SUMMER SESSION, 1896.

HOUSE OF LORDS.

Friday, May 8.

(Before the Lord Chancellor (Halsbury), Lord Watson, Lord Herschell, Lord Shand, and Lord Davey.)

VEIT AND OTHERS *v.* IRELAND & SON.

Sale—Sale for Delivery f.o.b.—Option as to Quantity—Period within which Contract to be Performed—Repudiation of Contract.

By sale-note addressed by an exporter in Scotland to a foreign buyer it was provided:—"We confirm having sold 3/3750 tons of Muiredge and 1/1250 tons of Lochgelly best steam coals, shipment by steamers and sailers, expected sailing about March to December, at the price of . . ."

Held (1) that it was at the buyer's option to require delivery of the larger quantities, (2) that the buyer was not bound to take delivery in equal monthly quantities, and (3) that the seller's obligation under the contract was not limited to loading vessels berthed in time to have the loading completed before the end of December, but that he was bound to complete delivery of the contract quantity on board any vessel arriving at the port of shipment before the expiry of the month.

Circumstances in which *held* (*rev.* judgment of the Second Division) that there had been a repudiation of the contract on the part of the seller entitling the buyer to damages as for breach of contract.

This was an action for damages for breach of contract by Isidor Veit, merchant in Denmark, and Hansen and Company, Leith, his mandatories, against David Ireland & Son, coal exporters, Dundee. The contract was contained in a sale-note dated 20th February 1893, addressed by the defenders to the pursuer in the following terms:—"We confirm having sold 3/3750 tons of Muiredge and 1/1250 tons of Lochgelly best steam coals, shipment by steamers or sailers, expected sailing about March to December, at the price of 6s. 6d. for Muiredge and 8s. for Lochgelly per ton f.o.b. . . ." Under this contract the following quantities were delivered:—

Date.		Muiredge. Tons.	Cwts.	Lochgelly. Tons.	Cwts.
30th May 1893,	.	303	5	129	15
26th June ,,	.	517	8	—	—
12th July ,,	.	432	8	122	1
14th ,, ,,	.	408	19	—	—
15th ,, ,,	.	532	13	—	—
20th Sept. ,,	.	561	8	—	—
9th Dec. ,,	.	259	—	182	16
				434	12
				3015	1
Making a total of	.			3449	13

On 18th October the pursuer chartered the sailing vessel "Taikun," carrying 400 tons, which was loaded on 9th December. On the 11th November the pursuer chartered the "Anna Elizabeth," carrying 190 tons, and on the 25th November the "Danmark" 120 tons. Owing to the crowded state of the port of shipment neither of these vessels were berthed for loading till after the end of December.

On 28th November, when the total quantity of coals received was 3008 tons, the pursuer telegraphed to the defenders "1150 steamer obtainable; ready for loading 5th-10th December. Wire in time. Contract coals; price quantity in excess." To this telegram the defenders replied on the 29th—"'Taikun,' 'Elizabeth,' complete December contract quantity; probably arrange 1150 Muiredge, similar 10/9; strike Fife excepted." The defenders also wrote to the pursuer on the same day a letter containing the following passage:—"'Taikun' and 'Anna Elizabeth' cannot now get loaded before December; and, however hard it may seem to be to you,

they must go against the December contract quantity, as the collieries inexorably stick to the rule to cut off all undelivered quantities at the end of each month. This is very hard to us all, and in many instances it is the long turn that prevents the buyers from taking up the whole quantity. According to your contract, you should have about 500 tons monthly, and as 'Taikun' and 'Anna Elizabeth' will exceed this quantity considerably, it is quite impossible for us to get any more coals for you against the contract." The steamer in question was not chartered in consequence (according to the pursuer's evidence) of the defenders' telegram.

In a letter dated 30th November the pursuer, after referring to the telegram sent by him, and the defenders' reply, says:—

"I had the option either to get the said steamer or to sell 800 tons of the balance of my contract coals at 2s. more than contract price, and my intention in asking you about completing the cargo was to be able to judge whether 2s. was an acceptable advance. To my great surprise, however, your answer says that the December contract is completed with 'Taikun' and 'Anna Elizabeth.'

