pursuers' condescendence discloses a relevant ground of action, and a full proof has been taken with regard to all the statements contained in the record. It is true that the interlocutor of 14th July 1908 for which I was responsible might have been more happily expressed, but the intention, as appears from the opinion which I then delivered, was not in any way to limit the allowance of proof except on the question of amount, which might be more conveniently ascertained by a remit to an engineer, or in some less cumbrous fashion than a proof at large, after the principles of liability had been determined by the Court. Parties appear to have understood the allowance of proof in that sense for evidence on all matters bearing on the main issue between them, namely, whether the contract of 16th and 18th September 1900 regulates all the pursuers' claims in connection with the work done in the construction of the Dalry and North Johnstone Railway has been taken without objection. There is here no question of surprise, for the main facts relied on by the pursuers were throughout well known to the defenders. It is therefore somewhat late in the day for them to urge technical objections based on a strict reading of the record and of the allowance of proof, which if they had been earlier insisted in could easily have been rectified under our rules of Court. I propose, therefore, to deal with the case as disclosed in the elaborate proof which has been led by the parties.

The pursuers' leading contention is that the contract under which they were originally employed is inapplicable as the basis of charge for the work executed by them, in respect it was entered into by them under essential error induced by the misrepresentations of the defenders. On this question I am in favour of the pursuers. I need not refer in detail to the misrepresentations alleged, as they have already been so fully discussed, notably by Lord Johnston and Lord Ardwall in this Court and by Lord Atkinson in the House of Lords. It is common ground that a correct copy of the journals of the bores put down at various parts of the line was not shown to the pursuers, but that in certain cases, and in particular with regard to bores 7, 8, 8A, and 9, the copy shown did not describe the strata in terms of the borer's reports, but as the latter were interpreted by Mr Melville. Even on this assumption I have a difficulty in understanding why he should have described the layer of material below the blue clay as "hard black blaes" when dealing with the bore No. 7, and as "black blaes" when dealing with Nos. 8, 8A, and 9. The borer had described this material in his letter of 14th October as "a hard black substance called black band," and he used the same expression "black band" in his reports written on 18th October relating to bores 8 and 9. As regards bore No. 8A he reported—"At peg No. 1 what seems to be solid rock was come on at 19 feet 5 inches down from the surface," and at peg No. 2 he described the

materials as consisting of blue clay and boulders of rock. The above being the only positive information which Mr Melville had as to the subsoil in the Kilbirnie cutting, I think it was his duty, in accordance with the representation in the contract, to have given it in the so-called "journal of bores" exactly as he received it from the borer. If he thought it inaccurate, there was no reason why he should not have added a note of the inferences which he drew from the bores and had given effect to in the schedule. It is admitted that blaes may be of all degrees of consistency. It may be as soft as sand or as hard as rock, although its composition does not vary any more than that of sand and sandstone. Reading the so-called "journal" along with the specification, schedule, and plans, I think a contractor was justified in coming to the conclusion that in the Kilbirnie cutting, except where otherwise indicated, he would have to deal only with a homogeneous layer of black blaes which at only one point could be described as hard, and all of which was capable of removal by the mechanical contrivances which are employed upon soft cuttings. He could have no conception that he would have to encounter in this cutting a mass of material to which the more expensive method of blasting required to be employed.

The matter becomes still more serious when regard is had to the reports of the borer in connection with the five so-called check bores. These bores were apparently sunk for the purpose of confirming the reports that had been given of the material encountered in two of the bores. So far from doing this, the borers in each case reported that at the point where black blaes had been found in these bores rock was now encountered, yet this information was withheld from the contractors. There was absolutely no reason to suppose that the first bore was more reliable than any of the check bores. On the contrary, most people would have assumed that where four out of five bores indicated rock at a certain depth they were more likely to indicate the true nature of the strata than the remaining one which showed "black band." To my mind the check bores afford very convincing proof that the "black band" reported as found in the original bores was as hard as rock and might appropriately have been so described. But on the assumption that Mr Melville honestly came to the conclusion that they indicated only posts of rock occurring in a layer of black blaes, that information would have been of the utmost importance to the contractor in making his offer for the construction of the line. I cannot read the clause in the contract as entitling the defenders to make a selection of the bores, and to put only those before intending offerers as would induce them to quote a low rate for the execution of the work. Thus, to take a concrete illustration, suppose bores 7 to 9 had been in point of fact sunk in soft blaes, but that at a little distance from each of them other bores had shown a layer of rock, it would surely not have been fair dealing to have disclosed to the contractors only those which showed soft blaes, and to have framed the contract on the footing that the whole intervening material might be expected to turn out of the same description. I do not overlook in this connection that one of the check bores reported whinstone as having been found, and that in fact there was no whinstone in this cutting. It is, however, to my mind unintelligible that Mr Melville should have dealt with this as a "clerical error." No attempt was made in the proof to establish that such an error was in fact made, and the chemical composition of the particular rock was of little moment to the contractor so long as he was informed that he would have to prepare for hard excavation instead of soft. Further, no communication on the subject was made at the time to the borer. Mr Melville simply assumed whinstone to be an error for blaes apparently, because it conflicted with his preconceived theory as to the material in this particular cutting.

The importance from the contractor's point of view of the information disclosed in the "copy journal of bores" is not disputed. The bores formed the only indication as to the nature of the material which fell to be removed in the cutting. Accurate and complete information as to what had been actually found in the bores was all the more necessary because of the stringent clauses throwing upon the contractors all the risk that might arise from the nature of the intervening and surrounding strata. The defenders took care in their contract to protect themselves (1) as to any inaccuracy in the journals of the bores—that is, any mistake which the borers might have made in describing the strata, and (2) as to the actual strata which might be encountered. Thus, to revert to my former illustration, if all the four bores with which I am now dealing had been reported to have passed through soft blaes by a competent borer—and in fact he had encountered at each of them a layer of rock—the contractor would have had to bear the additional cost without redress. Similarly if the bores turned out to be accurate, but the intervening strata, instead of being soft were entirely hard, the whole extra cost of excavation fell upon the contractor. It was therefore essential that the actual reports of the borers with regard to each bore taken should be fully before him so that he might be at liberty to draw his own inferences as to the difficulties which he was likely to encounter. It is not in accordance with good faith or fair dealing that the defenders should induce a contract for a slump sum on the footing that with regard to one of the most important cuttings on the line the contractor would only have to excavate in soft material when the defenders' engineer had just as reliable information that the material between the bores was largely of a rocky character, for of the nine bores actually put down in that cutting four disclosed black band described as "a hard black substance," the remaining five disclosed rock. How is it possible to say that the result of the five bores might be legitimately suppressed as apt to be misleading, and the contract based

upon the other four when all the nine bores were taken by the same borers? The course adopted by Mr Melville could, I think, only be justified by its having turned out that the four bores which he selected were an accurate index of the character of the ground and that the five which he suppressed were of no importance. But even the defenders admitted that posts of rock which required blasting occurred in the strata lying between bores 7 and 9, and this is precisely what the check bores if they had been disclosed would have led a contractor to expect.

