amount of her expenses. Counsel referred to the Codifying Act of Sederunt, F, iii, 3. The motion was refused.

LORD PRESIDENT—The verdict in this case was for £35. Under the Codifying Act of Sederunt (F, iii, 3) I am asked—as the Judge who presided at the trial—to certify the case as one in which the successful pursuer is entitled to charge more than one-half of the taxed amount of her expenses. The action was for damages in respect of a road collision, the damages being stated at £120. Having regard to the evidence adduced at the trial I think the case was of a relatively trumpery character for submission to a jury especially in the Court of Session. It raised no question of general interest or importance. I thought the jury's award both just and discriminating, and if it had been as high as £50 I should have thought it over-generous, In these circumstances the case seems to me a typical one for the application of the maximum prescribed by the Act of Sederunt. The Act establishes what may be called a rule of general application, and if a certificate is to be granted, it must be because there is something to take the case out of the ordinary rule. I do not think there is anything of the kind here and therefore I think no certificate ought to be granted.

Counsel for the pursuer thereupon moved the Court to apply the verdict and award half of the expenses as taxed.

Counsel for the defenders objected, and moved that the Court modify the pursuer's expenses to such an amount as would have been recoverable if the action had been raised in the Sheriff Court.

Argued for the defenders—Half expenses being the maximum in a case like the present, it was in the discretion of the Court to grant expenses on a lower scale, or even in certain circumstances none at all. Half expenses would here exceed the amount awarded to the pursuer. Counsel referred to *Jamieson* v. *Hartil* (1898, 25 R. 551, 35 S.L.R. 450, *per* Lords Trayner and Moncreiff), and to the Codifying Act of Sederunt (F, iii, 3).

LORD PRESIDENT—The unsuccessful defenders' motion to the Court is that we should modify the pursuer's expenses to such an amount as would have been recoverable if the action had been raised and concluded in the Sheriff Court. I do not doubt that the provision in the Act of Sederunt, which limits the amount of expenses for which motion can be made by the successful party in cases to which the Act applies, derogates nothing from the power of the Court to modify expenses further, or even in circumstances where the justice of the case demands it to refuse expenses altogether. The particular form of modification proposed is, no doubt, one which it would be within the competency of this Court to adopt, but it is, so far as I am aware, without sanction in practice. Apart, however, from any question with regard to form, I do not see anything in the circumstances of the case to take it out of the category to which the provisions of the Act of Sederunt normally apply, and in which the application of the Act of Sederunt is sufficient to do justice. Although the case was a small one and the pursuer recovered only £35 of her claim for £120, she was entitled to come to this Court and have her case tried by jury here.

LORD SKERRINGTON and LORD CULLEN concurred.

The Court refused the defenders' motion and modified the pursuer's expenses to one-half of the taxed amount.

Counsel for the Pursuer—Fraser, K.C.—Walker. Agent—J. M. Gow, Solicitor.

Counsel for the Defenders—Watt, K.C.—Jamieson. Agent—R. S. Rutherford, Solicitor.

---

# HOUSE OF LORDS.

*Friday, July* 14.

(Before Viscount Haldane, Viscount Finlay, Lord Dunedin, and Lord Shaw.)

## FORSLIND *v.* BECHELY-CRUNDALL.

*Contract — Breach — Repudiation — Delay and Evasion Equivalent to Repudiation.*

A B having entered into a contract with a landed proprietor for the purchase of eleven lots of timber growing on his property, on terms that forbade him cutting or removing more than four lots at one time, on 3rd May 1918 sold one of the lots delivered on rail to C D without disclosing to him the above limitation. At the time that the contract of sale to C D was entered into, cutting operations were going on on four lots. The contract with C D provided that the purchase price of £10,000 should be paid to the extent of £5000 forthwith and £5000 when timber to that value had been railed. The purchaser paid the first instalment of £5000, and the seller was proceeding to fell the trees on the lot sold when he was stopped by the proprietor on the ground that he was thus exceeding the four lots to which simultaneous operations were restricted. The purchaser pressed for fulfilment of his contract or return of the instalment, and the seller while endeavouring to obtain the landlord's consent alleged various reasons for not carrying out the contract, such as the state of the roads and unsettled claims which he had against the purchaser. The seller obtained the proprietor's consent in October 1918, but no deliveries were made before April 1919 under various excuses, when the purchaser commenced an action of damages against him for breach of contract. *Held* (*rev.* judgment of the Second Division, *diss.* Viscount Finlay) that the purchaser was entitled to treat the seller as having repudiated the contract in respect that

he had followed a course of conduct which would as its natural result put it out of his power to fulfil his contract when the time came for doing so.

