

my opinion that such a notice does not interrupt a decree of a court of law. I am all the more pleased to do so, as I think that this opinion is in harmony with the natural rule that a mother is the fittest person to look after so young a child.

LORD MONCREIFF—I am of opinion that the Lord Ordinary's judgment should be adhered to. At the expiry of seven years from the date of the decree for aliment, which the pursuer obtained in absence against the defender in 1883, the defender in 1890 offered to discharge the obligation under which he was for the support of the pursuer's child by taking him into his, the defender's, mother's house, and having him educated and taught a trade. It is now admitted that that offer was made *bona fide*, and was suitable to the child's circumstances. The defender was entitled to discharge his obligation in that way; and while he was not entitled to demand the custody of the child, the mother, if she did not accept the offer, was not entitled thereafter to call on the defender to contribute to the child's support—*Corrie v. Adair*, 1860, 22 D. 897.

When the offer was made the pursuer at first alleged that the defender's mother was not a fit guardian for the child, and her agent wrote on 10th September 1890—"If your client" (that is, the defender) "still declines to pay, then I must just put the decree into the hands of an officer." On 16th September 1890 the defender's agents replied—"Our client will resist any measures which your client may adopt to obtain further aliment from him."

It is quite clear that if at that date the pursuer had attempted to charge upon the decree, the defender could have relieved himself from further liability under it by suspension or other competent procedure. But the pursuer, probably being advised that the offer was a sufficient one, chose, as she was entitled to do, to retain the custody of the child and not to put the decree in force against the defender. Having kept silence till the thirteen years have expired, I think she is not now entitled to enforce the decree. As Lord Benholme says in *Corrie v. Adair*, 22 D. 902—"Where the father offers to take the child into his own family, and that is not conceded, and the claim is no longer insisted in for a course of years, we must hold according to the rules of law that the claim is given up; because the mother has refused to allow the father to aliment the child in the way which he is entitled to prefer."

The only difference in the present case is that here the decree was for thirteen years and was in force when the offer was made, with six years to run. But besides being a decree in absence it was a decree which in its nature and terms was a decree *in hoc statu* which might have been opened up at any time on a change of circumstances occurring. In my opinion this could have been done by suspension in 1890 if a charge had been then given, although the defender might also have applied to be reponed, the decree having been obtained in absence;

or he might have applied to the Sheriff for a modification of the decree. I think that suspension is equally competent now. In *Kay v. M'Laurin*, 4 Sh. 712, the suspension was not brought till 1826, while the decree was obtained in 1822; the decree in the suspension drew back to the date of the father's offer to take the child, which was made in 1822.

But I also think that by her actings the pursuer has barred herself from objecting to the defender's delay in applying for a reconsideration of the original decree. By her silence she led the defender to suppose that she had departed from her claim, preferring to retain the custody of her son; and now when the defender no longer has the option of discharging the obligation in the way least burdensome to himself, she calls upon him to pay aliment of which she could not have enforced payment had she claimed it sooner. I think she comes too late.

LORD TRAYNER was absent.

The Court adhered.

Counsel for the Complainer—Kennedy—Hunter. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Friday, December 23.

FIRST DIVISION.

[Lord Low, Ordinary.]

BURRELL & SON v. RUSSELL & COMPANY.

Proof—Credibility of Witnesses—Weight to be Attached to Conclusion of Judge who Heard the Evidence.

An action of damages was raised by a shipowner against a shipbuilder for breach of contract in respect that certain ships built by the latter to the order of the former had been constructed with cambered instead of straight keels. The defenders admitted that the keels had been cambered, but averred that this had been done in compliance with oral instructions given by the pursuers subsequent to the date of the written contract, the object of the cambering being that, when the vessel was filled with cargo, the keel might straighten out. The defenders led evidence to the effect that such verbal instructions had been given; the pursuers led evidence to the effect that such instructions had never been given.

The Lord Ordinary (Low) having assoilzied the defenders, the Court adhered, on the ground that as the determination of the question depended upon the credibility of witnesses, it was improper for a court of appeal to disregard the view taken by the judge

of first instance—*diss.* Lord M'Laren who held that the question did not depend exclusively on credibility but also upon the weight and effect of the evidence, and that a court of appeal was therefore entitled to give the evidence independent consideration.

On 1st April 1896 Burrell & Son, ship-owners, Glasgow, raised an action of damages against Russell & Company, shipbuilders, Port Glasgow, concluding for payment of £40,000.

The pursuers averred that in June 1893 the defenders contracted with them to build four steamers—the “Strathtay,” “Strathairly,” “Strathgarry,” and “Strathgyle,” the two former being the smaller, and the two latter the larger. The contract price was £39,000 for each of the smaller vessels, and £43,500 for each of the larger. “It was an implied term of the said contract, and in accordance with the universal practice of the shipping and shipbuilding trades, as was well known to the defenders, that the said vessels should all be constructed with straight keels, the straight keel being the only form which is proper and appropriate to vessels of the class specified. The draught of the vessels when completed, if built in accordance with the contract, was a mere matter of calculation, and necessarily followed from the dimensions specified in the offer and accepted by the defenders as above mentioned.”

On 4th October 1893 the defenders requested the pursuers to agree to an increase in the coefficient of fineness of the two larger steamers. “This proposed alteration of the coefficient the pursuers reluctantly agreed to on 11th October 1893, but no other alteration was made on the original contract between the parties, and the pursuers believed that the steamers were all being built in terms of said contract as so modified, and in that belief took delivery of them as after mentioned.”

The pursuers took delivery of all the vessels, and after the lapse of some time they were surveyed and examined in dock. “As the result of said surveys it was ascertained, and it is the fact, that all the steamers had, in violation of the contract, been built with a cambered or arched keel.” Certain other deviations from the specification embodied in the contract were averred by the pursuers, who continued—“In each and all of these respects each of the said four steamers was disconform to contract, and in consequence of the said disconformity of said steamers to contract, and of the defenders’ breach of contract with regard to said vessels, the pursuers have sustained and will sustain great loss and damage.” “(Cond. 7) The camber in the keel of each of said vessels (which was an unlawful, unauthorised, and most injurious device, resorted to, the pursuers believe, with the view of thereby increasing the dead-weight carrying capacity of the vessels), was in breach of the contract between the parties, and rendered the vessels liable to be strained and otherwise injured in being docked, and added materially to the expense of docking. In consequence of

said camber it became necessary to fit a false keel to each of said vessels so as to give them each a straight keel, and such a keel has been fitted to each of the ‘Strathgarry,’ the ‘Strathgyle,’ and the ‘Strathairly,’ and the ‘Strathtay’ is about to be similarly fitted with a false keel. Further, said vessels the ‘Strathgyle’ and the ‘Strathairly’ were, while having said surveys made and getting said false keels fitted, thereby detained, and the ‘Strathtay’ will in like manner be detained each for a lengthened period, and thus prevented from earning freight, or being otherwise utilised by the pursuers, and the defenders have in consequence incurred liability to the pursuers for the cost of fitting said false keels and for the demurrage or damages for detention of said vessels while having said keels fitted.” “(Cond. 10) The selling value of said vessels is greatly less than it would have been had the defenders constructed them in terms of the contract between them and the pursuers, said depreciation being directly due to the foresaid disadvantages arising from the defender’s failure to fulfil their contract in the particulars above libelled.”

The defenders denied that it was an implied term of the contract that the vessels should be constructed with straight keels. “The pursuers took delivery of the steamers in full knowledge of the fact that they had been constructed with cambered keels, of their draught, and of their coefficient, and so took delivery without objection or reservation.” “(Ans. 6) Admitted that the steamers were built with cambered keels. *Quoad ultra* denied. The said steamers were built with cambers, as is matter of common practice, and were so built at the sight and to the instructions of the pursuers, and in particular of their overlooker Mr James C. Stewart, to whom they entrusted the preparation of the specification for said ships, and the whole superintendence of their construction. The camber in the smaller ships was about 4 inches, and in the larger rather more. The cambers taken by the pursuers in 1897 were not properly taken, and the cambers mentioned do not truly represent the cambers of the vessels at the dates when same were taken.” The defenders further denied the averments contained in arts. 7 and 10.

The pursuers pleaded, *inter alia*—“(1) The defenders having failed to implement their obligations under the contract between them and the pursuers as condescended on, and the pursuers thus having suffered loss and damage to the extent of the sum sued for, the pursuers are entitled to decree in terms of the conclusions of the summons.”

The defenders pleaded, *inter alia*—“(4) The pursuers are barred from making the present claim in respect the said vessels were constructed under their supervision, and they took delivery thereof without objection, in full knowledge of the points of construction of which they now complain.”

