of a smaller one which was formerly on the holding and which was apparently taken down. The facts otherwise are the same as in the case of M'Kenzie. A further contention in law was put forward, but was only faintly argued, that because the appellant was a yearly tenant of the house and ground, section 4 of the 1895 Act did not apply to him. I am unable to take this view. The lease under which a tenant had made or acquired erections or structural improvements on the subjects let may be of any duration, provided it does not exceed twenty-one years. It is true that in an urban subject a tenant for only one year is not likely to make structural additions or improvements on his house, on the footing that these will at once become the property of the landlord on the termination of the one year's tenancy; but in Arran, although the small holdings were in theory held only from year to year, there was practical fixity of tenure, and now the appellant has obtained a legal fixity of tenure under the provisions of the Small Landowners Act 1911. In other respects the case seems to me to be ruled by our decision in the case of M'Kenzie, and that we ought to affirm the determination of the Valuation Committee.

I should like to add that I think it would be a serious injustice to other small holders, whose holdings are so situated, or whose houses are of such small size that they cannot well be let to summer visitors, if we had been obliged to hold that persons like the appellants who are more fortunately placed, and who are able to embark capital in what is apparently a lucrative business, that of letting their houses to summer visitors, should not contribute to the assessments in proportion to the property which they in fact own. The result would be that, taking two holdings of equal extent and equally rented, the landholder who was unable to let his house to summer visitors, and so was entirely dependent on the cultivation of his land, would have to contribute as much to the county assessments as his more fortunate neighbour who derived an additional rent of possibly £30 or £40 by letting his house for the summer, because he had built or acquired a house that was well adapted for such visitors' requirements.

LORD CULLEN—I concur. In the case of Sym there is a specific finding by the Valuation Committee that the house "is much larger than is necessary for the agricultural requirements of the holding." In the case of M'Kenzie there is a finding that "the said addition to the house built on the appellant's holding was made by the appellant's father for the purpose of summer letting. It was not required for any agricultural purpose." In view of this finding, and of the fact that the addition continues to be put to the non-agricultural use for which it was built, I think it lay on the appellant to displace the original purpose of erection by showing that the addition has changed in character, and falls now to be regarded as merely part of a house which *in toto* is no more than a normally sized house for the holding. This he has not done. In the case of M'Bride I have had more hesitation, but I have come to the conclusion that the determination of the Valuation Committee should not be disturbed. The house, which is one of six apartments, was built in 1887 to replace a smaller one which is not said to have been insufficient for the agricultural requirements of the holding. And it is found in the case that this new and larger house was built with a view to letting the same to summer visitors. I take it that the Valuation Committee by this finding did not mean merely to refer to the mental purpose entertained by the appellant's father who built the house, but to say that the reason why the house was built on an enlarged scale was in order that the additional accommodation might suit it for the non-agricultural purpose of earning an extraneous income through summer letting. I accordingly think with your Lordships that this as well as the other two appeals should be dismissed.

The Court held that the determination of the Valuation Committee in each case was right and dismissed the appeals.

Counsel for all the Appellants—The Lord Advocate (Munro, K.C.)—Wark. Agent—James Scott, S.S.C.

Counsel for the Assessor—Constable, K.C. —D. P. Fleming. Agents—Laing & Motherwell, W.S

HOUSE OF LORDS.

Monday, January 25.

(Before Earl Loreburn, Lord Atkinson, Lord Shaw, and Lord Parmoor.)

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

(In the Court of Session, February 7, 1914, 51 S.L.R. 281, and 1914 S.C. 472.)

Contract—Rescission—Misrepresentation—Restitutio in integrum—Quantum meruit—Railway.

In 1900 a railway company issued tenders for the formation of a railway line, and in September a contract was arranged with a firm of contractors, the payment to be a stipulated lump sum. The specification included this stipulation—"*Cuttings and Embankments.*—Bores have been put down at various parts of the line, the positions of which are shown on the small scale plan, and a copy of the journals 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. . . . Of the probability of rock existing in any of the cuttings or other excavations to a greater extent than the quantity given in the detailed schedule, the contractor must judge, and also form his own opinion as to the nature of the strata, of the material in the various cuttings or excavations and in the base of the embankments, and price the quantities in the detailed schedule accordingly, as no allowance whatever will be made over the lump sum in the detailed schedule for these, although the material may turn out to be different from what is calculated and given in the detailed schedule." By the end of 1902 the contractors were aware that the material they had to deal with was very different from and more costly to treat than what they had expected and they complained—the company in fact paid them £10,000 over the stipulated amount, half then and half later. The contractors continued the work, however, and completed it by May 1905. In November 1907 they proceeded to bring an action against the company, and in preparation therefor became aware that of sixty-five bores eighteen had not been made by professional borers but by employees of the company, and that in the journals four of these were not, as returned, by such employees but as edited by the company's engineer, he having entered what he honestly believed must be meant. The engineer had also omitted four check bores which had also been put down by such employees.

Held (*rev.* judgment of the Second Division) (1) that the contractors were not in a position to demand rescission of the contract, *restitutio in integrum* being a condition of such a remedy and being here impossible; (2) that there was no misrepresentation in the journals of the bores shown being as edited by the engineer and not the actual returns made by the men boring, what the specification contemplated being the product of the responsible officer of the company, the engineer, and he having acted honestly; (3) that even if there had been shown to have been innocent misrepresentation it was not proved to be *in essentialibus* inducing to the contract; (4) that the contractors could not now be heard, in the absence of fraud, on the disconformity of the material they had had to treat with what they had expected, they having after acquiring full knowledge thereof elected to proceed with the work and completed the contract.

This case is reported *ante ut supra.*

The defenders the Glasgow and South-Western Railway Company appealed to the House of Lords. The pursuers took a cross-appeal.

Parties had agreed to refer to arbitration all questions arising out of the position of the Paisley water-pipe and the alleged delay by the defenders in supplying plans for bridges.

At delivering judgment—

EARL LOREBURN—This case has led to a great deal of litigation, and now comes for a second and, I trust, the last time before this House. It arose as follows:—The Glasgow and South-Western Railway Company no less than fourteen years ago wished to construct a branch line and advertised for tenders. Messrs Boyd & Forrest thereupon tendered, and in September 1900 contracted to make the line for a lump sum of £243,690. The contract provided in the strictest terms that the contractors were to satisfy themselves as to the strata and nature of the work. They were to see the journals of bores that had been put down, but the company did not guarantee their accuracy or that they would be a guide to the nature of the strata. A hatched brown line on the longitudinal section supplied by the Railway Company showed the assumed dividing line between what the Railway Company inferred from the journal of bores ought to be regarded as hard or as soft material, but the contractor was warned that he must judge for himself in the most explicit language.

It is better to state what happened in order of date, quite in a summary way, for Lord Atkinson's opinion in the former appeal has covered the narrative already. The contractors began work in 1900. Before long they found that the strata were much more difficult than they had expected, or than the journal of bores and the brown line on the section had led them to anticipate. By the end of 1902 they knew completely what the relevant strata really were and how far they differed from what the brown line indicated. They complained bitterly. It seems to have been a hard case. A very considerable allowance was made to them by the Railway Company, but it was not accepted as what is called in England accord and satisfaction of any legal claim if any such claim existed. The contractors continued to complain. What is important, however, is that they also continued to carry out their contract, with full knowledge of the difference between the forecast presented by the journals of bores and the sections, on the one hand, and the reality, on the other hand. In 1905 the contract was completed. Failing to agree with their adversaries, the contractors brought this action in 1907, which has now lasted seven years.

