place, and take account of the traffic. The import of the evidence is that this accident occurred to the pursuer when he was unnecessarily clambering over goods which were legitimately there at the time, and in the proper use of the quay. He might have avoided the place altogether. I do not say he was bound to do so, but if he chose to clamber over these goods rather than to take the street outside, or the passage along the quay edge, he took a great and obvious risk upon himself. I do not think, looking to the whole circumstances of the case, that it has been established that the defenders were guilty of such fault or negligent carelessness as to contribute to the accident which the pursuer brought upon himself.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I concur in the view that the Sheriff-Substitute's judgment should not be interfered with except on clear grounds. My only difficulty is that the Sheriff has dealt with the evidence and expressed his opinions in a manner which does not inspire one with confidence in the result at which he has arrived. I concur, however, with Lord Young in thinking that the defenders were legitimately in occupation of this portion of the quay for the primary purpose of loading this vessel, and on the question, whether the handle fell through their fault, I am against the pursuer, who has, I think, failed to establish his case.

The Court pronounced this interlocutor:—

"Find that on the occasion libelled the wharf mentioned in the record, appropriated to the use of the defenders, was occupied by them in loading a ship with billets of steel, which were piled up on the quay: Find that the pursuer did not require to pass along the said quay, but could have, equally conveniently, gone by a different route: Find that, if he did pass along the quay, he did not require to pass over or close to the pile of billets: Find that he passed over the billets: Find that he did so at his own risk, and that the injury sustained by him in doing so is not attributable to any fault or negligence on the part of the defenders: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against: Of new assoilzie the defenders, . . . and decern."

Counsel for the Pursuer and Appellant—Young—Irvine. Agent—W. A. Hyslop, W.S.

Counsel for the Defenders and Respondents—Jameson—Dickson. Agents—J. & J. Ross, W.S.

Friday, June 6.

SECOND DIVISION.

[Lord Trayner, Ordinary.

HOPE *v.* CROOKSTON BROTHERS.

Arbitration—Award—Informal Proceedings—Intention of Parties—Goods Disconform to Contract—Right to Damages although Goods not Rejected as Disconform to Contract.

A merchant in Liverpool contracted to buy 1000 tons of hay of a prescribed quality from a certain firm at £4 per ton. 200 tons were delivered and paid for. Disputes arose as to the quality not being conform to contract, as to the obligation of the merchant to take the undelivered portion, and as to claims of damages. The parties agreed to "submit all matters in dispute" to two arbiters named, or their umpire, and to abide by their decision. An award of £350 signed by the two arbiters and their umpire was issued in favour of the merchant, who sued the firm for that sum in implement of the award, and alternatively as the amount of the damage he had sustained. It was proved that arbitration had been conducted in an informal manner, that the arbiters had made inquiries separately, had adopted the opinions of others as to the quality of the hay, had been in communication with the parties who had nominated them respectively, and had consulted the umpire without devolving upon him, but that such informal arbitrations were usual at Liverpool. The amount of the award had apparently been arrived at by taking the difference per ton between the £4 contracted for and the market price of the hay at the date of the arbitration. The hay had never been returned as disconform to contract. The Lord Ordinary was of opinion that the proceedings had been grossly irregular, and assoilzied the defenders, but the Court *held* that the proceedings in the arbitration as carried out had been just such as were usual in similar mercantile arbitrations, and such as the parties had contemplated, and gave decree for the pursuer accordingly.

John Wilson Hope, merchant, 3 Rumford Street, Liverpool, upon 26th September 1888 entered into a contract with Messrs Crookston Brothers, 19 Wellington Street, Glasgow, for the purchase of Algerian hay.

The contract note was in the following terms—"I have this day sold for you the following goods:—About one thousand (1000) tons Algerian hay in bales at £4 per ton for shipment in about equal monthly quantities between October and January next on cost freight and insurance terms per steamer to Liverpool. Quality to be fair average of shipments per 'Rufford' and 'Werneth Halls,' and only sound dry hay to be shipped—weight guaranteed over Dock

Board weighing machine. Payment cash against documents on arrival of vessel.
"Brokerage 1/ per ton. "JOHN W. HOPE.
One shilling.
—Any dispute on this contract to be settled by arbitration here in the usual way."

