

Tuesday, June 28.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WILLIAMSON v. ALEXANDER  
MACPHERSON & COMPANY.

*Sale—Contract—Implied Warranty—Sale for Particular Purpose—Condenser Tubes for Clyde Steamer—Fitness for Particular Purpose—Implied Condition that Goods of Merchantable Quality—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 14, sub-secs. (1) and (2).*

During negotiations between A & Company, a firm of contractors for ship machinery, and B, a shipowner, concerning condenser tubes to be supplied to one of B's steamers plying on the Clyde, A & Company's manager informed B of some special and newly invented tubes which had been recommended to him. Thereafter by letter A & Company sent to B the printed report on the qualities of these special tubes by the manufacturer of these tubes, and offered to supply them at a stated price. The report stated, *inter alia*, that the tubes were "giving good results in the Clyde tug steamers." By letter in answer B replied that in reference to A & Company's offer to supply him with condenser tubes for his steamer he would be glad if A & Company would arrange to deliver at their very earliest 750 of their special condenser tubes as referred to in their letter.

The tubes as ordered were supplied by A & Company to B, but they corroded within four months, and had to be taken out of the steamer.

In an action raised by B against A & Company for damages for breach of contract the Lord Ordinary (Kincairney), after proof, granted decree in favour of the pursuer on the ground that there was an implied condition in the contract that the tubes should be reasonably fit for a particular purpose, viz., for use in a steamer plying on the Clyde, and that they were not reasonably fit for such use.

The defenders having reclaimed, the Court *adhered*—the Lord Justice-Clerk on the ground that there was an implied condition in the contract that the goods should be of merchantable quality, and that they were not of such quality; Lord Young on the ground stated by the Lord Ordinary, and also on the ground that in the case of a newly invented article recommended for a particular purpose the seller is at common law liable in damages should it fail to fulfil that purpose—*diss.* Lord Trayner on the ground that the tubes were supplied as ordered, that they were not sold for a particular purpose, and that they were of merchantable quality.

Section 4 of the Sale of Goods Act 1893 enacts—"Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows—(1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to the fitness for any particular purpose. (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality, provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed." . . .

In November 1902 John Williamson, the owner of the paddle steamer "Strathmore," of Glasgow, raised an action against Alexander Macpherson & Company, contractors for boilers, engines, and ship machinery, Greenock. The action concluded for payment by the defenders to the pursuer of £1100 as damages in consequence of the defenders' alleged breach of contract with the pursuer in supplying defective condenser tubes for his steamer.

A proof was led before the Lord Ordinary (KINCAIRNEY). The circumstances leading to the action and the contentions of parties are fully stated in his Lordship's opinion.

On 13th January 1904 the Lord Ordinary pronounced the following interlocutor:—"Finds (1) that the pursuer purchased from the defenders 850 brass condenser tubes or thereby in or about December 1901; (2) that the said tubes were purchased from the defenders for the particular purpose of using them as condenser tubes in his paddle steamer the 'Strathmore,' plying on the Clyde; (3) that the tubes were delivered in or about April 1902, were paid for, and were placed in the said steamer; (4) that in or about June 1902 the tubes began to corrode, and the corrosion continued until 358 tubes or thereby were so affected, and the pursuer found it necessary to remove and replace the tubes; (5) that there was an implied condition in the contract that the said tubes should be reasonably fit for use in said paddle steamer when plying on the Clyde as aforesaid; (6) that they were not reasonably fit for use in said steamer; (7) that such unfitness was not caused by any act for which the pursuer is responsible: Finds that the defenders are chargeable with breach of the said condition, and are liable in damages: Assesses

said damages at the sum of £243, 9s. 9d., for which sum decerns: Finds the pursuer entitled to expenses, reserving consideration as to modification," &c.

*Opinion.*—The pursuer Captain Williamson is the owner of the paddle steamer 'Strathmore,' which he is in use to sail in the Clyde and the West Highlands as far as Campbeltown. He had occasion to fit his steamer with condenser tubes, and purchased 750 brass tubes from the defenders, who are not makers of tubes, but sellers on commission. The contract was constituted by the two following letters, the former written by the defenders, and the latter by Captain Williamson, the pursuer:—"28th December 1901.—In reply to your esteemed inquiry for condenser tubes, we beg to submit the following report we have received from the Broughton Copper Company, Limited.

... "The special tubes we refer to as giving good results in the Clyde tug steamers are made from 70 per cent copper and 30 per cent zinc, both metals being of special purity. It is, however, in the manufacture that the excellence of these tubes is arrived at. We submit the metal to repeated hydraulic pressure, and afterwards forge it in the red-hot state in large masses. Brass of the same alloy, if forged in the customary manner by steam or other hammers, would fall in pieces. By our method the state of compression is preserved, the forging being done by hydraulic pressure. These various processes produce a metal of greatly increased density, and with a particularly close, fine surface, which is much less liable to attack from the agents of corrosion and pitting than tubes made in the usual way (by casting and cold drawing), to which they are so destructive. The cost of manufacture is, of course, much higher in the case of these superior tubes than in that of ordinary ones."

"Our price for the tubes you require, made by the special process described above, is 9d. per lb., and for the ordinary tubes 8d. per lb. These prices are, of course, open only for prompt reply. Tubes to be delivered free on board your steamer at Albert Harbour. Hoping to be favoured with your esteemed order.

'ALEXANDER MACPHERSON & Co.'

"The pursuer wrote in reply:—"18th January 1902.—In further reference to your offer to supply me with condenser tubes for the "Strathmore" I shall be glad if you will kindly arrange to deliver at your very earliest in the Albert Harbour, Greenock, 750 of your special condenser tubes as referred to in your favour of 28th December last. I also desire you to supply me with 450 verrals same as sample which I am sending you per rail to-day. These verrals are also for the "Strathmore" and early delivery is desired. Kindly give this order your special attention, and advise me when you expect to be in a position to deliver as required."

"The reference in the beginning of the defenders' letter to Captain Williamson's 'esteemed inquiry' appears to be to an

interview between Captain Williamson and Mr Tannahill, the defenders' managing partner, from whose evidence it appears that he spoke to the pursuer about the Broughton Company's tube, of which Tannahill procured and exhibited a sample; that the pursuer then requested Tannahill to get a price for the tubes; that Tannahill (or the defenders) wrote to the Broughton Company asking their price, and saying in their letter that as the steamer for which the tubes were wanted was plying in the Clyde material was wanted which would withstand the action of the river. The Broughton Company, a Manchester house which manufactures tubes, wrote in reply in the terms which the defenders by their letter of 28th December passed on to the pursuer.

