HOUSE OF LORDS.

Tuesday, March 12.

UNION BANK OF SCOTLAND *v.* BUTTERY AND OTHERS.

(*Ante*, vol. xv., p. 37.)

Contract—Construction of Ship.

A firm of shipbuilders by a signed contract agreed to execute certain alterations on a ship, and to repair her so that she might be classed as A1 100 at Lloyds. The contract provided—"the plating of the hull to be carefully overhauled and repaired."—*Held* (*aff.* judgment of the Court of Session) that the shipbuilders were bound under the contract to supply a quantity of new plates so as to enable her to be so classified.

Opinions (*contra* that of the Lord Justice-Clerk) that in construing such a contract it is not admissible to look at a clause that has been deleted before signature for the purpose of arriving at the intention of parties.

Ship—Survey—Expenses.

Held that the expense of the survey of a ship by Lloyds' surveyor falls on the owner of the ship, who is the party that is to benefit by it.

This case was decided by the Second Division of the Court of Session of date November 3d, 1877, 15 Scot. Law Rep. 37. The question was raised in the form of a multiplepoinding in the name of the Union Bank, as to the right of the claimants, the Messrs Inglis, shipbuilders, Glasgow, on the one hand, and the Messrs Buttery, of Glasgow, on the other, to a sum of £1260 consigned in the hands of the Bank.

The origin of the matter was this—Messrs Buttery employed Messrs Inglis to repair and enlarge a ship for them, so that she might be classified as A1 100 at Lloyds. It was found necessary, in order to satisfy Lloyds' surveyor, and to put her in a complete state of repair, to supply a large quantity of new plates. The cost of these was £1200. The shipbuilders maintained that the contract between them and the Butterys contemplated repairs only, and did not include this, which was something that did not fairly fall under the head of repairs. The £60 was the cost of the survey by Lloyds surveyor. In order that the vessel might not be detained, these sums were paid into the Union Bank.

In the contract there had been inserted after the clause as to repairs quoted in the rubric, this clause, "But if any new plating is required, the same to be paid for extra;" but these words had afterwards been deleted. In giving judgment the Lord Justice-Clerk expressed an opinion that the Court in considering a mercantile contract were entitled to be put in the same position as the parties were when they signed it, and were therefore here entitled to read this clause, and to infer from its deletion that the demand of Messrs Inglis for extra payment had been made and withdrawn.

The noble and learned Lords who delivered opinions in the House of Lords, while they affirmed the decision of the Court below in substance, and held that in undertaking to repair the vessel the shipbuilders had made themselves liable for the cost of these plates, negatived this view, and expressed opinions that it was not competent to look at this deleted clause at all in explanation of parties' intentions.

At delivering judgment—

Lord Hatherley—My Lords, We have had the advantage of a very full and able argument on both sides of the question which has been at issue between the appellants and the respondents in this case, and we are the more indebted to that argument, because, in looking to the judgments of the Court below, although I believe your Lordships, in common with myself, have come to the conclusion that the decision of the majority of that Court is on the whole correct, we have not been able during the course of the argument—and I confess I am not able now—altogether to follow the line of reasoning which was adopted by the learned Judges, whose conclusion nevertheless we think can be supported, because, my Lords, it appears to me that there has been in this case the introduction of a class of testimony which it is desirable, I think, that we should at once characterise as not being admissible for the purposes for which it has been here introduced. There has been a good deal of evidence adduced with the view of expounding the contract, not for the purpose of explaining the meaning of a particular technical phrase used in the contract, which is a purpose for which it is quite legitimate to use external evidence, but where the words of the contract are not themselves in any way technical, but are plain and simple language—at all events so plain and simple as to require no aid of testimony specially to explain them—In that case it is not legitimate to introduce parole testimony to say what the meaning of the contract is.

Nor can I think—and I believe your Lordships will concur with me in this opinion—that it is legitimate to look at those words which appear upon the face of the agreement with a line drawn through them, and which are expressly by the intention of all the parties to the agreement deleted—that is to say, done away with and wholly abolished. I think it is not within the legitimate rules of evidence to examine those words because you happen to be able to read them, and find that they have been once there although they are expunged now. It is not legitimate to read them and to use them as bearing upon the meaning of that which has become the real contract between the parties, namely, the final arrangement of the document which we must now proceed to construe.

It appears to me, my Lords, that the whole case before us—the subject-matter of which is a claim to a sum of £1200, arising in the manner I shall presently mention—must be determined by the construction which is to be put upon an agreement for the repairs of a vessel, together with the specification which accompanied that agreement, and which forms a legitimate part of the agreement which has been entered into between the parties.

The case in controversy arises in this manner—A ship has been repaired by the Messrs Inglis, the appellants, for the Messrs Buttery, the re-

spondents in the case, and payment has been made of the contract sum for the repairs—of that sum, at all events, which Messrs Buttery conceived, and we think they rightly conceived, to be the sum owing for the repairs. That having been done, a dispute has arisen as to a sum of £1200 expended for a particular purpose, which I shall have occasion to refer to more particularly hereafter, and a sum of £60, 0s. 10d. which has been paid into Court together with the £1200, thus forming the sum now pending between the parties and awaiting your Lordships' decision. The parties were sensible enough to feel that it was not desirable that the ship should be detained whilst the litigation was going on with reference to the amount payable for the repairs, and accordingly, by a very sensible mutual concurrence, they agreed that instead of the dispute being so carried on to the great detriment of all parties, the vessel itself being *in medio*, that which should be *in medio* should be the £1200 for a certain portion of the repairs or the renewals, whichever they ought to be termed, part of the work executed by the appellants upon the ship, and a sum of about £54 paid to Lloyds' surveyor for his report and certificate for the classing of the ship, and a small sum of £5, which was paid by the appellants, as being supposed to be payable under certain other provisions contained in the contract, to the Board of Trade, with reference to a certificate given by that Board of the work having been properly executed.

