suers under their agreement with them. I therefore think the defenders have no title to retain the price against the pursuers' claim, and that the Lord Ordinary's judgment should be affirmed.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for Pursuers (Respondents)—J. P. B. Robertson—Young. Agent — Thomas Dowie, S.S.C.

Counsel for Defenders (Reclaimers)—Trayner —Armour. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, December 14.

FIRST DIVISION.

[Lord Adam, Ordinary.

AYR ROAD TRUSTEES *v.* W. & T. ADAMS AND OTHERS.

Executory Contract—Contract for Bridge—Work to be done to Satisfaction of Engineer — Acceptance—Defect subsequently Discovered—Settlement of Accounts Final.

Road trustees entered into a contract for the erection of a bridge, by which it was provided that the contractors should execute the work to the satisfaction of the engineer employed by the trustees. The works were to be carried on under the immediate superintendence of a resident inspector to be appointed by the engineer, and the contract price was to be paid in instalments by the engineer's certificate. The inspector was in fact selected and employed by the trustees, and was present at the execution of the work. The contractors did not personally superintend the work, but were represented by an agent appointed by themselves. The contractors were taken bound to maintain the bridge for one year from the completion of the contract, and on the expiry of this period the final payment was made to them on the certificate of the engineer. The accounts upon which the settlement proceeded were made up by the engineer from information supplied to him by the inspector. In April 1881, after the year of maintenance had expired, defects were discovered in the bridge, and in July 1882 the trustees raised an action against the contractors on the ground that the foundations of the bridge had not been excavated to the contract depth, that concrete had been used as a foundation for some of the piers instead of ashlar, and that the concrete was of inferior quality. The conclusions of the action were (1) for repayment of money paid for materials not supplied and work not done; (2) for the expense of remedial and protection works rendered necessary by defects in the defenders' work; and (3) for damages for breach of contract. *Held* that as the pursuers had made the resident inspector their servant, and as he, in the full knowledge of what had occurred, had furnished the engineer with the information for making up the accounts which the engineer had certified as correct, and on which the final settlement had proceeded, and looking to the fact that there had been no fraud on the part of the contractors, or representations by them conducing to the settlement of accounts between the parties, the pursuers were not entitled after the lapse of three years to open up these accounts.

Process—Proof—Evidence.

Held that where there are two or more defenders in an action, evidence brought out by any one defender in cross-examination is available to or may be used against any other defender.

Circumstances in which *held* that the manner in which a case had been conducted showed that the understanding of parties had been that the evidence-in-chief led for one defender was to be used by or against the other.

The Ayr Bridge Act 1877 provided for the removal of the bridge across the river Ayr, at Ayr, known as the New Bridge of Ayr, and the erection of a new one. Under this Act the Road Trustees for the district of Ayr were entrusted with the duty of having the necessary works executed.

Messrs Blyth & Cunningham, civil engineers, Edinburgh, on the employment and instruction of the Road Trustees, prepared the Parliamentary plans required for the obtaining of this Act, and after the Act was passed they were employed by the trustees to prepare the drawings, specifications, and schedules of measurement required for the removal of the former bridge and the erection of the new bridge, and to superintend the removal and erection. Messrs Blyth & Cunningham accordingly prepared the drawings, specifications, and schedules of measurement, and issued the same. The Road Trustees accepted the tender for the work of Messrs W. & T. Adams, contractors, Callander, and thereafter a contract was entered into between the Road Trustees and Messrs Adams, dated 5th, 10th, and 20th October 1877. By this contract Messrs Adams bound and obliged themselves to execute and complete the whole work, and to provide and supply all the materials required in the work, and that in a good and sufficient workmanlike manner, conform to drawings, specifications, and schedules of measurements prepared by Messrs Blyth & Cunningham, and signed as relative to the contract, and that to the entire satisfaction of George Cunningham, whom failing Edward Blyth, or of any other engineer to be appointed by the Road Trustees. The works were to be finished by 1st March 1879, the price to be £13,015, 19s. 6d., "under deduction of 10 per cent. upon each instalment, which shall be retained until the whole works are certified by the engineer as complete, and shall then be paid, without interest, within a month from the date of said certificate, under deduction of such sum as the engineer shall fix as a reasonable sum to be retained in security for the maintenance of the works during the period before mentioned, on the expiry of which, when the terms of the contract as to maintenance have been complied with, the balance shall be paid without interest."

The specification incorporated with the contract contained the following clauses:—"*Ex-*

cavations.—The excavation for the abutments and piers shall be cut to the depth shown on the drawings, or to such less or greater depth as shall be considered necessary by the engineer, and the stuff arising therefrom shall be removed from the works to such place as the engineer shall direct." "*Foundations to be Approved.*—No masonry shall be put in until the foundations have been carefully examined, and the engineer has approved of the same." "*Work to be Substantial.*—The whole works under the contract shall be done in a neat, careful, substantial, and workmanlike manner, and to the true intent and meaning of the specification. No advantage shall be taken by the contractor of apparent or inadvertent omissions or errors in the drawings or specification, and the works, with the whole material used and mode of their use, shall be to the entire satisfaction of the engineer." "*Superintendence.*—The works shall be carried on under the immediate charge of a resident engineer or inspector appointed by the engineer, whose directions in all points relative to the mode of carrying on the works, or workmanship executed, are to be received and acted on by the contractor; and the resident engineer or inspector shall have power to reject or condemn any materials or workmanship that he may deem unsuitable, and any material or workmanship so condemned and rejected shall be promptly removed and replaced by the contractor at his own cost to the satisfaction of the engineer." "The contractor shall keep on the works an agent who shall represent him in his absence, and all instructions given to the agent shall be held and considered as given to the contractor." "No person to whom the engineer shall object on account of improper conduct, or bad workmanship executed by such person, shall be employed by the contractor, or allowed to remain on the works." "*Maintenance of Works.*—The contractor shall be bound to keep and maintain in good and sufficient order and repair, and at all times open for traffic, the works under this contract for the period of one year from and after the time when the whole work under the contract shall have been wholly completed; and he shall then deliver these works to the Trustees in a good and sufficient condition, and that to the entire satisfaction of the engineer." "The contract price shall be paid by monthly instalments as the work advances, and to such an extent as shall be certified by the engineer." . . .

The bridge was finished in April 1879. On the completion of the work a final state was prepared by Mr George Cunningham, bringing out a balance due to the contractors of £466, 17s. 2d., being the sum appearing to be due to them on a final settlement of their accounts under the contract, less a sum of £100 retained to meet the contractors' obligation to maintain the bridge for a year after it was completed. Mr Cunningham accordingly granted a certificate for this sum in favour of the Messrs Adams on 23d May 1879. It was then paid, and Messrs Adams granted this receipt:—"Received from James M'Murtrie, treasurer, the within mentioned sum of £466, 17s. 2d., being fifteenth instalment of contract for new bridge. £496, 17s. 2d. Recd. payment for W. & T. Adams, C. W. A. 30/5/79."

In April 1880 the bridge was finally taken over from the contractors, and on 23d of that month Mr Cunningham granted a certificate authorising the Road Trustees to pay the said sum of £100 to the contractors as a final payment under their contract, and the sum was paid, and this receipt granted for the same:—"£100—Received from James M'Murtrie, treasurer to the Ayr Bridge, the sum of £100 stg., being payment of the final instalment within stated."

This action was raised in July 1882 at the instance of the Road Trustees for the district of Ayr against Messrs W. & T. Adams and Messrs Blyth & Cunningham, conjunctly and severally, for payment of £8750, made up as follows, viz., £1500 in respect the defenders Messrs Adams had been overpaid to this extent, because they had been paid for work not done, material not supplied, and for material superior to what they actually supplied; £5000, being the cost of remedial and protective works executed in order to remedy defects in the work alleged to be the result of the defenders' breach of duty; and £2250 in name of damages.