"It is, however, quite impossible to me to understand how this discrepancy has arisen, as the parcel, 4/5000 tons, in my option, for this instance is 5000 tons. Besides the two vessels mentioned above, I have fixed the sailer 'Danmark' with cargo for Methil, and according to the undernoted statement you will see that the quantity taken up, including the said three cargoes, amounts to 3915 tons, 17 cwt. I have thus a balance left of 1080 tons, 3 cwt. I have seen Mr Omoe (the defenders' agent in Denmark) *re* this, and he said that it must be a misunderstanding or a miscalculation of yours, and he promised me to wire you so that he could get a confirmation during the day.

"I regret very much that I lost the steamer on account of your telegram of yesterday, and I shall now have to open new negotiations for the sale of the balance, which I hope will not bring a more unfavourable sale on account of the high value —10s. 9d.

"The prospects of getting a vessel to take it up before 1st January is getting smaller every day, and successful charterers should then be able to buy these contracts with large profit. Several of them have already changed owner. I found it only reasonable to show you so much consideration as to ask whether you wished to repurchase, and Mr Omoe has wired you about this matter. Below you will find statement of the coals taken up, and I trust that the state of affairs in the new year will improve, so that I again may be able to get plenty of coals for winter stock."

The charter-party of the "Danmark" was signed on 25th November.

In reply to the defenders' letter of 29th November the pursuer wrote on 2nd December:—"Dear Sirs—I am favoured with yours of 29th ult. I can, however, not agree with your demand of cancelling the balance, as in our contract nothing is stated about monthly shipments; and if your contracts with the collieries have another form, you cannot ask that I should suffer for this. As you are aware, I have sold a lot of coals on contract, and I have to arrange this with large sacrifice."

A proof was taken on the 4th of June.

As regards his telegram of 28th November the pursuer deponed:—"I telegraphed to the defenders that I had an offer for a boat of 1150 tons. That offer was a verbal one. The terms were that I was to be ready to load between the 5th and 10th December. The rate of freight at which the ship was offered was 9s., but I might have got her cheaper. (Q) Was there any writing at all between you and the owner or agent?—(A) It was a verbal offer on the exchange in Copenhagen. The offer was open for twenty-four hours, but there was nothing arranged until I should hear from the defenders that they would load before the end of the year. . . . (Q) What does 'price quantity in excess,' in your telegram, quoted there, mean?—(A) I wanted to know what the price was at that time, as I possibly might place 800 tons extra with some buyer. (Q) What does the expression 'wire in time' mean?—(A) If the ship was in time for the contract. (Q) What do you mean by that?—(A) If the ship would be here in time to take the contract coal. I knew there was a long turn. (Q) You knew, in fact, that the turn was so long that a vessel arriving between 5th and 10th December might not get her coal at all?—(A) I wanted to make sure before I chartered the vessel. I wanted to make sure that, if the vessel got into the roads at Methil between the 5th and 10th of December, she would get into her berth before the end of December. The meaning of the words 'price quantity in excess,' will be seen from my letter. I wanted to know what the current price was, as explained in my letter. The 1150 tons would take up all the quantity, and I had the prospect of selling 800 tons extra in Denmark. (Q) You don't say anything about 800 tons in the telegram?—(A) I did not require to mention that as long as I got to know the current price. (Q) Doesn't the telegram mean that the 1150 tons would more than exhaust your contract quantity?—(A) No. The 2s. of advance in price referred to in my letter was the highest offer I had got for my coals at the time. The month of November was an advanced time of the year. I bought coals to fulfil contracts I had already made. I did not know whether the ship would come in time to receive the contract coals or not, therefore I would rather sell coals at the higher price, instead of running the risk that the ship would not come in time for the contract coal."

The pursuer maintained that the telegram of 29th November constituted a repudiation of the contract, and he accordingly sued for the difference between the market price of the coals undelivered at that date and the contract price.

The defenders maintained (1) that they had not failed to load any vessel within

the contract period which was berthed for loading at the port of shipment, and that consequently there was no breach of contract; (2) that their telegram of 29th November, read in connection with the pursuer's telegram, as explained by himself in evidence, to which it was a reply, was merely a refusal to guarantee that a vessel reaching the port of shipment between the 5th and 10th December would be berthed before the end of that month; (3) that the pursuer had not treated the telegram and letter complained of as a breach of contract, as shown by the reference to the charter of another vessel in his letter of 30th November; (4) that under the contract they were not bound to ship more than 4000 tons in all, and that they had shipped or booked for shipment by the 20th November 3000 tons, and that the quantity (1150 tons) required to load the steamer proposed to be chartered in the pursuer's telegram of that date was in excess of the quantity which the defenders were bound by the contract to supply.