My Lords, I think that this sum of £60, 0s. 10d. may be at once disposed of and put out of the question by saying that we have none of us been able during the argument to see any part of the contract which relates to the payment of fees, so as to throw the *onus* upon the appellants Messrs Inglis of satisfying the fees which had to be paid in order to obtain the classification. Whatever may be the result of the construction of the agreement itself with reference to what was to be done in regard to the repairs according to the demands and requisitions of Lloyds for classification, there is nothing in the agreement which states that the fees in respect of obtaining such a survey and classification are to be borne by the appellants. And I may say the same as to the Board of Trade survey. There is nothing to say that those fees were to be borne by the Messrs Inglis; they appear to be left to be borne by the owners, whose vessel had the benefit of the survey and classification. Therefore, my Lords, while I consider the decision of the Court below to be correct as to the construction of the contract itself with reference to the sum of £1200, I say with regard to the £60, 0s. 10d. that that sum appears to have been erroneously paid, and it does not appear to have been relinquished by the respondents in the present case when they were in the Court below; indeed, even at your Lordships' bar some sort of argument was offered in respect of that sum, but nothing that I think convinced your Lordships of the propriety of its being deducted from the Messrs Inglis. Therefore I may at once say, in respect of that, that we cannot concur in that part of the decision of the Court below.

I pass now to the main part of the case—that which relates to the £1200. The contract is in this form—Messrs Inglis agree to take, and Messrs Buttery, the respondents, agree to deliver, a screw-steamer to Messrs Inglis, of Glasgow, to be lengthened and supplied with new machinery. That was done. The ship was put in the hands of these builders for the purpose of being cut and lengthened and supplied with new machinery. These were the two leading purposes of the agreement. The second clause in point of enumeration, but the first in point of agreement, with Messrs Inglis is this—Messrs Inglis "agree to take out the present engines and boilers, cut and lengthen the vessel 40 feet amidships, of the same scantlings of materials as at present, with the additional strengthening required by Lloyds to enable the vessel to be classed 100 A1." That, then, is the first stipulation or engagement which is entered into, namely, to cut the vessel in two, to lengthen it by 40 feet amidships, and when so lengthened, the scantlings—that is to say, the sides—in proportion to the weight, and the materials and the like are to be as at present, but with such additional strengthening as would be required by Lloyds to enable the vessel to be classed 100 A1.

Then there is a second stipulation in the agreement, which is "to fit new spar deck of teak between poop and forecastle, with iron sides, beams, &c., shifting foremast, and boats' davits; to supply anchors and chains, and patent windlass worked by chain from fore steam-winch." So far it amounts to this—first of all, the ship is to be cut in two, she is to have 40 feet added to her length, and the scantlings are specified; she is to be so strengthened as Lloyds' agent shall require to take that particular classification. The second engagement is to have a spar deck, which, I believe, is, as has been explained to your Lordships, a deck to join the raised part of the poop and the raised part of the forecastle, so as to make a flat uniform surface, or what is called an awning deck, the whole length of the vessel. That is to be of teak, and to have "iron sides, beams, &c., shifting foremast, and boats' davits;" then "anchors and chains" and a windlass are to be supplied.

Then we come to a third stipulation, which is a different one from any repairs to be done to the ship—"To supply and fit on board a new pair of direct-acting compound engines of 140 horse-power nominal." The description of those engines is fully given. That is to be done according to the Board of Trade requirements, because, as has been explained to your Lordships, the committee of Lloyds watches over the construction of the ship principally with regard to its strength and its seaworthy capacity, but it does not deal with the machinery—the machinery is a subject-matter which is dealt with by the Board of Trade. Accordingly the requirements of the Board of Trade were all to be satisfied in respect of this new machinery. Then it is stated that the price shall be £17,250, and the "first instalment of £4500" is payable "when lengthened portion is framed—say in two months from this date. Second, of £4500 when the vessel is plated." That is not unworthy of notice—the expression is "when the vessel is plated." Third, of £4500 when the vessel is launched. Fourth, or balance, when the vessel is completed and ready for delivery. Then there is appended also this—"The said John Buttery & Company engage to hold the bill of sale of the said steamer at the disposal of

A. & J. Inglis." That has nothing to do with the present controversy.

That, my Lords, is the form in which the contract itself—the leading document of the whole engagement—is framed. But there is annexed to this a memorandum, or specification as it has been called during the argument, and the specification is "a specification of lengthening, alterations, and repairs agreed to be executed on the screw-steamer." The ship is to be lengthened; it is to be altered; it is to be repaired; the "lengthening is to be of 40 feet." "The scantling frames, reverse frames, stringers, floors, keelsons, stanchions, beams, decks, ceiling, and all iron and wood work of this portion of the vessel to be entirely new and complete, of the best material and workmanship, in accordance with Lloyds' rules to class the vessel A1 100."

Now, Mr Benjamin in his argument upon this part of the case, called your Lordships' attention to the framing of the leading contract, as I have termed it, and contrasted it with the specification, and endeavoured to lead the House into a consideration of the specification as exhibiting in detail, and following precisely step by step, the engagements contained in the original contract, developing those engagements by taking them up one by one, and applying a portion of the specification to a portion of the engagements in the contract in each case. He argued it thus—He said, You find the first engagement is to cut and lengthen the vessel by 40 feet; that being the case, the first item of the specification relates to that portion of the work, and says "all iron and wood work of this portion of the vessel to be entirely new and complete, of the best material and workmanship, in accordance with Lloyds' rules." You come next to "iron topsides;" that runs thus—"New iron topsides, from main deck to upper deck, including the lengthened part of vessel, to be fitted, in room of the present wood arrangement connecting the poop and forecastle, of sufficient strength of scantling for class. Ship's frames to be carried up (continued) to upper deck-beams, which are to be of angle and bull-iron of sufficient strength to meet classification." He says that refers to the second portion of the main contract, which is "to fit new spar deck of teak between poop and forecastle, with iron sides, beams, &c., shifting foremast, and boats' davits." And with regard to the words "for class," he says that again is to be done according to what Lloyds' classification may require.