The averments in the action were as follow, viz., "(Cond. 8) It was the duty of the engineers to superintend the carrying out and execution of the said work, and to see that the same, both as to workmanship and material, was in every respect conform to the said contract, drawings, specification, and schedule. In particular, it was the duty of the engineers to see that the foundations of the abutments and piers of the new bridge were excavated to the contract depth; that the said foundations were safe and proper foundations; that the said piers and abutments were constructed properly and safely of the material and in the manner provided by the contract; and that the excavations round the piers and faces of the abutments were filled in with concrete, the concrete being to be composed as provided in the specification. It was also the duty of the engineers to ascertain and advise the pursuers of the work actually executed by the contractors, and to take care that the contractors were not paid for any work different from what was provided for in the specification, and actually executed, or in excess of what they had actually done. The said engineers all along professed and represented to the pursuers that they in every point attended to and carefully performed the whole duties incumbent on them in connection with the execution of the work in question, and particularly those set out in this article." "(Cond. 9) In or about April and May 1879 the whole defenders concurred in representing to the pursuers that the whole work stipulated to be performed under said contract had, with the small exception after mentioned, been duly executed, and that the balance of the contract price was then payable by the pursuers. The only alterations represented by the defenders as having been made on the contract work were—(1) a deduction of ashlar saved in foundations of abutments and piers, 643 cubic feet at 2s. 6d., equivalent to £80, 7s. 6d.; (2) extra work in connection with a new parapet, £76, 11s. 8d.; and (3) extra work connected with alteration of accesses, £102, 2s. Relying upon the representations of the defenders as aforesaid, the pursuers paid the defenders (both contractors and engineers) the sums due to them in respect of their work and services as aforesaid. The said deduction of £80, 7s. 6d. was made at the

settlement in respect of ashlar work not executed in consequence of the piers and south abutment not having been carried down to the contract depth. The contractors represented that all the piers had been founded at the contract depth except the south abutment and pier No. 3, which were represented as having been founded 6 inches above that level, and pier No. 2, which was represented as having been founded partly 3 inches and partly a foot above that level. In point of fact, as after mentioned, the defenders' representation above set forth as to the depth at which the piers had been founded was untrue, and known by the defenders Adams at the time to be untrue." *Answer for Messrs Adams* — "The works were under the immediate personal charge of the pursuers' resident inspector, Mr John Haldane, who was in constant attendance and direction of the defenders' operations. They were also periodically examined and approved of by Mr Cunningham, the pursuers' engineeer, and Mr David. M. Westland, his assistant; specially the foundations previous to masonry being put in. Mr Charles Adam, C.E., was the manager and agent on behalf of the present defenders." "(Cond. 10) In or about April 1881 the pursuers learned from their road surveyor that the condition of one of the piers of said new bridge (known as pier No. 3 from the south side) was in an unsatisfactory condition, and requiring immediate attention. This was not known, and could not before said month of April have been known by the pursuers, who till then believed that the bridge had been in every way built conform to contract, and was sound and stable. In consequence of this information the pursuers at once communicated with the engineers, and caused them to inquire into the matter. Having done so, the engineers on 8th June 1881 reported to the pursuers. In that report they stated, *inter alia*, that 'the bed of the river Ayr at the new bridge consists throughout of flat bedded sandstone rock, the abutments and piers of the bridge were all founded on solid rock at a depth of from 3 to 6 feet below the surface of the rock;' and they recommended that an invert of strong Portland cement concrete should be constructed between piers 2 and 3, and for the whole breadth of the bridge, in order to prevent any evil consequences arising from a deepening of the channel between said piers, caused in their opinion, as they stated, by a crush of ice during the preceding winter—a coffer-dam being to be constructed to allow the invert to be rapidly proceeded with." "(Cond. 11) In September 1881 the engineers were again asked to report upon the work, and this they accordingly did on 22d September 1881. In that report the engineers (per Mr George Cunningham) said—'I find that some of the Trustees are under the impression that the bridge was founded on concrete, and that this was of inferior quality; this is a mistake; there is no concrete under any of the piers, they were all founded on rock, and the concrete was only placed round them to fill up the spaces excavated beyond the actual size of the piers when founding them.'" "(Cond. 12) Thereafter the said remedial works were proceeded with as expeditiously as possible. It was not, however, till November 1881 that such progress had been made as enabled the true state of pier No. 3 to be seen. It was then found that the foundation thereof had not been excavated to the contract depth, or to the depth that had all along been represented to be its real depth by the defenders, and that the material on which the said pier was founded, and of which it was in part constructed, was very much inferior to and cheaper than what had been contracted for, and represented by the defenders as actually used and paid for by the pursuers. For a considerable length from the west end of the pier (which from cutwater to cutwater measures about 59 feet) the ashlar work rested on the original bed of the river at a height of between 3 and 4 feet above the contract depth, no excavation at all having been made. At another part there had been some excavation, but the trench had been partially filled with inferior concrete and rubbish on which the ashlar work rested at a height of between 4 and 5 feet above the contract depth. It was also discovered that a considerable portion of the pier had no solid foundation at all, the river running through below the ashlar work. Before any other progress was attempted with regard to such other remedial measures as should be considered necessary, the engineers recommended that a concrete apron in bag-work should be at once placed along the whole of the north side of this pier. The construction of the concrete apron was at once set about, and at the same time the completion of the concrete invert before mentioned, and the underputting of pier No. 3, which had also been resolved on in accordance with the views of the engineers as necessary for the safety of the bridge, were proceeded with by the pursuers as rapidly as possible." "(Cond. 13) Thereafter the pursuers made further inquiry into the condition of the foundations of the piers and abutments of said bridge. It was then found that though the defenders had concurred in representing to the pursuers that the excavations for the said foundations had all been carried down either completely to the contract depth, or to within one or two inches or thereby thereof, and that the whole of said piers and abutments had been constructed of the material and dimensions provided for in the contract, and had obtained payment from the pursuers of the sums respectively due to them on that footing, the said representations were entirely incorrect. Not one of the said excavations has been carried down to the depth contracted for or paid for. . . . The piers and abutments ought, in terms of the contract, to have been constructed throughout from the foundations of solid ashlar, and they were represented by the defenders as having been so constructed, and were paid for on that footing. In point of fact, considerable portions of all of them (with the exception apparently of pier No. 4 and the north abutment) consist of very inferior concrete, rubble, and rubbish. In particular, pier No. 3, for a length of about 20 or 30 feet from the east end, had been founded for a height of between 4 and 5 feet from the bottom of the excavation with inferior concrete, clay, and rubbish. The defenders also represented that the excess space in the excavations for the piers and abutments beyond what was occupied by the mason-work had been filled up with concrete as provided for in the contract, and they were paid on this footing. In point of fact this was done, and large spaces were left, particularly at the south abutment, and piers Nos. 2 and 3, which were not so filled up.

The pursuers further averred that in consequence of these misrepresentations, and of the failures and deficiencies referred to, the defenders Adams had been overpaid to the extent of £1500; that if the bridge had been built in terms of the contract, and as the defenders represented to the pursuers it had been built, it would have been perfectly stable and safe, and there would have been no necessity for any protective works. In consequence, however, of the failures on the part of the defenders the bridge had become insecure, and protective works had been executed, and would require to be executed; that even after the whole of these works, which had cost £5000, and were necessary to remedy the said defects, the bridge would not be as good as it would have been if built in terms of the contract; that the damage on this ground sustained by the pursuers through the defenders' fault and fraud would not be less than £2250.

They further averred—"(Cond. 17) The defenders Adams were well aware all along that they had not executed the works in terms of their contract, in the several respects before mentioned. They concealed all of their said failures from the pursuers, and claimed and accepted payment of the contract price on the representation made by them and the other defenders that they had in every respect observed the conditions of the contract, and done all the work conform to contract measurements and of contract materials, except as regards the 643 cubic feet of ashlar before mentioned. Further, the said concealment was fraudulent on the part of the defenders Adams. If the defenders Adams had duly and properly performed their duties, the defects and failures now complained of would not have happened; the bridge would have been built conform to contract, and would have been good and stable in every respect, and none of the protective works, already executed and still requiring to be executed to make it safe, would have been necessary."

Both sets of defenders lodged defences on the merits, and for the defenders Messrs Adams the following plea-in-law was stated—"(2) The said works having been executed under the superintendence and to the satisfaction of the pursuers, or those by whose acts they are bound, and transferred to and accepted by the pursuers, and the whole accounts both for erection and maintenance having been finally adjusted and certified in terms of the contract more than three years prior to the raising of the present action, and the balance paid to the defenders, the pursuers are not now entitled to open up these accounts or to insist in damages as claimed."

The following facts were proved, viz.—Under the superintendence clause of the contract, quoted above, John Haldane was appointed resident engineer or inspector. Although by that clause his appointment fell to be made by the engineers, yet in point of fact he was appointed by the Road Trustees. He was at the time engaged in a similar capacity in the service of the Ayr Harbour Trustees, and the pursuers arranged with them that Haldane should inspect the bridge as well as the harbour works. This was done without the knowledge of Blyth & Cunningham. The agent appointed under the above clause by the defenders W. & T. Adams was Charles Adam. According to the specification he had to take his orders from the inspector. He was paid by salary, and the whole details of the work were left to him. In the course of the work concrete instead of ashlar was put into the foundation of pier No. 3.