Proof having been led at great length, the Lord Ordinary (Low), on 30th October 1897, assoilzied the defenders.

Opinion.— . . . “The pursuers claim damages to the amount of £40,000 from the defenders on the ground that all of the ships are disconform to contract in the following respects:—

“(1) The keels, instead of being straight, are cambered—that is to say, the keels are arched, being higher amidships than at stem and stern. The result is that the draught of the ships is increased, and that the operation of docking is made more troublesome and expensive, because unless the blocks upon which the vessel is placed are specially prepared with a curve corresponding to the camber of the keel, the vessel is strained and twisted. In order to avoid the expense and risk of docking ships with cambered keels, the pursuers have at large expense put false keels upon the ships, so as to fill up the camber and make the keels practically straight.

“(2) In the second place, the pursuers allege that the coefficient of fineness which was stipulated for has been exceeded as regards all the vessels, with the result that they require a larger consumption of coal to drive them through the water at a given rate of speed.

“(3) In the third place, the pursuers aver that the depth of all the vessels is in excess of the contract depth. The result is that the ships draw a great deal more water than they ought to have done, and are thereby excluded from a number of ports which would otherwise have been open to them.

“The position taken up by the defenders is this—

“(1) They admit that the keels of the vessels are cambered, but they allege they were so built by the instructions of Mr Stewart, the superintendent engineer of the pursuers, with the knowledge and approval of the pursuers.

“(2) The defenders deny that the contract coefficient of fineness has been exceeded in any of the vessels.

“(3) The defenders admit that the vessels were made deeper than they ought to have been in terms of the contract. They allege, however, that the pursuers knew what the draught of the vessels was, and that they took delivery without protest or reservation of any claim.

“I shall deal with these grounds of claim in the order in which I have stated them.

“I. The first and most important question is whether the keels were or were not cambered by the instructions of the pursuers? I am sorry to say that upon that question there is a conflict of evidence which leaves no room for doubt that upon the one side or the other there has been deliberate falsehood.

“Before dealing with the evidence I may explain that it is common enough to lay the keels of steel vessels with a camber. That has long been done in the case of sailing ships, and in recent years the course has also been frequently followed in the construction of steamers. The object, however, is not to supply a ship which will have a keel permanently cambered, but a keel which will become straight. It was

found that steel ships were to a certain extent flexible, and that if the keel was laid straight the weight amidships when the vessel was loaded caused the keel to sag or bulge. That was especially the case in sailing ships, which have not so many bulkheads as steam ships. To avoid sagging the keel is laid with a slight upward curve, so that the weight of the cargo, instead of causing the keel to sag or bulge, simply presses it straight. When this method of construction is followed, the whole materials of which the ship is composed are designed and prepared upon the assumption that she will have a straight keel. The camber is not given by building the ship deeper at the ends than she would have been if the keel had been straight, but simply by building the ship from keel to deck very slightly upon a curve.

“That is the method of construction which the defenders say that they followed upon the pursuers’ instructions.

“The case made by the pursuers, on the other hand, is this. The defenders had, upon a specification of length, breadth, and depth supplied by the pursuers, guaranteed a certain carrying capacity on a certain coefficient of fineness. They found, however (the pursuers allege), that they had made a miscalculation and could not give the carrying capacity with the coefficient which they had fixed. They therefore adopted certain devices to increase the carrying capacity. They increased the moulded depth, they increased the coefficient, and in addition they lengthened the end bulkheads and built the vessels deeper at the ends than in the middle to the extent of some seven or eight inches.

“Now, I think that the pursuers have made a formidable *prima facie* case against the defenders. In the first place it is proved, in my opinion, that the defenders’ draughtsman did make a miscalculation in regard to the weight of the machinery, and that if the vessels had been built strictly according to contract there would have been some shortage of carrying capacity. In the second place, the defenders admit that they had never cambered the keel of a steamship before. The inference of course which the pursuers draw from these two facts is that the defenders cambered the keels for the purpose of increasing the carrying capacity. In the third place, if, as the defenders allege, the keel had simply been set up a few inches to prevent sagging, the probability founded upon experience is that the camber would have disappeared or been greatly diminished by the use which has been made of the ships. As matter of fact, however, the camber has in no way diminished, and may have increased. Finally, after the present action was brought the defenders altered the plans upon which the ships had been built. Their draughtsman—Hutchison—cut off and destroyed the parts of the plans upon which the end bulkheads appeared, and made new plans of these bulkheads. The pursuers naturally draw the inference that that was done to conceal the fact that the end bulkheads were made longer to the

extent of the camber than they would have been if the vessels had been constructed as straight-keeled vessels. Further, the pursuers say that the assertion that they instructed the defenders to lay the keels with a camber is not only untrue, but absurd, because they had never had a vessel which was laid with a cambered keel, and had never heard of the practice of laying the keels in that way.

“On the other hand, if the pursuers’ case is true, then Mr Lithgow, the sole partner of the defenders’ firm, has been guilty of the grossest fraud and perjury, and has been able to induce a number of persons, some in his employment, and some no longer in his employment, to give false evidence. Further, even assuming that Mr Lithgow was dishonest enough to adopt the device with which he is charged, the antecedent improbability of his doing so appears to me to be great. The amount of carrying capacity to be gained was not very great (I think considerably under 100 tons in a vessel of over 7000 tons), and the fraud would have been certain to have been found out, because, if a vessel was built with a rigid camber of six or eight inches, the first time it was docked it would be strained and buckled in a way which could not fail to attract attention, and lead to the detection of the fraud.

“It is therefore necessary to examine the evidence with great care.

“Mr Lithgow’s evidence is that it was Stewart, the pursuers’ superintendent engineer, who instructed him to lay the keels with a camber. He says that one day before the keel of the first vessel was laid, Stewart was at the office going over the plans with Hutchison, the draughtsman. Lithgow accidentally met Stewart and Hutchison in the passage, and his evidence as to what passed is as follows:—“Addressing Mr Stewart, I said, ‘How are you getting on with the plans?’ and he said, ‘All right.’ Our stair goes down straight, and then there is a landing about six steps down. Mr Stewart went down a couple of steps while this conversation was going on, and when he got down to the landing he stopped there, and said to me, ‘The Grays are laying our boats with cambered keels.’ I said, ‘What camber are they giving them?’ ‘Three or four inches,’ he said, ‘and I wish you to lay these boats down the same.’ I said, ‘What will we give them, Mr Stewart?’ and he said, ‘Give the small boats four inches and the big boats a little more.’ That is the conversation that passed, not word for word, but very near it. That must have been about the middle of September, shortly before the first keel was laid. My reason for fixing the date is that I immediately sent to Greenock for our foreman carpenter Mr Arnot. Our office is about a mile from the yard where the steamers were being built, and I sent for Mr Arnot and Mr Lambie to come up that day and get instructions, and I gave the instructions to Mr Taylor.’

“The explanation of the reference to ‘Grays’ is that the pursuers were at the

time having four steamers similar to those in question built by Messrs William Gray & Company of West Hartlepool, and as matter of fact Messrs Gray laid the keels of the steamers with a slight camber.

“Lithgow’s evidence in regard to the alleged conversation with Stewart is corroborated by Hutchison, who was with Stewart and heard what passed.

“Staveley Taylor, the defenders’ manager, gave the following evidence:—‘Before the keel of the first vessel was laid, I was told by Mr Lithgow that Mr Stewart had asked him to camber the keels of the vessels when they were laid down. He said Mr Stewart wished the keels of the smaller vessels cambered to the extent of four inches, and the larger ones rather more, about four and a-half inches. He also mentioned that Stewart had told him that the Messrs Gray, West Hartlepool, who were building four vessels for them at the same time, were cambering their keels, or intending to camber them, three and a-half inches. I passed on the instructions to Mr Lambie, and I may have mentioned the matter to the foreman carpenter David Arnot as well.’

“Lambie, the defenders’ assistant manager, says that Taylor instructed him to lay the keels of the first two vessels with a camber of four inches, and the keels of the two larger vessels with a camber of four and a-half inches. He fixes the date when these instructions were given, by an entry in his note-book, as 28th August 1893.

“David Arnot, who at the time was foreman shipwright with the defenders, but has now left their service, gave the following evidence:—‘Before laying the keel of the first ship, Mr Lithgow gave me instructions to lay the blocks straight, and then to camber them. He gave me these instructions in the Kingston office in his private room. He sent for me for the purpose. . . . I laid the blocks of No. 343 (*i.e.* the first vessel), and afterwards Mr Lambie came along with Mr Stewart and gave me instructions to raise them a little higher in the centre, as he thought we had not quite got the four inches. That was done. Mr Lambie told me to give the boats four inches of camber. Mr Stewart was with him at the time.’

