the latter category the tenant might have a claim on the same ground as if injury were done by bringing down the surface or in some other similar way. However, after hearing your Lordship's views, I am not prepared to differ. I think it is a perfectly admissible view that the sum to be allowed to the tenant in this case includes all claims whatever either against the landlord or his assignees the mineral tenants. It is difficult to believe that a tenant would have agreed to a railway being constructed across his farm merely on receiving an abatement on his rent, nevertheless that the tenant did so agree in this case seems to to be the fairest and truest reading of the clause. We are bound accordingly to give effect to the clause, and to consider the claim of severance damage as included in the stipulated compensation.

LORD KINNEAR concurred.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute since the date of closing the record, sustained the defenders' third plea-in-law, and of consent decerned against them for a specified sum as the amount for which they did not dispute liability.

Counsel for Pursuer—Dundas—Salvesen. Agent—Thomas Liddle, S.S.C.

Counsel for Defenders—H. Johnston—Wilson. Agent—G. Monro Thomson, W.S.

Tuesday, July 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

COLLARD *v.* CARSWELL.

Ship — Charter-Party — Delay in Taking Delivery—Rescission.

By charter-party dated 3rd July 1891 the owner of a steamer, then being fitted out in the Clyde for the summer traffic, agreed to let her to a charterer till 30th September. The charter-party provided that the charterer should "pay for the use and hire of the said vessel at the rate of £425 per month, commencing the day of delivery . . . . whereof notice shall be given to the charterer . . . payment of the hire to be made in cash monthly, in advance, . . . first month's hire to be paid before the steamer leaves the Clyde. Charterer agrees to give a banker's guarantee for the due payment of the hire money."

As soon as the charter-party was signed the owner began, through his broker, to press the charterer for the bank guarantee. The charterer replied that he was not bound to give the guarantee until the vessel was ready to be handed over. The broker assented to this, but continued from 6th to 10th July to press the charterer daily to give the guarantee. The charterer made no answer to any of these communications until the 10th, when he replied that he was prepared to give the guarantee on delivery of the vessel. On 13th July the broker telegraphed that the vessel would be delivered in Glasgow on the 15th. The charterer replied that he would leave Hastings for Glasgow on the night of the 15th to take delivery, but without notifying the owner he postponed his departure for a day, and did not reach Glasgow until the morning of the 17th, when he found that the owner had chartered the vessel to someone else.

In an action by the charterer against the owner, the Court *held* (1) that the charterer had not committed a breach of contract by failing to take delivery on the day fixed; (2) that the charterer's conduct had not been such as to justify the owner in believing that he did not intend to fulfil his contract; and therefore found the charterer entitled to damages.

By charter-party dated 3rd July 1891 Morris Carswell, owner of the steamship "Victoria," then lying in the Clyde, agreed to let, and Richard R. Collard, of Hastings, agreed to hire, said steamship till September 30, 1891, "she being placed at the disposal of the charterer in the Port of Greenock or Port-Glasgow, in such berth as charterers may direct."

The charter-party further provided—"5. That charterers shall pay for the use and hire of the said vessel at the rate of £425 British sterling per calendar month, commencing the day of delivery in good order and ready for sea in the Clyde, notice whereof to be given to charterers or agents, and at and after the same rates for any part of a month; hire to continue from the time specified for commencing the charter and the vessel is placed at charterers' disposal until her re-delivery to owners at the expiry of this charter-party. . . . 5. Payment of said hire to be made in cash monthly, in advance, to owners in Glasgow without discount, first month's hire to be paid before the steamer leaves the Clyde. Charterer agrees to give banker's guarantee for the due payment of hire money, and in default of such payment or payments as herein specified, the owners or their agents shall have the faculty of withdrawing the said steamer from the service of the charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers in pursuance of this charter."

The vessel was to be used for passenger service between Hastings and other ports on the south of England. No particular day for delivery was specified in the charter-party, as the vessel was at the time being fitted out for the season, and the owner did not know exactly when he would be ready to deliver her.