Then the next item, which is a very important one, is "ironwork," and here it is that the passage occurs which I have already referred to as being a portion of the specification, which by common consent was deleted before the agreement was executed by Messrs Buttery. I shall read it now as it stands, omitting the words deleted, because I hold that so alone I arrive at the true contract engagement between the parties. It runs thus:—"Ironwork—The plating of the hull to be carefully overhauled and repaired, deck-beams, ties, diagonal ties, main and spar deck stringers, and all ironwork, to be in accordance with Lloyds' rules for classification." Now, Mr Benjamin endeavoured to confine the Lloyds' rules simply to the "deck-beams, ties, diagonal ties," and so on, connected with the formation of the spar deck, and to exclude the words "to be in accordance with Lloyds' rules for classification" from the former part of the sentence which I read under the head of "ironwork," namely, "the plating of the hull to be carefully overhauled and repaired." But I apprehend, my Lords, in the first place, before we consider what the overhauling and repairing means, when we find a specification divided into given heads—marginal notes we may perhaps call them—but whatever term is applied to them, certainly definite heads—we must take all that is under one head as being that to which the parties had their attention directed at the time they entered into the agreement, and to which, as far as it is applicable, they assented that the entire passages placed under the head would be referable. Therefore I read this as if the whole of the ironwork was to be in accordance with Lloyds' rules for classification. I consider that the whole sentence runs on, and the plating of the hull being of course ironwork, that is included in the ironwork which is to be in accordance with Lloyds' rules for classification. In considering the ironwork which is to be done, you cannot restrict that merely to that portion of work which consisted of the forming of the "spar deck of teak between poop and forecastle." There can be no reason why there should be such a restriction of the ironwork employed in the repairs which are the result of overhauling any more than in the case of the work actually connected with the spar deck, if the ship could not be otherwise classed at Lloyds in the class which was required. The whole object of the Messrs Buttery in having these repairs executed was for the purpose of classifying the ship as 100 A1, and that purpose would otherwise be entirely frustrated.

But Mr Benjamin put it thus—he argued that the whole engagement on the part of Mr Inglis was to be read as if he had said—I will do for the sum specified in the agreement certain specified works; as far as those works are specified I will undertake to do them according to Lloyds' rules, but my contract is so controlled by the leading original contract that you cannot enlarge my contract into making for you an entirely new ship all framed according to Lloyds' rules, irrespective of the consideration that what I have engaged to do is to give 40 feet of additional length only, to fit a new spar deck only, and those adjuncts which are connected with it, and to overhaul the plating of the hull, and to repair that; therefore if you do not find following that a specific engagement that that shall be done according to the rules and requirements of Lloyds, then you must give to these words "to be in accordance with Lloyds' rules for classification," under this head of "ironwork," the effect of confining them by the specific purpose of the spar deck, they not having been applied in the specification to the other larger work or other work, whether larger or not, of the plating of the hull.

First of all, I think we must carefully ascertain what "the plating of the hull to be carefully overhauled and repaired" means, as it is from the expense attending this that the contest has mainly arisen. It is argued that the engagement to overhaul and repair the plating of the hull did not involve any engagement to find new material in the shape of iron plates, so as to replace the

actual plating of the hull, but that with regard to places where the hull was found to be defective and out of repair, in consequence either of the wear of the voyage or in consequence of the bilge-water rushing in within, or from any other circumstance by which the plates of iron are apt to be affected. It is said my engagement was to overhaul the hull and examine any place where such a thing as that might have occurred, but it was no part of my engagement to replace any part of the plating of the hull, more especially if it was to be replaced for the purpose of satisfying the rules and regulations of Lloyds.

Now, my Lords, in the first place, if that had been shown which has not been shown in the present case, namely, that when the vessel came to be examined and repaired any of the plating had to be removed—not because it was worn, not because bilge or the wear and tear of the sea, or any other accident had damaged it, but to be replaced by new plating in order that the vessel might be classed 100 A1 at Lloyds—the case might have possibly assumed a different aspect from the different state of circumstances and facts that would be so brought to your notice. But we have nothing of that kind here. Although it was said by some of the witnesses that the plating of the hull was done in order that the ship might be classed 100 A1, that is coupled at the same time with this information, as it appears by the evidence, that in fact the plates were in many instances seriously worn and seriously affected by rust—in short, damaged by the wear and tear that had been inflicted upon them. The question then comes to be reduced simply to this—whether or not "carefully overhauled and repaired" included renewal of such plates?

My Lords, it was said by the appellants' counsel that throughout this agreement you have a distinction kept up, and carefully kept up, between the word "repair" and the word "renew." My Lords, when the agreement came to be sifted and looked through, it appeared that that was not a contention that could usefully be insisted upon. It was found that the words had been used interchangeably on more than one occasion. It is remarkable indeed, amongst other instances, that it occurs in a letter of the appellants—but it also occurs in different portions of the agreement itself—that the word "renew" is sometimes used when the word "repair" would be appropriately used, and in some cases the word "repair" is used where the word "renew" is equally expressive of the meaning intended. Some evidence was given by experts as to what they would understand if an order were given to them to "repair"—whether they would consider or would not consider that that included "renewing." I do not think we are driven to any such consideration as that, because I take it—reading this agreement, and especially the part where the word occurs, and bearing in mind the subject-matter to which it is to be applied—your Lordships cannot entertain a doubt that being "carefully overhauled and repaired" must include the replacing by totally new plates of plates which could not be patched and mended. An illustration was given by Mr Kay in his argument, which appears to me to be a very just one. He said—Instead of having the plating of a hull "overhauled and repaired," suppose you were to direct a person to overhaul and repair the slating of your house, or the roof of your house, or the like, you would be extremely surprised to find after that was completed that the water came in abundantly through your roof, and that the man you had employed justified himself because he said I only undertook to "repair" it. I did not undertake to place the slates in a corner where five or six slates were missing. That would be a very strange construction of an order to "carefully overhaul and repair" your roof or your slating. I think the words "carefully overhaul and repair" must necessarily include that which is the only possible repair where the plating is so worn and injured that it cannot be patched up, namely, withdrawing the injured plates and substituting for them new plates.

My Lords, that being so, it really seems in effect to carry that which has been the main subject of controversy in this particular case, for most of this expense which is now in question arises from the new plates having to be put into the hull of the vessel where the plating was found to be damaged and injured, in order that the vessel might have the proper certificate from Lloyds' surveyor, who of course would not certify to a half-restored hull that she was fit to receive her classification. In order for the vessel to receive the desired classification it would be necessary that the vessel should be overhauled and should be repaired by substituting completely new plates in cases where the repair could not be effected by means of patching the old ones and the like.