“Then several other witnesses speak to Stewart being anxious to have the keels cambered, and inspecting them while in course of construction.

“Thus, Staveley Taylor, the manager, says that during the earlier stages of the construction of the ships he had a conversation with Stewart in the office at Port-Glasgow in regard to cambering the keels. He said, ‘He’ (Stewart) ‘impressed upon me to be very careful to maintain and keep up the camber. His reason for saying so was that Grays considered it most important. I asked him what camber Grays were giving, and he said 3½ inches. I told him that we were giving quite that, and that we were giving them exactly what he had arranged for, and I promised that we would look after it. . . . The keels of the two smaller vessels were laid at the time when I had

this conversation with Mr Stewart. Mr Stewart was very anxious about the camber being maintained.'

"There is then the evidence of Bolton, who succeeded Arnot as foreman shipwright in November 1893, when three of the vessels were in course of construction. Bolton is no longer in the defenders' service. He gives the following account of a conversation which he had with Stewart in reference to the 'Strathgarry.' 'Shortly after I entered the employment I had a conversation with Mr Stewart about the vessels. The conversation took place at the bow of No. 345, the 'Strathgarry.' I had been speaking to him about them working on the ship, and he went forward to the bow and asked me to come along with him and have a look at the keel. I went along to the bow with Fergusson and him, and he got up on the platform so that he could see along the keel. He then asked me to come up and look along the keel with him. I did not consider there was any room for two to go up where he was, and I did not think it necessary. I said, 'There is no use of two good men going up there,' and I did not go. He said, 'Bolton, you are letting these keels come down in the centre.' I made no reply, because the vessel was coming down. She came down to the extent of three-eighths of an inch or almost that. I said, 'I know she has been coming down, but we will prevent her coming any further, and will bring her right to 4½ inches.' When he came down from the platform, he said, 'What are you to do?' I went amidships and showed him the vessel blocked up with double blocks for a length of 40 ft., so close that a small person could scarcely get through between them. He said, 'Is that the method you have taken to keep it up?' and I said 'Yes, and I think it is a practical method.' He said, 'Will that do?' I said, 'I think it will; by slackening the blocks fore and aft and ramming them up in the middle, the vessel will come down to that extent, and we will sight her again and keep her right when she is that way.' We afterwards brought her to that, and kept her to it—I mean 4½ inches.'

"The witnesses Lambie, Marshall, and Polonis also narrate incidents which, if true, show that Stewart was well aware that the keels were being laid with a camber.

"Now, Stewart's evidence is, that not only did he give no instructions that the keels should be cambered, but that he never heard anything about cambering the keels, and was not aware that they were not laid straight—'About the end of December 1893 I remember being at the defenders' yard along with Mr George Burrell. I had just come from West Hartlepool then. At this time the plating of the first of the smaller vessels was well advanced, and the other was nearly framed, and the keel of the first of the larger boats had been laid down. At the foot of the gangway of the first ship we met Mr Fergusson, our inspector, and while we were standing talking to him, Mr Lambie, prin-

cipal foreman in the yard in which the ship was being built, joined us. He knew I had come from West Hartlepool, and he asked me "How are Gray's boats getting on?" I said they were getting on very well, "beating you hollow." He then asked, "Are Gray's people keeping their boats up any in the bottom?" I said, "I asked Mr Purvis, Gray's under-manager, the same question, and he replied that the boat we were then looking at was being kept up an inch and a half in the bottom, but she would be straight when finished." That was the only reason Mr Purvis gave for keeping the bottom up, but I was aware the yard was new, and I naturally concluded it was to allow the ship to come down with her weight. In my opinion that would be a good enough reason for keeping up the bottom of the vessel 1½ in. The 1½ in. would be amidships. I had told Mr George Burrell what had passed between me and Mr Purvis on our way down in the train. When the conversation I have mentioned with Mr Lambie took place, Mr George Burrell asked him, "Are you doing anything of that sort here?" and Mr Lambie replied "No, we do not require to do anything of that sort." Keeping the vessel's bottom up an inch and a-half means that the keel, instead of being laid perfectly straight, has a little rise in the centre tapering away to the ends. A rise of 1½ in. in the centre of the keel would, in my opinion, come out in the course of construction. They have often to take out some of the blocks which support the vessel in order to get the rivetting done, and as the hull is much heavier in the centre the vessel would naturally come down. The extra weight in the centre would bring the vessel down, and compensate for the 1½ in. of rise, so that the ship when finished would have a perfectly straight keel. I never had any conversation with the defenders, or any of their representatives, at any other time as to the cambering of the keel. I never authorised any camber on the keel. I had no authority from the pursuers to do so. . . . *Cross.*—I have no recollection of meeting Mr Lithgow when I was going down from the drawing office. I do not remember him asking me how we were getting on with the plans. I have no recollection whatever of an interview with Mr Lithgow on the stair as I was going down from the drawing office. (Q) Do you remember having a conversation with him on one occasion in Mr Hutchison's presence, when he was standing on the landing above and you were just below at the staircase window?—(A) I do not remember ever having had a conversation with Mr Lithgow on the stair. (Q) Do you recollect of Mr Lithgow asking you, when you were in the position I have mentioned, how you were getting on with the plans, and you answering "Right enough," and then adding "Grays are laying our boats with a camber, and I want you to do the same?"—(A) I certainly say such an interview never took place. Mr Lithgow never asked me what camber the Grays were giving their boats, and I never answered that they were

giving 3 or 4 inches. I have no recollection of Mr Lithgow then saying "What will we give them?" I did not say in reply "Four inches for the smaller steamers, and the big ones a little more." No such conversation ever took place. I never spoke to Mr Lithgow about the setting up of the keels of the boats Grays people were building for us in my life.

"I think that it is impossible to believe that such witnesses as Taylor, Arnot, and Bolton were giving deliberately false evidence, and unless their evidence is false, it is certain that Stewart not only knew that the keels were being laid with a camber, but insisted that the camber should be kept up to the amount which Lithgow says was mentioned to him. But if that be the case, then it seems to me that Stewart's evidence is also discredited when he says that he gave no instructions for cambering the keels. The evidence of the defenders' witnesses is consistent throughout. The instructions which Lithgow gave to his employees, and Stewart's conduct when the ships were being built, are just what one would have expected if Stewart had instructed Lithgow to camber the keels.

"But then the pursuers say that even assuming that the keels were laid with a camber by Stewart's instructions, he had no authority to give such instructions, and the defenders acted upon them at their own risk. The question whether in such a matter the defenders were entitled to take their instructions from Stewart would only arise if it appeared that these instructions were given without the knowledge and approval of the pursuers, and I shall now inquire how the evidence upon that point stands.

"There are two partners of the pursuers' firm, William and George Burrell. The former takes charge of the commercial department of the business, and is not an expert in shipbuilding. George Burrell, however, is a practical shipbuilder, and prepared the specifications for the vessels in question.

"There is no evidence, in my opinion, that William Burrell knew of the keels being cambered, and I believe that he did not do so. I think that the fact that he did not know that the defenders had been instructed to lay the keels with a camber accounts to a large extent for this action being brought, and for the form which the pursuers' case ultimately assumed.

"There is, on the other hand, a considerable body of evidence which goes to show that George Burrell knew and approved of the keels being laid with a camber.

"George Burrell's evidence is that he never heard of the keels being cambered until after the ships were delivered, and and one of them had been injured by being docked upon straight blocks in Sydney. He says that the first time he ever heard of such a thing as keels being cambered was upon one occasion about the end of 1893, when he and Stewart were going by train to Greenock to visit the defenders' yard. Stewart then told him that the Grays were

laying their keels with a slight camber. Stewart explained that the Grays' yard was a new yard (in which I suppose the blocks were liable to sink somewhat), and that the object of laying the keels with a camber was to ensure that they should be straight when the ship was finished. George Burrell also says that upon the same day he and Stewart met Lambie in the defenders' yard, and his evidence as to what passed is as follows:—"When we were going to see the first steamer, Mr Lambie, one of the defenders' people, asked Mr Stewart how the Grays were getting on, and Mr Stewart said they were beating him hollow. Mr Lambie then asked, 'Are they putting up the bottom any?' and Mr Stewart said, 'Yes, they are giving her a camber of an inch and a-half.' I said to Mr Lambie, 'Surely you are doing nothing of that kind here?' and he said, 'Oh, no.'"