The claims are presented on the record with considerable skill, and some mental effort is needed to disentangle the real contentions. I propose to take notice only of those which have survived and may be regarded as living contentions. In the forefront the pursuers placed a charge of false and fraudulent misrepresentation in regard to the compilation of the journal of bores, against Mr Melville, the company's engineer, and the Second Division decided in favour of the pursuers on this issue, but the major-

ity, if not all, of their Lordships disclaimed the idea of imputing dishonesty. This was the sole issue upon which the Court of Session at that stage decided the case. This House held, on appeal, that dishonesty is a necessary element in any charge of fraud (whether it be dishonesty in telling what you know to be a lie, or in asserting for fact what you do not believe to be fact), and that Mr Melville was wholly guiltless of anything of the kind. So the case went to the Second Division again to decide on the other issues which they had left undetermined.

This House decides only on appeal, and we should be under a heavy disadvantage if we had here to adjudicate without the guidance of other Courts; but I am half sorry we did not then make an exception and take in hand those issues which the Second Division then left unsettled, for great expense has been incurred. The case went back, and the Second Division has now found that the contract of September 1900 was entered into by the pursuers under essential error induced by innocent misrepresentation and concealment on the part of the defenders, and also that the defenders were in breach of obligations under the said contract, and that the breaches committed went to the root and consideration of the contract. Accordingly the Second Division have decreed that the whole contract is set aside, and instead of being paid the stipulated sum of £243,690, together with whatever extra or additional work may fall to be paid for under the contract, the whole of the work begun in 1900 and ended in 1905 is to be paid for on the basis of *quantum meruit*. If this is to be so, then the charge of fraud which we had to consider on the former appeal was quite unnecessary and the former argument a mere waste of time, for here is awarded the utmost that could be inflicted as a penalty for fraud, though innocence is admitted. The representations complained of are precisely the same as those which were dealt with in Lord Atkinson's opinion—an opinion shared by all the Lords who sat with him.

I hope to be excused by that circumstance for dealing with them quite shortly now and in somewhat general terms.

Messrs Boyd & Forrest made a contract in itself rather hazardous, and their complaint as regards misrepresentation shapes itself under two heads, though there has been some confusion between the two. It is said that the work actually done was quite a different thing from what was represented by the brown line on the longitudinal section, that great quantities of hard rock had to be excavated instead of comparatively soft material, whereby the whole of the business of making the line was dislocated and immense damage ensued. A good many things might be said about this. Are we to say that when these contractors take the risk of the strata and are disappointed, the degree of their well-founded disappointment may be so great as to constitute essential error and give a right to rescind the contract? Would it give a corresponding right to the Railway Company if the whole strata turned out so soft that no one could have anticipated so absurdly easy a task for the contractors? Does the law say that when *restitutio in integrum* is impossible, the whole work having been completed two years before the action was commenced, one party to the contract who has been induced to make it by admittedly innocent misrepresentations can claim damages, and thus in effect substitute for the contract price whatever price the Court may think reasonable?—I assume for argument's sake that they were in fact innocent misrepresentations. I should answer these queries in the negative. I am not however writing a treatise on the law, which indeed has often been laid down, but deciding the rights of particular litigants. It is enough to say that Messrs Boyd & Forrest knew by the end of 1902 all about two things. They knew the representations by which they had been induced to make the contract, and they knew the reality about the physical condition of the strata. Knowing both, they elected to proceed and to complete the contract. After that they cannot rely upon the discrepancy between those representations and the reality as a basis of any claim either for rescission or for damages, whether it be called recompense or compensation or by any other form of words.

Mr Clyde did not in the end maintain the contrary, though I think in some of the judgments in the Court of Session the view I have expressed was not wholly shared. But he relied upon a different head of representation altogether. He said in effect—"My clients relied upon the journals of the bores which they were entitled under the contract to see, and these journals did not contain a record of all the bores which were in fact taken, nor did they accurately represent all the bores which they purported to record. There was a representation, and indeed an implied contract, that the journals should be both complete and accurate, and it was not discovered that they were neither complete nor accurate till after the recovery of documents in this action. This was a hitherto unknown cause of action, or at all events a most material fact unknown to the contractors when they elected to complete their contract."

Now this is the most plausible way of putting the contractor's case, and it caused me some anxiety in the course of the arguments. All of us would be perfectly ready to reconsider any opinion on a question of fact which might be represented in a different aspect upon an argument raising a fresh issue of law. I am not, however, able to sustain Mr Clyde's contention.

In my opinion there was not any contract, express or implied, that Mr Melville should communicate to the contractors all the letters which he received from the men who did the actual boring, nor was he bound to communicate everything that they told him. I adopt what Lord Guthrie, the dissenting Judge in the Second Division, said on this subject. The defenders were only bound to communicate the results of such bores as Mr Melville honestly believed gave a fair indication of the general nature of the ground, and were not bound to com-

municate the results of bores which he honestly thought would be misleading, or of check bores, unless in his honest opinion these check bores affected the results derived from bores taken in ordinary course. He was in effect the master borer for the incriminated bores. These journals were compiled by Mr Melville according to his judgment fairly applied for his own information and that of would-be contractors, and the contract, as I read it, means that these journals were to be accessible to the contractors, with an express notification that these gentlemen were to judge for themselves. Therefore I do not think that there was such a representation, still less such an express or implied contract as Mr Clyde founds upon. Nor does it appear that the borers were incompetent. Indeed Mr Clyde at the outset, and explicitly, abandoned this contention. It suited his argument better to maintain their competence, as he did, because he thereby magnified the impropriety of withholding what they actually reported from the intending contractors.

I further note what Lord Guthrie dwelt upon, that out of 65 bores along the whole line only four were in the end impugned as having been incorrectly reproduced in the journals. Four bores, it is true, may make a great difference, but it was necessary for the pursuers to show that, had the contractors seen the results of these four bores as reported by the actual borers, together with the check bores, it would have induced them to refuse the contract. I cannot assume that it would have been so. These borings covered only a comparatively small part of the whole ground, and I do not find it plainly stated in the evidence that if Messrs Boyd & Forrest had seen all the materials which Mr Melville had before him, the discrepancy between what he saw in the bores and letters and what he said in the journals would have influenced them in tendering. In truth the real case of the pursuers rested upon the discrepancy between the forecast actually represented to them by Mr Melville and the reality actually found in the working, not upon any difference between what the borers' letters told him and the conclusions which he drew from them. I do not enter upon the question how far this was an essential error which would have justified rescission, or how far it was a cause of action in itself, because what I have said is enough to dispose of the point. These contractors continued their contract when they knew the statements which had induced them to contract and the reality which they found in working on the spot. What they learned afterwards was merely an explanation of the way in which Mr Melville had been led into error, so far as it was error.

