*Wednesday, February 4.**

SECOND DIVISION.

[Sheriff of Lanarkshire.

SPENCER & COMPANY *v.* DOBIE & COMPANY.

Sale—Actio quanti minoris—*Breach of Contract in Building a Ship—Remedy open to Buyer.*

A vessel having been built to order, the purchasers, who had paid three instalments of the price, intimated by letter on the day previous to payment of the last instalment a reservation of their claim for damages in respect of an anticipated breach of contract due to deficient carrying capacity. They paid the instalment, accepting a clear receipt, took delivery, and used the vessel. *Held* in the circumstances as proved, and notwithstanding a plea by the defenders to the effect that the pursuers were barred by their own actings in the matter, that the latter were entitled while retaining the vessel to sue an action of damages in respect of a disconformity to contract which was only discovered subsequently to the delivery of the vessel.

Opinion (per Lord Ormidale) that even without such reservation, the fault being latent, the buyers would not have been barred, by taking delivery, from a claim of damages.

Sale—Breach of Shipbuilding Contract—Carrying Capacity Disconform to Contract.

Circumstances in which damages were awarded to the owners of a vessel, and against the builders, in respect of a deficiency in the carrying capacity which had been stipulated for in the specification, and *data* upon which the Court arrived at an estimate of the loss.

Shipping Law—Executory Contract—Purchase of a Ship.

In a shipbuilding contract payment by instalments passes the property in the vessel as at the period of payment of each instalment, and the buyer is not bound in case of disconformity to contract to reject his own property, but is entitled to retain the vessel and claim damages.

Dobie & Co., the defenders in this action, were shipbuilders in Govan, and James Spencer & Co., the pursuers, were shipowners there. On 18th August 1876 the defenders contracted with James Spencer & Co. to build for them an "iron sailing barque, of dimensions $196 \times 32\frac{1}{2} \times 19\frac{1}{2}$, all in accordance with the specification" signed by the parties of that date, for £14, 10s. per register ton, "payable in four equal cash instalments" at specified stages—the last on completion and delivery, in exchange for the builders' certificate—the vessel to be delivered in the harbour of Glasgow in March 1877. The specification contained, *inter alia*, the following provisions—"Depth of hold, 19 ft. 6 in. . . . . To be not less than tons net register, and guaranteed to carry not less than register tonnage, and half of dead weight on 17 feet 3 inches draught of water. Model, midship section, and plans to be submitted for owners' approval before commencing. . . . The whole of the work to be to the satisfaction of the owners, or any person or persons whom the owners may appoint to superintend during the building. . . . . No extras to be charged nor alterations made without first having written authority from the owners."

After the vessel, which was called the "Firth of Tay," had been built, and all the instalments had been paid and delivery given, Spencer & Co. raised this action in the Sheriff Court at Glasgow, concluding for £1700 of damages for breach of contract. They averred that the defenders had failed to make the vessel of the dimensions provided for, as her hold had only been made of the depth of 19 feet 3 inches in place of 19 feet 6 inches, and that they had failed to construct her so as to carry . . . register tonnage and half of dead weight. She ought to have carried 1239, and did not carry more than 1085 tons.

When delivery was tendered in March 1877 the pursuers wrote the following letter to the defenders—"We have your letter intimating that you propose to settle to-morrow at 11·30 o'clock, and we will then be ready for you. We think it right, however, to intimate that we will only settle under reservation of our claims for breach of contract between us, as we have now reason to believe that the ship will not have the carrying capacity guaranteed. The payment we make to-morrow you will therefore hold as paid under this reservation. We are weighing the cargo that is being put into the vessel. As we already mentioned to you (verbally), if you wish to do so, you can attend for your own interest." The defenders submitted that, in letters which were produced, they declined to admit of any reservation, and there was none in the receipt which they granted for the last instalment. These letters and the other documentary evidence are sufficiently referred to below.

The defenders in answer to the pursuers' statements averred that the pursuers had had the model altered, and had adopted a finer one than that originally submitted, and that the ship had been built under the immediate superintendence of the pursuers, who had personally altered the lines of the vessel.

The defenders pleaded, *inter alia*—"(3) The pursuers are barred from claiming any damages by their having got the defenders to build the ship according to their own views, and by their acquiescence in her construction, and their accepting delivery of her without reservation. (4) The pursuers are also barred by *mora* from claiming damages."

On 26th July 1878 the Sheriff-Substitute (Guthrie) after proof, the purport of which sufficiently appears from the note to his interlocutor and from the opinions of the Court, pronounced this interlocutor—. . . "Finds that the defenders have not proved that the condition as to the carrying capacity of the vessel was altered or departed from by the pursuers: Finds that as the building of the barque proceeded, three of the stipulated instalments, amounting to £9000, were duly paid, and that the last instalment of £2973 was paid and the builders' certificate delivered to the pursuers, with the full possession of the vessel, on the 30th of March 1877: Finds that at that time the pursuers, believing that the vessel would not have the required carrying

* Decided 17th December 1879.

capacity, gave notice that they paid the last instalment only under reservation of their right to claim damages for the deficiency: Finds that the vessel was deficient in the carrying power contracted for to the extent of 142 tons: Finds that by reason of the constructive delivery and appropriation of the vessel, by due payment of the instalments of the price, and of the said notice, the pursuers are entitled, notwithstanding their acceptance of the vessel, to damages for this deficiency, and assesses the damages at £1353, 6s. 8d., for which sum decerns against the defenders in favour of pursuers." . . . .