Mr Haldane deponed:—"All the piers and abutments of the bridge, with the exception of No. 3, were made of ashlar down to the foundations. There was concrete put into one-half of pier No. 3. That was done because it was found impossible to keep the water out of the excavations." Haldane further stated that as the contractors were desirous of trying concrete he agreed to let them put it in, and that it was put in with his sanction, but that he did not tell Blyth & Cunningham that he had sanctioned it. With regard to the information furnished by Haldane to the engineers as to the depths to which the foundations of the various piers had been carried down, he deponed that Charles Adam made no representation further than assisting in taking the measurements. "I don't believe he concealed anything from me. I had no suspicion of that at any time, and have not yet. I think he acted in good faith. Neither of the Messrs Adams had any communication with me upon the subject, either as regards the foundations or the quality of the work or anything else." Charles Adam was not examined as a witness, being absent abroad.

With regard to the settlement of accounts, Mr George Cunningham, C.E., deponed:—"Messrs Adam had not rendered us any account. The account was made out by me upon Mr Haldane's information . . . Mr Adams made no representation to us whatever to enable us to make up the account."

The Lord Ordinary (ADAM) decerned against W. & T. Adams for £1000, and assoilzied Blyth & Cunningham.

"*Note.*—The first point to be determined is as to the nature of the materials used in the foundation of the east half of the pier No. 3.

"It is not matter of dispute that this pier ought to have been founded at a depth of about 4 feet 6 inches below the bed of the river, and built throughout of ashlar, and that W. & T. Adams were paid on the footing that it had been so constructed. It is not matter of dispute that as regards about 25 feet of the east end of the pier, while the foundation was excavated to the requisite depth, it was not built of ashlar. The defenders say that the pier was founded up to the level of the bed of the river on excellent concrete; that this was a harder and better foundation than ashlar would have been; that consequently the cavity under it was not in any way due to the nature of the materials, but solely to its having been crushed out by ice; and that the bridge would probably have been in a worse condition or given way altogether if it had been built of ashlar.

"Mr Cunningham and others think that the pier must have been founded on concrete, but of a very inferior kind, so that when the bed of the river was scoured out and the ice and water got access to it it was incapable of resisting. Mr Cowan and others think that the existing concrete was simply placed on the top of the sand, clay, and silt lying in the excavation which had been made for the foundation, and that when the water got access to it it simply washed it out, leaving the cavity which was found.

"Now, as to the evidence on this point—We have only the evidence of one witness, Low, who

professes to have been present at the founding of this pier. I thought when he was being examined, and I think still, that his evidence is not to be relied on. No doubt it is true that workmen engaged at such jobs as this may be difficult to find after two or three years; but then there was one witness, Charles Adam, who was W. & T. Adams' agent and representative at the works, upon whom they throw the whole responsibility, whose evidence might and ought to have been obtained, but he has not been examined. Haldane, the clerk of works, who was responsible to the pursuers and the engineers, and ought to have seen as to the matter, says, whether truly or not, that he was ill of lumbago at the time, and not able to get nearer to the spot than two arches.

"In these circumstances, and in the absence of direct evidence on the subject, the Court is left to draw inferences from the state of matters disclosed when the foundation was exposed, and I am clearly of opinion that the only inference which can be drawn is, that if the pier had been founded on hard, solid concrete, as the defenders say, such a cavity as existed under the pier would not have been. Mr Cunningham is of opinion that the pier must have been founded on concrete, though of inferior quality, because if the existing concrete had been laid on the top of the sand, silt, &c., it would have been insufficient to support the superincumbent weight of the pier when settling, but that the concrete in being put in had got mixed with clay and other matters found in the cavity, which were quite sufficient to destroy good concrete, and to account for its being carried out when the ice and water reached it. Mr Cowan and others say that the appearance of the under surface of the existing concrete shows that it was simply spread on the surface of the sand, silt, and clay, and that the sand, silt, and clay being confined in the hole excavated for the foundation, were sufficient to afford support for the superincumbent weight of the pier, but that when the water got access to it it was at once washed away.

"It appears to me that there is a good deal to be said for either view, but in my view of the case it is unnecessary to determine which is right, because it seems to come simply to a question of the decree of badness or insufficiency of the material on which the pier was founded, and because whichever view is taken, W. & T. Adams are equally responsible,—*i.e.* whether the concrete was originally good, but spoilt in consequence of the way in which it was put into the foundation, or whether there never was any concrete in the foundation at all.

"But Mr Cunningham and Mr Cowan differ in opinion as to whether the existence of the cavity under the pier caused the bed of the river to be scoured away to the depth of 5 or 6 feet as it was, and this is important, because if it did, then W. & T. Adams may be liable for the expense of the protective works which that state of matters rendered necessary, but not otherwise.

"I think it is not proved that the existence of the cavity had anything to do with the scouring out of the bed of the river. I think the crush of ice under the arch which occurred on that most exceptional winter, taken in connection with the formation of the bed of the river, is alone sufficient to account for the scouring out of the bed. It is admitted on all hands that the bed of the river must have been scoured out more or less before the water or ice could get access to the cavity which had been excavated for the foundation of the pier. And it appears to me that if this scouring process was once set up, it would probably go quickly on. And I do not see how there could be any such rush of water or ice into the cavity as to cause or contribute to the scouring of the bed of the river. Besides, it would appear to me that if the scour was caused by the cavity, we should have found the scour deepest where the water forced itself out of the cavity,—that is, at the west end of it, and thence downwards, and not upwards, as is the fact

"It is not surprising that, after the disclosures made as to the state of the foundations of pier No. 3, the pursuers should have desired to ascertain how the rest of the bridge was founded and constructed. With that object they caused certain bores to be made through the piers and abutments, the result of which, they say, is to show that the piers and the south abutment are not founded to the depth contracted and paid for, and that the piers are not constructed throughout of solid ashlar, but partly of rubble and rubbish.

"With reference to the depth 'contracted for,' it appears that by the contract it was declared that the excavations for the abutments and piers should be cut to the depth shown on the drawings, or to such less or greater depth as should be considered necessary by the engineer. In this case the engineer inspected all the foundations, and, excluding for the present pier No. 3, did and does consider that the piers and abutments as paid for were founded of a sufficient depth; and if they were founded to the depth paid for, that appears to exclude any liability on the part of W. & T. Adams on that ground. But were they excavated to a lesser depth than they were paid for? The proof of this rests on the evidence furnished by the bores. But it appears to me to be shown that these bores are not at all reliable. In particular, when the invert was being put in, the foundation of No. 2 pier was seen to exist at a depth where the bores showed that it did not exist.

"On the same grounds I am of opinion that it is not proved that the piers were constructed otherwise than of ashlar in terms of contract.

"But this does not apply to pier No. 3. With regard to the foundation of it, although Mr Westland [a civil engineer, and assistant to Messrs Blyth & Cunningham] does not particularly remember having done so, I think he must have seen and approved of it. It appears that he inspected the works on the 29th March 1878, and three days afterwards Mr Haldane reports to the pursuers that the foundation of No. 3 was ready for building. Mr Westland could only have seen the east part of the foundation excavated, but according to the evidence that was sufficient to enable him to judge of the whole foundation, and it was by no means necessary that he should see the whole area of it excavated—that being a matter for the inspector or clerk of works to see done. It now appears that it never was excavated. On the 29th November 1878 Mr Westland sent to Mr Haldane a plan asking him to mark thereon the exact depth of the foundations of the piers and abutments, and to mark wherever a step occurred across a pier. That plan was returned, showing pier No. 3 constructed entirely of ashlar to the

depth to which the east end of the foundation had been excavated. Haldane now says that he kept no measurements, and that he and Adam had forgotten how pier No. 3 had been constructed. I do not at all believe that, and I believe that the plan was returned marked as it was to conceal what he had allowed to be done with reference to this pier. But the measurements so sent formed the basis of the settlement with W. & T. Adams, and in this way they have been paid for ashlar work which never was executed.

"With respect to the claim for damages. This is founded on the ground that the bridge is not so good a bridge, even with the protective works, as it would have been if built according to contract, and that it would be more expensive to look after and keep in order. In my opinion, however, the bridge was built according to contract except in respect only of pier No. 3, and that the remedial works, for which I think W. & T. Adams are liable to pay, have made it as strong as it would have been if built as the engineers instructed and believed.

"The protective works were suggested by Mr Cunningham as being desirable before the state of pier No. 3 was known, and were the result of the experience furnished by the winter of 1881. The bridge as designed and constructed, except pier No. 3, was perfectly sufficient, according to the opinion and knowledge of the engineer at the time it was constructed, and that being so, I do not see how Messrs W. & T. Adams can be made liable for the expense of these protective works.