There was a claim in respect of a Paisley water pipe and some other watercourses, but these were very properly made the subject of an agreement for reference to an arbitrator. They do not affect the case argued before us, and all the other points raised in the record have been either abandoned by the pursuers or properly decided against them. In my opinion this appeal succeeds, and the defenders are entitled to succeed on all the issues. The agreement between them to which I have just adverted stands upon the consent of parties, and is unaffected by the Order which I propose.

I will part from this case by expressing my satisfaction at learning that the Railway Company did in fact pay the contractors an additional sum of money in respect of excavation. It does seem to have proved unexpectedly difficult work, but I am far from suggesting that any further payments ought to have been made. Of one thing I am sure. It is wrong to charge fraud when you cannot prove it, or to describe by that exceedingly ugly word conduct which when challenged you cannot maintain to have been dishonest. When an accusation of that kind is made those who make it must look to their bare legal rights.

LORD ATKINSON—I concur. The facts have been sufficiently stated by my noble and learned friend who has preceded me.

The learned Judges of the Second Division of the Court of Session have, by the interlocutor appealed from, awarded to the pursuers precisely the same relief, estimated in money, though not styled damages, as they did when they decided that the agreement of the 17th September 1900 had been produced by the fraud of Mr William Melville, the engineer of the defenders, for whose conduct and action they were responsible. Then, as in the present instance, they decreed that the pursuers were entitled to be paid for the work they had executed on the basis of a *quantum meruit*. To hold otherwise when fraud was proved would have been to decide in effect that the defenders should profit by their own wrong, but now that fraud has been negatived different considerations apply.

The special contract under which the works were in this case executed was completely performed on both sides by the month of May 1905. Two and a-half years after that date the pursuers, who executed the works, instituted an action to have this special contract set aside on many grounds, and on the 7th February 1914 succeeded in obtaining an interlocutor setting it aside on the ground of innocent misrepresentation.

Now where a special contract such as that of the 17th September 1900 has been entered into to execute for a lump sum the works therein mentioned, the right to be paid on a *quantum meruit* does not arise out of that contract, but out of a new contract springing into existence on the extinction of the old one. The two contracts cannot co-exist—*Selway* v. *Fogg* (5 M. & W. 83). This new contract must be proved by those who rely upon it. The mere taking advantage of or enjoying the benefit of the work does not, as it appears to be assumed in this case, necessarily prove its existence. It does prove its existence if the thing takes place under circumstances from which a promise to pay may be implied. In cases dealing with works done on real property

no such implication arises in most cases, since it is impossible for the owner of the land to rid himself of the works unless he destroys them, which would in many cases be as impossible as it is in the present case, or gets rid of the land on which they had been executed, which in this case the defenders cannot do.

In *Pattinson* v. *Luckley* (L.R., 10 Ex. 330-334) Lord Bramwell points out this difference. He said—"In the case of goods sold and delivered it is easy to show a contract from the retention of the goods, but that is not so where work is done on real property."

In *Sumpter* v. *Hedges* (1898, 1 Q.B. 673), which was decided on the authority of *Munro* v. *Butt* (8 E. & B. 738), Collins, L.J., as he then was, at page 676 of the report, laid down the law thus—"There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a *quantum meruit* from the defendant's having taken the benefit of that work, but in order that that may be done the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. It is only where the circumstances are such as to give that option that there is any evidence to found the inference of a new contract. Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to found the inference of a new contract. . . . The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference." *Forman & Company Proprietary* v. *The Ship "Liddlesdale"* (1900 A.C. 190) illustrates the principle, and having regard to these and many other authorities to the like effect, I am inclined to the opinion that the entering into a new agreement to pay the pursuers for the work they have done on a *quantum meruit* basis has not been proved in this case. The law of Scotland does not, as far as I have been able to ascertain, differ from the law of England on this subject. Having regard to the view I take upon the other questions raised in this case, it is unnecessary for me to pronounce a definite opinion on this point. I wish, however, to guard against being supposed to acquiesce in the assumption that the mere use and enjoyment of the works executed proves in such a case as the present the entering into a contract to pay for them on a *quantum meruit* basis.

I think that Lord Guthrie in his able and convincing judgment has conclusively shown that the misrepresentation complained of only had reference to four out of the sixty-five bores made, namely, bores Nos. 7, 8, 8a, and 9, which between them extend along a distance of about 800 yards on the course of a railway line 12½ miles in length.

The erroneous forecast which it is alleged the journal caused the pursuers to make led to their having to excavate close on 70,000 cubic yards of material different from what they anticipated, and more difficult and costly to excavate. In consideration of this work, the character of which was realised in the year 1902, they were paid in all over £10,000. Half of this sum was paid at the time the discrepancy was discovered, and half when the work was finished. On the occasion of the first payment they elected to proceed with the work under the old contract. There is no clear evidence that the contractors would not have undertaken the work at the contract price even if the true character of the strata to be excavated had been correctly stated in the journal of bores, much less if they were to receive £10,000 more than the contract price. The claim the pursuers put forward on the authority of *Bush* v. *Whitehaven Trustees* (Hudson's Building Contracts, 118), and such like cases, to have this contract of 17th September 1900 set aside on the ground that the work they had to do and did was wholly different from that which they had contracted to do, I think wholly fails. The time they should have insisted upon that point was when they discovered the discrepancy, not when they had finished the work and received an additional £10,000 because of the discrepancy. Their cross-appeal therefore cannot, in my view, be supported.

The rest of the case depends primarily upon this question: Were the plaintiffs permitted to peruse and examine a document which was a true journal of bores within the meaning of the specification attached to the contract? Their complaint is that they were shown a document which was represented to them to be the true journal of bores, but was not, whereby they were led to make an erroneous forecast of the work to be done. The defects in the journal which made it, as they contend, misleading were, first, that it did not in the case of these four bores reproduce with accuracy the information conveyed to Mr Melville by the employees of the company who actually made the bores as to the substances they bored through in their operations; and second, that no mention is made in this journal of the result disclosed by four bores made near bores Nos. 7 and 9 for the sole purpose of testing the accuracy of the reports of the borers touching these two bores.

The changes made by Mr Melville consisted in this, that he substituted in the case of bore No. 7 the words "hard black blaes" for the borers' words "hard black ban," and in the case of each of the remaining three bores the words "black blaes" for the borers' words "black ban." On the appeal to this House it was found that in the compilation of this journal Mr Melville made these changes honestly believing that the borers had misdescribed the substances they found, that his own description was the true description, and that he made the change in order that the facts should be set forth with accuracy in the journal.