The Lord Ordinary (STORMONTH DARLING) on 26th January 1895 decerned against the defenders for the sum of £182, 13s. 6d., with interest.

Note.—"I am very clearly of opinion that there was here a breach of contract on the part of the defenders. The contract was that they should sell to the pursuer from 4000 to 5000 tons of coal, and that the coal should be shipped between the months of March and December 1893. There was no stipulation as to the deliveries being made monthly or at any other stated periods, and in point of fact the deliveries, as set out in condescendence 8, were made at very varying intervals, without objection on the part of the defenders. There were no deliveries at all till 30th May, and during three days in the month of July deliveries were made to the amount of 1596 tons. It was hopeless, therefore, for the defenders to maintain that the contract provided for equal monthly deliveries. Yet that was the position which they took up in their letter of 29th November 1893, which is the turning-point of the case. They declined in that letter to deliver more coal than could be taken by two vessels which were then about to be loaded, and they were disingenuous enough to lay the blame on the collieries, although it is now admitted that they had no running contract with the collieries at all, and that their true reason for refusing further deliveries was that the price of coal had very much risen.

The defenders reclaimed—They cited in support of their third contention—Benjamin on Sale (4th ed.), p. 548, and authorities there cited.

At advising—

LORD TRAYNER—This is an action for damages on account of breach of contract. The Lord Ordinary has held the breach of contract established, and decerned against the defenders for payment of £182 odds as the damages payable by them to the pursuer in consequence thereof.

The contract in question is contained in the contract note, No. 6 of process, and does not appear to be difficult of construction; and although different views seem at one time to have been taken of it by the parties, I think in the debate before us the differences almost disappeared. The contract was one whereby the defenders sold to the pursuer 4000 to 5000 tons of coal, "shipment by steamers or sailers, expected sailing about March to December," at a contract price per ton free on board. Whether under the contract so expressed the option lay with the seller to deliver or with the buyer to take the larger or the smaller quantity might admit of argument; but in the view which I take of the case it is not necessary to determine that question. The pursuer says the option was with him, and I will assume, without giving any opinion on that matter, that he is right. The quantity, whatever it was, was to be delivered by the defenders free on board steamers or sailers "expected sailing about March to December." Under such a contract I think it cannot be maintained (as was at one time maintained by the defenders) that the quantity of coal contracted fell to be delivered and taken in equal, or nearly equal, monthly quantities. On the other hand, it appears to me to be quite as untenable to say, as the pursuer at one time did, that under the contract he had the right to demand delivery of the whole coal at any time between March and December —that is, the whole coal in the month of March or December, or at any time within these months. I have no doubt that the meaning and intention of the parties in making this contract, as well as the legal effect of the contract, was that delivery was to be made and taken in quantities reasonably distributed over the whole period on reasonable notice being given *hinc inde.* But it is quite clear, and was not disputed by the pursuer, that the defenders were under no obligation to deliver any coal except on board of vessels furnished by the pursuer, and put by him into a berth at which the coals could be loaded; and were not bound to load any coals under this contract after the expiry of the month of December.

Now, it is not said by the pursuer that during any part of the period over which the shipment was to extend that he tendered at the port of shipment a vessel, steamer or sailer, which the defenders refused or failed to load. What, then, was the breach of contract on the defenders' part? The alleged breach on the part of the defenders, as maintained by the pursuer (and this is the view adopted by the Lord Ordinary) consists in the telegram sent by the defenders to the pursuer on 28th or 29th November. To understand this telegram, and the view which I have said has been taken of its effect by the Lord Ordinary, it is necessary to attend to the circumstances under which it was sent. On 28th November the pursuer telegraphed to the defenders as follows:—"1150 tons steamer obtainable, ready for loading 5/10 December. Wire in time; contract coals;