"George Burrell says that that was the only occasion upon which he ever heard the subject of cambering the keels mentioned.

"He also says that he never looked at the keels of the vessels when they were in course of construction in the defenders' yard.

"The witnesses upon whom the defenders chiefly rely as contradicting the evidence of George Burrell and showing that he did know of the keels of the vessels being cambered, are M'Geahan, Lambie, Marshall, and Polonis.

"M'Geahan was employed by the pursuers in 1893-94 as their inspector in Messrs Grays' yard. At Christmas 1893 he was in Glasgow, and saw Mr George Burrell, and he gives this evidence as to what passed:—"He' (George Burrell) said 'By-the-bye, M'Geahan, are Grays' people giving these boats any camber?' 'I did not understand what he referred to, and he drew it upon a piece of blotting paper, and then I understood him. He drew the camber down to a rough outline of the ship, fore and aft. He told me he wanted the ships to have three inches of camber. That was all that passed at the time. In the beginning of the year I went back to Hartlepool, and called on Mr M'Glashan, the chief draughtsman. He referred me to Mr Bailey, the foreman carpenter, and said Bailey would see that I got taking sights of the ship. I asked Bailey if he was cambering the ships. I don't recollect just now exactly what he said. I got him to make arrangements for sighting the ships, and I sighted them along with him. In the result, I judged that the ships had about three inches of camber.'"

"Now, George Burrell denies absolutely that he had any conversation with M'Geahan in regard to Grays' vessels being cambered. I think, however, that M'Geahan's evidence proves that such a conversation did take place. I do not believe that what he says about George Burrell illustrating what he meant by camber by a drawing upon the blotting-paper was an invention.

"I do not think, however, that I can regard M'Geahan's evidence as proving

that George Burrell instructed him to see that the keels were given three inches of a camber. M'Glashan, Messrs Grays' draughtsman, who was examined as a witness for the pursuers, says that he has no recollection of M'Geahan speaking to him about the cambering of the keels, or of any arrangement being made for M'Geahan sighting the keels. Further, M'Geahan never made any report to Burrell in regard to the amount of camber, as one would have expected him to have done if he had been instructed to see that the keels were kept up three inches.

"Now, if all that is proved is that George Burrell spoke to M'Geahan about Grays' keels being cambered, it does not amount to much. George Burrell admits that shortly before M'Geahan's call Stewart had told him that the Grays were cambering the keels, and it was therefore most natural that when he saw M'Geahan he should ask him what was actually being done. If nothing more passed, the incident might have escaped Burrell's memory.

"The next witness is Lambie, the defenders' assistant manager. He produced a note-book which he says he kept at the time, and the entries in which were made of the dates they bear. The entries are somewhat peculiar, but I see no reason to doubt that the note-book is one which Lambie actually kept at the time, and at that date he had no motive for making false entries.

"Under date the 8th March 1894 there is the following entry in the note-book:—'Mr Stewart and Mr George Burrell are here to-day. Mr Burrell had a talk with me about camber of keels. He says Grays of Hartlepool have laid the keels with 3 inches of camber, and would like ours here to have at least that. I said to him that our smaller steamers' keels were laid with 4 inches of camber, and I was sure they had at least 3½ to 4 inches. Afterwards, along with Mr Stewart, I had a look at the keels.'

"Lambie swears that that entry is a correct record of what took place, and he adds—'Both Mr George Burrell and Mr Stewart looked at the keels on that occasion—I mean looked along the keels. I was beside them at the time. We went up on the blocks at the bow of the vessel, and looked along the keel and saw the camber. Mr Burrell did not say anything—he seemed satisfied.'

"Lambie's evidence is corroborated by Charles Marshall, a shipwright in the employment of the defenders. He was working at the 'Strathairly' when Lambie, Stewart, and Burrell came to the ship. He describes how they looked along the keel, getting upon one of the end blocks for that purpose. His evidence then proceeds: 'They then got down, and I heard them say something—I did not make out the full statement—about giving them three on the Tyne. It was Mr Burrell who said that. Then they had some other conversation which I did not hear. Mr Lambie's back was to me. They were moving about, and after talking a little

bit the next thing I heard was, 'Of course nothing less, Mr Lambie,' and Mr Lambie said, 'Oh no, I will look out for that.' They then went away. I saw Mr Burrell and Mr Stewart about ten minutes afterwards at the stern looking under the bottom along the keel. I was inside the boat at the time looking out through the frames. From the place where they were they could easily see the camber on the keel. It was quite light at the time.'

"Now, this was evidently the same occasion as that to which Lambie speaks, because upon the same day as the incident occurred, Marshall tested the rudder-post, and made an entry to that effect in his note-book. The date appears at first to have been put down as 8th March, and afterwards a '7' has been written over the figure 8. Marshall cannot recollect how the alteration came to be made. He says that he supposes that he must have been looking over his notes and thought that the 7th was the correct date. The entry in Lambie's book is the 8th March, and it might have been suspicious if Marshall had altered the date in his book from the 7th to the 8th. He could have had no improper object, however, in altering the date from the 8th to the 7th, as appears to have been done.

"The witness Polonis also speaks to having heard George Burrell speak to Lambie about cambering the keels. Polonis was then foreman engineer with the defenders, but he is now in the employment of another firm. He says that he saw Lambie, Stewart, and Burrell in the yard, and that he heard Burrell say, 'What about these keels, Lambie?' and then he heard him say, 'I hope they are cambered the same as Grays.'

"Polonis is unable to fix the date when the incident occurred, but he thinks that it was about the beginning of winter.

"I think that it is impossible to disregard the evidence of Lambie, Marshall, and Polonis, and I saw no reason to believe that they were not speaking the truth. But if the evidence is to be accepted, then it shews that George Burrell was aware that the keels were being cambered, and was anxious that the amount of camber ordered by Stewart should be maintained.

"The pursuers founded upon the fact that there were no written communications in regard to the cambering of the keels. They pointed out that even trivial deviations from the specifications were made the subject of correspondence, and they argued that if so important a matter as cambering the keels had been proposed by Stewart, the defenders would, for their own safety, have obtained confirmation of the instructions in writing. It is to be remembered, however, that the cambering of the keels did not involve any alteration of the specifications or of the contract. It was simply a matter of laying the keels with a curve instead of straight.

"I am of opinion, for the reasons which I have stated, that it is proved (1) that the keels were laid with a camber upon the

instructions of Stewart; (2) that George Burrell knew and approved of the keels being cambered; and (3) that the keels were laid with a camber of 4 inches for the smaller ships and 4½ inches for the larger ships. I am further of opinion that it is not proved that in laying the keel with a camber any alteration was made upon the bulkheads or any other part of the vessel.

“I do not doubt that the object of Stewart and George Burrell in having the keels laid with a camber was to ensure ultimately straight keels, and I have as little doubt that Mr Lithgow, from his experience with sailing ships, anticipated that that would be the result. But the keels having been cambered upon the instructions of the pursuers, I am of opinion that the risk of the keels not becoming straight was with them.

“The result is that the pursuers have, in my judgment, failed to prove their claim of damages on account of the cambered keels.”

The pursuers reclaimed.

It is unnecessary to recapitulate the arguments of parties, which were directed to the merits, and not to the point on which the case is now reported.

At advising—

LORD PRESIDENT—The debate on this reclaiming - note occupied an immense amount of time, and the case is certainly a very complicated and troublesome one. As I have come to the same conclusion as the Lord Ordinary it will not be necessary for me to occupy at all a proportionate amount of your Lordships' time in stating the grounds of my concurrence in the full and careful opinion of the Lord Ordinary.

