19th December 1909 without prejudice to the question whether or not the appellant ought to submit to any further operation as a condition of his continuing to receive compensation under the memorandum of agreement recorded on 28th March 1906, if such question should be competently raised in any future application to the arbiter.

LORD LOW and LORD DUNDAS concurred.

The LORD JUSTICE-CLERK was absent.

The Court answered the question of law in the negative.

Counsel for Appellant — Crabb Watt, K.C.—Jameson. Agents—Marr & Sutherland, S.S.C.

Counsel for Respondents—D. P. Fleming. Agents—Mitchell & Baxter, W.S.

Thursday, June 2.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MECHAN & SONS, LIMITED *v.* BOW, M'LACHLAN, & COMPANY, LIMITED.

Sale—Disconformity to Contract—Right of Rejection—Bar—Act Inconsistent with Ownership of Seller—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 35.

A firm of engineers contracted to supply two feed tanks to a firm of shipbuilders for a tug which the latter were building for the Admiralty. It was a condition of the contract that the tanks were to be made "to British Admiralty latest tests and requirements." Owing to some misunderstanding between the parties the tanks were delivered to the shipbuilders without having been tested by the Admiralty inspector. The shipbuilders assuming that this had been done, built them into the vessel without further inquiry, and closed up the engines. A week later the tanks were inspected by the Admiralty officer, and rejected.

Held that as the shipbuilders had built the tanks into the vessel without ascertaining as they might have done whether the contract condition had been complied with, they were barred from rejecting them, and that accordingly they were liable for the price.

Contract—Construction—"All to British Admiralty Latest Tests and Requirements."

A contract for tanks contained a condition that they were to be made "to British Admiralty latest tests and requirements." The tanks failed to satisfy the Admiralty inspector.

Held that the tanks were disconform to contract.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), section 35, enacts—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

On 29th April 1908 Mechan & Sons, Limited, engineers and contractors, Glasgow, brought an action against Bow, M'Lachlan, & Company, Limited, engineers and shipbuilders, Paisley, in which they sought payment of £89, 10s., being the price of two galvanised feed tanks which they had supplied to the defenders for H.M. tug "Robust," which they (the defenders) were building, but which had been rejected by the Admiralty inspector after they had been built into the vessel. The defenders lodged a counter claim for £64, being (1) the expense of removing the tanks from the vessel, and (2) the cost of replacing them with others.

The following narrative is taken from the opinion (*infra*) of Lord Salvesen:—"This action is brought to recover, *inter alia*, the price of two galvanised steel feed tanks which the pursuers contracted to supply to the defenders on 30th August 1907. It was a condition of the contract that the tanks were to be made "to British Admiralty latest tests and requirements." In the ordinary case it appears that the Admiralty insist that the material of which tanks are made should be tested by bending and tensile tests before the construction is commenced, and that only such material should be used as has passed these tests. The pursuers originally contemplated that the steel plates required for the tanks should be specially rolled at the works of Messrs Beardmore; and it is common ground that it was their duty to instruct the Admiralty inspector to attend at Messrs Beardmore's works and test the plates there; and in their letter of 30th August in which they accepted the defenders' order they asked the name of the Admiralty inspector who would in ordinary course attend to this matter. Some delay occurred in getting the plates rolled, but on 11th September they intimated to the defenders that Messrs Beardmore intended to roll the plates that night, and that if they were not ready for the Admiralty inspector next day, they certainly would be by Friday. A telephone conversation took place on 12th September, in the course of which the pursuers were instructed, as the tanks were urgently required, to take the material from stock, and they maintain that at the same time the defenders released them from their obligation to have the material tested. The defenders deny this, and I agree with the Sheriff-Substitute that it cannot be held proved that there was any such change on the contract, if, indeed, that could be competently established by parole evidence, which I greatly doubt. On the other hand, I think that the pursuers *bona*

fide believed that such an alteration of the contract had been made, or at least that if the defenders wished the stock material tested by the Admiralty inspector, they would make arrangements to have this done in their own yard. There is some evidence to the effect that the Admiralty officer will not proceed to the works of a subcontractor to test the materials without instructions from the principal contractor, but I think this immaterial, as, assuming that the contract was not in any way modified, the pursuers were under obligation to deliver tanks which would satisfy the requirements of the Admiralty officials.

