But those considerations cannot control the principles affecting the liability of a trustee duly to discharge the obligations which he has taken upon himself arising out of his trust, and it is only by the application of those principles that the judgment of this House must be governed.

Now, it seems clear that the duty of the trustees in this case was to receive the trust money into their own hands or to place it in the hands of an agent properly selected and constituted for the purpose of taking charge of it and to see to its safety by their own control to the same extent as if it were in their own hands. I quite agree with my noble and learned friend Lord Morris that no breach of duty would have been committed by the trustees allowing a solicitor to receive trust money on a security being paid off, and also that if a new security was in sight or could fairly be anticipated promptly to come into existence, the money might, without breach of trust, remain, with the object of being so transferred, in the hands of the solicitor, that solicitor being employed for a purpose that was not completed at the time when the money was in his hands; but the solicitor so employed in the matter of a trustee's security is not the proper custodian of the trust funds except for the purposes I have mentioned.

On the whole case I have come to the conclusion as a matter of fact that this money was left without proper inquiry or supervision for an undue period of time in the hands of the solicitor under conditions which enabled him fraudulently to appropriate it to his own use. I do not refer to the facts of the case in detail, as they have been already stated by more than one of your Lordships, but referring to them generally I express the opinion that the period from July 1887 till December of that year, during which the money was allowed to remain in the solicitor's hands—a period of five months—was a period beyond that for which the money ought to have been allowed to remain in the hands of a solicitor as such, and during that period the trustees appear to have regarded their solicitor as a banker and custodian of the money and not to have treated him as a mere law-agent. In that way, as it seems to me, a breach of trust has occurred in this case.

With respect to the indemnity clause, I concur entirely in the observations which have been made by my noble and learned friend Lord Davey. It seems to me that that clause was intended only to protect the trustees from the fault of an agent properly constituted for the purposes of the trust; for instance, if the money had been deposited by the trustees in a bank, and the banker had become insolvent or had appropriated the money, the banker being properly constituted as the holder or custodian of the money, the trustees would have been protected; but if the trustees neglect to appoint an agent at all, and leave the money in the hands of some mere clerk in their establishment, careless as to how the money is taken care of, that person could not be regarded as such an agent that the trustees could appeal to the indemnity clause for their protection.

In the same way I think here when the trustees allowed money to remain in the hands of a solicitor without taking care as to the proper custody of it, the protection against the acts of an agent cannot apply in this case. Therefore, as I say, with reluctance I have come to the conclusion, with the majority of your Lordships, that the judgment of the Court below should be reversed.

Judgment appealed from *reversed*, and *ordered* that the sum of £3140, 12s. 2d. with interest at 3 per cent. from 15th July 1887, be paid by the trustees or their representatives to the judicial factor.

Counsel for the Appellant—Houston, Q.C.—Guy. Agents—H. Percy Becher, for Frank M. H. Young, S.S.C.

Counsel for the Respondent—Dean of Faculty (Asher, Q.C.)—Johnston, Q.C. Agents—A. & W. Beveridge, for G. M. Wood & Robertson, W.S.

Monday, March 26.

(Before the Lord Chancellor (Halsbury), and Lords Macnaghten, Morris, and Davey.)

BURRELL & SON *v.* RUSSELL & COMPANY.

(*Ante* Dec. 23, 1898, vol. xxxvi. p. 250.)

Proof—Written Contract—Modification by Parole—Incorporation of Plans—Ship.

By a written contract for the construction of certain ships the plans were expressly incorporated with the contract. These plans showed the vessels with straight keels, but as actually constructed the keels were cambered or arched so as to have a curve inwards. The effect of the camber was to increase the carrying capacity of the vessel, but it gave rise at the same time to inconvenience and expense when the vessel required to be docked, and was generally regarded as a serious defect unless it was of such slight amount that the keel would become straight when the vessel was loaded with cargo owing to the extra weight amidships.

A claim of damages by the shipowners on account of the camber, which had not disappeared in the manner indicated, was met by the defence that it had been resorted to in compliance with oral instructions given by the pursuers subsequent to the date of the written contract, and a proof in regard to this averment was, without objection, led before the Lord Ordinary. Evidence upon which *held* (*rev.* the judgment of the Lord Ordinary and of the First Division) that the defenders had failed to prove the alleged verbal modification of the contract.

Opinion (1) that the plans being incorporated in the written contract, were to be taken as part of it, and (2) that parole evidence of the alleged verbal modification of the contract was inadmissible.

