in the property of the concern, but also in the management, while the surviving partner concedes them a right to an interest in the business but denies that they have any right to interfere in the management.

Now, the contract contains a clause stipulating that on the death of either party the copartnery should not be dissolved, but, on the contrary, that the representatives of the partner deceasing shall be entitled to take his room and place in the copartnery, with this exception that such representatives shall not be entitled to take the active management or carrying on of the business of the copartnery. Now, the survivor contends quite reasonably that this clause, while it gives to the representatives of the predeceasing partner an interest in the profit or loss of the concern, excludes them from any share in the management. But it is contended on the other side that this is not the true meaning of the clause, or, at least, that though it may be the *prima facie* meaning, the words are capable of another meaning which is really impressed on them by reference to the contract as a whole, particularly by reference to a prior clause giving the whole active management to Alexander, which is to this effect, "and he shall be the manager thereof, and for his services as such he shall receive a salary of such amount as may from time to time be agreed on between the partners." The contention of the defender is that the clause first referred to must be taken in its *prima facie* meaning, and that though Alexander had the active management during his life, his representatives, if he predeceased, were to take his right in the business with the exception that they were not to have the active management of it which belonged to him.

The Lord Ordinary is of opinion—and I agree with him—that the words of the clause are applicable to the representatives of either party, and thus the true meaning of it is that contended for by the defender, and that the pursuers have shown no reason for impressing on it a more limited construction. I think the Lord Ordinary is right in this, and I see nothing in his judgment requiring any alteration or modification. The pursuers, as representatives of the predeceasing partner, will therefore take his share in the business, with the exception that they will have no part in the management, and the Lord Ordinary has rightly assoilzied the defenders from the remaining conclusions of the summons.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Justice-Clerk—I entirely concur.

Lord Craighill was absent.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Darling. Agent—David Milne, S.S.C.

Counsel for Defender (Respondent)—Pearson—Law. Agents—Rhind, Lindsay, & Wallace, W.S.

Thursday, July 9.

SECOND DIVISION.

[Lord Trayner, Ordinary.

WALLACE & BROWN *v.* ROBINSON, FLEMING, & COMPANY.

Sale—Disconformity to Contract—Timeous Rejection—Breaking Bulk.

A cargo of 615 logs of wood arrived in port on 14th June, and its discharge was finished on 26th June. The purchaser sold eleven logs from the ship's side without examination, and cut up in his yard thirteen other logs to fulfil an order. The latter were not delivered as they were found unsuitable. He subsequently had a great number of the other logs chipped in order to ascertain their condition, and on 3d July wrote to the seller's agents rejecting the cargo as disconform to contract. *Held* that the rejection was timeous, and that there had been no breaking of bulk nor act of ownership sufficient to bar rejection.

Opinion per Lord Trayner (Ordinary), that the purchaser must pay the seller the full amount received by him for the eleven logs sold, and not merely the amount of the invoice price relative to them.

Agreements and Contracts—Sale—Bill, Payment of Price of Goods by Acceptance of—Agent and Principal.

An agent for a disclosed foreign principal sold to a merchant in this country a cargo of timber, payment to be made "by approved acceptance to the seller's or agent's drafts payable in exchange for shipping documents." The purchaser, after accepting the seller's draft for an amount corresponding to the invoice price of the goods, rejected the goods on delivery as disconform to contract, and refused to honour the acceptance. In a suspension by him of a threatened charge on the bill by the agent, the latter pleaded that he acted only as agent, and that he held the bill for value, having given value to the principal for the amount of it by accepting the latter's draft, and was thus entitled to maintain the diligence upon the purchaser's acceptance independently of the contract of sale. The amount of the agent's acceptance to the principal did not correspond with that of the purchaser to the former. *Held* that the bill accepted by the purchaser related to the contract of sale, and that the agent could not maintain the diligence upon it while the contract remained unfulfilled by the principal.