"Owing to the misunderstanding already referred to, the pursuers completed and delivered the tanks to the defenders without any official from the Admiralty having either tested the material or inspected the tanks. They have been, indeed, subjected to a water-pressure test of 10 lbs. in the pursuers' works, but without any Admiralty inspector being present. Delivery took place on 24th September, and the defenders, assuming, as they say they did, that the tanks had been made and inspected in the usual way to the satisfaction of the Admiralty officials, at once proceeded to build them into the tug which they were constructing for the Admiralty. After the tanks were put on board, the engines were closed up, and the tanks were thereafter inspected by Commander Griffin on 1st October, and rejected by him. The ground of rejection is stated in his letter of 1st October, and was to the effect that as the tanks had neither been inspected nor tested, and had been made with material which had not been approved by the Admiralty overseer, they could not be accepted, and must be at once removed from the ship. As Commander Griffin could not be induced to reconsider his decision, the defenders had no option but to take out the tanks, and replace them with new ones which they constructed themselves. In order to effect this they had to remove a part of the engines which had been closed up, and while refusing to pay for the tanks—which they had placed at the pursuers' disposal on the quay at Paisley—they claimed to retain against the balance of the pursuers' account the sum of £60 as the price of the new tanks, and a sum of £25 as the cost of taking the tanks out of the ship, an operation which was rendered much more expensive owing to the engines having been closed down over the tanks."

On 9th August 1909 the Sheriff-Substitute (FYFE) decerned against the defenders as craved, on the grounds (1) that they had failed to prove that the tanks were disconform to contract, and (2) that they had not timeously rejected them.

The defenders appealed, and argued—(1) The tanks were disconform to contract, for they failed to satisfy the Admiralty inspector. It was immaterial that they were of equal or even of better quality if they failed as they did here to satisfy the inspecting officer. The contract in question being in writing, its modification could not be proved by parole evidence—*Burrell & Son* v. *Russell & Company*, March 26, 1900, 2 F. (H.L.) 80, 37 S.L.R. 641. Even assuming such proof were competent, no modification had been proved. (2) The appellants were not barred from rejecting the tanks, for section 35 of the Sale of Goods Act 1893 (56 and 57 Vict. c. 71) did not apply where as here they had been bought subject to the approval of a third party. His approval was a condition-precedent which prevented the property passing to the buyer until it was satisfied—Benjamin on Sale (5th ed.) 578; *Grafton* v. *Eastern Counties Railway Company*, (1853) 8 Ex. 699.

Argued for respondents—(1) Where as here both parties admitted that the contract had been altered (viz., to the extent of allowing the plates to be taken from stock) parole proof of its modification was competent—*Grant* v. *Mackenzie*, June 7, 1899, 1 F. 889, 36 S.L.R. 671. The evidence showed that the condition as to inspection had been waived. (2) The appellants having built the tanks into the vessel were now barred from rejecting them. A buyer was bound to examine the goods before doing any act in relation to them inconsistent with the ownership of the seller—Sale of Goods Act 1893 (*cit. sup.*), sec. 35; *Carter & Company* v. *Campbell*, June 12, 1885, 12 R. 1075, 22 S.L.R. 711; *Pini & Company* v. *Smith & Company*, May 29, 1895, 22 R. 699, 32 S.L.R. 474; *Electric Construction Company* v. *Hurry & Young*, January 14, 1897, 24 R. 312, 34 S.L.R. 295; *Croom & Arthur* v. *Stewart & Company*, March 14, 1905, 7 F. 563, 42 S.L.R. 437; *Hunt* v. *Barry*, April 11, 1905, 13 S.L.T. 34; *Parker* v. *Palmer* (1821), 4 B. & A. 387. The fact that no inspection had been made could easily have been discovered, for it was not a latent defect. The appellants had ample opportunity of examining the tanks, and not having done so they were now barred from rejecting them.

LORD SALVESEN—[*After the narrative ut supra*]—The Sheriff-Substitute has rejected the defenders' counter claim on two grounds, the first being that they had failed to prove that the tanks were disconform to contract. His view apparently was that the rejection by the Admiralty overseer was not a matter with regard to which the pursuers had any responsibility, but that it was incumbent upon the defenders to show that the material of which the tanks were made was not of such quality as would have stood the Admiralty test, or that there were other defects of workmanship which would have entitled an ordinary purchaser to reject them. In my opinion this view is not in accordance with the true construction of the contract. The pursuers undertook that the tanks would meet the requirements of the British Admiralty—in other words, that they would be accepted by the responsible official of the Admiralty who has charge of the duty of inspection. Accordingly if the tanks on being delivered in the defenders' works had there and then been inspected by an Admiralty inspector, and

had failed to satisfy his requirements, I think the defenders would have been warranted in there and then rejecting the tanks.