On Monday 13th July Carswell's brokers telegraphed to Collard that the "Victoria" would be handed over at Glasgow on

Wednesday 15th July, when bank guarantee and a month's hire must be forthcoming. Collard replied that he was leaving for Glasgow on the night of the 15th, and was prepared to take delivery, but he did not appear to take delivery until the morning of the 17th, when he found that Carswell had chartered the vessel to another party.

The present action was brought by Collard against Carswell for payment of damages for breach of contract, in respect of his failure to give delivery of the "Victoria" in terms of the charter-party.

The defence was twofold—(1) That time being of the essence of the contract the pursuer was bound to have taken delivery of the vessel on 15th July, the day on which the defender tendered delivery, and that the failure to take delivery was a breach of contract on the pursuer's part entitling the defender to treat the contract as at an end; and (2) that the pursuer's acts and conduct prior to 17th July were such as to justify the defender in assuming that the pursuer did not intend to fulfil his part of the contract.

The facts bearing on the defender's second ground of defence, as established by the proof, are fully detailed in the opinion of Lord Adam.

Evidence was also adduced showing that the pursuer would have made considerable profits from the use of the vessel.

On 18th February 1892 the Lord Ordinary (KYLLACHY) assoilzied the defender, and decerned.

"*Opinion.* — [*After stating the facts*]— The breach complained of is this — that the defender (the owner) on 17th July cancelled the contract and hired the steamer to another party, and did so notwithstanding that the pursuer was, as he alleges, ready and willing to take delivery, and to pay the first month's hire, and to grant a banker's guarantee for the remainder of the hire. The defence is that the vessel was ready to be delivered on 15th July, and that the pursuer had due notice of that fact, but that he did not appear to take delivery, or tender the hire or a banker's guarantee, so that after waiting for two days the defender concluded, and was justified in concluding, that he did not intend performance, and was therefore justified in making a new charter so as to preserve the benefit of the season's trade.

"The defender further pleaded that there had been an antecedent breach on the part of the pursuer in so far as he was bound under the charter-party to produce a banker's guarantee immediately upon the conclusion of the contract, and that he failed and declined to do so. I have not, however, found it necessary to consider how far such declinature constituted a breach of the contract or justified the defender's ultimate action. In the course which events took I think the decision turns upon the effect to be attributed to the pursuer's delay to take delivery, and otherwise perform his contract prior to the rehire of the vessel on the 17th July.

"I am of opinion, on the construction of the charter-party, that the pursuer's obligation was to take delivery on getting due notice of the vessel's readiness for sea; that he was at the same time, if not earlier, bound to furnish a banker's guarantee for the hire; and further, that he was also bound to pay the first month's hire so soon as, having got delivery, he was in a position to leave the Clyde. I am also of opinion that in the nature of the case time was of the essence of the contract, the season being far advanced, and both parties being well aware that if the contract between them failed the defender ran the risk of losing the whole benefit of the season's traffic.

"The question I have to decide is, therefore, I consider, simply this, whether the pursuer was in default in taking delivery, and whether the default was of such a character as to justify a rescission of the contract. In my opinion both these questions must be answered in the affirmative.

"There can, I think, be no doubt that the pursuer was in default. He had notice on the 10th of July that the vessel would be ready to be handed over on the 11th or 13th. He replied that that was too indefinite, and that he must have a day of delivery fixed and guaranteed. He was then informed, by telegram received on the evening of the 13th, that 'the vessel will be handed over at noon on Wednesday (the 15th) when bank guarantee and month's hire must be forthcoming.' He received a further telegram to the same effect on the morning of the 15th. He did not appear on the 15th, but intimated by telegram on that day that he was to go down to Glasgow that night. He did, not, however, do so, being detained by the engagements of a friend who had arranged to accompany him. And both the 15th and 16th passed without any communication being received from him, or any explanation of his absence. Neither was any such communication received from him on the morning of the 17th, or until after the defender had, somewhere about noon of that day, concluded a new charter with another party. It then appeared that the pursuer had travelled down to Glasgow during the night of the 16th, had arrived there on the morning of the 18th, had gone to the vessel in the course of the forenoon, and had thence sought ineffectually to open communication by telephone with the defender's brokers. He had not, however, as he might have done, called on these brokers on his arrival in Glasgow, nor taken any means otherwise to communicate with them, and the result was that when they did come to know of his arrival the recharter of the vessel had, as I have already said, been concluded.