The first and largest question is as to the cambering of the keels. The complaint is, that whereas the pursuers were entitled to have the ships delivered with straight keels, the keels are not straight but are cambered. On record the pursuers put their right to straight keels in this way—they say, “It was an implied term of the said contract, and in accordance with the universal practice of the shipping and ship-building trades, as was well known to the defenders, that the vessels should all be constructed with straight keels, the straight keel being the only form which is proper and appropriate to vessels of the class specified.” The case on record is therefore not express contract. In argument, indeed, the pursuers founded on the clause in the specification which says that the specification is subject to the plans, which in all cases of divergence shall be held to overrule. The specification says nothing about straightness or camber, but the plans depict straight keels. On this the pursuers have based an argument that, as there was no written agreement to take cambered keels, the plan is conclusive. It may be open to question whether everything in a plan thus referred to is the expression of an agreement, and whether the straightness of the keel in the plan is the expression of a term of the contract. But if in fact the ship was laid with a cambered keel by the

orders of the pursuers, and built and finished with a cambered keel under their eyes and on their express instructions, I do not think that there is any law enabling them to claim damages for what has been done, even assuming that on the contract and without their intervention they might have claimed straight keels. The first and most important question, then, as the Lord Ordinary remarks, is whether the keels were or were not cambered by the instructions of the pursuers. This is a very complicated question, and there are very weighty considerations on the one side and on the other. I do not think that I have omitted any of these in my study of the evidence, and the fact that one of your Lordships takes a different view of this case has necessarily brought specially before my attention the more salient points which militate against the Lord Ordinary's view. But when all is said, I do not think that there is such a balance of real evidence on either side that the question is not ultimately one of the credibility of witnesses. Again, when the testimony is sifted as best we can do it, I own my inability to pronounce that the pursuers ought to prevail. On the whole, if the question were before me at first instance, I think I should hold that the defenders have the best of it. But if the case turns on the credibility of witnesses, the decision of the Lord Ordinary has a very special authority, and his judgment on these sharp issues of fact is for the defenders.

I hold, then, with the Lord Ordinary, that the pursuers, through Stewart, ordered the keels to be laid with a camber of 4 inches for the smaller ships and 4½ inches for the larger ships, and that George Burrell knew and approved of the ships being so cambered. These two propositions are very closely connected, and the second being established, all question disappears as to the authority of Stewart. The case is, then, that the ships were, by the orders of the pursuers, built and finished with a camber, and the fact that they were the property of the pursuers as the building proceeded does not abate the importance of the acceptance of the work, in knowledge by George Burrell of this feature in it. If the ships were built with a camber by order of the pursuers, then their claim of damages cannot be maintained merely because the camber has not come out of the ships, for the responsibility of the defenders ceased so soon as the ships were finished, and the responsibility for the sequel of events must be with the pursuers.

LORD ADAM concurred.

LORD M'LAREN — [After discussing the question of the coefficient of fineness and the extent of the camber, his Lordship proceeded]—On the question whether the pursuers instructed the cambering of the keels, I may say that after very careful consideration of the question in all its bearings I am unable to accept the Lord Ordinary's conclusions. If this were a question of the credibility of witnesses and nothing more, I might have been content to accept the

Lord Ordinary's conclusions without discussion. But the Lord Ordinary, as I think, has treated this question as a question of the weight of evidence, and not merely one of credibility, and I think that all questions as to the effect of evidence, real, oral, and presumptive, are open to consideration by a court of review.

A point to be kept steadily in view is that according to the written contract the pursuers were entitled to straight keels. The specification contains this clause—"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." Now, the plans are produced in evidence, and it is admitted that they show straight keels. Any sensible deflection of the keel is then either a variation of the contract, or a breach of contract according as it was not authorised.

In view of the actual deflection of from 6 to 7 inches, it is not very material to inquire what amount of camber might be treated as negligible, but the evidence is to this effect, that straightness of keel is a point as to which builders and purchasers are extremely particular, an inch of camber in a new ship being considered a defect. So much importance is attached to perfect straightness of keel in view of the frequent dockings which are necessary, that in some of the largest shipbuilding yards of the North of England the device has been adopted of laying the keel with a very small camber, say from 1 inch to 1½ inches, in order that when the ship is floated and the weight comes to act on the central part of the keel the keel may become straight, instead of being slightly depressed, as might happen if no provision were made for this contingency. I refer on this subject to the evidence of Mr Innes of Gray & Company, whose output of shipping is one of the largest in the kingdom, Mr Bone of the Tyne Shipbuilding Company, and the defenders' witnesses Barclay and Auld. As to this practice nothing need be said except that the shipbuilder is responsible for the keel coming straight when the ship is floated. Considering that the ships as specified for Messrs Burrell were to have seven bulkheads and three decks, it may well be doubted whether any provisional cambering was necessary, as their construction would give great rigidity. But then there is evidence the relevancy of which I shall presently consider, to the effect that Mr Stewart, the pursuers' superintendent engineer, had expressed to the defender Mr Lithgow the wish that the ships which he was building for the pursuers should have their keels laid with a camber, according to the practice of Messrs Gray, who were also building four steel ships for the pursuers. There is also evidence that on one occasion Mr George Burrell, a partner of the pursuers' firm, had spoken to the defenders' people about cambering the keels. The effect of this evidence is for consideration.

The Lord Ordinary in his opinion has given a very careful and full epitome of the

proof on this subject, in which the principal statements are quoted *ad longum*. It would be a mere waste of time for me to go over the ground again, and I content myself with a reference to his Lordship's summary of the evidence.

Now, so far as regards the alleged instructions given by Stewart for the cambering of the keels, the defenders' case rests upon the statements of the defender Mr Lithgow and his draughtsman Hutchison, who speak to a conversation in a staircase, in which Stewart is represented as having directed the defender to "give the small boats 4 inches and the big boats a little more." The *locus* of the conversation and its brevity are scarcely befitting an order of such novelty and of such serious consequence to the construction and utility of the ships. No memorandum of the order was made, and the witnesses are unable to fix the time more nearly than that it was shortly before laying the first keel. To their statement Mr Stewart offers an unqualified denial, which, after all, is the only way in which such a story, if untrue, can be met. But even if we take Mr Lithgow's evidence as proof that a conversation did take place about cambering, we may well hesitate to accept from one who is so deeply interested in establishing the alleged authority the precise version of the conversation which he puts forward. Mr Hutchison's evidence is an exact echo of Mr Lithgow's, and rather suggests that his recollection has been aided. One thing is clear on the face of these statements, that what Mr Stewart wanted to be done was to lay the keels of his master's ships as the Grays were laying theirs. Now, we know how the Grays laid their keels, viz., with a set up of 1½ inch, which was to come out in the course of construction. Their partner Mr Jones is perfectly clear on this point, and is unshaken on cross-examination. He is corroborated by his chief draughtsman M'Glashan. Now Stewart's duties as superintending engineer required him to visit Messrs Gray's yard from time to time to inspect the ships they were building for the pursuers, and he must have known quite well that their keels were only cambered or set up to the extent of an inch and a-half. He says so in cross, and from the nature of his duties I should assume that he knew. Why then should he, while professing to found upon Grays' practice, go on to order the new ships to be cambered more than four inches? The thing is intrinsically improbable, not to say incredible. But bearing in mind that this was only a staircase consultation, and discarding the theory of a variation of the building-contract in this haphazard fashion, I can believe that such a consultation did take place, but that it made no impression on Mr Stewart; because I think it amounts to no more than this, that Stewart, wishing to give the defenders the benefit of Grays' experience, suggested some camber in the laying of the keels for the purpose of ensuring eventual straightness, and leaving the effect of what was done to depend upon the contract.

The Lord Ordinary considers that the evidence of the witnesses Staveley Taylor, Lambie, and Arnot, as to the orders subsequently given and the execution of these orders, as tantamount to corroboration of this story. I cannot so regard it. There is no question that the orders were given by the defenders and executed by their workmen for a camber of $4\frac{1}{2}$ inches or perhaps more. The real question which I shall presently consider is, whether these orders were given in fulfilment of a direction from Stewart, or were given by Mr Lithgow for his own purposes, perhaps to enable him to obtain a fictitious load-line, and thus to avoid liability for deficient carrying capacity. Passing over the evidence of Mr Staveley Taylor, the defenders' manager, which only proves that Stewart wished the keels to be cambered to the same extent as Grays' ships (which he puts at $3\frac{1}{2}$ inches), I come to the last witness, Bolton, a foreman shipwright, whose evidence is supposed to bear upon the question of Stewart's instructions. I have read the passage quoted by the Lord Ordinary carefully. If it is anything more than mere gossip, all that it proves about Stewart is that he said, "Bolton, you are letting these keels come down in the centre." This may or may not have been a proper criticism on the part of Mr Stewart, but nobody says that it is a right thing in shipbuilding to allow a keel to come down in the centre. The use of "keels" in the plural by the witness is significant, when it is considered that the inspection related to one vessel only, the "Strathgarry." To conclude this analysis—nobody, until the action was raised, ever heard of such a camber as 4 or $4\frac{1}{2}$ inches being intentionally given to a ship. But if Stewart, against all the probabilities of the case, did give such a perfectly purposeless order, I cannot see how that should affect the pursuers. There is no evidence that Stewart communicated to Messrs Burrell that he had given such an order. I cannot find that either he or Mr George Burrell were asked the question. Stewart was an agent of Messrs Burrell to see to the fulfilment of their contract; he had no authority to alter the contract. We see from the correspondence that the smallest variations of the contract, even such as involved a few shillings of extra expenditure, were made in writing, and I cannot admit that the pursuers could be made responsible for a fault which has cost many thousand pounds to rectify upon such evidence as I have examined. The evidence affecting Mr George Burrell personally is to this effect. Lambie, the defenders' foreman shipwright, produced a note-book, as to which the Lord Ordinary observes that the entries are somewhat peculiar, and in it he has written under date 8th March 1894, "Mr Burrell had a talk with me about camber of keels. He says Grays of Hartlepool have laid their keels with three inches of camber, and would like ours to have at least that," and so on. Lambie depones to the correctness of his note. Mr George Burrell gives