He added this note—

"*Note.*— . . . . . The vessel now called the 'Firth of Tay' was built and paid for and delivered, and now the purchasers claim damages for certain breaches of contract. In particular, they aver that the carrying capacity bears much less than the stipulated proportion to the register tonnage, and that the depth of hold, instead of being 19½ feet, is only 19 feet 3 inches. I do not understand that the general result of the proof with respect to these two matters is disputed by the defenders, though questions of some importance arise as to the extent of the breach of contract, and the consequent amount of damages in the event of the pursuers succeeding in establishing their claim.

"That claim is disputed by the defenders mainly on two grounds.

"I. It is said, first, that having paid for and taken delivery of the vessel, the pursuers are barred from asking damages for breach of contract; and that to sustain their claim in such circumstances would be to admit of an *actio quanti minoris*, which the law of Scotland in the ordinary case rejects. To this two answers are given for the pursuers—(1) that there was an express reservation of all claims of damages when the pursuers paid the price and took delivery of the ship; and (2) that, in any view, the rule which excludes a claim of damages for a defect in the subject of a sale after payment and delivery, does not apply to the case of a contract for building a ship where the price is paid by instalments.

"(1) In this case it appears that after the vessel was launched, but before final settlement and delivery, the pursuers began to doubt whether she would have the stipulated carrying capacity, and they accordingly, immediately after receiving the defenders' account and request for settlement of the last instalment, wrote the letter of 29th March 1877, in which, while stating their readiness to pay, they intimate—'We will only settle under reservation of our claims for breach of contract between us, as we have now reason to believe that the ship will not have the carrying capacity guaranteed. The payment we make to-morrow you will therefore hold as paid under this reservation.' [*The Sheriff then proceeded to examine the evidence which had been led, so far as bearing upon the question of the defenders' assent.*] I think . . . . . that there was no express assent by the defenders to the reservation made by the pursuers of their claim of damages.

"This case therefore presents a different state of facts with regard to the point now under consideration from the case of *Walker, Henderson & Co.* v. *J. & P. Hutchison* (not reported), Lord Curriehill's judgment in which was cited at the debate. I have not before me the opinions of the First Division, but I understand that on 19th July 1878 the Lord Ordinary's judgment was on the principal points affirmed. In that case the shipbuilders, who were suing for the balance of the price of the ship, which had been delivered after a partial payment of the last instalment, admitted that it was quite understood when the ship was delivered over that a claim of damages was to be made. There was thus a distinct agreement, or at least understanding, that the defenders, notwithstanding their acceptance and retention of the vessel, might insist in their claims of damage for breach of contract. Here, on the other hand, there is only a protest by the buyer, sufficiently emphatic, but not assented to by the seller, that he was taking and paying for the vessel without foregoing his right to object to her want of conformity to the contract. It is only by reason of a personal exception, arising from the defenders taking the money and parting with the vessel in the face of such an intimation, that the pursuers' contention can receive effect. And the question arises, whether the defenders were entitled to rely, notwithstanding the pursuers' reservation, on the general rule of law, that one who takes possession of an article he has bought cannot claim an abatement of the price, or were bound to refuse to take payment and deliver the vessel upon the footing proposed by the pursuer. There might be some difficulty in holding that an *ex parte* reservation of this kind could receive effect in an ordinary sale of a specific existing thing.

"(2) But Messrs Spencer & Co.'s letter of 29th March is, in my opinion, of some importance in defining their position in the actual case, in which we have not to deal with an ordinary sale of merchandise, but with an executory contract of a peculiar kind. It is settled in the law, both of England and Scotland, that when the price of a ship under a building contract is to be paid for by instalments as the work progresses, the property in the ship passes to the buyer by a process of successive appropriation as it is built and paid for.—*Simson* v. *Duncanson*, 1786, Mor. 14,204, 1 Bell's Comm. 177 (189 of M'Laren's ed.) It may be that the legal principle on which this rule is founded is different in this country and in England, but the result is in the main the same, and the foundation in reason and equity is the same. The common sense of the rule is, that the buyer may have security for the money he has paid. As it is said by the Court in *Clark* v. *Spence*—4 A. and E. 448—that in such cases as this, 'provision for the payment, regulated by particular stages of the work, is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that on payment of the first instalment the general property in so much of the vessel as is then constructed shall vest in the purchaser.' So Lord Neaves, with his usual felicity, thus forcibly explains the rule in *Orr's Trustee* v. *Tullis*, July 2, 1870, 8 Macph. 936 (p. 950)—'It would be contrary to common sense, and shocking to common justice, to hold that because the shipbuilder furnishes the materials and builds in his own yard, the property does not pass till the ship is launched. The law justly and reasonably holds the case to be undistinguishable from the other case, where the party who wants the ship buys or supplies