"In this state of the facts the defender asks, naturally enough, what was he to do? He had no desire to be off with the pursuer. On the contrary, the charter which he took was in all respects less desirable. But two days had passed, and he had heard nothing of or from the pursuer, except that having announced he was to leave London on the night of the 15th he did not arrive on the following day. The defender knew, more-

over, that although a respectable man, the pursuer was not a man of means, and he knew also that if he waited longer he lost the only other offer which he had for the vessel, and ran the risk of losing its whole hire for the season. In my opinion, in such circumstances, he was not unduly precipitate. I think he was justified in assuming that the pursuer had found himself unable to fulfil his contract, or that he did not intend to fulfil it; and if the circumstances justified that assumption, there can be no doubt in point of law that he was entitled to rescind the contract. Reference was made to various authorities--English and Scotch—on this matter, and I note them for reference—*Freeth* v. *Barr*, 9 C.P. 208; *Mersey Steel and Iron Company* v. *Naylor*, 9 Q.B.D. 648, 9 App. Cas. 434; *Reuter* v. *Sala*, 4 C.P.D. 739; *Turnbull* v. *M'Lean*, 1 R. 730; but none of them appear to me to throw any doubt upon the propositions (1) that when the circumstances sufficiently indicate that one party to a contract does not intend to carry it out, the other party is entitled to resile; and (2) that, at all events, in the case of an entire contract like the present a breach in a material, and certainly in an essential, part justifies the conclusion that the contract is off.

"On the whole, therefore, I must assoilzie the defender with expenses."

The pursuer reclaimed, and argued—The cases referred to in the Lord Ordinary's note showed by contrast when a contract might be rescinded on account of the purchaser's or hirer's delay to take delivery. There was no case in which a seller had been found entitled to rescind without a refusal on the part of the purchaser to fulfil his part of the contract, or such conduct as would found the inference that he did not intend to fulfil it. In the present case there was no obligation upon the charterer to be present to take delivery the moment it was tendered. He was only bound to pay hire from the date on which the ship was tendered to him. Where time was not originally made of the essence of the contract, one of the parties was not entitled afterwards by notice to make it of the essence, unless there had been some default or unreasonable delay on the part of the other party—*Green* v. *Sevin*, 1879, 13 L.R., Ch. Div. 589; *Compton* v. *Bagley*, 1892, L.R., 1 Ch. Div. 313. The pursuer's slight delay in taking delivery did not constitute a breach of contract. Nor had his conduct been such as to justify the inference that he was not prepared to fulfil the obligations which the contract laid upon him. The pursuer was entitled to substantial damages for the loss of the profits which he would have made from the use of the vessel, such loss necessarily having been, at the date of the contract, in the contemplation of parties as the result of its breach.

Argued for the defender—The pursuer was bound to appear and take delivery on the appointed day, and his failure to do so was a breach of contract. Further, the decisions established that if one party to a contract had shown an intention to refuse to implement it, the other party was entitled to treat the contract as at an end. The question accordingly was, whether the defender was justified in assuming that the pursuer had no intention of fulfilling the conditions of the charter-party — *Freeth* v. *Barr*, 1874, L.R., 9 C.P. 208; *Turnbull* v. *M'Lean & Company*, March 5, 1874, 1 R. 730, *per* Lord Justice-Clerk, p. 738. Now, time was of the essence of the contract, as the time for hiring the vessel for the summer's traffic was fast passing away, and the pursuer, having not only disregarded all the defender's urgent appeals for the bank guarantee, but failed to appear to take delivery on the appointed day, the defender was justified in believing that he did not intend to fulfil his contract. In any event, no sufficient evidence of loss of profits had been laid before the Court to justify any more than a nominal award of damages.

