regards (*a*) her structure, (*b*) her engine and mechanical power, (*c*) such labour to utilise these mechanical appliances as it is for the steamer to supply as that she "can discharge" (*i.e.*, as admitted, dump on the quay) 100 standards a day. This I think is the meaning of the proviso. The delay was caused by the deficiency of the labour above called (*c*); the proviso cast upon the ship the responsibility for this deficiency. The result is, in my opinion, that the proviso has relieved the charterers from a liability which would otherwise have rested upon them. For these reasons I think that the appeal should be allowed.

Their Lordships (Lord Wrenbury dissenting) dismissed the appeal with expenses.

Counsel for the Appellants — Condie Sandeman, K.C. — Douglas Jameson. Agents—John W. & G. Lockhart, Ayr—Dove, Lockhart, & Smart, S.S.C., Edinburgh—Ince, Colt, Ince, & Roscoe, London.

Counsel for the Respondents — F. D. Mackinnon, K.C.—J. A. Maclaren. Agents—Lucas, Hurry, Galbraith, & Macpherson, Glasgow—Macpherson & Mackay, S.S.C., Edinburgh—Botterell & Roche, London.

Thursday, July 31.

(Before Viscounts Finlay and Cave, and Lords Dunedin, Shaw, and Wrenbury.)

MARSHALL & COMPANY *v.* NICOLL & SON.

(In the Court of Session, December 21, 1918, 56 S.L.R. 178.)

Contract—Sale—Breach of Contract—Damages—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 51 (3).

Circumstances in which *held* that a contract for the sale of goods had been established, and damages for the non-delivery thereof *assessed* where there was little or no market for such goods.

This case is reported *ante ut supra.*

The defenders Nicoll & Son appealed to the House of Lords.

At delivering judgment—

VISCOUNT FINLAY—This action was brought by the respondents to recover damages from the appellants for their failure to perform five contracts for the delivery to the respondents of steel sheets. The defence was a denial that the contracts had been entered into.

The facts of the case are fully stated in the judgment which will be delivered by my noble and learned friend Viscount Cave. I have had the advantage of seeing that judgment, and I agree with him that the appeal fails.

I have only to add the following observations under each of the three heads which were in controversy between the parties:—

1. The Lord Ordinary held that two of the five contracts, namely, one for 100 tons of close annealed sheets and another for two lots of 50 tons each of steel sheets had been established. He was affirmed as regards these contracts by the Second Division. I entirely agree with the conclusions at which both these Courts arrive with regard to these contracts.

I also agree with the Second Division in their finding that another contract for 30 tons of steel sheets had been proved. This contract was in substitution for one of 25 tons which had been found by the Lord Ordinary.

2. There were two other alleged contracts in dispute, each for 100 steel sheets at £15, 12s. 6d. per ton, said to have been entered into on the 24th and 30th October 1916 respectively by oral agreement on the telephone.

The Lord Ordinary held that these contracts had not been established on the ground that the testimony was conflicting, and that he thought that it was extremely improbable that the appellants should have entered into these contracts at £15, 12s. 6d. per ton at a date when the price of such sheets had risen considerably, and when they knew that they could only get them by special arrangement as such sheets did not fall under their contract with the Youngstown Mills for the supply of sheets.

I was much impressed in the course of the argument with this improbability, and was disposed to think that the Second Division ought not to have held as they did that these contracts had been proved. But at the close of his address for the respondents Mr Moncrieff called your Lordships' attention to the correspondence between the appellants and the respondents in December 1916. In that correspondence the appellants explicitly admitted the existence of these two contracts. This admission, in my opinion, completely gets rid of the argument of improbability which prevailed with the Lord Ordinary, and which but for these letters would probably have prevailed with me. These letters appear to have been overlooked by the Lord Ordinary, but in my opinion when once they are examined their effect is decisive.