The Sheriff-Substitute has, however, also disallowed the defenders' claim on a legal ground. Section 35 of the Sale of Goods Act 1893 provides that the buyer is taken to have accepted the goods when they have been delivered to him, and when he does any act in relation to them which is inconsistent with the ownership of the seller. Now what the defenders here did was, immediately on delivery of the tanks to them, to build them into a vessel which they were constructing for the Admiralty, and in such a position that they could not be removed without a very large relative expense. I cannot imagine any act which could be more clearly inconsistent with the ownership of the goods remaining with the pursuers. It may be that if the pursuers' failure to fulfil their contract had not been discoverable on delivery of the tanks, as if the tanks had been subject to some latent defect which ultimately led to their rejection, the defenders would not have been barred. In this case, however, there was no difficulty in the defenders ascertaining whether the contract conditions had been complied with as soon as the tanks were delivered into their yard. They had only to ask the pursuers whether the Admiralty tests and inspection had been made and satisfied to have ascertained the truth. Indeed if they had examined the tanks they would have found that they were not marked with the mark by which an Admiralty inspector invariably indicates that the material has been tested to his satisfaction. The absence of this mark was discovered by Mr Smale, one of the Admiralty inspectors, while the tanks were still lying in the defenders' yard, but unfortunately he did not call their attention to this circumstance. In the ordinary case I think it is settled that it is the duty of the purchaser to ascertain within a reasonable time after delivery, and at all events before he does any act inconsistent with the ownership of the goods remaining in the seller, to ascertain whether they have been supplied in accordance with the contract. The failure of the defenders to do this is explained by their desire to have the job pushed on, and by their belief that the required tests and inspection had been duly carried through; but if they chose to act upon this assumption and to incorporate the tanks with the structure of the vessel which they were building, they took the risk of the tanks ultimately passing the Admiralty inspector, and they are not entitled to make the pursuers liable for the consequences of their own failure to ascertain whether the contract had been duly performed. Had the inspection taken place in their yard it is by no means certain that the tanks might not have been passed, or at least that the pursuers might not at comparatively small cost have remedied such defects in the workmanship as were ultimately discovered, and have prevailed upon the Admiralty inspector to grant the necessary certificate. At all events the consequences of rejection would not have been nearly so serious as after the tanks had been built into the vessel. It is unnecessary to consider whether the defenders might have had any other claim, such as Lord Kinnear pointed at in the case of *The Electric Construction Company* (24 R. 312), for in this case there are no materials upon which it could be assessed. The claim of the defenders is based on their right to reject the tanks after they had been built into the ship, and no alternative is stated or referred to in the evidence. In any event, such a claim would have been incompetent according to the decision in the case already referred to, and which has been followed, although perhaps with some misgiving, in two subsequent cases. I accordingly reach the conclusion that the Sheriff-Substitute is right in holding that the defenders did not timeously reject the goods, and that their counter-claim, which is based on rejection only, accordingly fails.

LORD JOHNSTON—The sub-contract out of which this question arises has got out of ordinary course by reason of the pressure of time and too great reliance upon telephone communications.

The two feed tanks for H.M. tug "Robust" were a small matter in the contract for the vessel, and it is clear that the sub-contract for them was left over till too late. Hence it was found impossible to wait for the sub-contractors getting specially rolled plates for them from Messrs Beardmore as had been intended, and on 13th September 1907 it was arranged between the contractors and the sub-contractors that the latter should use material from stock. This arrangement was made by telephone, and was not confirmed in writing. The contractors were under contract to the Admiralty, which stipulated that the whole materials supplied must pass the tests mentioned in their contract, "which tests must be carried out in the presence of the proper overseer in all respects in accordance with the instructions contained in the contract." The schedule showing the conditions of the contract was extremely voluminous, and provided for both tests and inspection.

