ing the sequestrated estate of George Smith & Company as they then stood: Find that the challenge of the said assignations by the pursuer has been departed from by them, except as regards the said bill for £57, 15s.: Find that by said deed of arrangement no special authority was given to the pursuers, or either of them, to challenge any preferences that may have been granted by the bankrupt: Find in law that the pursuers have no title to challenge the said assignation in respect of the said bill: Find that the pursuers are entitled to an assignation of the book debts enumerated in the said assignations of 6th, 20th, and 23rd May 1887, so far as these are unpaid, upon payment to the defender David Prentice Menzies of the balance of the sums due to him, and interest thereon at 5 per cent. from 3rd May 1888 to the date of payment: Grant warrant to the Sheriff-Clerk of Lanarkshire at Glasgow to pay to the pursuer Gavin Bell Millar the sum of £132, 2s. 10d., the amount consigned on 18th May 1888, and that upon production of a certified copy of this interlocutor: *Quoad ultra* dismiss the action," &c.

Counsel for the Appellant—Asher, Q.C.—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for the Respondents—Goudy. Agents—J. W. & J. Mackenzie, W.S.

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*Friday, February* 1.

## FIRST DIVISION.

[Lord Trayner, Ordinary.

## STEEL COMPANY OF SCOTLAND *v.* TANCRED, ARROL, & COMPANY.

(*Ante*, vol. xxv., p. 178.)

*Contract—Construction—Words of Estimate or Expectancy.*

A company contracted to supply "the whole of the steel required" by the contractor for the Forth Bridge, less 12,000 tons of plates, at certain prices. The general conditions appended to the contract contained the following clause—"The estimated quantity of the steel we understand to be 30,000 tons, more or less." From the specification attached to the contract for the construction of the bridge, to which the above contract referred, it appeared that the part of the bridge for which in the contemplation of the parties the steel was required was the superstructure of the four main spans.

In an action by the company against the contractor for damages on account of breach of contract—*held* that the pursuers were entitled to supply the whole steel required for the construction of the superstructure of the four main spans, in respect that the estimate of "30,000 tons, more or less," was merely a guide to the parties as to the amount which would probably be required, and did not in any way limit the legal obligation under the contract.

This was an action at the instance of the Steel Company of Scotland (Limited) against Messrs Tancred, Arrol, & Company, the contractors for the construction of the Forth Bridge, to have it found and declared "that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge at present being constructed at Queensferry, and that at the prices and subject to the terms and conditions contained in offer by the pursuers, dated 27th February, and acceptance thereof by the defenders, dated 7th March 1883, and the defenders ought and should be decerned and ordained to make payment to the pursuers of the sum of £100,000 sterling, or such other sum as shall be ascertained in the process to follow hereon as the damages due to the pursuers in respect of the defenders having supplied themselves elsewhere with steel needed for the construction of the said bridge."

In their offer the pursuers wrote—"We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices, viz.—Steel plates, per ton, £10; angles, £8, 10s.; tees, up to 12 united inches, £8, 10s.; tees, 12 in. by 6½ in. by 1 in., £12; channels, 10 in. by 3 in., £10, 10s.; channels, 12 in. by 4 in., or 14 in. by 3 in., £14; flats, £8, 10s.; rivet bars, £9, 10s." The offer contained the following clause—"The estimated quantity of steel we understand to be 30,000 tons, more or less."

The defenders accepted the offer in the terms in which it was made. The offer and acceptance were subject to the following general conditions, which are here given as appended to the acceptance— "*General Conditions.*

"The work and material herein described or referred to is to be executed and supplied in strict accordance with the specification attached to our contract for the construction of the Forth Bridge, and to the entire satisfaction in all respects of the engineer for the time being of the Forth Bridge Railway Company, who shall have full liberty at all times to inspect in person or by deputy the entire process of manufacture, and to reject any of the material or portions of the work which in his judgment are inferior or unsatisfactory, or not in accordance with the said specification, and his decision is to be final and conclusive. You will provide at your own cost all requisite apparatus and labour for the purpose of testing the steel. No part of the work will be considered as being in accordance with the contract until the engineer or his deputy shall have given his certificate in writing that it is satisfactory, but if the same be afterwards found to be defective, or not in accordance with the contract, it may, notwithstanding such certificate, be liable to rejection at our works. You agree at your own cost and charge to satisfy all royalties or claims in respect of any patent rights affecting any part of the works. Upon the first day of each month you shall render us an account of the material delivered during the preceding month, and the amount found due by us thereon is to be paid by us to you in cash on or before the first Tuesday of the following month. We are to have the power to cancel this contract should our contract for the erection of the bridge be from any

cause determined, as provided in our principal contract with the company, upon the condition that we give you three calendar months' previous notice in writing, and supply you with specifications for those three months to keep you fairly employed for that time, and upon the further condition that we will pay to you the contract price for all steel you may complete according to specification at or before the expiry of such notice, whether the steel be delivered or not within that time. Further, we undertake to pay you the amount of loss (if any) you may sustain by the cancelment of your contract or materials (pig iron, ores, &c.) which you may have purchased before notice as against this contract. This loss (if any) to be the difference on the last day of the said three months between the actual cost (delivered at your works) of such materials to you, including interest on price at 5 per cent. per annum, and their then market value. . . . . The steel to be manufactured at the works of the Steel Company of Scotland (Limited), and deliveries are to be made at such times and in such quantities as we may from time to time require, and to extend over four years, unless otherwise specially agreed, or unless the contract be cancelled as already provided, it being understood that we will furnish specifications so that deliveries shall be as nearly as possible made in equal monthly quantities over the period named. The estimated quantity of steel we understand to be 30,000 tons, more or less."

In the specification attached to the contract for the construction of the Forth Bridge there were the following references to the steel which would be required—

"*Iron Work in Caissons.*

"51. . . . The cutting edge of the caissons will be formed of steel plates, or of a cast steel curb, as may be determined by the engineer."

"*Superstructure.*

"54. The contract sum must be based upon the assumption that the superstructure will include 42,000 tons of steel work in main spans, and 20 tons of cast steel in bed plates and sundries, 3000 tons of wrought iron in approach viaduct, 200 tons of cast iron work in bed plates of approach viaduct and sundries, 2000 tons of old iron to weight ends of cantilevers, 1½ miles of permanent way for double line, with expansion joints complete, and asphalted side walks with hand rails, as shown on the drawings, and any alterations or omissions in or additions to the above quantities will be estimated at schedule rates, and be added to or deducted from the contract sum as the case may be."

"*Steel Work.*

"70. The whole of the metal in the main spans will be steel, of a make specially approved of by the engineer, and no wrought or cast iron will be used unless hereafter ordered by the engineer."

The pursuers averred—"The defenders have been supplying themselves with steel for the purpose of being used in the construction of the said bridge from other sources over and above the said excepted amount of 12,000 tons, as to which no question is raised. This they have been doing at prices considerably under the contract prices above mentioned."