I note in Lord Atkinson's opinion that he puts great reliance upon the evidence of the four expert engineers who were examined on behalf of the defenders, and who supported Mr Melville in his proposition that in contracts for railway construction such as this blaes or shale is not treated as rock "solid, broken, or loose," but is properly described as "soft." This evidence was of course important on the only question his Lordship was then considering, namely, whether Mr Melville had acted fraudulently. I cannot, however, accept it as proving the fact. No concrete illustration is given by any of these engineers. Their evidence was perfectly general and vague, and is consistent with the view that where soft blaes is for the most part encountered no extra allowance is made for harder layers of the same material which occur in the strata. But what is much more important no notice whatever was given of this line of defence in the cross-examination of the pursuers' witnesses. A custom to treat as soft material what is as hard to excavate as rock cannot be established in the absence of averment, and still less in the absence of cross-examination of three witnesses of the party whose interest it is to maintain the contrary. The evidence is, besides, contrary to the method actually adopted in the construction of the line. What was described as "black blaes" was not in fact excavated to the batter appropriate to soft material, but has been left at a batter in some cases steeper than that usually employed for solid rock. It is vain for these engineers to say after an interval of years that in their opinion the batter at which the hard black blaes has been left is too steep. The competency of Mr Melville is not in dispute, and in fixing the batter appropriate in the Kilbirnie cutting he had to keep in view the safety of the persons using the line. I cannot suppose that he would have left the sides of the cutting at an unsafe angle merely out of consideration for the contractors. It may be true that "black blaes," which is originally as hard as rock, is more liable to disintegrate from exposure to weather than other kinds of rock, but there is no convincing evidence to show that it has in fact done so in the particular case.

I hold, therefore, that the statements in the specification that bores had been put down at various parts of the line, and that a copy of the journal of these bores might be seen at the engineer's office, was a grave misrepresentation of the facts as now ascertained—(1) in respect that all the bores actually taken were not disclosed, and (2) that the journals were not accurate records of the borer's reports. On the evidence I cannot doubt that the contractors were misled by their reliance on the copy journal, and that the slump sum for which they contracted to do the work was affected to a material extent by this reliance. In making their tender I hold they were under essential error, induced by the misrepresentations as to the bores to which I have already referred to in detail. I am content on this part of the case to adopt the examination of the evidence which has led Lord Dundas to the same conclusion. I think it is conclusively proved that instead of the soft and hard blaes which they were led to expect in Kilbirnie cutting they found a mass of material consisting mostly of rock or blaes as hard as rock which could not be removed by the steam navvy until after a large amount of blasting had been done. The contention of the defenders that what the pursuers actually found was substantially all blaes is, I think, conclusively negatived by the evidence, for (1) in the five check bores the borers had described the material as rock, and in the four bores disclosed as black band which was substantially of the same hardness; (2) throughout the contemporaneous documents, such as the progressive sections, level books, cross sections, and inspector's reports, it is described as rock; (3) it was so treated in fixing the cross sections; and (4) it was so paid for. This payment, which is now described as an *ex gratia* payment, made no distinction between the parts of the strata which consisted of blaes as distinguished from freestone or other rock; and the suggestion that it was made out of consideration for the contractors appears for the first time in the defences. Whatever may have been the motives which influenced Mr Melville to certify for this material at the extra price of rock, the fact that he did so is a practical admission of the pursuers' statement as to what they found in the cutting.

The defenders admitted that if a contract is entered into under essential error induced by misrepresentation, however innocent, it may be rescinded by the injured party, but they strenuously maintained that this remedy is not open in the case of an executorial contract after the work has actually commenced. They said that according to our law it is a condition of rescission of a contract that the party rescinding shall be able to make *restitutio in integrum*, and that so soon as work has been done under the contract such rescission becomes impossible. If this were so, the remedy would for all practical purposes be of no avail, for the cases must be very few in which the error is discovered before work has been commenced. I do not think that this is the law of Scotland. The cases in which a remedy has been refused on the ground that restitution was no longer possible are not numerous, and in all of them the rights of third parties had intervened or the pursuer of the action had himself so acted in a matter unconnected with the contract as to debar him from the remedy he sought. The case of *The Western Bank*, 5 Macph. (H.L.) 80, is a good illustration of

the latter class. The pursuer of that action had bought shares in an unincorporated banking company; two years later he was a party to a proceeding whereby the company from which the purchase was made was put an end to, and he accepted shares in an incorporated company which took its place. In the subsequent case of *Hay* v. *Rafferty*, 2 F. 302, the pursuer did not offer restitution and was not in a position to grant it. On the other hand, in the case of *Adam* v. *Newbigging*, 13 A.C. 308, the House of Lords found it no obstacle to granting the remedy of rescission that the party who sought it was not able to put those against whom it was asked in the same situation in which they stood when the contract was entered into. The pursuer there had been induced by misrepresentation made without fraud to become a partner of the defenders in a business which belonged to them. The business was carried on for two years with disastrous results, and it was only then that a claim to have the contract of copartnery rescinded was put forward. In the Appeal Court, Bowen, L.J., said—"There ought, as it appears to me, to be a giving back and a taking back on both sides, including the giving back and taking back of the obligations which the contract has created, as well as the giving back and the taking back of the advantages." In this sense the pursuers are offering full restitution. They are willing that the work which they have done under a contract which they would never have undertaken at the agreed price shall be paid for on its own merits. If they have been paid more than others in full knowledge of the facts would have executed it for at the time, they must submit to repayment of the excess. If on the other hand they establish that they have received less than they are fairly entitled to according to the rates which ruled when the contract was made, I do not see any reason why in equity they should not recover. The *quantum meruit* which the Lord Ordinary has allowed them is not, I take it, to be understood as entitling the contractors to make up an account on a time and material basis, but as giving them a right to claim, *inter alia*, the extra cost in which they were involved owing to their reliance upon reports of bores which have proved misleading. So far as the Kilbirnie cutting is concerned, which is the only one which I have specifically dealt with, this extra cost may include an allowance for any dislocation of the contract work through the unexpected difficulties encountered over and above the extra price of removing rock as compared with other material which the contractors have already received.

Hitherto I have dealt with the case on the footing of the misrepresentations founded on having been entirely extraneous to the contract. As it happens they form part of the contract, but the result is not different if they are conditions-precedent of which it may be predicated (to use the words of Lord Ellenborough in *Davidson* v. *Gwynne*, 12 East. 381) that "the non-performance alleged in breach of the contract goes to the whole root and consideration of it." I have already indicated that in my opinion the completeness and accuracy of the journal of bores did go to the root of the contract, for it was the only information supplied to the contractors as to the nature of the work which fell to be performed, and, as has already been pointed out by several of the Judges, the inaccuracy of the journal of bores in one cutting did not necessarily affect only the work there but might affect the construction of other sections of the line. The engineers who designed the railway no doubt had in view the use of the soft material excavated from this cutting in making up embankments, and of the hard for building and ballasting. Any disproportion of hard material which was unsuitable either for building or ballasting would obviously affect the contractors' whole calculations in pricing the contract. I need not, however, dwell further upon this aspect of the case, except that I desire to add a few words on the subject of the competency of the borers; for in my opinion it was an implied term of the contract (to use the language of Lord Atkinson, who, however, does not commit himself to this view) "that the company should appoint or have appointed to do the work of boring skilled persons fully competent for that work." It is true that Lord Atkinson has already expressed the opinion that Mr Melville believed the Cowans (with regard to whom the question arises) to be competent, but that does not conclude the question as to whether they were in fact competent. It may be that for work of this kind the qualifications of a mineral borer were not essential; but I confess that, looking to the importance which attached to the accuracy of the reports, I feel surprised that a man should have been selected by the defenders for this piece of work who had had no previous experience of making bores, but had been employed as a superintendent of the permanent way. Such a man, if he did the boring himself, would no doubt be able to say whether the strata through which the boring chisel passed were soft or hard, but so would any workman whom he employed in the actual manual work. More was expected of him than this, for it was his duty to determine the nature of the material through which the bores passed, and to judge of this from the churned-up mass which was from time to time lifted out of the bore-holes. That he was not competent to do this is proved by the results which he obtained at the various bore-holes. He was admittedly in error reporting whinstone in one of the check bores, and now that we know the actual nature of the strata, which consisted throughout of either rock or bands of rock and clayband ironstone through blaes, I think it difficult to hold that any one of his reports as to the nature of the material encountered in the bores was reasonably accurate. The manner in which his reports were treated by Mr Melville contrasts with the latter's unqualified acceptance of the journal of bores furnished by the professional borer Brown. The fact that Mr Melville thought himself justified in interpreting or editing the reports of Cowan is

in substance an admission that he considered him only partially qualified, although I assume that he thought him sufficiently qualified under his own supervision for the work to which he had been put. It is to my mind incredible that at the four bores, 7 to 9 inclusive, Cowan truly encountered only a homogeneous mass of black blaes, and at a short distance from two of them encountered nothing but rock at approximately the same depth as the reports of the check-bores bear. The truth I believe to be that very much the same materials was encountered in all these bores, but that in some the hard black blaes predominated over the bands of rock which ran through the blaes, while in others the rock appeared to predominate, and that Cowan was not competent as a professional borer would have been to distinguish the one material from the other when ground down and macerated with water. If I am warranted in this conclusion there was a breach of an implied term of the contract.