In February 1884 Robinson, Fleming, & Co. of London, acting as agents for Anton Tuchhändler of Dantzic, agreed to sell to Wallace & Brown, of Arbroath, a cargo of wood. The sale-note contained these clauses—"All warranted to be of good, fresh, and merchantable quality, according to the usual mode of sorting at place of shipment; deliverable free on board a vessel according to the custom in the port of Dantzig. Payment by approved acceptance to the sellers' or agents' drafts at four months from date of bill

of lading, payable in London in exchange for shipping documents."

In June following, Wallace & Brown, after some correspondence, accepted Robinson, Fleming, & Co's. draft for £419, 13s. 1d., being the invoice price of the timber, in exchange for shipping documents. Robinson, Fleming, & Co. had previously accepted Tuchhändler's draft for £396, 6s. 5d.

A cargo of 615 logs of wood, consigned to Wallace & Brown, arrived at Arbroath on 14th June and was all discharged on the 26th. The official measurement of the cargo was completed on 1st July. Eleven logs were delivered to a purchaser from the ship's side while the cargo was in course of discharging, without being examined. Before the measurement was completed 13 other logs were cut up by Wallace & Brown in their yard into lengths and planks in order to fulfil an order to a customer who wanted the wood for joisting, but were not delivered, as they were not considered suitable. In consequence of the condition in which these 13 logs were found to be when cut up, Wallace & Brown had nearly all the rest of the logs, half of which were by this time lying in their yard and the other half in the tidal harbour, chipped on the sides in order to ascertain their condition. On 3d July they wrote to Robinson, Fleming, & Co. as follows—"The cargo pr. 'Elise' @ Dantzig is now discharged, and part put into our yard, and we take leave to say that it is by far the worst lot of timber ever we had into our place, and we really wonder that the shipper should have attempted to ship such wood. Instead of the wood being good, fresh, merchantable quality, as guaranteed and contracted for, it is hardly fit for firewood, being full of black sap and rot to such an extent that in our judgment it is not worth 25 per cent of the invoice price, and we must decidedly refuse to take delivery of this shipment in fulfilment of our contract."

On 7th July they again wrote that they would use no more of the cargo until they saw what was to be done, "and unless the shipper proposes something really substantial we must hold you responsible, applying to the Sheriff of the county to get a judicial survey made." On 15th July they wrote again that they had had the whole cargo examined by "a Glasgow gentleman," who was well versed in judging timber, in whose presence they chipped a great many of the logs in the yard and all that were in the dock, adding, "We must decidedly refuse to take this cargo in fulfilment of our contract."

Wallace & Brown refused to retire their acceptance for £419, 13s. 1d. when it was presented for payment on 30th September 1884. Robinson, Fleming, & Co. thereupon wrote to Wallace & Brown intimating that they (Wallace & Brown) had no claim against them (Robinson, Fleming, & Co.) and that they would take summary proceedings.

Wallace & Brown then presented the present note of supension of a threatened charge on the bill at the instance of Robinson, Fleming, & Co. They averred the contract as stated in the sale-note and disconformity thereto of the cargo received, and that the bill was accepted by them without consideration, or otherwise in anticipation of fulfilment of the contract, which had not been fulfilled.

Robinson, Fleming, & Co. averred in defence that they acted as disclosed agents for Tuchhändler, and that they were holders of an acceptance for value, they having accepted Tuchhändler's draft for the price of the cargo. They denied that the cargo was disconform to contract, and averred further that Wallace & Brown had not timeously rejected it, but had taken delivery and broken bulk, and were not in a position to reject when they wrote the letters founded on.

The suspenders pleaded—"(1) The suspenders having accepted the said draft in anticipation of implement of a contract which the respondents and Tuchhändler have failed to implement, the suspenders are entitled to have the said threatened charge suspended. (2) The complainers having been entitled to reject said cargo, and having duly and timeously done so, they are not liable to pay the bill in question. (3) The respondents, not being holders for value, and having no higher right than Tuchhändler as regards the bill in question, the complainers are entitled to suspension as craved."