My Lords, it is said that Mr Benjamin pressed this greatly upon our attention, and with very great power and vigour—that it would be absolute madness on the part of anyone to undertake for the price mentioned in the agreement to put the whole of this vessel from stem to stern in a complete and solid state of repair with reference to the hull. The price mentioned in the agreement is £17,250. Well, my Lords, the answer to all that is, that before entering into the agreement Mr Inglis, the appellant, either did see or might have seen (and that for the purpose of a person who has entered into an engagement is the same thing) the vessel and the state of the hull to a certain extent. He could not have seen the whole of it when it was in the water. The part that was under water of course he could not see, and he could not see the whole of it while the machinery was in the vessel. But we have the evidence of Mr Purdie, quite a disinterested witness, the surveyor for Lloyds, whose evidence is important upon this particular head. I will just turn to it, as it is very brief. What Mr Purdie tells us is this—"I am one of Lloyds' surveyors for the western district of Scotland, and am stationed at Glasgow. I was there in 1875 when the lengthening and repairing of the 'United Service' took place. These repairs and everything were carried on under the superintendence and supervision of myself and colleagues, because she was to be classed in Lloyds' book 100 A1, awning decked. That class which the 'United Service' got is the best class for that type of ship. A considerable amount of plating was required. All the plating that was done on the vessel was necessary to give her the class 100 A1 at Lloyds. Nothing was done to her more than was necessary to give her that class.

The ceiling did not conceal one-third of the 240 plates that were renewed."

Here, my Lords, is a point in controversy. Mr Inglis says—"All I heard about any plating being wanted at the time when I signed this contract was, that the master had said there were two or three plates which would want to be wholly renewed, and I was under the impression that no more than that would have to be renewed." Mr Purdie, however, tells us what I have just read. I am not using his evidence at all for the purpose of explaining the instrument, but merely as bearing upon the case for Mr Inglis. He says—"I never should have entered into such an engagement as that if I had thought that so many as 240 new plates would be required." He uses that as an argument that it was impossible that he could have read the agreement according to this construction. But Mr Purdie tells us—"The ceiling did not conceal one-third of the 240 plates that were renewed. There was no ceiling in the bunker, and the whole of the side there would be exposed. They could have been estimated by an expert, even with the ship afloat." Then he is cross-examined, and in his re-examination he says that he will not say there were no coals in the bunkers, but there could not have been many coals. It is perfectly obvious that there could not have been many, for the vessel had just returned home from a long voyage and was going to be repaired, and therefore it is not likely that she could have many coals in her bunkers. Mr Purdie says that the concealment of anything that was necessary to give him information would not extend to one-third of the 240 plates that required renewal. I apprehend therefore, my Lords, that Mr Inglis would have no reason to complain if, having had an opportunity of seeing the state of the hull, he did not exercise it, so as to know to a certain extent the large amount of the renewal of plates that would be required.

I have entered into this part of the case because it has occupied a considerable amount of attention in the Court below. The witnesses have been examined at great length upon what this gentleman did see or did not see, and what he was told and what he was not told, and the amount of hardship he might be subjected to. That was unnecessary, as it appears to me, because I said in the first observation I made to your Lordships—I do not consider that this case can rest upon anything outside the contract, or anything except the mere contract itself. We are informed—indeed we had a case the other day before your Lordships' House which bore upon that point—that in Scotland an agreement could not, as with us, be reformed and be made conformable, if it was previously inconformable, to the intention of the two parties. There is no such process in Scotland. An agreement must either be upheld altogether or set aside altogether. No action will be for the purpose of having it set straight or reformed, as we call it, between the parties. If an agreement did not carry out the intention of the parties, the only result would be that the party who thought himself aggrieved in this respect could ask the Court to hold that there was no agreement at all.

However, my Lords, in that shape the matter really does not come before us. It only comes before us upon this question. Here is the money put on deposit with reference to these contested points, relating mainly to the repairs done to this ship—with reference to the hull and with reference to the new plates which had to be inserted—and the question is—Who, under the agreement between the two parties, is entitled to draw the sum of £1200, and the sum of £60, 0s. 10d. afterwards added with reference to the expense of getting the certificate of classification at Lloyds? It all turns, my Lords, on that agreement, and we having simply to consider the agreement, our duty becomes a very simple one indeed. We have simply to read the agreement, and unless you can adopt the very ingenious view of Mr Benjamin, that you are to restrict the operation of these words in the specification by comparing them with what is contracted to be done in the first contract, it appears to me that the case is completely determined by that special portion of the specification which, referring to ironworks, says, in the first place, "the plating of the hull is to be carefully overhauled and repaired," and then that "all ironwork" is to be done in such a manner that the ship shall obtain the wished-for classification. I think, that being so, I should be only wasting time by reading at length any of the evidence which has been given.

There is only one further remark which I think it is necessary to make in order that there may be no misunderstanding as to the important point, how far evidence may be introduced for the explanation of written instruments. When I turn to the deleted words, and find that in spite of a line being drawn through them I can read the words, which words, being fourteen in number, are these—"But if any new plating is required the same to be paid for extra"—it appears to me that those words having been deleted, and a marginal note affixed showing that they were deleted before the contract was finally concluded, it was not in the power of any Court to look at words which have been so dealt with, and absolutely taken out of the contract for any purpose whatever connected with the construction of that contract, of which they form no part whatsoever. In this particular case the instrument was not executed before those words were deleted. There might have been an agreement by common consent to delete the words after both sides had executed it; but even then your Lordship could not have looked at them, they having been deleted. You must have looked at the new agreement which the parties had come to. If they had agreed to introduce a new term, or to strike out a term, that would have been a new agreement superinduced (to adopt the expression of one of the learned Judges in the Court below) upon the original agreement. But here there is nothing of that kind. At the time when the words were deleted the agreement was only an offer made by one party (Messrs Inglis) for the acceptance of the other party (Messrs Buttery & Company). Messrs Buttery & Company did not agree to that offer, and some words were therefore struck out. It is to my mind perfectly immaterial whether the instrument was torn up and rewritten—written out again with those words no longer contained in it—or whether the course was taken of running through those words as they stood in writing, in order that Messrs Buttery might come to an agreement

which up to that time they had not done. When that was done they agreed to the agreement which did not contain these words, and that is the only thing your Lordships can construe as being the agreement between the parties.