price quantity in excess." Any difficulty in understanding the full meaning of this message arises from the four last words, and I refrain from referring to the pursuer's explanation of this telegram, given in his evidence, as being, on the whole, less intelligible than the telegram itself. Apart from the concluding words, the message appears to have been to the effect that the pursuer could obtain a steamer to carry 1150 tons of coal, which would be available to load somewhere between the 5th and 10th December; that this shipment was to be of contract coal; and defenders were to wire in time whether such a vessel, if obtained and arriving between 5th and 10th December at the port of shipment, could be loaded within the contract period. The answer by the defenders was, "'Taikun' 'Elizabeth' complete December contract quantity"—that is, the shipments by "Taikun" and "Elizabeth" are all you are entitled to in December under your contract. This telegram is the only breach of contract alleged by pursuer, and the Lord Ordinary thinks that it constitutes a breach. In that view I cannot concur. The telegram certainly represented that the defenders' view was that the two shipments they referred to would complete the contract quantity deliverable in December, but it does not say that they would give no more coals under the contract; and the subsequent correspondence shows that the pursuer did not regard it as final, for he went on to maintain his right to further shipments of coal under the contract. More than that, he stated (as was the fact) that he had "fixed the sailer 'Danmark' with cargo for Methil,"—that is, was despatching, or had despatched (it is not very clear which), the "Danmark" to Methil to take coals under the contract. That vessel subsequently arrived and got a cargo of coals, but not under the contract, because through no fault of the defenders she could not be loaded in December. I think the parties were for some time after the date of defenders' telegram in correspondence, maintaining their respective views of the contract and their respective rights under the same, and the pursuer did not treat the telegram in question during that time as a final intimation on the part of the defenders that the contract was at an end. Assuming that the pursuer would have been entitled to treat the defenders' telegram, when received, as a statement that they would not supply further coals under the contract, I am of opinion that he did not do so, and that he is not entitled to do so now.

I have observed already that the defenders were only bound under the contract in question to deliver coals to the pursuer on board of a vessel furnished by him for that purpose. Now, it appears that the defenders duly loaded all the vessels sent by the pursuer. Did they prevent the pursuer sending other vessels, or act so as to induce him to refrain from doing so? It is said they did. The pursuer represents that he had or could have got a steamer to carry 1150 tons, which he did not charter, or failed to get because of the defenders' telegram of 29th November. Of this there is no proof, except the pursuer's statement, and therefore I cannot hold it to be established. But if he had got that steamer available, as he said, for loading between 5th and 10th December, it is not by any means proved that she could have been loaded before the end of that month.

On the whole matter, I am of opinion that no breach of contract has been established, and that the defenders are entitled to absolvitor.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court accordingly recalled the interlocutor of the Lord Ordinary and assoilzied the defenders from the conclusions of the action.

Against this judgment the pursuer appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, I confess I have not been able to see any reason for entertaining a doubt that the interlocutor appealed from of the Inner House must be reversed and the judgment of the Lord Ordinary restored.

The question turns upon the true construction of a contract, and it appears to me that it is not a very difficult contract to construe. A mercantile document drawn up by the parties for the express purpose of regulating their contract relations must speak for itself. It appears to me from the document speaking for itself, that the parties intended by the language which they adopted to avoid committing themselves to any precise period within which the delivery was to take place. The substance of the matter is a sale by the vendors of 5000 tons of coal; and then the question comes of the delivery of it. What is said is that it is to take place "about" particular dates. The period during which the deliveries are to take place is guarded in two ways, by two qualifying words which seem to me intended by the parties, and would, I think, be understood by all mercantile men, to repudiate anything like the fixing themselves by a precise date at which the contract is to be performed in respect of delivery, although two dates are mentioned as being the times within which they supposed and expected (the words to which I have referred are "expected" and "about") the contract might be completely performed. The effort to turn those qualifying words into an absolute condition that the deliveries shall take place at those dates seems to me about as extraordinary a construction of a mercantile document as it has ever been my fortune to hear argued.

My Lords, the question as to the meaning of the contract being settled, the next question is whether or not as a matter of fact that contract has been broken. Now, upon that subject also I cannot entertain a doubt that there was a repudiation—an absolute repudiation—of the true construction of

