non-arrival at the port of loading are excluded, though whether the defenders would get merchants to hire the ships on such terms is another matter. Here, however, there is no such clause; and in the absence of it the Lord Ordinary has held that a claim for damages is not excluded by the clause as it stands, seeing that when read in connection with the opening words of the charter it imports in his view an absolute obligation to have the ship at Leith on 10th March at latest.

I think the question so raised is one of some difficulty, and I prefer the alternative case which was made for the pursuers, and which in my view affords the true solution of this dispute.

The contract must be read as a whole in order to see exactly what obligations it lays upon the shipowners according to its terms. The ship is described as "now trading;" and as the voyages were apparently confined to home ports, there could be no difficulty in forecasting the probable day of her arrival at the port of loading, which was Leith. Accordingly the contract declares that she is "expected ready to load about 3rd March"; and the owners undertake that she shall with all convenient speed sail and proceed to Leith, and there load as customary. The defenders dwell on the expression "expected ready to load about 3rd March," as if it left everything open, with the result that the charter is absolutely indefinite as to time, in the important matter of the commencement of loading. I do not say that the words amount to an undertaking that she will be ready to load on 3rd March, or even about 3rd March. But touching as they do a matter within the shipowner's own knowledge and control, they at least import in my opinion an assurance that the vessel was at the time in such a position that she might reasonably be expected to be in Leith ready to load by the day named. Now, although that assurance was well founded at the time it was made, and although the ship might with all convenient speed have proceeded to Leith in ample time, the defenders deliberately put it out of their power to fulfil the contract. If for any reason the "Alice" was not available, they had the option of substituting a sister ship. But as regards each of them it appears that the defenders interposed a new charter in such a way as to make it impossible for them to fulfil their contract with the pursuers with either ship. That of itself seems to me sufficient to infer liability in damages.

The Court adhered.

Counsel for Pursuers (Respondents)—Solicitor-General (Ure, K.C.)—Grainger Stewart. Agent—W. & F. Haldane, W.S.

Counsel for Defenders (Reclaimers)—Morison, K.C.—J. G. Jameson. Agents—Boyd, Jameson, & Young, W.S.

Friday, May 31.

SECOND DIVISION.

[Lord Dundas, Ordinary.

PHILP & COMPANY *v.* KNOBLAUCH.

Contract—Offer—Acceptance—Terms of a Letter which was held to Constitute an Offer—Terms of a Telegram which was held to Accept that Offer.

Where defender wrote, "I am offering to-day Plate linseed for January/February shipment to Leith, and have pleasure in quoting you 100 tons at 41/3, usual Plate terms. I shall be glad to hear if you are buyers, and await your esteemed reply," and pursuers telegraphed in reply "Accept hundred January/February Plate 41/3 Leith, per steamer Leith," *held* (*reversing* the Lord Ordinary, Dundas) that the letter did not merely give information of the price quoted, but was an offer to sell, and that the telegram in reply accepted this offer and concluded the contract.

Harvey v. *Facey* [1893], A.C., 552, *distinguished.*

Alexander Philp & Company, carrying on business at Oil Mills, Lower Largo, Fife, and Alexander Philp, the sole partner of the said firm, raised an action against Hugo Knoblauch, Baltic Street, Leith, in which they sought decree for £94, 4s. 7d., with interest thereon at 5 per cent. that sum being as they averred the difference between the price at which the defenders contracted to sell them 100 tons of Plate linseed, and the market price on 5th January when they received notice that the defender declined to perform the alleged contract

The correspondence between the parties was as follows:—

1. Letter, Defender to Pursuers.

"Leith, 28th December 1905.

"Dear Sirs,—I am offering to-day Plate linseed for January/February shipment to Leith, and have pleasure in quoting you 100 tons at 41/3, usual Plate terms. I shall be glad to hear if you are buyers, and await your esteemed reply.—Yours truly,

"HUGO KNOBLAUCH.

2. Telegram, Pursuers to Defender.

"29th December 1905.

"Accept hundred January/February Plate 41/3 Leith, per steamer Leith.

"PHILP.

3. Telegram, Defender to Pursuers.

"29th December 1905.

"Sorry 41/3 now useless; sellers ask to-day 42/6. "KNOBLAUCH.

4. Letter, Defender to Pursuers.

"Leith, 29th December 1905.

"Dear Sirs,—I wrote you yesterday quoting 100 tons Plate linseed for January/February shipment to Leith at 41/3, usual Plate terms, and I am much obliged for your wire to-day *accepting* 100 tons. However, sellers to-day ask 42/6, and I wired you as follows:—Sorry 41/3 now useless; sellers ask to-day 42/6.—Yours truly,

"HUGO KNOBLAUCH.

