specifically that for the £528 which is the sole amount of damages it contains, the defender will be held liable to the Century Spinning Company, and therefore it is as clear as possible I think on the defender's own statement that the alleged loss is the loss to the Century Spinning Company, and that his only ground for maintaining that it should be taken into account in this action is that the company will have that claim against him. For the reasons I have given I think that cannot be sustained as a defence to this action, and that to allow a proof for the investigation of the questions of fact and law relating to the liability of the defender to a third person who is not a party to this action at all would be out of the question.

If your Lordships agree with these views then there is nothing on record to justify you refusing to give the pursuers the decree they ask. The defences should therefore, in my opinion, be repelled, and the pursuers should be held entitled to their decree.

That will not in the slightest degree affect any question between the pursuers and the defender or between the defender and the Bombay Company as to a claim of damages, if damages are proved, and if such claim should be constituted, but it determines only that there is no sufficient ground at present for holding that there is such a claim as will enable the defender to set off his claim for damages against his liability to pay in terms of his contract.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute and of the Sheriff dated 13th December 1898 and 26th May 1899 respectively: Sustain the second plea-in-law for the pursuers: Repel the defences: Decern for payment by the defender to the pursuers of the sum of £500 sterling, with interest thereon from the date of citation until payment: Find the pursuers and appellants entitled to expenses both in this and the Sheriff Court, and remit," &c.

Counsel for the Pursuers — Salvesen — Aitken. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defender—M. P. Fraser. Agents—Ronald & Ritchie, S.S.C.

Wednesday, July 12.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

JAMESON *v.* SIMON.

Contract—Executory Contract—Architect—Duty of Supervision.

An architect was employed upon the usual terms, and without any special bargain between him and his employer, to plan and supervise the erection of a small villa. He visited the work while it was in progress about once a week. The bottoming which formed the substructure of a cement floor upon the ground floor of the house was constructed of improper materials, and not according to specification, and in consequence dry-rot broke out in the woodwork after the villa was finished. The architect had not seen the bottoming, as he had not visited the work while it was being put in, and on the occasion of his first visit thereafter it was covered up with the cement, which had by that time been laid. The architect had instructed the plasterer to proceed with the laying of the cement without taking any steps to satisfy himself that the bottoming consisted of proper materials. He gave the mason and plasterer, who were responsible for the bottoming, certificates for that part of the work. In an action of damages against the architect by the employer for the expense and inconvenience caused by the dry-rot, evidence of architects was led to the effect that an architect only contracted to afford general and not special and detailed supervision, and that if he visited the work about once a fortnight he had done all that was incumbent upon him, the employer being bound to take his chance of any scamping that occurred which the architect did not and could not see on his occasional visits. *Held* that the architect was liable, on the ground that in the circumstances he had not sufficiently fulfilled the duty of supervision incumbent on him under his contract.

Observations upon the duty of supervision incumbent upon an architect employed upon the ordinary terms.

This was an action at the instance of Miss Mary Jameson, Rosefield Cottage, Cargill Terrace, Wardie, with consent and concurrence of her mother for her interest, against Frank Worthington Simon, architect, Edinburgh.

The defender had been employed by the pursuer to act as her architect in connection with the erection of a villa which she was building in the suburbs of Edinburgh. After the villa was finished and all the work had been certified by the defender, and paid for by the pursuer, dry-rot broke out in the woodwork. The pursuer alleged that this was due to the pursuer's failure to properly supervise the execution of the

contracts, and she concluded for payment of £80, 10s. 4d. as damages for the expense and inconvenience caused to her as the consequence of this neglect of duty on his part. There was no written contract between the parties, and it was ultimately held by the Court that there was no special bargain between them, but that the defender was simply employed to act as architect upon the ordinary terms.

The usual fee of 5 per cent. on the cost of construction was charged by the defender, and as stated in the account rendered by him to the pursuer the services included under this charge were as follows:—"Preparing sketch-plans, preparing working-plans: Details, specifications, obtaining tenders, and supervising the work from commencement till completion." Apparently about two-fifths of this fee was for supervision.