In their statement of facts the defenders maintained that the contract was for "30,000 tons of steel, more or less," and averred as follows—(Stat. 4) "By the custom and practice of the iron and steel trade in Glasgow as well as elsewhere, a contract for the supply of a quantity of manufactured iron or steel, in which the quantity to be supplied is described in general terms and not definitely fixed, but which has a clause expressing the estimated quantity to be delivered and taken under said contract, is regarded and held to be a contract only for the estimated quantity so expressed. According to the said custom and practice, the contract libelled is a contract for 30,000 tons of steel, more or less. The words 'more or less' in said contract are by the said custom and practice understood to mean, and were intended by the parties to mean, that the quantity delivered should not exceed or fall short of the estimated quantity by more than 5 per cent. The parties have, since the contract was made between them, acted on the footing that if the defenders took 30,000 tons of steel from the pursuers, they might get any extras elsewhere as not being within the contract of the parties. The pursuers have consistently read the contract between them and the defenders in the way contended for by the latter, and when the present questions arose they endeavoured to get the defenders to amplify the contract on the allegation that there was an agreement, subsequent to that now founded on, to take all extra steel from them however much it might exceed 30,000 tons." (Stat. 5) "In particular, the contract founded on embraced, *inter alia*, steel rivet bars. These were specified with the view to the defenders manufacturing the rivets themselves at the Forth Bridge works, but they subsequently found that it would be more convenient to buy them in a manufactured form. They accordingly, on or about 12th September 1884, ordered 700 tons of steel rivets from the Clyde Rivet Works, providing in their contract that the steel should be obtained from one of two makers, viz., the pursuers, or D. Colville & Sons, Motherwell. The Clyde Rivet Company accordingly purchased steel for making said rivets from the pursuers at the market rate then current, which was much lower than the rate in said contract. This steel was tested at the pursuers' works on behalf of the defenders, and the pursuers were well aware that the rivets to be made from it were for use at the Forth Bridge. The pursuers' manager at first objected to what was being done, on the ground that this steel fell within the contract in question. The defenders, however, informed the pursuers that 30,000 tons of steel would be taken under the contract, and that being so, that the contract would be satisfied. This view was acquiesced in by the pursuers, and the steel was sold to the Clyde Rivet Company as before mentioned. Subsequently the following additional quantities of steel were purchased by the defenders from the Clyde Rivet Works Company, viz.—March 25, 1886, 500 tons at £6, 5s., less 5 per cent.; January 24, 1887, 250 tons at £6, 10s. less 5 per cent. All the said steel was purchased by the Clyde Rivet Works Company from the pursuers, who were quite aware that it was intended for use in the construction of the Forth Bridge Railway. The steel was tested at pursuers' works on behalf of the defenders." (Stat. 6) "Again in April 1886 the defenders required 1000 tons of

steel to be used first for temporary purposes, and afterwards to be used in the construction of the Forth Bridge. The pursuers were invited to tender for this, and they thereupon claimed that it fell under their contract. The defenders again explained that they would take 30,000 tons independently of the said 1000, and that the pursuers had no right to ask anything more under the contract. This view was acquiesced in by the pursuers, and the steel was supplied at the pursuers' current prices, which were much lower than the prices in the contract founded on. (Stat. 7) "Further, the caissons for the Forth Bridge were originally intended to be made entirely of iron, but afterwards the engineer of the works requested, under the powers given him in the contract, that steel shoes should be used for these caissons. For this purpose 500 tons of steel were needed. The defenders gave this work to Arrol Brothers of Glasgow, who bought the steel from Neilson Brothers, Glasgow, who again bought it from the pursuers, who were well aware that it was required for the Forth Bridge, and it was tested on behalf of the defenders at the pursuers' works, but nevertheless the pursuers supplied it at their current prices, which were lower than the prices in the contract founded on. (Stat. 8) "Further, the approach viaduct to the bridge, according to the original specifications between the defenders and the Forth Bridge Railway Company, was to be made of iron. After the date of the pursuers' contract, steel was substituted for iron by the engineer. The defenders sub-contracted with Messrs P. & W. M'Lellan, Glasgow, for the supply of this steel. The pursuers supplied it without demur at their current market prices, and not under the contract founded on, though well aware that it was required for the Forth Bridge. Further, in or about 1884 there was a discussion between the pursuers and defenders as to the terms of payment and delivery of the said steel, on which a minute of the pursuers' directors followed. In said minute the defenders believe and aver that there is a proposal to the effect that in respect of certain alleged concessions made by the pursuers in regard to times of payment, the defenders should give the pursuers an order for steel in excess of the contract quantity."

In answer the pursuers averred that their manager complained to Mr Arrol that it was a breach of contract to get the steel rivets elsewhere, but Mr Arrol assured him it was a small matter, and the pursuers did not press it; that the 1000 tons of steel supplied by the pursuers outside the contract were ordered and supplied expressly for temporary purposes, and not for the permanent structure. They were not aware that the 500 tons of steel bought from them by the Neilsons and M'Lellans was for work which fell under the contract, and that consequently they did not at that time raise action against the defenders. In 1884 there was a proposal on the part of the defenders for extended credit, which was acceded to and acted on. There having been some discussion as to the meaning of the contract, the pursuers made it a condition of granting the credit asked, that the defenders should accept that view of the contract then and now contended for by the pursuers, and the defenders by their partner Mr Arrol agreed to this condition.

The defenders further offered to take 32,000 tons of steel from the pursuers in satisfaction of their contract.

The pursuers pleaded—"(1) The pursuers being able and willing to supply the whole of the steel required for the construction of the Forth Bridge other than the 12,000 tons excepted as aforesaid, the defenders are bound to take the same from the pursuers in terms of the contract constituted by said offer and acceptance. (2) The defenders having committed a breach of said contract, are liable in damages to the pursuers."

The defenders pleaded—"(4) The declaratory conclusions of the summons being inconsistent with a sound construction of the contract of parties, and with the construction put upon it by both parties in their actings under the same, ought to be refused. (5) The pursuers are debarred by their own actings under the said contract and by *rei interventus* from maintaining the declaratory conclusions of the summons. (6) On a sound construction of the contract of parties the pursuers were not thereby bound to deliver to the defenders, nor the defenders to take from the pursuers, more than 30,000 tons of steel, more or less, for use in the construction of the Forth Bridge."

Before answer the defenders were allowed a proof of their averments as to the custom and practice of the steel trade (*vide ante*, vol. XXV., p. 178), the result of which appears sufficiently from the opinion of the Lord Ordinary.

The following minutes of meetings of the pursuers' company were founded on by the defenders:—

"23*rd September* 1885.—Messrs Tancred, Arrol, & Company asked that the company accept bills occasionally in payment of their account and bear one-half the charge of discounting. It was decided that Mr Riley wait on them and agree to do this, provided they agree to give us the order for any steel they may require over our contract quantity, and at our contract prices for the Forth Bridge."

"7*th October* 1885.—Mr Riley reported that he had seen Messrs Arrol and Philips, of Messrs Tancred, Arrol, & Company, and had arranged with them that this company would, when desired by their firm, draw upon them in payment of their account, and only one-half of the costs of discounting to be charged. In consideration of this concession these gentlemen agreed that our contract with their firm should be taken as covering the whole of the steel required for the completion of the Forth Bridge, except that covered by the contract with the Landore Siemens Steel Company, which is for 12,000 tons plates. Messrs Arrol and Philips pledged themselves to carry out this arrangement, but stated that they did not think it judicious to embody it in a formal letter."

