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.—Macrobert. 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

pleaded—"(2) The arbitration clause being inoperative, the defenders are not bound thereby, and the action should be dismissed. (3) The goods sold to the defenders not having been of merchantable quality, as required by the contract, the defenders were not bound to take delivery thereof, and they are entitled to absolvitor, with expenses."

On 10th November 1903 the Sheriff-Substitute (FYFE) issued an interlocutor repelling the defences as irrelevant, and decerning as craved. In his note he said—. . . "On the merits, defenders, while admitting that the goods were tendered and refused, plead that the refusal to take delivery was justified because the goods were 'not of fair merchantable quality, conversion, and condition.' This is a mere quoting of an expression in the contract note, and conveys nothing at all to the pursuers as to what specific complaint they have to meet. A bald statement of this sort is not a relevant averment of disconformity to contract.

"But even if the defence were relevantly stated it cannot be entertained in this process, for it is excluded by the arbitration clause. The exact case which the defenders aim at setting up has been contemplated and is provided for in the contract. The buyer has contracted that, whether he has a claim for disconformity or not, he will nevertheless take delivery of the cargo and pay the price. This may be a peculiar stipulation, but there it is, and it must get effect. The contemplation of the contracting parties evidently was that any objection to the quality of the goods must be formulated in a claim of damages, and that that claim should be referred to arbitration; but that, claim or no claim, delivery must be taken.

"Defenders further plead that the arbitration clause is inoperative because the arbiter named is one of the contracting parties. But this is what both parties accepted as their arrangements, and having done so neither can evade the arbitration clause. (*Buchan* v. *Melville*, 28th February 1902, 4 F. 620.)"

The defenders appealed, and amended their defences by adding the following to their averment as to the defective character of the goods tendered—"In particular, the timber shows plain signs of worming, fully one-third of it is bent and rambling in shape and also wormy. These faults make it impossible to cut up the timber profitably, and seriously depreciate its merchantable quality and conversion."

On 16th March 1904 the Sheriff (GUTHRIE) recalled the interlocutor of the Sheriff-Substitute of 10th November, and before answer allowed a proof.

The pursuers appealed, and argued—The Sheriff's interlocutor was wrong and that of the Sheriff-Substitute right. The contract was quite clear that the goods were to be accepted, any dispute being reserved, and payment was to be made. What had occurred was exactly what the contract had contemplated and provided for. The arbitration clause was not yet called into force, and so no question had yet arisen as to disqualification of arbiters, and no such question could yet be discussed. If, however, that question was now to be looked into, there was no disqualification here, for the brokers had as yet in no way prejudged any dispute as to the quality of the goods, and certainly had not done so when payment became due and the action was raised—*Buchan* v. *Melville*, February 28, 1902, 4 F. 620, 39 S.L.R. 398.

Argued for the respondents—The Sheriff's interlocutor should not be disturbed, but the inquiry should be proceeded with. The condition that the goods were to be of fair merchantable quality, conversion, and condition underlay the whole contract, and if it were not fulfilled the defenders were not bound to take delivery. If it were proved that the goods were not what had been ordered, as was averred, then the arbitration clause did not apply to the dispute — *Vigers Brothers* v. *Sanderson Brothers* [1901], 1 K.B. 608. But further, the arbitration clause was inoperative, for in it the reference was to independent parties, and the pursuers had not maintained their independent position as brokers only, but had throughout identified themselves with the sellers. They were therefore disqualified—*M'Dougall* v. *Laird & Sons*, November 16, 1894, 22 R. 71, 32 S.L.R. 52. That at least was the averment, and it should go to proof.

LORD PRESIDENT — There are certain peculiarities in this contract which might place some of the parties to it in a position which might make it difficult for them rightly to discharge their duties, but in this, as in all such cases, the first question which we have to consider is, what is the true construction and effect of the contract? It was entered into on 18th May 1903 between C. Leary & Company, and F. Briggs & Company, London, and was for the sale "on account of our principals to Messrs Francis Briggs & Co." of a specified quantity of Moulmein teak logs. The contract contains a provision as to quality, which is in the following terms:—[*His Lordship quoted the clause in the contract*]. The next stipulation which raises the question we have to decide is as follows:—[*His Lordship then quoted the arbitration clause from the contract*]. That is an important clause, and it is of a class which is becoming common in mercantile contracts. The plain object of the clause is to secure that the contract shall be immediately executed by delivery and payment, leaving over any question that may arise as to quality or the like for after determination. The tendency in mercantile contracts is to exclude the possibility of delay by providing for instant execution of the contract, leaving any questions which may arise upon it to be settled by subsequent arbitration. It is clear that the parties intended and desired that such a dispute as the present should not prevent or delay the execution of the contract.