"No question has arisen about the verrals, and no question about the time of delivery, or the price or the time of raising this action. The only question is about the character of the condenser tubes, the number of which was increased to 850. These were all delivered and paid for, and they were fitted into the 'Strathmore's' condenser in or about April 1902. At that time no defect in them had been discovered, and it is not proved or said that any defect could have been discovered by ordinary examination. Externally the tubes appeared to be in terms of the contract. The defect, if any, was latent.

"The pursuer avers that in or about June 1902 it was observed that some of the tubes began to leak, the consequence of which was that the steamer could not sail at her usual speed or follow her customary routine, and that on 21st August it became necessary to have the whole of the tubes taken out and new ones put in their place.

"In these circumstances the pursuer raised this action, concluding for £1100 as damages resulting from the faulty condition of the tubes.

"The pursuer avers—"Upon examination of the tubes it was found that they were of inferior quality and defective manufacture, and were disconform to the defenders' representations. The material of which they were made was not homogeneous, and the tubes contained plugs of almost pure copper, which became corroded and dropped out, leaving holes right through the tubes. The tubes were not in accordance with the contract, and were entirely unsuitable for the purpose for which they were supplied;" and he pleaded—"(2) The defenders having supplied to the pursuer goods not reasonably fit for the purpose for which they were required, and that purpose having been made known to the defenders, and the goods being such as it is in the course of the defenders' business to supply, the pursuer is entitled to reparation."

"The defenders pleaded—" (3) The defenders having duly performed their contract with the pursuer are entitled to absolution."

"The case was sent to the Procedure Roll, but was afterwards withdrawn from

it, and a proof was allowed and taken. I do not remember that an order for issues was suggested. The proof has been of great, I think excessive, length. It cannot, however, be denied that the questions of scientific fact discussed were of very great interest and practical importance, but I doubt that much of the evidence was rather of the nature of a highly scientific inquiry than of practically available proof. The money really at stake is comparatively small, and seems hardly to justify such an elaborate inquiry, although it may be that questions of mercantile interest of importance may be at stake, and the proof was really of such a nature, and I may be allowed to say conducted so well, that I felt myself unable to shorten it.

"I think that the main facts may be stated within reasonable compass, but an adequate discussion of the various conflicting scientific views advanced would be beyond the scope of a judicial opinion, and I will not attempt it.

"It appears from the proof that owners of steamships in the Clyde have for some time been put to much inconvenience and loss by the frequent corrosion of their condenser tubes, which unfitted them for use. The pursuer and the defenders agree on this. It does not appear clearly that this deleterious action on the tubes is proper to the Clyde, or, as seems probable, is found in all estuaries. At any rate it seems to have come under the notice of the Broughton Copper Company, a Manchester house, and they invented a tube with the object of remedying this defect, a tube which they represented to be a great improvement on existing tubes, and I certainly believe that they thought it was. The idea of the Broughton Company was that the defect of the tubes was, and indeed must have been, that the tubes wanted solidity and density, and their endeavour was to rectify this defect by their improved method of welding together the copper and zinc in order to make the brass alloy, partly in their mode of dealing with the molten metals, but I think chiefly by subjecting the alloy to great hydraulic pressure. They thought that they would thus obtain a denser and more compact material, and I am not prepared to say that that expectation could be termed unreasonable.

"Still it is important to notice that this new tube was only an experiment, and I think it had not been sufficiently tested; and it appears to me that from the nature of the case it could not be sufficiently tested except by actual use. I do not see that any mere laboratory tests could be reliable.

"The tubes which were delivered apparently corresponded exactly with the description in the letter of the Broughton Company to the defenders of 28th December 1901, which was forwarded by the defenders to the pursuer and referred to in the pursuer's order of 18th January 1902. The specified proportions of copper and zinc specified in that letter were observed, and so far as I have heard the two metals were of the qualities described. No objection was taken to the tubes when delivered,

and it is the case of both parties, I think, that no defect in the tubes could then have been discovered by ordinary examination.

"Nevertheless I take it to be clearly proved that within three months, or even sooner than that, defects appeared in the tubes causing them to leak, which developed so rapidly that in August the pursuer found them unfit for use and removed them from his condenser. I think it proved that a large proportion of them became unfit for use, and that the pursuer was justified in removing them all and in substituting other tubes.

"That was certainly a very remarkable circumstance, and it was the more remarkable from the fact that so far as the proof discloses all the affected tubes suffered the same kind of lesion. They all became corroded, and they all suffered from a very special and a very extraordinary kind of corrosion—at least I think I may say that to the unscientific mind it must have appeared very extraordinary—which I think is proved to have been this, that part of the zinc portion of the alloy disappeared from the tubes, with the result either of leaving the copper with which it had been combined in what is called a spongy state, or in leaving it in the form of what is called in the proof copper plugs or balls, which fell out of the walls of the tube, with the result of leaving the tubes porous and leaky, and, if so, then unfit for use as condenser tubes.

"This very singular form of corrosion appears to be known by the name of dezincification or cuprification. I think that in regard to this inquiry these terms may be regarded as synonymous. They are not strictly scientific words. But they are convenient, and they indicate the result that the proportions of the zinc and copper in the alloy were altered by removal of part of the zinc, none of the copper being removed in the process, but some of it being lost afterwards by the falling of the so-called copper plugs out of the metal. I do not think that I need to discuss any question about the composition of brass. It is an alloy of copper and zinc, the most usual, though not the invariable, proportions being those in this case, namely, 70 per cent. copper and 30 per cent. zinc. It seems not to be absolutely determined whether the combination is chemical or only mechanical. On that point scientists seem not to be agreed. But at all events this case proves that the metals are susceptible of separation.

"The phenomenon is not novel, although I think it does not seem very familiar to science. It appears to be very singular, but I cannot but recognise it as proved.

"With regard to the cause of this phenomenon—if it be needful to go into that question—a great many opinions, more or less conjectural, have been offered. I can hardly profess to be able to follow them fully. So far as I can see it must needs be ultimately a chemical phenomenon, because the zinc was not only removed but disappeared, and it could not do so without a chemical reaction—that is to say, with-

out its combination with some other body which is attracted more by zinc than by copper. I do not know that this disappearance of the zinc could happen by mere force of galvanic attraction. But the phenomenon is said, and no doubt rightly said, to be an electro-chemical phenomenon, the chemical reaction being put in action by electrical forces, and the removal of the zinc being regarded as the result of the fact that zinc is more forcibly affected by electrical attraction than copper is. It is happily not necessary to understand completely this scientific puzzle, but the case is not fully intelligible without some reference to it, when one comes to consider the views of the parties as to what the destruction of the tubes as condenser tubes is to be attributable. It depends, no doubt, (1) on the structure of the tubes, and (2) on the treatment to which they have been subjected.