"Assuming, therefore, that the matter is open, I think that W. & T. Adams are liable in the expense of the remedial works, and to repay the price of the ashlar work which was not executed. But they say that the bridge was taken over by the pursuers, and all accounts closed and settled, and cannot now be reopened.

"They deny all personal knowledge of the state of pier No. 3, and they throw the whole responsibility on Charles Adam. But Charles Adam was their agent and representative, and I think his knowledge must be taken to be their knowledge. They say, further, that the pier was founded on concrete by permission of Haldane. But Haldane had no authority to give any such permission, and Adam had no right to make such a deviation from the contract plans except by permission or order of the engineer. Besides, that would not justify either a charge for work not executed or the founding of the pier either on inferior concrete or on sand and clay.

"They say further, that it was a reasonable thing to found the pier on concrete, because on account of a rush of water into the foundation it was impossible to found the pier on ashlar. I must say, however, that I do not believe in the alleged rush of water into the foundation. If there had been, Mr Westland would have seen it; besides, there was no such water when the pier was ultimately built entirely of ashlar. That the contractors were troubled by water I quite believe, and that it led to the founding of the pier on concrete—but then I believe that it arose from the insufficiency of their coffer-dam. Besides, that would not get over the difficulty that if concrete was used it was either inferior or improperly laid.

"It is true that the final settlement did not take place on measurements furnished by the defenders, or on any direct representation made by them, but on measurements furnished by Haldane. But it appears to me that the defenders, by settling on the footing of these measurements, adopted them, and represented them as correct. If the settlement had been with their agent Adam, I do not see that it could have stood, because there is no doubt at all that he must have known that the measurements were false, and that he was taking payment for work which in his knowledge was never done. But if, as I think, his knowledge was W. & T. Adams' knowledge, then I think they are in no better position than he would have been. I do not think it is any sufficient answer to say that the pursuers settled on the footing they did, not in respect of any representations made by W. & T. Adams, but in respect of representations made by their own servant Haldane. That Haldane failed in his duty in this respect does not, I think, exoner the defenders.

"It was said, further, that W. & T. Adams were not liable, because they should have been allowed to put matters right themselves. It appears to me, however, that the situation of the pier was a matter of great urgency, requiring to be put right without a moment's delay, and that the pursuers were in the circumstances perfectly entitled to do so themselves.

"As regards the defenders Blyth & Cunningham, they were employed under no special terms or conditions. Mr Shaw simply intimated to them, by his letter of 16th May 1877, that he was authorised by the pursuers to request them to proceed with the plans of the bridge.

"In these circumstances, the question arises, whether they gave that amount of supervision which the pursuers were entitled to expect?

"Mr John Haldane was duly appointed inspector of works, and to him they were entitled to look that the work was carried out in terms of the contract. They were also entitled to trust to him for all measurements of work done. They repeatedly visited the works, and they inspected the foundations of the abutments and piers, and there is no doubt that they were safe and proper foundations. With reference to pier No. 3, Mr Westland saw enough of it to satisfy him that it was a safe and proper foundation, and the defenders were entitled to rely that it would be excavated and built upon in the manner provided by the contract.

"I do not think, therefore, that there is any ground of complaint against them that they did not exercise a proper amount of supervision.

"It is said, however, that the defects in the building would not have occurred but for the fault of Haldane, and that they are responsible for him. It is true that the defects in the bridge would probably not have occurred except for Haldane's neglect of duty, but I do not think they are responsible for him. He was appointed no doubt by the engineers, and was under their orders; but he was paid by, and was I think the servant of, the pursuers. He was there in their interest to see that the persons with whom they had contracted duly fulfilled their contract. No authority was quoted to me to the effect that the engineers are liable for the negligence of a clerk of works, and I do not think they are.

"But even if it had been otherwise, I think the acts of the pursuers would in this case have relieved the engineers of that responsibility.

"Haldane was engaged at a salary of £3 per week. He was to be subject to the orders of the engineers, and to give his whole time to the bridge. But without the knowledge of the engineers the pursuers arranged with him that he should also act as clerk of works at the works being carried on by the Ayr Harbour Trustees, and that each of these bodies should pay him £2 a week. They thus entered into a new contract with him, with which the engineers had nothing to do, and to which certainly they would not have agreed. He was engaged at the bridge under this new contract, and not under his original appointment by the engineers. They also, without the knowledge of the engineers, desired him to report as to the state of the works directly to themselves, and he did so. They also required him to attend various of their meetings. It seems to me that after such proceedings on the part of the pursuers it is out of the question to hold the engineers liable for any failure or neglect of duty on his part.

"The result of my opinion, accordingly, is, that the defenders Blyth & Cunningham are entitled to be assoilzied, but that the defenders W. & T. Adams are liable—

"1. To repay the pursuers for the work not executed by them, but for which they were paid—*i.e.* for the ashlar in pier No. 3, being a sum of £193, 4s.

"2. That they are liable to the pursuers in the expense of the remedial but not of the protective works—that is, the expense of underbuilding No. 3 pier, and of the apron along the north side thereof, as that was a necessary part of the remedial works. I think they are also liable in the expense of protecting the foundation of the west end of pier No. 3, in respect that it was founded about 4 feet higher than it should have been. This is now effectually done by the invert, and therefore the defenders ought to pay a part of the expense of constructing that invert, but not to an amount exceeding the sum which would have been required to protect the pier if there had been no scouring.

"I think, also, that the defenders are bound to pay a part of the expense of the coffer-dam. I think the pursuers and defenders should each pay for the expense of it in proportion to the benefit they have derived from it—that is, in the proportion which the expense of the protective works (for which the pursuers are liable) bears to the expense of the remedial works (for which the defenders are liable), but not to an amount greater than would have been required if the only object had been to remedy the defects in the pier."

The pursuers acquiesced in this interlocutor in so far as it assoilzied Messrs Blyth & Cunningham, but reclaimed against it *quoad ultra*.

When the case came to be argued on the reclaiming-note a question arose as to whether the respondents Messrs W. & T. Adams were entitled to make use, without having expressly adopted it, either (1) of the cross-examination of the pursuers' witnesses by Messrs Blyth & Cunningham; or (2) of the evidence led in chief by Messrs Blyth & Cunningham.

The Court disposed of this on 31st October at the commencement of the argument.

Lord President—Two questions have been raised here about the admissibility of evidence, between which I think there is a material distinction. The first question is, whether in a case where there are two defenders the cross-examination by one defender of the witnesses for the pursuer can be used for or against the other defender without its being expressly adopted by him as his cross-examination. I must say that, judging from my own experience, this is a question quite settled in practice. That experience is not recent, and I do not know what is the practice in the Outer House under the new mode of proof, but under the old system, in which the evidence was led before a jury, it certainly was a rule well settled that whatever was brought out by one defender was held to be evidence in the case to all intents and purposes, and available to all the parties represented before the Judge and jury. I think that was justifiable and convenient in itself, for if it was to be held that anything said in cross-examination could only be made available to the defender extracting it, and not to any other, the result would just be that each defender, if there were two or more, would have to go over precisely the same ground, and repeat each question and answer which was already before the Court or the jury. That I think would be unnecessary, or at least very inconvenient, and therefore the safest and best rule, and what I always understood to be the settled practice, is, that whatever is brought out by any one defender in cross-examination is available to any other defender.

The second question, which is a more difficult one, is, whether evidence led in chief by one defender is available to or can be used against another defender without his adopting it? If it were necessary to decide that question in the abstract here, I should have required time to consider it deliberately, but the conduct of this cause has been such as to dispense with the necessity of deciding it. It is plain, from the way in which the Lord Ordinary has disposed of the case, and from the record of the evidence kept, that the understanding upon which the parties proceeded was that the evidence led for one defender was to be used by the other. The Lord Ordinary uses the evidence led for Blyth & Cunningham both for and against Messrs Adams, and I cannot suppose that he would have done this unless on the footing that there had been such an understanding.

If we were driven to sustain this objection, the result would simply be that we should allow Messrs Adams to lead this evidence over again, and that without any payment of expenses. It therefore follows from what I have said, that Mr Robertson and his clients have no interest to insist in this objection.