the contract, and a determination not to abide by the true construction of the contract, by the telegram and the letter confirming it of the 29th November. Indeed, it would be a very formidable thing, I think, if in order to maintain his rights upon a contract of this kind it were to be supposed that the vendee must, in the sense in which the learned counsel at the bar argued the question, tender a ship—that he must charter a ship and send it to the port, with the knowledge, having this letter and telegram before him, that if he does so it will be of no use, because considering the crowded state of the port and the period of the year it would be impossible that she could be loaded. If the question had arisen in another way—if the appellant had taken the extreme course of chartering a ship, and in that sense tendering that ship at the port of loading, and had afterwards, when the loading was refused, claimed damages for so doing, I cannot entertain any doubt that any Court would have said that it was a most unreasonable course to pursue, and if he had taken that course he must pay the expense of such a wanton and unnecessary increase of damages, by doing that which he was apprised, before he had done it, was quite useless, because no coal would be shipped then. Under these circumstances it appears to me that the vendee, the present appellant, has got according to my view somewhat less than his rights, but that is immaterial now, because the vendee has got a certain amount of damages in respect of his claim and there is no cross appeal.

Now the only further argument that I have heard upon this subject is, that both parties have acquiesced in a construction of the contract, and that therefore as a matter of fact what the person who has broken the contract according to its true construction is entitled to say is this—It is true I broke the contract in the true sense and meaning of the contract, but you then thought that that was the meaning of the contract as well as I did, and therefore that is no true breach of the contract. My Lords, I entirely differ from that view. I do not think it is a true view of the facts, but if it were true, it appears to me that without exactly deciding at the present moment what the contractual relations between the parties were, we can quite understand that gentlemen dealing with one another in this way, not having always a lawyer at their elbow might misconceive the obligations of the one towards the other. The pursuer did complain immediately after he had received the letter and the telegram of the 29th November, and said, I cannot acquiesce in your view. He complained that he had lost an opportunity of chartering a vessel which he could have obtained and sent to the port. But my Lords, as a matter of law, I entirely repudiate the suggestion that a party to a contract is entitled to repudiate his contract, and insist that the true view of the contract is what he says, because the other party to the contract did not at a particular time appreciate what was the true meaning and effect of the contract which they had entered into. That is my opinion as a matter of law, and I say that as a matter of fact I do not accept that as having occurred in this case, because I see that on the 9th of December, dealing therefore with the question only ten days after the letter and the telegram of the 29th November, the pursuer who is now complaining said—This is a breach of the contract; he said in terms that he would go to law about it and fight the question. Therefore if an acquiescence could be of any avail, which I think it could not after the cause of action had once vested, it is quite plain that there was not an acquiescence in this case. My Lords, it used to be a familiar principle of law, and I suppose it is so now, that a cause of action once vested could only be got rid of by release and satisfaction. Under these circumstances I am unable to follow the reasoning of the Inner House, which overruled the Lord Ordinary's judgment.

My Lords, Lord Trayner in delivering the judgment of the Inner House said:—"Did they" (the defenders) "prevent the pursuer sending any other vessels or act so as to induce him to refrain from doing so? It is said they did. The pursuer represents that he had or could have got a steamer to carry 1150 tons which he did not charter, or failed to get because of the defenders' telegram of 29th November. Of this there is no proof except the pursuer's statement, and therefore I cannot hold it to be established." My Lords, I am really wholly unable to appreciate what that means. The statement referred to is a statement to which the pursuer swore, and in the whole course of the controversy (in which, be it observed, the pursuer has stated the same thing more than once in his letters) no doubt is thrown upon it by the other party to the contract, who rests his defence upon totally different considerations. Now, why is it to be disbelieved because it is only proved by one witness, the pursuer himself, is one of those problems which I confess myself wholly unable to solve. With no evidence on the other side, with the facts all consistent with that statement, a statement made not for the first time at the trial, but a statement persisted in through the correspondence, and not challenged on the other side, that that statement is not to be believed is a matter which, as I say, fills me with considerable surprise.

My Lords, I am of opinion that the contract is tolerably plain. It is not necessary to decide it, but I myself do not assent to the suggestion that even if a vessel had been sent in January it would have been outside the contract between the parties. It is, as I say, not necessary to maintain that proposition; but looking to this mercantile document between these parties, seeing what they were dealing with, the subject-matter upon which they were engaged, and the qualifying words they have inserted in the contract for the express purpose of preventing themselves from being tied down to a particular date, I can entertain no doubt as to what the true construction of the contract is. If that is the true construction, the contract

has undoubtedly been repudiated by the defenders, who by the letter and telegram I have referred to practically prevented the pursuer from sending a vessel for the purpose of obtaining the coals to which he was entitled under the contract.

