which would be attended to in the course of the voyage, but if not attended to it would make the ship unseaworthy. I can imagine some things of that sort which if permitted to continue would make the ship unseaworthy, and bring the case within the exception contemplated by the contract between the parties. But for my own part I do not know any case, and I hesitate or rather decline to give any opinion upon the subject, where a vessel having an existing structural defect, which it is not either usual or easy to remedy during the progress of the voyage, would be prevented from being unseaworthy, because it is a negligence or an omission which those on board might have remedied in the course of the voyage. It is enough to my mind to say that it appears to me sufficiently from the facts as found that this structural defect in the vessel did exist, rendering the vessel manifestly unfit for the due and safe carrying of the cargo which she undertook to carry.

Under these circumstances I concur in the judgment which has been moved.

LORD MORRIS—My Lords, in this case it is found that a ship starts with a pipe uncased, though the usual practice is to case the pipe before the loading and starting of the ship. It is further found that the non-casing led to the pipe breaking, and consequently to the damage. It is further found that the non-casing was a default or neglect of the master or crew of the ship, and that the said default or neglect was committed by the master or crew in the ordinary course of the voyage. The bill of lading exempts from liability for any act, neglect, or default of the master or crew in the navigation of the ship in the ordinary course of the voyage. That exemption protects the defenders from the neglect or default of the master or crew in not casing the pipe during the voyage. I fail to see how it can exempt the defenders from liability for starting the vessel with a substantial structural defect in not casing the pipe. I see no inconsistency in the existence of two distinct faults, viz., first, the default in starting with a non-cased pipe, secondly, neglect in not repairing and remedying that defect during the voyage. The bill of lading protects against the second neglect—it gives no exemption from liability for the first.

I concur in the judgment moved.

LORD FIELD—My Lords, I am of the same opinion.

Their Lordships reversed the judgment appealed from, with a direction that the pursuers are entitled to judgment for the amount stated in the joint-minute; the respondents to pay the costs in this House and in the Court below.

Counsel for the Appellants — Graham Murray, Q.C. — Walton, Q.C. Agents—Waltons, Johnson, Bubb, & Watton, for J. & J. Ross, W.S.

Counsel for the Respondents—Bigham, Q.C.—Henry Aitken. Agents—William A. Crump & Son, for Forrester & Davidson, W.S.

Friday, December 16.

(Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, and Field.)

CALEDONIAN INSURANCE COMPANY *v.* GILMOUR.

(*Ante*, July 18, 1891, vol. xxviii. 899, and 18 R. 1219.)

Arbitration—Insurance Policy—Arbiters not Named—Arbitration Clause Excluding Action on Policy Pending Arbitration.

A policy of insurance was granted, "subject to the conditions on the back hereof, which are to be taken as part of this policy." These provided that when the company did not claim to avoid its liability on the ground of fraud or unfulfilment of the conditions of the policy, any difference arising as to the amount payable in respect of any alleged loss or damage by fire should be referred to the arbitration either of one person chosen by both parties, or by two persons—one appointed by the insured and the other by the company. The conditions further declared that "the party insured shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition-precedent to the commencement of any action or suit upon the policy."

A difference arose between the parties to the policy as to the amount of damage done by a fire to the property insured, and the insured raised this action in order to have the damage ascertained. The insurers defended, on the ground that until the pursuer obtained an award settling its amount the terms of the policy excluded action, but the Court of Session rejected this defence, on the ground that a reference to unnamed arbiters to value subjects, as to the identity or original condition of which there is no dispute, formed the only exception from the rule of Scots law, that a general agreement to refer future differences to arbiters who are not named is not binding on either of the parties.

Held (*rev.* the judgment of the Court of Session) that the ascertainment of the amount of damage by arbitration was made a condition-precedent to the obligation to pay, and that a court of law could not enforce the obligation until so ascertained.

This case is reported *ante*, July 18, 1891, vol. xxviii. 899, and 18 R. 1219.