What I have said hitherto is sufficient for the decision of the case, but on the assumption that the pursuers are not entitled to rescind the contract they have an alternative case on which I ought to express an opinion. This case proceeds upon the view that if the defenders were in breach of any express or implied condition of the contract they are entitled to damages for such breach. The breaches alleged are (1) that the copy journal referred to in the specification was not an accurate and complete, or at least was not an accurate, statement of the borer's reports; (2) that the bores were not taken by a competent borer; and (3) that the journal of the bores was grossly erroneous. I have already dealt with the first two breaches and hold that they have been established. As regards the third, I think it is excluded by the clause of the contract to which I have already referred. If the bores had been taken by a skilled borer I think it would afford no ground of damages that he had made serious mistakes, even although these mistakes in each case added largely to the cost of the work. The pursuers, however, added three other grounds of claim with which I have not yet dealt—(1) that it was an implied condition of the contract that the defenders should give the pursuers possession of the whole ground necessary for the contract work; (2) that permanent obstacles should be disclosed; and (3) that plans for bridges, aqueducts, and the like should be timeously furnished, and that defenders were in breach of these conditions. The first and second heads of claim apply specially to the structure which became known as bridge A. After considerable progress had been made in the formation of the line the pursuers discovered that the Paisley water-pipes ran diagonally across the Kilbirnie cutting. Until arrangements had been made with the Paisley authorities for carrying the pipes across the line by means of a bridge the work at that point had to be stopped. Great delay arose in making the necessary arrangements and completing the plans for the bridge, and in the meantime the work of excavation was not merely retarded but its cost seriously increased by the necessity of removing the material by what is called an "overland route," and of pumping the water which accumulated in the cutting, and which but for this obstacle would have run away from the working face according to the method of work contemplated by the contractors. The defenders concede that the cost of construction of the bridge falls to be treated as an extra, and they have paid for it as such, but they dispute their liability to make any compensation for the additional expense entailed on the contractors as above indicated. Now if the defenders had been excusably ignorant of the existence of this water-pipe there would have been great force in the argument that the entire risk was thrown on the contractors under the clauses in the contract to which reference has already been made, but this was not so. The parliamentary plans and book of reference lodged along with the Bill for the construction of this railway demonstrate that the defenders were at that time well aware of the existence of the pipe, and that provision required to be made to carry it either above or below their contemplated line. For some unexplained reason, which can only be attributed to negligence—not necessarily of the engineers but of the defenders—no provision at all was made in the contract for this pipe, although there were numerous plans of relatively unimportant structures. I think it was an implied term of the contract that provision had been made by the engineers for all the work which was known by the defenders to be necessary for the completion of this line, and that the defenders were in breach of this term in failing to disclose to the contractors the existence of the pipe which ultimately involved the construction of bridge A. I do not hold that this breach went to the root of the contract so as to justify the pursuers in rescinding it, but I think it is a breach for which they are entitled to claim damages. So also, dealing with the last of the pursuers' heads of claim, I am of opinion that it was an implied term of the contract that the defenders should furnish the designs necessary for the regular progress of the work, and that as regards some of the smaller water-courses they failed to do so. The extent of the damage which the pursuers thereby suffered is matter for subsequent inquiry.

The pursuers presented an alternative view, embodied in head (c) of plea 3, that the work as executed by the pursuers proved to be entirely different from that contemplated by the contract. In this connection they found upon the extra work in the Kilbirnie cutting, the dislocation and extra work resulting from the necessity of constructing bridge A, and lastly, the fact that one or more of the bores in the Whirlhill cutting proved grossly inaccurate, for while the material was shown according to the journal of bores to be sand and gravel, which are easily excavated, the pursuers in

fact encountered large masses of boulder clay, which is admitted to be more difficult to excavate even than rock. Assuming that there was no breach of contract by the defenders, I do not think that the work was so entirely different from that contemplated by the parties as to justify the pursuers setting aside the contract on that ground. One of the risks which they took was that of the strata turning out more expensive to work than might be inferred from the documents constituting the contract. If the borer had reported boulder clay in the Whirlhill cutting when in fact only sand and gravel fell to be excavated, I do not imagine that the defenders could have claimed any reduction of the contract price on that head. It was the pursuer's misfortune that the serious mistake which the borer made materially increased the expense to which they were put in removing the material in the cutting to which it applied, but this was just one of the matters against which the defenders had taken care to protect themselves. There is therefore no ground for the application of the doctrine of *Bush's* case, assuming it to be a binding authority. On the whole matter, therefore, I concur in the decision at which I understand the majority of your Lordships have arrived, and substantially on the same grounds.

LORD GUTHRIE—The summons in this case is appropriate to an ordinary petitory action, but I deal with it as if it contained a conclusion for reduction of the contract of 1900 entered into between the parties, with an appropriate petitory conclusion and an alternative conclusion for damages. It was not denied, however, that the averments must be relevant and the proof sufficient to infer reduction.

The original condescendence and pleas ignored the contract entered into between the parties under which the work commenced, and asked payment for work done on the footing of *quantum meruit*. On the defenders putting forward the contract and relative documents, with its lump sum, its exclusion of claims on the ground of the defenders' errors or omissions, and its arbitration clause, the condescendence and pleas were amended, and the pursuers formulated their claim on alternative grounds, claiming either, ignoring the contract, or at least treating it as rescinded, that they are entitled to the sum claimed on the footing of *quantum meruit*, or, assuming the contract to stand in whole or in part, that they are entitled to that sum, or a part or parts of it, in name of damages.

In their condescendence the pursuers founded on three matters as a basis in one view for payment of *quantum meruit* apart from the contract, and in another view for damages for breach of contract, express or implied, namely, first, the bores, or some of them, taken by the defenders antecedent to the contract; second, the operations, including the construction of bridge 12A, caused by the unexpected presence of Paisley water-pipes; and third, certain difficulties due to water-courses. Evidence was led in regard to a fourth matter not referred to on record, namely, the presence of boulder clay (misnamed "conglomerate" by the pursuers' witnesses) in Castle Semple cutting, but this is not dealt with in any of the opinions in the Outer House, the Second Division, or the House of Lords as involving a separate question. So far as their attack on the defenders in regard to these matters was based on the ground of fraud, actual or constructive, their claim either for *quantum meruit* or for damages has been negatived by the House of Lords. As I read their Lordships' opinions nothing else was actually decided, and any opinions on any other question expressed by Lord Atkinson, who gave the leading judgment, while entitled to great weight, must be considered as *obiter*. Another ground which bulked largely in the proof was based on an alleged agreement between the defenders and the pursuers, that the pursuers should be paid in the manner now claimed by them. This ground was abandoned at the hearing before us.