A proof was allowed. It appeared that the dry-rot was generated or developed in what is called the "bottoming," which immediately underlay the cement floors of the scullery, coal-cellar, and w.-c., which formed part of the ground floor of the villa. This bottoming ought, as specified, to have consisted of about 2½ feet of broken stone—the uppermost 3 inches being to be of small stones, and to be supplied by the plasterer, and the rest, which was described as "dry stone filling," being to be supplied by the mason. In point of fact the material used, at least in the uppermost 3 or 4 inches was miscellaneous rubbish. It consisted, according to the evidence, partly of chips of stone, but to a large extent (about 25 per cent.) of shavings, pieces of wood, plaster, sacking, and general sweepings. The fungus of dry-rot appeared on the pieces of rotten wood which formed a considerable part of the material, and thence spread to the doorposts of the kitchen and scullery which were embedded in the bottoming, and so passed into the woodwork of the house.

The mason and the plasterer both repudiated responsibility for the bottoming, and each of them threw the blame of it upon the workmen of the other. The mason, Mr Sutherland, deponed as follows:—"I cannot say exactly how far the filling was done by our men but I should think it was about a foot. We had no more to put in at the time because it was a job where there was very little dressing. We had very little stone on the ground to put in, and we intended to cart the rest afterwards. As the work proceeded our men filled in the debris from the dressed stone as they went along, in the specified places. (Q) Did your foreman inform you how much more filling required to be done to bring up the thing to the proper level?—(A) He did not require to do so as I saw the work myself daily. I think about 15 inches or so of the filling required still to be done under our contract, but I am speaking from memory. We intended to put in that when we got word either from the architect or the plasterer. (Q) Before the plasterer began his work of cement laying was it your intention to finish off your work whenever the plasterer was ready to begin his cement work?—(A) Whenever we got word to do so, but we never did get such word. I cannot say who finished off the fifteen inches of bottoming which we had not ourselves done. I have a note in my little diary to the effect that about the end of May I took occasion to go round there, simply to see what like the work was, and I was very much surprised to find the cement laid." On the other hand the plasterer Mr Hunter deponed as follows:—"The doing of my part of the cement floor occupied about one day. (Q) Do you mean one day in laying down the broken metal packing, and also laying on the cement top?—(A) One day laying the cement, because they did not lay any stones at all. That includes the water-closet and coal-cellar. I was down at the place the day before the cement floor was laid, but I was not down there on the day on which it was laid. The filling had been laid in previous to the day on which I was down. (Q) Was that in good order?—(A) I complained. My foreman spoke to me about it. He told me he had spoken to the foreman mason with regard to it, and that he was practically told to mind his own business. (Q) What had you to complain of?—(A) It was rubbish—small stones and lime, and little bits of wood that had been taken from an old building near by. (Q) Was it not the duty of your men to remove these before they laid on their cement?—(A) No, I don't think so. I did not draw the architect's attention to the matter. I did not consider it was my duty to do so, because I did not think I had any right to find fault with the work of a good builder like Mr Sutherland."

With reference to this matter the defender deponed as follows:—"Mr Tweedie (who was then the defender's partner) went away for his holidays some time in May 1896, and was absent during that month. While he was away I was the only member of the firm present at the building. That is the month in which the cement floor in question was laid. On going down one day, and making my usual visit of inspection, I found the floor laid, finished, and cemented over. I had on previous occasions seen the filling gradually put in; it was put in as it came from the masons' sheds. It is the practice to put shivers and broken metal in places where bottoming is required. So far as I saw it, there was no occasion to take exception to the filling as it was being done. I do not think I saw it just when the filling was completed, and before the cement was laid on. In the way in which the work had been done, so far as I saw it, there was nothing to lead me to suspect that proper filling would not continue to be put in. Everything was going on smoothly about the house. I did not consider it as part of my duty to stop the laying of the cement, and make a special visit to inspect and pass the bottoming before the cement was laid. I have never done so, and have never known of any architect doing it. The laying of a cement floor is not a matter of more critical importance than any of the other things in connection with the building of a house: it is the most common operation in connection with the building. I do not know the date of my visit when I found that the plasterer had completed his work. I notified him to proceed with his work on the 27th May. When I found the cement floor completed, there was nothing to raise in my mind the slightest suspicion that there had been any scamping of the work: I could not possibly tell, because the top surface was perfectly right. . . . From what I now know, I should say that the bottoming which had been put in below the scullery floor was disconform to contract, and was not the proper stuff that should have been used. If I had seen that stuff I would have condemned it at once. I did not as a matter of fact see the bottoming the time it was put in. I just saw the finished cement. I did not make any inquiry at the time as to what bottoming had been put in, or by whom. (Q) Did you know at the time who had filled in either the rough bottoming or the three inches above?—(A) I assumed that they were done by respectable tradesmen, although I did not watch the actual operation. I am not absolutely certain even now who filled in the rough work. It is not the case that I ever expressed to Mr Hunter my satisfaction with and approval of the work that he had done. In surveying the work I assumed that he had done it according to specification. I certified both Hunter's work and Sutherland's work at the time. I certified that work of the value so certified had been done by the tradesmen mentioned at that date. (Q) As a matter of fact your certificate as regards bottoming was not correct when it said that bottoming to that value had been done?—(A) No, it is not particularly certified. It covers that bottoming. (Q) Do you say now that the work as regards bottoming was done to the satisfaction of the architect?—(A) Not with my present knowledge. The final certificate in the case of each tradesman does not bear that the work has been done conform to contract."