At delivering judgment—

LORD CHANCELLOR—My Lords, the simple question raised in this case is, whether the

respondent was entitled to recover from the appellants, under a policy of insurance against fire, the amount of damage which he might prove that he had sustained within the sum of £1700, or whether by reason of one of the conditions endorsed upon the policy the respondent was precluded from bringing an action in respect of loss sustained by fire until he should have obtained an award in the manner provided by that condition, determining the amount due to him?

It was contended on behalf of the respondent, and the Court below has yielded to that contention, that inasmuch as the clause relating to arbitration provided for a reference to unnamed arbitrators, the jurisdiction of the Courts was not ousted, and that the arbitration provision could not be set up in answer to the pursuer's claim.

It cannot be disputed that it is well-settled law in Scotland that a mere agreement to refer disputes that may arise to unnamed arbitrators does not of itself oust the jurisdiction of the Courts, and would not prevent the enforcement in a court of law of a claim arising under other parts of the same contract, even though that claim were in dispute, and the party seeking to enforce it had refused to concur in an arbitration.

But it is to be observed in the present case that under the policy the only contract on the part of the appellants to make any payment at all is a contract to pay the sum ascertained in a particular manner, viz., by the arbitration provided for by the 13th condition of the policy. This condition is expressly incorporated in the body of the policy, and must be read into that part of it which alone provides for the payment of money by the company with the same effect as if it had been specifically inserted there and the obligation had been in terms qualified by it.

I think this circumstance was overlooked in the Court below. The question is not whether where a contract creates an obligation to pay a sum of money it is a good answer to an action to recover it that disputes have arisen as to the liability to pay the sum, and that the contract provides for the reference of such differences to arbitration, but whether where the only obligation created is to pay a sum ascertained in a particular manner—where, in other words, each ascertainment is made a condition-precedent to the obligation to pay—the Courts can enforce an obligation without reference to such ascertainment? If they could do so, they would not be enforcing the contract made by the parties, but one of a different nature.

I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Watson, and I find that he has so fully dealt with the Scottish authorities on this point that it is not necessary for me to do so. I was satisfied at the close of the argument not only that there was no authority in the law of Scotland for the proposition that in the case of such a contract as I have indicated the Courts would disregard the qualified character of the promise, and enforce the obligation as if it had been an unqualified one, but that there was weighty authority the other way. Subsequent consideration of the authorities has confirmed me in this view.

I may add that the reasoning of the noble and learned Lords who took part in the decision of *Scott* v. *Avery* appears to me completely applicable to the present case. Its cogency is not affected by any of the distinctions which then existed between the law of England and that of Scotland in relation to arbitration clauses.

I entirely concur in the reasons expressed by my noble and learned friend in his opinion, and think the interlocutors appealed from must be reversed.

With regard to the question of costs, it is to be observed that the question whether the condition relating to arbitration would be an answer to the action was raised and determined at an early stage of the action. After its determination, but not immediately after, application was made on behalf of the present appellants to stay further proceedings in the action until there had been an appeal from those interlocutors, pursuant to the leave of the Court, against the decision of the Court of Session. That application was refused by the Court, but not on the ground that it was not an application proper to have been considered and acceded to if it had been made at the proper time, but on the ground that inasmuch as that application had been delayed until the parties were close upon the proof it was not right at so late a stage to accede to the application then made. There can be no doubt, I think, that if the application had been made earlier the Court would have acceded to it, and the subsequent costs in the action might have been avoided. There does not appear to have been any very great difference between the parties as to the amount which the plaintiff ought to recover upon this policy, and I imagine there can be no doubt that this appeal has been proceeded with and argued at your Lordships' bar not by reason of the importance of any difference between the parties as to the amount to which the plaintiff was entitled under his policy of insurance, but because the question whether the condition afforded an answer to an action whether it was necessary in the first instance to ascertain the loss in the manner provided by the policy, was a question of general importance affecting all the policies of the appellants.