The first shipment of hay under that contract, amounting to about 200 tons, reached Liverpool on 31st October 1888 per steamer "Nedjed."

On 26th November 1888 Hope wrote to Messrs Crookston Brothers that the buyer from him had had the hay from the "Nedjed" returned by his customers, that said buyer had no market for hay of the quality supplied, and would not pay for any more without first thoroughly inspecting the bulk, but on 7th January 1889 he wrote again that his buyer having a large business to attend to was willing without prejudice to pass the lot per "Nedjed" "provided you make him an allowance of 5s. per ton, and he will agree to cancel the contract for the balance undelivered." Messrs Crookston Brothers declined to make the allowance claimed, and upon 15th January Hope wrote:—"*Hay ex 'Nedjed.*'—As my buyer claims arbitration on contract for the above, I hereby give you notice that unless you name your arbiter in course, I must call upon the Liverpool Brokers Association to name two arbiters to act."

The following minute of submission was accordingly entered into between Hope and Crookston Brothers—"*Liverpool, 26th March* 1889.—A dispute having arisen between the undersigned, Messrs Crookston Brothers of Glasgow and Mr J. W. Hope of Liverpool with reference to a contract for 1000 tons of hay, dated 26th September 1888, hereby mutually agree to submit all matters in dispute to the decision of James Beckett and Faithful Thomas Evans or their umpire, and to abide by their decision as if it were a rule of Court"—Beckett being the nominee of Hope, and Evans of Crookston Brothers. The arbiter chose Mr Richard Smith, produce broker, Liverpool, as their oversman.

The following award was issued upon 10th April 1889—"We, the undersigned, having been appointed by Messrs Crookston Brothers, Glasgow, sellers, and Mr J. W. Hope, Liverpool, buyer, to arbitrate in respect of a dispute on a contract for 1000 tons hay, dated 26th September 1888, hereby award, that the sum of three hundred and fifty pounds (£350) be paid by sellers to buyer in full satisfaction thereof.—F. T. EVANS; JAS. BECKETT; ROBERT HY. SMITH."

In May 1889 Hope brought an action against Crookston Brothers for payment of the £350 found due to him by said award, or alternatively for that sum as damages.

The defenders averred—"This award is so much in excess of the claim intimated to the defenders, or of any claim the pursuers could possibly have, that they cannot imagine on what basis it is arrived at. The pursuer has, however, sent to them the letter herewith produced, signed by Messrs John Coux and John Jarvis, to the following effect:—'We, the undersigned, having this day examined a quantity of bales of hay (Algerian) lying in the warehouse of Messrs Green & Taylor, situated in Beauford Street, have agreed that the market value is £2, 7s. 6d. per ton.' These are not the gentlemen whose decision the defenders agreed to abide by, nor is this the question in dispute between the parties, and which was referred to the said arbiters. The market value in April of the hay in question has nothing whatever to do with its being or not being of the quality specified in the contract. In the month of April the hay had been lying for months in a store, and even if it be assumed that it was really the hay in question, this fact does not appear to have been observed or at all events taken into account by the arbiters. The defenders believe and aver that the arbiters took no steps to ascertain what was the fair average of shipments at the date of the contract, nor whether hay supplied by them as aforesaid was in point of fact in conformity with the terms of the contract. They declined to receive evidence tendered by the defenders as to the standard quality of hay defined by the contract. The defenders therefore resist the present claim upon the following grounds, viz., that the arbiters have exceeded their powers in awarding the sum of £350, when the matters in dispute submitted to them were only (1) the question whether the hay actually supplied was of the contract quality, and (2) whether and what commission could be claimed by the pursuer, and the sum in dispute could not possibly exceed £90; that the arbiters have exceeded their powers, and have been guilty of oppression in basing their decision to any extent whatever on the market value of the hay in question, as at 5th April, without ascertaining the quality the defenders were bound to supply, according to the terms of the contract. Further, the award is informal, and falls to be set aside in respect that the oversman and the arbiters have been acting together, whereas the oversman should only have acted in the event of a difference between the arbiters. In any event, the arbiters were not entitled to delegate their duty, as they appear to have done. The defenders are prepared, if necessary, to raise a process of reduction of the said alleged award."