3. It was further contended for the appellants that the damages had been erroneously assessed.

It appears that there was no market in which goods of this description could be obtained. It follows that the damages must be assessed on the basis of what the goods if delivered would have been worth to the pursuers apart from any special circumstances. Strict accuracy with regard to the amount of such damages is impossible, but the sum of £2000 awarded by the Lord Ordinary in respect of the contracts which he found proved seems to be a fair estimate, and I certainly can see no reason for interfering with it. The Second Division applied the same measure to the case of the additional breaches of contract which they held to have been established, giving a total amount of £3475. I think that this amount should stand.

In my opinion the appeal should be dismissed with costs.

VISCOUNT CAVE—In this case the respondents (the pursuers) have obtained a decree against the appellants (the defenders) for £3475 as damages sustained by the respondents in consequence of the breach by the appellants of five contracts for the sale of steel sheets. The contracts alleged were as follows:—(1) A contract for 100 tons close annealed sheets at £15, 12s. 6d. per ton. (2) A contract for two lots of 50 tons each of steel sheets at £15, 2s. 6d. and £15, 12s. 6d. per ton respectively. (3) A contract for 100 tons steel sheets at £15, 12s. 6d. per ton. (4) A contract for 30 tons steel sheets at £15, 12s. 6d. per ton. (5) A contract for 100 tons steel sheets at £15, 12s. 6d. per ton.

The Lord Ordinary (Lord Hunter), before whom the proof was taken, found that contracts had been concluded for 225 tons of the steel sheets, being those mentioned under numbers (1) and (2) in the above list, together with 25 tons, part of the 30 tons mentioned under No. (4), and awarded £2000 as damages. On appeal the Second Division of the Court of Session (Lord Salvesen dissenting) found that the whole of the above contract for steel sheets, amounting in all to 430 tons, had been established, and awarded to the respondents £3475 as damages. Against this decision the appeal is brought.

The appellants seek to establish two points, namely (1) that no contracts were in fact concluded between the appellants and the respondents, and (2) that even if contracts were concluded, in which case it is admitted that they were broken, the respondents have failed to prove that they suffered any loss or damage by reason of the breach.

For the purpose of determining whether the above contracts were established it is necessary to deal in some detail with the letters, interviews, and correspondence. The transactions begin with a letter from the Youngstown Sheet and Tube Company, who own rolling mills in the United States of America, and have an office in London, dated the 27th September 1916, by which they offered to the appellants Messrs Nicoll & Sons from 200 to 500 tons of close annealed steel sheets, of gauges varying up to No. 28 Birmingham gauge and at varying prices. The offer was to be held open until the 5th October. On the 29th September Mr John M'Lean, who represented the appellants throughout the transaction, had an interview with Mr John Robertson, the chief clerk to the respondents Messrs Marshall & Company, and Mr Thomas Jamieson, their buyer, at which he informed them that he had the above steel sheets for disposal, and invited orders for them. It happened that the respondents had an order from a customer in Japan for 200 tons of steel sheets, which were specified in that order, not according to gauge, but according to the number of sheets contained in a bundle of 107-109 lbs. This order specified for 50 tons containing 10 sheets per bundle, 50 tons containing 11 sheets per bundle, and 100 tons containing 13 sheets per bundle. Sheets so specified were, however, readily convertible by an expert into sheets of the equivalent Birmingham gauge, and of that required by the Japanese customer—the first parcel, namely, the sheets at 10 per bundle would be equivalent to sheets of a gauge of 28, the second, namely, the sheets at 11 per bundle to sheets of a gauge of 29, and the third, namely, the sheets at 13 per bundle to sheets of a gauge of 31. Whether these equivalent gauges were in fact worked out and referred to at the interview of the 29th of September is a matter upon which there is a conflict of evidence, but in any case I do not think that Mr M'Lean then realised that the thinnest parcel of sheets specified in the Japanese order, being those containing 13 sheets per bundle, would be of a gauge thinner than any of those included in his offer from the Youngstown Company. Mr M'Lean accordingly quoted prices for the whole of the 200 tons required by the respondents for their Japanese customer, namely, £15, 2s. 6d. per ton for the sheets at 10 per bundle, and £15, 12s. 6d. per ton for the sheets at 11 and 13 per bundle. These prices were not then accepted by the representatives of the respondents, and it was arranged that the respondents should communicate with the appellants on the matter. So far there was of course no contract.