The Lord Ordinary (TRAYNER) on 2nd March 1888 pronounced this interlocutor:—"Repels the fourth, fifth, sixth, seventh, and eighth pleas-in-law for the defenders: Finds and declares that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge, at present being constructed at Queensferry, in so far as such steel is or may be required in the construction of the four main spans of said bridge, and decerns; reserves all questions of expenses; and *quoad ultra* continues the cause."

"*Opinion.*—The first question to be decided in this case is, What is the meaning of the contract between the parties which was constituted by the letters of offer and acceptance set forth upon record? The pursuers maintain that that contract is to be read literally according to its expression, and that it binds the pursuers to provide and the defenders to take the whole steel required by the defenders for the construction of the Forth Bridge at the prices specified. On the other hand, the defenders maintain that the contract is one for 30,000 tons of steel, more or less, but not a contract for the whole steel required for the bridge.

"The defenders aver that according to the custom and practice of the steel trade 'a contract for the supply of a quantity of manufactured iron or steel, in which the quantity to be supplied is described in general terms and not definitely fixed, but which has a clause expressing the estimated quantity to be delivered and taken under said contract, is regarded and held to be a contract only for the estimated quantity so expressed. According to the said custom and practice the contract libelled is a contract for 30,000 tons of steel, more or less.' When this case was debated before me in the Procedure Roll, I allowed the defenders a proof of this averment of custom, reading the defenders' statement as amounting to this, that the contract was framed in such a manner as technically to express (in the particular trade referred to) a contract for 30,000 tons, with a certain margin, more or less. The Court, however, on a reclaiming-note took a different view, holding that there was nothing technical about the contract or its expression requiring or admitting of interpretation by proof of custom, and accordingly the proof (so far) which I had allowed was refused. Dealing therefore now with the contract as one in no way technical, and one which is to be enforced according to the natural and ordinary meaning of its terms, I have no hesitation in holding that it binds the defenders to take from the pursuers the whole steel required for the construction of the Forth Bridge, 'less 12,000 tons of plates' ordered from another firm. This is a matter which does not admit of any argument, it is simply a question of what the contract says, and its words do not appear to me to have more than one meaning.

"The defenders, however, further aver that the 'parties have, since the contract was made between them, acted on the footing that if the defenders took 30,000 tons of steel from the pursuers they might get any extras elsewhere, as not being within the contract of the parties,' and in support of this averment the defenders condescend on several specific transactions. Of this averment, as well as of the alleged specific transactions, a proof was allowed, and has now been led, with the result that in my opinion the defenders have failed to establish their averment. The directors of the pursuers' company (so far as available at the proof), and their manager and secretary, distinctly deny that they ever acted in regard to the contract in question on the footing averred by the defenders, and the several specific transactions are explained satisfactorily, and in such a way as to show that they were neither known to nor regarded by the pursuers as in any way infringing or modifying the contract.

"A word or two in regard to each of the specific transactions will be sufficient to indicate my view of the evidence bearing upon each.

"(1) In 1883 the pursuers supplied 3000 tons of steel to Messrs P. & W. M'Lellan, to be used by them in the construction of the viaduct approaches of the Forth Bridge. These viaduct approaches it had been originally intended to form of wrought iron, but it was afterwards determined by the engineer that they should be constructed of steel. P. & W. M'Lellan had made a contract with the defenders for the iron work, and their contract was continued after the change to steel had been resolved upon. The steel obtained by them from the pursuers was for the purposes of this contract. The defenders rely on this transaction as showing that the pursuers did not read their contract as one for the 'whole steel required for the Forth Bridge,' as they supplied steel to P. & W. M'Lellan in the knowledge that it was to be used in the construction of the bridge. The pursuers explain in reply that they did not regard the viaduct approaches as part of the 'bridge,' as that word was read by them in their contract. They regarded the bridge as the four main spans—nothing else. It may be that the contract in question, strictly read, covers the approach viaducts, and that the pursuers were wrong in law in giving it the limited construction which they did. They do not now wish to depart from that limited construction rightly or wrongly; it is the view they have always held, and they are willing to abide by it. If they are right, then the transaction with P. & W. M'Lellan has no bearing upon the case, but if they are wrong it does not avail the defenders. For if Mr Riley's explanation is an honest one (as I do not doubt it is), their supplying steel for what was believed not to fall within the pursuers' contract could not be regarded as a departure by them from their contract rights as understood by them. And it is worthy of notice that in 1883 no question had arisen between the parties as to the meaning of their contract. But the pursuers' position as regards their contract came out very distinctly when the second transaction took place, to which I shall now refer.

"(2) In 1884 the defenders ordered from the Clyde Rivet Company a large quantity of steel rivets. The Rivet Company applied to the pursuers to know at what price they would supply the necessary steel bars, informing the pursuers that the rivet bars were 'for Forth Bridge contract.' The pursuers at once communicated on this subject with the defenders, and afterwards there was a meeting between the defender Mr Arrol and the manager and secretary of the pursuers' company. What took place at that meeting appears from the proof. Mr Arrol says that he maintained that it was no matter to the pursuers where he got his rivet bars (although they formed a specific item in the pursuers' contract) provided he took from the pursuers the 'contract quantity' of 30,000 tons of steel in all, which he said he would do. Mr Riley and Mr M'Lellan say, on the other hand, that 30,000 tons, as 'contract quantity,' was not mentioned; that Mr Arrol said he had ordered rivets, not rivet bars, and was not therefore violating the contract; that his partners wished rivets ordered and not rivet bars, and

that the pursuers should let the matter pass as there would more steel be required than was originally expected, which would fall to be supplied by the pursuers under their contract. This meeting, and what took place at it, having been reported to the directors of the pursuers' company, it was agreed that they should waive their rights in reference to the rivet bars in order to get on smoothly with Mr Arrol.

"I do not hesitate to accept, in this conflict of evidence the statements of Mr Riley and Mr M'Lennan rather than the statement of Mr Arrol. It is, besides, the statement of two witnesses against the statement of one—the two having no pecuniary interest in the matter, the one having great interest. At the very lowest it is impossible to hold on such evidence that the defenders have proved (and the *onus* lies on them) that in the transaction about the rivets the pursuers acted upon a reading or construction of their contract such as the defenders aver they acted upon.

"(3) The steel for the shoes of the caissons stands in the same position as regards the steel sold to P. & W. M'Lellan for the viaduct approaches, and I need not say more on this transaction.

"(4) The fourth transaction was steel sold for 'temporary purposes,' and it is admitted by the defenders that the evidence on this matter is not very strong in support of their view. I think the evidence is distinctly against them. The steel sold for temporary purposes was sold by the pursuers to the defenders on the statement of the latter that it was not to be used in the permanent structure, and the correspondence about the steel distinctly bears that it was 'not to be placed against contract, being intended to be used merely for temporary purposes,' and was at the defenders' request advised, priced, and invoiced 'so as to keep them distinct from the bridge construction.'

"The defenders relied very much on the terms of the minute of the pursuers' directors dated 23rd September 1885. I agree with Mr M'Lellan in thinking that that minute is 'unfortunate' in its expression, but I also agree with him as regards the explanation to be given of it, and which is given by him. I will only say further with regard to this minute and the explanation that it appears to me that the pursuers would never have ventured to approach Mr Arrol with the proposal that he should pay for steel 'at our contract prices for the Forth Bridge' if they had been asking him for orders which their contract did not cover. The prices of steel had by September 1885 fallen so much below what they were in 1883, when 'the contract prices for the Forth Bridge' were fixed, that any such proposal would only have made the pursuers ridiculous, as Mr Arrol would not have been slow to show them. As regards what took place at the meeting on 2nd October 1885, I again prefer the evidence of Mr Riley to the evidence with which he is in conflict. I regard the minute of the 7th October 1885 as an honest statement of what took place at the meeting on the 2nd. Further, I accept as correct the evidence of Mr Riley and Mr M'Lellan as to the meeting held on 29th April 1887.