a directly opposite version of the conversation. Two workmen, bystanders, speak to having overheard some conversation between Lambie and Burrell about camber. Now, it seldom happens that bystanders rightly understand the import of what they overhear. But supposing they are taken as corroborating Lambie, on a fair construction of the conversation it only amounts to this, that Mr George Burrell approved of Grays' method of laying the keels with a small camber in order to counteract the tendency to subsidence in the middle part of the ship. This is a very different thing from giving the ships a permanent camber of from 6 to 7 inches, as was done. The conversation was subsequent to the laying of all the keels, and is not referred to in the correspondence.

I pass to the consideration of the explanation suggested by pursuers' counsel of the cambering of the keels of the four ships. It was contended—and I think with much force—that the defenders' object or motive in cambering the keels of the ships was to obtain a fictitious load-line, which should give an apparent carrying capacity conformable to contract in excess of the true carrying capacity. According to mercantile usage, following upon the Act of Parliament which prescribes a load-line, denoting the proposed immersion of the ship when loaded, carrying capacity is now understood to mean the tonnage which a ship will carry when immersed to the depth of a load-line approved by one of the underwriters' associations. Of these I understand there are three where load-lines are recognised by the shipping interests—Lloyds', the British Corporation, and the Bureau Veritas. When a ship is completed, or is so far advanced that its lines may be held to be determined, a displacement scale is calculated by the draughtsman, giving for each foot of displacement the load which the ship will carry. When the ship is launched its light draught is taken from the figures marked on the outside. This determines the weight of the ship when unloaded, and then the displacement scale gives the load which the vessel will carry for each foot of immersion in excess of the light draught. The load-line, of course, is fixed with reference to the stability and safety of the ship when at sea. The underwriters' surveyors fix the proper amount of freeboard according to rules on which they are agreed, and which depend, as I understand, on a combined consideration of the volume or displacement of the ship and the moulded depth, *i.e.*, the depth from the dock to the top of the keel taken at the midship section. If the ship is of the normal construction, built on a straight keel, the sum of the freeboard and the draught when loaded will be equal to the depth, and in fixing the freeboard on data which include the moulded depth it is assumed that the moulded depth, or depth amidships, will also be the depth for all sections of the ship. But if the ship is cambered to the extent of 6 inches, the immersion or draught of water at stem and stern will be 6 inches in excess of that of the midship section. A load-line assigned

Lord Ordinary's conclusions without discussion. But the Lord Ordinary, as I think, has treated this question as a question of the weight of evidence, and not merely one of credibility, and I think that all questions as to the effect of evidence, real, oral, and presumptive, are open to consideration by a court of review.

A point to be kept steadily in view is that according to the written contract the pursuers were entitled to straight keels. The specification contains this clause—"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." Now, the plans are produced in evidence, and it is admitted that they show straight keels. Any sensible deflection of the keel is then either a variation of the contract, or a breach of contract according as it was not authorised.

In view of the actual deflection of from 6 to 7 inches, it is not very material to inquire what amount of camber might be treated as negligible, but the evidence is to this effect, that straightness of keel is a point as to which builders and purchasers are extremely particular, an inch of camber in a new ship being considered a defect. So much importance is attached to perfect straightness of keel in view of the frequent dockings which are necessary, that in some of the largest shipbuilding yards of the North of England the device has been adopted of laying the keel with a very small camber, say from 1 inch to 1½ inches, in order that when the ship is floated and the weight comes to act on the central part of the keel the keel may become straight, instead of being slightly depressed, as might happen if no provision were made for this contingency. I refer on this subject to the evidence of Mr Innes of Gray & Company, whose output of shipping is one of the largest in the kingdom, Mr Bone of the Tyne Shipbuilding Company, and the defenders' witnesses Barclay and Auld. As to this practice nothing need be said except that the shipbuilder is responsible for the keel coming straight when the ship is floated. Considering that the ships as specified for Messrs Burrell were to have seven bulkheads and three decks, it may well be doubted whether any provisional cambering was necessary, as their construction would give great rigidity. But then there is evidence the relevancy of which I shall presently consider, to the effect that Mr Stewart, the pursuers' superintendent engineer, had expressed to the defender Mr Lithgow the wish that the ships which he was building for the pursuers should have their keels laid with a camber, according to the practice of Messrs Gray, who were also building four steel ships for the pursuers. There is also evidence that on one occasion Mr George Burrell, a partner of the pursuers' firm, had spoken to the defenders' people about cambering the keels. The effect of this evidence is for consideration.

The Lord Ordinary in his opinion has given a very careful and full epitome of the

proof on this subject, in which the principal statements are quoted *ad longum*. It would be a mere waste of time for me to go over the ground again, and I content myself with a reference to his Lordship's summary of the evidence.

Now, so far as regards the alleged instructions given by Stewart for the cambering of the keels, the defenders' case rests upon the statements of the defender Mr Lithgow and his draughtsman Hutchison, who speak to a conversation in a staircase, in which Stewart is represented as having directed the defender to "give the small boats 4 inches and the big boats a little more." The *locus* of the conversation and its brevity are scarcely befitting an order of such novelty and of such serious consequence to the construction and utility of the ships. No memorandum of the order was made, and the witnesses are unable to fix the time more nearly than that it was shortly before laying the first keel. To their statement Mr Stewart offers an unqualified denial, which, after all, is the only way in which such a story, if untrue, can be met. But even if we take Mr Lithgow's evidence as proof that a conversation did take place about cambering, we may well hesitate to accept from one who is so deeply interested in establishing the alleged authority the precise version of the conversation which he puts forward. Mr Hutchison's evidence is an exact echo of Mr Lithgow's, and rather suggests that his recollection has been aided. One thing is clear on the face of these statements, that what Mr Stewart wanted to be done was to lay the keels of his master's ships as the Grays were laying theirs. Now, we know how the Grays laid their keels, viz., with a set up of 1½ inch, which was to come out in the course of construction. Their partner Mr Jones is perfectly clear on this point, and is unshaken on cross-examination. He is corroborated by his chief draughtsman M'Glashan. Now Stewart's duties as superintending engineer required him to visit Messrs Gray's yard from time to time to inspect the ships they were building for the pursuers, and he must have known quite well that their keels were only cambered or set up to the extent of an inch and a-half. He says so in cross, and from the nature of his duties I should assume that he knew. Why then should he, while professing to found upon Grays' practice, go on to order the new ships to be cambered more than four inches? The thing is intrinsically improbable, not to say incredible. But bearing in mind that this was only a staircase consultation, and discarding the theory of a variation of the building-contract in this haphazard fashion, I can believe that such a consultation did take place, but that it made no impression on Mr Stewart; because I think it amounts to no more than this, that Stewart, wishing to give the defenders the benefit of Grays' experience, suggested some camber in the laying of the keels for the purpose of ensuring eventual straightness, and leaving the effect of what was done to depend upon the contract.