5. Letter, Pursuers to Defender.

"Largo, 29th Dec. 1905.

"Dear Sir,—Your favour of yesterday came duly to hand, and this forenoon we wired you as per enclosed copy, thus buying from you 100 tons Plate linseed January/February steamer shipment usual contract.—Yours truly,

"ALEX. PHILP & Co.

5a. Letter, Pursuers to Defender.

"Lower Largo,

"30th December 1905.

"Dear Sir,—We are in receipt of yours of yesterday, also wire. In yours of 28th you offer us 100 tons Plate seed at 41/3, which we accepted as soon as we received your letter yesterday morning, and now you wire and write saying 41/3 useless, and ask 42/6. We cannot understand this at all. We bought seed from you and must look for delivery.—Yours truly,

"*p.* ALEX. PHILP & Co.,

"W. A. B.

6. Letter, Defender to Pursuers.

"2nd January 1906.

"Dear Sirs,—I duly received your favour of 30th ult. and have noted contents. With regard to mine of 28th ult. I only quoted you the parcel of linseed and did not make you a firm offer of it as you seem to have understood. Had I wished to make you a firm offer I would have distinctly stated it and I am sorry you should have misunderstood my memo.—Yours truly,

"HUGO KNOBLAUCH."

The defender in his answers stated—"Explained that the phrase 'on the usual Plate terms' in the defender's letter of 28th December, founded on by the pursuers, means, as the pursuers well knew, and as it is known in the oil seed trade customarily to mean, the terms of a recognised and uniform La Plata linseed contract drawn up by the Incorporated Oil Seed Association. The said form of contract is a printed document, which is well known among those who deal in oil seed, and a copy of it is herewith produced. If any contract was entered into by the defender with the pursuers, which the defender denies, it incorporated the terms of said La Plata linseed form of contract. By article 13 of said contract it is provided that 'all disputes from time to time arising out of this contract, including any question of law appearing in the proceedings . . . shall be referred to arbitration according to the rules endorsed on this contract.'"

To this the pursuers replied—"The pursuers are and have all along been willing to accept from the defender a contract note in the terms usual in the Plate oil trade, and to refer to arbitration any dispute arising out of such contract in terms thereof. Explained that the defender has never offered to execute any such contract note in favour of the pursuers."

The pursuers pleaded—"(1) The defender being in breach of his contract with the pursuers is liable to them in damages. (2) The sum sued for being the difference between the contract price of the said seed and the market price on the day of breach, the pursuers are entitled to decree therefor, with expenses."

The defender pleaded, *inter alia*,—"(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. . . . (3) No contract having been entered into by the defender with the pursuers he is entitled to absolvitor. (4) *Esto* that a contract was concluded between the parties, the action is barred by the arbitration provisions of the La Plata linseed contract."

On 15th June 1906 the Lord Ordinary (DUNDAS) sustained the defenders' first and third pleas-in-law, and assoilzied them.

Opinion.—"This case raises for decision a very short and sharp point, which is not without difficulty, and is to a considerable extent a question of impression. The matter involved is the construction of the defenders' letter to the pursuers, dated 28th December 1905. The pursuers aver that by that letter 'the defender offered to sell to the pursuers 100 tons Plate linseed for January/February shipment to Leith, at the price of 41s. 3d. per quarter.' This is not, in my judgment, the proper construction of the letter. If it were so it would not, I think, be easy to affirm within what period the offer, if not recalled, might be accepted by the pursuers—a very important matter, because, as the facts of the case indicate, the price of Plate linseed is liable to considerable fluctuation. The defender had apparently a call upon such linseed, which he was entitled to sell. I read his letter as amounting to no more than an intimation to the pursuers of this fact; an inquiry whether they were buyers of Plate linseed; an expression of willingness to sell to them up to 100 tons, and a quotation of the price at which it stood on the day of writing for their guidance. If this is the correct construction of the letter, it falls short, though perhaps not very far short, of a definite offer, to be closed by acceptance, to sell 100 tons at 41s. 3d. per quarter. In the dealings of the commercial world I think that letters or telegrams which are said to import a concluded contract must be construed upon their terms, according to the fair and natural meaning of the language employed; and that it is not legitimate to infer, if it is not sufficiently expressed, an offer on the one hand or an acceptance on the other. In this connection the case of *Harvey* v. *Facey*, 1893, App. Cas. 552 is interesting and suggestive. In my opinion the defender is entitled to have his first and third pleas-in-law sustained, and to be assoilzied with expenses."