They pleaded—"(1) The award founded on being improbative, the pursuer is not entitled to found upon the same. (2) The arbiters having, in pronouncing the award founded on, acted corruptly, and having adjudicated upon matters which were not submitted to their decision, the said award is null and void, or at all events reducible, and is not binding upon the defenders. (3) The award being oppressive and *ultra fines compromissi*, and *ultra vires* of the arbiters, the pursuer is not entitled to enforce the same, and the defenders are entitled to have it set aside by way of exception, or at all events to have the present action sisted, in order that they may bring an action of reduction of the reward, if so advised."

A proof was allowed, from which it appeared that the arbiters had made inquiries in an informal manner from those able to assist them, but that evidence was not led

before both arbiters together; that they had examined those who had seen the hay shipped by the "Rufford Hall" and the "Werneth Hall," but had not themselves seen the hay from those vessels; that they had along with Messrs Coux & Jarvis inspected the hay from the "Nedjed," and that these gentlemen as experts had at the request of the arbiters written the letter objected to by the defenders; that each of the arbiters had had communications with the party which had nominated him; that they had consulted the oversman when they were in difficulty, had accepted his decision as final, had given effect to that decision in their award, and had acted throughout in the manner customary in such mercantile arbitrations in Liverpool. The defenders could not supply a sample of the "Rufford" and "Werneth Hall" hay, but offered evidence that the hay of that year was equal to their average shipments.

Mr Evans deponed—"I had seen the contract note in this case when the matter was referred to us. I knew there was a guaranteed quality stipulated, and that guaranteed quality was to be a fair average of the shipments as per 'Rufford' and 'Werneth Halls.' (Q) Did you ask the defenders repeatedly for a sample of the 'Rufford' and 'Werneth Halls?'—(A) I advised them that I had no sample to go upon it, but I cannot say whether I asked for a sample. [Shown No. 219]. (Q) That shows that you telegraphed for a sample of the 'Rufford' and 'Werneth Halls?'—(A) I presume so. I cannot remember whether they said they had kept none, but I got no sample at any rate. When I failed to get a sample I proposed to take evidence as to the shipments *per* 'Rufford' and 'Werneth Halls.' These shipments had been made in August 1888, or about that time. (Q) And this was now April 1889?—(A) Yes. The hay from those shipments in 1888 had been dispersed all over the country long before that. (Q) What was your only way in these circumstances of getting at a fair average of shipments *per* 'Rufford' and 'Werneth Halls?'—(A) From those who had consumed the hay. I made inquiries as to who had dealt in this hay or had consumed it. I found Mr Jarvis had taken delivery of some of it. He is a large farmer. I also made inquiries as to whose opinion we could ask regarding the quality of the 'Nedjed' hay. (Q) Your desire was to compare the opinion of experts as to the 'Nedjed' hay with the evidence of those who had seen the 'Werneth' and 'Rufford Halls' shipments?—(A) Yes. I met Mr Becket in my own office. Probably I had a meeting with Mr Jarvis and Mr Becket in my office, but I cannot be certain. I had a meeting in my office with Mr Becket and Mr Wilson Clark. I had found that Mr Wilson Clark had seen shipments of the 'Rufford' and 'Werneth Halls,' and the 'Nedjed' hay. I have been accustomed to act as arbiter on many occasions in Liverpool in mercantile contracts. The whole proceedings in the arbitration in question were conducted in the usual course. (Q) And as you had done on every occasion before?—(A) Yes. I have had similar inquiries made as to the comparison of goods. Mr Becket and I had a meeting with Mr Clark in my office. We asked him questions as to the value of the 'Werneth Hall' shipments. He told us the price, which I think was £5, 10s. He also told us what the hay looked like. I did not go along with Mr Clark to where the hay was stored, but I went with the experts, Messrs Jarvis & Coux, and Mr Becket. We went up to the hay loft. We were told by the owners of the place that that was the hay that came from the 'Nedjed.' They gave us a certificate to that effect."