“As regards the structure of the tubes, they were, as has been said, of the structure and composition specified in the defenders’ letter, and I think they were made in the manner there expressed. I think there is no proof of any carelessness or ignorance or want of skill in the making of them. There was no gross blunder in conception or execution. That is my conclusion from the proof. But then the pursuer puts forward the theory that the idea of the Broughton Company’s invention was or must have been erroneous, and that the tubes were spoiled in the making, partly in the heating process and partly in the application of hydraulic pressure. The evidence in support of this view seems very speculative. The proposition is that the crystalline character of the metal has been altered, and this view was supported by the exhibition of various highly magnified photographs of the metal, which seem to disclose differences in the various portions of it. There is, it is true, in these portions of metal nothing having to the unassisted eye the remotest resemblance to crystallisation of any kind. But the crystallisation appears when the metal is examined through a sufficiently powerful microscope, as it does, it is said, in all metals.

“On this particular point the scientific witnesses are greatly at variance. All I can say about it is that I cannot find it to be a proved fact in the case that the crystalline character of the metals employed by the Broughton Company was affected by their process of manufacture of the brass, or that if it was the change had any effect on the electrical action or on the tubes.

“So far as I can see, it has not been proved that the dezincification of the tubes was caused by any fault in their manufacture. Fault of construction by the defenders is not a matter of fact in the case.

“With regard to the treatment to which they were subjected on board the steamer by the pursuer, there seems to be only two points of much importance—(1) the influence of the water of the Clyde, and (2) the

defenders’ theory about the deposit of carbonaceous or other particles within the tubes.

“As regards the water of the Clyde, it is argued that its injurious effect is owing to two causes, first, its foulness from the proximity of Glasgow, and secondly, the effluent from the St Rollox chemical works. What the precise detrimental effect of the mere foulness of the water is does not exactly appear, but I suppose it may contain many things which may act as electrolytes and set in force electrical action. With regard to the St Rollox effluent, it seems proved that it contains at least one substance, viz., sulphide of calcium, which I understand may probably have had an appreciable effect in decomposing the brass and separating the zinc from the copper. While there is much conflicting evidence on this part of the case—too much to admit of examination—I am of opinion that it must be held to be proved that the Clyde water forms an important element in this case, and that it must be held a proved point that the tubes in this case yielded to the injurious action of the Clyde water, and I rather think it a fair conclusion that they would not have failed but for the action of the Clyde water. I do not put this conclusion as clear or certain, but I am of opinion that it is supported by a preponderance of the evidence, and I am not sure that either side disputes it. The pursuers maintain that if the corrosion of the tubes was caused by the Clyde water the defenders are liable, because the tubes were bought for the particular purpose of their being capable of resisting that action.

“But the defenders, as I understand, say that the tubes were unduly subjected by the pursuer to that deleterious influence, because they say that the water was sent through the tubes too slowly, and also because the tubes were not washed out nightly with Loch Katrine water as they ought to have been.

“They say further that this comparatively sluggish flow of water and the want of flushing had a very serious effect on the tubes, permitting of the deposit in them of foreign bodies carried in by the salt water, such as particles of carbon, which would otherwise have been washed out of the tubes. It is suggested that such particles were deposited in the tubes, and gave rise to electrolytic action by reason of the difference of potential between carbon and either copper or zinc, and they say that that accounted for the formation of the copper plugs, the existence of which was so difficult to account for otherwise. It is suggested that the corrosion formed round the carbon particles.

“I am not convinced by this theory, and do not accept it as sufficiently accounting for the dezincification of the tubes. It does not profess to account for all the phenomena of dezincification, but only for such as took the form of the so-called copper plugs, and it assumes the existence of the carbon particles, of the existence of which there is, I think, no sufficient evidence.

Further, one would expect that there would be proof of the disappearance of copper in presence of the carbon, as well as of the zinc, although it may be not in such great quantities.

“The defenders further made a point of the absence of a protective zinc plate on the cylinder door, but that does not seem of much importance.

“On the whole, my opinion on this part of the case is that the balance of the evidence favours the view (1) that no fault in the construction of the tubes as delivered has been proved; (2) that they became dezincified in the course of use through an electro-chemical action operating by means of the water which passed through them; (3) that one material cause of the dezincification was the action of the Clyde water and the various corroding substances contained therein; (4) that the process of dezincification must be held to have resulted in the practical destruction of the tubes; (5) that it is not proved that this result was caused during and by the construction of the tubes, and can on that account be charged against the defenders, or by the use to which they were subjected in the ‘Strathmore,’ and can on that account be charged against the pursuer.

“As regards the question of fault, if any such question be raised, I am of opinion that it is not proved that anyone was in fault. There is not the least appearance of any attempt to overreach or conceal on either side. I believe the defenders believed in their tubes and honestly endeavoured to fulfil the bargain, and that the pursuer is not chargeable with any serious fault or oversight in regard to the management of the tubes when on board the ‘Strathmore.’

“The question then is, whether in these circumstances the seller is chargeable with breach of contract and is liable in damages. It appears to me that that question depends entirely on the 14th section of the Sale of Goods Act 1893, which materially affected the law as then existing, and that decisions prior to that date must at least be used with great caution.

“The 14th section of that Act provides that there shall be no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. The defenders maintain that this provision applies, and if it does, then it is clear there is no further question, and that the defenders would in that case be entitled to absolvitor. The goods ordered were certainly supplied, and in all cases to which this primary provision of the Act applies it would not affect the liability of purchaser or seller whether they served their purpose or not. It would be enough if it were shown that the goods supplied corresponded with the goods ordered.

“But the provision is not absolute, but subject to material exceptions expressed in sub-sections, and the pursuer maintains that this case falls under sub-section (1) and not under the main provision. By this sub-section it is provided that ‘where the buyer expressly or by implication makes

known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller’s skill or judgment, and the goods are of a description which it is in the course of the seller’s business to supply (whether he be manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose.’

“This sub-section corresponds with the 5th section of the Mercantile Law Amendment Act 1856 (which section is repealed by the Sale of Goods Act), but the provisions of the two Acts differ considerably. In the Mercantile Law Amendment Act the exception to the general provision is limited to goods ‘expressly sold for a specified and particular purpose.’ The phrase ‘expressly sold’ and the word ‘specified’ are omitted in the Sale of Goods Act. Further, the parenthetical words ‘whether he be the manufacturer or not,’ and the provision as to the goods being ‘of a description which it is in the course of the seller’s business to supply,’ are not in the Mercantile Law Amendment Act.