the materials himself and has them wrought up in the builder's yards. This, in fact, is held to be the true *res gesta*—the shipbuilder, after having been paid for his materials, being truly not an owner of the vessel, but a *locator operarum* on a ship belonging to the man for whom it is destined.' If this be a correct statement of the law—and it is conformable to the authorities and practice—see, *e.g.*, Lord Ardmillan in *Wyllie & Lochhead* v. *Mitchell*, Feb. 17, 1870, 8 Macph. 552, 560, who holds that there is a specific appropriation and constructive delivery of the ship from the laying of the keel, provided the first instalment be then paid—it is obviously unjust and unreasonable to hold that the shipowner under such a shipbuilding contract which has not been duly performed by the builder, has no remedy at the end of the day but to reject the ship and rely on the sufficiency of the shipbuilders, or on diligence against the ship, to recoup the loss he may suffer. In the present case Messrs Spencer & Co. had paid before the breach was apparent three instalments of £9000 out of the whole price, which was £11,973; and in the receipts granted by the defenders for each instalment it was formally declared that the ship was their property to the extent of the instalment paid. I think, therefore, that it would be a perversion, and not a fair application of a rule of law, otherwise wholesome enough, to hold that the pursuers, having bought and paid for three-fourths of the ship, and being vested with the property in the ship, were bound, on discovering her disconformity to contract, to leave her in the hands of the shipbuilder, and to seek from him repayment of the money expended. The defenders argue that they are not to be deprived of the right of disposing of their ship to the best advantage, and that therefore the buyer is shut up to definite rejection or acceptance; but the ship, according to law, is not theirs, but is the pursuers' property already, subject to payment of the last instalment. I think, therefore, that the rule of law on which the defenders found does not apply to a ship the property of which had already vested in the pursuers, and that the letter of March 29 was a proper and sufficient reservation to protect the pursuers from the inference that might possibly have been drawn from their silence in paying the balance of the price.

"I am aware that Lord Shand in an unreported case—*Clark, &c.* v. *Rait & Lindsay*, 29th February 1876—expressed an opinion adverse to the view which I have taken. I venture to think, however, that Lord Shand's opinion might have been different had there been a reservation by the owner in taking delivery such as there is here, and there was not in that case; or even if the point had been fully argued before him. The view I have taken is supported by the case of *Sutherland* v. *Montrose Shipbuilding Company*, February 3, 1860, 22 D. 665, though that case is not precisely identical.

"II. The second ground on which the defenders dispute this claim for damages is that the alleged deficiency in carrying capacity was due to alterations in the plan and models made by the pursuers themselves. It may be proper, in dealing with that part of the cause which involves the meaning and effect of the contract, to state that there was some argument as to the construction of the clause of the specification on which the action is rested, and which I quoted at the outset. The defenders laid some stress upon the blanks, and on the comma after the word 'tonnage.' But it must be assumed that the parties did not intend to fill up these blanks, and I must disregard the comma, the punctuation being the work of the printer, and being no index of the intention of the contracting parties. Thus the clause distinctly bears that the parties did not stipulate in the specification for any special register tonnage, but only that the ship could carry cargo weighing one-half more than her register tonnage. That this was the meaning of the parties is clear enough; no other meaning was suggested in the course of leading the proof. . . .

"The contract therefore was to furnish an iron sailing ship carrying register tonnage and a-half of cargo. It was stipulated that 'model, midship section, and plans to be submitted for owners' approval before commencing.' The defenders now maintain that the deficiency in carrying capacity has arisen from the pursuers fining the model and altering the plans. This means that the parties, at a date subsequent to the conclusion of the contract, altered it; for it cannot reasonably be contended that the clause of the contract last quoted is itself intended in any way to derogate from the express stipulations as to dimensions and carrying capacity. It only means that, subject to these stipulations and to the other express terms of the contract, the plans and models may be altered to meet the owner's views, and that he must approve of them before they are adopted as the working plans and model of the ship. In order, therefore, to get rid of the condition in question, the defenders must go beyond the contract and prove that it was discharged by the distinct agreement of parties. Now, where a contract has been put in writing, it is always a difficult and delicate matter to set aside any of its provisions by parole evidence of a subsequent verbal alteration. It would be more correct, indeed, to say that such evidence is inadmissible, except in a few special cases, particularly (if not exclusively) these in which *rei interventus* or acquiescence is alleged and proved. The law on this subject is to be found in *Wark* v. *Bargaddie Coal Company*, 6th March 1856, 18 D. 772, *rev.* 15th March 1859, 3 Macq. 467; *Sutherland* v. *Montrose Shipbuilding Company*, February 3, 1860, 22 D. 665; *Buttery* v. *Inglis*, November 3, 1877, 5 Rettie 58 (*per* Lord Gifford)—H. of L. 12th March 1878, 15 Scot. Law Rep. 462. Here there is a plea of acquiescence . . . But it is not alleged that the pursuers did these things in the knowledge that they would deprive the vessel of the carrying capacity contracted for, and with the intention of derogating from the contract in that respect. It may be, however, notwithstanding the want of this allegation, that in the ordinary case these averments, if they had been followed up by an allegation of such knowledge and intention, might have sufficed to let the defenders into a proof of acquiescence, and ultimately of a verbal agreement, innovating on the contract, on the principle of *Wark* v. *Bargaddie Coal Company;* and by the interlocutor allowing proof this was perhaps contemplated. But in the course of the proof it appeared that there was an express condition in the contract in these terms—'No extras to be charged nor alterations to be

made without first having written authority from the owners.' It appears to me that this sentence is susceptible of no other construction than this —that the written contract at the close of which it occurs shall not be altered or modified in any of its terms except by writing of the owners. . . . I apprehend therefore that the rule to be applied here is precisely the same which received effect in the late case of *M'Elroy* v. *The Tharsis Sulphur and Copper Company*, November 17, 1877, 5 Rettie 161 (especially *per.* L. J. Clerk p. 167, and Lord Ormidale, p. 168), *aff.* 15 Scot. Law Rep. 777.