My Lords, under these circumstances I cannot but think it would be unfortunate that in this case there should need to be another inquiry into the amount of loss which the respondent has sustained. The course therefore which I propose to your Lordships is this—whilst giving judgment for the appellants, reversing the interlocutor and dismissing the action, to reserve the question of costs for further determination in order that an opportunity may be given to the parties of conferring with regard to the matters to which I have called your Lordships' attention. Possibly

an agreement between them may render it unnecessary for the House to determine the question of costs—if not, it will be determined upon a future occasion.

SIR HORACE DAVEY—Will your Lordships allow me to say (I do not know whether I am right in saying it now before the other noble and learned Lords have addressed the House) that my clients are prepared, in order to put an end to the matter, to accept the amount fixed by the Court as if it had been fixed by the arbiters.

LORD CHANCELLOR—The question will have to be considered as to the costs of the inquiry which led to its being fixed. Of course I do not say anything about it now.

SIR HORACE DAVEY—If your Lordship pleases.

LORD WATSON—My Lords, this is an action by the respondent for the full amount of an insurance effected with the appellant company upon a tenement of shops and dwelling-houses belonging to him which were destroyed by fire in February 1891. By the terms of the policy the company agreed with the insured, "subject to the conditions on the back hereof, which are to be taken as part of this policy," to pay or make good such loss or damage to an extent not exceeding £1700. The eighth condition is to the effect that when the company does not claim to avoid its liability on the ground of fraud or unfulfilment of the conditions of the policy, any difference arising as to the amount payable in respect of any alleged loss or damage by fire shall be referred to the arbitration either of one person chosen by both parties, or of two persons—one appointed by the insured and the other by the company—who shall name an umpire before they enter upon the reference. Provision is made for keeping up the submission in case of the failure of either party to nominate, or of the death of an arbiter or umpire, and it is declared that the award of the arbiters or umpire shall be finally binding upon all parties. It is further declared to be a condition of the policy, and part of the contract between the company and the insured, that "the party insured shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition-precedent to the commencement of any action or suit upon the policy."

A difference did arise as to the amount of damage done to the property insured, the respondent claiming £1700, whilst the appellants offered to pay £1350, which he declined to accept. He then instituted this action in order to have the damage payable to him ascertained by ordinary legal process, and was met by the defence that until he had obtained an award settling its amount all right of action was excluded by the terms of the policy. In answer to that defence the respondent relies upon the rule of Scotch law which the House had recent occasion to consider in *Tancred, Arrol, & Company* v. *The Steel Company of Scotland*, 15 App. Cas. 125, according to which a general agreement to refer future differences, if and when they shall arise, to arbiters who are not named, is held not to be binding upon either of the contracting parties. His answer was sustained, and the plea in defence repelled by the Lord Ordinary (Stormonth Darling), whose decision was unanimously affirmed by four Judges of the First Division.

From the note appended to the interlocutor of the Lord Ordinary, and the opinions delivered by the late Lord President (Inglis) and Lord M'Laren, in which Lords Adam and Kinnear simply expressed their concurrence, it appears that the appellants' undertaking to indemnify, and the eighth condition, were treated by their Lordships not as together constituting a stipulation one and indivisible, but as consisting of two independent stipulations, the one imposing an obligation to pay or make good damages resulting from fire, and the other containing an agreement to refer all disputes and differences as to the amount payable. I gather that even in that view their Lordships would have been prepared to hold the clause of reference binding if the function of the arbitrators had been limited to the mere estimation of value, and had not extended to the ascertainment of the *data* upon which their estimate was to be formed should these *data* be in dispute. They held that the reference came within the rule, inasmuch as it committed to the decision of the arbitrators, not merely the *quantum* of damage, but, as the Lord President explains (18 Sess. Cas. (4th series) 1221), questions which might possibly arise "as to whether articles alleged to be destroyed fall within the scope of the policy, or as to whether the articles alleged to be destroyed were actually in the premises at the time, or as to the value of articles burnt, which could only be got at by an expert, or by someone who knew their intrinsic value." Their judgment went against the appellants, upon the ground, apparently, that a reference to unnamed arbitrators to put a value upon subjects, as to the identity or original condition of which there is no dispute between the parties, forms the only exception from the rule already referred to.

