show that the right to call a person to account, where such a right clearly exists, even though the balance is not ascertainable, is an arrestable interest."

In the present case, if Mr Crichton were admitting liability to account, I should consider the case governed by the decision in *Baines & Tait*. From the record in the action against Mr Crichton by the defender it is manifest that he makes no such admission. If the pursuer's contention were sound a foreigner by bringing a petitory action in the Court of Session would be subject to the jurisdiction of the Court of Session in any other action brought at the instance of a person arresting his claim, and that independent altogether of whether the claim were well or ill-founded. I was referred to no case in which such a proposition has been affirmed. The pursuer founded upon the recent case of *Riley* v. *Ellis*, 1910 S.C. 934, but that case did not deal with founding jurisdiction against a foreigner by arrestment. I think that the pursuer must establish that she actually attached some property of the defender in the hands of Mr Crichton before I sustain her plea to jurisdiction.

I propose to repel plea 1 (*a*), and to allow the pursuer a proof before answer of her averments bearing upon plea 1 (*b*), and to the defender a conjunct probation.

The Lord Ordinary pronounced the following interlocutor: — "Repels the plea-in-law for the pursuer that the defender is subject *ratione delicti* to the jurisdiction of the Court: Before answer allows to the pursuer a proof of her averments that the defender is subject to such jurisdiction by arrestments *ad fundandam jurisdictionem* and to the defender a conjunct probation thereanent, said proof to proceed on a day to be afterwards fixed: Reserves meantime all questions of expenses."

Counsel for the Pursuer — Aitchison. Agents—Balfour & Manson, S.S.C.

Counsel for the Defender—R. M. Mitchell. Agents—Gardiner & Macfie, S.S.C.

HOUSE OF LORDS.

Monday, October 18.

(Before the Lord Chancellor (Buckmaster), Lord Atkinson, Lord Parmoor, and Lord Wrenbury.)

FORREST *v.* THE SCOTTISH COUNTY INVESTMENT COMPANY, LIMITED.

(In the Court of Session November 17, 1914, 52 S.L.R. 66, and 1915 S.C. 115.)

Contract — Executory Contract — Breach — Building Contract — Deviations Sanctioned by Architect.

Under a building contract based upon plans and a detailed schedule or estimate, a builder completed certain tenements, handed them over to the proprietors, and received from the measurers and architect the final certificates for payment. On the builder suing upon the certificates the proprietors pleaded that, the work done being disconform to contract, they could not be sued upon the contract. The tenements were proved to be substantial, of good workmanship and good material, and similar in appearance to others previously erected for the same proprietors. The plea depended upon the fact that certain rybats were not of the size specified. The size was given in the schedule, but the plans did not in any way show it. The architect had instructed the builder to carry out the work as in the previously erected tenements, and had from time to time passed it.

The schedule contained this condition —"The whole materials and workmanship to be of the best description and completed in accordance with the drawings, in an expeditious and tradesmanlike manner, to the entire satisfaction of the proprietors and architect, or any person appointed to inspect the work; and power is reserved to increase, lessen, or omit any part of the work. The work will be measured when finished by J. H. Bradshaw & Craig, I.M., measurers, 122 Wellington Street, Glasgow, and charged at the rates contained in this schedule or others in proportion thereto, and in proportion to slump sum in letter of offer. Any extra prices to be revised and adjusted by the measurers to correspond with the foresaid rates."

Held (*dub.* Lord Atkinson) that the architect had not exceeded his powers, that the builder was not in breach, and so was entitled to recover the sum sued for.

This case is reported *ante ut supra.*

The defenders, the Scottish County Investment Company, Limited, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR — This case comes before your Lordships' House with unusual and perplexing antecedents. All the judgments in the Inner Division as well as that of the Lord Ordinary are in favour of the respondent, yet no two judgments are in close agreement as to the reasons upon which they are based. The explanation of this unity of result and diversity of opinion is to be found in the peculiar circumstances in which a comparatively simple dispute has become involved.