The oversman deponed—"I acted as umpire in the submission between the parties to this litigation; Mr Evans and Mr Becket were the arbiters. I was consulted by them twice on two different points. (Q) Was that all you had to do with the arbitration?—(A) All I had to do with it in any way. They came to my office. The point about which they first came to me was with reference to whether the pursuer had barred his claim by taking delivery of part of the hay. . . . I read over the papers, and gave my opinion on the point. The second point was as to whether they could give any damages in respect of the hay not delivered—whether they could add anything to the sum they had already assessed. As far as I can remember, they had already assessed the amount of the claim. They had already made up their minds upon the amount to be allowed on the claim made, and the question for me was whether they were entitled to anything beyond that in respect of hay not delivered. The contract was for 1000 tons, and this dispute had reference to about 170 or 200 tons. I inferred that they had made up their minds as to the amount of the award when they came to me. I think the sum they arrived at was £365 or £370, and I said to make it a round figure, £350, and let the sellers pay expenses. . . . (Q) Were you shown Coux & Jarvis' report upon it?—(A) I think I saw every paper that they had. I took them home and read them before giving my opinion on the first occasion. When the arbiters came to me on that occasion it was rather to get my view on a point which they had difficulty about than for me to decide a point upon which they had differed. They came to me in the same way on the second occasion also. (Q) Rather to get their view corroborated than for you to give your judgment on a point regarding which they were at variance?—(A) I think one of the arbiters thought Mr Hope ought to receive something for the 800 tons not delivered, (Q) And then you said your opinion was that he was not entitled to that?—(A) Yes. As regards the actual amount—£350—which they awarded, I did not apply my mind as to how that sum was made up, so far as I am aware. They may have shown it to me, but I cannot remember. I did not see a sample of the hay. . . . (Q) Were the proceedings here in accordance with the usual custom in Liverpool?—(A) Quite."

The Lord Ordinary (TRAYNER) assoilzied

the defenders from the conclusions of the summons.

"*Opinion.*—According to the pursuer's averments on record, he purchased from the defenders, in September 1888, a thousand tons of hay, at £4 per ton, to be delivered, in about equal monthly proportions, from October to January. It was stipulated that the quality of the hay should be equal to 'fair average of shipments per "Rufford" and "Werneth Halls";' and only sound dry hay was to be shipped. The first shipment of hay under that contract reached Liverpool on 31st October, per the "Nedjed." About three weeks thereafter the pursuer wrote to the defenders that 'his buyer' was disappointed with the "Nedjed" cargo, and would accept no more of such quality. After some correspondence, the parties agreed, in March 1889, to submit 'their dispute' about this cargo to two Liverpool merchants, with power to them to name an umpire. An award has been produced, signed by the arbiters and umpire, by which they 'award that the sum of £350 be paid by sellers to buyer.' The pursuer now seeks decree for the amount so awarded, in respect of the award or otherwise, for £350 in name of damages for breach of contract. The defenders deny the alleged breach of contract, and consequently their liability for damages; and as regards the award, they plead (for the reasons given on record) it is not valid or binding upon them. To save the delay and additional expense which would have been occasioned by a separate action for the reduction of the award, I allowed a proof in this action generally of the averments of parties, a course in which the pursuer acquiesced.