Fraud and agreement being out of the case, I shall first consider the claim of the pursuers to be dealt with apart from the contract, and then their alternative claim under the contract for damages in respect of the defenders' alleged breach of it.

In support of their claim to be paid apart from the contract, two grounds stated in the summons remain, which form heads (*b*) and (*c*) of plea 3 for the pursuers. "Plea 3—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 . . . (*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."

In addition to these grounds for being dealt with apart from the contract, the pursuers maintained that the defenders had failed to fulfil certain obligations in reference to the bores, which they contended were conditions-precedent to the operation of the contract.

As the pursuers' main case, that connected with the bores and the Paisley water-pipes, is now presented, it is a singular and, the defenders suggest, a significant fact that it depends on correspondence between the defenders' engineer and his subordinates and on a certain parliamentary plan, the existence of said correspondence and plan being unknown to the pursuers until they discovered them under a diligence granted after the record was closed.

I deal first with the pursuers' claim to be paid irrespective of the provisions of the contract. They claim right to payment without regard to the contract—first, because they are entitled to ignore it; and second, because if not they are entitled to treat it as rescinded.

I.—*Are the pursuers entitled to ignore the contract?*

The pursuers claim to be entitled to ignore the contract, first, because it con-

tained conditions not fulfilled by the defenders, the fulfilment of which by them was necessary in order to render it binding on the pursuers—in short, conditions-precedent. They allege that the defenders not having complied with these conditions must be held to have repudiated the contract from the first, and therefore cannot found upon it. Second, they say that the work as executed was so "entirely" (they also use the adverbs "totally," "materially," and "essentially") different from that contemplated that it would not be equitable to apply the provisions of a contract framed in contemplation of different operations.

1. *Conditions-Precedent.*—These deal with the bores taken by the defenders and referred to in the contract, and with the construction of bridge 12A and its alleged consequents, and with the discovery of boulder clay in Castle Semple cutting.

In regard to the bores it is said to have been a condition-precedent that all the results of all the bores taken by the defenders in anticipation of this contract should be communicated to the pursuers, and it is alleged that in connection with bore 7 the results of one check bore, and in connection with bore 9 the results of three check bores, were not communicated. I do not read the clause founded on in the specification as importing an obligation to communicate the results of all bores by whomsoever taken, for whatever purpose taken, and with whatsoever results. The defenders were only bound, in my opinion, to communicate the results of such bores as they honestly believed gave a fair indication of the general nature of the ground, and were not bound to communicate the results of bores which they honestly thought would be misleading, or of check bores, unless in their honest opinion these check bores affected the results derived from bores taken in ordinary course. In their whole proceedings connected with the bores, including their appointment of borers, the ground selected for the bores, the method of boring, the method of recording the results of the bores, and their non-communication to the pursuers of the results of check bores, it has been held by the House of Lords that the defenders, acting through Mr Melville, were not knowingly fraudulent, and did not act with such negligence and recklessness as to amount to fraud. Lord Atkinson put it that "Mr Melville honestly thought that he was stating in the journal of bores the information in fact conveyed to him by the borers, and that the change he made in the entry was made for the very purpose of correcting what he honestly believed to be their misdescription of the substances actually found, so that the journal should set forth the absolute truth. For the reasons I have already given I think that, so far from not knowing or caring whether the statements contained in the journal were true or false, he was anxious to state the truth, and took such means as he honestly considered sufficient, for the very purpose of ascertaining what the truth was, so that he might set it forth with accuracy."

But it is also said to have been a condition-precedent that what is called a journal of bores should have contained all the information obtained by the defenders from their borers, the Cowans and Brown, and that in the case of the Cowans it did not do so. This contention seems to me to mistake the position of William Cowan, the father, and William and John Cowan, the sons. In a question between the pursuers and the defenders, or between Mr Melville and the defenders, his employers, Mr Melville was the borer and the Cowans were his subordinates. Mr Melville did not actually work the boring tools, nor did he record the results of the boreholes. But he made himself responsible for the Cowans, and acted as master-borers usually do who may have a dozen railway, mineral, and miscellaneous boring contracts in progress at one time, except that he did not visit the bores. In these circumstances Mr Melville, whatever his subordinates might report, was not only entitled but bound to see that only the results, which he honestly believed to be accurate, were recorded as the journal of the bores. For example, in the case of bore 7, Mr Melville got information from John Cowan, by letter of 8th November 1898, that he had found 11 feet of whinstone rock. Mr Melville knew this was a mistake, and that, whatever the substance was, it could not be whinstone. He was bound to correct that obvious mistake. Whether he did so accurately is a different question, which I shall afterwards consider. I may add (in reference to a contention that nothing was kept in the form of a regular journal) that a contractor has no interest in the mere form of the record; what he is concerned with is to have a convenient and accurate statement of the results of the bores, which he had in this case in the so-called journal and in the longitudinal section. Indeed, Robert Forrest, one of the pursuers, seems to attach little or no importance to the journal—"(Q) Do you recollect whether on that occasion (before the contract was entered into) you were shown a separate record or journal of the bores apart from what was shown on the longitudinal section?—(A) It was not much difference, seeing that they were indicated on the longitudinal section."

Then it is said it was a condition-precedent that the borers should be competent, and that the Cowans were not. This contention seems to me to be met by the same answer as that which I have just given. It is proved that the Cowans could work the boring tools in connection with any kind of boring; and their reports show that they were competent to obtain and record all that was necessary in a contract of this kind, namely, material for the schedule distinction between soft, broken, or loose rock and solid rock, and for the distinction between building and ballasting rock and useless rock. They did not require to make, and it is evident that their experience would not have enabled them to make, without more supervision than they got in this case, the detailed records required in mineral boring. There was nothing different in the kind of work involved in this contract

(which has more resemblance to the probing contemplated under section 83 of the Lands Clauses Act 1845 than it has to mineral boring) from what they had done satisfactorily in previous railway boring for parliamentary plans. It seems to me, as I shall presently explain, that the mistake, as I think it, made by Mr Melville, was due not to the incompetency of his subordinates, or to the faulty information supplied to him by them, but to his drawing a wrong conclusion from their presumably accurate data.

Then it was said that it was a condition-precedent that Mr Melville should have taken reasonable means to inform himself of the contents of the bores, and that in connection with bores 7 and 9 he did not do so. It was certainly a condition-precedent that bores should be taken, and in cond. 5 and in the proof by Mr Robert Forrest it was asserted that, at least in certain cases, no bores were in fact taken—a contention which, I understood, was abandoned, or at least not insisted in, by the pursuers' counsel. As the contention is now stated I think it is a reasonable one, but I do not agree that the condition-precedent was not fulfilled. Mr Melville seems to me, in accordance with the evidence of the experts examined, to have acted reasonably when, the original results having left him in doubt, he obtained samples of similar material and made check bores. I repeat that the mistake he made was in misinterpreting the material before him and innocently misrepresenting the facts to the pursuers, thereby leading them into error, which, however, as I shall explain later, was in my opinion not essential.

I am therefore of opinion that the pursuers' case, based on the defenders' failure to fulfil conditions-precedent, is not well founded, and that the pursuers are not entitled on this ground to ignore the contract.

But they also claim to be entitled to charge on the footing of ignoring the contract, on the ground that the work as executed was entirely different from the work contracted for, and that for this reason also the contract never came into operation.