Now the proper construction of the passage in the specification dealing with this

journal must in this, as in every other case where a written document has to be construed, depend upon the intention of the contracting parties as disclosed in the document itself. The specification does not impose on the engineer or on the defenders any duty to attach to the journal of bores any document or any note to the effect that he or they consider it inaccurate or misleading. If his or their duty was simply to reproduce without change the information the engineer received from the operators he would be bound to reproduce it, however erroneous or misleading he or they might believe it to be. What was to guide the engineer's own judgment and help him to make his own forecast was a reproduction of the borers' reports, corrected where he believed them to be erroneous, not a reproduction of them which he believed was misleading, and therefore when he gave to the intending contractors the corrected journal he gave them to guide their forecast the same material he had to guide his own. The journal was, I think, intended to be the journal of the engineer, not of the borers, prepared on the responsibility of the engineer, not solely on that of the borers, and setting forth correctly the substances the engineer believed the borers had found, not what he believed they had not found. The duty the specification imposed upon the engineer as the trusted agent of the defendants was in the compilation of this journal to act honestly at once towards his employers and the intending contractors, and to give to them the information he believed to be accurate. He did so, and in my view, therefore, was not guilty of any misrepresentation in describing the substances reported to him as "hard black ban" and "black ban" as what he believed them to be, namely, "hard black blaes" and "black blaes" respectively. The company were not obliged to employ professional borers. The men actually employed the engineer believed to be fully competent to do the work, acting as they did under his supervision and control and subject to his correction.

I do not think the defenders or their engineer were under any obligation whatever to describe in detail the results obtained in the test bores. These bores were made to get the right description of the substances found in bores 7 and 9. The result of this test boring was, according to Mr Melville's belief, given in effect when he made the changes above mentioned, and recorded them as the results obtained at bores 7 and 9. I think, therefore, that the pursuers' case wholly fails upon this their main point; but even if I were in error in this view I should still be clearly of opinion that they are not entitled to have this contract set aside, inasmuch as *restitutio in integrum*, in the true sense of that phrase, is now absolutely impossible.

The plaintiffs cannot take back what they gave—their work—though they might restore what they got—the money they received; that, however, is precisely what they are not required to do. The work was done; the parties cannot in any sense be restored, in relation to this contract, to the position they occupied before the contract was entered into. If they had succeeded on their allegation of fraud, they could have got damages in an action for deceit sufficient to cover their loss, but they have not sued for damages either for deceit or breach of contract, and they cannot get damages for an innocent representation made outside the contract, though inducing to it—*Derry* v. *Peek* (14 A.C. 337).

The learned Judges of the Second Division did not question the applicability of the doctrine of *restitutio in integrum* to this case, but they applied it in a novel and eccentric fashion. They do not direct that if the pursuers should recover on a *quantum meruit* less than the sum they have already received, they should refund the difference or refund anything at all, but merely that if they should recover more than they have received they should give credit for this latter sum against the sum recovered. This in the result merely means that pursuers should keep all the money they have got and get as much more as possible. That, no doubt, is a safe and lucrative kind of operation for the pursuers, but it is one which in many cases would lead to great injustice, and with the utmost respect for the learned Judges of the Court of Second Division, is, in my view, indefensible on authority.

There is no case in either country which I can find—we certainly were not referred to any—where it has even been suggested, much less held, that it is competent for a person bound to restore what he has got under a contract which he asks to have set aside, to put a money value on the thing to be restored by him and pay over or allow credit for that sum instead of returning the thing itself.

If any such rule prevailed, *restitutio in integrum* might be satisfied in the case of a sale of a chattel by putting a money value on some article delivered instead of the article purchased when the former had been destroyed, lost, or re-sold, and setting off this sum *pro tanto* against the price of the article purchased, thereby reducing the thing to what Lord Dundas describes in this case as "a mere adjustment of disputed accounts." Yet it has again and again been decided that this cannot be done. In *Wallis, Son, & Wells* v. *Pratt & Haynes* (1910, 2 K.B. 1003), affirmed on Appeal (1911 A.C. 394), for instance, where seed indistinguishable from that purchased but much inferior in quality and less valuable was delivered instead of the seed purchased, it was admitted the contract could not be rescinded, because the inferior seed had been re-sold by the plaintiff. If this new mode of carrying out restitution were legitimate, the plaintiff could have put a money value on the inferior seed, and the contract of sale should have been rescinded on the terms of setting off *pro tanto* that sum against the contract price.

I need only refer to a few of the authorities on this subject, namely, *Hunt* v. *Silk* (5 East 449), *Blackburn* v. *Smith* (2 Ex. 783), *Western Bank of Scotland* v. *Addie* (L.R., 1 H.L. Sc. 145, 164-5), *Houldsworth* v.

The City of Glasgow Bank (5 A.C. 317, 338), *Adam* v. *Newbigging* (13 A.C. 308). The first of these, decided by Grosse, Laurence, and Le Blanc, JJ., affords a striking example of the rigidity with which the doctrine must be applied. The defendant agreed with the plaintiff to execute to him a lease of a house within ten days which the defendant was to repair, in consideration of which the plaintiff was to pay £10 and execute a counterpart, the plaintiff to get immediate possession. The plaintiff paid the £10 and went into possession. The defendant neither executed the lease nor repaired the house within the ten days, notwithstanding which the plaintiff continued in possession for some time, but then quitted the house, gave the defendant notice that he rescinded the contract for the defendant's default, and brought an action to recover back the £10 he had paid. It was held he could not recover, the C.J. expressing himself thus—"Now where a contract is to be rescinded at all it must be rescinded *in toto* and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done, and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account. This objection cannot be gotten rid of, the parties cannot be put *in statu quo*." And Justices Laurence and Le Blanc both stated that the parties could not be put back in the same position as before the contract, because the plaintiff had an occupation of the premises under the agreement.

The other authorities established that in every case the particular thing obtained under a contract by one who seeks to have that contract set aside must be restored to him from whom it was obtained. The contest has generally arisen as in the case of *Adam* v. *Newbigging*, which I shall presently examine in detail, on the question whether the thing which it is offered to return is the same as the thing received—such, for instance, as where the shares of a company registered at a late stage of its existence under the Companies Act of 1862 are sought to be returned, instead of shares held in it before its registration—*see The Western Bank of Scotland* v. *Addie*.

It is, no doubt, true that courts of equity, when they set aside contracts, direct as ancillary to the main relief, but never in substitution for it, that money is to be paid by one litigant to the other in order to do complete justice between them. Lord Blackburn, in his judgment in *Erlanger* v. *The New Sombrero Phosphate Co.* (3 A.C. 1218), explains the principle upon which this ancillary relief is given. After stating that according to the doctrine of both law and equity there can be no rescission where *restitutio in integrum* is not possible, and the contracting parties put in *statu quo ante*, he says at p. 1278—"But there is a considerable difference in the mode in which it (*the doctrine*) is applied in courts of law and equity, owing, as I think, to the difference of the machinery which the courts have at command. . . . It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property though not destroyed has been in the interval deteriorated, without making compensation for that deterioration. But as a court of law has no machinery at its command for taking account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost."

Some reliance was placed by the respondents in argument on the above-mentioned case of *Adam* v. *Newbigging*. So far from that case being an authority for the proposition that where the parties cannot be restored to their original position in fact, rescission may be decreed simply upon the terms of the payment of a sum of money by the party seeking rescission to the other party or *vice versa*, it is in my view a strong authority against such a proposition, and a good example of the application of the doctrine of *restitutio in integrum* on the well-established lines. The respondent there was induced by innocent misrepresentation as to the solvency of a business to become a partner in it with the appellants. The business was, in fact, insolvent at the time, and from its own inherent vice, not from anything done or omitted by the respondent, became much further indebted before he discovered that the misrepresentation had been made. On discovering this he instituted a suit for, amongst other things, a dissolution of the partnership and a return of the capital he brought into the business, less a sum he had drawn out. By the dissolution of the partnership Colonel Newbigging would have restored to his copartners in the only way possible the thing which he had got under the partnership agreement, namely, a share in the partnership business, and by a repayment of his capital he would have received what he had given to become entitled to that share. He thus claimed, to use Lord Watson's words, at page 320, "to give as well to as demand restitution."