Lord Shand—There is no doubt a distinction to be kept in view between cross-examination of the pursuers' witnesses and examination-in-chief of his own witnesses by one of several co-defenders, for in the case of proof-in-chief being led by one defender the other defender has no opportunity of cross-examination—in fact no right of cross-examination except by special arrangement. So, in such cases, it should be made clear that the examination-in-chief of the witnesses for each defender may be used as evidence in the whole cause, and for all purposes, and that this is agreed

to by the parties, and this may be done either by a minute to that effect, or at least a statement by the counsel for the parties in presence of the Court. In this case it is clear that the Lord Ordinary, from the way in which the case was conducted before him, was satisfied that the parties proceeded on the footing that the evidence-in-chief for Blyth & Cunningham was to be taken as evidence in the whole cause, and I therefore agree in thinking that the proof should be so dealt with now. Even if the pursuers' objection were sustained it would only be to the effect of allowing the witnesses now to be re-examined by the other defenders, the result being that we should have the same evidence given over again, and in these circumstances the objection appears to me to lose all its force, for I do not understand that a re-examination of the witnesses is insisted on if this be the result of sustaining the objection.

With regard to the question as to the evidence given on cross-examination of the witnesses, I think it is not uncommon, when counsel for one of two co-defenders has cross-examined a witness, for the counsel for the other to say that the Court should hold that cross-examination repeated on his behalf, and, strictly speaking, I think that is the correct practice. I have seen that occur repeatedly both in jury trials and in proofs, but I think it probable that as proofs have become so much more common the practice may not be so general as it used to be. I have, however, always understood in practice that unless something is said to the contrary cross-examination conducted for one defender is evidence in the whole cause. If the rule were otherwise the obvious inconvenience would arise that after a witness had been cross-examined, possibly at great length, by one defender, the other defender would require to have it repeated word for word. It may be true that the difficulty could be obviated by counsel for the other defender stating that he adopts the cross-examination of the first defender, but I think that the practice that has prevailed is as I have stated it. My view therefore is, that cross-examination by one defender must be held to be part of the evidence in the whole cause, and applicable for or against all the parties unless the other defender interposes and says that it is not to be so held. Then the Judge and the other parties are put on their guard. On the whole matter I concur with your Lordships.

Lord Deas and Lord Mure concurred.

Argued for the reclaimers—The amount awarded was too small, and the pursuers were entitled to expenses. A settlement of accounts was no bar when the contractor had grossly scamped his work.

Argued for the respondents—The test of the work in this case was completion to the satisfaction of the engineer, and the work having been taken over as complete by the person appointed judge by the contract, this settlement could not be opened up on the ground that the work was badly done, especially after the lapse of three years—*Muldoon* v. *Pringle*, June 9, 1882, 9 R. 915, 19 Scot. Law Rep. 668; *Dunaberg and Witensk Railway Company* v. *Hopkins, Gilkes, & Company*, 36 Law Times, 733; *Houldsworth* v. *Brand's Trustees*, May 18, 1875, 2 R. 683; *Stevenson* v. *Watson*, 4 C.P.D. 148; *Wilson and M'Lennan* v. *Sinclair*, February 12, 1829, 7 S. 401, and December 7, 1830, 4 W. & S. 398. There had been no fraudulent concealment—Story's Equity Jurisp. ii. (9th ed.), sec. 197; *Gillespie* v. *Russell*, February 28, 1856, 18 D. 677, and June 26, 1857, 19 D. 897; *Broatch* v. *Jenkins*, July 5, 1866, 4 Macph. 1030; *Attwood* v. *Small*, 6 C. & F. 232; *Clarke* v. *Mackintosh*, 4 Gifford's Ch. Rep. 134; *Jennings* v. *Broughton*, 17 Beavan, 235.

At advising—

Lord President—The pursuers of this action are the Road Trustees for the district of Ayr, and they sue the defenders Messrs Adams as contractors for the building of a bridge under their employment, the demand made in the summons being that they shall repay to the pursuers money paid to them for work which was not done, and secondly, that they shall pay them damages for failure to execute the work in terms of the contract between the parties.

The contract was entered into in the month of October 1877, and it is stated in the condescendence that Messrs Blyth & Cunningham, who had been employed in carrying through the Act for the erection of this bridge, were "employed to prepare the drawings, specifications, and schedules of measurement required for the removal of the old bridge and erection of the new bridge, and to superintend the said removal and erection, and to see that the contractor in all respects observed the terms and conditions of his contract, and completed the whole work in a good and sufficient workmanlike manner." The contract itself, which is a very carefully prepared instrument, contains a number of provisions which it is necessary to have fully in view.

It is provided, among other things, that the whole works under the contract "shall be done in a neat, careful, substantial, and workmanlike manner, and to the true intent and meaning of the specification; that no advantage shall be taken by the contractor of apparent or inadvertent omissions or errors in the drawings or specifications; and the works, with the whole material used, and the mode of their use, shall be to the entire satisfaction of the engineer"—that is, Messrs Blyth & Cunningham.

Then there is a special clause in the contract devoted to the superintendence of the works, in these terms—"The works shall be carried on under the immediate charge of a resident engineer, or inspector appointed by the engineer, whose directions in all points relative to the mode of carrying on the works or workmanship executed are to be received and acted on by the contractor, and the resident engineer or inspector shall have power to reject or condemn any materials or workmanship that he may deem unsuitable, and any material or workmanship so condemned and rejected shall be promptly removed," and so forth. And further, it is provided that "the contractor shall keep on the works an agent, who shall represent him in his absence, and all instructions given to the agent shall be held and considered as given to the contractor. No person to whom the engineer shall object on account of improper conduct, or bad workmanship executed by such person, shall be employed by the contractor, or allowed to remain on the works."

Then with regard to the maintenance of works,

it is provided that "the contractor shall be bound to keep and maintain in good and sufficient order and repair, and at all times open for traffic, the works under this contract for the period of one year from and after the time when the whole work under the contract shall have been wholly completed; and he shall then deliver these works to the trustees in a good and sufficient condition, and that to the entire satisfaction of the engineer."

Then with regard to the payment of the price, it is provided that "the contract price shall be paid by monthly instalments as the work advances, and to such an extent as shall be certified by the engineer, under deduction of ten per cent. upon each instalment, which shall be retained until the whole works are certified by the engineer as complete, and shall then be paid without interest within a month from the date of said certificate, under deduction of such sum as the engineer shall fix as a reasonable sum to be retained in security for the maintenance of the works during the period before mentioned, on the expiry of which, when the terms of the contract as to maintenance have been complied with, the balance shall be paid without interest."

Now, with reference to the contract, the pursuers state further in their condescendence that "it was the duty of the engineers to superintend the carrying out and execution of the said work, and to see that the same, both as to workmanship and material, was in every respect conform to the said contract, drawings, specification, and schedule. In particular, it was the duty of the engineers to see that the foundations of the abutments and piers of the new bridge were excavated to the contract depth, that the said foundations were safe and proper foundations, and that the said piers and abutments were constructed properly and safely of the material and in the manner provided by the contract, and that the excavations round the piers and faces of the abutments were filled in with concrete, the concrete being to be composed as provided in the specification. It was also the duty of the engineers to ascertain and advise the pursuers of the work actually executed by the contractors, and to take care that the contractors were not paid for any work different from what was provided for in the specification and actually executed, or in excess of what they had actually done. The said engineers all along professed and represented to the pursuers that they in every point attended to and carefully performed the whole duties incumbent on them in connection with the execution of the work in question, and particularly those set out in this article."

Now, that being the nature of the case as stated by the pursuers so far as the contract is concerned, it is only necessary to state further of what they complain. They complain that the work has not been performed in the terms specified in the contract itself, and in particular that as regards one of the piers of the bridge, instead of its being built of ashlar in the lower part of it, it has been made of concrete, that the concrete was of a bad quality, and that the consequence was that upon the occurrence of a heavy flood in the river Ayr the foundation of that pier was carried away by masses of ice floating down the river. They say that the account of the defenders Messrs Adams was paid upon the understanding that everything had been done in terms of the contract, but that it turns out in point of fact, that although they charged for ashlar work in the construction of this pier, concrete was substituted for it. And they say further that the quality of that concrete was so bad that it was the cause of the calamity which followed in the destruction of this pier of the bridge.

In the course of the process Messrs Blyth & Cunningham, the engineers, who were called as defenders, were assoilzied, and the pursuers have acquiesced in the judgment so absolving them from the conclusions of the action. Messrs Adams, on the other hand, are still in the case, and they maintain, among other things, this defence in their second plea-in-law, that the "works having been executed under the superintendence and to the satisfaction of the pursuers, or those by whose acts they are bound, and transferred to and accepted by the pursuers, and the whole accounts both for erection and maintenance having been finally adjusted and certified in terms of the contract more than three years prior to the raising of the present action, and the balance paid to the defenders, the pursuers are not now entitled to open up these accounts, or to insist in damages as claimed."