"There is no doubt that the pursuers suggested alterations on the lines of the vessel, but it is not alleged that they did so with the intention of reducing the proportion of weight carried to the register tonnage. It is said that these alterations had that effect; but it was the business of the defenders, knowing (as being men of skill they were bound to know) that these alterations would have such an effect, to point that out to the pursuers, who relied on their ability to produce a ship according to contract, and to get them either to approve a model and plans conformable to the written contract, or to concur in a formal written modification of the contract.

"I hold, therefore, that the defenders have not established either their third or their fourth pleas.

"There remains the question what amount of damages is due? The ship actually carries 1090 tons on a mean draught of 17 feet and ¼ inch in salt water; and I take it, that in a contract to build a sea-going ship, a condition as to draught of water is intended to refer to her draught in salt water, her natural element (see *Walker, Henderson, & Company* v. *J. & P. Hutchison*, cited). It thus appears that on a draught of 17 feet 3 inches, she would carry 1130 tons in salt water. This makes a deficiency of 109 tons. But the evidence of Mr Lawrie and Mr Spencer, which is not contradicted, shows that the breach of contract in regard to the depth of the hold, which is also proved, has been productive of a further loss. For, assuming that the hold had been 19 ft. 6 in. in depth, the vessel would have been able to carry 33 tons, or 11 tons per inch, beyond the weight she could carry on a draught of 17 ft. 3 in.—that is to say, the vessel is not confined by any physical or legal limitation to a draught of 17 ft. 3 in., and if there were sufficient space in the hold, could have carried tonnage answering, as the proof shows, to considerably more than 3 inches of further draught. But only 3 inches more was contracted, and all the pursuers can ask is that they should get damages for this shortcoming of 33 tons.

"The damages upon the 109 tons are to be calculated, as I think, at the rate of £9, 13s. 4d. per ton (see Mr Lawrie's evidence), which gives the same result as the rule of proportion adopted by Lord Curriehill in the case of *Walker, Henderson, & Company* v. *Hutchison*, viz., £1053, 6s. 8d. The damages for deficiency in hold space cannot be so accurately calculated. It is said that the 3 inches lost would have enabled the pursuers to earn about £150 a-year of additional freight. Probably this is a very liberal estimate; but I think it may be assumed that the value of the ship would have been enhanced by £300. The whole sum due therefore in name of damages is £1353, 6s. 8d."

On appeal the Sheriff (CLARK) adhered, and the defenders then appealed to the Court of Session.

On 4th July 1879 the Second Division allowed the appellants additional proof as to the knowledge of the respondent Spencer with regard to the effect of the alterations made on the model and plans of the vessel, and this proof was taken before Lord Ormidale on 20th October.

Argued for the appellants—(1) As to the alterations on the model—Admitted that it was incompetent to prove that a written contract was modified by verbal agreement; still, if there were acts amounting to *rei interventus* alleged, such proof was admissible.—Dickson on Evidence, 1st ed., 130, note, and cases there cited; *Wark* v. *Bargaddie Coal Co.*, March 6, 1856, 18 D. 772; *rev.* 15th March 1859, 3 Macq. 467; *M'Bride* v. *Hamilton*, June 11, 1875, 2 R. 775; *Houldsworth* v. *Brand's Trs.*, May 18, 1875, 2 R. 683; *Duke of Portland* v. *Baird & Co.*, Nov. 9, 1865, 4 Macph. 10: *Buttery* v. *Inglis*, Nov. 3, 1877, 5 R. 58, and H. of L. 87; *Andrews*, 2 C.B., N.S. 779. These cases showed that if the pursuers had adopted a new model inconsistent with the written contract, that part of the contract was abrogated. The proof showed that the deficient carrying capacity was due to the alteration of the written contract. (2) The pursuers having taken delivery of the ship, could not claim damages. Their duty was to reject the ship, retaining only a lien over it for the past instalments until the price paid was refunded. Any other rule would admit the *actio quanti minoris* into the law of Scotland with regard to ships. (3) In any event, the damages were not proved.