The case is reported *ante, ut supra.*

The pursuer appealed against the judgments of the Lord Ordinary and of the First Division.

At delivering judgment—

LORD CHANCELLOR—This is an action upon a contract, whereby the pursuers agreed to take and the defenders agreed to deliver for an agreed price four large steamers. The contract is in writing, and subject to one observation as to what are the provisions of the contract, no dispute arises as to the construction of the contract itself.

The one observation to which I refer is that having relation to the plans. In some cases a question may arise whether plans which are intended to show the subject of the contract have been sufficiently incorporated into it to make each part of the plan an expression of a contract obligation. No such question can arise here, because by the express language of the contract itself the plans are made part of the contract by the following expression—"Excerpts from hull specifications of steamers 345 and 346 and 343 and 344, page 5. The following specification is subject to the plans which are to be submitted and approved by the owners before work is commenced, and which in all cases of divergence shall be held to overrule."

The ships were built and delivered, and it appears to be faintly contended that the delivery and acceptance by the pursuers of the subject-matter of the contract precluded them from their remedy unless in some form or another it reserved all their rights at the time of taking delivery. Such a contention is of course erroneous. A person who in pursuance of a contract accepts the subject-matter of it may either reject what is tendered to him, or accept it and bring an action for the non-performance of the contract. Where there is a dispute whether the thing delivered is in conformity with the contract or not, it may be of weight to consider whether the acceptance without complaint does not show that the complaint afterwards made is unfounded. But it is only a question of evidence, and will be of greater or less weight according to the circumstances—the opportunities of knowledge and observation which may exist at the time of delivery.

In this case it is undoubtedly true that the ships were received and accepted without complaint. But I think it is also true that within quite a reasonable time, considering the nature and opportunities of observation afforded to the pursuers, complaint was made; and I think it is also true to say that there was a singular taciturnity on the part of the defenders in replying to the complaint.

I may, in what I have further to say, speak of the subject-matter of the contract as if it were only one ship; but it will be understood that the same observations are intended to apply to all four.

Now, the first complaint made by the pursuers is that the ship is cambered. This means that the keel of the vessel is arched, so that instead of the keel being straight it is arched inwards amidships. This the pursuers allege is contrary to the contract, and in this allegation they are borne out by the plan, which shows a straight keel, and which, as I have said, is undoubtedly part of the contract. I am disposed to think myself that in the state of the evidence that your Lordships have had read to you, it would have been an implied term of the contract even if it had not been expressed that the ship should be delivered with a straight keel. It has hardly been suggested that any ship is intended to have a cambered keel when it is trading. The utmost, I think, that has been established by the evidence is, that in the actual process of building, and in order to produce the ultimate result of a straight keel, a small camber may be devised so as to counteract the tendency to what is called "sagging," arising from the greater weight which the ship is subjected to amidships. But it does not appear to be gravely disputed that a permanently cambered keel for a vessel when actually trading and after the process of building has been completed would be a serious defect. I shall have to return to this subject when I have hereafter to deal with the question of damages, but at present it is enough to say that it would be a source of danger and expense if a vessel were so built that in the course of her trading she could not be docked on straight blocks. Under these circumstances it might, I think, be well contended that even if no express contract had been entered into the defenders were bound to deliver a ship which should have a straight keel and not one subject to such danger and inconvenience as would be involved in keeping a cambered keel.

The first question which arises in this case is as to the fact whether the vessel when delivered was cambered or not, and if it was, the extent and degree to which that camber existed. I think it unnecessary to go through the voluminous evidence upon this subject, but I cannot doubt myself that it is established by an overwhelming body of testimony that the keel was cambered, and I think further that it was cambered to a very considerable extent. I think the evidence shows it by direct testimony and by a very remarkable piece of indirect testimony to which I shall refer hereafter, and I am therefore of opinion that the pursuers have established *prima facie* at all events a cause of action against the defenders. In the sixth condescendence it is alleged that the steamers were built with cambered or arched keels, and the answer admits that they were so built. But the answer goes on to allege that they were built with cambers, as is a matter of common practice, and were so built at the

sight and to the instruction of the pursuers, and in particular of their overlooker Mr J. C. Stewart, to whom they entrusted the preparation of the specifications for the said ships and the whole superintendence of their construction.