On the 3rd of October the respondents telegraphed to the appellants as follows:—"Book 125 tons steel sheets 6 by 3 feet by 13 sheets bundle of 108 lbs., £15, 12s. 6d.; hold price open Thursday morning 50 tons each 10-11 sheets."

On receipt of this telegram the appellants wrote acknowledging its receipt, and adding, "We await your formal order sheet with full particulars thereon." On the same day the respondents wrote confirming their telegram and enclosing formal orders for 100 tons and 25 tons respectively. Each of these orders was on a printed form commonly used by the respondents, and which included the words "Your acceptance or refusal of this order must be given by return." It also included the following note:—"We have the option of cancelling or postponing the fulfilment of this order in case of war, riot, strikes, or pestilence, interrupting carriage to or disturbing trade in the market where goods are going or in this country."

On the 4th October the respondents wrote to the appellants enclosing a formal order in similar form for the two lots which had been kept open for them, namely, 50 tons at 10 sheets per bundle and 50 tons at 11 sheets per bundle. These orders, which included a new term not previously discussed between the parties, namely, the clause referring to war, strikes, &c., and that expressly invited acceptance or refusal, did not conclude any contract.

On the 4th October the appellants wrote to the respondents asking for a letter of credit for the amounts of the orders, but by letter dated the following day this request was refused.

On the 4th October the appellants also wrote to the Youngstown Company accepting the contract for the 200-500 tons, and on the same day sent them orders for 125 tons

of sheets as specified by the respondents, namely, sheets at 13 per bundle. On the 5th October the Youngstown Company replied, pointing out that sheets 6 feet by 3 feet by 13 sheets per bundle were thinner than they were accustomed to roll, the thinnest sheets rolled by them being about No. 30 Birmingham gauge, and offering to cable to their works asking whether an offer would be accepted for 125 tons of sheets at 12 sheets per bundle. On the 6th October, in consequence of the receipt of the last-mentioned letter, the appellants wrote to the respondents as follows:—"If you will kindly go into your calculations again you will find that the sheets you specified, say sheets weighing 8¼ lbs. each, are thinner than 30 G., and as the thinnest sheet which our principals roll is 30 G., we regret our inability to put these orders through. We would respectfully suggest, however, that we supply you with our one pass C.R. and C.A. 12 sheets per bundle of 108 lbs., say No. 30 G., at the same price as in your order sheet." This letter amounted to a refusal to supply the 125 tons as ordered, with an alternative proposal to supply somewhat thicker sheets which was not then accepted.

I have referred to the above correspondence in some detail, as it is contended on behalf of the respondents that at some point in the correspondence quoted there was a concluded contract to supply the 125 tons. In my opinion this contention cannot be supported. Each of the documents referred to contained expressions which left the question, contract or no contract, to be determined by some subsequent communication, and if at any point during the correspondence either party had desired to withdraw from the negotiations he would have been at liberty to do so. The appellants in effect withdrew on the 6th October.