No clerk of works was employed to supervise the execution of the contracts, and it appeared that in such jobs as the present the employment of a clerk of works is unusual.

After the dry-rot made its appearance the pursuer, after sundry correspondence, sent the defender a letter on the subject which he returned unopened, at the same time recommending her to her lawyers. On 3rd June 188 the pursuer intimated to the defender through her law-agents that unless the necessary work was arranged for within three days by him she would herself give instructions for its being done, and would charge him with the expense thereof. The defender on 6th June 188 replied saying that he repudiated all liability.

The pursuer's law-agents also wrote to the masons and the plasterer intimating that as the floors were not laid conform to specification, and as she was having [illegible] she reserved [illegible] she might have [illegible] replied that [illegible] tract accordingly satisfaction of [illegible] way respectfully terers replied that was done to the [illegible] under his direc[illegible] first-class job, and Miss Jameson must [illegible] at her own risk.

The pursuer then done, and thereupon action.

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The defender [illegible] Mr Tweedie was [illegible] an average [illegible]

The defender [illegible] rule of the Royal [illegible] tects as showing [illegible] ment:—"The [illegible] services included [illegible] 5 per cent.—[illegible] sketches, drawings sufficient for [illegible] drawings and [illegible] one set of tracings [illegible] tion: general [illegible] exclusive of [illegible] ing and passing [illegible] measuring and [illegible] omissions."

The defender [illegible] and others, who [illegible] architect's superintendence, supervision, and [illegible] if required, must [illegible] employment of [illegible]

Mr Carter, [illegible] deponed as [illegible] experience, both [illegible] ing along with [illegible] not expected to [illegible] of the different [illegible] on: the architect's general superintendence which he has [illegible] also called in when difficulty occurs, as in the course of the work is seen to be desirable of visits is it usual to a building such as A One can't draw as to the number of practice for a villa [illegible] in ten days or a fortnight provided the architect builder under him [illegible] irregular visits I would tect to visit whenever occurs requiring him architect is entitled to work is properly done

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The pursuer's law-agents also wrote to the masons and the plasterer intimating that as the floors were not laid conform to specification, and as the dry-rot was due to this, she was having the whole re-done, and that she reserved all claims of damages which she might have against them. The masons replied that they had carried out their contract according to specification and to the satisfaction of the architect, and were in no way responsible for the dry-rot. The plasterers replied that the work complained of was done to the architect's instructions and under his direct supervision, and was a first-class job, and that any action which Miss Jameson might take would be entirely at her own risk.

The pursuer then ordered the work to be done, and thereafter raised the present action.

In these circumstances the question came to be what kind and amount of supervision was implied in the defender's employment as architect, and whether in view of the amount of supervision in fact given by him he could be held to have adequately discharged the duty incumbent upon him.

The defender deponed that either he or Mr Tweedie went down to the building on an average about once a-week.

The defender founded upon the following rule of the Royal Institute of British Architects as showing the terms of his employment:—"The following are the professional services included in the ordinary charge of 5 per cent. — the requisite preliminary sketches, drawings, and specifications sufficient for an estimate and contract; detailed drawings and instructions for execution; one set of tracings and duplicate specification; general superintendence of works (exclusive of clerk of the works); examining and passing the accounts, exclusive of measuring and making out extras and omissions."

The defender adduced several architects and others, who deponed generally that the architect's supervision was only a general supervision, and that detailed supervision, if required, must be provided for by the employment of a clerk of works.