In the view that I take of this contract, and as matter of law, I am of opinion that it is not competent to vary a written contract in the way that the defenders suggest that the written contract was varied, and I think it would be impossible to illustrate better the danger of permitting a written contract to be so varied than by pointing to the evidence in this case, and apart from the question of law I entertain no doubt whatever that the evidence the defenders have offered on this subject is wholly insufficient to establish the proposition that they are freed from their contract obligation to supply a straight keel, even if by law such evidence could avail them.

This is a contract of a very important character between shipbuilders of high commercial reputation and owners who desired to have what was at the time of this contract the largest cargo ship in the world, the contract price having been upwards of £160,000. It is not denied that the ship, if it retained the camber which it is alleged this vessel possessed, would be subject to great inconvenience and danger. It is not denied that the giving this vessel a camber at all, as a steamer and not a sailing ship, was an experiment, and it is gravely put forward that this serious experiment, and one on so great a scale, which in a steamer had never been tried before by the defenders, was suggested and agreed to between the parties without a single line in writing from the commencement to the close of the transaction, although the contract was most specific as to certain matters in the written terms. It is to be remembered that, as I have before pointed out, a camber is not confessed to be a thing useful in itself. On the contrary, it is expected to disappear and that the vessel should ultimately have a straight keel; and yet the owner who applies to experienced shipbuilders of great reputation is supposed to have taken upon himself the risk of instructing the shipbuilders in their own business and informing them how they were to perform their contract, which, as I have said before, involved the delivery to him of vessels with straight keels, and this though subjects of far less importance and gravity were the subject of written correspondence and negotiation during the very period when the vessels were being built, and the builders are supposed to have acted without a single line to protect themselves if the experiment failed.

I think it would require very cogent evidence to convince me that any such arrangement was made, and certainly the sort of evidence tendered cannot be so described.

Before dealing more minutely with the evidence I think it appropriate to point out the entire absence of anything like discussion, even according to the defenders' own evidence, on so important a change in the contract. The suggestion is that this was an experiment—an experiment which between experienced shipowners and experienced shipbuilders never formed the subject of a single conversation. It is now indeed said that it was an experiment, but it is obvious to inquire why that subject should not have been entertained between persons so competent and so experienced. The idea of a ship changing her actual shape when built, and the possibility of the tendency to "sag" being averted by the camber, and the camber coming out during the loading—all these things are new to me, and probably new to most of your Lordships, but to these experienced men such things were not new, and the difference between a ship with six or seven bulkheads such as these vessels and a sailing vessel with only a few could not possibly, I should think, have passed unnoticed by those who were agreeing to try a new experiment; and yet the only evidence which it is suggested could have called the attention of the shipowner to such a question is a casual conversation when one man is going upstairs and the other coming down on a staircase —a few words interchanged while passing.

It appears to me that such a condition of things as is thus insisted on by the defenders is absolutely incredible. Mr Stewart, who would have no authority to alter the contract, absolutely denies that the conversation attributed to him took place, and Mr Burrell denies that any such communication was ever made to him. It would probably be enough to say that it is for the defenders to establish a variation of the contract into which they had entered. But I am afraid, if I thus put it, I shall inadequately express the strength of the conviction which I have formed that it is untrue that any such directions were given by Stewart or heard and acquiesced in by Mr George Burrell.

It is not an unfamiliar mode of dealing with evidence of the character to which I have referred for each side in turn to place their contention so high that one side or the other must be guilty of conspiracy and perjury, and in that observation to embrace not only the principals who may flatly contradict each other but also every witness who may appear to corroborate or contradict them. No one, however, of any experience in courts of justice will accept so unreasonable a mode of dealing with evidence. I should think it is very likely some loose conversation passed upon the subject of other shipbuilders who were building other ships for the pursuers and the expedient that they had resorted to (very different however in kind and degree to that which is here alleged to have been authorised), and that some of the witnesses had partly heard and partly misunderstood what they heard in the light of the dispute that afterwards arose, and after an interval of years misrepresented it unintentionally. And I should be very sorry to assume that all the witnesses whose evidence is apparently inconsistent with witnesses on the other side were necessarily guilty of perjury,

much less of a previously conceived design to give false evidence, and thus conspire to conceal the truth.

Of course I cannot apply to all of the witnesses the observation that I may attribute to mistake after years as to the effect of particular conversations; but what I protest against is the assumption that all of the witnesses on one side or the other must be guilty of perjury and conspiracy.

It will justly be asked what motive could the defenders have had in trying this rash experiment unless they were authorised to do so by the owners.