In the case in the Court of Appeal, 34 C.D. 582, Cotton, L.J., so treated the matter. He said (p. 588) the "plaintiff (*i.e.*, Colonel Newbigging) then is entitled to be put back into his old position. How is that to be done?" And he proceeds to show that that could be done by a decree dissolving the partnership and directing the return of the capital brought in by the Colonel. A further question as to an indemnity against the debts incurred during the partnership arose upon which the two tribunals did not quite agree. The defence was that Colonel Newbigging could not restore the appellants to

their former position, since, to use Lord Herschell's words (p. 330), "at the time he brought his action and claimed rescission the business, an interest in which he agreed with them to purchase, was hopelessly insolvent and no longer a going concern." And lower down on the same page says—"I have already pointed out that the enterprise was insolvent to a large amount when the respondent was induced to take a share in it, and I do not think the fact that the extent of its insolvency afterwards increased justifies the contention that *restitutio in integrum* is impossible. To hold otherwise would be to say that where a losing and insolvent business is sold by means of a misrepresentation that it is solvent and profitable, rescission could never be obtained if the loss were increased prior to the discovery of the true state of affairs." The pith and marrow of this contention appears to me to have been this, that the thing Colonel Newbigging proposed to restore was not the same thing that he had received, inasmuch as the increased indebtedness of the firm had made that thing different.

That defence failed, and in my view the decree made in this case was as different—generically different—from a mere exchange or a set off of sums of money—a mere adjustment of disputed accounts—as anything could conceivably be.

As to the point of essential error, Mr Clyde, in dealing with the receipt of this sum of over £10,000, in his able and most ingenious argument put his contention in a phrase. He said until his clients discovered how the journal of bores had been "edited," as it was styled, they were fully aware of their *damnum* but not of their *injuria;* this sum therefore could not be an accord and satisfaction of cause of action of which they were unaware when they received it. No doubt that is quite true, but if this misrepresentation had formed part of the contract of the 17th September 1900, and if, being fully aware of the nature and extent of their *injuria*, they had brought an action for breach of contract, the damages which they would have been entitled to recover would have been divisible under two heads —(*a*) direct damage, the extra costs of excavating the unexpected materials, and (*b*) the consequential damages arising from the additional expense imposed upon them by this error in carrying out the remainder of the works. His clients have been paid over £5300 in full discharge of head (*a*) to settle the dispute, and £5000 on foot of (*b*).

The real error consisted in the difference between the work they were led to anticipate they would have to do and the work they really did. They bargained for one thing and they had to do another. But that difference is the very thing of which they were fully aware, and for which they have received the compensation, which they retain. I cannot think the subsequent discovery of the way the journal of bores happened innocently to be framed as it was framed can give a right to rescind after what has taken place.

On these grounds I am clearly of opinion that the interlocutor appealed from was erroneous, and should, so far as it deals with the matters above mentioned, be reversed, and this appeal be allowed. The cross-appeal should, I think, be dismissed with costs. The respondents should, I think, pay to the appellants the costs here and below.

LORD SHAW—I agree to the course proposed by my noble and learned friend Lord Atkinson.

When this case was formerly before your Lordships' House I contented myself upon its merits with concurring in the judgment of my noble and learned friend, and with accentuating the elimination from the case of all elements of fraud upon the part of Mr Melville, the appellants' engineer. I venture again, after a fresh study of the case in all its volume, to repeat my concurrence with the judgment of Lord Atkinson to which I have referred; and in particular relation to the action and conduct of Mr Melville I will now give a citation from Lord Atkinson's judgment which appears to me to go to the root of the case, whether upon its former or its present aspect.

My noble and learned friend said (49 S.L.R. at p. 741)—"Mr Melville honestly thought 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 substance actually found, so that the journal should set forth the absolute truth. For the reason 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."

The reference, as your Lordships know, is to the clause of the contract which deals with the subject of bores. It is to the effect that "bores have been put down at various parts of the line, the positions of which are shown on a small scale plan, and a copy of the journals 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."

When Mr Melville, as engineer for the Railway Company, employed sometimes railway servants and sometimes outside borers to make borings, he received reports and letters from them containing their account of what they had found. He then journalised these, the journals being kept in his office, copies being available to all contractors. The most of these journals set forth names and situations of the substances encountered as the borers had put it; but in two or three cases out of a very large number it was perfectly manifest that some gross mistake had been made by the borer. An instance of this in the case of bore 7 is that the borer John Cowan stated that he had found 11 feet of whinstone. In another

instance the borer was himself doubtful as to what the substance should be called. Mr Melville accordingly took the steps which the case has disclosed, putting down a few check bores and otherwise using the best of his judgment to journalise truth and not falsehood.

If the true view of this contract be that the journal of the bores must be construed as the journal of the borer, that is to say, the borer's letter, and that what the Railway Company had to do was to show that letter as a journal of bores, it appears to me, concurring in this matter entirely as I do with my noble and learned friend Lord Parmoor who is to follow me, that this would have been to unload from the shoulders of Mr Melville the responsibility which ought to and did attach to him as the responsible engineer in the matter of issuing journals to contractors for prospective work. On the contrary, I am of opinion that Mr Melville had such a responsibility, that he did exercise it, and that he was right to exercise it, and I see nothing in the case to suggest that he did not with accuracy journalise the bores as they existed in fact. I observe that this is the view taken by the learned Lord Guthrie in the Court below, and indeed I beg respectfully to adopt these sentences from his opinion (51 S.L.R. at 302)—"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."

I put the other case. Suppose Mr Melville had scrupulously followed the contract in the sense contended for by the contractor, and suppose he had entered as the journal of bores substances and measurements exactly as they were communicated to him, which entries he was, however, personally aware did not truly represent the facts. Then indeed there would have been a case made with no little force that the Railway Company was thus deliberately lending itself to misleading its contractors, and that under cover of the observance and letter of the contract they were committing a fraud. There might have been much to say for such a case, but I cannot say the same of a case first laid upon fraud and now upon misrepresentation by reason of the Railway Company doing the opposite thing through their engineer, viz., making the very best attempt to have the journal square with the truth.

I do not go into an investigation of the facts to show how, in my opinion, the attempt thus made was successful—how, in short, the editing of the journal was entirely in the interests of accuracy. I am clearly of opinion that this was so, and I will now ask the question—the case being now founded upon misrepresentation — what is it which is said to have been misrepresented? I put this in the course of the argument more than once, and I received the answer that the representation founded upon by the respondents was not a representation of the facts as shown in nature, but was a representation of the information upon which the journal was founded. It was said that that information had not been correctly reproduced, and that the representation was that it was correctly reproduced. But with regard to the real gist and substance of what the contractor wanted to know, viz., what did the strata consist of in fact, it was not alleged that the strata as penetrated were misrepresented in the journal. Similarly with regard to error—error was not alleged on the ground that it was not error as to the strata themselves arising from a misrepresentation of those strata, but the error alleged was that the contractor thought the journal represented the precise information which reached the engineer, which information should have been journalised.