At advising—

LORD ADAM—By charter-party dated 3rd July 1891 the defender agreed to let, and the pursuer agreed to hire, the steamship "Victoria" till the 30th September 1891, she being placed at the disposal of the pursuer in the port of Greenock or Port-Glasgow as he might direct.

The conditions of the charter-party, so far as material to the present question, were that the charterer should pay for the use and hire of the vessel at the rate of £425 per month, commencing on the day of delivery in good order and ready for sea in the Clyde, notice whereof was to be given to the charterer or agents, and at and after the same rates for any part of a month, hire to continue from the time specified for commencing the charter, and the vessel is placed at the charterer's disposal until her redelivery to owner.

It was further stipulated that payment of the hire was to be made in cash monthly in advance to owner in Glasgow without discount, first month's hire to be paid before the steamer left the Clyde, and the charterers agreed to give a banker's guarantee for the due payment of hire money, and in default of payment as specified, the owner was to have the faculty of withdrawing the steamer from the service of the charterer.

On Monday 13th July the defender telegraphed to the pursuer that the "Victoria" would be handed over on Wednesday the 15th at Glasgow, when bank guarantee and a month's hire must be forthcoming.

The pursuer did not appear to take delivery on the 15th, the day named, but he appeared on Friday the 17th. He did not, however, get delivery of the vessel, as the defender had chartered her to another person.

The pursuer now sues this action against the defender for damages for breach of contract, in respect of the defender's failure to give him delivery of the vessel in terms of the charter-party.

The defender pleads that in this case time was of the essence of the contract, that consequently the pursuer was bound

to have taken delivery of the vessel on the 15th, the day named by the defender for delivery, and that his failure to take delivery was a breach of contract on his part, and entitled the defender to treat the charter-party as at an end.

It will be observed, however, that no particular day for delivery is specified in the charter-party—the reason being that the vessel was at the time being fitted out for the season, and the defender did not know when he would be ready to deliver her. Notice of the day of delivery was to be given to the charterer. It is not, however, made a condition of the charter-party that the charterer should take delivery on that day, and that failing his doing so the owner should be entitled to resile. What the charter-party does provide is, that the charterer should be bound to pay hire from that day—although he may not have taken delivery—and I do not see how it can be implied that the pursuer's failure to take delivery on the day named should entitle the defender *de plano* to put an end to the contract.

But the defender further pleads that the pursuer's acts and conduct prior to the 17th July were such as to justify him in believing that the pursuer did not intend to fulfil his part of the contract. If the defender has made out this in point of fact, then I think that in law he would be entitled to resile from the contract, and to let the vessel to a third party.

The charter-party was arranged between Messrs Thomas Reid & Company, the defender's brokers in Glasgow, Messrs Neill, Topping, & Company, brokers in London, and the pursuer. All the communications between the pursuer and defender passed through Neill, Topping, & Company, and a question is raised as to whether they acted for the pursuer or defender. They were employed by Thomas Reid & Company to assist them in getting the vessel chartered. The commission paid by the owner on the execution of the charter-party was divided between them. Mr Topping says they were the owner's brokers. I do not doubt that they were, and that the pursuer, who acted for himself in the matter, so regarded them, and was entitled so to regard them.

The first matter on which the defender founds to justify his conduct is the pursuer's failure to furnish the bank guarantee immediately after the charter-party was executed, and his failure to answer certain letters and telegrams asking for it.

By the charter-party the charterer was bound to give a guarantee for the due payment of the hire money.