“In this case the defenders, who are the sellers, were not the manufacturers, but only agents, the Broughton Copper Company being the manufacturers. But I think the provision of the section (differing from the common law and from the law under the Mercantile Law Amendment Act) implies that that is not a circumstance of any importance, but that the clause will apply to a seller on commission or dealer as well as to a manufacturer, if the goods be such as the seller is accustomed to deal with in the course of his business—*Gillespie Brothers & Company v. Cheney, Eggar & Company* [1896], 2 Q.B. 59. These provisions appear to me to render inapplicable the otherwise important case of *Wilson v. Dunville*, 1878, 4 L.R. Ir. 249, on which Mr Salvesen, for the defenders, specially relied. There is no dispute that the tubes were a description of goods which it is in the course of the defenders’ business to supply. The question therefore depends on the provisions in regard to the particular purpose of the buyer in buying; and the first question is, did the buyer, Captain Williamson, buy the tubes for a particular purpose? or otherwise, was the purpose for which he bought them a particular purpose in the sense of the Act? The defenders contend that it was a general sale. The pursuer contends that he purchased the tubes for a particular purpose. He maintains that he bought the tubes for the particular purpose of using them in a Clyde steamer. That, the defenders maintain, is not, in the sense of the Act, a particular purpose. The defenders quoted on this point *Hardie v. Austin*, May 25, 1870, 8 Macph. 798, 7 S.L.R. 489 (turnip seed); *Hamilton v. Robertson*, May 31, 1878, 5 R. 839; *Dunlop v. Crawford*, June 15, 1886, 13 R. 973, 23 S.L.R. 702 (milk cows). These were cases under the Mercantile Law Amendment Act, but I am inclined to think that the same judgments would be pronounced under the Sale of Goods Act. But I think they do not cover this case. The pursuer contends that his

purpose to use the tubes in the 'Strathmore' was a particular purpose (*Randall v. Newson*, 1877, 2 Q.B.D. 102)—at all events that his purpose to use the tubes while sailing in the Clyde waters was a particular purpose, and I think it was.

"It is true that that purpose is not expressed in the written contract of sale. But I think the Act does not require that it should be, or that it should be expressed in or proved by writing, and I entertain no doubt that the buyer's purpose and the seller's knowledge of it may both be proved by parole evidence, and may affect the written contract by importing into it a condition which it does not express. In this case there seems to be no doubt either about the buyer's purpose or the seller's knowledge of it. The buyer's object was to procure tubes which would resist the corrosive action of the Clyde water as far as possible, and there is no doubt that that was known to the defenders. It was self-evident, and is besides clearly proved by the evidence of Tannahill, the defenders' manager, and is indeed expressed in his letter of 28th December to the Broughton Company. But the provision of the statute on the point is somewhat peculiar. It speaks of the buyer (Captain Williamson) making known his purpose to the sellers (the defenders). But then it says that that may be done by implication. It may be that Captain Williamson did not mention his particular purpose to the defenders, seeing that he was, and could not but be, well aware that the defenders knew it perfectly; and I can hardly think that the statute required a buyer to tell the seller what the seller knew, and what the buyer was aware that the seller knew; and I hold that, in the circumstances proved, the requirement of the statute as to disclosure to the seller of the buyer's purpose was satisfied.

"But the section further requires that the buyer shall make his purpose known so as to show that he relies on the seller's skill and judgment. This is a very strange and, as I think, an unfortunate provision, and it is by no means easy to give it any satisfactory or rational meaning. It does not require the buyer to mention expressly to the seller that he relies on his skill or judgment, and I think it cannot surely refer to anything so vague and indefinite as the mere manner of the buyer in making his communication. I think that all that the statute can be held to mean is that it shall appear from the circumstances of the case that the buyer relied on the seller, and that the seller knew that he did. Now, when a merchant deals in particular goods, and tenders them as fitted for a particular purpose, and they are bought on that tender, there is a strong presumption that the buyer purchases in reliance on the seller's knowledge, and also that the seller takes that for granted. These presumptions may be displaced, and it may be shewn that in point of fact the buyer did not rely on the seller at all, but solely on his own knowledge, or solely on the advice of someone else.

"Now, the circumstances under which

this sale was effected were briefly these:—Tannahill, acting for the defenders, introduced the subject to the pursuer, and advised the pursuer to buy the Broughton tubes. I do not know that he gave that express advice, but he wished the pursuer to buy them that he might gain as a dealer his profit on the transaction, and I think that what he did must have been regarded as an advice to do so. Now, the statute seems to impute to sellers who are not manufacturers the knowledge of manufacturers when they are advising the sale of goods in which it is their business to deal for a particular purpose. The facts that the defenders dealt in tubes though they did not make them, that they knew the pursuer's purpose, that they brought this tube under the notice of the pursuer and advised him to buy it, as I think they did—these facts seem sufficient to show that the pursuer in buying relied on the defenders' skill or experience. I do not think it appears that the pursuer relied on anyone else. It cannot, I think, be held that he relied on the Broughton Company, for that would do him no good at all. He could have no recourse against that company. But the statute only requires that the buyer shall rely on the skill or judgment of the seller; it does not provide that the seller shall be the only person on whom the buyer relies, or that he did not rely on the skill or judgment of other people.

"I may just notice here that although Tannahill procured a sample tube, yet this is not a sale by sample such as is described in section 15.

"I conclude that the pursuer has succeeded in bringing his case under the sub-section, with the result that there must be held to be implied in the contract of sale a condition that the tubes shall be reasonably fit for use as tubes in a Clyde steamer. I do not think there was a condition that the tubes should be absolutely non-corrosive, but only that they should be so to a reasonable extent, just as if a condition to that effect had been expressed in the contract.

"The next question is, was this condition fulfilled? At first, and for a couple of months or so, it appeared to have been fulfilled, and had the question been raised at or about the time of delivery, the defenders might have obtained a judgment of absolvitor which might have protected them against subsequent actions. But even although it were assumed that the tubes were faultless when delivered, still as the condition was (in substance) that they should continue to be so for a reasonable time, that fact could not be held to be a sufficient answer to this action.

"I have already found as matter of fact that a very large proportion of the tubes became corroded and useless after use for a very few months, and I now have to express the opinion that they were not in a reasonable sense fit for use in a Clyde steamer, unless their corrosion could be ascribed to the treatment of them by the pursuer. On that point I have also

expressed an opinion favourable to the pursuer, and the result is, that I must now find that the defenders are chargeable with breach of contract and are liable in damages.