The Lord Ordinary considers that the evidence of the witnesses Staveley Taylor, Lambie, and Arnot, as to the orders subsequently given and the execution of these orders, as tantamount to corroboration of this story. I cannot so regard it. There is no question that the orders were given by the defenders and executed by their workmen for a camber of $4\frac{1}{2}$ inches or perhaps more. The real question which I shall presently consider is, whether these orders were given in fulfilment of a direction from Stewart, or were given by Mr Lithgow for his own purposes, perhaps to enable him to obtain a fictitious load-line, and thus to avoid liability for deficient carrying capacity. Passing over the evidence of Mr Staveley Taylor, the defenders' manager, which only proves that Stewart wished the keels to be cambered to the same extent as Grays' ships (which he puts at $3\frac{1}{2}$ inches), I come to the last witness, Bolton, a foreman shipwright, whose evidence is supposed to bear upon the question of Stewart's instructions. I have read the passage quoted by the Lord Ordinary carefully. If it is anything more than mere gossip, all that it proves about Stewart is that he said, "Bolton, you are letting these keels come down in the centre." This may or may not have been a proper criticism on the part of Mr Stewart, but nobody says that it is a right thing in shipbuilding to allow a keel to come down in the centre. The use of "keels" in the plural by the witness is significant, when it is considered that the inspection related to one vessel only, the "Strathgarry." To conclude this analysis—nobody, until the action was raised, ever heard of such a camber as 4 or $4\frac{1}{2}$ inches being intentionally given to a ship. But if Stewart, against all the probabilities of the case, did give such a perfectly purposeless order, I cannot see how that should affect the pursuers. There is no evidence that Stewart communicated to Messrs Burrell that he had given such an order. I cannot find that either he or Mr George Burrell were asked the question. Stewart was an agent of Messrs Burrell to see to the fulfilment of their contract; he had no authority to alter the contract. We see from the correspondence that the smallest variations of the contract, even such as involved a few shillings of extra expenditure, were made in writing, and I cannot admit that the pursuers could be made responsible for a fault which has cost many thousand pounds to rectify upon such evidence as I have examined. The evidence affecting Mr George Burrell personally is to this effect. Lambie, the defenders' foreman shipwright, produced a note-book, as to which the Lord Ordinary observes that the entries are somewhat peculiar, and in it he has written under date 8th March 1894, "Mr Burrell had a talk with me about camber of keels. He says Grays of Hartlepool have laid their keels with three inches of camber, and would like ours to have at least that," and so on. Lambie depones to the correctness of his note. Mr George Burrell gives

a directly opposite version of the conversation. Two workmen, bystanders, speak to having overheard some conversation between Lambie and Burrell about camber. Now, it seldom happens that bystanders rightly understand the import of what they overhear. But supposing they are taken as corroborating Lambie, on a fair construction of the conversation it only amounts to this, that Mr George Burrell approved of Grays' method of laying the keels with a small camber in order to counteract the tendency to subsidence in the middle part of the ship. This is a very different thing from giving the ships a permanent camber of from 6 to 7 inches, as was done. The conversation was subsequent to the laying of all the keels, and is not referred to in the correspondence.

I pass to the consideration of the explanation suggested by pursuers' counsel of the cambering of the keels of the four ships. It was contended—and I think with much force—that the defenders' object or motive in cambering the keels of the ships was to obtain a fictitious load-line, which should give an apparent carrying capacity conformable to contract in excess of the true carrying capacity. According to mercantile usage, following upon the Act of Parliament which prescribes a load-line, denoting the proposed immersion of the ship when loaded, carrying capacity is now understood to mean the tonnage which a ship will carry when immersed to the depth of a load-line approved by one of the underwriters' associations. Of these I understand there are three where load-lines are recognised by the shipping interests—Lloyds', the British Corporation, and the Bureau Veritas. When a ship is completed, or is so far advanced that its lines may be held to be determined, a displacement scale is calculated by the draughtsman, giving for each foot of displacement the load which the ship will carry. When the ship is launched its light draught is taken from the figures marked on the outside. This determines the weight of the ship when unloaded, and then the displacement scale gives the load which the vessel will carry for each foot of immersion in excess of the light draught. The load-line, of course, is fixed with reference to the stability and safety of the ship when at sea. The underwriters' surveyors fix the proper amount of freeboard according to rules on which they are agreed, and which depend, as I understand, on a combined consideration of the volume or displacement of the ship and the moulded depth, *i.e.*, the depth from the dock to the top of the keel taken at the midship section. If the ship is of the normal construction, built on a straight keel, the sum of the freeboard and the draught when loaded will be equal to the depth, and in fixing the freeboard on data which include the moulded depth it is assumed that the moulded depth, or depth amidships, will also be the depth for all sections of the ship. But if the ship is cambered to the extent of 6 inches, the immersion or draught of water at stem and stern will be 6 inches in excess of that of the midship section. A load-line assigned

in reliance on the moulded depth taken at midships will not then be a just load-line, because it will not represent the true ratio of freeboard draught of water, but it may answer the proposal of the person applying for it, because it will permit the immersion of the ship to a greater depth than is consistent with the interests of underwriters, and will give the desired carrying capacity. Now, the construction of these ships was supervised, as is customary, by the surveyor of one of the underwriters' associations, viz., Lloyds, for the purpose of enabling them to certify the insurable class of the ships, which, according to the contract, was to be 100 A1. Lloyds' surveyor could not fail to know these the ships was cambered. If he had been asked to fix the load-line he would or might have taken account of the camber, and if he fixed it fairly, instead of proceeding on the moulded depth of the mid-section, he would most probably have taken the mean of the moulded depth amidships and the depth at stem or stern as his datum point, and would thus have brought out a lower load-line and a lesser carrying capacity. But the defenders did not apply to Lloyds' surveyor for a load-line. They entered into correspondence with Mr Dutton, the surveyor for the British Corporation, who knew nothing of the camber, and the motive of the application sufficiently appears from the following letter dated 20th February 1894—"Thanks for yours of yesterday. With the large steamers we must have 6 ft. 8 in. if at all possible, to keep our carrying" [capacity] "safe, and from our figures I think this can be got. If you think, therefore, 6 ft. 8 in., and 6 ft. 0 in. or 6 ft. 0½ in. can be allowed from your calculations, we will have your freeboard, although it will cost us nearly £40. I am, &c., W. T. LITHGOW." Mr Lithgow admits in his evidence that he gained an inch of freeboard by taking it from the British Corporation. Now, I am not concerned to express an opinion as to the commercial morality of this proceeding. I have some sympathy with the defenders in their difficulty, because they were at the beginning only allowed eight days to make their calculations and give an estimate, and it is clear on the evidence of their leading scientific witness, Mr Robertson, that their draughtsman had made a mistake of something like 250 tons in his estimate of the carrying capacity of the larger ships. The defenders may have thought that the load-line which they asked from the British Corporation through Mr Dutton was practically safe, and I assume that it is so, because no complaint is made, and because it is not said that the Underwriters' Association propose to cancel the load-line. But I say that they got this load-line by applying to Mr Dutton, who did not know of the camber, and I do not think they would have got it from Lloyds' surveyor, who knew about the camber, and this, to my mind, supplies a motive for the cambering of the keels, which but for this circumstance might well be regarded as wholly inexplicable.

I may here notice parenthetically that according to the pursuers' argument the defenders took advantage of the camber to directly increase the carrying capacity, and in this way—When a ship is cambered only to the small extent that is judged necessary for obtaining a straight keel, all the sections of the ship, except the stern and the stern-post, are displaced vertically, but there is no variation of the form of any section. The pursuers, however, maintain that in the case of their ships the sections as built are different in form from the sections as drawn, that the sectional drawings were elongated so as to give carrying capacity and at the same time to avoid the somewhat exaggerated shear which would result from a deformation of six or seven inches extending from the deck to the keel. In support of this theory counsel for the pursuers called attention to the fact that the defenders' draughtsman, before returning the drawings of sections, cut away a portion at the foot of the paper and continued the drawings on new paper. It is unfortunate that this was done, as it lays Mr Hutchison open to the suspicion of having manipulated the drawings for the purpose of concealing alterations that had been made upon them consequent on the camber. But Mr Hutchison denies the charge, and there is no direct proof to set against his denial.

In any case I could not treat this as a separate case of breach of contract, or as giving rise to a separate claim of damages. The pursuers were quite willing, as the correspondence shows, that the dimensions of the ships should be increased in a manner consistent with symmetry of form. A mere variation of external form for the purpose of gaining carrying capacity would not necessarily be a breach of contract, but might become so if it affected the coefficient of fineness or other condition of the contract. For the purposes of the case it may suffice to say that the fault, if fault there is, consisted in cambering the keels, and not in taking advantage of the camber to increase the carrying capacity. Passing from this point to complete my review of the evidence and argument on the question of camber, let me say that if I am wrong in ascribing to Mr Lithgow as a motive the wish to camber the keels for the purpose of obtaining a favourable load-line, I think I cannot be in error in saying that the pursuers at least had no motive for wishing that the keels should be cambered. That they should ask for something which was not only of no value to them, but was extremely detrimental to the efficiency of the ship, is a supposition so contrary to all experience that I could not, unless on the clearest evidence, treat it as admissible. There is, moreover, an element of real evidence which, as I think, is conclusive against the theory of an authorised camber. The pursuers did not know of the existence of the camber when they sent the first ship, the "Strathtay," to sea. Every witness in the case agrees that when a ship is known to be cambered, provision is made in advance for docking

the ship on blocks similarly cambered; and it is explained that in such cases the master has always a plan of the keel with him, from which the dock-superintendent can make up the set of blocks to the proper curvature instead of having to find it for himself by sending down divers.