The defender had from the first entertained doubts as to whether the charterer had sufficient means to fulfil his obligations under the contract, and as the defender and his Glasgow brokers thought under the contract the pursuer was bound to grant the guarantee at once, they telegraphed to Messrs Neill, Topping, & Company on the 4th July that unless the guarantee was in Glasgow on the 6th, business would be off. Messrs Neill, Topping, & Company did not take the same view of the pursuer's obligations, and did not communicate this telegram to him, but wrote to Messrs Thomas Reid & Company of the same date that their proposal was simply absurd, that there was no proviso in the charter as to what hour or day the charterer was to produce the guarantee, but, to keep the owner's mind at ease, the writer was going down to see the pursuer, and no doubt the banker's guarantee would be posted to them on Monday or Tuesday.

Mr Topping had a meeting with the pursuer next day, who gives this account of what took place—"The question," he says, "of the bank guarantee was mooted by him (Mr Topping.) In the first place, he asked—'When are you going to send the bank guarantee and the first month's hire?' I said 'It was not necessary, according to the wording of the charter, to send it until the boat was ready to be handed over, and that I should be prepared to pay the first month's hire and to give the bank guarantee.' Mr Topping said the owners were continually worrying for it, and I said there was no need for that, as there was no stipulation in the charter that it was to be forthcoming until the boat was ready to be handed over. He said, 'Certainly not, but they keep worrying me, why don't you make some arrangement?' and I said, 'It is not necessary.' We had the charter before us at the time, and were discussing the matter and going over the clauses. Mr Topping quite agreed with me that it was not necessary, and that it was unreasonable for them to ask for the money and the bank guarantee until the boat was handed over." Mr T. confirms this. He says—"On that occasion I told the pursuer he was under no obligation to present the bank guarantee immediately, but that as I did not wish to have any unpleasantness with the people in Scotland, I would like him to meet them in some way or other.

Messrs Thomas Reid & Company, however, continued to press Messrs Neill, Topping, & Company to obtain the guarantee, and Messrs Neill, Topping, & Company between the 6th and the 10th July sent several letters and telegrams to the pursuer pressing him to send the guarantee at once. The pursuer did not answer these letters and telegrams. He gives the following reason for not doing so—"On the Sunday," he says "after the charter was signed I stated to Mr Topping my view of the charter, and he agreed with me. That was the reason why I did not think it necessary to reply to the other telegrams. It was never intimated to me by Mr Topping on behalf of the owners, in any telegram or letter, that the owners considered them selves entitled to withdraw the vessel unless I produced the bank guarantee there and then for the whole hire. If I thought I was bound to do so I could have arranged for a bank guarantee."

I agree with the pursuer's construction of the charter on this point, and therefore that he was not in fault in not producing the bank guarantee before getting delivery of the vessel; and seeing that he was asked by the defender's agents Neill, Topping, &

Company to produce the guarantee, not as a matter of obligation, but merely as an accommodation to them, I think that neither his failure to produce the guarantee or to answer the letters and telegrams can justify the defender in breaking the contract.

But however that may be, the defender did not take that course at the time.

On the 10th July the pursuer received from Neill, Topping, & Company a telegram to the effect that the steamer would be tendered to him on the next day (Saturday) or Monday, in terms of the charters, when the month's hire and banker's guarantee must be in Glasgow.

The pursuer was naturally dissatisfied with the indefinite nature of this telegram, and telegraphed in reply of the same date in these terms—"Let owners telegraph me direct guaranteed date of delivery 'Victoria,' to avoid unnecessary expense am prepared to go to Glasgow and pay first month's hire on delivery and produce bank guarantee according to charter. All fuss made unnecessary; always intended fulfilling my legal obligations in due course."

It further appears that Mr Lucas, of Neill, Topping, & Company, had gone to see the pursuer about the matter, and on his return Neill, Topping, & Company wrote Messrs Thomas Reid & Company as follows on July 11th—"Mr Lucas saw Mr Collard yesterday, who seemed very much surprised indeed at all the fuss that had been made, as he had been prepared from the outset to carry out his legal obligations in due course. The hire money is not due; when it is he will pay it, and produce the bank guarantee for balance of hire in accordance with charter. He naturally wishes to avoid having his men hanging on for four or five days in Glasgow, and he therefore wishes to know guaranteed date of delivery, in order that he may at once make his arrangements."