Argued for the respondents—(1) The proof showed that the alterations made were within the contract. It was for the shipbuilder, who was the man of skill, to point out that the alterations, if they would have the effect of diminishing the carrying capacity, were incompatible with the specification, which formed a warranty requiring to be fulfilled. It was a warranty of a certain minimum tonnage. The contract provided that any alterations on it must be made in writing. (2) In this case it was the understanding of parties, as manifested by the writings, that the pursuers in making the last payment reserved their claim for damages. The Court would always in a mercantile matter give effect to an understanding which would prevent the rigid law of rejection from doing injustice.—*M'Cormick* v. *Rittmeyer*, June 3, 1869. 7 Macph. 854 (Lord Kinloch's opinion). Further, a ship was in a different position from ordinary goods. The rule *navis sequitur carinam* applied. From the time when the first instalment was paid, the property in the ship so far as built passed to the buyer. Thereafter the builder was *locator operarum*. It was just like the case of a man building on another's land.—*Simson* v. *Duncanson's Crs.*, 1786, M. 14,204; Brodie's Stair, p. 900; 1 Bell's Comm. (7th edit.) 189, note; Lord Neaves in *Orr* v. *Tullis*, quoted by Sheriff-Substitute. In this case, therefore, the shipowner could not reject his own property. —*Wyllie & Lochhead* v. *Mitchell*, Feb. 17, 1870, 8 Macph. 552, *supra.*

At advising—

LORD ORMIDALE—The pursuers of this action, respondents in the appeal, contracted in August

1876 with the appellants, defenders in the action, for the building of an iron sailing vessel to be called the "Firth of Tay," for a price payable by instalments at certain stages of her construction. The vessel was accordingly built by the appellants, and taken delivery of by the respondents in March 1877, when the last instalment of the price was paid.

The pursuers thereafter, in March 1878, brought the present action against the defenders, concluding for payment of £1700 as loss or damage sustained by them in consequence of the vessel turning out to be disconform to contract in respect of a deficiency in the stipulated carrying capacity. On the other hand, the defenders rely upon various pleas in defence, and especially upon pleas to the effect that the pursuers having taken delivery of the vessel are barred from claiming damage on the ground stated by them, and at any rate that any disconformity there was between the vessel as delivered and the contract was caused by the pursuers themselves in requiring, for their own objects, that deviations should be made from the contract as it was originally entered into.

It may be well to deal with the first of these pleas in defence before entering into a consideration of any other question, because if the pursuers have by taking delivery of the vessel barred themselves from maintaining their claim for loss or damage, that will be enough of itself to dispose of the case.

In regard, then, to the defenders' plea of bar, it may be remarked that the Sheriff-Substitute repelled it, and the Sheriff-Principal, on appeal to him, adhered, on the ground that when the pursuers paid the last instalment of the price and took delivery of the vessel they intimated to the defenders that they did so under reservation of their right to claim damages for her deficiency in carrying capacity, an intimation which they were led to understand was tacitly, if not expressly, acquiesced in by the defenders. It was, I take it, impossible for the pursuers to know with any degree of certainty, without some experience and a trial of the vessel, what, if any, was her deficiency in carrying capacity, although they may have suspected, and did, as it appears from the proof, in point of fact suspect, that there would be a deficiency. But the defenders did not admit that the vessel as constructed by them was in any respect disconform to contract, and assuming that they were right in this, they were entitled to insist on full payment of the price before delivering up the vessel to the pursuers, and in that way losing their right of lien upon her. The situation was therefore not a little perplexing. On the one hand, it could not be expected that the pursuers, who had already paid, as the vessel was being constructed, £9000 out of her whole price, or, in other words, about three-fourths of her cost, and had therefore, in any view that can be taken of the matter, a much larger interest in her than the defenders, should have allowed her to remain unproductive if it could possibly be avoided. They accordingly, subject to intimation or warning to the defenders that their claim for damage in the event of it turning out that the vessel was deficient in carrying capacity was to be held as reserved, took delivery of her, paying at the same time the last instalment of her price. It appears to me that this was a fair and reasonable course in the circumstances—the best course, indeed, which could have been taken in order to save as far as possible loss to both or either of the parties. But then it is denied by the defenders that the vessel was delivered up by them subject to the pursuers' intimation or warning that they paid the last instalment of her price and received delivery of her under reservation of their claim of damage. They have maintained, on the contrary, that while they received payment of the last instalment of the price, they repudiated the pursuers' intimation or warning, and denied their right to make any reservation whatever. This raises a question of fact which must be determined on the proof.

Now, it is indisputable on the proof, and was not disputed, that the defenders wrote to the pursuers the letter of 28th March 1877, bringing out the amount of the final instalment due to them, and intimating that one of them, Mr Young, would call on Friday (which was the 30th of March) to obtain a settlement; that on the 29th of March the pursuers wrote the defenders acknowledging the receipt of their letter of the 28th, and distinctly intimating that they would "only settle under reservation of our claims for breach of contract between us, as we have now reason to believe that the ship will not have the carrying capacity guaranteed;" and that immediately after the last instalment had been paid by the pursuers to the defenders, and a settlement accordingly made on the 30th of March, the defenders, although they had previously received the pursuers' letter of the 29th March, wrote them on the same 30th of March stating "that notwithstanding our settlement for the 'Firth of Tay's' account to-day we undertake to see everything connected with the outfit, &c., so far as not already completed, finished to satisfaction." There is no repudiation here of the pursuers' reservation of their claim of damages, although it was then, and in that letter, that such a repudiation, if made at all, might have been expected to have been expressed or referred to. Neither do I think that with these letters in existence, containing as they do a record, written at the time, of what actually passed, any parole and conflicting statements on the subject made by the parties *ex intervallo*, and after the present litigation had commenced, are of any moment. And assuming that I am right in holding it to be proved, as I do, by the letters referred to, that the pursuers paid the last instalment of the price of the vessel and received delivery of her under reservation of any claim of damages they could afterwards establish, and that such reservation was tacitly, if not expressly, acquiesced in by the defenders, it is unnecessary to enter into a consideration of the question of law how far they would be barred from maintaining such a claim had they taken delivery without any reservation. I may say, however, that were it necessary to deal with that question, I should be disposed to come to the same conclusion regarding it as both the Sheriffs have done—a conclusion which I think is in accordance with principle as well as the authorities referred to in the note of the Sheriff-Substitute. Where, even in the case of ordinary merchandise, the disconformity to contract is latent, and can only be discovered after trial, the buyer, although he has paid the price and used the merchandise in place of rejecting it—although, for example, he has actually sown the seed, if that be the merchandise, in place of rejecting it,—will not be precluded from his claim of damage when the seed has grown up if