The appellants the Scottish County Investment Company, Limited, are a limited company engaged in building operations, and at some date before 1910, though the exact date is nowhere stated, the respondent, who is a builder, had built certain tenement houses for them at a place known as Garrioch Crescent in Glasgow. These houses were built under a contract based upon certain plans and estimates or schedules of the work. The architect who acted for the appellants in that work was a Mr Alexander Adam, and the people employed

to get out the schedule and measure up the work were a firm of Bradshaw & Craig.

This work in Garrioch Crescent was completed, accepted, and paid for by the appellants, and in June of 1910 the appellants were intending to build further buildings of a similar character in a road known as Garrioch Road. Accordingly the architect prepared plans, and from these Messrs Bradshaw & Craig in agreement with these plans drew up a document in the form of an estimate and schedule stating the material to be used and the work to be done. This document is headed "Estimate of digger, mason, and brick works of four tenements proposed to be erected in Garrioch Road, North Kelvinside, for Messrs the Scottish Investment Company, Limited." It consists of the different items of work and material, with a blank for the prices to be inserted against each item by the builder, and it concludes with these words — "Glasgow, 16th June 1910, measured from plans and calculated. J. H. BRADSHAW & CRAIG, Measurers, 122 Wellington Street." On the same document, below this signature, certain general directions were given under the head of notes, containing among other conditions the following: — ". . . [*quotes condition given supra in rubric*] . . ."

Finally at the foot there was a form of tender as follows: — "Messrs the Scottish County Investment Company, Limited. Gentlemen—I hereby offer to execute the digger, mason, and brick work of four tenements proposed to be erected in Garrioch Road, North Kelvinside, according to plans thereof by Alexander Adam, architect, now shown, as described and in conformity with the foregoing estimate, and at the rates affixed thereto, for the sum of £ ."

It was stated in evidence and not disputed that this schedule and estimate was in exactly the same form as the previous schedule and estimate for the buildings in Garrioch Crescent. It was issued to builders, including the respondent, and on the 27th of June 1910 the respondent filled in the blanks on the schedule of prices and inserted in the form of tender the sum of £3496 sterling, which was the total of the prices of all the separate items less a small credit of £2. The addition of the items appears to have been incorrect by the sum of 5s., and the figure of £3496 was accordingly altered to £3495, 15s.

This offer was not accepted by the appellants, and in order to effect a reduction in the amount they instructed their measurer and the architect to make certain alterations. The measurer accordingly made an estimate showing how a saving might be effected by the substitution of certain cheaper materials in certain places; and the architect made new plans, cutting 7 feet off the tenement as originally designed. No new schedule of quantities was issued, and no alteration made in the schedule that had already been sent out, nor were the new plans submitted to the respondent. But he was informed that the alterations were made, and on the 25th of January 1911 he amended his original offer by writing underneath it—"The above offer is subject to 2½ per cent. discount," and deducting the sum of £91, 2s. 8d. from the original £3495, 15s.

On the 31st March 1911 the appellants' architect, by a letter addressed to the respondent, accepted the respondent's offer on behalf of the appellants, and on the 4th of April he forwarded to the respondent the working plans, and by way of further instruction told him to build as he had built the houses in Garrioch Crescent.

The respondent proceeded with the work, carried it out from first to last under the supervision and with the complete approval of the appellants' architect, who granted from time to time certificates for payment of instalments in terms of the contract, and such payments were duly made.

Some time shortly before the 5th of June 1912 the respondent's work was finished, and a final measurement was made by the appellants' measurer and the prices fixed according to the estimate, which brought out a sum of £633, 16s. due to the respondent. It was checked and certified by the appellants' architect, and on the 5th of June 1912 was sent to the appellants for payment.