The answer of the pursuers, corroborated I think in more than one way, is that a mistake had been made with reference to the carrying capacity of the vessel, and that the cambering, which it is admitted would have a tendency in the direction of compensating for that mistake, was intended to make up the carrying capacity to the contracted amount, and I think it is both proved and admitted that it has had that effect.

Now, the mistake which is but faintly contested was made by a person of the name of Hutchison. He is the foreman draughtsman to the defenders, and he prepared the plans of the four vessels in question in this case. Of course the plans on which the vessels were built would be the most satisfactory evidence of their design, and Mr Hutchison was in possession of the plans for which he was himself responsible. After this litigation had begun he received notice in due course to produce them, and what followed upon that notice is to my mind absolutely c on clusive of the truth of this case.

The dispute between the parties in respect of the camber has been narrowed to the question of whether or not it was 4 or 4½ inches, or was as much as 8 inches. The bulkheads as laid down in the plans would have an important and almost conclusive bearing upon the dispute in question.

Mr Hutchison, familiar of course with the question, familiar with the dispute, and familiar with the effect which the evidence of the plans would have on this issue, mutilated the plans with the view to their production. The longitudinal plan, which had been in one piece, he cut in half. The ends which showed the bulkheads fore and aft he cut from the lower half of the plan thus divided, and re-drew the bulkheads from the finished lines of the vessel.

The object of dividing the plan into two was apparently to conceal the fact that the bulkheads had been cut off at each end, since if the plan had been preserved without being cut in two pieces it would at once have been apparent that something had been cut off at each lower corner of it, but when thus divided it would avoid suspicion that anything had been suppressed. But even thus mutilated the plan shows a line (a pencilled line) which has been erased as far as it was possible to srase it, and that pencilled line it cannot be denied shows eight inches of camber.

When I put together these two facts of what the witnesses prove as to the extent of the camber, and what Mr Hutchison admits he did, I come very firmly to the conclusion that a camber of 8 inches or thereabouts is established. It is vain to say that the effect of this mutilation might be got rid of or might be supplied from other sources. Mr Hutchison, the draughtsman, knew well what he was doing. The object is to my mind plain and palpable, and that he endeavoured to conceal the line showing the 8 inches of camber and the bulkheads which, if allowed to remain according to the original plan, would be inconsistent with the case that he was supporting. He was a skilled person; he was the draughtsman responsible for the plans, and he knew better than any of us can know how much would be disclosed by those plans if he had not tampered with them, and how important was their destruction, and he was responsible for the original mistake.

I do not condescend to notice the childish excuse put forward for this proceeding. I am dealing with the rights of the pursuers and defenders here, and whatever might be the punishment appropriate to such a person, it is not merely on account of the discredit that attaches to such a person that I regard it as so important, but because I think it establishes beyond doubt or question affirmatively by the pencilled line the accuracy of the measurements taken by different processes of an eight-inch camber. At the same time, speaking in a court of justice, I cannot acquiesce in the Lord Ordinary's commentary, when he says—"It might be that Hutcheson's explanation is true, and this mutilation of the plan was just one of those inexplicable acts which people sometimes commit." To my mind the motive was plain and clear, which was a fraudulent attempt to conceal from the Court the evidence which would establish that which he was concerned to deny, and I cannot agree with the Lord Ordinary by accepting what he apparently suggests, that Hutchison may have done this for some undisclosed reason quite unconnected with the bulkheads. He did not want the parts of the plans which he had cut off to be seen. It was a gross and wilful perversion of the truth.

It appears to me that the first proposition of fact in this case that the ship was dangerously cambered, and contrary to the provisions of the contract is established.

[*His Lordship then dealt with the evidence in regard to the question whether there had been a breach of contract as to the coefficient of fineness of the vessels, and proceeded*]—I come to the conclusion that the independent evidence shows that in respect of the coefficient the defenders have been guilty of serious breach of contract.