C. A. Forslind, timber merchant, West Hartlepool, *pursuer*, brought an action against G. E. B. Becheley-Crundall, Drumtochty Castle, Auchenblae, Kincardineshire, *defender*, in which he craved decree for payment of £85,000 as damages for breach of contract. The defender raised a counter action to recover damages for the pursuer's breach of the same contract, and the two actions were subsequently conjoined. A proof in the conjoined actions was allowed and led.

The following narrative of the *facts* of the case is taken from the opinion of Viscount Haldane:—"Shortly stated, what happened was this. In October 1917 Mr Cobbold, the proprietor of a timber-covered property at Kinloch Rannoch, in Perthshire, entered into an agreement with a firm of Grant, Stevenson, & Company for the sale to them of eleven lots of timber growing on his property for £12,500. The lots contained about 68,916 trees in all, and they varied from lots containing about 32,000 trees down to a lot containing about 380. By the terms of the agreement the wood was sold standing, and the purchasers were to fell and remove it all by 1st September 1922. They were to be free to cut and clear the various lots in any order they thought fit, but having commenced the cutting and removal on any one lot, they were bound to complete this before commencing operations on any other lot, and were not entitled, without the seller's written consent, to carry on cutting or removal operations on more than four lots at one time. The price was to be paid by four equal instalments on 1st January 1918, 1st April 1918, 1st July 1918, and 1st October 1918. Various facilities for their operations were accorded by the agreement to the purchasers. The respondent's interests appear to have been identical, by virtue of his having been a partner or otherwise, with those of Grant, Stevenson, & Company, and he proceeded early in 1918 to offer to sell lot 6 of those purchased, including upwards of 20,000 trees, to the appellant. The latter was a timber merchant at West Hartlepool, who, personally and through a company of which he was managing director, was engaged in supplying timber to shipyards to be used in the construction of ships. On 3rd May of 1918 the negotiation came to fruition, and a contract was entered into contained in two letters dated on that day and the next. The terms of these letters, which contain the contract the subject of this litigation, were as follows:—The appellant wrote—'Dear Sir—I hereby offer to purchase delivered on to rail all the timber in lot 6 of your timber estate at Kinloch Rannoch, Perthshire, the price to be calculated as follows—The sum of £10,000 as representing the value of the timber in the wood, plus 1s. per tree for felling and trimming, and 25s. per ton actual felling' (explained subsequently to be a mistake for drawing) 'and hauling; where railway returns of actual weight are not available the weight shall be calculated at 30 c.f. to the ton. I will pay forthwith the sum of £5000 for and on account of the general purchase, and a like sum of £5000 when timber to the value of £5000 has been railed. I am to have the option, after the trees are felled, to peel and cross-cut the same. Each month I will pay you at the rate of 1s. a tree for all trees felled during the month, and 25s. a ton for all timber loaded on to rail during the month, such monthly payments to be for and on account of the general purchase.' On the next day the respondent replied:—'Rannoch Lot 6. Dear Sir—Your letter of 3rd instant duly received offering a price delivered to rail for above lot, and which offer I hereby accept. Please send me a cheque for £5000 and oblige, and I will at once begin to fell the trees, and make arrangements about cartage to rail. Please note your letter of 3rd should have stated 25s. per ton actual weight "for drawing and hauling to rail," and not "felling and hauling"; no doubt this was an error in drafting the letter on Mr Whitlock's part.' This was in reality a contract which the respondent was not in a position to make. For already more than four timber lots on the landlord's estate were partly cut, but the cutting was not completed. He, however, received the £5000 and instructed one of his local agents, a Mr Miller, on 13th May, to go on with the felling of the timber on lot 6, intimating on the same date to the appellant that he intended to start the felling at once. On the 20th May the landlord's local agent objected on behalf of the proprietor of the property to the cutting of the timber on lot 6, and presently his law agents intimated that this would not be allowed to take place, and a few days later the respondent gave instructions that the cutting must be stopped. It was not, however, until 5th June that the respondent informed the appellant that he was unable to cut the timber on lot 6 because of the landlord's objection. He said that this might delay the cutting for a week or two, but that he would see that the matter was put right and the felling started at the earliest possible moment. The appellant replied that if the respondent had given instructions for lot 6 not to be felled the money paid must be returned. During this month the appellant continued to press the respondent to cut the timber on lot 6, saying that he wished the wood cut while the sap was in the trees, in order to facilitate easier working on the bark. The respondent was endeavouring, but unsuccessfully, to obtain release from his obligation to the landlord not to cut on lot 6 until the lots already being dealt with were cleared. On 17th July the respondent's local agent informed the appellant that the latter could not get the timber on lot 6 for a long time, and suggested his accepting that on a different lot. The appellant pointed out that this indicated a breach of contract, and on 12th August again wrote to the respondent a peremptory letter insisting on the fact. The respondent replied on 19th August admitting that the landlord was still refusing release from the terms of the contract