"The first question now to be decided is whether the award is binding on the defenders. To this question I think there can only be given an answer in the negative. Anything more irregular than the proceedings in the so-called arbitration it would be difficult to imagine. The question to be there decided was whether the cargo of the "Nedjed" was conform to contract; that is, whether it was sound dry hay when shipped, and of the average quality of the shipments by two other vessels named. No inquiry seems to have been made at all as to the condition of the hay when shipped. Neither of the arbiters had seen the shipments which afforded the standard of comparison, and therefore had, of necessity, to inform themselves as to the character of those shipments by evidence. This evidence was taken partly by one arbiter and partly by another, not together but separately. The evidence was not taken upon oath, and no opportunity was given to the parties of cross-examining the witnesses who were seen by the arbiters, and the defenders' requests to be allowed to lead evidence were refused. The arbiter appointed by the pursuer, it should be noted, was not a dealer in hay, and confessedly was unable to decide as to the quality of the hay in dispute, or indeed, of any hay, by his own examination of it. Further, the arbiter last named admits that before the arbitration was commenced, and during its progress, he was frequently, almost daily, in private communication with the pursuer on the subject of it, advised what claim should be submitted on the pursuer's behalf, and received 'instructions' from him. The award, when pronounced, appears not to have been the award of the arbiters at all. Mr Becket (the pursuer's arbiter) says so; he says it is the judgment of the umpire alone. The umpire says he did not pronounce the judgment, that he never applied his mind to the question how the £350 awarded was made up, and that he (practically) did nothing more than name the sum of £350, as a round sum, in slight reduction of a sum on which he understood the arbiters were agreed, or practically agreed. Both arbiters however, say that they differed as to the amount to be awarded. Again, the award does not decide that the cargo of the "Nedjed" was disconform to contract. It decided that the defenders were to pay £350; but that proceeded obviously on this view, that the hay the arbiters had examined was worth £1, 12s. 6d. per ton less than the invoice price, and even this was the opinion, not of the arbiters (it could not be the opinion of Mr Becket, for he knew nothing about hay or its value), but the opinion of two persons to whom the arbiters seem to have delegated the duty of valuing the hay. In short, the arbiters, on the information given them, decided that the hay was too dear at £4 per ton, but they did not decide, and had not the proper materials for enabling them to decide, that that hay was disconform to contract.

"For these reasons, among others afforded by the evidence of the arbiters and umpire, I put the award aside as not valid and binding on the defenders, and proceed to consider the pursuer's claim for damages.

"Whether the cargo of the 'Nedjed' was good hay or bad, is a question on which the evidence is conflicting; but whether it was disconform to contract as not being equal to the prior shipments, is a question on which there is very little reliable evidence. But I am relieved from deciding whether the hay was conform to contract, being of opinion that the pursuer's claim is excluded by the fact that he never rejected the hay as disconform to contract, but has retained it since October 1888, when it was delivered to him. If the pursuer had rejected the hay as disconform to contract immediately after the award was pronounced, I should not have regarded his retention of the hay up till that date as sufficient to bar his claim on the ground that rejection was not timeously made, because up till then both parties were in dispute as to whether the hay was conform to contract or not. But whenever it was decided, or thought to be decided, that the hay was disconform to contract, it was the pursuer's duty to have rejected the hay at once. He was not entitled to retain the hay, and claim damages for breach of contract (*M'Cormick & Company* v. *Rittmeyer & Company*, 7 Macph. 854). In answer to this view of the case, the pursuer contends that the hay was timeously rejected by Mr Wilson, to whom he sold the hay, as

the pursuer's agent. But this answer will not avail the pursuer. In the first place, the pursuer avers on record that he was the purchaser of the hay from the defenders, and there is no statement that the pursuer was merely the defenders' agent in selling the hay to Wilson. If the pursuer was the buyer from the defenders, then the defenders are not affected by anything which may have been done by the buyer from the pursuer. Such a sub-buyer's rejection is not rejection by the pursuer. But (secondly) if the pursuer was not the buyer, but merely the defenders' agent in selling the hay to Wilson, then the pursuer has no title to sue the present action. In that case, there was no contract of sale between the pursuer and defenders, and consequently there could be no breach of contract to give rise to a claim of damages."

The pursuer reclaimed to the Second Division, and argued—The arbitration had been conducted as regularly as other arbitrations of a similar kind. A formal arbitration was not in view of either of the parties. The arbiters could not judge of the quality of the hay for themselves. They had taken the opinion of those in whom they had confidence, and whose opinion they had adopted as their own. They had acted rightly in so doing. The hay *per* "Rufford Hall" and "Werneth Hall" was no longer there to be inspected, so they had made inquiries from those who had seen it. It was said the award was not theirs but the oversman's, and that he had not devoted his mind to the matter. It was the award all those were agreed upon after consultation in the usual way in such matters. The non-rejection of the hay by the reclaimer did not bar his claim, for that fact was before the arbiters and the oversman. The award was made upon a submission of "all matters in dispute." That the parties intended a very comprehensive inquiry appeared from the correspondence with regard to the submission. The Lord Ordinary had made the mistake of scrutinising this arbitration as if it had been intended that it should be conducted with all the solemnities of a final arbitration in Scotland.