After some further correspondence, which was directed towards getting rid of the difficulty which had arisen with the mills, a telephone conversation took place on the 24th October between Mr M'Lean representing the appellants, and Mr Jamieson (with whom was Mr Robertson) representing the respondents. At this telephonic interview Mr M'Lean again offered to supply thicker sheets than those comprised in the formal orders for the 125 tons, namely, sheets at 12 per bundle. Mr Jamieson, after consulting Mr Robertson, then definitely accepted this offer, and at the same interview it was agreed that a further 100 tons at 12 sheets per bundle should be added, making 225 tons of that thickness. On the same day, and immediately after the interview, the respondents wrote to the appellants referring to the arrangement made by telephone as a definite agreement and enclosing a new order for the additional 100 tons. They also, within a few days afterwards, forwarded an additional order for 30 tons with a sheetage of 12, explaining that this order would cancel the original order for 25 with a sheetage of 13. These orders and the letters enclosing them were received by the appellants without question or comment of any kind, and they strongly confirm the evidence on behalf of the respondents that a firm contract for 225 tons was concluded at the interview. The additional five tons were treated by both parties as of no importance. In my opinion a contract was at this date concluded for 230 tons of steel sheets at 12 sheets per bundle, being the sheets referred to in contracts 1, 3, and 4 of the above list.

On the 30th October a further interview took place by telephone, at which a further 100 tons similar steel sheets were ordered at the same price and a formal order was subsequently sent. The formal order in this case as in the others included the invitation to the receivers to accept or refuse, but the contract had been made over the telephone, and I think that both parties treated the acceptance referred to in this note as already given. This was the contract numbered 5 in the list.

Throughout the period above referred to no question had been raised as to the order for 50 tons at a sheetage of 10 per bundle and 50 tons at a sheetage of 11 per bundle. No difficulty had arisen with the makers with regard to this order, which was well within the gauge of the sheets which they were willing to supply. This order was treated throughout as a settled matter, and I think that the appellants must be held to have accepted it. This was the contract numbered 2.

The result of the above review is that in my opinion the respondents have proved concluded contracts for the sale of the whole 430 tons of steel sheets referred to in the proceedings. I have arrived at this conclusion without reference either to the correspondence which passed between the appellants and the Youngstown Company, or to the correspondence which passed between the appellants and the respondents after the 30th October, but if that correspondence is referred to it strongly confirms the view that the contracts had been concluded. Mr M'Lean in his letters to the Youngstown Company repeatedly made statements to the effect that the appellants were under contract with the respondents for supply of the sheets ordered by them. Mr M'Lean explains these statements by saying that they were "white lies" which he told with a view to putting pressure upon the Youngstown Company to supply the sheets which the respondents required, but it is impossible to accept this explanation as satisfactory. No doubt Mr M'Lean's statements to third parties would not create a contract if none existed, but they go to the credibility of the writer and point to the conclusion that wherever a conflict of evidence exists between Mr M'Lean and the agents of the respondents the latter are to be believed.

It is also noticeable that the appellants cabled to their shipping agents in New York, booking space for 225 tons of steel sheets on the 5th October, for a further 120 tons on the 24th October, and for a further *100 tons* on the 30th October, and it is hardly to be supposed that they would have incurred this liability unless they had considered that definite contracts had been concluded on these dates.

The following quotations may be made

from the correspondence after the 30th October. On the 8th December the respondents wrote to the appellants a letter in which, after referring to all the orders amounting to 430 tons of steel sheets, they proceeded as follows:—"With regard to the above orders we confirm the conversation with your Mr M'Lean to-day, in the course of which he suggested that we should supply against these orders sheets 30 inches wide instead of 3 feet wide, which would enable you to complete your contract and ship the sheets during January and February without prejudice to the position as it stands at present. We agreed to cable out to our clients offering them sheets 30 inches wide, *i.e.*, 430 tons close annealed steel sheets 6 feet by 30 inches, it of course being understood that the thicknesses of the sheets will not vary in any way from the thicknesses ordered by us, *i.e.*, weight per bundle will be decreased accordingly, as of course our clients would not accept heavier sheets than those ordered." This letter clearly asserted a binding contract for the whole 430 tons. The appellants did not at once reply to it, but on being pressed for an answer wrote as follows:—"We certainly received your letter of the 8th December confirming the writer's interview with you, but as it was clearly a definite statement of the case we hardly thought it called for any reply." It would be difficult to show more clearly that the appellants accepted the respondents' view that there was a concluded contract for the 430 tons.