Another stipulation not now uncommon

is the reference to "the undersigned" brokers as independent parties between buyer and seller. I apprehend that the meaning of that is that the fact of their being brokers is not to disqualify them. They are independent between buyer and seller, although they may be agents for one or both of the parties. Therefore unless some cause can be shown for disregarding the plea founded on the arbitration clause, that plea should be sustained, and no ground has in my judgment been shown for disregarding it. This is the view taken by the Sheriff-Substitute. I think that he is right. I can quite understand the view taken by the Sheriff, but it seems to me that if it were necessary to adopt that view it would defeat the plain intention of the parties, who desired that any dispute which might arise between them should not be taken into a court of law. I therefore think it would be quite in accordance with the intention of parties to have the matter settled by business men on business principles, and not upon a general proof such as the Sheriff allowed in this case.

I am therefore of opinion that the proper course is to recal the Sheriff's interlocutor, and in substance revert to the interlocutor of the Sheriff-Substitute.

Lord Adam—The pursuers on 18th May 1903 entered into a contract with the defenders by which, acting as agents for certain principals, they sold to the defenders a quantity of teak logs. I do not understand that there is any dispute that a cargo professing to be the cargo contracted for was tendered to the defenders in Glasgow, and I do not understand that if the defenders were bound to take the cargo there is any dispute whatever as to the figures. Therefore the sole question raised on this record seems to be whether or no the defenders were entitled to reject the cargo as they did when the cargo and shipping documents were tendered to them. They rejected the cargo on the ground that the teak logs were not of "fair merchantable quality, conversion, and condition," and the question to my mind is whether they were right in so rejecting it. That no doubt is a very good ground for rejection in ordinary cases, but it appears to me clear on this contract that the intention of the parties was that although objection was stated with reference to the cargo that it was not of fair merchantable quality, conversion, and condition, nevertheless the defenders were bound to take the cargo, and that whether it was of fair merchantable condition or not was a question for subsequent consideration and disposal between the parties. I think that is clear, because the contract provides that "should any dispute arise in connection with this contract," and the dispute here is as to whether it is of merchantable quality or not, "the buyer shall nevertheless take delivery of the goods as shipped, and make due payment as therein agreed." The buyer is to make payment whether the cargo is merchantable or not, and then there is a clause which provides for the future disposal of that question in the following terms—"such dispute shall be referred to the undersigned (the pursuers), whose decision, as independent parties between seller and buyer, shall be final." It therefore appears to me that the intention of the parties to this contract is that the cargo professing to be the cargo shipped under the contract shall be accepted and paid for, and that if the buyer chooses to dispute about the condition he shall have that subsequently settled. At the time when the defenders rejected the cargo they could not have had the defence which they now state, viz., that the arbiter named in the contract had acquired such an interest at that date as to entitle them at the time to reject the cargo. It may be that Leary & Company by becoming parties to this action have disqualified themselves from in future acting as arbiters. I say nothing on that point, but I cannot see how these future proceedings could have entitled the consignees to reject the cargo. We were referred to the case of *Vigers Brothers*, L.R. [1901], 1 K.B. 608, but it appears to me that that is quite a different case. There the contract was for logs of a particular size, there was no question of merchantable condition as here, and the fact that the cargo tendered was not the cargo contracted for was visible to the eye. I am therefore of opinion that no relevant defence has been stated in this action, and that we should return to the judgment of the Sheriff-Substitute as your Lordship proposes. I think, however, that the interlocutor should be qualified so as to keep open the defenders' objection to Leary & Company acting as arbiters in any claim which they may make. I offer no opinion on that subject, but if it should turn out that the defenders are right in saying that they are not bound to submit to the arbitration of Leary & Company they will have their redress by applying to the Court.