Now, looking to the terms of the contract, it appears to me that that is a very formidable defence, and it becomes more so when we look to the manner in which the settlement of Messrs Adams' account was gone about more than three years, as it is stated, before this claim was brought. It will be recollected that in terms of the contract there was to be a resident engineer, and a person of the name of Haldane was appointed to that duty, and it was his business to be constantly present superintending the execution of the work. Messrs Adams, who, like all other contractors who undertake large contracts of this kind, did not expect to be able personally to superintend the operations, were required to appoint an agent to represent them on the spot, by which I apprehend was meant a foreman or a person who is fully acquainted with the work to be done, and possessed of sufficient skill to enable him to see that it was rightly done; and the consequence was of course that the execution of the work and its immediate superintendence came to be entrusted to this gentleman on the one hand—a person of the name of Charles Adam—and Mr Haldane, as resident engineer, on the other.

It is quite clear from the evidence that all the mischief complained of was arranged between these two parties—between the representative of Messrs Adams on the one hand, and the resident engineer upon the other. The contract provides that the judge of the sufficiency of the work is to be the engineer, but by that certainly I do not understand a person in the condition of Mr Haldane to be meant, but, on the contrary, Messrs Blyth & Cunningham, who were the engineers of the pursuers in the proper sense of that term. If they passed the work as done in fulfilment of the contract, and as workmanlike and sufficient, I apprehend that was a full justification to the contractors for what they had done, unless it could be alleged that the certificate of the engineers was obtained in some fraudulent manner, or by means of some misrepresentation on the part of the contractors. On the one hand it is fair to say, that as the contractors were men

in a large way of business they could not be expected to be able personally to superintend the execution of this work; so on the other hand it would hardly be expected that engineers of the standing and extensive business of Messrs Blyth & Cunningham could be expected to be constantly present to see what was doing, and therefore their duties in that respect were necessarily delegated to a great extent to Mr Haldane. But there is a peculiarity also in regard to Haldane's appointment. It was provided by the contract that there should be appointed by the engineers a person who should act as resident engineer, but that was not so done in point of fact. The pursuers chose to take the appointment of the resident engineer into their own hand. They selected him for the work, and they made an arrangement with another public body who were at that time employing his services — I mean the Trustees of the Ayr Harbour—that he should divide his time between the works going on for them and the works at this Ayr Bridge, and therefore probably in a question with the pursuers and their engineers, Messrs Blyth & Cunningham, the liability of the engineers of the pursuers might be considerably affected by what the pursuers had done in this respect, because the engineers, Messrs Blyth & Cunningham, could not be expected to be answerable for the resident engineer in the same way as if he had been selected and employed by themselves as specified in the contract. Be that as it may, Haldane was present at the execution of this work, and whatever was done against the provisions of the contract, and in the way of bad workmanship, must have been done under his cognisance and superintendence.

Now, it is stated that the representative of the Messrs Adams must be held to be exactly in the same position as Messrs Adams themselves, and that his knowledge is their knowledge, and to that proposition I entirely assent. But, on the other hand, I think the same observation applies, at least to a certain extent, to Mr Haldane, and that what was known to Mr Haldane must be held to be known to the engineers and to the pursuers. They cannot be altogether without liability for what Haldane does, because he is there as their representative, and although he is not authorised—I am very far from saying that he was authorised—by his employment to go against the contract or to dispense with any of the requirements of the contract as in a question between him and Messrs Adams, still it cannot be left out of view that what has been done amiss, as alleged in the condescendence, must be held to have been done in the full knowledge of Haldane.

Now, if the settlement which was brought about here had been brought about by fraudulent misrepresentations upon the part of the contractors I should have had no hesitation in saying, that let the settlement be as complete as it might in itself, and let the lapse of time be as great or even greater than it is in the present case, the pursuers would have been quite entitled to open up that settlement and have redress for every wrong that was done. But although there is something like an allegation of this kind on record, it is entirely unsupported by evidence. There is not the slightest appearance of any fraudulent misrepresentation on the part of the defenders Messrs Adams, or of anyone representing them, leading to the concluding of that settlement by which the bridge was taken off the hands of the defenders and the price paid to them.

On the other hand, if when it was proposed that this bridge should be taken off the hands of the contractors and the price paid, it had appeared that some part of the work was ill done, or not done in conformity with the contract, or if thereafter it had appeared during the year of probation for which the contractors were bound to warrant the sufficiency of the bridge and to maintain it—if during that time it had been shown that any part of the work was disconform to the contract, or of bad workmanship—I do not in the least doubt that the pursuers would have been entitled to redress, and might have enforced the contract by having the work altered and made in conformity with the contract. But the question comes to be, whether after what has passed in this case in the way of a settlement it is now competent to the pursuers to open this up, and to make the complaint which they do here, just as if they had done so when the work was complete and ready to be handed over to them?

In the view of this plea of the defenders it is necessary to see precisely what it was that was done. When the work had been completed, and the whole money apparently earned in terms of the contracts, the contractors did not render an account. That is not the form in which the settlement took place, but they put themselves into the hands of the engineers, Messrs Blyth & Cunningham, to whose satisfaction everything is to be done under the contract—who are to be the judges whether the work is conform to the contract. They put themselves into their hands, and gave them, Messrs Blyth & Cunningham, the materials for making up a final account between the parties. Now, as I said before, if Messrs Adams in putting these materials into the hands of the engineers had made any false representations to them—had said anything which was contrary to the facts within their own knowledge—I should have held them answerable in this action undoubtedly. But they did not do so. They were ignorant of the violation of the contract which had been carried through by their representative Adam and the pursuer's representative Haldane. They were just as ignorant of that as the pursuers were, and in that state of ignorance they hand over to Messrs Blyth & Cunningham, the engineers, the materials for making a settlement of the whole outstanding account between them and the pursuers. Accordingly we have a final state of work executed under the Ayr Bridge contract, as at the month of May 1879, by Messrs W. & T. Adams, contractors—I need not go through the details and figures—and the result of it is that there is brought out the amount due as at this stage—that is to say, at the 23d of May 1879—being £466, 17s. 2d. due to the contractors, and that final state of work is signed and certified by Mr George Cunningham, the engineer. Now, Mr Cunningham was not entitled to certify that final state of work unless he was satisfied that it was accurate, and unless he was satisfied that he could in the due discharge of his duty certify that this work was fully and completely done in terms of the contract.

It was sought in this action originally to make Mr Cunningham and his partner liable for having

neglected their duty in this respect, and in certifying that the work was duly and properly done, but these gentlemen have been assoilzied from the conclusions of the action, and that is acquiesced in by the pursuers. Therefore we have here Mr Cunningham, as the engineer of the parties, to whom the whole of this matter is submitted under this contract, certifying that there is a balance due and payable to the contractors, as at 23d May 1879, of £466, 17s. 2d.; and Mr Cunningham, in conformity with that final state of accounts, addresses Mr Shaw, the representative of the pursuers in these terms—"We hereby authorise you to make payment of the sum of £466, 17s. 2d. to Messrs W. & T. Adams, to account of the Ayr Bridge contract;" and that money is paid accordingly, and a receipt is granted by Messrs Adams acknowledging payment of the sum as being the fifteenth instalment of contract for new bridge.

There is a matter that comes in there which is perhaps not of any consequence to the decision of this case. There is another payment of £350 for extra work in respect of a granite parapet. I think that may be left out of the case altogether. But there is thus in the year 1879 the payment of the 15th and last instalment of the contract price. Now, the liability of the contractors did not quite cease then, because by the terms of the contract it was provided that they were to maintain the bridge for twelve months afterwards—twelve months after the full execution of the contract—and accordingly there was retained by the pursuers the sum of £100 until the lapse of that probationary period. But when the year had elapsed we find that this, the only remaining matter, is also fully settled and done with, because on the 23d of April 1880 Mr Cunningham, again addressing Mr Shaw as representing the pursuers, says—"We hereby authorise you to make payment of the sum of £100 sterling to W. & T. Adams, Dalmally, final payment of the Ayr Bridge contract;" and the money is paid accordingly, and is acknowledged by Messrs Adams as "being payment of the final instalment" therein set forth.

Now, from that time onwards until this action is raised there was no other communication between the parties.