Under these circumstances I move your Lordships that the interlocutor of the Inner House be reversed, and the judgment of the Lord Ordinary be restored, and that the respondents pay to the appellants the costs here and below.

LORD WATSON—My Lords, I have had very great difficulty in this case in understanding how the learned Judges of the Second Division of the Court of Session found their way to the conclusion which is embodied in the interlocutor appealed from. I agree with the noble and learned Lord on the woolsack that the contract in question is a very simple mercantile contract; and I also agree with him as to the construction of that contract so far as it is necessary for the purposes of this case to deal with it; and I also agree with the observations which have fallen from his Lordship on that point.

I do not think it admits of dispute, upon the evidence in this case, that towards the end of November or the beginning of December 1893 the respondents in this appeal distinctly indicated that they were under no liability to make, and certainly did not intend to make, any further deliveries of coal under the contract. I do not think their own argument addressed to us from the bar in all respects bore that out, but that really is immaterial. There are indications towards the close of the judgment delivered by Lord Trayner, of two considerations which if well founded are sufficient to dispose of the claim to damages for breach of contract which was made in this case, and which was given effect to by the interlocutor of the Lord Ordinary. To the first of those the Lord Chancellor has already referred. Their Lordships discredited the evidence of the pursuer when he was adduced as a witness, and held as a matter of fact that it was not proved that he either had or could have got a steamer to carry 1150 tons which he failed to charter or failed to get because of the defenders' telegram of the 29th November. I cannot find in this case a single material for impeaching the testimony of the pursuer upon that point, and none such has been referred to by Lord Trayner or by the learned Judges who agreed with him; but, on the contrary, I venture to say that it was an exceedingly strong step on the part of an appeal court, without the indication of a single such scintilla of proof against the credibility of a man, to set aside the deliberate finding to the contrary of the Lord Ordinary who saw him when he was examined, and who believed him.

The other point which is coupled with that, and which also adds to the sufficiency of the reasoning, if it were well founded is this—"But if he had got that steamer available as he said for loading between the 5th and 10th of December it is not by any means proved that she could have been loaded before the end of that month;" indicating clearly that in the mind of the learned Judge the opinion prevailed that unless the steamer was not only at or near the loading berth but actually loaded before the expiry of the month, the obligations of the contract so far as concerned these respondents were at an end.

My Lords, I need not say any more. The interlocutor of the Lord Ordinary seems to me to be in all respects well founded, and the judgment of the Second Division appealed from to be without foundation.

LORD HERSCHELL—My Lords, I am entirely of the same opinion, and but that we are differing from the Second Division of the Court of Session I should have added nothing. As it is, I shall add a very few words.

I think the contract is one the construction of which is free from any difficulty, and the only difficulty has arisen, as it seems to me, from a resolute determination to disregard two very important and simple words which are to be found in the contract. The substance of the contract was the sale of a certain number of tons of coal. It was an ordinary contract in that respect of purchase and sale. But the delivery was not contemplated as taking place all at once. The coal was to be delivered from time to time; and in the contract there appeared a statement of the period, roughly speaking, within which it was "expected" on both sides that the delivery was to take place. That is how I paraphrase the language used. It is stated, "expected sailing about March to December." That seems to me to indicate as clearly as anything possibly can that it was not a part of the contract that delivery must be taken in those months, and that there would be no right to delivery of the coal contracted to be sold after those months, but that that period was merely roughly named in order to prevent any unreasonable claim to deliver, on the one hand, or to receive on the other, at a period long distant, and unreasonably distant, from the *termini* that are named.

Further, the contract is not a contract such as is sometimes found for the delivery of so many tons *per mensem*. There is no such provision in this contract. I quite agree that if the whole of the tonnage were demanded at once, and the other contracting party said, "We are not prepared to deliver it all at once, it must be distributed over some time between those months," it may well be that the purchaser would have had no right to make any complaint. It may be, too, that he could not have insisted upon having the whole in December so as to have a right of action if it were not delivered in December. But that is a very different thing from saying that it was a contract for the delivery of 5000 tons of coal in 10 months at 500 tons per month. The contract says nothing of the kind; to insert any such stipulation is to add to the contract, not to interpret it.