The respondents pleaded—"(1) Suspension should be refused in respect (1st) that the respondents acted as agents for the sale only of the goods, and being holders for value of the said suspenders' acceptance, the suspenders are bound to meet and pay the same; (2d) that the said contract was duly and entirely implemented by the sellers; (3d) that the suspenders took delivery of, broke bulk, and used said cargo; (4th) timeous rejection was not made."

A proof was taken, in which the facts above stated were proved, and in which it was established that the cargo was not conform to contract.

The Lord Ordinary suspended *simpliciter*.

"*Opinion.*—In this case the suspenders seek to suspend a threatened charge upon a bill for £419, 13s. 1d. which they have accepted to the respondents Messrs Robinson, Fleming, & Co., London, and the ground upon which the suspension mainly proceeds gives rise to various considerations. In the first place it is said—and it is the fact—that the bill in question was accepted as against shipping documents, with reference to a cargo of wood sent from Dantzic to Arbroath on the suspenders' order. The contract is not an unusual one in any of its terms. It specifies a certain kind of wood—red wood and white wood—to be delivered at Arbroath, and it is all warranted to be of "good, fresh, and merchantable quality, according to the usual mode of sorting at the place of shipment." When the shipping documents arrived they were forwarded by the respondents to the suspenders, and in return for these documents, as I have said, they got the bill on which diligence is now threatened. The suspenders object to diligence being done upon that bill, on the ground, mainly, that the bill was granted in implement of their part of the contract, while the other part of that contract incumbent on the respondents has not been fulfilled.

"Now, obviously the first question that arises is that raised by both parties in their pleas-in-law—Whether the contract has been implemented by the respondents, that is to say, whether they have furnished a cargo of the description specified in the bought-and-sold note between the parties? [*His Lordship here reviewed the evidence*

on this point, and decided that the cargo was not conform to contract.]

"But then the second question is not less important, and it is—Whether if the cargo was not conform to contract it was timeously rejected? This question depends to some extent upon certain dates. The cargo seems to have arrived at Arbroath about 14th June, and the discharge of it was finished about the 26th. The measurement then went on, and the measurement was given by the customs officer to the suspenders on 1st July. On 3d July the letter by suspenders to respondents, which is in process, was written, which I take to be a distinct rejection of the cargo. I don't think it is in the least degree modified by the subsequent correspondence, so far as brought under my notice, and certainly not by the letter of 7th July, upon which the respondents chiefly rely. I regard this as timeous rejection. A purchaser is entitled to a reasonable time to examine the goods delivered to him; and in this case I cannot see that there was any unreasonable delay in the examination of this cargo with a view to its rejection or acceptance. From the time it was discharged—from 26th June until 3d July—very few days elapsed indeed, and it does not seem to me to be in the least degree an unreasonable time to occupy in the examination of the cargo, and therefore I think there was timeous rejection.

"But then it is said that the respondents are entitled to plead that bulk was broken, and that that of itself bars the suspenders from objecting. Now, there again I don't think the respondents have been successful in their contention, because in regard to either of the two matters on which they rely I don't think there was breaking of bulk in the legal sense so as to bar objection, nor was there any act of ownership of the kind which would bar rejection, if rejection was otherwise warranted. The thirteen logs that were cut up were undoubtedly cut up with a view to fulfil an order, but it was found upon cutting them up that they were utterly unsuitable for the order—an order for which they would have been perfectly suitable if the goods had been conform to contract. I think the suspenders were entitled to rely upon the goods delivered to them being conform to contract, and to proceed to cut them up to fulfil an order they had. But the moment they discovered that these thirteen logs were not conform to contract they put them aside; and I don't think that their cutting them up was either an act of ownership or breaking bulk such as would warrant me in saying they were now barred from rejecting goods otherwise not conform to contract. With regard to the eleven logs there is probably a little more difficulty. There again I am of opinion, however, that the respondents have failed to show any good ground why the suspension should not pass. The eleven logs were taken possession of from the ship's side, or from the dock, by the persons who were going to use them, and no objection has been stated to them, because they were put to a purpose for which, all defective as they were, they seem to have been suitable enough. Undoubtedly the suspenders must pay the respondents the full amount they received for these logs, and not the mere amount of the invoice price relative to them.