I have always thought from the beginning of this case that it is one which upon this head is of extremely doubtful relevancy. The truth, in so far as the truth had relevance to the state of mind of a person about to contract, was truth as to the strata themselves, and, whatever the borer had written to the contractor before the journalising took place, the truth which was wanted was that the journal should be as near to the actual facts as possible. In order, therefore, to involve the Railway Company in misrepresentation on the materials in the present case, it would have been necessary, in my opinion, to establish affirmatively that the interposition of the engineer by entering upon the journal in one or two instances, by way of correction or editing, or as as a result of collation, something different from the borer's letter to the engineer, had perverted the facts and turned the borer's truth into a falsehood, and so to make a misrepresentation of what, had it been left alone, would have been a true representation.

Nothing of this sort was done in the present case. This enormous litigation has now come to this point. In the midst of a voluminous proof or recovery of documents it has been discovered that the editing of these one or two items took place. It accordingly could not have been that error that was alleged upon the record, but I agree with Lord Guthrie that—discovered as it was late in the day—it still is without any legal effect.

As a ground of rescinding the contract, error and misrepresentation must be *in essentialibus*. The true essentials here were the nature of the strata themselves. And when we turn to the proof it is discovered that to this point practically no evidence was addressed. The contrast desired, and relevant, was between the strata as they were found and the denominations and measurements which the journal gave. The truth is that this issue was probably obscured, for two reasons, viz., that the

respondents were in the course of attempting to prove fraud, and secondly, that they mistook one contrast for another, namely, the contrast between the journals and the borer's letters, and the contrast between the journals and the natural facts. Upon the last, which in the stage the case has now reached would have been the really valuable portion, substantially no proof was led on the evidence as it appears. I do not have any doubt that Mr Melville's journals were a much better and safer guide than the letters he received. I am accordingly of opinion that the case of misrepresentation leading to essential error fails.

I also agree with Lord Guthrie in his view of the law of this case. But I attach even greater importance than he does to the stipulations of the contract themselves. Citations have been made of the clauses, and I need only again make two brief quotations. After referring to the putting down of bores on various parts of the line, and to the journals, the contract stipulates, "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." One other part of the contract runs thus—"The particular attention of intending contractors is directed to the specification in regard to the following matters:— . . . The probability of more or less rock or soft material having to be excavated, as no allowance will be made should the material turn out to be different from what is calculated and given in the schedule."

The contract is not in any unusual terms. It seems clear that to the knowledge and in the expectation of all parties the projected railway was to run through a part of what may be called "troubled country," that individual bores might be quite an ineffective guide, and it is also, I think, manifest, and in accordance with experience in such cases, that the denomination of the different stuffs found, their nature, and quality may be largely a matter of expression and opinion. It is to that class of facts that the contract applies.

Notwithstanding the stringency of the clauses, I am of opinion that such a contract could not be pleaded as exclusive of a case of fraud, for it is a sound principle, to which I do not hesitate to give adhesion, that the terms of a contract, however far they may extend in putting a burden of risks and speculations upon the contractor, cannot be founded upon as a protection against fraud of either contracting party. It could not be so, in my opinion, even although the contract were expressed in such a particular. The law excludes from the range of agreement what is openly contrary to legal principle and to honest dealing.

It is in this view that I attach much more importance than appears to have been attached in the Court below to the elimination of fraud from this case, for I think that these clauses which I have quoted from this contract, although not a protection against fraud, were a protection against innocent misrepresentation; and even although I had been of the opinion, which I am not, that misrepresentation had occurred, the contract is, in my judgment, exclusive of the ground of action of error arising from innocent misrepresentation.

A case in some respects not unlike the present may be cited, viz., *Pearson* v. *The Lord Mayor of Dublin*, 1907 A.C. 351, in which there were protective clauses analogous to those in the present contract. Putting the contractor upon his own inquiry, as the noble Earl Loreburn said, these clauses "contemplate honesty on both sides, and protect only against honest mistakes." Lord Ashbourne was of opinion that "such a clause may be appropriate and fairly apply to errors, inaccuracies, and mistakes, but not to cases like the present"—that is, to a case of fraudulent misrepresentation. Lord James is quite clear upon the point—"Such a clause would be good protection against any mistake or miscalculation, but fraud vitiates every contract and every clause in it." Applying that law to the present case, I am of opinion that fraud being excluded and innocent misrepresentation alone remaining, the contract affords—and indeed I do not doubt it was intended to afford—complete protection against that.

The view thus stated of the contract might be sufficient for disposal of the case, but the shape of the action and the attack made upon certain principles fundamental to the law of rescission and damages appear to me to make it necessary for me to state in a few words in addition my view upon this subject. The language used in this record has to yield to the broad admission made that in substance we are dealing with an action of reduction or rescission. With those parts of the judgment of the learned Judges of the Court below (principally of the Lord Justice-Clerk and Lord Dundas) to this effect I entirely agree. But until this case I have not for many years heard it doubted that rescission is not a remedy open to any litigant when matters are not entire and when *restitutio in integrum* is impossible. I do not find myself able fully to comprehend that view of the case which would treat the situation as one equivalent to possible restitution by a process of adjustment of accounts. The railway is there, the bridges are built, the excavations are made, the rails are laid, and the railway itself was in complete working two years before this action was brought. Accounts cannot obliterate it, and unless the railway is obliterated *restitutio in integrum* is impossible.

Of course if one were free by the law to do so one could in may cases say that, granting that all that has been done under a contract is to remain, you still can reach a more equitable result by giving less or more money upon certain items than was allowed for in the bargain. I should view with some alarm the prospect of consequent litigation upon both sides of every important contract, for innocent mistake with regard to

many items occurs in nearly every contract, and it might in many cases be open, on the one hand, for the undertakers like railway companies to say that by reason of the mistake they paid too much, or for contractors or engineers to say that by reason of the mistake they got too little. In the present case *restitutio in integrum* being impossible, I think the law is very well settled—too well and too long settled to be disturbed—as expressed, for instance, by Lord Cranworth in *Western Bank of Scotland* v. *Addie* (1 H.L. Sc. 145)—"Relief under the first head (*i.e.*, repudiation or rescission), which is what in Scotland is designated *restitutio in integrum*, can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into. Indeed, this is necessarily to be inferred from the very expression *restitutio in integrum;* and the same doctrine is well understood and constantly acted on in England."

I may add upon this part of the case that I see no foundation for the idea that this principle of law is confined to cases of sale. It appears to me, on the contrary, to be a recognised and established doctrine of the law of contract in general.

The case of *Adam* v. *Newbigging* has been mentioned as a case of departure from this principle of the law, but I agree with Lord Atkinson's observations upon that case, and it appears to me that restoration was possible and was afforded in fact, and that the case was so treated in this House. Lord Watson, on page 320 of 13 A.C., stated the proposition broadly thus—"I entertain no doubt that these misrepresentations, although not fraudulently made, are sufficient to entitle the respondent to rescind the arrangement of February 1883 if he is in a position to give as well as to demand restitution." After this language it does not appear to me possible to contend that there was in *Adam* v. *Newbigging* any evasion of the general principle that restitution is a condition of rescission.