Upon a full consideration of the above circumstances I have come to the conclusion that the alleged contracts are proved, and that upon this part of the case the appellants cannot succeed.

The second point raised by the appellants, namely, the point as to damages, may be more shortly stated. The claim for damages must be governed by section 51 of the Sale of Goods Act 1893, which is as follows:—"(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer the buyer may maintain an action against the seller for damages for non-delivery. (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, and if no time was fixed then at the time of the refusal to deliver." It is admitted that on the assumption that contracts were concluded they were broken on the 3rd February 1917, and it is argued on behalf of the appellants that the evidence did not establish that there was on that date an available market price for the goods in question, and accordingly that the respondents cannot recover damages unless they can prove actual damage incurred under their contract with the Japanese customer. The question whether there was an available market and a market or current price is a question of fact, and upon this the Lord Ordinary had evidence before him in the shape of a number of quotations for steel sheets of the character described between the month of October 1916 and the 3rd February 1917. Acting upon the evidence furnished by those quotations and upon the oral evidence the Lord Ordinary held (as I understand his judgment) that there was a market price at the date of breach, and making the best of the varying figures placed before him, and taking a broad view of the situation, he fixed the market prices at the date of the breach as higher than the contract prices to the extent of £10 per ton in the case of the 125 tons and £7, 10s. per ton in the case of contract No. 2, and upon that footing awarded £2000 as damages for non-delivery of the 225 tons in respect of which he held the contract to have been proved.

The Court of Session adopted the figures of £10 and £7, 10s., and extending the latter figure to the remaining contracts awarded £3475 as damages for non-delivery of the whole 430 tons. After reading the evidence on this point I am satisfied that there was evidence upon which the Lord Ordinary could come to the conclusion which he reached, and accordingly it appears to me that the findings under this head should not be disturbed, and that it is unnecessary to consider the further question what damages would be recoverable if no market price had been proved.

For the above reasons I am of opinion that this appeal fails and should be dismissed.

My noble and learned friend Lord Dunedin, who is engaged at the Privy Council, concurs in the judgment I have just read.

LORD SHAW—In September and October 1916 the appellants are said to have sold to the respondents 430 tons of closed annealed steel sheets. Such a contract, or rather such a series of contracts, for they are in all five in number, can of course be proved *prout de jure*. The proofs are (1) the parole evidence, and (2) the correspondence, the one being supplementary, or rather complementary, to the other. The object of a survey of such evidence is to ascertain whether a point of mutual consent was reached by the parties. Once that point is reached the contract is made and can be enforced, unless the further point be reached that by a similar mutual consent the parties had agreed that they being bound had gone back upon that and were to be released.

With regard to the parole evidence, it is unfortunate that so far as the appellants are concerned their representative M'Lean, a principal actor in the negotiations, when confronted by the letters in the case, gives most unsatisfactory explanations, and, in short, puts the accuracy of his own recollection out of Court. No such discredit attached to the evidence for the respondents.

With regard to the letters, these must of course be read as a whole. The whole of what has passed between the parties must be taken into consideration — *Hussey* v. *Horne-Payne*, 4 A.C. 311. And the same principle—the principle of a just conspectus—applies to correspondence and commun-

ings taken together. If these result in a contract, and the contract reached is not resiled from, the parties remain bound and are answerable in fulfilment or in damages.