Assuming the right of the pursuers to recover, it is a somewhat embarrassing position for your Lordships to determine the amount of damages to which they are entitled. So far as the remedies applied to cure the cambering of the ships are concerned I do not think there is much difficulty. That the course pursued was the cheapest and best mode of mitigating the consequences of the breach of the de-

fenders' contracts is established by proof and not really denied by any witness on the part of the defenders. But it appears to me that the expense of that mitigation is not all to which the pursuers are entitled, and it is upon the rest of the case, which is more or less speculative, that the great difficulty arises. I think it is proved that a vessel with false keels is not as good a marketable article as one built without that defect. I think it is proved that the coefficient of fineness provided for by the contract has not been supplied, and it appears to me impossible to say that where skilled persons have stipulated for a particular coefficient of fineness with reference to speed, symmetry, and economical drawing of the vessel, a breach of the contract in that respect can be regarded as altogether immaterial, and only to be treated as though the damages in respect of the breach were merely nominal. I give credit to persons familiar with shipbuilding and trading with carrying ships for knowing their own business, and therefore I cannot doubt that it is a breach upon which substantial damages should be assessed. I also think that the exact depth, though not of itself a breach of any contractual obligation, is nevertheless one of the injurious consequences resulting from the camber. The misfortune is that each side regards it as necessary to enhance or diminish the damages by somewhat exaggerated calculations. The pursuers seek to obtain damages to the extent of 20 per cent. upon the contract price of the vessels, wherein, as it appears to me, they are endeavouring to obtain damages twice over for the same cause of action. The defenders, on the other hand, seek to minimise the damages sustained by suggesting that the only damages to which the pursuers would be entitled would be the extra cost of docking on each occasion when the vessels are to be docked.

It appears to me that both views are absolutely unreasonable. It is true that great difficulties arise when one is endeavouring to reduce into money the probable and possible commercial injury which may hereafter arise in a commercial adventure, and I believe all your Lordships agree with me that taking all the heads of damage together and the costs of the efforts to remedy the defects, we shall be right in assessing the damages at £16,000.

I therefore move your Lordships that the interlocutor appealed from be reversed, and that judgment be entered for that sum, the respondents to pay to the appellants their costs both here and below.

LORD MACNAGHTEN—I agree with my noble and learned friend in his view of the result of the evidence, and in the conclusion at which he has arrived.

LORD MORRIS—I do not propose to deal with the question whether oral evidence should have been admitted to vary the contract in writing of the 1st June 1893. The evidence appears to have been given without objection at the trial, and the trial which would otherwise have come to a rapid conclusion proceeded almost entirely on the oral evidence of the witnesses on both sides. It is not disputed that the appellants under the contract were entitled to ships with straight keels. The respondents did not deliver ships with straight keels; the two larger were admittedly cambered by them to the extent of 4½ inches, and the two smaller ships to the extent of 4 inches. The respondents allege that such cambering was given by the instructions of Mr Stewart, which were adopted and approved of by George Burrell, one of the appellants. Oral evidence, even if admissible, of such an important departure from the contract, should be clear, conclusive, and cogent. The party relying on it had the entire onus of proof cast on him, and such an onus would not be discharged by a mere balancing of the credibility of the respective witnesses. The case of the respondents as to cambering is sustained solely by the testimony of Mr Lithgow, the surviving partner of the respondents' firm, or, with one exception, by the testimony of his employees. All the circumstances make it most improbable that the appellants gave any such instruction as is relied on by the respondents. A continuous correspondence is put in evidence, in which references are made to comparatively trivial matters, and no reference whatever is made to cambering the keels of the ships. The suggestion that it was directed by Stewart because the Grays were giving 3 inches of camber to the vessels they were building for the appellants is disposed of by the fact that the Grays did not do so, but merely laid down the keels with 1½-inch of camber, which was intended to come out, and did so come out before delivery. The motive assigned for the appellants giving such a direction as is relied upon by the respondents is entirely inadequate, while the motive for the respondents themselves adopting the expedient of cambering the keels has substantial reason, for the weight carrying capacity of the ship being incorrectly estimated by the respondents' draughtsman, was with reason doubted by the appellants, and the respondents could and in fact did by the adoption of the expedient of cambering obtain a false load-line and thereby became enabled to perform their contract as to weight carrying. The replies of the respondents when challenged by the letter of the 21st January 1895 enclosing the extract from the Sydney letter as to the docking of the Strathtay are studiously general and vague, and not such as would be written if the respondents really knew the cambering was done by the instructions of Stewart. The *a priori* improbability is very great that Stewart would take upon himself to direct cambering—a new and unprecedented process as regards steamers,—equally so that the respondents would act upon his instructions without formally communicating with the appellants. Thus all the antecedent probabilities, the correspondence, and the subsequent conduct of the respondents after being challenged on the subject, are inconsistent with their defence that the