Argued for the respondent—The Lord Ordinary was right. The arbitration had been utterly irregular. The procedure was not such as the parties intended. The arbiters were chosen as skilled men in whose opinion the parties could trust. Their award was based entirely upon the opinion of third parties. One of the principal questions was whether the hay was disconform to contract when shipped from Africa. No inquiry as to this was made. The market value at the date of Coux and Jarvis' report was quite beside the question. Even if the hay was disconform to contract there had been no rejection. The hay should have been returned, if not during negotiations, certainly whenever the award was issued. It was *ultra vires* of the arbiters to deal with the question of damage—*Padgett* v. *M'Nair*, November 24, 1852, 15 D. 76; *Campbell* v. *M'Holm*, December 11, 1863, 2 Macph. 271; *Jardine* v. *Pendreigh*, January 28, 1869, 6 S.L.R. 272; *M'Cormick & Company* v. *Rittmeyer & Company*, June 3, 1869, 7 Macph. 854; *Chapman* v. *Couston Thomson & Company*, March 10, 1871, 9 Macph. 675; and July 19, 1872, 10 Macph. (H. of L.), 74; *M'Carter* v. *Stewart & MacKenzie*, June 14, 1877, 4 R. 890; Bell on Arbitration, bk. iv. *pass.*

At advising—

LORD JUSTICE-CLERK—The judgment of the Lord Ordinary in this case proceeds upon the grounds stated in his note. We desired a full debate that we might carefully consider both sides, but after hearing that debate I confess I have no difficulty about the case. My only difficulty is to see why the Lord Ordinary has decerned as he has done.

The action is one for £350, which the pursuer demands from the defenders in fulfilment of an award in an arbitration. The case arose about a cargo of hay which the pursuer bought from the defenders, but which he alleged to be bad, and not conform to contract as stipulated. He stated to the defenders that a buyer from him demanded arbitration, and he gave notice that unless they named an arbiter in course he would call upon the Liverpool Brokers' Association to name two arbiters. Matters were thus brought to a point, and the parties thereupon by an informal document agreed that the dispute should be referred to Messrs Becket & Evans as arbiters, or to an umpire or oversman to be named by them. What the parties agreed to was to refer all the matters in dispute to arbitration. The reference was rough and ready, but it was entered into in order to get practical men to decide in all matters relating to the dispute. It appears from the evidence that in this matter, as often happens in arbitrations, each party looked on the arbiter he had named as the representative of his side of the question, and as the person prepared to urge the points most favourable to him. It does not appear to have been in the mind of anyone that the arbiters were to keep aloof from their constituents. The arbiters accepted the appointment, met and considered the facts, made inquiries, and selected as their oversman Mr R. H. Smith. When they came at last to find that they could not agree, they went to Mr Smith, got him to decide, accepted his decision, and issued it as their own.

The allegation is now made against the arbiters that in not acting on their own knowledge they did not act properly, and that they took means to inform themselves as to facts and circumstances which they were not entitled to take. There is nothing in this objection. It was not in the mind of any of the parties that this arbitration was to be entered into with elaborate formalities. The defenders themselves say in their fourth statement that they "did not have any meetings with the arbiters, relying upon their settling the matter as practical and trustworthy men of business without any formal procedure." On their own statement there-

fore it is plain that the defender expected that the matter would be dealt with in a rough and ready—a practical—and not a formal manner. The arbiters dealt with the matter in this way, and they may have erred in not conducting the investigation in the best manner possible. This, however, was a contingency which might have been expected. Tangible corruption in the mode of conducting the inquiry is not averred, and mere informality in the proceedings is not sufficient ground for overturning the award.

It is also said that although the arbiters differed they did not refer the whole question to the oversman. I am not certain that in an arbitration of this sort the arbiters may not be allowed to take the assistance of the oversman without remitting the whole matter to him. But we are relieved from considering that by the fact, which is not disputed, that such a mode of procedure is in accordance with the custom of the place where this arbitration took place. After the matter was considered by the arbiters, with the aid of the oversman, all three concurred in the decision arrived at, and signed the award. There was nothing done which the arbiters were not entitled to do.