The appellants appear to have accepted the buildings, to have taken them over, let, and mortgaged them; but they made no reply for a month to the respondent's request for payment, and when they did answer they stated that the measurements did not give sufficient information to enable the various items to be checked, and asked the respondent to get it amended.

Ultimately they employed an independent architect, who examined the whole building with the schedule and said that in certain respects the schedule had been departed from. The appellants accordingly declined to pay, and these proceedings were brought to recover the balance due upon the contract.

Several trifling objections were raised which were not proceeded with. The real objection upon which the whole argument before your Lordships depended related to the size of certain rybats that had been used in the building.

The appellants say that the sizes of these rybats were prescribed and fixed by the contract, that the work done in this respect was wholly disconform to contract, that there was no power in the architect to vary any of the conditions of the contract relating to the size and arrangement of these stones, and that consequently the action which is based on the contract must fail.

The statement with regard to this matter in the defendants' own terms is to be found in statement 5 of the defendants' statement of facts, which is as follows:—"According to the said estimate (as provided for in items 44, 45, 46, 47, and 48) the front wall of the buildings was to contain the following rybats, viz.—Out and inband rybats of windows, 24 inches and 12 inches long on face alternately, and 17 inches and 10 inches long on face alternately; rybats of oriel windows, 24 inches and 12 inches long on face alternately, and rybats of close openings, 24 inches and 12 inches long alternately. In building the said front wall the pursuer did not give effect to the provi-

sions in the contract above referred to. Many of the inband rybats supplied are not of the prescribed length on face. No outband rybats of the prescribed length have been supplied, and the pursuer has in place thereof inserted headers or other stones."

Now this case is not embarrassed by controverted statements of fact. It is perfectly true that these rybats have not been used. The respondent has, on the contrary, at alternate courses between the windows used rybats extending for the whole of the distance, and there are other similar deviations with regard to rybats which it is not necessary to specify, since the same principles that apply to the particular rybats to which I have referred apply also to other instances of the same class of work.

The respondent says that the method of construction which he has thus adopted is better than the method which the appellants say he was bound to provide, that it was exactly the same as that which he used in the buildings of Garrioch Crescent, that he had been expressly told by the architect to build in the same manner as he had built in Garrioch Crescent, and that under the direction and the authority of the architect he had made the deviation complained of.

I think upon the evidence it is plain that the building as constructed is at least as good as—there is some trustworthy evidence for saying that it is better than—the arrangement which the appellants say they were entitled to have, and that the rybats used were more costly than those specified although they were measured up at the scheduled price. So far as appearance is concerned it may safely be assumed that the appellants have no real objection, since it is exactly the same as the houses in Garrioch Crescent, which they accepted without demur.

But this does not establish the respondent's case. Even though the appellants had no ground for dissatisfaction, even if their objection had been based on a mean desire to avoid payment of a just debt, yet if the objection be well founded it must prevail; and the real question for determination is whether the contract was unfulfilled or whether the alteration was an alteration within the power of the architect to direct.

In order to answer this it becomes necessary to examine closely the terms of the estimate. The material items with regard to the rybats are items 44, 45, 46, 47, and 48:—

"44. Out and inband rybats of windows in 2 feet 0 inch walls, 24 inches and 12 inches long on face alternately, with 6 inches cleaned ingoing, 3½ inches check for case and hammer-dressed splayed inner scuntions, average girth of hewing 27½ inches.

"45. Do. do. 17 inches and 10 inches long on face alternately, with do. do., average girth of hewing 23 inches.

"46. Do rybats of oriel windows in do., 24 inches and 12 inches long on face alternately, with 6 inches cleaned angled ingoing, 3½ inches check for case and do., average girth of hewing 28 inches.

"47. Do. do. 17 inches and 10 inches long on face alternately, with do. do., average girth of hewing 23 inches.

"48. Do. of close openings in do., 24 inches and 12 inches long alternately, with cleaned square ingoings, average girth of hewing 36 inches."