My Lords, with regard to the authority before Sir William Grant, I think it only comes to this, that being convinced that an interlineation made in a will had been made at the same time as the codicil, and the codicil being struck through, he was able to ascertain, and did rightly ascertain, that the codicil being cancelled, that amounted to a cancellation of the very thing the testator had done in his will. Therefore it came to an ordinary case of duplicates, where one of the duplicate wills being in the testator's custody, and the other being in India, he revokes and cancels the one will, and the cancellation of that is a cancellation of the duplicate. That is the real explanation of that case, and no other is required.

Therefore, my Lords, what I propose to your Lordships is, that the interlocutor complained of should be affirmed, except so far as it relates to the sum of £60, 0s. 10d. and that as regards that £60, 0s. 10d., it should be reversed. There may be some doubt as to whether the success of the appellants in that point should affect the costs, but £60 is a sum worthy of consideration, and it was not given up in the Court below, nor was it given up here until there had been some discussion of the case. Taking this into consideration, perhaps your Lordships will be of opinion that we ought to come to the conclusion that the appeal should be dismissed except as regards the £60, 0s. 10d., and dismissed without costs of the appeal. We shall not interfere with the costs below of course.

Lord O'Hagan—My Lords, I entirely agree with my noble and learned friend who has just addressed your Lordships, and he has exhausted so fully the reasons on which our judgment will be founded as to dispense me from the necessity of saying more than a few words.

The case appears to me, my Lords, important, —not in itself, because after all, although the matter in dispute is considerable, the principles of the decision, so far as the agreement is concerned, are, I think, very clear indeed—but important with reference to the admissibility of evidence. Upon that matter a question of very great importance, I think, did arise in the Court below, and has arisen before your Lordships, and I am bound to say, with my noble and learned friend now on the woolsack, that although I concur in the conclusions at which the majority of the Court of Session have arrived, I do not concur in the reasons upon which those conclusions were grounded. I speak particularly of the judgment of my noble and learned friend the Lord Justice-Clerk. I do not think that the case is to be decided at all either with reference to the evidence as to communings or writings before or after the completion of the contract.

We were pressed very much by Mr Benjamin as to the hardship of the case upon his client. He said that the work had been done and the work had not been paid for. That is simply begging the question. The work undoubtedly was done; but the question is whether all was not paid for it which the parties had contracted to pay? I am of opinion, after giving the case the best attention I can, that that was so, and that, whilst of course one may regret that Mr Inglis should suffer by any mistake he committed, if he did commit a mistake—and I suppose he did, as he says he did—in this matter, at the same time I cannot forget that, upon the uncontradicted evidence—for it is uncontradicted as far as I know—of every competent person in the case, it was his own fault if he did commit the mistake, the consequences of which he must now suffer.

With reference to the deleted words, I think, with my noble and learned friend, that it is of great importance that it should be understood that there is no question on that point in the mind of anyone of your Lordships. When those words were removed from the paper which at that time presented the full contract between the parties, those words being removed ceased to exist to all intents and purposes, and whether it was possible, as in point of fact it was, to read them in consequence of their simply having a line drawn under them, or whether they were absolutely obliterated, appears to me not to make the smallest difference in the case. The contract was complete after the deletion. The parties had had a confluence of will, and had come to identity of decision and purpose upon it, and the removal of those words took away absolutely from that contract any sort of explanation or condition which might have been introduced into it by them. It appears to me that if we had yielded to the extremely able argument which was addressed to us upon this point on behalf of the respondents, we should have fallen into the error—which has been, I must say, very forcibly discussed on both sides—of attempting to construe a contract by things antecedent to it. The only effect of admitting these deleted words to the consideration of your Lordships would have been to show what had been in the contemplation of the parties before the contract came to be completed. That appears to me to be impossible, and all the more so for this reason—If those words were to be admitted to affect the minds of your Lordships in deciding this case, then, if they had been obliterated altogether, you must by logical necessity have permitted also that secondary evidence should be given to them. Now that manifestly could not be done; there is no authority for it, and it is contrary to all reason and all principle. Therefore, I think that these deleted words will be very properly excluded from the consideration of your Lordships.

I need say no more than has been already said as to the impossibility of allowing the class of evidence of what is called communings—that is to say, negociations—before the matter settled itself into a contract to be admitted at all, whether those negociations or communings occurred before (communings, at all events, occurred beforehand) the contract was completed or afterwards. The contract must stand by itself, and must be construed according to its own words and what is contained within its own four corners.

Proceeding to the question, which appears to me to stand altogether upon the agreement itself and the appended specification, I think it is not very difficult to come to a reasonable conclusion as to what was the real understanding between the parties. It was observed—and I think very properly observed—by Mr Herschell, as a very

material circumstance in the case, that both these parties knew very well what they were about; they knew what the classification of the ship was, and it is perfectly manifest that the object which was proposed on the one side and accepted on the other was that the ship should be classified. You cannot doubt that when you see the whole course of the statements in this specification, and the references to the rules of Lloyds in all the cases I believe to which those rules are applicable. It is perfectly plain that those references indicate clearly the intention of the respondents to have their ship classified—not to have a bit of it classified, whether this bit or that bit, according to this rule or that rule, but to have the whole ship classified, and classified in the very highest way.

That being so, my Lords, we have the evidence of Mr Purdie, to which my noble and learned friend has referred for another purpose, and he tells us upon this particular matter—"That class which the "United Service" got is the best class for that type of ship. A considerable amount of plating was required. All the plating that was done on the vessel was necessary to give her the class 100 A1 at Lloyds."

Nothing was done to her more than was necessary to give her that class. If that be so—and it is as manifest as the light that the purpose of the parties was to have her so classified—then if these repairs—call them repairs, or call them renewals, or call them what you please—were such as were necessary, and nothing more than necessary for that purpose, it is not too strong a thing to say that Mr Inglis should have known when he entered into this bargain that it was intended that the contract should bind him to complete the repairs in that particular way.