"On the whole matter, I am of opinion that the defenders have failed to establish the averments on which their fourth and fifth pleas are based, and that these pleas ought therefore to be repelled."

Thereafter a joint minute for the parties was lodged containing, *inter alia*, the following admissions:—"(1) That the defenders had ordered outside the contract, and have used or will use for the permanent work of the four main spans of the Forth Bridge, not less than 5000 tons of steel, viz., 2400 tons plates, 2000 tons angles, 300 tons tees up to 12 united inches, and 300 tons flats. (2) That, assuming the previous interlocutors in the cause to be well founded, the pursuers are entitled to damages in respect of said 5000 tons. (3) That the measure of damages in respect of said 5000 tons shall be held to be the difference between £6, 5s. per ton overhead and the contract prices for the different classes of steel specified in article 1 hereof. That the amount of damages represented by this admission is £14,850."

The Lord Ordinary on 13th June 1888 pronounced this interlocutor—"Interpones authority to the joint minute, and in respect thereof decerns against the defenders for £14,850 sterling: Finds the defenders liable to the pursuers in expenses," &c.

The defenders reclaimed, and argued—The pursuers' original contention was that they were entitled to supply the whole steel required for the bridge save 12,000 tons. That contention was now departed from, and the question was what was the proper restriction. The moment that the universality of the contract was departed from, the only reasonable and intelligible limitation was the one contended for by the defenders, viz., that the contract was to be limited to what was declared to be the "estimated quantity," and the "understanding" of parties—that is to say, "30,000 tons, more or less." This estimate appeared among the general conditions appended to the contract, and was part of the contract. That was the preferable interpretation which gave a meaning to every part of the contract, and it was very reasonable that these words should have been introduced as a safeguard to the Steel Company that they might know what amount of steel the contract bound them to supply. The pursuers attached a meaning to these words which rendered them pactional, because they maintained that they were the measure of damage in the case of cancellation. But once they were considered as in any way pactional it was difficult to refuse them the full binding force contended for by the defenders. The clause as to "equal monthly deliveries" also favoured this reading of the contract, which was borne out by the actings of the parties as disclosed in the evidence, and by the minutes of meeting of the pursuers' company of 23rd September and 7th October 1885.—Benjamin on Sale (4th ed.), 699; *Merris* v. *Levison*, Feb. 10, 1876, L.R., 1 C.P.D. 155.

The pursuers argued—The specification in the contract between the defenders and the Forth Bridge Railway Company was part of the contract to be here construed, and comparing that with the contract between the pursuers and defenders, it was clear that the steel which it was anticipated would be required, and which the pursuers contracted to supply, was the whole steel for the superstructure of the four main spans with the exception of 12,000 tons. That had been the contention of the pursuers since they came into Court, and neither the evidence

nor the minutes showed that they had ever understood the contract differently, or deviated from that construction of it. The words "the estimated quantity of steel we understood to be 30,000 tons, more or less," were merely words of expectancy, inserted as a guide to the parties as to the probable amount required. It was important to have an estimate of the quantity likely to be required as a protection against a possible *mala fide* increase or diminution in the amount; and also (1) to afford a measure of damage in case of cancellation of the contract, and (2) to regulate the amount of the monthly deliveries, and the position of the above words in the contract strengthened this view. On the other hand, if these words had been really a binding part of the contract they would not have appeared in the general conditions appended to the offer and acceptance, but in the offer and acceptance themselves. The case of *Morris* v. *Levison* was distinct from a case like the present, for there it was reasonable that the estimate of a party who had complete means of knowledge of the capacity of his own ship should be taken as part of the contract. The case was quite different where there was no means of knowing with certainty the amount of material which might be required under a contract.—*Gwillim* v. *Daniel*, 1835, 5 Tyr. 644; *M'Connell* v. *Murphy*, April 22, 1873, L.R., 5 P.C. 203; *Leeming* v. *Snaith*, Jan. 17, 1851, 16 Ad. & Ell. 265; *North British Oil and Candle Company* v. *Swann*, May 27, 1868, 6 Macph. 835; *Brawley* v. *United States*, 1877, 6 Otto. 168.

At advising—

Lord President—We have now before us the evidence which has been led under the authority of Lord Trayner's interlocutor of the 26th of November 1887, as modified by our interlocutor of the 22nd of December 1887, and with the additional light thus afforded we now resume consideration of the terms of the contract between the parties.

The offer which was made by the pursuers and the acceptance by the defenders are precisely in the same terms—that is to say, the one is just an echo of the other, both being expressed in the very same words, making allowance for the difference of expression arising from the parties being different. And therefore it is quite plain that the terms of this contract, although it is expressed in letters, must have been the subject of very careful and anxious consideration between the parties, and that is not surprising, because it was a contract of a very heavy kind involving great interest and great risks both on the one side and on the other.

The contract is for the supply of steel work, the pursuers of the action being steel manufacturers, and the question comes to be, what is the steel work that falls under this contract, or, in other words, what is meant when the one party offers to supply "the whole of the steel work required by you for the Forth Bridge, less 12,000 tons of plates," and the other in the same words accepts of that offer. There seems very little room for construction or doubt in regard to the words that I have quoted, "the whole steel required for the Forth Bridge." But there are considerations arising from other terms in this contract that require to be taken into view in order to understand what is meant by the term "required for the Forth Bridge."

Now, the first observation that occurs to one is that in specifying the prices which are to be charged for each kind of steel we get a view of what sort of steel—what form of steel work—is intended to be supplied under the contract. There are enumerated steel plates at £10 per ton, angles at £8, 10s. per ton, and in like manner so much a ton for tees of a certain size, for tees of another size, for channels and for channels of another size, for flats, and for rivet bars. Therefore it is natural to suppose that the kind of steel—by which I mean the form of the steel that is to be supplied for the purpose of this contract—consists of these different things, steel plates, angles, tees, channels, flats and rivet bars. Now, the next observation that occurs to one is that there are immediately after this enumeration of the forms of steel work that is to be supplied certain general conditions, and the first of these appears to me to be very material, "the work and material therein described or referred to is to be executed and supplied in strict accordance with the specification attached to our contract" (that is, Tancred, Arrol, & Company's contract) "for the construction of the Forth Bridge, and to the entire satisfaction in all respects of the engineer for the time being of the Forth Bridge Railway Company, who shall have full liberty at all times to inspect in person or by deputy the entire process of manufacture, and to reject any of the material or portions of the work which in his judgment are inferior or unsatisfactory or not in accordance with the said specification, and his decision is to be final." Now, this reference to the specification applicable to the contract between the defenders and the Forth Bridge Railway Company is extremely important, because it shows very clearly upon the face of it what is the steel work required according to the terms of that specification for the construction of the Forth Bridge. It shows, quite in accordance with the enumeration of the forms of steel which I have already referred to, that the steel required is just the steel that has been priced in the contract between the two parties before us. It shows that that steel work is to be used exclusively for the construction of the superstructure of the four main arches of the bridge, and has nothing to do with any other part of the bridge whatever.