Lord M'Laren—It may be kept in view that while the common law of Scotland gives a purchaser in general only the right of rejection, there were of course well-known exceptions—it was always competent to the buyer and the seller by agreement to exclude that right, and to substitute for it any other mode of settling differences which they pleased. This question which we are now considering of the law of sale, as it appears to me, has no relation to the amendment made by the Sale of Goods Act, because it might just as well have arisen before the passing of that Act—the question being, what is the remedy open to the purchaser under the agreement. I notice that the contract-note provides that "The shipment as a whole is guaranteed to be of fair merchantable quality, conversion, and condition," and therefore if the provision for referring disputes to the broker is to have any operation at all I think it would certainly be applicable to a dispute as to the merchantable quality of the goods. There are cases where it may be difficult to say whether an

objection stated by a purchaser is an objection to quality and sufficiency, or comes to this that he has not got goods of the description which he ordered. In the case which was read to us (*Vigers Brothers*) the learned Judge who considered the case thought that the timber supplied being so many feet shorter than the length stipulated for was not timber of the description prescribed by the contract, and it is easy to see that where the timber was too short it might be altogether unfit for the purpose to which the purchaser intended to apply it. If instead of feet it had been only a matter of inches it is quite possible the Judge might have held that the objection was covered by a general reference to arbitration of all objections to the quality and sufficiency of the goods. In this case my opinion is that the objections stated are objections to quality and sufficiency, and would therefore fall under the arbitration clause, but in common with your Lordships I wish to reserve my opinion as to whether the broker by his actings has disqualified himself from acting as arbitrator by suing on the contract. In the meantime nothing done has deprived the seller of his right to claim that delivery should be taken of the cargo and the price paid under reservation of all claims arising from imperfect fulfilment of the condition as to quality and sufficiency. I concur with the observations made by both your Lordships to the effect that we must consider this claim exactly as if it had arisen on the day when delivery ought to have been taken, and that whatever may be the result of the broker having sued on the contract, it has no effect on the purchaser's obligation to take delivery and pay the price.

I therefore agree that we thould return to the judgment of the Sheriff-Substitute under reservation to both parties of their rights upon the objections that have been stated.

LORD KINNEAR—I agree with your Lordships. If there had been no stipulation on this subject the right of a buyer in a case of this kind is clear enough. He would have been entitled, if he were dissatisfied with the quality of the goods delivered to him, either to reject the goods and treat the contract as repudiated, or to retain the goods and claim damages for failure to perform a material condition of the contract. But by express stipulation the buyer has surrendered his option and bound himself to accept the goods and pay for them notwithstanding that there may be some dispute between him and the seller as to their condition and quality. One of the remedies under the Sale of Goods Act is still open to him, and he may treat the seller's failure as a breach giving rise to a claim for compensation or damages, notwithstanding that he has retained the goods, but he cannot reject them, and in the meantime he must pay the price. It was maintained by Mr Hunter that the condition that the "shipment as a whole is guaranteed to be of fair and merchantable quality, conversion, and condition" was not qualified by the immediately following stipulation that if any dispute were to arise "the buyer shall nevertheless take delivery of the goods as shipped and make due payment." I do not think the second stipulation can be properly described as a qualification of the first, but it excludes a remedy which would otherwise have been open for breach of the first. I do not think the English case of *Vigers Brothers* (L.R. [1901], 1 K.B. 608) has any application to the question. The distinction between the identity of the subject of a contract of sale and the quality of the subject is perfectly simple and plain. The contract is for the purchase and sale of Moulmein teak logs. If the seller had offered anything else but Moulmein teak logs the buyer would have been quite entitled to reject it, not on any objection to the quality or condition of the thing offered to him, but on the simple ground that that was not the thing he had bought. But there being no dispute as to the goods tendered being Moulmein teak logs, and only a dispute as to quality and condition, that is in my opinion a dispute which falls within the stipulation by which the buyer has undertaken to accept the goods and pay for them, reserving, of course, a claim for damages for non-performance of a material part of the contract if he can show that the quality of the goods was insufficient. Taking that view of the contract, I agree with Lord Adam and Lord M'Laren that it is not necessary, and I think it would not be apposite, to express any definite opinion as to the question whether the persons named as arbiters in the contract are disqualified or not. The question is whether the defender was not bound to accept the goods and pay the price when the goods are delivered to him. If we so hold, we must hold at the same time that any claim for damages for defective quality must be reserved, and it follows that the answers to such claims must be reserved also, and that the method by which the dispute is to be decided must be determined on the process in which it is raised and not in a different process from which it is excluded. I therefore concur in the suggestion of Lord Adam and Lord M'Laren, that while we affirm in substance the interlocutor of the Sheriff-Substitute, there ought to be reserved to the defender any right which may be competent to him to maintain his claim in respect of the alleged insufficiency of the goods, and to the pursuers their answers thereto.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff, dated 16th March 1904: Affirm the interlocutor of the Sheriff-Substitute, dated 10th November 1903, and decern: Reserving to the defenders any right competent to them to the effect of maintaining a claim in respect of the goods, and also as to the pursuers' right to act as arbiters under the contract, and to the pursuers their answer

thereto: Finds the pursuers entitled to expenses from the date of the Sheriff-Substitute's interlocutor," &c.