So far it appears to me that there is nothing to suggest that the pursuer did not intend to fulfil his obligations.

On 13th July, Neill, Topping, & Company telegraphed to the pursuer that "Victoria" would be handed over at noon on Wednesday at Glasgow, when bank's guarantee and month's hire must be forthcoming.

On the 14th they again telegraphed to him—"Presume you leave to-night for Glasgow; telegraph," to which he replied on the 15th—"Leaving for Glasgow tonight, am prepared to take 'Victoria,' expect her ready according to your telegram received Monday. If not ready, say so, to save unnecessary expense. Wire where 'Victoria' lying." Neill, Topping, & Company replied on the same day—"Owners say 'Victoria' now ready, lying Glasgow, Henderson's Meadowside private dock, waiting, hire begins to-day." These were the last communications which took place between the parties before the 17th. What afterwards took place was this. The pursuer as he had said he would do, left Hastings for Glasgow on Wednesday evening. He had by the charter-party a right to purchase the vessel at a fixed price, and he had arranged with a Mr Hempsted for a sub-sale of the vessel to him and some friends, subject to inspection, and Mr Hempsted was to have accompanied him to Glasgow for the purpose of inspection. The pursuer however found on his arrival in London that Mr Hempsted was unable to accompany him until next night. The pursuer thereupon resolved not to proceed to Glasgow that night, but to wait for Mr Hempsted, and he returned to Hastings. He did not, however, inform the defender that he had postponed his journey for a day. He is asked if it did not occur to him to communicate with the owners or their agents? His answer is—"They told me that the boat was ready and that the hire commenced from that day, and I therefore thought there was no need for me to wire on the subject at all."

Next day, the pursuer and Mr Hempsted left for Glasgow, and arrived there on the morning of the 17th. They went straight to the vessel, not knowing the address either of the defender or of his Glasgow brokers, arriving on board about 11·30. The pursuer found no one there to give him delivery of the vessel. He endeavoured without success to communicate with the brokers, and it was not until about 4·30 on the same afternoon that he learnt that a second charter-party had been entered into. It appears that the defender had executed this charter about an hour after the pursuer's arrival at the vessel.

The question is, whether these facts are sufficient to justify the defender in breaking his contract with the pursuer.

The defender knew that the pursuer intended to leave Hastings on the 15th for the purpose of taking delivery of the vessel, and it appears to me that the mere fact that he did not appear on the morning of the 16th at Glasgow was not a sufficient reason to justify the defender in concluding that the pursuer did not intend to fulfil his contract. Many things might have occurred to delay the pursuer's arrival without suggesting that conclusion. The defender did not take the trouble to communicate with the pursuer during the 16th. If he had he would have learnt the true cause of his non-arrival. If he had sent down to the vessel on the forenoon of the 17th before signing, he would have found the pursuer there. I cannot assent to the conclusion that in these circumstances the defender was justified in putting an end to the contract.

With reference to the question of damages, the pursuer claims on record damages in respect of his loss of profit on the subsale of the vessel to Mr Hempsted, but that claim was not pressed on us.

The pursuer on failing to get possession of the vessel, seems to have done everything in his power to obtain another vessel in her place, but without success. He therefore now claims damages in respect of the loss of profits he would have made by her use.

The means which the pursuer has furnished to us for coming to a conclusion on this point are most meagre and unsatisfac-

tory. He has produced an estimate of these profits, but it is most extravagant in my opinion. It appears however, from the evidence of the defender's witness, Captain Campbell, who says he has knowledge and experience on the subject, that the pursuer would have made profits to a very considerable amount during the season from the use of the vessel. From these, however, would have to be deducted the profits made by the "Nelson." On the whole matter, I do not think we will do injustice if we award £500 of damages to the pursuer.