There is just one exception to that statement which it is necessary to notice in passing, and that is, that in the specification, in speaking of the caissons upon which the main pillars of the bridge are to stand, it provides that "the cutting edge of the caissons will be formed of steel plates or of a cast steel curb, as may be determined by the engineer." Now, that occurs under the head "iron work in caissons," and therefore the steel there mentioned is a mere incident of the very heavy iron work required for the caissons. It is the cutting edge of the caissons by which I understand from the evidence we have had the lowest part of the caissons, which cuts into the ground below water, and to say that that is a part of the steel work required for the Forth Bridge is I think a misconstruction altogether of that part of the specification. That is not dealt with in the specification as steel work. It is dealt with as iron work,

the edging of steel being a mere incident. Therefore I return to what I said before, that the steel which, according to the specification in the contract between the defenders and the Forth Bridge Railway Company, is required is steel that is to be applied exclusively in the construction of the superstructure of the four main arches of the bridge.

By these means we are enabled to fix, I think, with precision and accuracy what is meant by the words of the contract between the parties before us when they say that the pursuers are to supply the whole of the steel required for the Forth Bridge, less 12,000 tons. It means, and can mean, at the date that these letters were written, nothing but the steel work specified in the specification of the principal contract. Now the words, "the whole of the steel required" are certainly very emphatic. It is difficult to understand that the parties could have meant something less than the whole of the steel which is according to the specification of the principal contract necessary for the construction of the bridge. Surely the words "whole of the steel" would never have been used unless that was in the contemplation of the parties. But if these words are emphatic, I think they are rendered even still more emphatic by the exception which is introduced, "with the exception of 12,000 tons of plates," which, as we learn, had been already secured by the defenders and paid for to another steel company altogether. It is to be the whole steel that is required by the contract with the Forth Bridge Company less 12,000, but less nothing else.

That being so, I think the contract could not have admitted of the slightest doubt as to its meaning if it had not been for some words which are used at the very end of the conditions to which I have already referred, and upon which indeed the whole argument of the parties turns. The words are these—"The estimated quantity of steel we understand to be 30,000 tons more or less." It is contended that that limits the words of obligation to supply and of obligation to take, to 30,000 tons or thereabouts. It appears to me that these are not words of contract at all, but the expression of an understanding; and it was certainly most natural and convenient that there should be some such understanding between the parties. A contract of this kind is of course a very serious one, and it is very difficult to foresee what might be the extent of the furnishings likely to be required under the leading words of this contract. It is a very extensive and a very large contract, and of a most unusual and novel kind; and therefore in the course of the communings between the parties which must have preceded this very carefully expressed letter and answer, it would of course naturally come to be considered what about the expectation of quantities? The pursuers would naturally say—"We should like to have some idea of what you are likely to require;" and the answer to that is—"Well, 30,000 tons more or less." Does that limit the obligation in the principal part of the contract? I think not. I think these are mere words of expectation or understanding or estimate, but certainly do not limit the very emphatic words with which the contract begins. There is another reason why this expression was introduced in the place where it is, because it is immediately preceded by this condition—"The steel is to be manufactured at the works of the Steel Company, and deliveries are to be made at such times and in such quantities as we" [that is, Tancred, Arrol, & Company] "may from time to time require, and to extend over four years unless otherwise specially agreed, or unless the contract be cancelled as already provided, it being understood that we will furnish specifications so that deliveries shall be as nearly as possible made in equal monthly quantities over the period named." If these equally monthly quantities were to be supplied according to the demands of the defenders over a period of four years, it certainly was all the more necessary that the pursuers should have some notion of what kind of quantities were to be required each month, or what was likely to be the total quantity required to be delivered in equal portions over four years. If the parties had gone blindly into this not knowing whether the quantities ultimately to be required might be 30,000 or 300,000 tons, it would have been a very awkward position for both parties. And therefore it is that they come to an understanding as to what is probably to be required during that period. If the pursuers had not had this hint given them as to what they were to provide for, they would have been placed in the greatest possible difficulty in managing their works. Their works might require to be kept in more constant operation for the purpose of this contract than they would otherwise be if the quantity were larger or smaller; and very possibly, in order to fulfil their obligations under this contract they might require additional machinery in their works or even an extension of the works themselves if the quantities had been of such an amount as to require that that should be done. And therefore they naturally said, "What quantity is it that you expect us to deliver within these four years?" And the answer is, "The estimate, the understanding"—that is all, an estimate or an understanding—"is 30,000 tons."

I come without any hesitation to the conclusion that these words do not in any way limit the legal obligation in this contract, and that the pursuers are entitled to supply, and the defenders are bound to take, the whole quantity of steel required by the specification of the principal contract to be supplied for the purpose of constructing the Forth Bridge; but that is limited in the specification to the superstructure of the four main spans. Now, when the parties came into Court it seems to me that they were both in the wrong. The claim made by the pursuers was a great deal too large and quite unjustified by the contract as I have now construed it, because they came into Court demanding that they should have the right to supply under their contract not merely the steel which within the meaning of the contract was required by the specification of the principal contract for the construction of the Forth Bridge, but also all the steel which by subsequent alteration of the principal contract had come to be used for portions of the bridge other than the four main spans. And that, I think, was an entirely unfounded claim. The defenders, on the other hand, have maintained throughout that they are not bound to take from the pursuers the steel requisite for the four main spans of the bridge

as specified in the specification of the principal contract, and therein they were wrong.

There is only one part of the case remaining to be noticed, and that is, that the defenders contend that the pursuers have by their actings interpreted this contract in a sense different from that for which they now contend, and that their actings must be taken to override the terms of the contract, and to show that the true meaning of the parties, whatever the words used may be, was different from that which I have now explained. I think this attempt upon the part of the defenders has proved quite a failure. In the first place, in regard to the supplying of steel for other parts of the bridge, that would have been a very good answer if the true construction of the contract in itself had been that the pursuers were entitled to supply all the steel that might be required for any part of the bridge according to the altered contract afterwards made between the defenders and the Forth Bridge Company. But that not being the meaning of the contract as I construe it, and the meaning of the contract plainly being that the steel to be supplied is limited to that which is necessary for the superstructure of the four main spans, this fact of the defenders taking steel for the other parts of the bridge from other manufacturers, with the knowledge and without the objection of the pursuers, only shows that at that time the pursuers were construing their contract a great deal more correctly than they did when they afterwards came into Court. There was another matter regarding the steel for temporary purposes. I cannot conceive that that being supplied and taken by the defenders from other dealers than the pursuers could possibly have been objected to by the pursuers as being a departure from the contract which they had made as we now construe it, because they are not under any obligation to supply, and the defenders are not under any obligation to take under the contract before us, any steel for temporary purposes. There is another matter in which it is said the contract has been departed from as now construed by the pursuers, and that is in regard to rivet bars. Rivet bars was one of the things specially within the contract, and were to be supplied at £9, 10s. a ton. Now, it certainly is the case that the defenders were desirous, in place of receiving delivery of rivet bars, to purchase rivets in a manufactured state—not merely the materials for making rivets, but manufactured rivets ready to be used. There was a good deal of communing between the parties on this subject, and there is a good deal of conflicting evidence about it. I am disposed to take the view that the Lord Ordinary has done in preferring the evidence for the pursuers on this subject to that of the defenders. But really I do not think it of very much consequence to determine exactly which of them is giving the more precise and accurate account of the communings on this subject, because it is, to my mind, perfectly obvious that the pursuers were not disposed to press this matter, seeing that the defenders were very anxious to have their rivets direct from the rivet-maker instead of taking the rivet bars from the Steel Company. They say, and say most naturally—"It would not do for us to quarrel with the defenders on this matter; our interests are bound up with theirs in this great contract in such a way that nothing could be more inexpedient than that we should give them any cause of quarrel, and therefore by all means let us yield this point rather than have any question about it." It is impossible to say that that is an acting of the parties which is sufficient to take off the plain meaning of the contract itself, and to show that the words used are not used in their natural sense, but in some different sense altogether.