The first reported case in which the rule to which effect has thus been given was authoritatively settled by the Court of Session is that of *Buchanan* v. *Muirhead*, Mor. Dict. 14,593, which was decided in 1799. The principle of the so-called exception had been recognised by the Court eighty-two years before in *Wallace* v. *His Tacksmen*, 5 Brown's Sup. 7, where a landlord had let heritable subjects, with a right to his tenants to obtain an extension of their lease upon payment of an increase of tack-duty to be determined by "two indifferent arbiters, mutually to be chosen by him and his tacksmen." The landlord brought an action of removing, on the

ground that under the tack he had the option of resuming possession, but the Court repelled his plea, and found "that the defenders being willing to submit to a further tack-duty, and to name an arbiter, the pursuer was also bound to name another."

In my opinion the distinction between those contracts of submission to arbiters unnamed, which have been held to be invalid, and those which the law sustains, is to be found in the fact that the one class does, whilst the other does not, oust the jurisdiction of the ordinary Courts of the country. The reason assigned for the decision in *Buchanan* v. *Muirhead*, Mor. Dict. 14,594, was that "supporting such clauses would create a new Court;" and in all the cases which have followed on the same point, that has been accepted by the bench as the real ground of their judgment, although some Judges have doubted whether it was satisfactory. On the other hand, where the object of the reference is to ascertain some fact or term which is made essential to the constitution of contract rights or liabilities it does not raise a proper *lis*. As Lord Deas said in *Cochrane* v. *Guthrie*, 21 Sess. Cas. (2nd ser.) 376—"It has long been settled that such a stipulation is effectual. It is not a submission of disputes and differences. It is an agreement that the occurrence of a certain contingency shall be ascertained in a certain way, and in that way only." In the later case of *Howden & Company* v. *Dobie & Company*, 9 Sess. Cas. (4th ser.) 761, Lord President Inglis observed—"A reference to fix a price or the conditions of a lease, or any dispute arising as to the execution of a contract, as in *Merry & Cuninghame's* case, 21 Sess. Cas. (2nd ser.) 1337, are matters which cannot be settled by a court of law without assistance. They are not *lites*."

Had I been able to accept the construction which appears to have been put upon the terms of the policy in the Courts below, I should probably have agreed in their conclusion as to the non-obligatory character of the agreement to refer. But the language of the policy is exceptionally plain and free from ambiguity. The 8th condition is incorporated with and made an integral part of the obligation of indemnity undertaken by the appellants, and it expressly stipulates that their obligation is not to give rise to any pecuniary liability until the amount of loss or damage payable to the insured has been liquidated by an award. Assuming the Court below to be right in holding that the agreement to refer is not binding in law, and that the respondent has the option of either naming or declining to nominate an arbiter, what would be his position? Upon that point I do not entertain any doubt. If he chose to carry out the reference the appellants would become his debtors, and he could sue them for the amount of the award whenever it was issued. If he elected to decline, it would, in my opinion, be beyond the competency of the Court to make a new and different contract between these parties by entertaining an ordinary action for assessment of damage, and giving decree against the appellants for a sum which by the terms of the contract they are in no event liable to pay. I do not mean to suggest that if through any act or default of the appellants such a reference as is contemplated in the policy had become impossible, the Court could not have given the respondent a remedy by entertaining an action of damages as for breach of agreement, but no such case occurs here.