appellants had given instructions for cambering. I do not refer to the necessity imposed on the respondents of further clearly proving that George Burrell had approved of and ratified the alleged instructions of Stewart, because I am of opinion that there was no proof upon which a Court should act to bring home to Stewart that he had given the instructions asserted by the respondents. The evidence offered by the respondents consisted of casual conversations depending on slippery memory and given by the party vitally interested and his employees, and it was encountered by the distinct denial of the appellants and Stewart. The question is not one of a mere balancing of the testimony or of the credibility of the witnesses. The appellants rely on their contract in writing. If it was to be varied at all by oral testimony to their detriment to the serious extent that the amount of damages now to be awarded demonstrates, the oral testimony should be overwhelmingly cogent. I am further of opinion that the evidence proves that the cambering so far from being limited to 4 or 4½ inches was from 7 to 8 inches. The evidence of Lloyd's surveyors and the divers employed by the appellants is as satisfactory as the question admits of; for the ascertaining of cambering is a matter of much nicety, and the keeping back by the respondents of their own divers on the subject is to my mind the most conclusive evidence against them. I am much impressed by the episode of the mutilation of the plan by the draughtsman Mr Hutchison. If the respondents' case were an honest one the reason assigned by him for the mutilation is absurd. If a dishonest case the reason for the mutilation is apparent, and it is an unpleasant coincidence that the pencil line which still faintly appears on the plan lays down cambering of 8 inches. That Mr Hutchison mutilated the plan for some improper purpose I entertain no doubt. He was the draughtsman of the respondents whose blunder (as asserted by the appellants) of the carrying capacity of the ships was to be covered by adopting the expedient of cambering. This mutilation of the plan prepared by himself reflects a strong and lurid light on the other part of the respondents' case. I do not think it necessary to refer to the complaint of the appellants of an excess of the coefficient of fineness over that of the contract, nor of the excess of draught of the vessels over the expected draught further than this, that even if the coefficient of fineness were exceeded, upon which I offer no opinion, and there were an excess of draught, which is proved, they are incidents to the cambering and should fall within the amount of damages which should be given for cambering the ships. On that question of damages I have great difficulty in arriving at any result. The evidence for the appellants is vague and uncertain, perhaps necessarily so. It is difficult, if not impossible, to reduce the damages to money, but on the best consideration I can give I have come to the conclusion that £16,000, being nearly 10 per cent. of the cost price, would be a reasonable amount of damages.

I concur in the motion made by the Lord Chancellor.

LORD DAVEY—I might content myself with a silent concurrence in the judgment of the Lord Chancellor, but as I have formed an independent opinion on the case I venture to trouble your Lordships by expressing it, though at the risk of repeating what has already been said.

We were much indebted to learned counsel on both sides of the bar for their exhaustive and exceedingly able analysis and criticism of the voluminous evidence in this case. By their assistance I am able to state concisely my conclusions on the various points in issue so far as material.

(1) The contract (including the relative plans) provided for straight keels. It was therefore *prima facie* a breach of contract to deliver them with cambered keels. (2) I think the amount of camber is that deposed to by Dodd and Stanbury, viz., from 7 to 8 inches in the larger vessels, and from 6 to 7 inches in the smaller one. Their reports are substantially confirmed by the results obtained by the divers and by the method described as sweeping, and curiously so by an application of the method of calculation employed by Duncan for the purpose of proving that Gray's vessels had a camber of 3 inches. Unfortunately for the witness the figures on which he based his calculation in that case were not proved or admitted, but in the case of these ships we have the actual figures and the calculation brings out a result which substantially agrees with Dodd's and Stanbury's report. (3) The effect of cambering the keel is to increase the draught of the vessel. The effect is also to increase the carrying capacity by reason (as the witness Flannery explained) of "a wedge of displacement corresponding to the droop of the keel being inserted into the water line." "We assumed" (says the witness Taylor) "that we got some increased capacity by the camber." Whether this increase of carrying capacity is a real one or only the result of the vessel being able to obtain a more favourable load line it is immaterial for the present purpose to inquire. (4) One inch was added by the builders to the moulded depth of the smaller vessels, two inches to that of the larger ones, and I think the coefficient was increased to some appreciable though not very large extent above the contract figures of ·77 for the smaller vessels and ·78 for the larger ones. The controversy on this point turns on the proper use of Simpson's rule to which both parties appeal. I think that Mr Lithgow has not proved any general custom or usage to begin with an ordinate of nothing. Such a practice is applicable to vessels with a sharp pointed bottom, but not to vessels with comparatively flat bottoms such as those in question. The evidence of the pursuer's own witnesses on this point is confirmed by an instrument called a planometer. (5) It is not admitted by the defenders that a mistake was made by them in the estimated weight of the hull and machinery, and it is impossible now to prove it to demonstration. But the