"That brings me to the last question—Whether or not the respondents are entitled to maintain their diligence on the bill in question in respect that they hold it for value in a way altogether apart from and unconnected with this contract? I am unable to adopt the respondents' contention. It seems to me that under this contract payment is plainly stipulated by acceptance of the seller's or agent's draft. Now, I ask first, for what was the bill in question granted? Plainly in fulfilment of this contract, for the respondents had no right whatever to draw upon the suspenders except in reference to this contract. They did in fact draw for the invoice price under this contract, and the subsequent acceptance on the part of the suspenders was a distinct fulfilment on their part of their obligation under the contract, which the respondents, as agents for Mr Tuchhändler, had a right to enforce. But I cannot connect the bill in question with anything else than the contract in question, and if I am right in that, then, as I have already found, the consideration having failed, the objections to the bill are well founded. But the case that is presented by the respondents is this, that after getting that bill from the suspenders as in fulfilment of this contract they gave themselves value to Tuchhändler for the amount of that bill, and that they held it precisely in the same way and to the same effect as if they had got it under endorsation from Tuchhändler. Now, in the first place, it seems to me the proof is defective upon that point. The respondents have produced in support of their view a bill drawn by Tuchhändler upon and accepted by them. But that bill is not and cannot be for the amount of this invoice, because it is for £396, 6s. 5d., while the amount of the invoice for which the respondents draw upon the suspenders is £419, 13s. 1d. The difference between them may be the amount of the commission, *del credere* or otherwise, that Tuchhändler undertook to pay to respondents in connection with the transaction. But when I look at the two bills I find that the one is in exact conformity with the contract—that is to say, it is a bill for the exact amount of the invoice price of this cargo, which is the consideration for the bill; and when I look at the other bill I find it is not in conformity with that invoice price, but relates to a transaction, maybe more or less distantly connected with the contract and arising out of it, but certainly not a bill which was ever drawn or accepted in fulfilment of suspenders' obligations under the contract with which I am dealing. I think the bill granted by the respondents to Tuchhändler may be regarded rather in the light of a separate transaction with him. They relied, and I have no doubt with very good reason, upon the perfect solvency of the suspenders, and in the meantime they accepted Tuchhändler's draft upon them for the amount which ultimately Tuchhändler was to take out of the transaction. In that way they undoubtedly accommodated Tuchhändler; but I cannot see that the fact of their entering into a separate transaction with him prevents the suspenders from pleading that the bill which they granted, and upon which diligence is now threatened, was (1) the bill which they were bound to grant, and did grant, under this contract; and (2) that the consideration for the bill having failed, they are entitled to have threatened dili-

gence thereon suspended. Upon the whole matter I will suspend as prayed for, and find respondents liable in expenses."

The respondents reclaimed, and argued—They admitted that the cargo was not conform to contract. But then the suspenders had broken bulk by cutting up a part of the cargo and selling another part, and could not restore it *in forma specifica*. They were thus barred from rejecting before their earliest letter professing to do so—Addison on Contracts, 8th ed., p. 955; *Tighe* v. *Wynne*, 2 Campb. 346. Further, the suspenders' remedy was not against them, but against the shipper. They were in the position of third parties with regard to the suspenders' contract with him. There was nothing to connect them with that contract. The bill did not show it; it was merely a negotiable document which might come into the hands of any holder, against whom the suspenders could not refuse payment.

The suspenders' counsel were not called upon.