Upon the question whether a reference like the present, by reason of its possibly devolving upon the arbiters the decision of the matters specified in the passage already cited from the opinion of the Lord President, becomes obnoxious to the charge of invading the jurisdiction of Her Majesty's Courts, the judgment of this House in *Scott* v. *Avery*, 5 H.L. Cas. 811, is a direct authority. No doubt the judgment was given in an English suit, but that circumstance does not detract from the weight, because until modified by comparatively recent legislation the law of England went beyond that of Scotland, and held that no agreement to refer future disputes to arbitrators, whether named or not named, could oust the jurisdiction of the Courts or disable either of the contracting parties from resorting to them. In *Scott* v. *Avery* the action was brought by the insured under three maritime policies, each of which contained clauses and conditions with respect to payment of indemnity and the ascertainment of the amount by the award of the arbitrators, substantially the same with those which occur in the policy before us. It was held by the House, affirming the judgment of the Exchequer Chamber, that until an award was made no action was maintainable.

In delivering the judgment of the House Lord Campbell said (5 H.L. Cas. 851)—"I think that the contract between the shipowner and the underwriters is as clear as the English language could make it, that no action should be brought against the insurer until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition-precedent to the bringing of any action. There is no doubt that such was the intention of the parties; and upon a deliberate view of the policy I am of opinion that it embraced not only the assessment of damage, the contemplation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers as well as the amount to be paid." The noble and learned Lord then deals with the question, whether such a contract is tainted with illegality, which he answers in the negative, and the main ground of judgment is expressed by him in these terms (5 H.L. Cas. 854)—"Now, in this contract it is stipulated in the most express terms that until the arbitrators have determined, no action shall lie in any Court whatever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined."

The observations of the noble and learned Lord, in so far as they refer to the terms of the contract, are precisely applicable to the contract of insurance between the appellants and the respondent, and in so far as they relate to non-ouster of the Court's jurisdiction, they appear to me to be in consonance with the principles of Scots law as these are illustrated by the decisions cited in the arguments of counsel, which I shall now notice in the order of their dates.

The first of these cases—*Monro* v. *Mackenzie*, 1 Sess. Cas. (1st series, N.E.) 508—which was strongly relied on by the appellants' counsel, does not throw much light upon the present controversy. In virtue of powers reserved to him by the lease, the lessor during its currency resumed possession, and took over the tenant's stock of sheep, for which it was stipulated that he should pay such valuation as might be put upon them by two men mutually chosen. Four years afterwards the tenant brought an action at law for the value of the stock. The Lord Ordinary remitted to a person of skill, selected by himself, to ascertain and report the value of the sheep at the time of delivery. Against that appointment the landlord unsuccessfully reclaimed to the First Division, on the ground that he was entitled as a matter of right to have the case sent for trial to the Jury Court. The clause of reference was not, and neither party appears to have insisted that it should be, enforced.

Dixon v. *Campbell*, 8 Sess. Cas. (1st series) 970, is more in point. A lease of coal provided that in the event of the mineral-field becoming, "in the opinion of skilful men, mutually chosen by the parties, incapable of being wrought to advantage," the tenants should have power to renounce. The First Division, reversing the judgment of the Lord Ordinary, held that the clause of reference continued to be binding, notwithstanding that two arbiters duly nominated by the parties had differed in opinion, and consequently that the tenants could not maintain an action to have it found and declared that the coal had become unworkable to profit, and that they were entitled to give up the lease.