Lastly—for I think this is the last point—reference is made to certain minutes of the pursuers which seem to imply that they were not of the mind that they were entitled to supply the whole of the steel work of the bridge, and that they would like very much to have their contract so construed and extended as to include the whole. The minutes, so far as I see, were not communicated to the defenders, and therefore could not have misled them in any way, and the verbal communication which the pursuers say was made to the defenders on this subject, and which formed the subject of an agreement or arrangement, is entirely denied by the defenders. They deny that there was any such communication or any such arrangement. Now, is this an acting by which the contract can be construed? I think not. It is not an acting of the parties at all. I can quite understand what was in the minds of the pursuers, or some of the directors—that in consequence of that little controversy about the rivets and the rivet bars they would like to have had some very plain assurance that no other question of that kind should be raised. The cause—the beginning of the whole affair—was that the defenders had proposed an alteration on the terms of payment under the contract, that they were to give short bills instead of cash as stipulated in the contract, and the pursuers very naturally thought, "Well, this is a very good opportunity for requiring a little concession from the other side, and we should like to have a positive assurance that there is to be no more question about our right to deliver the whole of the steel required." That seems to have been the origin of the thing, but I really do not attach any importance to this point, for the reason I have already stated, that I think it is not an acting of the parties that can construe the contract.

The proof therefore, it appears to me, which was allowed, does not contribute to throw any material light on the question before us, and I think we are just driven back to the construction of the contract itself, coupled, however, with the specification of the principal contract, which is directly imported by reference into the contract between the pursuers and the defenders for the purpose of showing what are the obligations laid upon Tancred, Arrol, & Company as to the use of steel in the construction of the bridge, and upon that question I have already expressed an opinion and do not require to say anything further on the matter. I am for adhering to the Lord Ordinary's interlocutor, that is to say, to the interlocutor of 2nd March 1888, which of course was brought up along with the last interlocutor which is expressly reclaimed against, and if we adhere to the interlocutor of 2nd March 1888 it is quite unnecessary for us to consider anything further than that, because it is matter of arrangement between the parties by the

minute which is before us, that if that interlocutor of the 2nd March is well founded and is to stand, then the measure of the damage and the amount of damage is settled by agreement.

Lord Mure—I also concur in thinking that the Lord Ordinary has come to a sound conclusion upon the main question brought before him, and which he decided on 2nd March. I have very little to add to what your Lordship has so clearly stated as to the meaning of this contract. It appears to me that the words of the offer and acceptance are in themselves very clear and distinct. The steel to be furnished was the whole steel required for the Forth Bridge, and if these words had stood alone they could scarcely have given rise to any dispute. But it is said there are certain words in the latter part of the offer which qualify and control these expressions, and these are the words—"The estimated quantity of steel we understand to be 30,000 tons, more or less." It is said that by these words the leading provision of "the whole steel" is controlled. I cannot adopt that construction. Having regard to the nature of this contract, the very expensive character of the works that were to be put up, and the time that was required to carry the work to a conclusion, would naturally lead the parties who furnished so large a proportion of iron or steel to desire to have a general idea as to the quantity that might be required in order to enable the contractors to go on with the work, and that was merely put in as a statement of the general understanding of the parties as to the probable amount of steel that would be required for the bridge. "Thirty thousand tons more or less" evidently means that in this particular contract there might be less than 30,000 required, or there might be more than 30,000 required.

That is pretty clear reading these two passages alone, but when we come to look at the terms of the specification, it is made quite distinct that the whole steel required for the Forth Bridge meant the whole steel to be used in the formation of the four main spans of the bridge, because it is upon that part of the work alone that at that time steel was to be required. I agree therefore in the view which the Lord Ordinary has taken, and which the pursuers themselves have taken since the case was last before us, that the fair meaning of the contract was the whole steel required for the erection of the superstructure of these four main spans. On these general grounds I concur in what your Lordship has stated with reference to the effect of the proof upon the reading of the contract. The parties were allowed a proof that certain actings of the pursuers in this matter showed that they construed the contract differently. I have gone over the evidence carefully on the four points that the Lord Ordinary has dealt with, viz., the approaches to the four main spans, the caissons, the rivets, and the temporary purposes, and I think the Lord Ordinary has come to a right conclusion on all these four points, and I have nothing to add.

Lord Shand—The words of this contract which have raised any question of difficulty are contained in the conditions appended to the offer and acceptance respectively relating to the quantity of steel to be furnished by the Steel Company, the pursuers, to the defenders, and they are these—"The estimated quantity of steel we understand to be 30,000 tons, more or less." And upon the construction of the contract the question to be determined is, whether these are words of expectation and estimate only, or are words of contract which fix a quantity with a certain percentage up or down, "more or less," which of course could not be taken to be of unlimited amount. I had not the advantage of being present at the first discussion which took place on this case, when your Lordships had to consider the contract, and allowed a proof which has now been taken, and which has formed the subject of much of the debate, and I confess that throughout a considerable part of the argument, which has taken place under the present reclaiming-note, I was in considerable doubt as to the true effect to be given to the words I have quoted. I thought it a question of very considerable difficulty whether these words were not to be interpreted as words of contract, and the consideration which weighed with me in feeling that difficulty was this, that the contract was one involving very large liability upon the part of the contractors the Steel Company, who had agreed to supply the whole steel for this bridge. It seemed to me that it was not a likely thing that dealing with a great undertaking of this kind they would enter into a contract without any limit, which might be a protection to them against claims involving very serious liability. Of course in making a contract like this they had to buy the quantity of steel that was likely to be required so as to be ready to supply it, unless indeed they wanted to run the risk of a very speculative market—the iron market, which, as one knows, has fluctuations of very considerable amount. They had also to arrange for labour in connection with the large amount of work to be done. It might even be, as your Lordship has suggested, that they might have had to extend their works. If they had proceeded to purchase a very large quantity of material on a mere rough estimate of what might be required, and if afterwards a great deal of that material had been dispensed with, they might have suffered very serious loss. On the other hand, if they purchased a very limited quantity, and if a much larger quantity was afterwards demanded, they might have had to make large purchases of material at great loss after the market for iron had risen. This led me to think that it was a serious question to be determined, whether these words had been intended to express a matter of mere expectation or estimate, or were not rather really inserted as words of contract for the purpose of protection to the pursuers. But the result of the argument, and particularly the closing argument submitted on behalf of the respondents on the reclaiming-note, has satisfied me that the construction of the contract is as your Lordship has explained it.