“The amount of the damage is a jury question about which there was little argument, and about which I can do no more than return a verdict, the materials for which are very unsatisfactory. I think that the particular sums specified in No. 72 of process may be allowed except £16, the price of the new cylinder cover, because I am not satisfied that that might not have been avoided by due care. That amounts I think, to £83, 9s. 9d. With regard to the general claim of damages, the case is different. There may be a good basis for the claim to some extent, but the sums are conjectural, and measures might have been taken which would have greatly reduced them. But my principal objection is, that I am unable to see why the pursuer did not get new tubes as soon as he found that these tubes would not work. The total expenses of new tubes amount to only £75. I assess the damage on this head at £160. The claim for depreciation was withdrawn.

“The result is, that I find for the pursuer for £243, 9s. 9d.”

The defenders reclaimed, and argued—There was no guarantee given in this case by them, either express or implied, under section 14 of the Sale of Goods Act 1893. Sub-section 1 of that section did not apply. The purchase of the tubes for use in a steamer plying on the Clyde was not a particular purpose under the Act. It was the ordinary purpose of condenser tubes to be used on steamers plying in waters such as the Clyde, and it was absurd to say that because they knew the steamer was a Clyde steamer they had guaranteed the tubes against the action of the Clyde water—*Hardie v. Austin, supra*; *Hamilton v. Robertson, supra*; *Dunlop v. Crawford, supra*; *Connell v. The Glasgow Motor Car Co.*, December 9, 1903, 11 S.L.T. 500, March 17, 1904, 11 S.L.T. 758. The buyer placed no reliance on the opinion of the seller. He asked for and was supplied with a well-defined article sold under a trade name, and where an article was well-defined there was no implied warranty, even if it had been sold for a particular purpose—*Wilson v. Dunville, supra*. Sub-section 2 of section 14 of the Act of 1893 did not help the pursuer, as the goods supplied were of merchantable quality. The Lord Ordinary had held that there was no fault in their construction. In order to show that they were not merchantable it would require to be proved that the buyer would not have purchased the article if he had examined it when bought, or that there was some inherent defect in the article sold. Nothing of the kind had been proved here. As to onus, the Lord Ordinary, notwithstanding that he was of opinion that the tubes were properly manufactured, had thrown the onus of showing what had caused them to deteriorate on the defenders. In an action of damages like the

present the onus of showing the defect lay on the pursuer, not on the defender—*M'Millan v. Dick & Co.*, July 7, 1903, 11 S.L.T. 210. But even if the onus was on the defenders they had discharged it by showing (1) that the corrosion arose from the cast-iron door of the condenser being without a protective zinc plate; (2) that the tubes had not been properly flushed; and (3) that the best condenser tubes were liable to give way in as short a time as occurred here.

Argued for the pursuer and respondent—The defenders were liable both under sub-sections (1) and (2) of section 14 of the Act of 1893. There was here a purchase for a particular purpose in reliance on the seller's skill; that the tubes were for use in the “Strathmore” while navigating in Clyde waters was a particular purpose within the meaning of the Act. Where a dealer contracted to supply an article in which he dealt, to be applied to a particular purpose, so that the buyer necessarily trusted to his judgment, there was an implied warranty that it should be reasonably fit for the purpose to which it was to be applied—*Jones v. Bright*, 1829, 5 Bingham 533; *Jones v. Just*, 1868, L.R., 3 Q.B. 197, opinion of Mellor, J., 202; *Randall v. Newson*, 1877, 2 Q.B.D. 102, opinion of Brett, J., 109; *Gillespie Brothers & Company v. Cheney, Eggar, & Co., supra*; *Wallis v. Russel* [1902], 2 I.R. 585; *Preist v. Last*, [1903], 2 K.B. 148. Further, the tubes were not of merchantable quality. On the proof *res ipsa loquitur*. The result had shown that the tubes supplied were worthless as condenser tubes.

At advising—

LORD JUSTICE-CLERK—The sum involved in this litigation is not large, but it is a case of some importance, and has been so treated by the parties, as is shown by the very voluminous and expensive proof which has been led, although I cannot help saying that in some respects it has been much overloaded, and rendered less valuable from its excess of volume.

The pursuer entered into a contract with the defenders to supply him with a set of steamship condenser-tubes for a vessel called the “Strathmore,” which plies in the river and Firth of Clyde. The defenders offered to supply a kind of tube which they believed to be a tube made by a process of manufacture which produced a better tube than that ordinarily supplied. Being not themselves manufacturers, but only dealers, they were in negotiation with the Broughton Company, who manufactured such tubes on a large scale. Messrs Broughton believed that a new process they had adopted in making up the brass for the tubes was an improvement and would produce a better pipe. Under the old process the metals were heated to a boiling point together, and large pipes made, which were afterwards drawn cold down to the size required and annealed by heat. The new idea was to press the heated metal in block by hydraulic pressure, and while still hot to form the large tube by

forcing a ram down into the heated metal, and so to form it, it being afterwards drawn out in the usual way. The defenders communicated to the pursuer a copy of a report by the Broughton Company to them, in which the Broughton Company described their new method of manufacture, by which it was maintained that a greater density was obtained "with a particularly close fine surface, which is much less liable to attack from the agents of corrosion and pitting than tubes made in the ordinary way."

The tubes being delivered and fitted into the pursuer's condenser, I am satisfied upon the evidence that it was found that they did not fulfil the expectations of the makers. In a very short time—much shorter than was to be expected if they were even as good as the ordinary tubes made under the old process—they developed serious leaks, and became unfit for further use. It was found that electrolytic action was set up, and that dezincification was extensive, the places at which it presented itself showing the formation of small plugs of pure copper, which fell out, leaving the hole surrounded with a ring of copper of clean surface. This form of deterioration was quite different from that shown in ordinary tubes, in which dezincification has taken place. In the ordinary tube the oxidation of the zinc left the copper, not in solid nodules or rings, but in a spongy or fibrous state, not so rapidly causing leakage nor so rapidly producing leakage in a serious degree. It is according to my reading of the evidence that the ordinary tubes, although their life is uncertain, as one would expect where the cause of deterioration is electrolysis—as such varying causes may set up galvanic action—that life is proved to be very much longer than the life of the tubes supplied for the "Strathmore."

The next question is, whether this rapid deterioration by which the tubes became useless was attributable to something in the tubes themselves, or was to be accounted for by anything abnormal in the way in which they were treated either in fitting them into the ship's condenser, or in the use of the condenser when the vessel was plying. After studying the evidence upon this matter I am unable to find satisfactory proof that anything was done or left undone on board the vessel which would account for the extraordinarily rapid failure of these tubes. The defenders of course suggest more than one thing that should have been done, but I am satisfied that these tubes were not treated in any way differently from those of many other vessels plying in the same waters whose tubes have lasted for years. No doubt there is a great deal of skilled evidence as to causes which might account for what happened, and suggestions of things which if done might have delayed the deterioration. But if, as I think was the case, the treatment was ordinary treatment in such a vessel, and that such treatment does not destroy tubes in a few months in ordinary circumstances, I

can see no ground for holding those in charge of the vessel to blame for not adopting every special mode of treatment that can be theoretically suggested as preventive.