It turns out now, as alleged by the pursuers, that there was a defect in this work. I take it as proved, in reference at least to that part of which we heard so much in the argument; I take it as proved that there was a breach of contract there—that the work was not executed in terms of the contract. But why was that not known before? Why was that not known before this settlement was made? Looking to the elaborate nature of this contract, and to the careful provision for superintending the work, there must have been fault somewhere, or that could not have happened. Well, it must have been fault of superintendence, or rather fault in respect of the want of superintendence. Messrs Blyth & Cunningham, according to the statement of the pursuers, were appointed to see that the contractors in all respects observed the terms and conditions of their contract, and completed the whole contract in a good and sufficient workmanlike manner. If that duty had been performed in the manner here alleged by the pursuers to have been undertaken by Messrs Blyth & Cunningham, then this could not have escaped observation. But supposing that Messrs Blyth & Cunningham were entitled to perform that duty by deputy, then there was fault in the deputy—fault in the resident engineer Mr Haldane—and we know now in point of fact from the evidence where that fault actually lay. Now, who is to be answerable for that? Haldane was the representative of the pursuers. If they had laid upon Messrs Blyth & Cunningham the full burden of seeing to everything that they say in the condescendence that Messrs Blyth & Cunningham were bound to see to, and had charged them with the duty of personally superintending the work, then they might have Blyth & Cunningham answerable for what has happened, but not only by the contract did they allow the superintendence of Messrs Blyth & Cunningham to be done to a certain extent by deputy—by a resident inspector or engineer—but they themselves appointed that engineer, selected him as qualified for the work, and made him their servant instead of deputy engineer, and therefore if it was through his conduct that this violation of the contract was committed, and this settlement made, I do not see who is to be answerable for this except the pursuers. In short, I have come to the conclusion—I do not say without difficulty altogether, because undoubtedly this case requires very special attention and consideration — but I do come to the conclusion, with perfect satisfaction to my own mind, that this is a case in which there has been such a full settlement of accounts between the parties that the pursuers cannot at this distance of time, and after all that has passed, be allowed to open up that settlement, and to have the accounts opened up also, and the whole work revised and put right at the expense of the contractors. I am therefore for assoilzieing the contractors from the conclusions of this action.

Lord Deas concurred.

Lord Mure—Upon the leading facts of this case I am disposed to agree with the Lord Ordinary in thinking that the pier No. 3 in question was not built in terms of the contract, and that in that respect there was a breach of contract on the part of the defenders. I also cannot help thinking that there was a breach of contract in substituting concrete for ashlar, and that on the whole the pier was built in such an inefficient way and on such bad foundations that it gave way on that account, and further, that the pursuers were thereby put to considerable expense in the rebuilding of that pier. It is for that expense that this action has been brought, and it is maintained on the ground of fraud or breach of contract. The fraud is set forth distinctly in the condescendence, and the first plea-in-law for the pursuers is, that the contractors are liable in damages for breach of contract, and "*separatim*, for their fraudulent acts as above set forth." Now, I quite agree with your Lordship in thinking that there is no evidence of fraud on the part of the contractors, nor of any misrepresentations on their part, because the settlement to which your Lordship has referred was not made by the representative of the contractors at all—that is proved by Cunningham in his evidence—it was made on certificates furnished to him by Haldane, who was the resident engineer or inspector, and

while he was resident engineer, and not by Messrs Adams, the contractors, at all. This settlement was done by certificates furnished by Haldane, and the alteration was made on the pier No. 3 by Adams (who was the contractors' agent or servant) and Haldane together, not in the sense that they were doing what was wrong, but in the firm belief at the time that they were doing what was right. I think there was perfect good faith on the part of Haldane, and on the part of Adams too. I think they acted in the belief that in their view concrete was better than ashlar. That was their view. And they thought it was within the power of Haldane, the resident engineer, to say that in the circumstances they might take and use concrete instead of ashlar as being more likely in their view to facilitate the building of the bridge. Now, I think they were both mistaken. I do not think it was necessarily within the power of the resident engineer or clerk of works to make such a material change upon the specifications and intentions of the framer of the contract, and to substitute concrete for ashlar. I think they acted in the way that appeared to their view to be best for all parties; but be that as it may, they acted under an erroneous impression as to the power of the resident engineer, and therefore in that respect I do not think there has been any fraud proved as against Haldane and Adam, and if that be so, fraud has not been proved against the defenders here. Haldane and Adam's conduct was not of a fraudulent nature; they only acted under a wrong impression as to the power of the resident engineer, and they seem to have held the view that a number of the piers could be more easily founded with concrete rather than with ashlar. That was not fraud either. If it was anything at all it was a mistake.

Now, in this state of matters the works were built, and a settlement completed in terms of the contract, first, by paying a balance of £466 odds, and then, finally, on a certificate by Haldane, addressed to Blyth & Cunningham, a sum of £100 which was retained by the pursuers from the instalments of the contract price till a year after the full completion of the works was paid to the defenders on the expiry of that period. Now, then, it is after these settlements have been made, and after a considerable time has been allowed to elapse, that this difficulty is presented. These settlements were carried through on the authority of the resident engineer, who was appointed by the pursuers themselves instead of by the head engineers as in the ordinary case, for the reason as appears from the evidence that he happened to be engaged in the neighbourhood of Ayr at the time, and was selected by the pursuers of this action as the person who should be appointed. The Lord Ordinary in dealing with this part of the case states very distinctly, I think, his reasons for holding that Messrs Blyth & Cunningham are not responsible, because Haldane was appointed, not by them, but by the pursuers, and so appointed by the pursuers as to make him their servant. And I must say that is the impression created on my mind too, that Haldane was not the servant of Blyth & Cunningham, but that being upon the spot at the time he was selected by the pursuers for the office of resident engineer, and paid by them, and the pursuers received reports from him direct as to the state of each of the piers, and as to how the work was going on from time to time. And all this that is now complained of by the pursuers was done by the person selected by them to see that the work was properly carried out. I am therefore of opinion that the wrong done was done by the pursuers or their servants, and particularly, that this settlement having been effected on the information furnished by Mr Haldane, I do not think there is any sufficient ground set forth in this record and proved in the evidence that leads me to say that the accounts should be opened up again. And on these grounds I concur with your Lordship in thinking that we ought to recal the Lord Ordinary's interlocutor and assoilzie the defenders Messrs Adams.

Lord Shand—By much the larger claims made by the pursuers in this action have reference to the expense which was incurred in making the invert at the site of pier No. 3 to cover the archway in the centre of this bridge, and also in the putting down of bags of cement, and otherwise in protective works for the bridge generally, and I understand it to be the opinion of all your Lordships, as it certainly is my opinion, that there is no case made out against the defenders upon that which is by much the most important part of the pursuers' claim. And the Lord Ordinary has given the grounds of his opinion for holding that there is no such claim. Apart altogether, however, from any question arising from the settlement between the parties, there is a considerable conflict of evidence in regard to the invert—one set of the witnesses speaking of the necessity of these works, and of the defective state of pier No. 3, while a different class of witnesses are of opinion that the bed of the river at that part of it is of a very peculiar formation, and liable to be affected and torn up by storms, floods, and ice; and they say that the winter after this pier was put down was unprecedently severe, that the weather was very stormy, and that floods of water and masses of ice came down the river and cut up the shaley bed at that part of it, and that that would account for the defective state of the pier. Agreeing with your Lordships and the Lord Ordinary upon that matter, I am of opinion that the evidence of the second class of witnesses is to be accepted as sound.

And in regard to the other important expenditure laid out by the pursuers in providing protective works, I have only to observe, as has been done by the Lord Ordinary, that these works were advised by Mr Cunningham, and resolved upon by the pursuers as works that must be executed quite apart from the question whether pier No. 3 was defective or not; but looking to the whole appearance of the bridge, and to what had occurred from the storms and weather, can it be said that this defective state of the pier can be traced to the contractor? And that brings us to the question of difficulty in the case to which your Lordships have more especially referred, and for which the Lord Ordinary has held that the sum of £1000 ought to be awarded to the pursuers.