the disconformity could not have been sooner ascertained—1 Bell's Com. (M'Laren's ed.) 463-4, and cases there referred to. So, accordingly, keeping in view that the disconformity to contract of the vessel in question could not have been ascertained till after she had been taken delivery of and the price paid, I cannot hold that the pursuers' claim in respect of disconformity is barred. And, indeed, to return the vessel to the defenders as the builders, leaving the pursuers to recover back the whole of the price as well as their claim of damages, would only aggravate the loss to one or other of the parties, and it might be the defenders. The defenders have not, indeed, maintained, in the record or elsewhere that I can see, that the vessel ought, when the alleged disconformity was ascertained by the pursuers, to have been returned. Their contention was simply that the pursuers having paid the price and taken delivery of the vessel, were barred from thereafter claiming damages on the ground that she was disconform to contract.

Assuming, then, that the pursuers are not barred from maintaining their claim by taking delivery of the vessel and paying the last instalment of her cost, the next question is, Has the claim been substantiated, and to what extent? That the stipulated depth of hold was deficient by three inches is not disputed by the defenders. They have, however, denied and disputed that this was the cause of any appreciable damage to the pursuers, as they had only to load the vessel three inches deeper in the water, and in that way to make up for the deficiency in the depth of hold. But I have no hesitation in saying that this view of the matter is inadmissible as an answer to a plain breach of contract.

Neither do I think that the defenders are right in their contention that the want of three inches of depth of hold is for any other reason so immaterial a disconformity to the contract as to be entirely disregarded, although I certainly do think that the pursuers have maintained an exaggerated view of that matter. All I think it necessary for me to say further on this branch of the pursuers' claim is, that I have in estimating the amount of damage awarded to the pursuers, as afterwards mentioned, taken the whole circumstances connected with it into account and given them the effect to which I think they are fairly entitled.

The more important question is, whether the pursuers have established their claim for loss or damage in respect of the deficiency otherwise in the carrying capacity of the vessel as built and delivered? And here I may remark that there does not appear to me to be any room for holding that in point of fact there was no such deficiency. The extent of it, however, is quite another matter, and so is the plea of the defenders, very strenuously maintained by them, to the effect that it was entirely owing to the fault of the pursuers themselves that there was any deficiency. In order to determine the question thus arising as to the alleged fault of the pursuers, it is necessary to attend to the various heads or articles of the specification which formed the foundation of the contract between the parties. The defenders by their letters to the pursuers of dates 28th July, 15th August, and 18th August 1876, contracted to build the vessel according to that specification, which again shows that while some things relating to the construction of the vessel were left open and uncertain, others were quite fixed. Among the things fixed, besides the depth of hold, was that the vessel was guaranteed to carry not less than a half more than the registered tonnage of dead weight. But then by another head or article of the specification it is stipulated that the model according to which the vessel was to be built was to be submitted by the defenders to the pursuers for their approval before the building of her should be commenced. That the defenders accordingly sent to the pursuers a model, and that the latter altered it by fixing the lines so as to give the vessel, as they thought, a better appearance and more speed in the water, has been admitted, or at any rate proved. Founding on this, it was argued for the defenders that the deficiency in the carrying capacity of the vessel was caused by the pursuers themselves, and that although warned by the defenders at the time of what would be the consequence of their alterations on the model, they, notwithstanding, insisted upon these alterations being given effect to, and are now for that reason precluded by their own fault from holding the defenders responsible for the result. On the other hand, the pursuers, while denying that the alterations made by them on the model had the effect alleged by the defenders, or that they had been warned that such would be the result, contended that at any rate it was incompetent to entertain such a plea on the part of the defenders, or allow the requisite facts in support of it to be proved by parole, in respect it was one of the conditions of the contract set out in the specification that no alterations were to be made by the defenders without first having written authority from the pursuers. The parties being in this way at issue in fact as well as law, it was thought desirable by the Court to have the facts, and especially the fact whether the pursuers had at the time they made the alterations referred to been warned by the defenders that they would, if made, have the effect of diminishing the carrying capacity of the vessel, and they were allowed in regard to that matter a proof before answer. A proof was then adduced, and with regard to its import I am disposed to think that it cannot be held to have any material effect in the case, in respect that it is so conflicting—the pursuers Spencer and Wyllie deponing that no such warning as that referred to was given, and the two defenders Thomson and Young being equally positive that such a warning was given. Having regard to this state of the proof, there seems to me to be no alternative but to deal with the case as if the proof—which was only allowed before answer—had not been adduced, or at any rate that the defenders had failed in it. In this view the point must be decided adversely to the defenders, on the ground that they did not obtain the pursuers' written authority for the alterations which they say caused the deficiency in the carrying capacity of the vessel. They were bound, I think, to have obtained such authority, in terms of the article or head of the specification which requires that no alterations should be made by them without first having such authority. It will not do for them to argue, as they did, that this article of the specification came to be operative only after the model was approved of by the pursuers, and therefore that no alterations were made on the specification requiring written autho-