Now, when the "Strathtay" came to Sydney on her first voyage she was treated just like any ship having a straight keel. She was docked upon a level line of blocks, and it was a complete surprise to all concerned when the existence of the camber was made known by the phenomenal buckling of her decks. Can it be supposed that Messrs Burrell would have exposed their ship to the risk of irremediable straining had they known of the camber? The contrary is proved, because, having been informed of what happened to the "Strathtay," and on the mere supposition that the keel of the "Strathairly" might prove to be similarly affected, they gave instructions to the master not to allow the "Strathairly" to be brought to rest in the dock at Sydney until her keel had been tested by divers, and the blocks suitably adjusted. On learning that the "Strathairly" also was cambered, the pursuers had the two larger vessels surveyed before they were allowed to leave the Clyde, and measures were then taken to have the fault rectified. This line of conduct in my opinion is inconsistent with the theory of antecedent knowledge and approval of the camber on the part of the pursuers.

LORD KINNEAR—I agree with the Lord Ordinary and with your Lordship in the chair. I only desire to add that in regard to the pursuers' claim for damages in respect of the cambered keels, I think the most troublesome point we have had to consider is whether the keels were cambered upon the instructions of the pursuers themselves, given through the inspector Mr Stewart and through Mr George Burrell, and that appears to me to depend upon the determination of a question of conflicting evidence. I have considered the evidence with great anxiety, and while I concur in the views expressed by the Lord Ordinary in so far as I am in a position to form an opinion from a study of the printed evidence, I fully appreciate the weight of the considerations on the other side which have been explained by Lord McLaren, and I come finally to the conclusion which I have stated, mainly because of the respect which I think is due on a question of the kind to the judgment of the Lord Ordinary. The principle upon which a court of appeal ought to consider a question of this kind has been very clearly and authoritatively stated by the Lord Chancellor in the recent case of *Taylor v. Burger* (H.L., February 15, 1898, 35 S.L.R. 398, 400). His Lordship points out that it is one thing to have the printed evidence before you, and another thing to have what he calls the life and spirit of the evidence which the person has who tries the case and sees and hears the witnessess, and his Lordship goes on to say that where the question turns upon the

credit to be given to one or other of two sets of witnesses it is improper for a court of appeal to disregard the opinion of the Judge who tried the case. Now, it appears to me that the question whether the instructions alleged were or were not given by the pursuers is just such a question. It must undoubtedly depend upon the credit which any judge who heard the evidence gave to one set of witnesses against the other, and he makes that very clear in his opinion. His Lordship points out with regret that the witnesses contradicted one another on points on which one or other must be giving evidence which he knew to be false, and then in the result he accepts the testimony of the one and rejects the testimony of another set of witnesses. I do not feel myself in a position to disregard that decision of the learned Judge who saw and heard the witnesses, even if upon consideration of the conflicting points of testimony I had come to the conclusion that the pursuers' evidence ought to outweigh the evidence of the other side. I think it material to observe upon this question that the defenders' case is not that there was no variation of the contract between themselves and the pursuers, but that the instructions in question were given for the purpose of pointing out the method of performing the contract. It was not intended, according to the defenders' case, that the ships should be delivered with cambered keels when they were fully loaded, but that they should be built with cambered keels in order that when the ship was afloat and fully loaded the camber might disappear, and that she might be a ship with a straight keel. Now, I appreciate the weight of the point which arises, that even upon that statement of the case when the ships are ultimately examined they are found to have a camber considerably greater than that said to have been instructed; but then in this particular case the cambering was really an experimental proceeding. The parties could not be certain before then how the ships would ultimately turn out, and whether the camber would completely disappear or not when the ship was loaded. There is evidence, I think, to a certain extent quite satisfactory, that whether the camber should disappear in the course of the voyage with a full cargo or whether it should increase, must depend upon the distribution of the weights, and that in the case of the ships in question the arrangement of the water ballast might reasonably account for the increased camber. I do not say upon the evidence that it is clearly proved that the increased camber is to be accounted for in this way, but I think there is quite enough to displace the point in favour of the pursuers upon the increased camber as found upon examination and what it is said the pursuers themselves had instructed. It does not follow that the ships were built with any greater amount of camber than 4 and 4½ inches because of their being found now to have a camber considerably greater; that may be accounted for in many ways.

Upon the whole therefore—upon the grounds I have stated and your Lordship has stated—in concurrence with the Lord Ordinary, I have come to the conclusion that the keels were laid with a camber upon the instructions of Mr Stewart, and that the pursuer Mr George Burrell knew and approved of its being done, and that the pursuers accepted the ships in full knowledge that they had been built in this way.

The Court adhered.

Counsel for the Pursuers—Sol. Gen. Dickson, Q.C.—Salvesen. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders—Ure, Q.C.—Younger. Agents—J & J Ross, W.S.

Thursday, December 22.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MACDONALD v. ANDREW WYLLIE & SON.

Reparation—Master and Servant—Defective Plant—Liability of Master for Defect in Plant Supplied by Competent Independent Contractor.

A firm of builders and contractors having a contract to take down certain high walls, contracted with a firm of competent joiners for the erection of a scaffolding. The scaffold so erected, after it had been taken over by the builders, collapsed owing to a defect which might have been discovered by a skilled person inspecting it. A workman who was injured by the fall of the scaffold brought an action of damages for the injuries sustained by him against the builders, his employers. At the trial of the cause by jury the Lord Justice-Clerk directed the jury as follows:—“That if the jury are satisfied that the defender, not having the knowledge and skill to erect the scaffolding in question, selected a tradesman having skill and experience of such work, and contracted with him to provide such a scaffold, he would not be liable as for fault if the scaffolding fell in consequence of its being erected in an unskilful manner through the fault of the skilled person who contracted to erect it.” *Held*, upon a bill of exceptions, *inter alia*, to this direction, that it was erroneous in law. Exception allowed and new trial granted.

Expenses—Jury Trial—Bill of Exceptions—New Trial—Expenses of First Trial and of Bill of Exceptions.

Held (diss. Lord Young) that the general rule now established, to the effect that when a new trial is granted, apart from special circumstances, the expenses of the former trial should be reserved, applies to cases upon bills

of exceptions as well as to cases upon motion for a new trial.

Gibson v. Nimmo & Company, March 15, 1895, 22 R. 491, distinguished and commented on.

This was an action brought in the Sheriff Court at Ayr by John Macdonald, a labourer, against Andrew Wyllie & Son, builders and contractors in Ayr, and George Wyllie, the only known partner of that firm, in which the pursuer claimed damages, alternatively at common law or under the Employers Liability Act 1880, for personal injuries sustained by him while working in the defenders' employment, through the collapse of a scaffold.

In the month of December 1897 the defenders had the contract for taking down the walls of Ayr Town Hall, which had been destroyed by fire. The walls were in some places 60 feet high, and scaffolding had to be erected to the wall head to enable the walls to be taken down.

The defenders maintained that even if the scaffold was in fact defective they were not responsible for it. They averred that the erection of it was proper joiners' work, and not such work as is usually executed by builders; that they had accordingly employed a firm of joiners in good repute, who had had large experience in the erection of high scaffolds, and that they had entrusted the erection of the scaffold required for the performance of this condition entirely to this firm of joiners, who had duly erected it, and had represented to them that it was safe and sufficient.

This scaffold so erected gave way while the pursuer was working upon it in obedience to the defenders' orders as one of their workmen, and he sustained certain injuries in consequence of its collapse.

The defenders originally denied that the scaffold was defective.

A proof was allowed, and the pursuer appealed for jury trial. The following issue was adjusted and approved for the trial of the cause:—“Whether, on or about the 14th day of December 1897, and at or near the Town Hall in Ayr, the pursuer, while in the employment of the defenders, was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer.

“Damages laid at £1000, or alternatively, under the Employers Liability Act, at £195.”

It was ultimately admitted that the scaffold was defective and dangerous, and that the defects were not latent, but would have been apparent to the inspection of any skilled person.

The case was tried before the Lord Justice-Clerk and a jury on 17th October 1898. In his charge the presiding Judge directed the jury as follows:—“That if the jury are satisfied that the defender, not having the knowledge and skill to erect the scaffolding in question, selected a tradesman having skill and experience of such work, and contracted with him to provide such a scaffold, he would not be liable as for fault if the scaffolding fell in consequence of its being erected in an unskilful