Counsel for the Appellants—Guthrie, K.C.—Orr. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Hunter—R. S. Horne. Agents—Webster, Will, & Co., S.S.C.

Tuesday, June 28.

FIRST DIVISION.

PIRIE AND OTHERS *v.* STEWART

Company — Winding-up — Petition for Winding-up Order—Just and Equitable —Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 79.

A company was formed to "purchase, charter, hire, or otherwise acquire" steam or other vessels, having a capital of £10,000 in £1 shares, of which, however, only 2825 shares were subscribed. At the end of its first year's trading, during which the only business carried on was the ownership and management of one vessel, that vessel was lost, and the only remaining asset of the company was a balance of £363 in bank. A majority in number and value of its shareholders proposed to have the company wound up, but failed to obtain the three-fourths majority necessary to carry a resolution for winding-up voluntarily. A minority of the shareholders were anxious to continue business by chartering vessels, and had made an offer to the majority of a price per share for their holding more than would apparently be obtained in a winding-up.

In a petition under the 79th section of the Companies Act 1862 the Court *granted* a winding-up order.

The Stewart Steamship Company, Limited, was on 25th March 1902 registered and incorporated under the Companies Acts 1862 to 1900, with its registered office at Strath Buildings, 208 South Market Street, Aberdeen. By its memorandum and articles of association power was taken to purchase, charter, hire, or otherwise acquire, build, equip, and maintain steam or other ships, and to carry on the business of shipowners; and the prospectus explained that the intended sphere of the company's business was the East and West Coast Baltic herring trade and the general coasting trade. The capital of the company was £10,000 divided into £1 shares, but of this amount only 2825 shares were subscribed among twenty-three members. These were fully paid-up. James R. Stewart, the principal promoter of the company, was by the articles of association appointed manager with sole power to regulate the ship or ships which might belong to the company.

On 17th May 1904 John Pirie, master-mariner, 40 East Church Street, Buckie, and three others, being four of the five directors of the company, with the consent and concurrence of nine shareholders, representing in all 1435 shares, presented a petition to the Court for an order for the winding up of the company. They stated—"In or about the month of July 1902 the company acquired by purchase the s.s. 'City of Verviers,' a trading vessel of 290 tons or thereby. The purchase was negotiated and effected by the said manager of the company without consulting the directors, and solely on his own responsibility as to the vessel's suitability and adequacy for the purposes in view and her value. The purchase price of said vessel was £2000, but she was in such condition and so unsuited to the trade in view that she required an outlay of about £1100 on alterations and repairs, and this expenditure was incurred by the manager without authority of the directors and without consulting the directors. This whole expenditure was met partly out of subscribed capital and partly by means of an overdraft from the bank. After the purchase of the 'City of Verviers,' she was employed in the Baltic herring trade for a short period, then in the general coasting trade for a short time, in both of which trades money was lost, and latterly in the general coasting trade on time charter. This is the only business the company has ever done, and instead of making a profit the said business was carried on at a loss of £757, 4s. 7½d., as appears from the first balance-sheet as at 30th September 1903. On or about 6th July 1903 the said vessel stranded at Llandulas in North Wales, and became a total wreck. Previous to foundering she had done considerable injury to the pier at Llandulas, which gave rise to a claim of damages, for which the company was ultimately, after a litigation, found liable. The said manager had neglected to make provision by insurance against such damages, and the said claim consequently was one against which the company had no relief. The principal sum of damages and expenses of the litigation amounted in all to £1344, 14s. Since the loss of said vessel the company has not transacted any business, nor has it been in a position financially to do so. From a special balance-sheet prepared on 14th April 1904 by the auditors of the company, the total capital loss sustained by the company is shown to amount to £2415, 13s. 1d., including the loss in connection with said claim of damages. The only asset now remaining, so far as shown in said balanee-sheet, is a sum of £363, 8s. 10d. in bank. . . . In view of the heavy losses which the company has sustained, and its present obligations, the directors, and, so far as is known, the whole of the shareholders (with the exception of the said James R. Stewart and his nominee after mentioned), are agreed that it is impossible for the company to continue its business, and that, in order to save what is left of the assets it should be immediately wound up. The company really existed for the purpose of working the s.s. 'City of Verviers.' Consequent upon the loss of