rity. It appears to me that the condition as to written authority applied to the specification as it was authenticated by the parties, so that no alterations could thereafter be made on the stipulation which it then contained, that the carrying dead weight of the vessel should be not less than register tonnage and a-half.

The question next arises, What is the extent of the deficiency of carrying capacity of the vessel besides the deficiency in depth of hold which has been already noticed? In regard to this matter it has been, in my opinion, sufficiently proved that there was a material deficiency in the carrying capacity of the vessel, although the precise extent of it is not very clearly shown. On the best consideration, however, which I have been able to give the evidence on the point, I think the deficiency may be taken at 115 tons, or about 27 tons less than what is assumed by the Sheriff-Substitute to be the deficiency as I read his note. While the Sheriff-Substitute proceeds in arriving at his conclusion on certain precise data spoken to by particular witnesses, I have thought it safer and more advisable in dealing with such a jury question—for it is eminently a jury question—to look at all the circumstances of the case, and to deduce therefrom what I believe to be the fair and equitable result. Acting on this principle, I have not overlooked that the pursuers, especially the pursuer Spencer, who it is impossible to doubt on the proof had considerable knowledge on the subject of ships and shipbuilding, interfered from first to last in, I should suppose, a very unusual degree with the defenders in reference to the construction of the vessel in question. It was he who prepared the specification which was the foundation of the contract, and it was he who made the alterations on the model, which there is reason to think was the cause of the deficiency in the carrying capacity of the vessel. Nor is it to be overlooked that the witnesses who have been examined in the case are by no means at one either as to the extent of the deficiency in the carrying capacity or the true mode of arriving at a conclusion on that point. Neither do I think that the pursuers after they got delivery of the vessel proceeded to ascertain what her carrying capacity was with that strict regard for the interests of the defenders which was incumbent upon them. For example, it does not appear that they gave the defenders an opportunity of ascertaining for themselves, at the time the vessel was first loaded, her true carrying power or her speed or draught of water. And even taking the deficiency of carrying capacity to be a given quantity, it does not follow that to the extent of that deficiency loss or damage has arisen to the pursuers, for the want of employment of the vessel and other circumstances might not improbably render such want of carrying capacity of little or no moment. Again, although the fixing of the lines of the vessel may have affected her carrying capacity, it is not, I think, unreasonable on the proof to hold that her rate of sailing or speed in the water was thereby increased, and so has been or may be of advantage and profit to the pursuers. Having regard, then, to all these and other considerations fairly arising out of the whole circumstances of the case, it appears to me that if the pursuers are found entitled to £850 of loss or damage, such a verdict ought to satisfy the truth and justice of the case.

Lord Gifford—I concur in the opinion of Lord Ormidale, and very much on the same grounds. In the first place, I think that the pursuers' claim for damages is not barred by delivery and payment of the price. The pursuers say it should not be barred, for two reasons. The first is, that the last instalment of the price was paid under protest. The second is, that even if there had been no protest, this was an executory contract, and the fact that the instalments were payable as the ship reached certain specified stages of construction removed this from the category of an ordinary case of sale, in which acceptance and payment of the price bar a subsequent claim for damages.

I am of opinion that both these answers are well founded. As to the first, though there is some contradiction in the proof, I think that the correspondence shows that there was tacit acquiescence in the pursuers' protest on the part of the defenders.

But I am not careful to go further into that question, because I am satisfied as to the second answer, that a shipbuilding contract like this is an executory contract in which the payment of instalments passes the property in the vessel as it exists at the payment of each instalment, and the buyer is not bound to reject what is really his own property, but is entitled to take the vessel, and to claim damages if she is found disconform to order. It is like the case of building a house, and I agree with the Sheriff-Substitute when he finds that "by reason of the constructive delivery and appropriation of the vessel by due payment of the instalments of the price, the pursuers are entitled, notwithstanding their acceptance of the vessel, to damages." This is the first case in which this point has been decided in Scotland.

This brings us to the question of damages. It is material to look at the stipulations of the contract itself in deciding this part of the case. The contract says the vessel is to be "not less than tons net register"—that is to say, it has been signed with a blank in it, and so there are no stipulations at all for a definite tonnage. The dimensions are given in the contract, and therefore so far as the tonnage can be gathered from the dimensions, there are materials for doing so, but there is no tonnage stipulated. But then the contract goes on—"and guaranteed to carry not less than register tonnage and half of dead weight on 17 feet 3 inches of water." That is, the builder says—While we do not guarantee any registered tonnage, we do guarantee that, whatever it is, the carrying capacity shall be as much and one-half as much more—when measured by the proper measurer, the vessel shall be found to carry half as much more as the net register. Then there is a clause on which we had much argument—"model, midship section, and plans to be submitted for owners' approval before commencing." That means that the owner shall have a certain power of altering the model before building begins. Then there is a most important clause at the end of the contract—"no extras to be charged nor alterations made without first having written authority from the owners."

