enough the pursuer's representatives could not give it on the day appointed for the trial, yet if there had been one they must have been able to give it now. Without expressing any opinion on the general question, I think this is a case for making payment of the expenses incurred through the adjournment a condition of allowing the trial to proceed.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court pronounced the following interlocutor:—

"The Lords approve of the Auditor's report on the defender's account of expenses, and decern against the pursuer for the sum of £67, 12s., the taxed amount thereof; and upon payment thereof allows the trial to proceed."

Counsel for the Pursuer—R. L. Orr—Findlay. Agents—Patrick & James, W.S.

Counsel for the Defender — Jameson, Q.C. — Salvesen. Agent — Alex. Wylie, S.S.C.

Wednesday, July 20.

FIRST DIVISION.

[Sheriff of Forfarshire.

RAMSAY & SON *v.* BRAND.

Contract — Building Contract — Disconformity to Specification—Materiality of Deviations.

Illustration of the rule that though one who undertakes to perform certain specified work has no claim for the contract price or any part thereof unless he has executed the work *modo et formâ*, nevertheless, if the disconformity to contract be only in matters of detail, he will be entitled to demand payment of the contract price less such a sum as may be required to complete the work in compliance with the contract.

Contract—Building Contract—Approval of Work by Architect.

Observed, per Lord President—"The architect to whose satisfaction the work is to be done according to specification cannot approve of work done disconform to specification, for without special permission he has no authority to dispense with performance of the express terms of the contract."

This was an action raised in the Sheriff Court at Arbroath by D. Ramsay & Son, builders, against Robert Brand, concluding for declarator that the pursuers were entitled, in terms of a certain contract between them and the defender, to complete the mason work of a cottage in Arbroath in the course of erection for the defender, and craving warrant to the pursuers to complete the mason work of the cottage accordingly. There was also a conclusion for payment of £79, 10s., being the contract price of the said mason-work.

The pursuers founded upon their contract with the defender and relative specifications, which provided that the whole work should be done "to the entire satisfaction of the architect in every respect."

When the pursuers' offer to execute the work was accepted in April 1896 a Mr Mason was the defender's architect. He resigned his appointment in the following month, when a Mr Lamond was employed by the defender, and Mr Symon, Arbroath, was appointed architect in succession to him in February 1897.

The defender pleaded, *inter alia*—"(4) The defender not being bound to accept work and materials disconform to contract, notwithstanding the architect's satisfaction therewith, the pursuers are not entitled to the finding and declarator asked by them. (7) The mason work, so far as executed, and the materials already supplied, being materially disconform to contract, the pursuers are not entitled to the finding and declarator asked by them."

After sundry procedure the Sheriff-Substitute (DUDLEY STUART) on 26th August 1887 pronounced an interlocutor by which he found the pursuers entitled to complete the mason work of the cottage in terms of the contract, and granted warrant to Mr Symon to superintend its execution and completion, and ordained him to report.

On 29th September 1897 Mr Symon reported that having examined the building, he found certain specified parts of the work unfinished, and that the pursuers had since proceeded with the work, "which is now satisfactorily completed in terms of the contract." In a letter to the defender's agents dated 15th October 1897 Mr Symon wrote as follows:—"Of course what I state in regard to the completion of the contract referred only to the items specified in the report, as I considered that the interlocutor prevented me taking any notice of any other part of the disputed work.

On 27th October 1897 the Sheriff-Substitute (DICKSON) found that the pursuers had completed the mason work of the cottage to Mr Symon's satisfaction, and gave decree in their favour for the sum sued for.

The defender appealed, and on 16th March 1898 the Court recalled the Sheriff-Substitute's interlocutor of 26th August 1897 and the interlocutors subsequent thereto, and remitted to Mr Symon "to report whether the work executed prior to the 26th August 1897 has been done to his entire satisfaction in every respect, or in what respect, if any, the said work is disconform to contract, and what sum, if any, it would cost to complete the work in accordance with the contract."