It is urged on behalf of the appellants that the acceptance of the respondent of these items binds him by contract to provide the actual measured rybats that are there mentioned, and that consequently, as the architect had no power to alter the contract, he had no power to alter the size of the rybats.

It is difficult to maintain this proposition in its entirety in the present case. The builder was bound to work to the plans; the plans contained nothing to show the arrangement of the rybats, and if the plans had not permitted the use of the size of rybat mentioned in the estimate, and in the one or two small instances this is said to have occurred, the contract would become impossible of performance. When it is remembered that the plans were in fact altered without alteration in the estimates, it is remarkable that the discrepancies were not more frequent. In addition to this the architect had power to increase, lessen, or omit any portion of the work, and it might well be that the exercise of such power might alter the measurement of the rybats.

To my mind the whole arrangement of these rybats is really a matter of construction. There is nothing in the schedule to show that if the exact measurements cannot be adhered to, measurements as near as possible may be adopted, and the solution of any such difficulty must be left to the architect, while a change in the rybats would cause no difficulty in measuring according to the estimate, and, in fact, no such difficulty was experienced.

In the circumstances of this case, therefore, I think it was within the architect's authority to arrange these rybats as he thought best. He would clearly have no power to change one class of material for another; he could not introduce stone in the place of brick, or *vice versa*; but in a matter which is essentially a detail of constructional arrangement I am unable to see why the power which the architect must have exercised if the size of the rybats could not be made to agree with the plans, which he might have to exercise if he used the powers expressly reserved to him, could not also be exercised so as to make the construction more uniform, and, as he thought, more satisfactory than that which would have resulted from close adherence to the measurements in the schedule.

In coming to this conclusion I have carefully abstained from considering the evidence which was given as to the meaning of the contract and the intention of the parties when the contract was made. The whole of this evidence is clearly inadmissible. There is no word of art in the whole of the document from beginning to end, except such words as rybats, ashlar, and words of that description on the true meaning of which nothing depends. Whatever

interpretation is given to the document this must be done, not because of the evidence of witnesses that such was the meaning intended, but because this is to be gathered as the true meaning from the document itself.

Upon the view that I have expressed the cases quoted do not apply.

The case of *Ramsey* v. *Brand*, 25 R. 1212, 35 S.L.R. 927, depends entirely upon the view that the contract sued upon had in fact been broken, but only in an immaterial respect, and I reserve my opinion as to the validity of this case; while the case of *Steel* v. *Young*, 1907 S.C. 360, 44 S.L.R. 291, only decides that where a contract binds a builder to use a particular substance in construction the architect has no power to substitute a wholly different material.

I am glad to find that this opinion is in exact agreement with the judgment of the Lord Ordinary, and I think also of Lord Johnston, but it has not the support of the Lord President or Lord Skerrington. The former of these learned Judges deals with this question in the following terms—"Now I understand that one of your Lordships, agreeing with the Lord Ordinary, considers that the dispensation allowed from the precise dimensions given in the contract of these outband rybats was within the architect's power. I acknowledge that I have felt this part of the case attended with great difficulty, for it seems so eminently sensible that questions of dimensions not really affecting the substantial character of the building should be left to a presumably intelligent and trustworthy architect, that I should be disposed to hold this to be within the architect's power, had it not been that the question seems to me to be absolutely settled by law, for I can draw no distinction between deviations in respect of material and deviations in respect of measurement in a contract such as this."