Mr Carter, civil engineer, Edinburgh, deponed as follows:—"According to my experience, both working myself and working along with architects, the architect is not expected to give supervision in detail of the different items of the work as it goes on; the architect's supervision is more a general supervision, to see that the design which he has put in is carried out. He is also called in whenever any question of difficulty occurs, and particularly when in the course of the work any slight alteration is seen to be desirable. (Q) What number of visits is it usual for an architect to pay to a building such as a suburban villa?—(A) One cannot draw any hard and fast line as to the number of visits, but in ordinary practice for a villa I should say that once in ten days or a fortnight should suffice, provided the architect has a respectable builder under him. In addition to such irregular visits I would expect the architect to visit whenever any special occasion occurs requiring his direction. . . . The architect is entitled to assume that the work is properly done unless he has hap-

pened to notice something wrong with the mode of its execution when he made his visits to the ground."

Mr Dick Peddie, architect, Edinburgh, deponed as follows:—"In my own case I consider that I have done very satisfactorily if I go to the building once in three weeks. . . . In the case of an architect in larger practice he would do by deputy to a certain extent what the other man would do by himself. . . . I think an architect's certificate means that to the best of his ability the work is done according to contract. (Q) Founded on occasional visits?—(A) Yes. (Q) Which may occur about once in a fortnight?—(A) I think that is perfectly sufficient for a small building like that. . . . My view is that, apart from special contract between the architect and the employer in regard to the carrying out of the specification, the employer takes his chance of the care and integrity of the contractor, and of what the architect may happen to observe on his occasional visits."

Mr Robertson, principal surveyor for Scotland of Her Majesty's Board of Works, Mr Peddie, Mr Morham, and Mr Ross, architects, Edinburgh, deponed that they did not consider that it was incumbent upon the architect to examine the "bottoming" specially before the cement was laid on top of it, that the nature of the bottoming was very unlikely to cause any subsequent trouble, and that what happened in the present case was not a thing which any architect could be expected to anticipate as a reasonably possible result of improper bottoming being used. Mr Baird, plasterer, and Mr Slater, builder, also gave similar evidence.

On the other hand Mr Ormiston, ordained surveyor and Dean of Guild of the City of Edinburgh, and his son Mr W. M. Ormiston, architect and surveyor, deponed that it was usual to inspect the bottoming before allowing the cement to be laid.

On 1st June 1899 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Decerns against the defender for payment to the pursuer of the sum of £40: Finds the pursuer entitled to expenses, &c.

Opinion.—"This case does not involve a large sum of money, but it raises questions of some importance, especially in view of the evidence given by some eminent architects as to what they consider to be the extent of their professional responsibility. —[*His Lordship then stated the facts*].

"The question, however, is whether the mischief having been thus caused, the defender ought, in the course of due supervision, to have observed and prevented it. The pursuer contends that supervision of the contractors was part of the defender's duty but that as regards this part of the work he gave no supervision at all, certifying the work as duly executed in reliance solely on the contractors' faithful observance of the specification. This, the pursuer says, constituted a breach of contract on the defender's part which entitles her to redress.

"I may say at once that I do not think it proved that there was any special contract as to the kind or degree of supervision which the defender should exercise. The pursuer and Mr Bartholomew, her agent, both say that the defender undertook to give 'special attention' to the job, and I think it quite likely that something of that sort was promised. But I am not disposed to attach importance to general expressions of that sort. On the other hand, I do not hold it proved that the defender warned or informed the pursuer or her agent that to secure adequate supervision they must have a clerk of works, and that he (the architect) could only undertake to visit the building once a week or once a fortnight. That statement was first made by the defender in the course of his cross-examination towards the close of the proof, and while it is probably consistent with the view which the defender took or takes of his duty, it does not appear to me to be consistent with the weight of the evidence. That some mention was made of a clerk of works is I think possible, but it is common ground that in such jobs the employment of a clerk of works is unusual, and it must, I think, be taken to be the fact that the defender neither stipulated for nor advised the engagement of such a functionary.

"The question therefore is, what kind and amount of supervision was implied in the defender's employment as architect on the job? It is quite certain that he undertook some supervision. He received the usual 5 per cent. commission, which to the extent of about 2 per cent is for supervision and nothing else. It is also certain that the supervision which he undertook was not confined to the mere matter of his design. He undertook, like other architects, to grant certificates to the contractors upon which the contractors should be paid, and by these certificates he certified, if not expressly, by the plainest implication, that the work done had been done according to contract. *Prima facie* therefore he must at least be held to warrant that in so far as he could ascertain by reasonable care and skill there had been no scamping of the work or serious deviation from the plans and specifications. That seems to be his *prima facie* undertaking, and I confess I am not prepared upon anything I have heard to put his responsibility lower. He was bound to supervise, and in doing so he was, I think, bound to use reasonable care and skill, the burden being upon him to show that with respect to any disconformity or default it was such as could not be discovered by reasonable care and skill. I cannot assent to the suggestion that an architect undertaking and being handsomely paid for supervision, the limit of his duty is to pay occasional visits at longer or shorter intervals to the work, and paying those visits to assume that all is right which he does not observe to be wrong. It may well be that when he stipulates for and obtains the assistance of a clerk of works his implied undertaking is less stringent. He may in that case be entitled to accept the reports of the Clerk of Works as