proper inference from the evidence is that a mistake was made to some extent, if not to the full extent alleged, by the pursuers in their correspondence. And at any rate the builders knew that they had a very narrow margin of carrying capacity, and that they ran a very serious risk of not being able to fulfil their contract. (6) The builders had never cambered the keel of a steamer before, and never cambered the keels of sailing vessels beyond 3 inches. To camber the keels of vessels such as these to the extent of even 4½ inches was an absolute novelty and an experiment in shipbuilding as to the effect of which the builders had no experience to guide them, and there certainly was no previous experience to justify a belief that the camber would come out either when the vessel received her machinery or when she was loaded. (7) Gray's vessels were cambered to the extent of 1½ inches only, and such camber came out when the machinery was put on board. (8) It was a reasonable thing to do to put false keels to the vessels, and the best way of curing the defect. The selling value of the vessels either with or without the false keels is to some extent depreciated by reason of the keels being cambered, though to what exact amount it is hard to say.

If these conclusions are rightly made, the proper decision to be given in this case will not present any great difficulty. The Lord Ordinary seems to have somewhat overlooked that it is for the defenders to justify what *prima facie* is a breach of contract on their part. How do they endeavour to do so? By some supplemental memorandum of agreement or letters between the parties? No. Then at least by some oral agreement come to between the parties themselves? Nothing of the kind. The only justification alleged is a conversation between Mr Lithgow, the sole member of the defenders' firm, and Stewart, who was an employee of the pursuers, at a casual meeting between them on the staircase of the defenders' office. Evidence was also given of other conversations between Stewart and employees of the defenders' firm. There is no attempt to prove that Stewart had any authority from his employers to alter their contract. The only way in which it is attempted to fix the pursuers with approval or ratification of Stewart's alleged instructions is a conversation six months afterwards between Mr George Burrell and Lambie, an assistant manager of the defenders, which is said to have been overheard by two workmen who were accidentally near the spot. Needless to say that every step in the argument, the fact of the interview between Lithgow and Stewart, the instructions said to have been given by Stewart, and what was said by George Burrell to Lambie, are the subject of controversy, and the witnesses on either side directly contradict each other. And all this time letters were almost daily passing between these two firms relating to the ships then being built or about to be laid down, and not one word is to be found in any single letter about this novel and risky experiment in shipbuilding, which Mr Lithgow says he was trying at the expense of the pursuers. I will not try to apportion the exact amount of truth or falsehood, exaggeration, or misunderstanding in this controversy. If the wisdom of the rule of law (common to England and Scotland) which says that a contract in writing shall not be varied, except by another writing, required illustration, you would surely find it in this case. It is sufficient for me to say that I agree with my noble and learned friend in his comments on this part of the case, and I believe all of your Lordships are of opinion that the defenders have not made out any justification for their breach of contract. It is said that the defenders believed or hoped that the camber would come out when the vessels were loaded, but your Lordships will not find anything whatever in this voluminous record to justify such an expectation.

If it be proved that the defenders have broken their contract, it is not very material to inquire what was their motive for doing so. But as the question has been very fully debated both in the Court of Session and in this House, I will say this much. In my opinion the evidence points to the conclusion that Mr Lithgow and his draughtsman Mr Hutchison, or one of them, before the keels of any of these vessels were laid had found out or had a dim consciousness that Hutchison had underestimated the weight of the hull and machinery, or (in other words) the defenders had contracted to build vessels with a larger carrying capacity than the figures upon which the contract was based would justify, or at any rate that they had too narrow a margin for safety, and that they resorted to the device of slightly increasing the coefficient and the moulded depths and of cambering the keels of the vessels in order to make themselves secure. Hutchison's extraordinary conduct, of which my noble and learned friend on the Woolsack has spoken, tends to strengthen this inference. It is not indeed proved that the fore and aft bulkheads were lengthened; but there must have been something in the plans of those parts of the ship which he desired to conceal, and from the evidence of the pursuers' witnesses, and on cross-examination of Taylor and Barclay, and the existence of what may now be considered a permanent camber of considerable extent in the keels of the vessels, it is probable that the bulkheads were lengthened. This is not entirely met by the suggestion at the bar that the bulkheads might have been measured. I do not know whether in a finished ship of the class of these vessels that could conveniently be done, and no questions were asked for the purpose of showing it. This is not the only instance in this case in which suggestions have been made which ought to have been the subject of cross-examination and proof. Mr Ure in his very able argument made a great point of what happened when the vessels were successively delivered. It was found that the draught of all the vessels was