The cause of the failure of the tubes undoubtedly was rapid electrolytic dezincification, upon tubes which did not exhibit the effects of dezincification in the ordinary way, but in a novel manner, which more quickly brought the deterioration to the point of absolute breakdown, rendering the tube no longer fit for condensing purposes. That this may be unaccountable may be true, and certainly the skilled witnesses seem to hold it to be mysterious, and from their point of view inexplicable. But it is I think impossible to dissociate the failure from the change in mode of manufacture. We have no aid from the history of other tubes used in steamers and made by the same process, for it appears that only two steamers had been fitted with them, the "Strathmore" being one of these, and that the Broughton Company have abandoned the manufacture by this new process. We therefore have only these two facts—(1) that these tubes were made by a new process, and (2) that they have up till now not fulfilled the expectations of the manufacturers that they would prove to be better tubes than those made in the old way, but on the contrary deteriorate with great rapidity.

Upon the facts I concur with the Lord Ordinary. And I also concur with him in holding that although the peculiarities of Clyde water may have something to do with the injury to the tubes, this cannot afford a defence to the defenders if the pursuer's case is good otherwise. The tubes themselves were to be delivered free on board the vessel in the Clyde, and further the navigation of such a river as the Clyde is an ordinary use of a steam vessel, and every steam vessel trading to the Clyde, and particularly a paddle steam vessel plying in the estuary of the Clyde which does not go to sea, must be regularly exposed to the risks of the action of Clyde waters. There is abundance of evidence that steamers fitted with brass condenser tubes can ply in the Clyde without serious deterioration showing itself for years in the condenser tubes.

Upon the question of the law applicable to the case I have felt considerable difficulty. It appears to me to be difficult to bring the case under sub-sec. 1 of sec. 14 of the Sale of Goods Act of 1893, which turns upon the goods having been sold for a particular purpose made known to the seller expressly or by implication. This was an ordinary purchase for an ordinary purpose, well known in the trade, and having nothing special about it. It is, I think, unlike the case which has occurred of goods being bought for a particular purpose, such as sending them to a tropical climate or using them in special and unusual circumstances different from those in which such goods would ordinarily be placed or employed. Such cases are wines for ship-



ment abroad, or the case of coal suitable for bunkering referred to in the debate. Here the supply was of an article of trade used generally for a purpose for which it is manufactured, but not either to be used in an exceptional manner from ordinary goods of that description or exposed to any exceptional treatment in the course of use. I do not therefore think that sub-sec. 1 can be held to apply.

On the other hand I have come to be of opinion, on the best consideration I have been able to give to the case, that it falls under sub-sec. 2, by which it is declared that "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality." I do not think these goods were of merchantable quality. They were, as I hold, not "reasonably fit"—indeed, I hold they were totally unfit—to fulfil the purpose for which they were supplied. If this is so, then the only remaining question is whether the proviso of this sub-section applies, "provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed." Now, here no such defect was or could be visible on inspection by the eye. The tubes were undoubtedly brass tubes to appearance. It was only when they were subjected to their ordinary use that they quickly failed from one of the components of the brass being eaten away in such a manner and with such effect that the tube was useless for its purpose. That state of fact seems to me to fulfil the condition of sub-sec. 2, that the quality of the article was not merchantable.

I am therefore in favour of finding accordingly, and would assess the damages as the Lord Ordinary has done, as I understand the question of amount is not in dispute.

**LORD YOUNG**—There is no dispute about the terms of the contract of sale between the parties. It was constituted by the letters of 28th December 1901 and 18th January 1902, the reference in the beginning of the first to "your esteemed inquiry for condenser tubes" being, as the Lord Ordinary points out in his note, what passed at an interview between them shortly before the date of that letter.

The questions of fact in dispute are, first, did the buyer (the pursuer) make known to the sellers (the defenders) the particular purpose for which the goods sold were required by him so as to show that he relied on the sellers' skill or judgment, the goods being of a description which it was in the course of the sellers' business to supply? and second, were the goods which under the contract the sellers supplied and delivered to the buyer reasonably fit for such purpose?

On both questions the Lord Ordinary's verdict is for the pursuer, and in my opinion supported by the evidence. On the first I may observe that pursuer's purpose was to buy condenser tubes fit and suitable

for use on board a steamer plying on the Clyde and its immediate neighbourhood. No other purpose has been or can be imputed to him. It being in the course of the defenders' business to supply such tubes, they were proper persons to be resorted to for advice as to what were the fittest and most suitable kind of tubes with which they could supply a customer. When so resorted to by the pursuer they very properly and prudently in their own interest as tradesmen applied for information to the manufacturer from whom they usually or always got the tubes which they supplied to customers. I do not think it doubtful that the pursuer relied on the defenders' skill or judgment, and that the defenders knew it and sold the tubes on that footing.

Agreeing, as I have already said, with the Lord Ordinary's verdict as to the unfitness of the tubes, it is superfluous to say that I reject, as his Lordship did, the contention that their failure, their very early and complete breakdown, was attributable to faulty or in any way improper use or treatment by the pursuer or those in his service.

From what I have said regarding the purpose for which the pursuer bought the tubes and the making of it known to the defenders so as to show reliance on their advice, it will appear that in my opinion sec. 14 of the Sale of Goods Act is applicable and sufficient to put legal liability on the defenders. This is the Lord Ordinary's view, and I concur in it. I should, however, desire to say that having regard to the evidence respecting the very recent genesis of the particular tubes which were recommended by the defenders and sold, and the failure of their creator's purpose, I am of opinion that the common law would in this case have led to the same result.

The manufacturer very properly, as I suppose, in the course of his business set about devising an improvement in the construction of such tubes, fitted for the very particular purpose for which the pursuer desired them. He very properly and prudently, in his own interest as a tradesman, set about devising the construction of tubes for that purpose superior to any he had theretofore made, and I am not in a position to judge, except in so far as the evidence in this case enables me to do so, whether there was good sense from a manufacturer's point of view in what he did design and devise and proceed to construct as a superior tube for this purpose. He honestly set about it in his own interest and in the interests of the customers he would be employed by had his design been successful, and he produced the device in question. Now, the evidence in this case satisfies me that they were unfit for that purpose. I am convinced, upon the evidence, that they were properly used by people who were skilled in the use of such tubes, being in the practice of using them on board ship. They entirely failed, without its being possible, in my opinion, to attribute the failure to any misuse of them on the part of the purchaser or any of his

people. Now, I am of opinion that if a manufacturer proceeds, however creditably, to devise a superior article and recommends it as a superior article for a purpose such as that for which it was required here, and it turns out to be a failure in the hands of the first or one of the first persons to whom it is sold, the risk is with the manufacturer, with the seller, whether he sells it directly or through such tradesmen as the defenders who have resorted to him to supply the article for which he is applied to by the customer. I think the manufacturer, if he has sold it directly, would undoubtedly have been liable, the risk of the failure of his newly devised article being with him and not with the customer. The defenders, upon very clear principles of law, as well as reasonable good sense, are under precisely the same liability, and irrespective of clause 14 of the Sale of Goods Act I should have held that they are liable here at common law.