Now, in regard to that matter, the first question that arises is one of fact. Has it been proved that the state of that pier, as it was found after the coffer-dam had been put up and access obtained to the bottom of the foundation, was a state

due to defective work? Here again undoubtedly we find a considerable conflict of evidence. It appears that the bridge itself was completely finished in April 1879, the work connected with the foundation having been finished some time before, and it was not until eighteen months afterwards, in November 1881, when the water had been displaced by means of the coffer-dam so as to enable the parties to say what the state of that pier was, there having been in the meantime, as your Lordship has observed, a settlement in May 1879 for the final instalment of the price of the bridge, and the payment in April 1880 of the sum of £100, which was retained in consequence of a warranty with reference to the bridge for the period of a year. The result of the examination of the foundation of the pier was to show Messrs Blyth & Cunningham that concrete had been used in place of the ashlar stipulated by the contract for the foundation. On the other hand, it is worthy of notice that of the whole concrete which was thrown in at that part of the bridge, a considerable amount of it was bad, and again that part of it was perfectly good and sound that was still adhering, and the witnesses say that to the concrete there remaining they had no possible objection. But a number of the witnesses, in conflict with the witnesses for the defenders, have drawn the inference, from certain appearances in the river bed, that there must have been concrete, which in the meantime must have been washed away through its bad and inferior character, judging by that which was still left, and in their opinion the washing away of the foundation of that pier was attributable to this inferior concrete. That circumstance undoubtedly gives room for the inference. One class of witnesses say that the clay which was left at the bottom of that pier, or rather which was found there, was material which must have been washed in there after the concrete had been washed away by the winter storm, while the others say it must have been originally there; and I have had great difficulty in making up my mind whether the case of the pursuers on that difficult question has been proved. But, upon the whole, though with considerable difficulty, and regarding the case as a narrow one, I have come to the conclusion that the pursuers have established that, as regards the foundation of that pier No. 3, either the concrete which had been used was unskilfully put in—put in in such a way that the cement did not get time to harden and to rest on the foundation, and had been washed away—or that inferior cement had been used, from there having been a mixture of clay amongst it, attributable to the falling in of the coffer-dam originally used, or part of it, although as to the falling in of that coffer-dam I do not think a single witness speaks. But taking it so, the question arises, Is there responsibility in the circumstances of this case? Now, upon one thing I agree with what I think has fallen from your Lordship and the Lord Ordinary, and that is that Haldane as the resident engineer or inspector was not entitled at his own hand to authorise a change in the foundation of that pier from ashlar to concrete. I think it was a matter that should have been communicated to the principal engineers, and that their sanction should have been obtained. Whether the contractors or their representative Mr Adam, who was engaged at the work, understood that Haldane had made such a communication or not we cannot tell, but the fact is that the authority of the engineers was not got for the change. On the other hand, I agree with the view which all your Lordships have taken, that in the use of concrete there was no fraud on the part of the contractors or their representatives in the execution of the work. As Lord Mure has observed, I think that all parties acted for what was considered to be the best in the circumstances, for I think there is evidence on which we can rely that it was found necessary, in consequence of the pressure of water in the spaces where that pier was to be founded, to vary the original plan, and to put in concrete instead of ashlar, and I think it quite probable that if the state of matters had been communicated to the engineers they would have sanctioned that, because there is a body of evidence to show that concrete carefully put in in such circumstances is of so hard and solid a character as to be considered quite equal to ashlar. However, taking the case as it stands, I think the result of it is that there could not be, and in fact there was, no breach of contract on the part of the defenders, the contractors. If the concrete had been put in skilfully and carefully, and if it had been of good quality, the whole evidence points to this, that it would have been as good as ashlar. And if it was not put in skilfully, or was not of the best quality, or free from an admixture of clay from that coffer-dam or otherwise, even that, as it appears to me, would just amount to a case of careless workmanship, and not in any way a case in which the contractors were acting fraudulently.

Now, taking the case in that aspect of it, the case that is to be determined is, What is the effect of the settlement that occurred between the parties? Your Lordship has gone over the details of that settlement, and I shall not do so again. But I have to observe that I do not think there was fraud on the part of anyone connected with that settlement. Messrs Blyth & Cunningham wrote Mr Haldane for certain particulars as to the piers in the letter of 29th November 1878, in which they say—"I enclose a ground plan showing the abutments and piers of the bridge, and I shall be obliged if you will mark on each the exact depth it is founded below the bottom bed of the impost." And in reply to that Mr Haldane says, on 2d December 1878—"I beg to return the tracing with the depths of foundation marked on each. I hope it is what you required." This first letter does not ask anything in regard to the material of which these foundations had been composed. And it was observed very justly by the counsel for the defenders that it would not have been natural that in returning this tracing he should have mentioned that concrete had been used at the bottom of one of the piers instead of ashlar. Haldane says that did not occur to himself, and accordingly he returned the tracing with the markings asked, and in so returning it I am not in the least of opinion that Haldane had any fraudulent design in his mind in not giving particulars of the foundations of the piers. It was not said in that letter that the information asked was required for the purpose of a settlement of the contract price, and Haldane's attention was not drawn to that. But then the letter is answered by Haldane, who, as has been pointed out, was the representative of the pursuers them-

selves, and then the settlement of the last instalment of the price of the bridge occurs. Then a year after that there was in addition the payment of the £100 which had been retained, and which payment was believed and intended by both parties to be a final and conclusive settlement of accounts between them. And looking to what I believe to be the fact, viz., the absence of fraud on the part of the contractors, or representations so far as they were concerned conducing in any way to the settlement of accounts between the parties—that settlement having been made by Haldane and Blyth & Cunningham—I am of opinion that the pursuers cannot now question that settlement or open up these accounts. Haldane, undoubtedly, as your Lordship has observed, knew everything that occurred, although when first examined his evidence did not come up to that, but undoubtedly when he was re-examined at a later stage of the case he stated that everything was known to him. And the next question is, what was his position? He was no doubt clerk or inspector of works under the contract. But he occupied a very peculiar position, for he was not appointed by the principal engineers to that duty, but was the servant of the pursuers, having been selected by them, and was in direct communication with them from time to time. And indeed they so far interfered with the performance of his services in connection with the bridge contract that he could not give his full time to that work. He was employed by the pursuers to perform a similar duty at another important contract, which necessarily took him away from the bridge for a very considerable part of his time. But looking to the fact that he was resident engineer, and acted in that capacity all through the work, it appears to me, concurring with your Lordship, that the pursuers are not now entitled in this matter of the settlement of accounts—a settlement of accounts acquiesced in so far as Haldane is concerned—to say now, and in a question with the contractors, that they are not bound by it, looking to the circumstances that have since come to their knowledge, especially those connected with the pier No. 3. But it seems to me that Haldane's knowledge on that subject must be their knowledge, and as he knew precisely how matters stood, and was their servant when this settlement took place, and acted for them in it, I think the accounts cannot now be opened up to the effect of asking damages for bad workmanship in connection with pier No. 3. That claim is, I think, precluded by the settlement of accounts which occurred so long ago, and on these grounds I express my opinion that the judgment of the Lord Ordinary should be recalled.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming-note for the Ayr Road Trustees against Lord Adam's interlocutor of 20th March 1883, Recal the interlocutor in so far as it decerned against the defenders W. & T. Adams, and William Adams and Thomas Adams, individual partners, for the sum of £1000 sterling: Sustain the second plea-in-law for the said defenders: Assoilzie the said defenders, and decern; and find the reclaimers (pursuers) liable in expenses to the said defenders, and remit," &c.

Counsel for Pursuers—J. P. B. Robertson—Dickson. Agents—Gordon, Pringle, Dallas, & Company, W.S.

Counsel for Messrs Adams—R. Johnstone—Kennedy. Agents—Campbell & Somervell, W.S.

Counsel for Messrs Blyth & Cunningham—Trayner—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, December 14.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THE MERCHANT COMPANY OF EDINBURGH *v.* CORMACK AND OTHERS (GEORGE SQUARE GARDENS CASE).

Property—Property in Town—Common Interest—Regulation of Right of Proprietors of Houses having Common Interest in Ornamental Garden Ground—Usage.

By the titles of houses in a square in Edinburgh, the superior conveyed their respective houses to the various feuars "with a right and interest in the centrical area" in the middle of the square, "jointly and in common with the other proprietors of other houses . . . the proprietors always inclosing, smoothing, laying, and keeping the same in good order and in an ornate manner." There were also various provisions for securing that the houses in the square should continue to be dwelling-houses of a superior class. The proprietors appointed a committee, who took charge of the garden in the middle of the square, and made, *inter alia*, a regulation, which was acted on for more than forty years, to the effect that the use of the garden should be personal to the families and households of proprietors and their tenants, and should not extend to the pupils attending any day-school opened in any of the houses. In 1882 the governors of a public body having established a large day-school in the square, claimed the right to admit to the garden, subject to such regulation as should be fixed, the masters and pupils attending the day-school. *Held* that the right of proprietors in the "centrical area" was one not of common property but common interest; that the proprietors were entitled to make the rule they had made for the management of the garden; that the right of the pursuers must be determined according to the past possession and administration; and therefore that the rules and usage following on them for more than forty years disentitled the pursuers to the access claimed.

The Merchant Company of Edinburgh, as Governors of George Watson's Hospital, acquired by purchase on 11th March 1876 the house No. 5 George Square, Edinburgh. They made considerable additions to it, and used it as a day-school for girls, called the George Watson's College for Ladies, in connection with the Hospital No scholars resided in the house, nor was anyone left in charge of the premises after school hours.