From this statement it appears that unless the learned Judge had felt himself constrained by authority he would have accepted the grounds upon which the judgment of the Lord Ordinary was based. I entirely agree with what I regard as his own opinion, but I differ from his view that there is no difference between deviations in respect of material and deviations in respect of measurement in contracts such as this. The one is a matter of substance, the other of arrangement, and the learned Judge gives no weight to the circumstances to which I have alluded or to the consideration emphasised by Lord Johnston that in this case the plans according to which the work was to be performed showed no arrangement at all. In such a case, unless the architect had power to adjust the measurements of the materials to the conditions prescribed by the plans, great confusion might arise; but no such difficulty could be associated with the substitution of a new material in the place of the one specified,

Lord Skerrington, however, rejects this view. In his opinion the measured rybats were unchangeable items of the express contract, and he says that even if it had been impossible for the builder substantially to comply with the estimate as regards the length of the outband rybats, such impossibility would have afforded no excuse for not using the measurements given in the schedule where it was practicable to do so, as was the case in most parts of the building. But upon this assumption it would follow that unless the architect had power to change the measurements the contract would become incapable of exact performance, and the possibility of such occurrence is, to my mind, a cogent reason for the necessity of an architect's control.

In all the circumstances of this case I think such control was part of the architect's duty, and the permitted construction was within his power.

LORD ATKINSON — This case turns, in my view, on the question whether the stipulations contained in the so-called estimate relating to the dimensions and placing of the rybats were constructional stipulations or merely provisions only as to constructional details as to which the architect had power and authority to vary. If the former the appeal should in my opinion be allowed; if the latter it should be dismissed. I own that the inclination of my mind is to hold in this somewhat complicated and difficult case that they were contractual stipulations, but I am not sufficiently confident of the soundness of that opinion as to induce me to differ from the conclusion at which my two noble and learned friends, the Lord Chancellor and Lord Wrenbury, have arrived.

I therefore concur in the motion proposed.

LORD PARMOOR—The respondent, who is a builder and contractor is Glasgow, entered into a contract with the appellants to execute the digger, mason, and brick works of four tenements proposed to be erected in Garrioch Road, Glasgow. The contract is not a lump sum contract, but a contract based on measure and value. It is in a form not unusual in contracts of this character, though in some respects more vague and less explicit in detail. Mr Alexander Adam was the architect appointed in the contract. His employment is a term of the contract in the interest of both parties, but he has no power to dispense with the express terms and conditions therein contained or to authorise works disconform thereto. The works were carried out and handed over to the appellants. Instalments were paid on account to the amount of £2790, and on the completion of the works the architect and Messrs J. H. Bradshaw & Craig, measurers, named under the contract, issued their certificates to the effect that under terms of the contract a further sum of £633, 16s. was payable to the respondent in final settlement. The respondent sued the appellants for payment of the said sum as the contract price due to him under the terms of the contract. The appellants in answer to the respondent's claim alleged that the works executed by the respondent were in various material respects disconform to the contract, and that they were not liable to pay the said sum of £633, 16s. or any part thereof. The Lord Ordinary and the First

Division of the Court of Session have decided in favour of the builder, and it is against this decision that the present appeal is brought.

Two questions of considerable importance emerge for the consideration of your Lordships' House. The first question is, what are the rights of a builder or contractor who, having entered into a contract to construct certain works on a measure and value basis, has received the final certificates under the contract and handed over the works to the building owner, but against whom it is alleged that certain portions of the work have not been constructed in conformity with the contract terms. The second question is, whether the architect had power to direct the respondent to construct the works as they were in fact constructed under his directions, or whether in giving such directions he was exceeding the limit of his authority and acting in contravention of the contract terms.

There is no obligation in the contract on the respondent to execute the digger, mason, and brick works as a whole for a lump sum. He undertakes to carry out the various items of work according to the plans as described, and in conformity with the estimate and at the rates affixed thereto for a sum which amounts to the aggregate of the added figures. As regards a large number of the items the respondent has admittedly carried out the works to conform, *in modo et forma*, with the contract. In the proceedings before the Lord Ordinary and the Court of Session the defence raised was that under certain specified items the respondent had not carried out the works conform to the contract. I understand that before your Lordships' House the complaint was limited to items 44-48 in the schedule, which at the schedule rates amount to a sum of £142, 8s. 2d., an amount certified as due by the measurers, subject only to a slight deduction. I cannot assent to the proposition that in a measure and value contract where the work has been carried out and handed over to the building owner and the final certificates have been issued, it is a condition-precedent that every item of the works should be completed conform to the contract before any claim for any part of the contract price can be made by the builder. I do not question the proposition that if it is the intention of a contract that nothing less than a complete performance shall found any claim to payment, then an imperfect or part performance does not afford a ground of action; but I find no such intention in the measure and value contract entered into between the appellants and the respondent, and so to construe the contract would appear to be in contravention of its expressed terms and conditions.