It is obvious—too obvious and clear to require to be pointed out—that the provision to which I have referred in sub-sec. 1 of clause 14 of the Sale of Goods Act is applicable to an article of common use, it may be in a variety of ways. It may not be fit for all purposes to which it could be applied, but it is a good saleable article for use in a way which is well known to the public in buying it by its name. But if any customer desires to use it in a particular way for which it may not be fit he must specify that. Now the particular way being specified, then there is liability created by the Act, although it be a perfectly saleable article and good for general purposes. But this was not. This was not fit for the purpose for which it was of peculiar value, and specified to be of peculiar value, and a great improvement upon what had gone before. It was not fit for that. It was not fit, so far as the evidence appears to me, for anything, and accordingly it was abandoned as a failure, given up as not fit for a purpose, a particular purpose for which it was made.

I am therefore of opinion that both upon the Act and at common law there is a good claim for the damages which have been allowed by the Lord Ordinary.

**LORD TRAYNER**—The pursuers of this action claim a sum of damages from the defenders on the ground of a breach of contract. The contract was for the delivery of a certain number of condenser tubes to be used in the boiler of a steamer plying on the Clyde, and there appear to be three questions raised here for determination, viz. (1) did the pursuer get delivery of what he ordered, (2) were the tubes ordered for a particular purpose so made known to the defenders as to imply reliance on the defenders' skill and judgment, and therefore a guarantee of fitness for that particular purpose, and (3) were the tubes delivered "merchantable?"

On the first of these questions I do not think there is room for dispute. What the pursuer ordered in his letter of 18th January 1902 was a number of the "special con-

denser tubes referred to in your favour of 28th December last," and from the terms of the letter there referred to it is clear that what the pursuer ordered were the special condenser tubes of the Broughton Company. It was these tubes which were supplied, and so far as appears they were in all respects conform to the representations made of them in the Broughton Company's letter sent by the defenders to the pursuer.

The second question, as I have above stated it, is attended with more difficulty, and is the question on the determination of which favourably to him the pursuer's right to succeed depends. In dealing with this question it is necessary to consider a little more in detail the terms of the contract made between the parties, and the circumstances under which it was made. It appears that the defenders having heard that the pursuer was in need of condenser tubes, Mr Tannahill, the managing partner of the defenders' firm, waited upon him to solicit the order for supplying the tubes. In the conversation which then took place Mr Tannahill informed the pursuer about the Broughton tubes which had been recommended to him by Mr Watson, the superintending engineer of a fleet of tug steamers on the Clyde. The pursuer desiring more information about these tubes than Mr Tannahill could give him, it was arranged, or perhaps I should say understood between them, that Mr Tannahill should communicate with the Broughton Company on the subject and inform the pursuer of the result. Mr Tannahill accordingly applied to the company, and received from them the circular which was communicated verbatim in the defender's letter to the pursuer of date 28th December 1901. Three weeks thereafter—that is, on 18th January 1902, the pursuer wrote to the defenders ordering the "special condenser tubes referred to in your favour of 28th Decr. last." It is right to observe that the pursuer and Mr Tannahill are not at one with regard to what took place during this conversation prior to the order being given. The pursuer says that Mr Tannahill said, or gave the pursuer to understand, that the tubes would "withstand the Firth of Clyde and the river Clyde waters." Mr Tannahill says that he did not say anything as to "these tubes being able to stand Clyde water." In my opinion it is not competent to consider what took place verbally before the contract, which is in writing, was made. The written contract is the expression of the ultimate bargain, and can neither be modified nor added to by antecedent negotiation. But in the view I take of the case it is not material here to insist on that opinion. I take it that parties knew when the contract was made that the tubes were to be used in a steamer plying on the Clyde, but that no guarantee was asked or given that the tubes would "withstand" the effects of Clyde water. The pursuer does not put his case on express warranty. His case is that the tubes were sold to him for a particular purpose so made known to the defenders

as to show that he, the pursuer, relied on the defenders' skill and judgment, which implied a warranty that the tubes would be reasonably fit for the purpose. That is the substance of the pursuer's second plea-in-law, and in effect the ground on which the Lord Ordinary has proceeded in giving judgment for the pursuer. With that judgment I am unable to concur. I cannot see any ground for holding that these tubes were sold for a particular purpose. Condenser tubes are used for only one purpose—to condense the steam passing over them, and there is no evidence, not even a suggestion, that the tubes in question were not reasonably fit for that purpose when delivered to the pursuer. The only ground of objection to the tubes stated on record is that the material of which they were made was not homogeneous, but that objection is entirely displaced by the evidence of the pursuer's own witnesses after having examined some of the tubes in question—“All I examined seemed to be quite satisfactory as to homogeneity as I should expect from experienced manufacturers like the Broughton Company. (Q) In your view the defect, if there is one, was not that the material was not homogeneous?—(A) Certainly not. The material was quite satisfactory chemically and as to homogeneity.” The only objection therefore to the tubes stated on record disappears. Again, I think it not proved that in ordering the tubes the pursuer relied on the skill and judgment of the defenders. The defenders communicated all they knew or had ascertained about the Broughton tubes, and after having that information before him for three weeks the pursuer gave the order. Nothing passed between the pursuer and Mr Tannahill to lead the latter to believe that his skill and judgment (not superior to the pursuer's) were being relied on. The pursuer, however, maintains that the tubes were to “withstand” the water of the Clyde. I have already said that this was not guaranteed. But it appears from the proof (again from the evidence adduced by the pursuer) that the water of the Clyde is not accountable for the failure of the tubes. Mr Macfarlane says—“My belief is that the Clyde water is not detrimental to condenser tubes. Dr Drinkwater says—“The experiment I made with the two Broughton tubes showed that the tubes were not acted upon by the Clyde water, of which I had got samples. (Q) And that they were thus fitted to withstand the action of such Clyde waters?—(A) That is so.” And being further asked—“I understand that the result of your experiment was that if these particular tubes had been exposed to nothing but ordinary Clyde water they would have remained entirely unaffected?” And his answer is—“Yes, that is the result.” Accordingly, if it be assumed that there was an implied warranty that the tubes would “withstand” the Clyde water, the pursuer has established that Clyde water is not detrimental to condensertubes, and that by experiment it has been found that it did

not do so. It follows from this either that the Clyde water could not injuriously affect the tubes, or if it was capable of doing so the tubes “withstood” it. The particular purpose therefore, if it was a particular purpose, that the tubes should be fitted to withstand the action of Clyde water, has been satisfied.