correct, and of course in no case can the architect be bound to that minute supervision which is only possible to a person continually on the ground. But, speaking generally, his (the architect's) obligation is, so far as reasonably possible to see that the work is duly and properly executed, and whether he has failed in that duty in any particular case is a question of circumstances, and a question not for his professional brethren but for the Court.

"Now, applying these principles, I am of opinion that the defender here has failed to show that as to this part of the work he gave due and reasonable supervision, or that the want of such supervision was not a materially contributing cause of what occurred. It is, I am afraid, impossible to assimilate the deliberate substitution of general rubbish for dry stones below the cement floors of a building to such things as the driving of a nail in the wrong place, or similar acts of casual negligence, which it was properly said might elude even the vigilance of a clerk of works. All that may be readily admitted. But, so far as I can see, there was no difficulty in the defender—without anything like constant attendance—doing all that was in the matter required. He might have arranged to go down or send down an assistant during the day or two when this particular work was going on. He might (as Mr Ormiston says is usual, and as is at all events, I think, quite reasonable) have asked that the bottoming should not be covered up until he had seen that it was in order. He might, in any case and at least, have looked to see whether there was sufficient stone dressing on the ground, and finding that there was not, have inquired as to the source from which the bottoming was proposed to be got. I am, afraid, however, the fact is that he did nothing at all. He simply trusted to the contractors—his view of his duty being, as he frankly enough says, that it was enough for him to pay occasional visits—once a week or once a fortnight—and that his employer took her chance of any scamping, however serious, which the contractors might perpetrate in the interval. Now, that is a view of the defender's duty to which I cannot assent. It is quite true—and I regret to say it—that it has received the support of some eminent members of his profession. But it appears to me to be a view which reduces the architect's supervision to a farce. It is not the view of Mr Ormiston (the Lord Dean of Guild), who gives evidence for the pursuer, and it is not a view which is, I think, likely to commend itself to ordinary minds. At all events it does not commend itself to mine. And accordingly on the whole matter I find for the pursuer, and assess the damage at £40."

The defender reclaimed, and argued—The only way in which the Court could ascertain what was the extent and scope of the supervision which was implied in a contract to act as architect upon the ordinary terms was by taking the evidence of architects. Such evidence was competent and indeed essential—*Chapman* v. *Walton* (1833), 10 Bing. 57, 38 R.R. 396. All the evidence given by architects in this case was to the effect that while the architect was bound to supervise the work generally he was not bound to give special and detailed supervision. See also the rule of the Royal Institute of British Architects on the subject (quoted *supra*). From the nature of the architect's avocations, the possibilities of the case, and the amount of the remuneration, nothing more than general supervision could be expected from him. Such general supervision as was incumbent upon an architect had been given by the defender here, and he was not responsible for imperfection in the work which he had failed to detect in consequence of his not having maintained a special and detailed supervision over it. Nothing short of such a special and detailed supervision could have guarded against the possible occurrence of the scamping which took place here. What happened here was not a thing which the defender could have been reasonably expected to anticipate as at all likely to happen. The laying of the bottoming was not a matter of any special importance, and there was no special duty upon the architect to take means to ensure his seeing it before it was finally covered up.

Argued for the pursuer and respondent—The question here was one for the decision of the Court, and the opinion of the architects' profession on the subject was not conclusive. Apart from any wider question as to the amount of supervision incumbent upon an architect, he was at least bound to see that work which was to be finally covered up out of sight was properly done according to specification before he allowed it to be finally covered over.