At advising—

LORD JUSTICE-CLERK—We have here a very clear and distinct note from the Lord Ordinary explaining the case on both sides. We have heard Mr Hay's argument, and it appears to me that the grounds of the Lord Ordinary's judgment have not been in the slightest degree invalidated by anything we have heard from the bar.

In the first place, the Lord Ordinary holds that the cargo furnished was not conform to contract, and not only so, but that it was entirely disconform. In the second place, he holds that there was no unnecessary delay on the part of the buyers in rejecting the cargo. I think he is right in these respects. Then it is said that to a certain and very partial extent bulk was broken, not merely by the buyers for testing, but also to supply a customer. But it seems to me that there was nothing done of a kind which barred the buyers' right to reject the cargo as disconform to contract. Indeed, in many cases disconformity can be discovered only by a customer using some of the goods.

Lastly, it is contended that the bill on which the diligence is threatened, and which was accepted by the suspenders, stands good as a document of debt, and may be enforced by the agent as drawee, against the acceptors, although the contract has not been fulfilled by the principal. I entirely differ from this view. This bill was granted in terms of a written contract which says:—"Payment by approved acceptance and to the seller's or agents' drafts at four months from date of bill of lading payable in London in exchange for shipping documents." That it relates to this contract is certain, because the respondents had no other claims against the suspenders. I know of no authority for the contention that they as agents are entitled to enforce payment of a bill when the contract to which it relates has not been performed by the principal.

On these short grounds I am quite satisfied that the Lord Ordinary's view is the right one, and that we should refuse this reclaiming-note.

LORD YOUNG—That is my opinion also. We have heard Mr Hay's argument, and I admired the great candour with which the case was stated by him. The only point with which I had any difficulty was the last—whether an agent acting for a disclosed principal could make a claim against the acceptor of a bill, which claim could not have been made by his principal? But I confess that on reflection I am of opinion with your Lordship and the Lord Ordinary that the acceptor is not cut out of any answer by the fact of his acceptance being granted to the agent with whom the contract was made on behalf of the principal, and being sued upon it by him.

On every other point I think the case is at an end, on the most candid and proper admission of the respondents' counsel that the goods sold were not conform to contract, but so disconform that the buyers were entitled to reject them. That leaves only the question of timeous rejection. I think there was timeous rejection, and that it is contained in the letters which have been read to us. Now, was anything done to bar the rejection which the buyers, on the concession of the respondents, were entitled by reason of the disconformity, to make? Two things are alleged. Thirteen logs were cut up with a view to execute an order. Was the cutting up of these a bar to rejection? I am of opinion it was not. Then again, eleven logs were sold to a third party at the ship's side. He says that bad as they were they answered his purpose. Neither do I think that was a bar to rejection. There were over six hundred logs in the cargo, and some cutting and examination was necessary to determine their quality. I think nothing was done by the buyers to bar rejection, and that it was timeously made by them, and the bill which was accepted by the buyers in payment of the price being in the hands of the seller's agent, who made the contract, I think the disconformity of the cargo to contract is a good reason for suspension of a charge on the bill.

LORD RUTHERFURD CLARK concurred.

LORD CRAIGHILL was absent.

The Court adhered.

Counsel for Complainers—Thorburn. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Mackintosh—Hay. Agents—Henderson & Clark, W.S.

Friday, July 10.

FIRST DIVISION.

SPECIAL CASE — CARRICK AND OTHERS (NORTH BRITISH BUILDING SOCIETY IN LIQUIDATION).

Friendly Society—Building Society—Winding-up—Effect of Circular by Directors putting Stop to Business—Allocation of Losses—Rights of Borrowing and Non-Borrowing Members.

The directors of a benefit building society, which had sustained losses to an extent which absorbed the profits allocated to members of the society, borrowing and non-borrowing, issued on 13th May 1882 a circular to the members which practically brought the business of the society to a close, so that subse-