It is the fact, however, that the tubes in question gave way in about three months after being in use, and it is argued from that that they could not have been fitted for use as condenser tubes either because of their material or their manufacture. As to the sufficiency of the material, I need go no further than the evidence of Mr Arnold, which I have already cited; and as to the manufacture, the evidence of the defenders' witnesses, who manufactured the tubes, and which is not contradicted, is enough to negative any suggestion that the manufacture was not in all respects proper and sufficient. There is no duty on the defender to account for the failure of the tubes in so short a time—at all events, no such duty until the pursuer has established that there was some defect in the tubes at the time of their delivery which might account for their failure, or give ground for reasonable inference that the failure was thereby occasioned. If free from defect at the time of delivery the defenders' contract was fulfilled. But it is made clear by the evidence adduced by the pursuer that condenser tubes will and do fail sometimes after a very short period of use, and that the corrosion which is the immediate cause of such failure is a thing which cannot always be accounted for. Thus Mr Macfarlane says—“I think it is the case that it has been a standing trouble amongst engineers how to account for the sudden corrosion of condenser tubes.” Mr Boyd, examined on the same subject, says—“Condenser tubes have been rather an unknown quantity. You will get tubes which will last for 10 years and 20 years. It is very hard—indeed it is a puzzle—to say the cause of it. That is a subject of great perplexity to all engineers.” And Mr Stewart says—“It is quite well-known that condenser tubes may go in a very short time. (Q) Is it the case that condenser tubes may go in a few weeks or month?—(A) Well, in a few weeks under a very extraordinary condition. There have been abnormal cases of deterioration from time to time.” He was then asked if engineers had “been able to account for this abnormal condition,” but gives no direct answer to that question. Accordingly, as I have said, it appears that condenser tubes deteriorate and fail even in a few weeks, for which engineers cannot account. The failure of the defenders' tubes may therefore be regarded as one of these abnormal cases not to be accounted for, and certainly not to be accounted for, in view of the evidence I have already referred to, by any defect or deficiency in the material of which they were made, or any fault committed in this manufacture. I think, however, the defenders may go further and say that the

cause of the failure or deterioration of their tubes has been accounted for. After these tubes were taken out of the boiler, they were found in some cases to have deposits or traces of deposits of graphite or other carbonaceous matter. The existence of such matter in the tubes acted upon by the water passing through them, undoubtedly caused corrosion, and it is matter of fair inference that the presence of matter which would cause corrosion did cause it. Now, that carbonaceous matter was not in the tubes when delivered. Where did it come from? Most probably I think (having regard to the evidence adduced) from the cast iron door of the the condenser, which was not protected by a zinc plate or cover as is sometimes done. But where it came from the defenders are not bound to show. It was not there when the tubes were delivered to the pursuer.

With regard to the question whether the tubes were merchantable, I have only a word to say. This is not pleaded on record as a separate ground of action. As I have pointed out, all that is put on record is that the tubes were sold for a particular purpose for which they were not reasonably fit. But I admit that if the tubes, as condenser tubes, were radically defective they were not merchantable. If the tubes were in material and manufacture what in my opinion they are proved to have been, then they were merchantable.

The conclusion I come to on the whole case is that the pursuers have failed to establish any breach of contract on the part of the defenders, who are therefore in my opinion entitled to absolvitor.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Ure, K.C.—R. S. Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defenders and Reclaimers—Salvesen, K.C.—Macrobot. Agents—Campbell & Smith, S.S.C.

Tuesday, June 28.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

### LEARY & COMPANY v. BRIGGS & COMPANY.

*Contract—Sale—Arbitration—Stipulation against Rejection and for Arbitration—Right to Reject—Goods Not According to Specification.*

L. & Co., timber brokers in London, sold "on account of our principals" to B. & Co., timber merchants in Glasgow, a shipment of teak logs, the shipment as a whole . . . to be of fair merchantable quality, conversion, and

condition." The contract stipulated that should any dispute arise in connection with it the buyers should nevertheless take delivery of the goods as shipped, making due payment as therein agreed, and such dispute should be referred to L. & Co., whose decision as independent parties between seller and buyer should be final.

B. & Co. refused to take delivery on the ground that the timber was not of fair merchantable quality, as required by the contract, and L. & Co. raised an action for the price. B. & Co. defended the action upon the ground that (1) the arbitration clause was inapplicable here, where the averment was that the goods supplied were not what had been ordered, and only applied where the contract had been substantially fulfilled, and (2) if it were held to be applicable, then it had become inoperative owing to L. & Co. having so closely identified themselves with their principals as to disqualify them from acting as arbiters.

Held that B. & Co. were bound to take delivery and make payment, inasmuch as the arbitration clause did apply, and L. & Co., at the time when payment became due, had in no way disqualified themselves, reserving however to B. & Co. any claim they might have in respect to the goods or as to L. & Co. acting as arbiters in any subsequent proceedings.

On 18th May 1903 C. Leary & Company, timber-brokers, Lombard Court, Gracechurch Street, London, E.C., sold to Francis Briggs & Company, timber merchants, Hope Street, Glasgow, a shipment of 125 loads of Moulmein teak logs. The contract-note bore that the sale was "for account of our principals," and contained the following stipulations—"The shipment as a whole is guaranteed to be of fair merchantable quality, conversion, and condition. Payment to be made on arrival of the steamer in cash, less 2½ per cent. discount, the freight to be allowed in account and paid by buyers according to bill of lading. Should any dispute arise in connection with this contract, the buyer shall nevertheless take delivery of the goods as shipped and make due payment as herein agreed; such dispute shall be referred to the undersigned, whose decision, as independent parties between seller and buyer, shall be final."

The logs were shipped from Moulmein in the steamship "Burma," which arrived in Glasgow on 16th September 1903, and Leary & Company's representatives there tendered to Briggs & Company the bill of lading in exchange for the price, amounting, after freight and discount had been deducted, to £1244, 8s. 9d. Briggs & Company refused to accept the shipping documents or to pay for the goods, and thereupon Leary & Company raised an action for the price. In their defences Briggs & Company averred that "the logs were not of fair merchantable quality, conversion, and condition as stipulated for in the said contract;" and