Having regard to the opinion hereinafter expressed as to the power and authority of the architect, it is not necessary to consider whether under all the items 44-48 the work done is conform to the precise description in the prices schedule. If it was a question of the amount of deduction to be made from the respondent's claim, I should agree with the opinion expressed by Lord Skerrington. I dissent in principle from the proposition that the right of a builder to claim contract price for contract works stands on the same basis in a measure and value contract as in a contract for a lump sum. If the case of *Steele* v. *Young*, 1907 S.C. 360, 44 S.L.R. 291, can be taken to affirm any such proposition, I respectfully differ from the judgment of the Court of Session. In the case of *Ramsay* v. *Brand*, 25 R. 1212, 35 S.L.R. 927, the Lord President states propositions which are not open to question in a contract in which the completion of the whole contract work for a lump sum is to be regarded as a condition-precedent to the right of payment. "The right of the builder was to payment of this lump sum upon his executing the work according to the plans and specifications. If the builder chooses to depart from the contract he looses his right to sue for the contract price." A similar case to *Ramsay* v. *Brand* is that of *Sumpter* v. *Hedges*, 1898, 1 Q.B. 674—"Where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered." These cases and dicta are not applicable to the contract entered into between the appellants and respondent in the present case. In such a contract the covenants for work are independent of each other in this sense that a builder who has completed a number of items conform to the contract, and has handed over the works to the building owner, and has obtained the final certificates of the architect and measurers, is not disentitled to recover in respect of these items on the ground that on other items he has failed to conform with the contractual conditions. This construction involves no hardship on the building owner. If the building owner succeeds in his contention that work for which contract price is claimed has not been carried out conform to contract terms, he is not liable to pay the contract price, and if in consequence of the failure of the builder to carry out work on the contract terms he alleges and proves damage, he is entitled to claim the amount of such damage either as a set-off or a deduction.

In the case of *Stavers* v. *Curling*, 3 Sc. (C.P.) 740, 1836, the question arose whether the performance of certain covenants formed a condition-precedent to the plaintiff's right to recover. Tindal, L.C.J., says—"The rule has been established by a long series of decisions in modern times that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears upon the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way."

Applying the rule to the terms of the present measure and value contract, I think it would not be consistent with the intention and meaning of the parties to hold that after the taking over of the works by the appellants and the giving of the final certificates, the respondent is not entitled to claim the contract price in respect of all

those portions of the work which have been admittedly constructed to conform with the contract terms. On this part of the case I am in accord with the opinion expressed by Lord Skerrington.

In the course of the argument reference was made to the Scotch action "*quantum lucratus.*" It is, however, not necessary to consider what the rights of the respondent would have been under an action framed alternatively in this form. The respondent has elected to make his claim for contract price for contract work, and the case was argued on this basis.