Nor do I think that there is a remedy in damages for an innocent misrepresentation. Such a representation is not an actionable wrong. The error under which the parties labour is common to both, and the material for a case of damages is wanting because the *damnum* is not there. I should willingly investigate this topic further were it not that I find the language of Lord M'Laren so apt in the case of *Manners* v. *Whitehead* (1 F. 176, 36 S.L.R, 94, at p. 97) that I do not desire to add anything which would weaken or presume to improve upon the exposition contained in these sentences—"Where a pursuer only desires to set aside a contract of sale on the ground of innocent misrepresentations 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. But when we are in the region of damages it does not appear to be consistent with equity or with any sound principle of law that in respect of a mistake for which neither party is responsible the seller shall pay to the purchaser a sum of damages, the purchaser retaining such benefit as the contract has given to him. The remedy of damages, according to all the light which our decisions throw on the question—perhaps there is not very much light to be got from them—is confined to the case of proved fraudulent misrepresentations, and the damages we find as compensation for loss sustained through fraud." The same principle has been frequently enunciated in England, and I refer to the judgment of Farwell, L.J., in *Whittington*, 16 Law Times Reports 181.

The subject of whether the representations went to the root of this contract may have been sufficiently adverted to in my treatment of the other steps in the case. On the facts I would simply observe, firstly, that if this were so in the present case, it would seem to me impossible to prevent almost any large contract being similarly attacked because of dissatisfaction as to one or two relatively small items; and secondly, that I do not think it to be proved that this contract would not have been entered into if the journal had been in terms of the borer's letter, or that even its lump sum would have been different on that account. Lastly, I confess myself to be at present unable to see how the principle of *quantum meruit* can be invoked to settle the relations of these parties. *Quantum meruit* stands upon the footing that persons have agreed to contract with each other that certain work is to be done, but have not agreed as to how much is to be paid for it. But the settlement *ab ante* of the *quantum* in the present case was a most radical consideration; it does not appear to me—in this I also agree with Lord Guthrie—at all clear that these contractors would ever have been asked to do the work on the terms now claimed, or that it would be in accordance with either law or justice in the relation of the parties to substitute for the sum in the contract another which according to the claim of the pursuers exceeds the lump sum bargained for by over £100,000.

The question of the legal effect of the contractors having proceeded with and finished the work after they had encountered strata of a kind which was unexpected and, as alleged, contrary to the contract is one which I have not dealt with, my view upon the other questions making a separate treatment of the point unnecessary. If it had been necessary I should have agreed with the opinion upon it of both of your Lordships who have preceded me.

LORD PARMOOR—The respondents in September 1900 entered into a contract with the appellants for the construction of a railway in Ayrshire for the lump sum of £243,090, with a provision for payment of extras. The contract work has been completed, and the appellants have made payment to the respondents of a sum of £272,030, being the

said sum of £243,090 and certain further sums allowed by Mr Melville, the engineer of the appellants.

The present action was commenced in November 1907. It was held in the Second Division of the Court of Session that the contract was induced by fraud on the part of the appellants, but this judgment was reversed in this House. No other point was decided, and the case came on for further consideration in the Second Division of the Court of Session.

The respondents raised as pleas-in-law other than fraud that the contract founded upon by the appellants was inapplicable as the basis of charge for the works executed by the respondents, and was no longer binding upon the respondents in respect that (1) the said contract was entered into by the respondents under essential error induced by the misrepresentation of the appellants, (2) that the work as executed by the respondents proved to be entirely different from that contemplated by the contract, and (3) that the appellants were by their actings barred from founding on the said contract as the basis of charge.

Their Lordships of the Second Division were of opinion that the plea that the work as executed by the respondents proved to be entirely different from that contemplated by the contract was not sustained. In this opinion I entirely concur. If a lump sum contract such as the present could be upset on the ground that the execution of the work has turned out to be more difficult or more costly than was contemplated at the time of tender, it could also be upset on the ground that the execution of the work has turned out to be less difficult or less costly, with the result that the whole intention of the parties to such a contract would be defeated, and that either the contractor might be mulcted of legitimately anticipated profit, or that the Railway Company might be rendered liable to an excess cost which they had never intended and might not be in a position to incur.

The real questions argued on the appeal are lucidly expressed in the case of the respondents under two heads. The respondents claim either the reduction of the contract on the ground that they entered into it under essential error induced by misrepresentation of the appellants extraneous to the contract, or that the appellants were in breach of the contract in matters which went to the root of the contract. Under either one head or the other the respondents claim that an amount in money is due to them as on the basis of a *quantum meruit* payment. They estimate the sum at £106,688, 13s. 11d. in addition to payments already made. The respondents cannot succeed unless they can prove misrepresentation, and in my opinion they fail in this initial factor. I agree with the judgment of Lord Guthrie.

There is nothing exceptional in the terms of the contract. It is well recognised that a contract of this character involves risks owing to the difficulty of making an accurate forecast of the character of the strata through which the cuttings will be made. This risk must be taken by one of the parties, and in the present case the respondents were willing to take it in return for the payment of the lump sum of £243,090.

It was argued that the contract was stringent and in its terms harsh to the respondents. I do not doubt that it has turned out a bad contract for the respondents, but they took the risk and it might have turned out the other way. In any case considerations of this character cannot affect the construction of the contract. The contract contains the bargain which the respondents, who are contractors of business experience, were willing to make as a matter of business. It is open to observation that the contract contains two arbitration clauses—one incorporated in the contract itself, and the other in the specification attached to the contract. In both instances a wide power is given to an arbitrator selected by the parties as a person on whose skill and judgment they can rely. The clauses are amply sufficient to cover any difference which may arise under the contract, either during the execution of the work or in the final settlement. No doubt the charges of fraud or of misrepresentation extraneous to the contract are not subjects within the jurisdiction of the arbitrator, but if one of the parties to a contract elects to found an action on fraud or misrepresentation and fails to substantiate the charge he must take the consequences.

The clause of the specification on which the case really turns is under the head of "Cuttings and Embankments":—

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

"The formation level in both cuttings and embankments shall be 1 ft. 9 ins. below mean rail level.

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

"On the longitudinal section and cross-sections the hatched brown line shows the assumed surface of rock; where the journal of bores shows loose or broken rock, then the assumed surface of the solid rock is

shown by a dotted brown line on the sections. The calculations of the quantities of the cuttings have been made in accordance therewith; all the materials in the cuttings above the hatched brown line shown on sections is measured as soft cutting, and the contractor will only be paid for it as such."

What is the representation made in the first portion of this clause? It is that bores have been put down at various parts of the line, the position of which is shown on a small scale plan, and that a copy of the journals of these bores may be seen at the engineer's office. The alleged misrepresentation is that all the bores which had been put down at various parts of the line were not included in the small scale plan, and that the copies of bores at the engineer's office were not a true copy of the journals of bores as actually taken and recorded by the borer employed by the appellants. On the first point there is no dispute that bores were taken other than those included in the small scale plan, so that this question becomes one of the true meaning of the representation; on the second point, the appellants say that a true copy of the journals of the bores was to be seen at the engineer's office, viz., a copy of the journals recorded by Mr Melville, who was their chief engineer, and occupied the position of responsible borer. It will be convenient to consider in the first instance the second allegation.