The pursuers reclaimed, and argued—The defenders' letter of 28th December was a firm offer of a specified quantity of linseed at a specified price, and the pursuer's telegram of 29th December, sent as soon as possible in reply, and confirmed by letter the same day, accepted that offer. That there was an offer was shown by the naming of a specified quantity; had it been a mere quotation no quantity would have been specified. Again in a mere quotation there was no need for the pronoun "you." In *Harvey* v. *Facey* [1893], A.C. 552, the telegram founded on as an offer only answered one of the two questions asked

by the telegram of inquiry, *i.e.*, though stating lowest price, it did not state willingness to sell to the inquirers.

Argued for the defender (respondent)—(1) "I am offering," meant that defender on that particular day had under his control the quantity of linseed mentioned. "Quoting you" meant telling you the quotation. There was here as little of an offer as there was in *Harvey* v. *Facey* (*cit. supra*). (2) In any case there was no acceptance even assuming an offer, for there was no acceptance in pursuer's telegram of 29th December of the condition "on usual Plate terms," which *inter alia* involved an agreement to arbitrate; as for the pursuer's letter of 29th December, which did mention usual Plate terms, it was not received till after the dispatch of the telegram saying "41s. 3d. now useless." The acceptance of the condition "on usual Plate terms" could not be implied any more than the willingness to sell to the inquirers could be implied in *Harvey* v. *Facey* (*cit. supra*).

LORD JUSTICE-CLERK—I am sorry to differ from the Lord Ordinary, who has carefully considered the case, but I am of opinion that the Lord Ordinary's interlocutor is erroneous. This first letter of 28th December 1905 is not a letter merely indicating that the defender had certain goods at his disposal, and would be glad to enter into negotiations with regard to them, but stated that he had "pleasure in quoting you (the pursuers) 100 tons (of linseed) at 41/3d. usual Plate terms," and that he awaited "your esteemed reply." That I think was clearly an offer of the 100 tons at a named price. Now that letter was replied to by a telegram in these terms —"Accept hundred January/February Plate 41/3 Leith *per* steamer Leith." That was a shorthand way of stating their reply, to be followed by a letter. I think the telegram was a very plain acceptance of the 100 tons which the defender had quoted. I think it must be read along with the letter which followed, in which the pursuers say—"We wired you as *per* enclosed copy, thus buying from you 100 tons Plate linseed January/February steamer shipment usual contract." The pursuers' telegram read with their letter is a very plain acceptance of what I consider is the plain offer contained in the defender's letter of 28th December. Without going nicely into the phraseology used, I am distinctly of that opinion. The only difficulty is the question whether the words used by the pursuers involved an acceptance of the usual Plate terms as a condition of the contract. I think they did, when we read the telegram and the letter together. The telegram "accepts" without any reservation on this point, and the letter contains the words "usual contract," which plainly mean the same thing as the words "usual Plate terms" in the offer.

The case of *Harvey* v. *Facey*, [1893], A.C. 552, which was quoted to us, has no bearing. That was a case regarding an alleged purchase and sale of heritable property, not a transaction like this *in re mercatoria*. Further, there was never really an offer. The telegram founded on as an offer was not an offer. It was merely an opening of negotiations. It offered nothing. It was merely an intimation of the lowest price which would be considered if anyone came forward offering it. I have no doubt that decision was right, but it has no bearing here.

LORD STORMONTH DARLING—I agree. I should like, in addition, only to make a single reference to *Harvey* v. *Facey*, [1893] A.C. 552, cited by the Lord Ordinary. In that case a telegram was sent to the owner of a certain property asking whether he was willing to sell it to the persons making the inquiry, and also asking what was the lowest price; and the telegram in reply stated the lowest price for the property, but did not answer the first question. The Privy Council there held (and I do not of course question their judgment in the least) that there was no contract, the ground of their judgment being that there was no answer to or agreement on the question first asked, which had to be express, and could not be implied.

But here I am of opinion that the defender's letter to the pursuers of 28th December and the pursuers' telegram of 29th December in answer thereto contained all the conditions necessary to make a concluded agreement. There was no necessity or reason for the defender in that letter quoting to the pursuers a specific quantity and price unless he was prepared to make a contract with them if buyers, as to which he awaited their reply. That reply could only be received next day and was sent by telegram as soon as possible. I am of opinion that a contract was thereby concluded, and on usual Plate terms. It is true the telegram does not repeat "on usual Plate terms," but I think that pursuers' telegram plainly implied their consent thereto.

LORD LOW—I agree.