2. *Work Entirely Different.*—It is not said that what was constructed was not a railway (as, for instance, if on the ground taken under the Act a canal had been constructed instead of a line of railway), or that the route was altered so as to involve material to which the bores taken would be no guide, or that material was encountered (running sand, for example, or rock, in a contract where the bores showed nothing but clay and the schedule only specified "soft") essentially different in nature and difficulty in working from what was contemplated and provided for, or that the pursuers had unexpectedly to incur cost in procuring special workmen or special machinery. The complaints (of a familiar kind in working out such contracts, although in degree the difficulties may have been greater than usual) are, first, that a greater amount of solid rock was encountered than was expected, and second, that the unforeseen presence of Paisley water-pipes running across the line of the track not only led to delay and extra cost, but caused expense by a general dislocation of the whole works. Both these elements would be for the arbiter to consider—the first as an answer to any claim by the defenders for penalties for delay, and the second under the head of "extras" if the pursuers thought the extra payments already made by the defenders inadequate.

(*a*) *Bores.*—If any circumstances could warrant either employers or contractors in ignoring the terms of a contract because the ground had turned out entirely different from the anticipation reasonably created by bores taken by the employers and referred to, as here, in the contract, I do not find any such circumstances here. The nature of the undertaking, as well as the terms of the contract, demonstrate that it involved hazard on the one hand to the employers of having to pay much more than the value received, and on the other hand to the contractor of incurring heavy loss. But I cannot proceed on the assumption that in fact there was either the immensely increased amount of solid rock alleged by the pursuers beyond that contained in the schedules, or that even if there was, its presence necessarily resulted in the large loss now averred. That Mr Melville paid as rock for large areas of what had been scheduled as soft is proved, and this may be fairly held to show that the material so paid for was much more costly to take out than was expected. But in view of "hard black blaes," which is as hard although not as solid as many rocks, being journalised (although it is only "black blaes" in the longitudinal section) under that name and scheduled as "soft," it does not follow that the material thus paid for as rock was as a whole actually "solid rock" in the sense of the contract, although it may have had posts of solid rock running through it. As to resultant loss, the evidence suggests that it may turn out that the pursuers had themselves to blame for much of the loss said to have been incurred. I shall deal later with the precise relation of the alleged loss to the work as a whole, when considering the question of innocent misrepresentations alleged to have induced essential error. I think the facts there dealt with are relevant to the present issue, although it is, no doubt, true that on the question of entire alteration of work attention cannot be confined only to bores (7 and 9) challengeable on the ground of misrepresentation.

On the question of misrepresentation the pursuers sought to make a separate point of the existence of boulder clay in the Castle Semple cutting, which it is said none of the bores in that cutting disclosed. This point seems to me inseparable from the "rock" and "soft" question. Mr Blyth says—"Boulder clay is invariably dealt with as soft. That is about as stiff as anything to take out; it generally requires to be blasted." It is not suggested that the defenders made any misrepresentation in regard to the existence or amount of this substance.

(*b*) *Paisley Water Pipes.*—On the question of fact I do not think the dislocation of the work alleged to have been produced by this cause, so far as is proved to be neces-

sary, resulted, in any reasonable sense, in entirely altering the work contracted for.

If the law involved in the opinions of the learned Judges in *Bush's* case (reported only in Hudson on Building Contracts, vol. ii, p. 118), refusing to disturb the verdict of a jury, is sound, and is applicable to Scotland, the facts in that case were entirely different. It is sufficient to quote, from the judgment of the Master of the Rolls, the statement of what his Lordship took to be the plaintiff's case — "The result of that, if it is true, is this, that the original contract is made with regard to a different subject-matter from the subject-matter which was dealt with by the parties. If that finding stands, then the condition of things with which the parties dealt ultimately was so very different from the condition of things with regard to which the original contract was made, that the circumstances with regard to which the original contract is made have ceased to exist." In *Bush's* case every part of the work was affected by the change from summer work to work in winter.

But if, contrary to my opinion, the pursuers are entitled to ignore the contract either on the ground of the defenders' failure to fulfil conditions-precedent or on the ground of the work being entirely different from the work in the contract, it necessarily follows that the defenders can obtain no benefit from the protecting, any more than from any of the other, clauses in the contract.

If, however, the pursuers are not entitled to ignore the contract as never having had any application, they say they can treat it as rescinded.

II.—*Are the pursuers entitled to treat the contract as rescinded?*

The pursuers' claims based on fraud having been negatived by the House of Lords, the only other ground of rescission is essential error induced by the misrepresentations of the defenders. The plea as originally stated may or may not have been intended to cover the case of innocent misrepresentations, as an alternative to a case of fraudulent misrepresentation, but, in any view, it must now be so treated and limited.

The law might have recognised three classes of misrepresentation, and might have assigned different legal effects and remedies to each—first, fraudulent misrepretation, second, misrepresentation, careless and negligent, but not so careless and negligent as to be equivalent to fraudulent misrepresentation, and third, innocent misrepresentation, with no element of carelessness or negligence. But it was admitted that there is no legal distinction between the second and the third, although in a certain sense there is fault in the one case and not in the other. The view of the law was thus expressed by Lord Adam in *Wood* v. *Tulloch*, (1893) 20 R. 477—"As the misrepresentations are not said to have been fraudulent, they must be assumed to have been innocent statements of the defender's honest belief." Therefore even if the Court think the alleged misrepresentations by Mr Melville were careless and negligent (short of fraud), no remedy can be given to the pursuers in respect of them different from what would have been given had they been associated with the most scrupulous care. I shall therefore use the expression "innocent misrepresentation" and ignore the element of carelessness, it being in law indifferent whether it existed or not so long as it is not equivalent to fraud.

It was further admitted, first, that there is no case in the books in which the point was deliberately considered where misrepresentation inducing essential error, even fraudulent misrepresentation — *Smyth* v. *Muir*, (1891) 19 R. 81—was allowed to afford a remedy without it being possible to give *restitutio in integrum*—that is to say, as Lord M'Laren puts it in his edition of Bell's Commentaries, vol. i, p. 466, note, "returning things to their original position," although it may be in a condition diminished in value or even worthless at the time — *Adam* v. *Newbigging*, (1888) 13 A.C. 308; second, that to warrant a remedy the error induced must be so essential, in the sense of grave and far-reaching, as to induce the reasonable conclusion that but for its existence the contract would, or at least might, not have been entered into; and third, that (except in two cases, the one statutory and the other at common law, which have no application to the present case) the only remedy which the law gives for innocent misrepresentation (careless or not careless) is rescission of the contract and not damages for the breach of it—*Manners* v. *Whitehead*, (1898) 1 F. 171.

I shall first deal with the question of restitution. In this case *restitutio in integrum*, in the ordinary application of that expression, is of course impossible. But it was contended that the ordinary rule ought not to be applied in a case like the present, where it was only after the work began that the misrepresentation could be discovered. At first sight this contention seems reasonable. But it ignores the basis on which a remedy is allowed against an innocent misrepresentation, and the fact that while the law provides a remedy in every case where there is fraudulent misrepresentation, the remedy is limited and conditioned in the case of innocent misrepresentation. An innocent misrepresentation may arise in many ways —for instance, from a clerical error, from forgetfulness, from the use of ambiguous language, from neglect to obtain sufficient information and from a conclusion from consequently insufficient premises, or from the employment of an apparently competent agent or messenger who misapprehends his instructions. In these cases the person responsible for the misrepresentation, being considered innocent, has done no legal wrong. Innocence is incompatible with fault; therefore actions of damages which always involve fault are excluded. But it is considered reasonable that the misrepresenter should not profit by his misrepresentations, however innocent, provided always his own interests are safeguarded — "When a pursuer only desires to set aside a contract of sale on the ground of innocent misrepresentation, he may obtain relief, but only on

condition of making *restitutio in integrum*. While the other party may thus be deprived of the benefit of a bargain which he considers advantageous to him and is desirous of retaining, yet he receives compensation in the shape of restitution" — *per* Lord M'Laren in *Manners* v. *Whitehead*.