In the first place, the offer itself is perfectly distinct apart from the conditions. It is an offer to supply the whole steel required for the bridge less a certain specified quantity, while what is said to have the effect of limiting that obligation occurs not in the body of the contract itself, where one would naturally expect it, but in one of the series of conditions appended to the con-

tract. The first of these conditions imports to a certain effect the specification attached to the contract for the construction of the bridge. In regard to that matter I am bound to say that looking at the reference to the specification in the conditions as a reference I think only in regard to the nature and quality of the "work and material" to be executed and supplied, I am not prepared to say that on the sound construction of the contract the Steel Company were not entitled to supply the steel for that part of the bridge which has been called the viaduct, and that part of the steel which was also required for the feet of the caissons for the support of the four spans to which your Lordship has referred. I think that was a question attended with considerable difficulty, and I am not satisfied that the reference to the general specification would have controlled the words "the Forth Bridge" in the earlier part of this contract so as to limit their meaning to the superstructure of the four spans. But I think it unnecessary to form any final opinion on that matter, because as parties proceeded it was made clear that they were both agreed in acting on the footing that the steel furnished, as falling under the contract, was the steel for the superstructure of the four spans alone. It has been made clear upon the proof that that was the view upon which the Steel Company at least were willing to act, and of course the defenders, with a falling market for iron, would be quite ready to close with that view, because it saved them a large sum of money.

I have only said this in passing, because I was considering the effect of the words of estimate or words of contract as to the quantity of the steel. Now, in regard to these words, it appears to me that we find in the other conditions of the contract a key to their presence where they are. It might very well be said that there is no need for putting in such words as these, "The estimated quantity of steel we understand to be 30,000 tons, more or less," in these documents, in framing a contract, if they are to be used as mere words of expectation or estimate of what would likely be required, for this might have been done as well in conversation between the parties, or in a separate letter after or about the time the contract was concluded. The strength of the defenders' argument lies in this, I think, that this estimate is not given in conversation or in a separate letter, but that it is in the contract. We have to find if we can a reason for these words being in the contract, and yet for not giving them the full force of words of contract fixing a contract quantity. Now, I think that looking at these conditions we have a sufficient explanation of the presence of these words there. One of the reasons your Lordship has fully dealt with, viz., that arising from the immediately preceding clause in regard to the deliveries under the contract. I think these words receive an appropriate meaning, and have an appropriate place in these conditions, because something had to be arranged in reference to the measure of the deliveries, and the company were fairly entitled to get an estimate which would guide them in their preparations as to what amount of deliveries would be required each year and each month. Having got this estimate they would be entitled, I think, to found upon it in the event of unreasonable demand for delivery having been made, by saying there must be some check on that, and we have that check in this clause. But, as was pointed out by the Dean of Faculty, there is a more important consideration to account for the words of quantity, and that is the earlier provision in the deed containing the clause that Tancred, Arrol, & Company should be entitled to cancel the contract in the event of their principal contract being cancelled. In that case there would have been a very grievous hardship on the Steel Company if they had made all their arrangements. The Steel Company provided that in that case the defenders should undertake to pay them the loss which might be sustained on materials which the company might have purchased before notice as against the contract. The purpose of putting in the estimated quantity was, as I take it, for the protection of the steel company, and I cannot doubt that if the company had purchased 30,000 tons of material under this contract, and if a month or two afterwards the contract had been brought to an end, they might have appealed to the clause of expectation or estimate, and said that before the notice they had purchased 30,000 tons of material, and they were entitled to do so because of that estimate. I think when we examine the contract as a whole this case is in a position which distinguishes it from the previous cases that have occurred in England or in America, because we have in the agreement itself a special reason which accounts for the words being inserted, and a special ground, therefore, for the presence of such words of estimate in the contract. They would have a clear bearing on any questions of damage which might arise, and on the claims in reference to the time of delivery under the contract. And so I have come to have a clear opinion that the sound construction of the contract is as I have stated.

I may add that this view is strongly corroborated and supported by the decisions to which reference was made in the law of England and of America. There were two classes of cases referred to. The first were cases entirely, I think, of contract of purchase and sale; and in all of these the view contended for by the pursuers received effect in these courts. The first of these was *Gwillim* v. *Daniel*. There the contract was for all the naphtha manufactured by A B, say from 1000 to 1200 gallons per month during two years. It was held that although the quantity supplied was much smaller than had been contemplated—there were 7000 gallons of a deficiency in nine months—yet as the manufacturer had supplied all the naphtha which he had made, that was sufficient, and that the words referring to quantity were mere words of expectation. So again in *M'Connel* v. *Murphy*, where the contract was all the spars manufactured by M'Connel, say about 600 of a certain size, it turned out that there were only 496; but there again the Court held that as all that had been manufactured were supplied, that was sufficient, and that the other words were words of expectation merely. The third case of the same class was the case of *Brawley*, in the American Court, and there the same principle received effect. The quantity of cords of wood expected to be supplied in that case was stated at 880 cords more or less, but it was qualified "as shall be determined to be necessary" by a third party named or pointed

out. The quantity ultimately ordered was only 40 cords or some small quantity. But there again the principle received effect that the quantity mentioned was to be regarded as a mere estimate, and the ruling words "the whole quantity manufactured" were held to be operative. So here we cannot hold that the words referring to quantity are to control the more important words "the whole of the steel required for the bridge," more particularly as we find in the contract a special explanation of the use of these words in the clause referred to. The cases quoted on the other side do not, I think, affect the authority of the three cases just noticed. They were special. One was the case of *Leeming*. The words there were that the party should take such a quantity, not less than say 100, and the only possible force that could be given to the words was that at least a 100 should be given. The only other case referred to was *Morris* v. *Levison*, and there there was this speciality, that an owner of a vessel stipulated for a full cargo at a foreign port, but he added the words, "say about 1100 tons," and the Court, proceeding upon the view that the owner of the vessel must be presumed to know the carrying capacity of his own vessel, and must be taken to have been contented with 1100 tons if he got that, when dealing with one who did not know the carrying capacity of the vessel, and who had to provide the cargo in ignorance. It was held that it would be unreasonable to require the party who was to present the cargo to have ready in a foreign port more than the quantity which the owner of the ship himself estimated as necessary. On these grounds I am of opinion that both on the special terms of the contract, and on the authorities, it must be construed in the way your Lordship proposes—that the Steel Company were entitled to provide the whole steel for this bridge, in the limited sense of the word bridge as applying to the superstructure of the four main spans.