On 6th May 1898 Mr Symon presented a long and detailed report, in which he dealt minutely with numerous particulars, in which the defender alleged that there had been deviations from contract or bad workmanship. The following are typical passages from the report:—"The foundations are not deep enough, inasmuch as there is an average of 6 inches of black earth or

vegetable mould left under foundations. This earth should have been cleared out, and the walls founded on the hard sub-soil, but it is impossible to do this now in a satisfactory manner without taking down the walls and rebuilding them. This could be done with the back and front walls, but in regard to the new part of the gable a difficulty is found in the fact that the neighbouring property has been taken down and rebuilt during the time that this case has been going on. Not only that, but they have built on the top of the gable, and it is impossible to take it down without the proprietor's consent, and at a great expense, whereas the benefit to be derived from the alteration would be very small. The walls shew at least 9 inches less depth under the floor than what is shewn on the plans, but I would have considered it quite satisfactory if they had been put down to the bottom of the black earth, even although they had not been put so deep as shewn on the plans. In that case, of course, the wall would have been measured, and if found to have less measure than what was shewn on the plans, it would have formed a deduction on the account. To take down the back and front walls, and to take out the foundations to the necessary depth and rebuild the walls again would cost a sum of £9. To take down the gable as the pursuers built it, and rebuild it at a proper depth of foundation, would have cost a sum of £7, 4s.; and to take down the gable as it now stands, and rebuild it, would cost a sum of £25, in addition to the £7, 4s. above. This, of course, would have to include the restoration of the plaster work, &c., in the other house, and might also have to include compensation for tenants, which your reporter does not include in this estimate. If your reporter were asked the amount of deduction he would have made if the walls were allowed to stand as they are built, he would have considered a sum of £2 sufficient." . . . "No. 12. New stones are from Brax Quarry instead of Leysmill.—Your reporter is of opinion that Brax stone is better than Leysmill and more expensive, and that, so far as the spirit of the specification is concerned, the stones are quite satisfactory, but if they must be substituted by Leysmill stone it will cost a sum of £8, 10s. In the event of the wall being taken down as before, this would amount to £6 only. This sum, of course, includes for new hewn work. No. 13. Mortar is not of 'best dark Fife lime' and 'and clean sharp sand.' Neither is it 'one to three.'—Your reporter found the lime mortar of fair quality, and so far as he can judge it is of fair quality. No. 14. Dwarf or sleeper walls have not been built.—The specifications and plans are somewhat at variance on this matter. The plan shews sleeper walls, but the specification makes no mention of them, but specifies that the space under the floor was to be filled up with stones and to be covered with asphalte. This has been done, and your reporter is of opinion that it is quite satisfactory."

Mr Symon concluded by fixing £41, 4s. as the sum which would be required to complete the work in accordance with the contract (the said sum being arrived at as above set forth), and £2, 15s. as the sum which should be deducted from the contract price if the building were allowed to remain as it actually stood.

Argued for the defender—The architect's report conclusively proved that the mason work was not conform to contract. If that were so, the pursuers were not entitled to payment of the price. It was vain for them or for the architect to say that what the pursuers had given, though disconform to specification, was better than what had been stipulated for—*Waddell* v. *Campbell*, January 21, 1898, 25 R. 456.

Argued for the pursuers—The architect's award was final, and he had expressed himself satisfied with the work, even where the work was disconform to specification. That was enough to entitle the pursuers to the contract price—*Chapman* v. *Edinburgh Prison Board*, July 16, 1844, 6 D. 1288; *Muldoon* v. *Pringle*, June 9, 1882, 9 R. 915; *Ayr Road Trustees* v. *Adams*, December 14, 1883, 11 R. 326; *Moore* v. *Paterson*, December 16, 1881, 9 R. 337, also referred to.

At advising—

LORD PRESIDENT—This house is certainly a very small affair, but although we are in the meantime only in the second of its lawsuits, its value already lies rather in the region of jurisprudence than in the regions of architecture or commerce. The present phase of the dispute involves principles of considerable importance.

The contract, be it remembered, was for the execution of the mason work of a cottage, according to plans and specifications, for the lump sum of £79, 10s. Accordingly, the right of the builder was to payment of this lump sum upon his executing the work according to the plans and specification. It is now ascertained by the report of the architect, to whose entire satisfaction the whole work was to be done in every respect, that in several specified particulars the plans and specification have been departed from, and that although the house has been built, the building is in those respects disconform to contract. The defender has moved that the action be dismissed; while the pursuer claims decree for the contract price, less, it may be, certain small deductions.