At advising—

LORD JUSTICE-CLERK—The question in this case is whether the architect employed by the pursuer for the building of a villa failed in his duty of superintendence of the work while the villa was in course of erection in not seeing that the bottoming for a cement floor was composed of proper materials, in consequence of which dry-rot broke out in the wood-work to the loss and damage of the pursuer. About the facts there is no doubt. The bottoming was bad, consisting in part of wooden chips, shavings, sacking and other perishable material, and it is not disputed that this was the cause of the rot which set in. It may be difficult to arrive at certainty which of the contractors it was who put in this improper material, as they naturally accuse each other. But this is certain—first, that the mischief was done, and second, that there was no such supervision by the architect as to prevent it or to note who caused it, the architect having certified this part of the work as having been well done, and this brought the pursuer into the position of having to pay for it as good work when in fact it was bad, and cannot now be maintained to have been anything else. It is quite certain that he certified this part of the work without having seen it, as it is not maintained that if he had by himself or deputy seen the mate-

rials which were put in he would not at once have ordered them to be removed and proper materials provided in their place. Can it be held in these circumstances that the defender, whose percentage on cost was one covering supervision, did exercise that amount of care and oversight which was reasonably to be expected of him? I feel compelled to agree with the Lord Ordinary in thinking that it cannot. There may, of course, be many things which the architect cannot be expected to observe while they are being done—minute matters that nothing but daily or even hourly watching could keep a check upon. But as regards so substantial and important a matter as the bottoming of a cement floor of considerable area, such as this is shown by the plans to have been, I cannot hold that he is not chargeable with negligence if he fails before the bottoming is hid from view by the cement to make sure that unsuitable rubbish of a kind that will rot when covered up with wet cement has not been thrown in in quantities as bottoming contrary to the specifications. It is contended that the architect cannot be constantly at the work, and this is obviously true. But he or someone representing him should undoubtedly see to the principal parts of the work before they are hid from view, and if need be, I think he should require a contractor to give notice before an operation is to be done which will prevent his so inspecting an important part of the work as to be able to give his certificates upon knowledge, and not on assumption as to how work hidden from view had been done. Here the architect directed the plasterer who was to put down the cement to proceed with his work without knowing whether the work to be covered up by it had been properly done or not.

I agree with the views expressed by the Lord Ordinary in his note, and move your Lordships to affirm his interlocutor.

Lord Young—I agree with the Lord Ordinary that this is a case of some importance, and indeed of considerable importance. It is important to architects and their employers to know what are their respective obligations and rights. They do not seem to be agreed, and there is a conflict of evidence upon the subject.

I think we may take it for granted that the contract here was upon the ordinary terms. Architects and their employers may contract as they please, but when they contract upon the ordinary terms it is important to architects and those who employ them to know what are the rights and duties implied in such a contract. The defender's contract here was to prepare plans and specifications, to obtain tenders, and to supervise "the work from commencement till completion." That was the obligation undertaken by him which he says he fulfilled. On the other hand, he was to receive a fee of 5 per cent on the total cost of the villa. That was a contract upon the ordinary terms.

Now, the question here is, what is the import and meaning of such a contract.

It cannot be disputed that the bottoming of the cement floor was bad—so bad as to necessitate the taking up and relaying of the floor, causing not only expense but inconvenience to the pursuer—[*His Lordship then read the passage from the defender's evidence with regard to the bottoming, which is quoted supra*]. I am surprised that the defender should say that the certificate does not bear that the work has been done conform to contract. An architect's certificate that work has been done means that the work has been properly done according to the contract. Now, the question is, was the defender's conduct as stated here by himself in accordance with the duty he had undertaken to supervise the work?

I think it important to refer to two other passages in the evidence—[*His Lordship read the passage from the mason's evidence, which is quoted supra*]—That illustrates very forcibly the defender's conception of his duty, and makes it clear that he did not get any information upon which to give a certificate to the mason. The other passage is in the plasterer's evidence, and it shows that the defender did not get any information upon which to give him a certificate either—[*His Lordship read the passage from the plasterer's evidence, which is quoted supra*].

Now, that this work was scamped and the employer wronged is, I think, clear. When the pursuer asked the defender to set this scamping right, he in the end sent back her letter, and told her to go to her lawyers. Then the pursuer's lawyers write and the defender, instead of saying that he would endeavour to find out whose fault it was, writes in answer simply that he repudiates all liability. Then the lawyers applied to the masons, and they say that the work has been done to the satisfaction of the architect, and that they are in no way responsible. When the plasterer is applied to he says that the work was done to the architect's instructions, and under his direct supervision, and was a first-class job. Then the pursuer brought this action, and the question is, whether under his contract obligation to supervise, the defender is under no obligation except to go occasionally, and to take a glance at the work and see if anything is wrong, and if he sees anything wrong to have it put right, but if he sees nothing wrong when he chances to be there, to make no further examination. I think the defender's contract obligation demands a good deal more from him than he and some of his professional brethren seem to think.