But the defenders' interests will not be safeguarded, and the defenders will not be compensated, unless they can be restored to the position they occupied before the misrepresentation, and that for two reasons — first, because they never would have entered into a contract for payment *quantum meruit*, and second, because if it be assumed that the Railway Company had known that the construction of the railway line would cost them £378,254, instead of the contract price of £243,090, a difference of £135,000, it may reasonably be inferred that it would have affected their plans, and induced them to recast the details, and cut down the costs of their undertaking, except those that were absolutely indispensable. It seems to me that the same reason, namely, absence of fault, which excludes actions of damages for innocent misrepresentation, leading to essential error, makes restitution indispensable. It follows that a works contract, where a substantial part of the work has been executed, cannot be rescinded on the ground of innocent misrepresentation, because *restitutio in integrum* is impossible. The suggestion that in a case of this kind restitution can be made in the shape of money or money's worth is fallacious. It is the pursuers who must make restitution if they are to get rescission of the contract, and they are not proposing to restore in any shape whatever. Instead of restitution they propose a complete subversal of the whole relations between the parties, to the serious detriment of the defenders.

I am not moved by a suggestion thrown out by the pursuers' counsel in the effort to meet the objection of unfairness to a person who has in the eyes of the law done no wrong. He suggested that in the end the pursuers might possibly not be found entitled to ordinary profit but only to be recouped for loss. But neither principle nor authority was stated for invoking the law of recompense in a question of essential error and *restitutio in integrum*. Nor was I impressed by a proposal, foreshadowed in cond. 4, to deal with the contract as severable and to treat the charges as inapplicable while allowing the other stipulations to stand. This contract seems a typical instance of an agreement, the provisions of which must stand or fall together—*Sheffield Nichol Company*, (1877) 2 Q.B.D., *per* Lush, J., 233.

I am therefore of opinion that the pursuers are barred from asking rescission of the contract by their inability to give *restitutio in integrum*.

Suppose this view is unsound, the questions remain—first, was there innocent misrepresentation on the part of the defenders; and second, if there was, did it result in essential error warranting rescission of the contract at the instance of the pursuers?

So far as bores 7 and 9 are concerned, I agree with your Lordships that there was misrepresentation. I differ from the resulting conclusion at which you have arrived, because I think that the error thereby induced was not essential in the sense of giving the pursuers a right to reduce the whole contract. The question is a difficult one. As Lord Blackburn puts it in *Kennedy* v. *Panama Mail Company*, (1867) 2 Q.B. at page 588—"The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." But in considering this question the distinction must be kept in view which the same learned Judge draws in the previous paragraph of the same opinion—"There is a very important difference between cases where a contract may be rescinded on account of fraud and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained; it is enough to show that there was a fraudulent misrepresentation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an honest misrepresentation or misapprehension, it does not authorise a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration."

Two courses were open to Mr Melville in connection with the bores actually taken by the Cowans, for which he was directly responsible. He might either have given the contractors the information about the bores as he got it from the actual borer, with or without observations by himself, or he might have put the information into convenient shape so as to convey what the borer truly meant, although not exactly in the language used by the borer. He took the latter course, as I think he was entitled, on one condition, to do. That condition was that his reproduction was accurate. It seems to me that the information got from the borer in regard to bores 7 and 9 left it doubtful whether the "black ban" in the case of bore 7, and the "black band" in the case of bore 9, interpreted and stated by Mr Melville as "hard black blaes" in the case of bore 7 and as "black blaes" in the case of bore 9, and classed by him as "soft," should have been so interpreted, stated, and classed. The practice to treat all blaes as soft seems sufficiently proved, although the question should have been directly raised in the cross-examination of the pursuers' witnesses, and it would have been more satisfactory if the defenders had led evidence on this point from contractors. Apparently in classing certain hard material as "rock" or "solid rock," and other hard material as "soft," regard is had not only to the hardness as affecting the mode and difficulty of working, but also as to whether

the material will be of value for building or ballasting purposes—and blaes, which in many cases is hard but not solid, is of no value, or little value, for either of these purposes. The contractor was informed by the documents shown or available to him that all blaes, whether called "black blaes" (bores 8, 8A, 9, 53, 54, and 55), or "hard black blaes" (bore 7), was being treated as "soft." And I keep in view that the mere fact that material is hard, and may to a greater or less extent require blasting, does not necessarily imply that it is to be classed as "solid rock." But if, as in the case of bores 7 and 9, "black ban" or "black band," in addition to being reported in bore 7 as "a hard black substance," is referred to in both cases by the man actually making the bores as "rock," it appears to me either that more inquiry should have been made beyond obtaining samples from a bore 800 yards from bore 7 to ascertain into which category the material fell to be scheduled, or that, if Mr Melville did not choose to make more inquiry, his information was such as ought to have certiorated him that some at least of the material which he scheduled as "soft" fell to be scheduled as "hard." Mr Melville either drew a conclusion from insufficient premises, or he misrepresented the results of these bores in either case innocently. That his subordinate in reporting whinstone rock was manifestly wrong in calling the rock found by him whinstone, did not entitle Mr Melville to think he was also wrong in describing the substance as rock. The fact that Cowan thought the substance whinstone showed that, whatever it was, it must be of a very dense and therefore solid nature. The explanation of clerical error cannot be accepted as proved when Cowan was not asked about it in the witness-box. No doubt it might still have happened that Mr Melville's representation, although not the natural deduction from his information, was in fact accurate. Here the misrepresentation being proved, the *onus* of proof was on the defenders. I do not think they have discharged this *onus*. Their contention may be correct, but looking to the evidence led by the pursuers and to the extraordinary variety of material in the ground, I do not think the defenders' case is established by the rate of progress of the works shown by the waggon lists, or by the progressive sections, or by the material found at the date of the proof at the sides of the cuttings, or by the slope at which the cuttings stand or were intended to stand.

But, as already stated, I do not think this innocent misrepresentation of a "soft" material for a "hard" led to any essential error on the part of the pursuers. It is common ground that the accuracy of the bores was among the essentials of the contract. The defenders did not defend their statement in answer 5—"The journal of bores mentioned in this article formed no part of the contract, and the pursuers were not entitled to rely on it in any way." But it does not follow that every inaccuracy in the bores, however insignificant, and however small a number of bores it may have affected, will produce essential error in the other contracting party warranting rescission of the whole contract. In *Wood* v. *Tulloch*, already quoted, Lord Adam, referring to the innocent misrepresentations of which the pursuer complained, said—"Although they may have affected his mind to a certain extent, they cannot be said to have done so to the extent of inducing essential error."

In this connection it is necessary to compare the case on the bores originally made by the pursuers with the case now presented. The original case of misrepresentation in regard to all the bores except one in the three cuttings has shrivelled to a complaint about bores 7 and 9. Yet the pursuers still speak in a general way about the material in "the bores" being misrepresented, and rely upon evidence which proceeds on the footing of all the bores in all the cuttings, or most of the bores in most of the cuttings, being inaccurate. The matter stands thus: Over the whole contract of 12½ miles there were 65 bores, of which Brown, the professional borer, made 47, and William Cowan senior and John Cowan, railway employees, acting under Mr Melville's instructions, made 3 and 15 respectively. Brown's bores being made by an admittedly competent man, whose results were recorded without alteration, are unchallengeable on the head of misrepresentation. Therefore for the present purpose the 65 bores are reduced to 18.