That being so, when the month of December was approaching there remained undelivered some 1500 tons. Notice had been given that sailing vessels that would take about 500 tons or so of this quantity had been chartered and were coming forward. That notice was given in the month of November. Then at the end of November the pursuer is in a position to charter a vessel for 1150 tons which would take the residue. Now, it is not necessary to inquire whether he could have insisted upon having the whole of that quantity delivered in the month of December or not. To my mind it is quite immaterial whether or not he was under the impression that unless he supplied a vessel so early in December that she could be loaded before the 31st, he would not be entitled to the coals. The position which the defenders took up was this—On the 29th of November they said—"You are only entitled to a delivery of 500 tons a month; in December therefore you can only claim 500 tons. We are going to load the two vessels which are named; they will take the 500 tons, and you will have no right to any more; it is of no use therefore your talking of chartering a vessel which will take 1150 tons and sending her here; there will be no coals for her when she comes." That seems to me as plainly as possible the meaning both of the telegram of the 29th and of the letter of that date.

Under these circumstances it seems to me that to adopt the language of the Lord Ordinary there was here very clearly a breach of contract on the part of the defenders, and for that breach of contract the damages given seem to me in no way unreasonable.

LORD SHAND—My Lords, I am also of opinion that the judgment of the Lord Ordinary, in which he in the first place laid down the construction of the contract, and in the next place found that there was a breach of that contract, was a sound judgment, and it appears to me that there have been no satisfactory reasons given either in the judgment of the learned Lords of the Second Division or in the argument we have heard to-day, for disturbing that judgment.

In the Divisional Court upon the appeal, Lord Trayner, speaking for himself and the other learned Judges, says—"I have no doubt that the meaning and intention of the parties in making this contract, as well as the legal effect of the contract, was that delivery was to be made and taken in quantities reasonably distributed over the whole period on reasonable notice being given." So far, my Lords, I entirely concur in the view that his Lordship takes of the contract, and it was not disputed in the argument to-day. But when his Lordship goes on to say further—"But it is quite clear and was not disputed by the pursuer, that the defenders were under no obligation to deliver any coal except on board of vessels furnished by the pursuer and put by him into a berth at which the coals could be loaded, and were not bound to load any coals under this contract after the expiry of the month of December." I agree with your Lordships in holding that that view cannot possibly be successfully maintained.

As has been pointed out by your Lordships, the contract is framed with a certain degree of elasticity in regard to the times at which the loading was to take place. The coals are to be put free on board with an "'expected' sailing about March to December," and I agree in thinking that these words "expected" and "about March to December" were intended to cover cases which might occur in which it might be desirable equally on the part of the purchasers and the sellers of the coals to extend the deliveries even beyond that period. The view which the Inner House took of this matter was that the pursuer could not ask that coals should be loaded after the expiry of the month of December, which practically comes to this, that even if the pursuer had sent a ship to this harbour in the month of October or November, but by reason of the pressure of other traffic those coals could not be got on board even during October or November or December, the contract was at an end in regard to those coals. My Lords, it appears to me that the stipulations of the contract were carefully framed so as to prevent any such conclusion happening.

Then, my Lords, in regard to the breach of the contract, I am equally of the opinion which your Lordships have expressed. It appears to me, as has been said repeatedly in the course of the argument, that the telegrams and letters from the defenders at the end of November practically informed the pursuer that he need not charter or send another ship there, for that another ton of coals would not be delivered beyond that which the ships already in the harbour were ready to take. I cannot conceive any more distinct breach of contract nor a more distinct intimation of a breach of contract. That being so, it is idle to suggest, as has been done, that even in the face of that intimation the pursuer ought to have hired another vessel and sent her to the port. I agree with what fell from my noble and learned friend on the woolsack, that if any such expense had been incurred it would have been thrown away, and upon a claim of damages the pursuer could not possibly have recovered it.

Finally, my Lords, it appears to me that the error in the construction of the contract enters very deeply into what I take to be the mistaken view which has been adopted by the Inner House. My noble and learned friend opposite (Lord Watson) has already noticed the passages at the close of the judgment of Lord Trayner in which he observes that the pursuer had represented that he might have got a vessel to send in time, but failed to get her. That statement by the pursuer which accords with all the probabilities of the case, and which was made immediately in the very first letter after the intimation that the coals would not be delivered, has been rejected on the ground that it had not been proved. I agree with all your Lordships have said on that subject. In the first place, what the

pursuer said was entirely consistent with what was to be expected, and, in the next place, the Lord Ordinary adopted it as the true view having seen the witness for himself. I agree with your Lordships in thinking that under the circumstances it is unwarrantable to reject that testimony.