That contract must be fulfilled according to its true meaning. When the vessel was tried she was found incapable of carrying the once and a-half of her registered net tonnage as had been

agreed on, and the question arises whether that was in consequence of the alterations on the model which were made by Spencer? I agree with Lord Ormidale that if the builders of the ship allowed such alterations as to change the carrying capacity which was guaranteed, that ought to have been put in writing. That is the very object of the provision I have quoted from the contract. I do not think it was intended that the alterations on the model should alter the carrying capacity, and these alterations were merely verbally agreed to, and at any rate I agree with the Sheriff-Substitute in holding that it is not proved that these alterations caused the deficiency. The parties laid down the law for themselves that there should be written contract only, and I am disposed to apply it strictly. I do not dispute the law that parties by their subsequent arrangements can alter a contract they have made, but the cases are rare. They are such as the *Bargaddie* case, referred to by the Sheriff-Substitute. I think this case falls under the other class of cases to which he refers. But admitting that the alterations on the model are the cause of the deficient carrying capacity, they did not even, according to the defenders themselves, cause a deficiency of more than 15 tons on the net registered tonnage.

On the question of the amount of damages we sit here as a jury, and should be unanimous. Therefore, though I should myself have been inclined to give more than £850, I concur with Lord Ormidale in fixing on that sum.

Lord Justice-Clerk — I concur, and have nothing to add.

The Court adhered.

Counsel for Pursuers (Respondents)—Balfour —Darling. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Appellants)—Trayner —Dickson. Agents—Morton, Neilson, & Smart, W.S.

Friday, February 6.

FIRST DIVISION.

[Lord Young, Ordinary.

NEILSON AND OTHERS (FULTON'S TRUSTEES) *v.* FULTON AND OTHERS.

Succession — Vesting—Fee and Liferent — Intestacy where no Bequest of Residue.

A testator directed his trustees to divide the residue of his estate equally among his children, the sons' shares to be paid to them on majority, and those of the daughters, to the extent of £200, on marriage or majority, the remainder of the latter to be laid out by the trustees on heritable security, and the titles taken to each daughter in liferent, for her liferent use only, and to her child or children in fee. There was no reference to residue. The trustees invested the funds in heritable securities taken in their own names, and not in terms of the direction. A married daughter having died, but without issue and intestate, *held* (*rev.* Lord Young, Ordinary) that her interest in her share was a bare liferent (except to the extent of £200 as above), and that consequently the fee lapsed to the intestacy of her father, and in the absence of a proper residuary clause in his settlement fell to his next-of-kin *ab intestato*.

Opinion (*per* Lord Deas) that if the funds had been moveable they could not have reverted to the testator's intestate estate.

John Fulton died on December 27, 1844, being survived by four sons and six daughters. He left a trust-disposition and settlement dated 25th March 1820, by which he conveyed his whole estate, heritable and moveable, to the trustees therein mentioned, for the following purposes, viz., (1) To pay his debts, sickbed and funeral expenses; (2 and 3) To provide an annuity and liferent of a dwelling-house and furniture to his wife, who however predeceased him; (4) To sell, let, divide, or burden any portion of his property, as the trustees should deem beneficial for his family; (5) To pay a sum to his wife, furth of their share of his succession, for the education and upbringing of his children; (6) To hold his whole means and estate, rents, interest, profit, and produce thereof, and all sums which might be realised therefrom, in trust for behoof of his children, and to deposit the moneys in bank or invest them in heritable security; and (lastly) the testator declared with regard to the disposal of the residue of his estate—'So soon as any of my children shall attain the age of twenty-one years complete or be married, I appoint and ordain my said trustees, after deducting all charges and expenses incurred under this trust, to divide my said means and estate, with the rents, profits, and produce thereof, into as many equal shares as there shall be children then alive, and to pay one just and equal share thereof, or if my property be then unsold, to convey one just and equal share thereof, *omni habili modo quo de jure*, to and in favour of each of my children, as they respectively attain majority or are married . . . . But declaring that if at my death any of my children shall be twenty years of age, the shares of such child or children shall not be payable till the first term of Whitsunday or Martinmas which shall occur one year after my death; and that should any of them die before receiving their shares of my succession, leaving lawful issue, such issue shall have full right and title, equally, share and share alike, to their parent or parents' share of my succession under these presents, with full power and authority, however, to my said trustees to withhold payment of all or any of my children or grandchildren's shares until they attain the age of twenty-five years if their conduct seems to require that precaution; as also to lay out the shares of all or any of my daughters in the purchase of heritable subjects, or upon sufficient heritable securities, and to take the rights and title-deeds thereof to and in favour of my said daughter or daughters (as the case may be) in liferent, for their liferent use only, and to their child or children equally in fee, but so as the said liferent rights shall not be anyways transferable by the liferenters or their husbands, nor be subject to the *jus mariti* of such husbands, nor be affectable by his, her, or their debts, but that they may remain free and permanent alimentary funds to my daughter or daughters during