If the opinion which I have expressed as to the construction of the contract entered into between the appellants and respondent is correct, the question of the authority of the architect within the contract is of importance in reference to the items of work which are alleged not to conform to contract terms. It is therefore material to consider what is the authority of the architect within this contract, and this question has given rise to differences of judicial opinion. Mr Adam, an architect in Glasgow, was instructed to prepare the Garrioch Road plans, and was told to follow the recent tenements, the Garrioch Crescent tenements. The plans as prepared by Mr Adam, and which under the authority of the appellants were inserted in the contract as the contract plans, give no indication of the size of the out and inband rybats described in items 44-48 of the schedule. In reply to inquiries by the respondent, Mr Adam told the respondent's foreman, Robert Mitchell, to follow the Garrioch Crescent job. I think that Mr Adam had authority to give this direction, and that the respondent was under obligation to follow this direction. It was in no sense an alteration of the plans, but an explanation incident to their vagueness, which the appellants had sanctioned, and which the parties intended to be made sufficiently explicit for practical working under the directions of the architect. In the notes of the estimate a description is given as to the character of the stones, bricks, and mortar to be used. The size of the stones for ashlar and hewn work of front and gables is not defined, but they are to be taken from the best part of the Locharbriggs or Closeburn Quarries.

There is no allegation that these directions as to the quarries from which the stones should be taken were not followed. The obligation of the respondent, further, is that "the whole materials and workmanship be of the best description, executed and completed in accordance with the drawings, in an expeditious and tradesmanlike manner, to the entire satisfaction of the proprietors and architect, or any person appointed to inspect the work." The work was carried out to the satisfaction of Mr Adam, and generally conforms to the contract, subject only to certain alleged deviations no longer insisted upon, and to the question of the sizes of the rybats, which were not determined or shown on the plans or drawings. A power is reserved to the architect to increase, lessen, or omit any part of the work. I cannot construe these words as giving authority to the architect to give directions which would be inconsistent with the works specified in the contract, or that if he did so there would have been any obligation either on the respondent to carry them out or on the appellants to pay the contract price. It is material to observe that the work when finished was to be measured and charged at the rates contained in the schedule or others in proportion thereto, and in proportion to lump sum in letter of offer. This provision shows that the parties did contemplate that there might be deviation from the priced items. The measurers have applied the rates contained in the schedule in items 44, 45, 46, 47, and reduced the price in item 48 from 4s. to 3s. 9d. per lineal foot.

It is said that the architect went outside his authority and authorised work not conform to the contract in not insisting on the size of the out- and inband rybats as described in items 46-48 of the schedule, or as near thereto as would be consistent with the conditions of the construction. I cannot agree with this contention, and concur in the judgments of the Lord Ordinary and Lord Johnston.

The architect had authority in the terms of the contract to order the work to be constructed in accordance with the contract plans. These plans were vague and indeterminate, and in themselves ambiguous in matters of constructional detail, and unless the architect's authority extended to enable him to give sufficient explanations I do not see how the contract could have been practically performed. It was the duty as well as the right of the architect to give explanations and directions, and in giving the explanations and directions which he gave to the respondent through his building foreman Robert Mitchell he was acting, not in contravention of the contract, but in accordance with its meaning and intention. In my opinion it is the plain business meaning of this business contract that work done in accordance with the contract plans as explained by the architect is work which does conform, *in modo et forma*, with the contract obligation.

The evidence called by the pursuer that the schedule under a contract of this kind should be looked to, not for the character of the work but for the price to be charged, is not admissible; but at the same time I think it is shown on the face of the contract that the main purpose of the priced schedule in the contract is to fix a price applicable to the contract work, and that if the description in the schedule is not applicable a deduced price may be certified by the measurers. In my opinion Mr Adam had authority to sanction the work as constructed, and the appellants are liable to pay the amount claimed.

It has not been necessary to examine the character and stability of the digger, mason, and brick works carried out by the respondent. I think, however, it is due to him to say that I accept fully the evidence of Mr Frank Burnett, an architect of acknowledged skill and experience in Glasgow, who states that the buildings in Garrioch Road

were "very much above the average class of mason work in tenements of this kind, workmanship good, and material good, all together a very creditable job."

The appellants have the benefit of the work constructed by the respondent under the contract terms and must pay the contract price.

The appeal should be dismissed with costs.