It seems that the practice in Admiralty work is, generally speaking, that the district officer and his subordinate inspectors follow out the whole work of a contract from stage to stage. It is understood that material as well as workmanship has to pass the specified tests and their inspection. And contractors to the Admiralty and the Admiralty inspectors work into one another's hands in the matter of notice, &c., and the conduct of tests and inspections. Of this both the contractors and the sub-contractors were fully aware. But while the contractors were in possession of the whole detail of what was expected of them under their contract and its relative specification, &c., all that the sub-contract bore was that the tanks in question were "to be to British Admiralty tests and requirements," and in another place "to

British Admiralty requirements, tests, and inspection."

I am unable to hold that in a question with their sub-contractor the contractors were relieved of all responsibility, not merely for quality of material and for workmanship, but also for seeing that all steps were taken to make sure that the Admiralty officials were satisfied.

Now what happened was this—a misunderstanding, *bona fide* I think, occurred between the parties in course of the telephonic communications of 13th September, the sub-contractors being impressed with the extreme urgency of the contractors and understanding their instructions to go ahead night and day as importing that they were to be no more concerned with arranging or waiting for Admiralty tests and inspections, but were to leave that matter to be looked after by the Admiralty officials and the contractors. The latter, on the other hand, relied upon the sub-contractors, notwithstanding the hurry, attending to these matters, and gave neither any special directions nor made any inquiry.

The tanks were completed, and again there was mutual misunderstanding, due to the use of the telephone. The sub-contractors distinctly assert that on 23rd September they were directed to send on the finished tanks at once, and that they would be inspected in the yard of the principal contractors. The contractors, on the other hand, assert that they were informed that the tanks were being tested in presence of the Admiralty inspector at the time of the message, and merely directed that they should at once be sent on if he were satisfied. It was the case that they were being tested, but privately, by the makers, as was their custom, for their own satisfaction, and independently of any Admiralty inspection; and as the material had not been tested, neither were they inspected at their works by the Admiralty at any time. In the conflict of evidence on this matter, that for the sub-contractors is, I think, distinctly to be preferred. But I am satisfied that on both sides the misunderstanding was again *bona fide*.

The contractor received the tanks, made no inquiry as to Admiralty inspection, and straightway built them into the ship and then closed up the engines. I concur with Lord Salvesen in thinking that the contractors so dealt with the articles in question as to import acceptance in terms of the 35th section of the Sale of Goods Act 1893. But I also think that the contractors were not in the circumstances entitled to rely upon the sub-contractors having directly satisfied the Admiralty requirements in the matter of tests and inspection, and to maintain that their acceptance was on that assumption, as they might, I think, successfully have done had they been entirely clear of any responsibility for seeing that the Admiralty officials had been satisfied before delivery.

LORD KINNEAR—I concur in the opinion of Lord Salvesen.

LORD PRESIDENT—I also agree on the grounds which have been stated by Lord Salvesen and also by Lord Johnston.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute dated 9th August 1909: Find in fact in terms of the first eleven findings in fact in said interlocutor" [These included the following:—"(7) That defenders, having decided to sub-contract for the steel tanks for the 'Robust' on 20th July 1907, invited tenders from various makers, including pursuers; (8) that the defenders' circular-letter inviting tenders specified that the goods were 'to be to British Admiralty latest tests and requirements'; (9) that on 31st July 1907 pursuers quoted for the work referred to in the circular-letter of defenders of 20th July 1907; (10) that after some further correspondence the defenders on 29th August 1907 placed with pursuers the order set forth in the document No. 8/1 of process; (11) that the order as placed contained the stipulation 'all to British Admiralty latest tests and requirements'"]: "Find further in fact (12) that the feed tanks were delivered on 24th September 1907; (13) that the tanks had not before delivery been tested or passed by the Admiralty inspectors in terms of the contract; (14) that the defenders, without informing themselves whether the tanks had been tested by the Admiralty inspectors or not, built the tanks into the vessel; (15) that the tanks were subsequently rejected by the Admiralty on the ground of not having been tested or passed by them; and (16) that the sum sued for is the proper price *per* contract: Find in law that the defenders in the circumstances must be held to have accepted the tanks in a question with the pursuers: Therefore decern against the defenders as craved."

Counsel for Pursuers (Respondents)—Constable, K.C.—James Stevenson. Agents—Campbell & Smith, S.S.C.

Counsel for Defenders (Appellants)—Sandeman, K.C.—Hon. W. Watson. Agents—Webster, Will, & Company, W.S.