In *Smith* v. *Wharton Duff*, 5 Sess. Cas. (2nd series) 749, a lessor resumed possession under a clause in the lease which bound the tenant to remove on being allowed such compensation as should be "ascertained by men mutually chosen for that purpose." Arbiters were mutually nominated, and issued their award. The tenant being dissatisfied with its amount, raised an action against the lessor, concluding for reduction of the award, and for payment of £800 as compensation. The award was set aside by the Court on account of various irregularities, but the Lord Ordinary (Cockburn) assoilzied the defender from the petitory conclusion, holding it to be settled law that where such an engagement to refer is incorporated with the contract so as to form a part of it, the engagement is obligatory. In the First Division his judgment was unanimously affirmed. The Lord President (Hope) agreed with the reasoning of the Lord Ordinary. Lords Mackenzie and Jeffrey came to the same conclusion, but thought the case was attended with difficulty. Lord Fullerton delivered a very clear opinion in favour of the judgment, observing—"When the reference is essential to liquidate the obligation come under by the party, it is good, though to a person not named. If not, what would become of the obligation?" The same learned Judge, in *Hendry's Trustees* v. *Renton*, 13 Sess. Cas. (2nd series) 1007, stated the rule of law to be that clauses of reference to persons not named are valid and obligatory in cases where the ascertainment by their means "of a point essential to the extrication of a special stipulation in the contract is made part of the stipulation itself. As, for instance, when parties bind themselves to pay or receive a sum to be fixed by men mutually chosen, or to accept their opinion as the criterion of the existence or non-existence of some contingency on which the obligation of parties is by the contract dependent." The clause of reference in *Hendry's Trustees* v. *Renton* being a general one, and the stipulation which the Court was asked to enforce not being made dependent upon it, was held not to be binding; but I refer to these *dicta* because of the effect which was given to them in the next case which I have to notice.

The clause which was considered by the Court in *Merry & Cuninghame* v. *Brown*, 21 Sess. Cas. (2nd series) 1337, occurred in a mineral lease constituted by an informal missive, and was in these terms—"Should the minerals become exhausted or workable only at an evident loss the tenants shall be entitled to give up the lease on the same being ascertained by arbiters mutually chosen." The tenants brought an action to have it declared that the lessor was bound not only to name an arbiter, but also to concur in naming an oversman, or in giving the arbiters power to appoint one in the event of their differing in opinion; and in the event of the question not being so determined, to have it declared by the Court that the minerals were unworkable to profit, and that they had the right to renounce the lease. The Lord Ordinary (Benholme) found that the parties were bound to refer to two arbiters, as provided in the missive lease, and assoilzied the defender. In the Inner House, where the judgment of the Lord Ordinary was substantially adhered to, a question arose upon the construction of the missive as to the true character of the clause of reference, and upon that point there was a difference of opinion. Lords Wood, Cowan, and Benholme held that the reference was so incorporated with the power of remuneration that they formed one stipulation, whilst the late Lord Justice-General (then Lord Justice-Clerk) was of opinion that the ascertainment of the fact of unworkability to profit, by means of arbitration, was not made a condition-precedent of the tenants' right to renounce. But all the learned Judges, the Lord Justice-Clerk included,

expressed their approval of the law laid down by Lord Fullerton in *Smith* v. *Wharton Duff*, and *Hendry's Trustees* v. *Renton*.

The principle of law followed by the First Division of the Court of Session in *Dixon* v. *Campbell* and *Smith* v. *Wharton Duff*, and by the Second Division in *Merry & Cuninghame* v. *Brown*, appears to me to be practically the same with that which was adopted by this House in *Scott* v. *Avery*. I can find no authority in any Scotch decision for limiting the application of the principle to cases in which the sole duty of the arbiters is to value an existing thing the identity of which is admitted, and which they can inspect for themselves, or to forming an estimate of value upon facts admitted or otherwise ascertained. It is seldom possible for arbiters, who have to decide whether a mineral field has become unworkable to profit, to determine the question by personal examination. In order to form an estimate they must know approximately how much mineral has been worked out, how much remains to be worked out, and the probable cost of bringing it to the surface. These are matters which can in very few cases be ascertained by inspection. In *Cochrane* v. *Guthrie*, 21 Sess. Cas. (2nd series) 376, Lord Deas said, in reference to the functions committed to an arbiter in cases of that kind—"I have no idea that men of skill are not entitled to investigate in all cases so far as necessary to enable them to form their opinion. They may take evidence if they wish it, or they may go to the spot and use only their own eyes if they find this sufficient. In short, they are entitled to do whatever is necessary to enable them to make up their minds." In the opinion thus expressed I entirely concur.