To some extent an architect is an artist—that is, as regards the design and plan. But for the rest, his work is just ordinary tradesman's work—drawing specifications and supervising the work. He is not supposed to do all the supervision personally. His subordinates can do much of it as well as he can himself, but if he undertakes to do it, he is bound either to do it himself, or to have it done by some person whom he employs and in whom he has confidence. I think the mean-

ing of the contract is that he shall see that the work is done well before he certifies it. If he does not do this, then the interest of the employer is altogether neglected. The neglect here was not great, but I agree with the Lord Ordinary and your Lordship that there was neglect, and that the defender is liable.

If scamping of work is not discovered at the time it may be discovered afterwards, and one knows of architects who, upon scamping being discovered, thought it their duty, as standing between the employer and the contractor, to see that the contractor put it right, as the architect can do, for he has great power with the contractors. He employs them and he certifies their work. I am surprised therefore that the defender here met the pursuer's demands as he did, but the question is, what are the legal rights and obligations of the parties under this contract, and as I have said, I think the defender was liable for the neglect of the employer's interests which took place here.

I am not without sympathy for the defender here, because he seems to have done as much as he and his professional brethren think they are bound to do. But we must construe the contract, and I think he was bound under his contract to do more than he did, and that he is liable for having failed to do so.

I am therefore of opinion that the interlocutor reclaimed against should be adhered to, and with additional expenses.

LORD TRAYNER—I think this case in one aspect of it is a hard one for the defender. He appears to have given to the building of pursuer's house as much supervision and inspection as it was customary to give according to the practice of architects. Tried by that standard, it may be said that he did not fail in the performance of the duty he had undertaken. But that is not enough to absolve him from liability. Admittedly the duty of the defender was to give reasonable supervision, and I think that means such supervision as would enable him to certify that the work had been executed according to contract, which he had to certify before the tradesmen could call for payment of the sums due under their contracts. Now, here the defender certified that work had been done conform to contract, and the tradesmen on that certificate were paid for doing it, when in point of fact it had not been so done. Reasonable supervision of the work would have informed the defender that the masons were not entitled to the certificate he gave them. Again, it is a point against the defender that he ordered the plasterer to proceed with his work before he knew or had ground for believing that the actual state of the mason's work warranted such an order, and the fulfilment by the plasterer of the order so given to him prevented the defender from afterwards discovering that the bottoming was defective or bad. Without going into further details, my opinion is that the judgment of the Lord Ordinary is right, although I do not adopt all that he has said in his opinion.

LORD MONCREIFF—The Lord Ordinary has taken a somewhat strict view of the defender's duties as architect, but looking to the peculiar circumstances of the case I am of opinion that the judgment is justified by the evidence.

It is satisfactorily proved (although this was denied by the defender) that the dry-rot which made its appearance in the pursuer's dwelling-house was caused by defective bottoming or filling under the scullery floor. The parties primarily responsible for this inexcusable scamping were either the masons or the plasterer, for of course they were responsible for the acts of their workmen. The dry-rot did not make its appearance until the house had been taken off the contractor's hands and after the defender had been settled with and paid. On discovering the state of matters the pursuer applied to all three—the defender the architect, Messrs Sutherland & Sons the masons, and Mr Hunter the plasterer. They all repudiated liability. Messrs Sutherland & Sons said that they had carried out their contract according to specification and to the satisfaction of the architect. Mr Hunter said that the work was done under the architect's instructions and under his direct supervision, and in his (the plasterer's) opinion was a first-class job. The defender not only repudiated liability, but refused to admit that the dry-rot was connected with the bottoming or filling.

In these circumstances the pursuer was placed in a very awkward position. She did not know against whom to proceed, and the defender gave her no assistance in that matter. If she brought both the masons and plasterer into Court there was risk of one of them being assoilzied with expenses. Now that we have got their evidence there is reason to think that they both might have been found liable, as they each according to their own story adopted and were paid for defective work which had been done for them by the other contractor. But the pursuer could not foresee this, and the question is whether she was bound to run the risk which I have indicated.

She decided to proceed direct against the defender the architect.

The question which is raised as to the defender's liability is difficult and narrow—the more difficult because a large number of eminent members of the defender's profession entirely acquit him of blame and responsibility in the matter. No doubt he is paid a commission of 2½ per cent. for supervision, but in return for that remuneration he cannot be expected to be constantly present, and even if he were to visit the work every day scamping might go on when his back was turned for which it would be unreasonable to hold him responsible. The ground—narrow, but I think sufficient—on which I think he should be held responsible is that the scamping occurred at a stage of the work to which his attention should have been and indeed was directed, that is, the point at which the plasterer succeeded the masons.