LORD WRENBURY—I have had the advantage of reading the opinions of the Lord Chancellor and of Lord Parmoor. With their conclusions I agree.

If I had found that the stipulations as to the dimensions of the rybats were contractual, I could not hold that the architect had authority to vary that or any contractual term. His authority is to control the performance of the contract, not to make it or vary it.

Further, if I had found that the contract had not been performed, I could not hold that the builder could sue for the contract price, and that the building owner could have a remedy in damages. The two things are, to my mind, wholly inconsistent. The builder can sue for the contract price only if the contract has been performed. The building owner can sue for damages only if it has not. The two rights of action cannot co-exist.

The question upon which the case turns is, in my judgment, whether the stipulations as to the dimensions of the rybats were contractual or not. The better view, I think, is that they were not contractual, that the measurements were inserted as a basis for pricing and not as a contractual obligation as to exact size, that the exact measurements and arrangement of the rybats was matter of construction over which the architect had control. It was within the authority of the architect to give directions as to construction in accordance with the contract plans. These plans left constructional detail in many respects unprovided for; it was for the architect to supplement them if and so far as necessary.

The case is not an easy one, but it is, I think, too narrow a view to say that these details of measurement, which in certain circumstances it was impossible to follow, were contractually obligatory.

For these reasons, my judgment is that this appeal shall be dismissed.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellants (Defenders)—Clyde, K.C.—Wilson. Agents—Beveridge, Greig, & Company, Westminster—Fraser & Davidson, W.S., Edinburgh.

Counsel for the Respondent (Pursuer)—Blackburn, K.C. — Graham Robertson. Agents—John Kennedy, W.S., Westminster—Anderson & Allan, Glasgow—J. L. Hill, Dougal, & Company, W.S., Edinburgh.

Monday, October 18.

(Before the Lord Chancellor (Buckmaster), Lord Shaw, Lord Parmoor, and Lord Wrenbury.)

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED *v.* AKTIESELSKABET "FJORD" OF CHRISTIANIA.

(In the Court of Session, December 18, 1914, 52 S.L.R. 244, and 1915 S.C. 281.)

Ship—Collision—Pilot—Compulsory Pilotage Area—Ship Necessarily in Charge of Pilot, but not yet within Statutory Area—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 633—*Clyde Navigation (Consolidation) Act* 1858 (22 *and* 23 *Vict. cap. cxlix*), *sec.* 75.

The Merchant Shipping Act 1894, sec. 633, enacts—"An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law."

The Clyde Navigation (Consolidation) Act 1858 defines the western limit of the river Clyde as a line drawn from Newark Castle to the mouth of the Cardross Burn—that is, about 4 miles east or up the river from Greenock—and it makes it unlawful for anyone to navigate without a pilot a vessel in any part of the river as defined by the Act. It also confers power on a pilot board to make bye-laws regulating the pilotage in the river and in the Firth. By these bye-laws Greenock is the place for taking up and dropping river pilots, and when on board a pilot is to be in control of the vessel.

Held (*rev.* judgment of the First Division) that there is no exemption from liability between Greenock and the line between Newark Castle and the mouth of the Cardross Burn, either under the Merchant Shipping Act 1894, or (*dub.* Lord Dunedin) at common law.

This case is reported *ante ut supra.*

The pursuers the S.S. "Beechgrove" Company, Limited, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—On the 2nd February 1914 the steamship "Blaenavon" left the port of Glasgow and sailed down the river Clyde on an outward voyage. She reached Greenock, which is outside the statutory limits of the river, at about 6 p.m. At the same time the steamship "Fjord" was sailing up the Firth of Clyde to Glasgow, and a collision occurred between the two vessels outside Princes Pier. The owners of the "Blaenavon" blamed the "Fjord" for the accident, and instituted the proceedings out of which this appeal has arisen for the purpose of recovering compensation for the damage that they suffered.

The actual question of who was to blame for this misadventure is not before your