The Courts below have differed, the Lord Ordinary holding that two of the contracts have been established, and awarding damages upon that footing, the Division holding that all the five contracts have been established and increasing the damages accordingly. In my opinion your Lordships are able to settle this difference by an express reference to that part of the correspondence which unquestionably refers to all the five contracts. They are enumerated by number and date in the letter of the respondents to the appellants on date 8th December 1916, and the material passage is as follows;—"With regard to the above orders, we confirm the conversation with your Mr M'Lean to-day, in the course of which he suggested that we should supply against these orders sheets 30 inches wide instead of 3 feet wide, which would enable you to complete your contract and ship the sheets during January and February." As was not unusual with M'Lean he took no notice of this. In a week the respondents sent him a protest—"Why don't you acknowledge receipt of our letter?" And on the 19th he on behalf of the appellants wrote—"We certainly received your letter of the 8th December confirming the writer's interview with you, but as it was clearly a definite statement of the case we hardly thought it called for any reply."

In my opinion no legal terminology required to be added to this in order to enable it to stand as the acknowledgment of a complete and binding contract to which the Courts must give effect.

As to damages I can give no countenance to the views expressed by Lord Salvesen on that subject. If the learned Judge merely referred to the fact that the pursuers had condescended on market price as an apparent datum for their calculations, I should not willingly agree that they were thereby foreclosed from obtaining damages on a more general footing. But if the learned Lord's judgment was meant to cover the general case, and to lay down or imply that failing a market the right to damages is destroyed, I could not agree to any such doctrine. To prevent damages falling due because the party to be indemnified cannot postulate or prove an actual market at the material date, viz., the date of breach, would appear to me tc empty of all reality, in very many cases easily supposed and often occurring, the general remedial provisions not only of the ordinary law of sale, but even those special provisions of the Sale of Goods Act to which the noble and learned Viscount opposite referred. "Where," says the Act, section 50 (3), "there is an available market, then the measure of damages is *prima facie* to be ascertained" in such and such a manner. But where there is not an available market, shall there then be no damages given? Not at all. This only leaves the situation exactly where (2) had put it, namely, that "the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract."

I agree to the motion proposed from the Woolsack.

Viscount Finlay—I am authorised to say that my noble and learned friend Lord Wrenbury concurs in this judgment.

Their Lordships affirmed the judgment appealed from and dismissed the appeal, with expenses.

Counsel for the Appellants—Sandeman, K.C.—Macquisten—Beveridge. Agents—J. & H. Pattullo & Donald, Dundee—Alex. Morison & Company, W.S., Edinburgh—Beveridge & Company, Westminster.

Counsel for the Respondents—Moncrieff, K.C.—Hamilton—F. C. Thomson. Agents—Donald Currie, Glasgow—Kessen & Smith, W.S., Edinburgh—Cannon, Brookes, & Odgers, London.

Friday, August 1.

(Before Viscount Finlay, Viscount Cave, and Lords Dunedin, Shaw, and Wrenbury.)

CLADDAGH STEAMSHIP COMPANY, LIMITED *v.* THOMAS C. STEVEN & COMPANY.

(In the Court of Session, December 19, 1918, 56 S.L.R. 195.)

Contract—Writ—Proof—Admission of Evidence to Show Apparent Final Written Contract not the Real Contract of Parties but merely Machinery for Carrying out Real Contract.

Contract—Sale—Ship—Fulfilment of Contract—Intervention, through Requisition, by Government.

A trading company were anxious to purchase a ship for their business, and got in touch with a ship company which owned two ships, one free, one under requisition, and was willing to sell. The ship company, however, refused to sell the free ship alone, and after negotiations the trading company agreed to purchase both ships at £100,000. The brokers made out a separate written contract for each ship, dividing the £100,000 without consulting the sellers, which contracts were duly executed. Before the ships were delivered the Government put the free ship under requisition. The trading company refused to go further, and the ship company took action against them. *Held* (1) that it was competent for the trading company to prove by extrinsic evidence that the written contracts were not the real contracts of parties, but were merely the machinery for carrying out the real contract, which was for the sale of both the ships together; (2) that the purchase by the trading company of the one ship was of a free ship for their own trade, and the ship company could not insist on the purchase when the ship was no longer free; and (3) that the ship company