greater than had been expected. But it is to be observed that the contract did not contain any provisions as to the draught of the vessels, as is now conceded on both sides. Mr Lithgow, when his attention was drawn to the subject, stated that some mistake had been made in placing the water-marks on the vessels, and strangely enough this appears from the evidence of Mr Lithgow himself and Mr Taylor and some of the expert witnesses to have been the case to some extent in at least three of the vessels, though whether it was admitted by the Board of Trade dees not appear. But when loaded, the vessels were found to have their full carrying capacity according to contract, and nothing further was then said as to the draught. To ask your Lordships to draw the inference that the pursuers had (it must be) constructive notice that the keels were cambered from the depth of water which they drew strikes one as somewhat extravagant. It is more difficult to understand why their suspicion was not aroused in the case of the Strathogle which was not delivered until after they had learned from Sydney that the keel of the Strathtay had been cambered. But however this may be there is nothing proved which can in law deprive the pursuers of their right of action in respect of each of the vessels. The excess of draught is not now made a separate or distinct cause of action though it originally was so.

The question as to what amount of damages should be given has engaged the anxious attention of your Lordships, and I believe that all your Lordships are agreed as to the propriety of the amount mentioned by my noble and learned friend on the Woolsack.

LORD CHANCELLOR—I ought to say that my noble and learned friend Lord Brampton, who is unable to be present to-day, concurs in the judgment which has been proposed by your Lordship.

Interlocutor appealed from *reversed*, and *ordered* that judgment be entered for £16,000 for the pursuers.

Counsel for the Appellants — Salvesen, Q.C.—Clyde. Agents—Grahames, Currey, & Spens, for Webster, Will, & Company, W.S.

Counsel for the Respondents—Ure, Q.C.—Younger. Agents—Thos. Cooper & Company, for J. & J. Ross, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, March 15.

(Before the Lord Justice-General, Lord Adam, and Lord M'Laren.)

JACOBS AND ANOTHER *v.* HART.

Justiciary Cases — Procedure — Note of Documentary Evidence—Summary Procedure Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 16.

The Summary Procedure Act 1864, sec. 16, requires that the "record shall set forth . . . a note of any documentary evidence that may be put in" at a trial under the Act.

At the trial of a person charged with the theft of "600 liras Italian money, of the value of £24 sterling or thereby," the prosecutor produced in evidence (1) nine Italian bank notes of the value libelled, and (2) 22 £1 notes of a Scotch bank. It was proved that the accused had changed the Italian notes for the Scotch notes, the latter being subsequently found in his possession, and he was convicted. The record of the proceedings did not set forth the production of the notes. In a suspension at the instance of the accused, *held* (*diss.* Lord Adam) that neither the Italian nor the Scotch notes had been produced as documentary evidence within the meaning of sec. 16, and that it was therefore unnecessary to note them in the record. Suspension accordingly *refused*.

Statute—Interpretation—Variation between Words of Schedule and Enacting Clause.

Where the words used in a schedule vary from those of the enacting clause, the rule is that the latter must prevail.

This was a suspension at the instance of Max Jacobs and Mary Marshall, who were charged in the Sheriff Court at Glasgow upon a complaint which set forth that they did "on 6th or 7th January 1900, in said Max Jacobs' house, 67 Cadogan Street, Glasgow, steal 600 liras Italian money, of the value of £24 sterling or thereby, from Giacomo Cicirello."

The complainers were convicted on evidence, and sentenced to imprisonment for 60 and 30 days respectively.

They brought a bill of suspension. In their statement of facts they averred—(Stat. 3) The "said warrant and sentence and proceedings are irregular, illegal, and incompetent. The prosecutor produced and put in evidence as part of his case certain documents. The documents so produced and put in evidence consisted of 22 Union Bank of Scotland notes of £1 each, and also of Italian bank notes, consisting of three notes each for 100 liras, and six notes each for 50 liras. These documents, which are all bankers' notes promising to pay the sums stated therein, were produced at the trial by the prosecutor, and exhibited to the witnesses and to the Court, and put