Over the whole contract work sixty-five bores were taken. They were taken partly by employees of the appellants, under the superintendence of their engineering staff, and partly by an independent professional borer, Mr Brown, whom the appellants employed for this special purpose. The professional borer made forty-seven bores. As to these bores no question is raised. The remaining eighteen bores were made by two employees of the appellants named Cowan, under the superintendence of Mr Melville, who as chief engineer was head of the engineering staff. It is in respect of these bores, and more especially in respect of bores 7 and 9, that the complaint of misrepresentation is made. There is no dispute as to the relevant facts. The Cowans, by one or other of whom the actual boring machinery was worked, sent up returns to the engineering office. If these returns are to be considered as the journals of the bores. then no doubt a copy was not shown to the respondents at the engineering office, and the respondents establish the first step in their case. Mr Melville did not record the actual returns made to him, but made up journals from them, using his own skill and experience. The case of the appellants is that the journals of the bores which the respondents were entitled to see were these records made up by Mr Melville, and that a true copy of them was shown in the engineering office, open to inspection by the respondents I have no hesitation in coming to the conclusion that the contention of the appellants is right, and in accord with ordinary business experience. The responsible borer in respect of the eighteen bores was Mr Melville, and he would have failed in his duty both to the appellants and the respondents if he had not used his skill and experience in making up what he believed to be correct journals of the bores.

It is due to Mr Melville to say that, in my opinion, he acted with perfect propriety, and that his conduct would have been open to serious reflection if he had done nothing more than record the returns of the Cowans, when, using his own knowledge and experience, he had formed the opinion that these returns were not accurate and were calculated to mislead. The Cowans were simply the workmen who manipulated the boring machinery, and Mr Melville properly treated their returns on these lines, assuming himself the position of responsibility. The incompetency of the borers employed by the appellants was at one time made a subject of complaint by the respondents, and reference to the incompetency of the Cowans is made in more than one form. There might be some ground in this allegation if the Cowans had been so employed; but the journals were recorded, not on their responsibility, but on the responsibility of Mr Melville, and a copy was shown in the engineering office. It follows that under this head there was no misrepresentation, and that there is no ground for claiming either a reduction of the contract or damages for breach of the contract.

It remains to be considered whether the respondents were entitled, under the representation made, to see a copy of all the bores which had been made, whether material or not in the opinion of Mr Melville, and whether included or not in the small scale plan. I cannot construe the words at the commencement of the clause to have any such meaning. The bores referred to are the bores included in the small scale plan. It was on these bores that Mr Melville based his forecast of the character of the material which might probably be found in the execution of the contract. Mr Clyde insisted that the respondents were entitled to see all the factors on which Mr Melville based his forecast. In my opinion all these factors were supplied to them. He based his forecast on the bores included in the small scale plan, not on the bores not so included, and on the journals made upon his responsibility, not on the returns of the Cowans. This forecast he supplied to the appellants, who placed it at the disposal of the respondents.

The respondents are warned in the terms of the contract that the accuracy of the information placed at their disposal is in no way guaranteed by the appellants, and that they must form an independent opinion by applying their own knowledge and experience to the information derived from the journals of the bores. They had before them the same materials as had been used by Mr Melville in making his forecast of the character of the work, neither more nor less, and their complaint really is that Mr Melville did not give them data which he had not used and information which he did not consider accurate. Mr Clyde argued

that this would mean supplying to the respondents nothing more than a mechanical translation of the information obtained from the bores. This appears to me to be a fallacy. No doubt the bores are an important factor in making a forecast of the character of the material to be excavated, but experience in contracts of this character has shown that, however carefully bores may be taken, there is a large field of possible error. It is within this field that the respondents were called upon to use their own business knowledge and experience, and when fixing the lump sum figures they must have known that they were undertaking this risk. It is unnecessary to refer again to the actual words of the relevant clause in the contract. It is abundantly clear that the respondents cannot succeed if they fail to prove misrepresentation.

It is not, under these circumstances, material to express any view as to the accuracy in fact of the information supplied in the journals of the bores. I agree, however, with the opinion expressed in the judgment of Lord Guthrie, that if there is inaccuracy in the information supplied mainly as to bores 7 and 9, it cannot be inferred without evidence that such inaccuracy is an essential error which induced the respondents to enter into the contract, and that there is no evidence that this error induced the respondents to enter into this contract, or that they would not have entered into the contract if this error had been known to them at the time.

I desire to guard myself against giving any sanction to the view that the respondents would have been entitled to claim a reduction of the contract even if it had been proved that they entered into the contract under essential error induced by the innocent misrepresentation of the appellants. Innocent misrepresentation connotes not wrongdoing but an innocent act, and the question is which of two innocent parties should suffer. The remedy of reduction is not in general available unless the party seeking reduction is able to place the party against whom it is sought in substantially the same position as he occupied before the contract. In substance there must be *restitutio in integrum*. As incidental to the remedy of reduction, and in order to work the remedy out to a just result, there may be a giving back and a taking back on both sides; but whatever such adjustment may involve it must clearly be distinguished from damages, which the plaintiff who succeeds in an action for reduction is not entitled to recover as an independent remedy.

In the present case *restitutio in integrum* is impracticable in any form. After the execution of the works for the construction of the railway the respondents cannot restore the appellants to their former position. I cannot follow the reasoning that it is a mere matter of money account. There is an essential difference between the position of the appellants before the contract was entered into and as it would be under a liability to pay for the work done on the basis of a *quantum meruit*. The respondents could not be compelled to accept payment on this basis if any inaccuracy had turned out in their favour, and the appellants cannot be compelled to make payment on this basis under the conditions which have arisen. In effect to decree reduction of the contract in the present case is to subject the appellants to the same liability as if fraud had been proved against them. It is indicated in more than one judgment, and forcibly expressed in that of Lord Dundas, that to refuse the remedy of reduction enables the appellants to retain the pecuniary advantage arising from their own misrepresentation merely because the work has been done and cannot be undone. The answer is that the respondents must take the consequences of their own contract, and that it is not fair to regard only one side of the picture. It may be said with equal force that it is unjust to throw on an innocent party the liability of a *quantum meruit* payment, which shifts to his shoulders the risk which in the present contract the respondents had undertaken at a price fixed by themselves.

This difficulty is apparent in the judgment of Lord Salvesen, if I rightly understand it. Lord Salvesen holds that the *quantum meruit* which the Lord Ordinary has allowed is not 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 to be misleading. This is not the reduction of the contract and the substitution of a liability based on the principle of *quantum meruit*, but would enable the respondents to retain payments made to them under the contract and to select for extra payment certain items in respect of which their forecast had turned out unfavourably.

It is not necessary to refer to the Paisley water pipes.

In my opinion the appeal should be allowed, with costs, and the cross-appeal dismissed, with costs. I concur in the opinions already expressed and agree in the order proposed by my noble and learned friend Lord Atkinson.

Their Lordships allowed the appeal and disallowed the cross-appeal, with expenses both in the House of Lords and in the Courts below.

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