Taking the matter in another way, the pursuers' challenge is limited to the bores taken at Kilbirnie cutting, Whirlhill cutting, and Castle Semple cutting. Out of the 65 bores 23 were in these cuttings, namely, 8 in Kilbirnie, 11 in Whirlhill, and 4 in Castle Semple. But of these 23 bores 5 were made by Brown. Therefore, again, the number for consideration is 18.

In cond. 5 the pursuers say—"Of 44 (23) bores represented by the defenders to have been taken in the three cuttings in question, 22 are substantially inaccurate, and a large proportion of these are entirely false and misleading. Reference for illustration may be made to bores 8, 16, and 27. . . . Further, in a number of instances the result of bores taken by the defenders and set forth in said journal is in the plans and schedule falsely and fraudulently set forth, hard shale, blaes, and rock found by the bore being therein represented and scheduled as "soft," and *vice versa*. Examples of this are to be found, *inter alia*, in bores, 7, 8, 8A, and 9." Seven bores are thus referred to as illustrative examples of false and misleading bores.

In opening the case for the pursuers their counsel intimated that he proposed to challenge the following 22 bores, namely, 7, 8, 8A, 9, 10, 11, 11A, and 12 in Kilbirnie cutting, being all the bores in that cutting except bore 6; and in Whirlhill cutting bores 13, 14, 15, 16, 16A, 17, 18, 18A, 19, and 20, being the whole bores in that cutting; and in Castle Semple cutting bores 26, 27, 28, and 29, being the whole bores in that cutting. He added that he laid chief stress on bores 7, 8, 8A, and 9 in Kilbirnie cutting, bores 14, 16, and 18

in Whirlhill cutting, and bore 27 in Castle Semple cutting, being 8 in number. He added that his strongest point arose on bore 9. In the case of five bores thus challenged by the pursuers' counsel in opening the case, namely, bores 13, 15, 18A, 20, and 26, it will be found that all these bores are actually accepted by the pursuers as "correct." Further, referring to bore 18, another of those not only challenged by pursuers' counsel in opening the case, but put forward by him as one of those on which he laid chief stress, Mr Robert Forrest, one of the pursuers, deponed—"There was not much wrong with bore No. 18. In that case the Railway Company showed me 1 foot of soil, 9 inches yellow clay, 4 feet 9 inches dark clay, 9 inches broken whin, and 32 feet whinstone. In fact I found 2 feet 6 inches clay, and all the rest whinstone. We did not consider that that was anything out of the ordinary and we said nothing about it. At the same time it showed that the borer (Brown) did not know what he was doing, as he might have seen the whinstone sticking through the ground. If we have only 2 feet 6 inches of clay, or 5 feet of clay, that does not make much difference to us, because we cannot use the digger. That had to be taken off by hand. In regard to any difference in the measurement I would have to take my chance." Bore 14, another bore on which chief stress was to be laid, was not further alluded to. In the end pursuers' counsel made no detailed reference to any of the 22 bores enumerated by him except bores 7, 8, 8A, 9, 16, and 27, the two latter being taken by Brown, a professional borer, and passed on by the defenders unedited.

Looking to the importance of the bores as the basis of the contract, and to the practical impossibility of the contractor checking or supplementing the results supplied to him by the defenders, I do not doubt that innocent misrepresentation as to the relative proportions of rock and soft materially affecting, to the contractors' serious prejudice, the whole 65 bores, or confining attention to bores in the three cuttings, the whole 23 bores in the cuttings, or even the 8 bores above mentioned (seeing that these 8 are scattered over all the cuttings), would have produced essential error entitling the pursuers to rescission of the contract, and I accept the pursuers' evidence based on one or other of these views. Mr Robert Forrest, for instance, deponed—"I told Mr Melville that we could not carry out the contract at the price, that the stuff was not as represented, and that everything was grossly misrepresented." The case is very different when the proved misrepresentation affects only two bores in the same cutting, and these within 500 to 600 yards of each other. Without evidence it is not obvious that if Mr Melville had journalised and scheduled "rock" in both these cases instead of "hard black blaes" in bore 7, and "black blaes" in bore 9, the contractors' views of the contract as a whole would have been in any way affected. In the proof I find no evidence bearing on that question. The pursuers have directed their proof to an assumed state of facts, which they have failed to establish, and have neither made averments nor led evidence nor cross-examined the defenders' witnesses directly on what seems to me the real question in the case, namely, suppose Mr Melville had entered "rock" instead of "hard black blaes," and "black blaes" in his report of bores 7 and 9 respectively, and adjusted his schedule accordingly, what effect, if any, would that have had on the contractors? As Lord Abinger said in *Cornfoot* v. *Fowke*, 6 M. & W. 378, "there must be the assertion of a fact on which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it at all, or at least not on the same terms."

It might have been different if Mr Melville had kept back the discovery of such an obstacle as old mineral workings, or some material like running sand, or some specially intractable material which had been found by him in these bores, and the presence of which in the ground it so happened the other bores had failed to disclose. But it appears that between pegs 45 and 67, in which space bores 7 and 9 were sunk, 41,765 cubic yards of "solid rock" are scheduled, as well as 275,560 of "soft." This entry may be contrasted with the results between pegs 6 and 13, and five other similar cases, where "soft" only is scheduled.

Not unnaturally the pursuers themselves (and the fallacy was not absent from their counsel's speeches) fail to keep in mind the distinction between their being misled by the defenders' misrepresentations as to the contents of the bores (which did not go down to formation level—a fact which vitiates the pursuers' comparisons of the whole material found at and near a bore with the contents of a bore), and their being misled by the failure of the bores to give them a fair idea of the strata between the bottom of the bore and formation level and of the intervening strata. The proof is conflicting, but it may well be that the pursuers were misled by the bores and their calculations upset, because the underlying and intervening strata contained more solid rock, or at least material more difficult to work by the digger than the contents of the bores could have led one to expect. In any view of the defenders' action in calling certain material "rock," in treating it as such, and in paying large sums to the contractors for it either as rock as the contractors say, or "as for rock" as the defenders say, this seems probable. But even if the contractors' representation of that transaction must, in view of the contemporary documents and of the unexplained absence of the defenders' chairman and general manager to confirm Mr Melville's statement, be taken as correct, this of itself does not prove that the bores were not accurately taken and accurately reported. It only establishes a not infrequent experience that the bores were not reliable guides to the rest of the ground unbored. The case might have been reversed, and the defenders might have been required to pay a sum largely in excess of any value received by them. And on the assumption that a large loss has been suffered, the whole alleged loss might have

happened although the bores had been taken with the highest skill and reported with perfect accuracy. In almost all contracts of this kind parts of the ground are found harder, and therefore (except in the case of valuable stone) dearer, and other parts turn out to be easier, and therefore cheaper to work than contemplated. The contractor hopes that on a balance the easier parts will be much more extensive than the hard, and he will make a large profit. The opposite may have been the case in this contract. But the mere fact that the underlying and intervening strata turned out different in several or in many instances, or even all over the contract, from what the bores foretold as probable, proves nothing.

But if, contrary to my opinion, misrepresentation is proved and essential error is proved, the protecting clauses applicable to bores will not avail the defenders. These seem to be designed as an answer to claims of damage.

Accordingly I hold that the pursuers are not entitled to rescission of the contract on the ground of essential error, caused by the defenders' innocent misrepresentations in connection with the bores, first, because although innocent misrepresentation by Mr Melville is proved with regard to bores 7 and 9, it is not proved that essential error was caused thereby, entitling the pursuers to rescission of the contract, and second, because, if essential error is proved, the pursuers are barred by their inability to give *restitutio in integrum* from the only remedy open to them, namely, rescission of the contract.

I come to the same conclusion in regard to the alleged dislocation of the pursuers' whole work caused by the discovery of the Paisley water-pipe running across the railway and the delay thence arising, the necessity for overland routes, and the construction of bridge 12A.