As to the concluding passage of the judgment, in which it is said that "If he had got that steamer available, as he said, for loading between the 5th and 10th December it is not by any means proved that she could have been loaded before the end of that month," there again on the question of the construction of the contract we find that the Court proceeded on what appears to be an error. It was not necessary that it should be proved that it could have been loaded before the end of the month. It appears to me that it would have been quite sufficient if it had been proved that the vessel had been there before the end of December, although she might have been loaded earlier, and indeed I am not prepared to say that a vessel sent in the month of January would not have been within the terms of this contract, having regard to the elastic expressions which we find in it.

On these grounds, my Lords, concurring with all that has fallen from your Lordship, I agree in thinking that the judgment of the Inner House ought to be reversed.

Lord Davey—My Lords, I cannot agree with the judgment of the Inner House delivered by Lord Trayner, because I think it is founded upon an erroneous view of the evidence given in the case, and also upon an erroneous view of the construction of the documents. Lord Trayner says that the telegram upon which the defenders, the present appellants, rely does not say that "the defenders would give no more coals under the contract." My Lords, it does not say so in words, but I am of opinion that it does say so in substance, and that the true meaning and effect of that telegram is to say, you are not entitled to, and we will not give you, any more coals under the contract than those which are in the course of being loaded on the "Taikun" and the "Elizabeth." The judgment then says—"That vessel (that is the "Danmark") subsequently arrived and got a cargo of coals, but not under the contract, because through no fault of the defenders she could not be loaded in December." Under that statement lies the proposition that the defenders were not bound to load any coals under the contract after the expiration of the month of December. I cannot agree in that construction of the contract; I think it is erroneous.

And, lastly, it appears to me that the judgment is based upon a statement which has been already commented upon, that the pursuer's statement that he had got the offer of a steamer to carry 1150 tons, which he did not charter because of the defenders' telegram of the 29th of November, ought not to be accepted, and that there was no proof that it was true. My Lords, I cannot agree either in that view of the evidence.

My Lords, I entirely concur in what your Lordships have said as to the view taken by the Lord Ordinary of this case. I do not think it necessary to add anything to the reasons which have already been given, nor indeed should I have thought it necessary to say anything at all in this case had we not been differing from the judgment of the Inner House delivered by Lord Trayner.

Ordered "that the judgment of the Lord Ordinary be restored, and that the respondents do pay to the appellants the costs both here and below, and that the money already paid in respect of the costs below be repaid."

Counsel for the Pursuer and Appellant—J. B. Balfour, Q.C.—Glegg—Nield. Agents—Armitage & Strouts, for Galloway & Davidson, S.S.C.

Counsel for Defenders and Respondents—Joseph Walton, Q.C.—Salvesen. Agents—Thomas Cooper & Co., for Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, May 12.

(Before the Lord Chancellor (Halsbury), Lord Watson, Lord Herschell, and Lord Davey.)

J. & G. PATON *v.* CLYDESDALE BANK, LIMITED.

(*Ante*, vol. xxxiii. p. 22, and 23 R. p. 38.)

Cautioner—Representations as to Credit—Fraud—Mercantile Law Amendment Act 1856 (19 *and* 20 *Vict. cap.* 60), *sec.* 6.

Representations, otherwise falling within sec. 6 of the Mercantile Law Amendment Act 1856, are not excluded from the operation of that section by the fact that the person making them does so fraudulently and with the ulterior purpose of benefit to himself.

In an action of damages against a bank, and against S., the agent of the bank, the pursuers founded upon representations alleged to have been fraudulently made to them by S. for the purpose, and with the effect, of inducing them to sign bills for the accommodation of the firm of D., R., & Co. The pursuers alleged that these representations were made by S. in order to enable the bank to apply the bills so procured in reduction of an overdraft which was then due to it by the firm of D., R., & Co. The representations, which it was admitted were made verbally, were (1) that D., R., & Co. were in a sound condition financially and only required temporary accommodation; (2) that the sum due by them to the bank was very trifling; (3) that D., R., & Co. had made up the losses which they had previously sustained through the failure of a certain firm, by fortunate speculations; (4) that no portion of the proceeds of any acceptances by the pursuers would be