As to the proof which has been taken, I agree with your Lordship in thinking that it can have no substantial effect on the question to be now decided. If the meaning of the contract be clear, any proof as to the actings of the parties could not have the effect of changing that meaning. If, however, it could be made out that though the meaning of the contract was clear, the actings of the parties showed unequivocally that they agreed to make a new contract in some particular, or to modify its original terms, then the actings might have that effect. The proof should no doubt receive effect to this extent, that if it appears that the Steel Company had agreed to abandon their right to supply steel for certain parts of the bridge which they had the right to supply, and Tancred, Arrol, & Company acquiesced in this, so far the contract would be modified; and if there be difficulty, as I think there is, in the question whether this contract would not, if strictly construed, include the steel for the whole bridge, the proof then is very material, because it shows that whatever might be the decision of the Court on that question both parties have by their actings agreed that the supply shall be limited to the superstructure of the four spans. I am not sure that the Steel Company in their actings have ever contended for anything more—that one can infer from their actings that they ever maintained that they had anything to do with the supply of steel for any part of the bridge except the superstructure of the four spans. I think the proof shows that they never said or maintained in their communings with the defenders in reference to the supplies—"We insist that we have right to supply the 3500 tons for the viaduct, or we are entitled to supply the steel plates or curb for the shoes of the caissons." I cannot say so much for their pleading in Court. I think they erred in their pleading, though their actings in regard to this matter seem to have been consistent throughout. In article 7 the defenders say—"The caissons for the Forth Bridge were originally intended to be made entirely of iron, but afterwards the engineer of the works requested, under the powers given him in the contract, that steel shoes should be used for these caissons. For this purpose 500 tons of steel were needed. The defenders gave this work to Arrol Brothers of Glasgow, who bought the steel from Neilson Brothers in Glasgow, who again bought it from the pursuers, who were well aware that it was required for the Forth Bridge." And what is the answer to that? "Admitted that the pursuers tested 500 tons of steel which was bought from them by Neilson Brothers of Glasgow. Explained that at the time they were not aware that the said steel was for work which fell under the contract, and that consequently they did not at that time raise action against the defenders." That means this—they never raised any question in point of fact about it. But now when they come to plead their case in order, I fancy, to support their view of the contract, and apparently in some dread lest if they made a concession that the contract was limited to the superstructure of the four spans it might hurt their cause otherwise, they now say what I have just quoted. The same observation may be made as to the approach viaduct to the bridge. In statement 8 the same statement is made, and the answer is—"Explained that at the time they were not aware that the said steel was for work which fell under the contract, and that consequently no action was taken by them." These answers and the proof satisfy me that in point of fact the Steel Company never claimed to supply either the 3500 tons of steel work for the viaduct nor the steel for the caissons, although they have pleaded that they were entitled to make such claims under the contract, and the conclusions of the summons indicate no limitation of the bridge to its four leading spans and to the superstructure of these spans only.

The next point in the proof was in regard to the rivet bars. I have a strong opinion that if the Steel Company had thought right to object to the proceeding about the rivets they were entitled to do so. They had undertaken to supply all the steel for the bridge, and as part of that steel rivet bars were specified. The view undoubtedly was that they should get the rivet bars ready, and Tancred, Arrol, & Company were to convert these steel bars into rivets. I do not think it was in Tancred, Arrol, & Company's power to say, "We will supply steel ourselves for part of the bridge, and not take any rivet bars from you, but make our own rivets even for the work on the four spans. But I agree with your Lordships in thinking that on this part of the case the proof shows that while the Steel Com-

pany thought this was an invasion of their contract they resolved that they would not make a question about it. They thought it was not a large enough matter to get into conflict with Tancred, Arrol, & Company about, and I attribute no importance to that point.

The only other point that remains is the matter of the minutes, and I agree with your Lordship in thinking that there was no acting of parties proved in reference to this subject. As to the second minute, I think nothing can be made of it. It is quite properly expressed with reference to the position in which the parties stood. It is dated 7th October 1885—"In consideration of this concession" (about taking bills instead of cash) "these gentlemen agree that our contract with their firm should be taken as covering the whole of the steel required for the completion of the Forth Bridge—that is to say, the question having been raised as to whether the contract did include the whole steel, the Steel Company maintaining that it did, and Tancred, Arrol, & Company maintaining that it did not, they agreed that the contract should be construed as the Steel Company construed it. There is nothing in that to show that the Steel Company construed the contract otherwise than in the manner to which effect will now be given. The earlier minute is more loosely expressed:—"23rd September 1885.—It was decided that Mr Riley wait on them and agree to do this, provided they agree to give us the order for any steel they may require over our contract quantity, and at our contract prices." Undoubtedly these words are quite fitted to bear the meaning that the Steel Company though there was a "contract quantity" only stipulated, and that they were asking a new and extended arrangement in this respect, but my opinion on the evidence as a whole is that the minute is not truly expressed so as to bear out what was in substance the controversy. I think the real question between the parties was not as to having a fixed contract quantity, but rather that the Steel Company were maintaining the view that they were entitled to supply the whole. But in any case it would be a novelty, if the contract be clear in itself, to say that if the defenders can find in the books or documents of the pursuers, recovered under a diligence, something that tends to show that the pursuers had a view of the contract differing from its legal meaning and effect, and was more favourable to the defenders, this should control or alter the contract. If these were very clear minutes—and a series of minutes—making it clear beyond all question that the pursuers took the same view as the defenders maintain, that the true contract was for a limited quantity, this might raise a question of difficulty as to whether the Court should not construe the contract as both parties by their actings declared they interpreted it. But there is no such state of the facts. I am of opinion that the solitary passage in a single minute can have no effect whatever in controlling the written contract of parties, constituted by letters which passed between them. And accordingly I think that in this matter of the minutes the proof gives no assistance in the determination of the case. It is a case which must be determined entirely on the contract. The parties are now agreed that the limit of the claim of the Steel Company shall be the steel for the superstructure of the four spans, and I am of opinion that on the contract the Steel Company clearly had right to supply and were bound to supply the whole steel required for that superstructure.

LORD ADAM—I entirely concur with your Lordship, and wish to make only one observation, and that is that the reference in the contract between the Steel Company and Tancred, Arrol, & Company to the main specification is not limited to the material to be supplied. The reference is to the work to be executed by Tancred, Arrol, & Company "in strict accordance with the specification," and I think that being incorporated in the Steel Company's contract gave a right to the Steel Company to see what the work to be executed by Tancred, Arrol, & Company with reference to this steel was in that specification. It is in that view that I concur with your Lordship that we are entitled to look at the specification as to that matter, and to incorporate it in the Steel Company's contract with Tancred, Arrol, & Company. And if that is done we see quite plainly that the work required to be executed by Tancred, Arrol, & Company is the superstructure of the four main spans.

The Court varied the interlocutor of the Lord Ordinary of 2nd March 1888 by inserting the words "of the superstructure" after the word "construction," and before the words "of the four main spans;" and recalled the finding in the interlocutor of 13th June finding the defenders liable in expenses, and in place thereof found them liable in expenses with the exception of the expenses of the proof.

Counsel for the Pursuers (Respondents)—D.-F. Mackintosh—Sir C. Pearson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders (Reclaimers)—Balfour, Q.C.—Jamieson. Agents—Millar, Robson, & Innes, S.S.C.

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*Saturday, February 2.*

## FIRST DIVISION.

### CUNNINGHAM *v.* DUNCAN & JAMIESON.

*Reparation—Slander—Issue—Diligence to Ascertain Authorship of Libel—Evidence in Aggravation of Damages.*

In an action of damages brought against the publishers of a newspaper for alleged libels contained in an editorial article and a series of letters purporting to come from a number of independent writers, which had been published in the defenders' newspaper, the pursuer averred that the defenders were themselves the authors of both article and letters, and he lodged a specification craving diligence to recover the manuscripts of the article and letters and any books or writings relating to their authorship and composition. The issue taken by the pursuer related only to the publication of the alleged libels.

*Held* that the pursuer was entitled to the diligence craved, and to lead evidence in