LORD M'LAREN—I agree, and only desire to add a few words on the point where it seems to me the analogy on which the Lord Ordinary has proceeded breaks down, namely, where he comes to the conclusion that the defender was entitled to rescind the contract on the ground that time was of the essence of the contract, and the pursuer had failed to perform his part of the contract at the expected time. It is indisputable that in all cases on contract there is an implied right to either party to rescind where there is a failure of performance in a matter touching the essentials of the contract, and it is not necessary to give rise to the right of rescission that the failure should be total. The most familiar instances of the application of this rule are to be found in the contract of sale where goods are delivered, some of which are of defective quality, and the purchaser has a right to reject them, though in a sense there has been a partial though defective performance of the contract. In the same way, if there is any substantial failure on the part of the purchaser to implement the conditions as to payment of the price, the seller is entitled to hold the goods or to stop them *in transitu* if he has already entrusted them to a carrier. This case, however, does not appear to me to be analogous to the illustrations I have given, because it was not a matter of vital importance—I mean a matter touching the very existence of the contract of location that delivery of the ship should be taken on a particular day. If the pursuer was willing to take delivery, and had done nothing which could be interpreted as amounting to a repudiation of his obligation, the mere delay in taking delivery was an inconvenience to the lessor which could be made up to him by a money payment. But the action of the defender in treating the charter-party as cancelled, and granting a lease of the ship to another party, is defended on the ground that it was reasonable for the defender to conclude from the pursuer's conduct that he never intended to come forward and implement his contract. Suppose the same thing to occur in the case of goods—that a cargo is shipped, and when the ship arrived at the port of delivery, no consignee of the shipper comes forward to claim the goods. It would not, I think, in such a case occur to the seller or his representative to order an immediate re-sale of the goods at the best price he could get for them. Certainly if he were to take such a course he would be subject to a claim of damages on the part of the consignee. No doubt he might be inconvenienced by the delay of a day or two, and no doubt time is always important in mercantile dealings, but I think that everyone would recognise that this was not a case in which time was of the essence of the contract, but that the delay of a day or two in taking delivery of the cargo was a breach of contract of the kind which might be compensated by demurrage or payment for the inconvenience, whatever it might be, which was caused thereby. In the present case the defender might have remembered that it was just as important for the pursuer to get early delivery of the ship as it was for the owner to get his ship chartered when the summer season was running on. Accordingly, when the pursuer failed to appear on the day of delivery, having agreed to pay for the hire of the ship in advance, and there being no real question as to his solvency, there were no justifiable grounds for treating the contract as at an end, and it was the duty of the defender to wait a reasonable time, or at least to communicate with the pursuer as to the cause of the delay. If he did not come forward at once he would of course be liable in the expense and loss occasioned to the defender, and would not be released from his obligation to pay the hire of the ship.

If the defender had made every effort to communicate with the pursuer, and had got no answer, and the circumstances had been such as to make it reasonable for the defender to assume that the pursuer had no intention of fulfilling his contract, and was really evading performance, a very different case would be raised. But there was no reason for the defender's reaching that conclusion, and I am afraid he must suffer the consequences of the mistake he made in seeking to protect his interests.

LORD KINNEAR concurred.

LORD PRESIDENT—After full consideration of this case I have arrived at the conclusion that your Lordships' is the sound determination of this case. I do not doubt that the defender acted in good faith, and that he *bona fide* believed that the pursuer had defaulted, and the rather unbusiness-like conduct of the pursuer in not telegraphing to explain his failure to appear on the 16th in accordance with his telegram of the 15th goes so far to explain the action of the defender. But the defender was too hasty, and I do not think that we could decide in his favour without laying down a precedent dangerous to the stability of mercantile contracts.

The Court recalled the Lord Ordinary's interlocutor and decerned against the defender for payment to the pursuer of £500.

Counsel for Pursuer—Salvesen—Crole. Agents—A. B. Cartwright Wood, W.S.

Counsel for Defender—Dundas—Orr. Agents—Simpson & Marwick, W.S.