In judging of this question it is necessary to bear in memory the law applicable to it. No man can claim the sum stipulated to be paid on the completion of certain specified work unless he has performed that work *modo et forma*, and this applies to building contracts just as much as to other contracts. The parties may, if they please, and very often do, agree to vary the contract, but we have nothing of that kind here. The builder has no right either to disregard the specification altogether or to modify it, as by supplying one material in place of another; and neither in the case of total departure, nor in the case of partial deviation from the specification, will it avail to prove that what has been done is as good as what was promised. Accordingly the

rule is that if the builder chooses to depart from the contract he loses his right to sue for the contract price. But further, losing his right to sue for the contract price he does not acquire right to sue for *quantum meruit*, the other party never having agreed to pay according to its value for work which *ex hypothesi* he never ordered.

In the application of this rule it suffers a modification which in no way invades the principle. A building contract by specification necessarily includes minute particulars, and the law is not so pedantic as to deny action for the contract price on account of any and every omission or deviation. It gives effect to the principle by deducting from the contract price whatever sum is required to complete the work in exact compliance with the contract.

The question whether in any given case the deviations are of such materiality as to fall within the general rule, or are of such detail as to fall within the modification of the rule, is necessarily one of degree and circumstance. If the deviations are material and substantial, then the mere fact that the house is built would not prevent the proprietor of the ground from rejecting it and calling on the contractor to remove it, and he might do so if not barred by conduct from insisting in his right. If this right were so insisted in, then the contractor would of course have right to the materials but he would have no right to payment. If, on the other hand, the proprietor made the best of it and let the house stay, the only claim which the contractor could have would be a claim of recompense; and this, be it observed, would be not for *quantum meruit* the builder, but for *quantum lucratus est* the proprietor. Accordingly, when contractors do not stick to their contracts they not only unmoor themselves from their contract rights, but they drift into much less certain and much less definite claims.

Such being the doctrine applicable to this case, the question before us is, whether the deviations reported to us fall within the rule or the modification of the rule. This, as I have said, is a question of degree, arising on the particulars of this individual case, which happens to be one of very small magnitude; and it is necessarily matter of opinion. The prevalent opinion in the Court is that this is a case of detail, and therefore one for deduction, and I am prepared to assent to that view. Our previous interlocutor, recognising the principles to which I have referred, required the reporter to state what sum, if any, it would cost to complete the work in accordance with the contract, and he has reported accordingly. We are therefore in a position to fix the amount of deduction. The architect has volunteered an estimate of the savings to the builder by the deviations, but I do not see any legitimate use of this information; for neither this nor the difference in value between the work as done and the work as contracted for afford any proper basis for deduction.

One other point was raised in the debate which requires notice. On some of the items the architect says, or is deemed by the pursuer to say, at one and the same time, that the work is disconform to contract but that it would meet with his approval. Now, the architect to whose satisfaction the work is to be done according to specification cannot approve of work done disconform to specification, for without special permission he has no authority to dispense with performance of the express terms of the contract. His approval only applies to the mode of fulfilling the express provisions of the contract. Of course, in many cases departures from the contract are agreed upon by the parties as the work proceeds; and very often the architect represents the employers in such arrangements. But this is a totally different matter and does not effect the principle now stated.

I am for giving decree for the contract price, less £41, 4s.

LORD ADAM concurred.

LORD M'LAREN—There is just one point which I would notice, and that is that the owner of the ground on which the house was to be built changed his architect twice or thrice, and therefore the builder had not the kind of supervision which is usually given when the contract is all under one architect. It is not to be wondered at that the work got on badly, and that is one reason I think why we should hesitate to throw the work entirely on the hands of the builder.

LORD KINNEAR—I agree with your Lordship.

The Court decerned against the defender for payment of £38, 6s.

Counsel for the Defender—Salvesen. Agents—J. & D. Smith Clark, W.S.

Counsel for the Pursuers—J. Graham Stewart—Sandeman. Agent—John Hay, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, July 19.

(Before the Lord Justice-General, Lord Adam, and Lord Kinnear.)

NIVEN *v.* HART.

Justiciary Cases — Procedure — Right of Accused to See Notes Used by Witness for Refreshing his Memory.

In a criminal trial a witness for the prosecution referred to certain notes for the purpose of refreshing his memory. The accused asked permission to see these notes, and was refused by the presiding judge. *Held* that the refusal was wrong, and constituted such a deviation from proper procedure as to entitle the accused to succeed in a suspension of the conviction in which the trial resulted.