In this case Lord M'Laren refers for the grounds of his judgment to *Ramsay* v. *Strain*, 11 Sess. Cas. (4th series) 527, where his Lordship, sitting in the Second Division with Lords Young and Rutherfurd Clark, delivered the leading opinion. In that case a disposition of coal, dated in 1788, laid an obligation upon the disponees to pay damages done to the surface by their workings, "as the same shall be ascertained by neutral persons, to be mutually chosen." In the year 1883 the then owner of the surface brought an action against the then coal-owner, who not only pleaded that the action was excluded by the clause of reference, but also (1) that the pursuer was not *in titulo* to maintain the claim, and (2) that it was barred by previous settlements and discharges. To my mind it seems clear that it was not in the contemplation of the parties who contracted in 1788 to submit either of these two prejudicial pleas to the decision of the arbiters. The Lord Ordinary found that the action was excluded by the clause of reference, and the pursuer having reclaimed, the Inner House recalled the interlocutor and remitted the case to him. I cannot regard that as a precedent which can govern the present case, because there were pleas stated, proper for the determination of the Court, before any question could arise as to the manner in which the amount of damage fell to be ascertained; and I am confirmed in that view by the fact that Lord Young, one of the two Judges who concurred in Lord M'Laren's opinion, expressly stated, without contradiction either by Lord Rutherfurd Clark or Lord M'Laren, that the Court was not deciding "anything just now as to whether, after the Lord Ordinary has had a proof on the question of liability, there should be a reference as to the amount of damage." Subject to that explanation, the decision was in my opinion perfectly right. If, on the contrary, it was intended to settle the question raised in this appeal, I should have no hesitation in holding that it was wrong.

For these reasons I am of opinion that the judgments appealed from ought to be reversed, and that the appellants ought to have absolvitor.

LORD ASHBOURNE—My Lords, I have had an opportunity of reading and considering the opinion which has just been addressed to your Lordships by my noble and learned friend near me (Lord Watson), and I only desire to express my entire concurrence in the conclusion at which he has arrived.

My noble and learned friend Lord Morris, who is unavoidably absent to-day, has requested me to state his concurrence in the conclusion at which your Lordships unanimously arrive.

LORD FIELD—My Lords, the contract which your Lordships are called upon to construe in this appeal is the familiar one of fire insurance, and is made in the familiar form of a "policy" under the company's seal, containing on the face the consideration for and the promise to pay for loss or damage by fire, and the conditions on the back on which the contract is based, and which are by the very terms of the policy "to be taken as part of it." Although, however, the instrument wears the appearance at first sight of two contracts, one to pay or compensate the assured, leaving the amount to be ascertained in case of difference in the ordinary way, and the other an independent contract to refer any such difference to unnamed arbiters, yet in truth the language of the policy which I have referred to makes the 13th condition, which is the only one to which it is necessary to refer, a very essential part of the policy, the result being that there are not two contracts to any extent independent of each other but one contract, which may be thus generally expressed—as a contract to pay only such amount as shall be ascertained by the arbiters to be named in the manner provided by the condition. This appears to me to be the plain construction of the contract, and the reasoning which induced this House to give a similar construction to the mutual policy under consideration in the case of *Scott* v. *Avery*, referred to by my noble and learned friends, fortifies me in coming to that conclusion.

If, then, the parties to the contract have for obvious motives of convenience agreed to substitute (except in case of the allega-

tion of fraud or non-compliance with conditions-precedent) for the ordinary tribunal, a tribunal which from its composition may consist of persons competent by their experience to deal with the questions which ordinarily arise when the value of destroyed or injured property has to be ascertained, and by their freedom of movement able to investigate upon the very spot the necessary condition, does the law of Scotland on the ground of general public interest refuse to enforce this contract which the parties have so made for themselves? My Lords, the authorities which have been so exhaustively dealt with by my noble and learned friend Lord Watson satisfy me of the contrary; and I think therefore that your Lordships should give effect to the contract by adopting the motion now made.

Their Lordships reversed the interlocutors appealed from, and assoilzied the appellants from the conclusion of the action, and reserved the question of costs.