It is also said that the decision was *ultra vires* of the arbiters, because they had no power to award damages. It is not clear that the submission to arbitration of all matters in dispute did not include the question whether the pursuers were damaged by having received hay which was not conform to contract, and if so, what was the amount of the damage sustained? This may not have been the only question in the arbitration, but I think in the present circumstances it was included in the matters referred to arbitration. Cases have been quoted showing that in strictly formal arbitrations in Scotland the question of damage is not taken into account; but it must be borne in mind that this is an English arbitration, and an arbitration of an informal character. The defenders in receiving notice of the award expressed loud indignation at its nature, but they said nothing about the question of damages being outwith the arbitration.

Lastly, the defenders say that if the award was good the proper course for the pursuer to pursue was to return the goods immediately thereafter as being found disconform to contract. This point is practically settled against the defenders if the question of damage was within the arbitration. There was no question of returning the goods at all. It is also a good answer to such an argument that the award was not accepted by the defenders, and they have therefore no right to found upon it in order to cut out the pursuer from his claim of damages.

On the whole matter, and after careful consideration, I have come to the conclusion that the pursuer is right.

LORD YOUNG—I am of the same opinion. I think the pursuer is entitled to decree. I am of opinion that the claim submitted to arbitration was not one of damages, but that the true character of the claim was for abatement from the price paid. The Lord Ordinary states this accurately in his note thus—the award "decided that the defenders were to pay £350, but that proceeded obviously on this view that the hay the arbiters had examined was worth £1, 12s. 6d. per ton less than the invoice price . . . in short, the arbiters on the information given them decided that the hay was too dear at £4 per ton." The contract price of £4 per ton had been paid. The dispute arose whether the hay was according to the quality contracted for. The contract referred to a certain standard. What the pursuer maintained was, that looking to the quality and condition of the hay supplied it was below that standard, and by so much per ton as it was below that standard he was entitled to have the price returned to him. This was distinctly intimated to the defenders before the arbitration was begun. The defenders in their own words at the end of statement 3 "agreed to an arbitration of these claims," that is, they agreed to an arbitration of the claim referred, a claim of abatement of the price paid on the ground that the goods delivered were below the standard of quality stipulated for.

The contract required the reference of such a claim to arbiters and an umpire according to the practice in Liverpool. Did the parties proceed according to this practice? The evidence is that they did. I see nothing to censure in the proceedings of the arbiters. They proceeded in the whole matter in the manner that both parties intended. They made inquiries as to the quality of the shipments referred to as the standard in the mode that both parties contemplated. They got information from persons who were well acquainted with what they spoke about. They could do nothing else than take the information from those who they thought were able to give it. When the arbiters gave in the result of their investigations corrected or modified by their reference to the umpire, according to the practice of Liverpool, they acted regularly and commendably. The result was that they found the goods inferior to the standard in the contract by £1, 12s. 6d. per ton, or in all by £350, as they held that justice would be done if this sum was restored to the pursuer.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I am of opinion that the question to be decided is whether this award is reducible on any ground known to the law and alleged on record. When such an award as this is issued it is important to bear in mind that it is not to be set aside unless fundamentally bad. Now, without going over them in detail, I may say that the Lord Ordinary has found the award bad on six different grounds. I am unable to concur with him in any one of these. I think the Lord Ordinary has proceeded upon an erroneous view of the nature of the submission.

The Court recalled the interlocutor of the Lord Ordinary, and gave decree for the pursuer in terms of the conclusions of the summons.

Counsel for the Pursuer and Reclaimer—Jameson—Ure. Agent—James F. Mackay, W.S.

Counsel for the Defenders and Respondents—R. Johnstone—Burnet. Agents—Wallace & Begg, W.S.

Friday, June 6.

SECOND DIVISION.

[Sheriff of Renfrew.

TURNBULL *v.* SMYTH.

Reparation—Personal Injury—Labourer Injured by Falling Bale—Common Employment—Fellow-Servant—Fault.