With reference to Mr Inglis not knowing the condition of the hull, my noble and learned friend has referred already to the evidence of this same Mr Purdie, and nobody can read that evidence, I think, without coming to the conclusion that if Mr Inglis did not understand the condition in which the hull was it was his own fault, because Mr Purdie distinctly says upon that part of the matter—"Shipbuilders like the Messrs Inglis would certainly be able to see these plates I have just mentioned for themselves."

We are told also that the Messrs Buttery in their condescendence declared what was not to be encountered by such evidence as was given in the case—that the state of the plating was not discoverable at that time. The condescendence does not say that; it simply says that the defenders and their principals, away in the Indies at the time, had not an opportunity of discovering it; but it does not say that nobody had an opportunity, and here is the surveyor of Lloyds, who says he had an opportunity and used it, and saw with his eyes what any other eyes might have seen equally well. Therefore it is impossible to have any question upon that point.

Then, coming for a moment to the terms of this agreement—putting aside the communings, &c.—putting aside the deleted words—what have we? We have, first, in the beginning of the particular clause on which the matter appears to me really to turn altogether—"The plating of the hull to be carefully overhauled and repaired." The first question, of course, is that which has been discussed so much—namely, what is the meaning of the word "repair" there? I think, as I said in the course of the argument, it may have either of two meanings—either the meaning of patching or the meaning of renewing, according to the circumstances. It is impossible to say that if in a case like this there was really a want of the supply of a plate in a particular place, or of half-a-dozen plates in particular places, the repairing would have been complete if those plates had not been supplied.

I find in one of the judgments of the Court below something with reference to the meaning of the word repair which may be worthy of the attention of your Lordships. Certain Scotch authorities, and English also, are presented with reference to the meaning of that word. In Young's Nautical Dictionary it is stated to mean, to see "that any defect is made good." In Judd's Johnson's Dictionary (I do not know Judd's particular edition of Johnson's Dictionary, but I suppose it is a Scotch edition) it is stated to mean "to restore after injury or dilapidations;" and again, "to fill up anew, by something put in the place of what is lost." Certainly, if these definitions are in any degree correct, there is an end of the question. And in Webster's Dictionary "to repair" is stated to be "to restore to a sound or good state after decay or partial destruction, as to repair a house, a wall, or a ship; to repair roads and bridges; to rebuild a part decayed or destroyed; to fill up, as to repair a breach; to make amends, as for an injury, by an equivalent."

Nothing can be more to the purpose and more conclusive as to the meaning of the word "repair." The evidence that was given in this case by experienced persons with a view of putting a particular conventional meaning upon that word utterly failed. The witnesses contradicted each other, and some of their evidence appeared to me, I confess, to be contrary to common sense and to all experience. One of them said that if he was employed to repair the deck of a vessel he would not consider himself bound or at liberty to put in a plank for the purpose of "repair." That was going, I think, beyond reason and experience. Therefore upon this first clause, which is the determining clause in the case, I am clearly of opinion that Mr Inglis undertook to renew when he undertook to repair, as far as was reasonably necessary.

The other part of the clause is equally strong, I think, with the first part of it—that is with reference to the use of the word "ironwork." Mr Benjamin contended, and the Lord Advocate also contended, with very great force and ingenuity, that the effect of those words should be limited, and, as I understood them, "all ironwork" was not said by them to relate to "all ironwork" of every kind referred to in all portions of this specification, nor to the plating of the hull, mentioned in the beginning of the clause, but was to be confined to the deck-beams, ties, diagonal ties, main and spar deck stringers, and all "ironwork" being *ejusdem generis* or connected with those particular things. I confess I cannot go with that. The words, in the first place, are very large and general; moreover, they come in a portion of the clause the heading of which is "ironwork." The specification is framed in such a way as to divide under certain heads the particulars which are referred to gene-

rally in the agreement, each particular being headed in a particular way, and when you find "ironwork" put at the top of this paragraph, and find "the plating of the hull" put next after it, and then "deck-beams, ties," and so forth, and then "all ironwork," I do not see that you can eliminate the operation of the general title of the clause, nor do I see how you can apply the requirement that all "ironwork" is to be "in accordance with Lloyds' rules for classification merely to the "deck-beams, ties, diagonal ties," and so forth, and not apply it to the plating of the hull. The plating of the hull requires the use of iron, and why, contrary to what one would say is the plain meaning of the clause, should you confine the operation of the words "all ironwork" to "deck-beams, ties, diagonal ties," and so forth, and not give them application to the plating of the hull? If you do give them that application the matter is tolerably clear, and there cannot be much difficulty about it.

My Lords, I wish to make only one other observation. I am not sure whether that observation was made by my noble and learned friend or not, but if so, it may, I think, well be repeated. It is that, looking at the other portions of the specification, you find such a thing as this—"Ceiling: as much ceiling in holds to be lifted as required by Lloyds, and ship's timbers thoroughly cleaned, examined, and overhauled, cemented and painted. Any ceiling renewed to be paid for extra." Now, it is a very striking thing that when a renewal as a separate thing was intended to be provided for, and especially when an extra was intended to be provided for, that is specifically stated; whereas in this particular case, with reference to the ironworks of these plates of the hull, there is no such provision. Taking the instrument as it stands before us, and not as it stood before the deletion took place, there is no provision of that sort regarding Messrs Inglis, or preventing the common operation of the words.

On the whole, my Lords, I am clearly of opinion that the judgment of the Court below ought to be affirmed, so far as regards the £1200.