Counsel for the Appellants—Sir Horace Davey, Q.C.—Ure—Alex. M'Clure. Agents—Loch & Goodhart, for T. & R. B. Ranken, W.S.

Counsel for the Respondent—Sol.-Gen. Sir J. Rigby—Salvesen—E. B. Pymar. Agents—Clulow & Gould, for Thomas M'Naught, S.S.C.

COURT OF SESSION.

Tuesday, November 29.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles.

KINNIMONT *v.* PAXTON.

Contract — Agreement — Evidence of Contract—Breach of Contract—Damages.

K wrote to P—"*Novbr. 10th* 1891.—I hereby agree to take those premises situated at Canal Loading Wharf, presently occupied by John Paxton, 87 Gilmore Place, from this date, and to relieve him of rent from Novbr. 11th 1891 till the expiry of his lease, and to pay him for fittings the sum of fifteen pounds stg., including engine and boiler, &c." P wrote to his landlord—"As I intend giving up those premises, and have secured another tenant, I will take it as a great favour if you could arrange with him from this date for a three years' and half-year's lease." P gave this to K, who delivered it. P subsequently cancelled this letter, and broke off negotiations with K, who sued him for damages for breach of contract, founding on the letters of 10th November. It was pleaded in defence that the pursuer's letter, being neither holograph nor tested, was inadmissible as evidence, and further, that the defender had not accepted the pursuer's offer.

Held (1) that the letter was binding, and evidence, although neither holograph nor tested, because respecting the purchase of the fittings it was merely a writing *in re mercatoria*, and respecting the premises it was merely a bargain that the pursuer should relieve the defender of his liability for rent; and (2) that the pursuer's letter was not an offer requiring acceptance, but the written expression of a contract already made, and therefore that the pursuer was entitled to damages for breach of contract.

In 1890 John Paxton, manufacturer, Edinburgh, leased from James M'Kelvie the stable and loft at Manure Wharf, Fountainbridge, at a yearly rent of £14, payable at Whitsunday and Martinmas. The lease excluded sub-tenants without M'Kelvie's consent in writing. In November 1891 Paxton gave up his business in Edinburgh, and desiring to dispose of his plant and premises, he entered into negotiations with Robert Kay Kinnimont, manufacturer, Edinburgh, and upon 10th November 1891 handed to him a pencil draft of the following letter, No. 26 of process, which on the same day Kinnimont extended and gave to Paxton—"I hereby agree to take those premises situated at Canal Loading Wharf presently occupied by John Paxton, 87 Gilmore Place, from this date, and to relieve him of rent from Novbr. 11th till the expiry of his lease, and to pay him for fittings the sum of fifteen pounds stg., including engine and boiler, &c." Upon the same date Paxton wrote to M'Kelvie's trustees, the proprietors of the premises, this letter, No. 17 of process:—"Sirs,—As I intend giving up those premises at Canal Loading Wharf, and have secured another tenant, I will take it as a great favour if you could arrange with him from this date for a three years' and half-year's lease. By doing so you will greatly oblige yours, JOHN PAXTON." He handed this letter to Kinnimont, who delivered it to John Merry, clerk to Mr James M'Kelvie junior, who acted for the late Mr M'Kelvie's trustees, and who at that time was absent from Edinburgh. Paxton afterwards entered into negotiations with other parties for the transfer of the premises, and upon 14th November 1891 he called at M'Kelvie's office, and stated that the arrangement between Kinnimont and him had fallen, and that he cancelled the letter formerly given. It was returned to him, and was never shown to Mr M'Kelvie junior. Upon 14th November Kinnimont was informed that the agreement was at an end, and in December Paxton purchased the premises from M'Kelvie's trustees for £115, and let them to other parties.

In December 1891 Kinnimont brought an action in the Edinburgh Sheriff Court against Paxton, claiming £100 as damages for breach of contract.

The defender maintained—"There was no completed contract between the pursuer and the defender."

Upon 9th June 1892 the Sheriff-Substitute (RUTHERFURD) found in point of fact, *inter*