LORD ARDWALL—I agree. I think that the letter of 28th December 1905 contains in the first place a general statement that the defender is selling Plate linseed, and then goes on to make an absolutely definite offer of a specific quantity at a specific price. The defender says, "I shall be glad to hear if you are buyers." This does not mean buyers in general but buyers of the quantity specified at the price quoted, otherwise there would be no meaning in the phrase which follows:—"And await your esteemed reply." This offer was accepted by a telegram dated 29th December 1905 sent before the offer was recalled, and the letter and telegram constitute, in my opinion, a concluded contract for the purchase of the linseed in question.

It was maintained by the defender that there was no concluded contract because the telegram did not fully meet the offer in respect that it did not refer to "usual Plate terms," but with regard to a document so plainly *in re mercatoria* as a

telegram I think the acceptance therein contained, which included a specification of the subject sold, the time of delivery, the quantity and the price, was sufficient, and that it implied an acceptance of the ancillary condition "usual Plate terms." But further, the pursuers' letter of 29th December 1905 contained that condition, and, moreover, these "terms" being the invariable conditions for Plate linseed, they must be held to have formed an implied condition of the acceptance unless specially excluded. For these reasons I think it is vain for the defender to plead that there was no concluded contract in respect of the absence in the telegram of a reference to "usual Plate terms."

The Court recalled the interlocutor reclaimed against, repelled the first and third pleas-in-law for the defender, and remitted the cause to the Lord Ordinary to proceed therein.

Counsel for the Pursuers (Reclaimers)—Sandeman—Mair. Agent—James Ayton, S.S.C.

Counsel for the Defender (Respondent)—Dickson, K.C.—Horne. Agents—Beveridge, Sutherland, & Smith, S.S.C.

HOUSE OF LORDS.

Tuesday, June 11.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord James of Hereford, Lord Robertson, and Lord Collins.)

CLIPPENS OIL COMPANY, LIMITED *v.* EDINBURGH AND DISTRICT WATER TRUSTEES.

(In the Court of Session, March 20, 1906, *reported* 43 S.L.R. 540, and 8 F. 731.)

Interdict—Interim Interdict—Subsistence of Interim Interdict.

An interim interdict having been granted upon a Note of suspension and interdict, and the Note having been passed, such interdict subsists until the Note is finally disposed of, *i.e.*, until the Lord Ordinary has pronounced an interlocutor disposing of the Note and the days for reclaiming thereagainst have expired without a reclaiming note being taken, or if a reclaiming note be taken thereagainst, until the Inner House has pronounced judgment upon such reclaiming note.

Process—Appeal—Interdict—Reparation—Damages for Wrongous Interdict—Review by House of Lords of an Award of Damages for Wrongous Interdict.

Where the Court of Session, without setting forth the way in which the figure has been arrived at, has awarded a sum as damages for wrongous interdict, and it does not appear that any wrong principle of law has been applied to the facts of the case, the House of Lords will treat the matter as a jury question and will not disturb the award save on some very strong ground.

Interdict—Reparation—Wrongous Interdict—Damages—Basis on which Damages Assessed.

Per Lord Collins—"In my opinion the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act. On the other hand the victim, being in fact a poor man, is not entitled to claim damages in respect of lost opportunities which he could not have utilised unless he had been rich.

"I think the wrongdoer is not entitled to criticise the course honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after events that another course might have saved loss. The loss he has to pay for is that which has actually followed under such circumstances upon his wrong.

"I am at a loss to see what bearing" malice in obtaining the interdict "has on the actual facts of this case. It is not essential to the cause of action, which rests on the grant of the interdict on caution, and therefore I think it is not a case for exemplary or punitive as distinguished from compensatory damages."

This case is reported *ante ut supra.*

Clippens Oil Company, Limited, the pursuers (reclaimers), appealed to the House of Lords.

The Edinburgh and District Water Trustees, the defenders (reclaimers), also appealed.

At delivering judgment—

LORD CHANCELLOR — This case comes before your Lordships under conditions of exceptional difficulty. Both the Lord Ordinary and the First Division have found in favour of the pursuers. Nor is there any dispute in regard to liability. It is merely a question of damages. But the amount of damages, so far from admitting of precise calculation, depends upon a series of conjectures as to what would or might have happened in the way of working a shale mine if the defenders had not obtained a wrongous interdict to prevent or hinder its being worked. And the learned Judges who heard this case in the Outer and the Inner House have not specifically found one way or another upon a variety of issues of fact in regard to which a Court ought to be satisfied before it can assess damages with accuracy. No doubt these matters were duly weighed in the Courts below, but we have not their conclusions upon all of them, and this House can hardly review with any sense of confidence the great mass of detailed evidence without seeing