Lord Blackburn—My Lords, in this case there is a sum of £1260, 0s. 10d., which has been paid into a bank to abide the decision of some points which were raised. The question which arose in the Court below was, whether Messrs Inglis or Messrs Buttery were entitled to that £1260. That question arose upon two different matters—as to the £1200, the question was as to whether the work done was extra work or not; as to the £60, 0s. 10d., the question was whether the moneys paid for certain small matters which made up the £60, 0s. 10d. were moneys which Messrs Inglis ought themselves to have paid, or moneys which ought to have been paid by Messrs Buttery. Somehow or other the question of the £60, 0s. 10d. appears to have been lost sight of altogether in the Court below. I can see no reason whatever—and none has been suggested—why that money of £60, 0s. 10d. should not be recovered by Messrs Inglis, for I do not see that they were bound to pay that sum at all. In saying that I do not think that one does really reverse the decision of the Court below, for I do not think any of the learned Judges in that Court noticed that there was such a point. Nevertheless they have given the £60, 0s. 10d. to Messrs Buttery, and Messrs Inglis are entitled to have that sum. Therefore, as regards the £60, 0s. 10d., the decision of the Court below must be reversed, and Messrs Inglis must be declared entitled to it.

My Lords, I also agree with my noble and learned friend who moved the judgment, that under these circumstances, where the appeal is brought not for a mere nominal sum, but for a substantial sum, there ought to be no costs of the appeal on either side. Both sides succeed to some extent. Messrs Inglis get the £60, 0s. 10d. Messrs Buttery keep the £1200, and the appeal, I think, is a matter in which there is no victory; consequently there should be no costs of the appeal given. The costs in the Court below are quite on a different footing, and we do not propose to touch them at all.

Now, my Lords, as to the £1200, upon which I think the decision of the Court of Session was right, although I think it my duty to state distinctly that in my opinion the reasons upon which the Lord Justice-Clerk mainly relied were not good reasons for that judgment, I think the conclusion was a right one, but the reasons given by him were wrong. He lays down a principle nearly accurately, but not quite. He says that in all mercantile contracts, "whether they be clear and distinct or the reverse, the Court are entitled to be placed in the position in which the parties stood before they signed," and that he applies so as to say that you are entitled to look at all that they said and did during the time of the communings, as they are called in Scotland—that is to say, whilst the matter was in negotiation, as it is more generally called in England—because unless you look at all those things you cannot be in the position in which the parties were, and he takes the document in which there is a deletion and looks at the deleted sentence, which in my mind is merely a communing. I cannot think that that is correct.

I think that Lord Ormidale, who comes to the same conclusion, comes to it upon right grounds. He says he does not think that he ought to look at the communings and other matters. He mentions the subject, and says that you are entitled to look at the surrounding circumstances to a great extent, but not at the communings; and he therefore says—"I have been examining the proof and correspondence, and taking the benefit of such aid as it affords. I have endeavoured to eliminate and disregard everything except those circumstances which can be fairly and legitimately comprehended by the expression 'surrounding circumstances' in its legal sense." That, I apprehend, is perfectly right and sound.

My Lords, I should hardly occupy time by mentioning this unless it were that these principles appeared to me really to be of great consequence, and I have the less scruple in mentioning it now because I really do not think I can do better than read about twenty lines of Lord Gifford's judgment, as expressing in extremely clear words exactly what I think myself. He says—"Now, I think it is quite fixed—and no more wholesome or salutary rule relative to written contracts can be devised—that where parties agree to embody, and do actually embody, their contracts in a formal written deed, then in determining what the contract really was and

really meant, a Court must look to the formal deed, and to that deed alone. This is only carrying out the will of the parties. The only meaning of adjusting a formal contract is that the formal contract shall supersede all loose and preliminary negotiations, that there shall be no room for misunderstandings, which may often arise—and which do constantly arise—in the course of long, and it may be desultory, conversations, or in the course of correspondence or negotiations during which the parties are often widely at issue as to what they will insist on, and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation. There can be no doubt that this is the general rule, and I think the general rule strictly and with peculiar appropriateness applies to the present case. The deed which we have to interpret as to the contract consists of the memorandum and specifications, and of nothing else." Now, my Lords, I agree in every word of that, and, as I have already said, I do not see that I can possibly express it better. This is my opinion as well as Lord Gifford's.

Quite consistently with that I think you may, while taking the words of the agreement, "look at the surrounding circumstances," as Lord Ormidale expresses it, and see what was the intention. You do not get at the intention as a fact, as Sir James Wigrain in his treatise on Extrinsic Evidence calls it, but you see what is the intention expressed in the words used as they were with regard to the particular circumstances and facts with regard to which they were used. The intention will then be got at by looking at what the words mean in that way, and doing that is perfectly legitimate.

We have now to look at what this contract means.

I think both Lord Gifford and Lord Adam, who took a different view of the contract from that which I take, seem to have come to this, that to do repairs cannot mean to do repairs when they are very extensive. That really seems to be the argument they have used. Lord Adam says—"The Lord Ordinary, however, does not think that the extensive renewal of iron plating which was found to be necessary was intended by the parties to be included under the head of overhauling and repairing the plating of the hull." And I think Lord Gifford says very nearly the same. He seems to think that if it had been a little new plating that was to be done, that might have been fairly enough called repairing, but that, being a great deal, it cannot be. That I cannot agree in.

My Lords, according to the sound rules of construction, what we have to look at is What, when the parties used these words in the memorandum and specification, did they mean by them? Upon that I can only say it was an iron ship that was to be lengthened. It plainly appears upon the face of the contract that both parties knew and intended that it should be classed as 100 A1 at Lloyds; and the one being a shipowner and the other being a shipbuilder, we must take it that both of them were perfectly well aware what the rules of Lloyds were. I do not pretend to construe the rules of Lloyds. I had them handed to me during the argument, but when I looked at them I found, what I had rather expected, that I could not understand them without the assistance of an expert to explain them, and answer various questions about them. But whatever they were, they were known to both these parties. Both Messrs Inglis and Messrs Buttery must be taken to have been well aware what the ship was, and what the scantlings were, and what was the thickness of the plates of this ship in her normal state and condition if in good order. They both evidently thought—and no doubt they were right, for so Lloyds' surveyor seems to think—that if the plates are in good order and condition and in their normal state, and such as they should have been, the ship might have been classed 100 A1 well enough after she had been lengthened 40 feet, and with the "additional strengthening," whatever that may be. At first I thought it meant strengthening of the whole ship, but I rather changed my mind in the course of the argument, and thought that it applied only to the 40 feet; now I am inclined to think it means the 40 feet and so much strengthening as was necessary to join on the 40 feet to the rest of the ship; but as the decision does not require me to solve that point I only say that there is a difficulty about that point, and I leave it.