Now, it appears from the defender's own evidence that on the 27th May he notified to the plasterer to proceed with his work. I do not think that I am misstating the evidence when I say that when that notice was given the defender did not know that the masons had completed their part of the bottoming. If the defender had inspected the work at that stage, or sent an assistant to do so, he would, if the masons' story is true, have discovered that 15 inches of the masons' part of the bottoming still required to be done, and if the plasterer's story is true he would have found that the whole of the bottoming, including the 3 inches which the plasterer should have supplied, had been filled in, but that the upper part of it was not conform to specification and must be immediately rejected, in which case he would not have granted certificates as he did.

Instead of doing this, however, he trusted to the experienced contractors whom he had employed, and without finding out how matters stood told the plasterer to proceed, with the fatal result that the scamped work was covered up with cement.

I have no doubt that in the great majority of cases an architect would be in perfect safety to trust the work of experienced contractors like Messrs Sutherland & Sons and Mr Hunter; and, moreover, we are told that it is a very unusual thing to find bottoming scamped in this way, or to find dry-rot proceeding from such a cause. But here the unforeseen occurred; on the evidence there is no doubt that dry-rot was generated by the bad bottoming, and there is also no doubt that the contractors, although their attention was drawn to the state of the bottoming (for they each say that they were surprised to see that the work was completed) afforded no protection to the pursuer. In these circumstances I think she was compelled as well as entitled to fall back upon the architect who had undertaken to supervise the work.

While this is my opinion on the facts of the present case, I do not wish to be understood as meaning that an architect is to be held responsible for all defective work which may be covered up during his absence. Not even a clerk of works could be expected to detect everything of that kind. My opinion proceeds on the ground that when one contractor had to follow another, and when the work done was about to be covered up so that it could not thereafter be inspected, the architect should, under the duty of supervision which he had undertaken, have ascertained either by personal inspection or through an assistant whether the bottoming had been done according to specification, and that in failing to do so he did not use reasonable care in the discharge of his duty.

The defender seems to have taken a great deal of trouble in connection with the construction of this villa, and it is therefore all the more to be regretted that he should be held liable for this mistake; but on the evidence I am unable to say that the Lord Ordinary's judgment is wrong.

The Court adhered, with additional expenses.

Counsel for Pursuer and Respondent — Ure, Q.C. — Clyde — Lyon - Mackenzie. Agents—W. & F. Haldane, W.S.

Counsel for Defender and Reclaimer—Johnston, Q.C.—Baxter. Agents—J. S. & J. L. Mack, S.S.C.

Wednesday, July 12.

FIRST DIVISION.

[Lord Pearson, Ordinary.

CORPORATION OF GLASGOW *v.* WYLLIE.

Police—Sewer—Assessment—Glasgow Corporation and Police Act 1895 (58 *and* 59 *Vict. cap.* cxliii.), *sec.* 26.

The Corporation of Glasgow entered into agreement with two other local authorities for the construction of a main sewer for the drainage of a district partly within the City of Glasgow and partly within the areas under the control of the other contracting parties. By this agreement, which received statutory authority under sec. 26 of the Glasgow Corporation and Police Act 1895, it was provided that the sewer should be constructed by the first party, who should bear the whole cost in the first instance. It was further provided that the gross valuation of all the parties should be ascertained annually, "and the amount necessary to provide in each year for the annual instalment of repayment of capital, or cost of the said main sewer . . . shall be allocated annually on each party in the proportion which their gross valuation in that year bears to the total valuation of said drainage district, . . . each party to raise their own respective proportions so determined according to their own method of assessment." The method of assessing for the purposes of the agreement was provided for the other parties by section 26 of the Act of 1895 but no method was specified as regards Glasgow.

The sewer was constructed in accordance with the terms of the agreement. An action was raised by the Corporation against the proprietor of lands and heritages adjoining a street through which part of the drain ran, for a sum which they alleged to be his proportion of the capital cost of construction of the sewer. The action was based upon section 329 of the Glasgow Police Act 1866, which provides that such proprietors, where no ordinary sewer previously existed in the street, "shall be bound to relieve the magistrates and council from the expense of constructing an ordinary public sewer" in proportion to their respective frontages.

This was the ordinary method of assessment in Glasgow.