A firm of coopers employed a carting contractor to carry several bundles of staves, and a lorry under the charge of a carter was sent for their conveyance. The coopers' labourers placed a heavy bundle of staves on the lorry, but the carter negligently failed to wedge it firmly, and it accordingly rolled back and injured one of the coopers' men. He brought an action against the carting contractor for damages. *Held* that although the pursuer and the carter had been engaged in the same work the carter was not voluntarily assisting the labourer, but that the men represented their respective employers, that therefore they were not in common employment, and that the defender was liable in damages to the pursuer.

Upon 20th May 1889 Bryce Whyte & Sons, coopers, 30 South Kinning Place, Glasgow, engaged a lorry from John Pender Turnbull, carting contractor, Glasgow, to receive a load of hoop staves. These staves were made up into large rolls or bundles similar in appearance to casks, and in weight ranging from 12 to 15 cwts. Three of these formed one load. The lorry was in charge of a driver named Laidlaw. Bryce Whyte & Sons' labourers placed upon the lorry a large bundle of staves weighing 15 cwts. In loading such goods it is usual and necessary as each bundle is put upon the lorry to fix it in a position by a wedge. In accordance with the usual practice Laidlaw had brought some such wedges, and when the first bundle of staves had been put upon the lorry he proceeded to wedge it up. He failed to wedge it securely, and the result was that the bundle rolled out of the lorry, and striking John Smyth, a cooper in the employment of Bryce Whyte & Sons, inflicted upon him such severe injuries that he was absent from work for 17 weeks. A foreman of Bryce Whyte & Sons was present at the loading.

Smyth raised an action against Mr Turnbull for damages, and averred that the accident was owing to the negligence of Laidlaw.

The pursuer pleaded—"(1) The pursuer having been injured through the negligence of the defender's servant, is entitled to reparation from the defender."

The defender pleaded—"(1) The said accident having happened through no fault of the defender, or of his servants, he is not liable therefor. (2) At any rate, the accident having happened through the contributory negligence of the pursuer himself, the defender is entitled to absolvitor."

At the proof the pursuer deponed—"Three bundles constitute a load of two tons. The plan we adopt is to roll these bundles up the planks on to the lorry. There they are received by the defender's carter, and as far as I can understand, it was his duty to place them in position on the lorry, and to put wedges in to keep them in position, to prevent them from shifting or rolling."

Upon 5th November 1889 the Sheriff-Substitute (COWAN) pronounced this interlocutor:—"Finds in fact that the pursuer has not established that the injuries which he sustained on 20th May 1889 were occasioned by the fault of anyone for whom the defender is responsible: Finds in law that the defender is entitled to absolvitor: Therefore assoilzies the defender from the conclusions of the libel, &c.

"*Note.*— . . . There is some dubiety as to who placed the coign there. The Sheriff-Substitute is of opinion on the evidence that it was the defender's carter who did so, and if it had been established that the defender had undertaken the loading of the lorry, as well as the carting of the stuff, there would be little hesitation in holding him liable for the injury sustained by the pursuer, who is not proved to have by his own negligence contributed to the accident.

"The loading, however, was carried out in presence of the foreman of Messrs Bryce Whyte & Sons, who, and whose men, actively assisted, and the Sheriff-Substitute is of opinion that it was under his direction and charge. In those circumstances, whatever claim the pursuer may have against his own employers, the Sheriff-Substitute cannot sustain his claim against the defender."

Upon appeal the Sheriff (CHEYNE) found in fact in terms of the above narrative. He further found that Laidlaw had been guilty of neglect; "that there was no contributory negligence on the part of the pursuer; and that in taking part in the loading Laidlaw was acting as the defender's servant, and within the scope of his duties as such, and not as the pursuer's fellow-servant; and as the legal result of these findings, finds that the defender is liable in damages to the pursuer for the injuries received by him through Laidlaw's negligence: Assesses the damages at the sum of £35 sterling, and decerns in the pursuer's favour for that sum accordingly, &c.

"*Note.*—I am satisfied on the proof that the pursuer's accident was due to the negligence of Laidlaw in putting in an insufficient wedge, or not seeing that the wedge he used was firmly in, and further, that there was no contributory negligence on