My Lords, when you come to the specification, which is certainly a part of the contract, you find that it says—"The plating of the hull to be carefully overhauled and repaired." Now, I do not say that the words at the end of that sentence—"All ironwork to be in accordance with Lloyds' rules for classification"—apply to the overhauling and repairing of the plates. I am rather inclined to think that they hardly do. And I by no means say that if Mr Benjamin has been correct in his basis of fact, and had established that the only reason why they changed the plates upon the portion of the ship corresponding to that portion of the model which is made red was, that Lloyds' rules required that they should be heavier and thicker plates than they had been originally. If that had been made out, I am not satisfied that he could not say that substituting thick plates for thin ones was not repairing. I think it might have been right in that case. But then I think, as I said before, we must take it upon the evidence that the parties knew, and as a matter of fact were right in knowing—although at the trial shipwrights were present, and there was every means of questioning it, no one seems to have questioned that both sides were right in thinking—that the plates would do for classifying the ship as they wished if they were in that natural and normal condition. The only evidence we really have as to their state is in a letter, where Mr Inglis said he found on looking "that the reverse bars in holds were much decayed, and require renewal in some places, also that the shell plating was greatly wasted, having been originally unprotected by cement." And Lloyds' surveyor "recommended that the whole of the plating between the bulkheads of the machinery space be removed and replaced by new plating."

When that comes before us explained, it certainly seems to me that the plates were so wasted

that they would not do, and, moreover, I think it goes to this extent, that they were so wasted that you could not merely repair them. I quite agree that when a rivet has got loose and there is a hole, you are not necessarily to take out the plate and put in a new one. You may repair the hole by rivetting over it; that will do very well. "Repaired," I think, means patching where patching is reasonably practicable, and where it is not you must put in a new piece. The instances which have been mentioned already by some of your Lordships seem to me to show that that is the plain meaning of the word.

Taking that to be the case, Messrs Inglis having said we will "overhaul" the plating "of the hull," and "repair" it (using the words "overhaul" and "repair"), can it be said—when it was found that many of those plates were so wasted that it was required in order that the ship should be put in a good condition that they should be replaced—can it be said that that was not "repairing?" I think it cannot. As I have already observed, some of the Lords of Session seem to me to have gone as far as this, that a little replacing would be "repairing," but when it turned out to be much it could not be considered as repairing, on the ground of hardship upon Mr Inglis. Now, I should have thought it would have been hard upon Mr Inglis if he had been unable to discover it beforehand, and at first I thought it was so; I supposed that when the ship was afloat you could only guess at what was wanted. But the evidence of Lloyds' surveyor seems to show that as to the larger portion Mr Inglis really did commit a mistake in not going down or sending someone down into the hold or the coal-bunkers, and that if he had done so he would have found that the plates were wasted, and that there was a good deal more requiring to be done than he expected. However that may be, we can only construe the agreement now as it stands, and it seems to me that he was bound to repair whether what needed to be done was much or little.

Consequently, I am of opinion that as regards the £1200 the judgment of the Court below is correct.

Lord Gordon—My Lords, I quite concur in the proposal which has been made to your Lordships by my noble and learned friend now on the woolsack. It is so late in the day that I really think it would be wrong in me to detain your Lordships much longer, but still there are one or two points connected with the disposal or management of this case in the Court below that I respectfully think it my duty to bring before your Lordships.

The Lord Ordinary (Lord Adam) gave judgment for the appellants looking at the documents alone, and not ordering any general proof, and I must say that I think, upon the whole, that was probably a more judicious course than to open up a proof before answer, as it is called. A proof before answer is a very convenient proceeding, but I think it is one which should be very carefully limited before the Court allows it to take place, especially upon such a record as the present, for really there are no averments upon which a proof could well be taken, or which could afford any restriction or limit to the proof. When a proof before answer is granted, it appears to me that the proper course is to limit the proof to certain definite points which the Court will take up before they leave it to a jury or to a Judge to go into what are called the surrounding circumstances, which really opens a floodgate for litigation of a very uncertain character indeed; and therefore I venture to say that the proper course is to define what are the points with reference to which the Court are of opinion that an inquiry is relevant. Unfortunately that course was not adopted in this case, and the result has been a proof which has been very discursive and in no way limited.

I quite concur in the view which has been taken by your Lordships, that certain views have been expressed by the Lord Justice-Clerk with reference to the competency of proof which I think might be attended with dangerous consequences if it were not that your Lordships have expressed an opinion opposed to the principles which he has laid down. Lord Ormidale has gone into the "surrounding circumstances." Now, there were undoubtedly some facts which might need to be inquired into, but with reference to these I wish they had been defined before the proof was ordered, and then we should have had a more relevant and limited proof. But Lord Gifford, I venture to think, has expressed more correctly the views which ought to regulate this case.

I think it quite unnecessary to go into the circumstances connected with the case at this late hour of the day, and I shall merely express my opinion that your Lordships have disposed of the case in the best manner.

Interlocutors complained of affirmed, save so far as the interlocutor of the 3d November 1877 ranks and prefers the respondents Messrs John Buttery & Company to the sum of £60, 0s. 10d., part of the consigned fund of £1260, 0s. 10d., with interest upon such part since the 18th October 1877; and as to such sum of £60, 0s. 10d., and interest, declare that the said interlocutor should be reversed, and that the appellants should be ranked and preferred as entitled thereto. No costs of the appeal.

Counsel for Appellants (Respondents)—L.-A. Watson—Benjamin, Q.C. Agents—W. A. Loch—Gibson, Craig, Dalziel, & Brodies, W.S.

Counsel for Respondents (Reclaimers)—Kay, Q.C. Herschell, Q.C. Agents—Robertson—J. W. & T. Mackenzie, W.S.

COURT OF SESSION.

Monday, March 25.

OUTER HOUSE.

[Lord Adam.

M'INTOSH AND OTHERS (STEVENSON'S TRUSTEES), PETITIONERS.

Lands Clauses Act—8 and 9 Vict. cap. 19, sec. 79—Reinvestment of Consigned Money—Expenses.

Certain subjects, held by testamentary trustees for behoof of A in liferent allenarly