In this case, however, I do not find anything proved in the nature of a misrepresentation. The defenders had, no doubt, the parliamentary map and book of reference in their possession, which, had they read the two together, would have enabled them to ascertain the existence of the water-pipe. It is not alleged that they did consult this information, and in these circumstances I do not think the facts amount to misrepresentation. But suppose they do, the evidence does not satisfy me that this question can, in any view, go to the root of the contract, as in one sense the question about the bores undoubtedly does. Therefore I cannot affirm essential error on this head any more than on the question of the bores.

There remains the alternative claim for damages founded on breach of contract in respect of the bores and bridge 12A and also certain water-courses.

III.—*Are the pursuers entitled to damages?*

The proof allowed to the pursuers by Lord Salvesen's interlocutor of 14th July 1908 was "of their averments so far as bearing on their third plea-in-law." Damages form the subject of the fourth plea-in-law. The defenders contended that no proof on the question of damage was before the Court, and in these circumstances objected to the competency of using the same set of facts for alternative purposes. They further pointed out that there was no conclusion for damages and no relevant averment of loss. Technically sound as these objections are, I think, looking to the history of this case, they should be overruled and the question of damages considered on its merits.

In regard to the bores, I have already indicated my opinion that the defenders have not broken any provision of the contract, express or implied, relative to bores. The *onus* in this part of the case being on the pursuers, I am further of opinion that the pursuers have failed to prove any material inaccuracy in any of the bores, and that on similar grounds to those which induced me to hold that the defenders where the *onus* was upon them had not discharged the *onus*. Their attempt to locate boreholes 8 and 16, which they say they opened and found, contrary to the journals, to be in rock, seems to me to have failed. I say the same about the alleged finding of a broken jumper in borehole No. 8. The jumper, which may have been used for other purposes, is not produced, and the borehole is not satisfactorily located. If, however, any material inaccuracy in any of the bores has been proved, I am of opinion that on a just construction of the protecting clauses the defenders are exempted from liability for any such inaccuracy or omission.

The pursuers complained of the severity of these and other clauses in the specification, and asked that they should be construed with special strictness. But neither separately nor in combination do these clauses seem different from those usually present in contracts of this kind. There is nothing in them to take the case out of the ordinary rule, thus expressed by Lord President Boyle in *Smaill* v. *Potts*, 9 D., at p. 1045—"The contract is subject to a rational, not a judicial construction, but if it is conceived in plain and explicit terms it must form the rule by which the rights of parties are to be fixed."

In regard to bridge 12A I do not find any breach of any of the stipulations of the contract, express or implied. Under the powers of their Act the defenders were in a position, subject to the conditions specified in the Lands Clauses Act 1845, to give possession to the pursuers of all necessary ground, despite the presence of the Paisley water-pipes. The construction of the bridge was not and could not be expressly provided for in the contract, but provision was made for extras, under which the pursuers have been paid £5000 in connection with the bridge, and if this sum is inadequate for construction the matter can be brought before the arbiter. I further think that this is a typical case for the application of the protecting clause covering "inadvertent omissions." Water-pipes are expressly mentioned in the contract and in the specifications and in the incorporated Act of 1845. A similar point arises with bridges, of which the contract embraced more than a dozen,

a number increased by one in respect of bridge 12A. No case was cited in which the operation of omission clauses has been limited to small omissions.

In regard to the water-courses, these were as visible to the contractors and as well known to them as to the defenders. If, however, there might have been any obligation on the defenders such as is alleged, the case seems to me to be covered by the protecting clauses.

Nor can I see any ground for claiming damages in respect of the boulder clay in Castle Semple. The bores, which did not disclose it, were taken by a professional borer and were not edited. The defenders were unaware of its existence, and committed no wrong against the pursuers. Besides, the case is covered by the clauses as to omissions.

A point made about some undefined amount of delay in giving plans in connection with 12A bridge and the water-courses is not on record, and is too vague to be dealt with as a substantive ground of damage.

On the whole matter I am of opinion that the defenders are entitled to absolvitor.

The Court sustained branches (*b*) and (*e*) of the pursuers' third plea-in-law, repelled branches (*c*) and (*d*) of said plea, found that the pursuers were entitled to be paid for the work executed upon a *quantum meruit* basis, found *separatim* that the defenders were in breach of the contract in question, and that the pursuers were entitled to damages in respect thereof; but standing the above judgment, found it unnecessary to dispose of the pursuers' fourth plea-in-law, and remitted the cause to the Lord Ordinary for further procedure.

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

Counsel for Defenders—Macmillan, K.C. —Hon. W. Watson, K.C. Agents—John C. Brodie & Sons, W.S.

Tuesday, February 3.

FIRST DIVISION.

[Lord Dewar, Ordinary.

SUZOR *v.* BUCKINGHAM.

Reparation—Master and Servant—Slander —Privilege—Malice—Averments—Facts and Circumstances Inferring Malice—Relevancy.

A bookkeeper and cashier, who had been in the employment of a clothier, to whose shop a tea-room was attached, raised an action of damages against the manager of his former employer. Pursuer averred that certain discrepancies having occurred between the records of the returns from the tea-room and the cash, he was summoned on 3rd July 1913 to the private room of his employer, when the defender accused him of having taken the money and defrauded his employer, and that on the evening of the same day he was dismissed; that on 5th July the defender came to his house and again accused him of having taken the money; that the defender made no inquiry into the matter; that the shortages occurred and were ascertained before the money passed through the pursuer's hands; that some months previously the defender's attitude to the pursuer had changed, that he had ceased to come to his house, and took every opportunity of showing his ill-will; that the defender had urged their employer to get rid of the pursuer, and was anxious to find an excuse for getting him dismissed; that he had made these accusations maliciously to gratify his animus against him.

Held (1) that the pursuer's averments did not disclose that the second occasion, July 5th, was a privileged occasion, and (2) that even if it appeared at the trial that said occasion was privileged, yet the pursuer had made averments relevant to infer malice and to displace the privilege.

Samuel Suzor, cashier, Stirling, *pursuer*, raised an action of damages for slander against Sydney Buckingham, manager to Messrs M'Lachlan & Brown, clothiers, Stirling, *defender*.

The pursuer averred — "(Cond. 1) The pursuer was for several years cashier and bookkeeper to Messrs M'Lachlan, Pepper, & Company, Limited, Glasgow, until that company was wound up in 1909. He also acted as private secretary to the late Andrew M'Lachlan until his death in 1910, and assisted in the winding-up of his affairs after his death. On the invitation of Mr John M'Lachlan, a brother of the said deceased Andrew M'Lachlan, the pursuer in February 1911 entered the employment of Messrs M'Lachlan & Brown, milliners, &c., at 8-12 Murray Place, Stirling, as bookkeeper. The said John M'Lachlan also carries on a tailor and clothier's business in Stirling at 59-63 Murray Place there. Said last-mentioned business is under the management of the defender. The pursuer and defender were on friendly and intimate terms till about the beginning of 1913. They visited regularly and frequently at each others houses, and when the defender called at the millinery department he made a point of chatting with the pursuer. In or about January 1913 the defender's demeanour towards pursuer entirely changed. He discontinued visiting at the pursuer's house, avoided pursuer, and only spoke to him when he had occasion in connection with business matters. The pursuer believes and avers that the defender became jealous of the confidence that the said John M'Lachlan reposed in the pursuer, and conceived a scheme in his own interest to undermine said confidence. (Cond. 2) The pursuer's duties consisted at the first of writing up the books of the business at 8-12 Murray Place, Stirling, including the said John M'Lachlan's private cash-book. About six months later the pursuer was transferred to the counting-house, to take in addition a