with him, but adding that this made little difference, because the road and railway facilities were so bad that they would have caused delay even if lot 6 had been cut. The appellant continued to press for the fulfilment of the contract with himself, and threatened to claim damages for breach, and finally instructed his solicitors. On the 16th October the respondent instructed another of his local agents, Mr Simpson, that he desired to get on with the cutting of lot 6, but that no timber was to be delivered from that lot to the appellant until certain accounts due for settlement in respect of some transactions quite independent of the contract in question had been settled. This instruction to withhold delivery was one which was not consistent with the legal duty which the terms of the contract imposed on the respondent. The latter then wrote again to the appellant raising various points as to how the contract was to be executed, among which some related to difficulties arising from the state of the roads and railways. The appellant replied that with these points he had no concern under the terms of the contract, inasmuch as the respondent had undertaken to deliver free on railway trucks. He also said that the delay in putting the timber on the railway was a source of injury to him, as in the wet season timber lying with the bark on deteriorated, and that it was a great loss to him that the felling had not been done during the summer season. In the end of October the respondent succeeding in getting his landlord to withdraw the objection to the cutting on lot 6, and then began to proceed. It is clear that the obligation of the respondent under the contract of 3rd and 4th May 1918 was to deliver the timber cut on to the railway. No doubt the roads to Rannoch and Struan, the only two stations under the circumstances available, were not good roads, and the distances were fourteen and eighteen miles respectively. In the case of the Struan road, moreover, there was a bridge which had not at the time been sufficiently repaired to be fit for engine-hauled traffic. The respondent was entitled to a reasonable time to cut and haul the timber on lot 6, and the appellant was to have an option to peel and cross-cut it on the lot. The time requisite for performance of the respondent's obligations could not in any case have been short. To carry out the contract as regards over 20,000 trees would have required at least the two years which were suggested in the Lord Ordinary's judgment, and perhaps longer."

The pursuer *pleaded* — "The defender having failed to implement his contract with the pursuer as condescended on, and the pursuer having thereby sustained loss and damage to the extent of the sum sued for, the pursuer is entitled to decree as concluded for."

The defender pleaded, *inter alia*—"(2) The defender not being in breach of the said contract is entitled to be assoilzied from the conclusions of the summons."

On 4th June 1920 the Lord Ordinary (SANDS) decerned in favour of the pursuer for repayment by the defender of the sum of £5000 paid to account with interest, and for payment to the pursuer of £2500 in name of damages, and assoilzied the pursuer (Forslind) from the conclusions of the counter-action.

The defender in the principal action (Bechely-Crundall) reclaimed to the Second Division.

On 1st March 1921 the Second Division (LORD JUSTICE-CLERK, LORD DUNDAS, and LORD SALVESEN) recalled the interlocutor of the Lord Ordinary, assoilzied the reclaimer from the conclusions of the summons against him, and in respect that the sum due to him was more than extinguished by the sum of £5000 (with interest) which had been paid to him dismissed his counter-action.

The grounds of their Lordships' opinions, together with the opinion of the Lord Ordinary, sufficiently appear from the judgment of the House of Lords.

The pursuer (Forslind) appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—[*Read by Lord Dunedin*]—I do not think that the law applicable to this case presents much difficulty. The real question appears to me to be one really of fact, depending on the view taken of the action of the respondent in the individual circumstances proved.

[*After the narrative supra*]—But the case made by the appellant is, not that a reasonable time had elapsed so that in this respect there was a breach of contract, but that the conduct of the respondent was such as to evince the intention to make default in the performance of the contract as a whole, in such a fashion that the appellant was entitled to elect to treat it as repudiated *in toto* without waiting for the arrival of the time at which specific implement could in the ordinary course be demanded.

Whether what amounted to such repudiation actually took place is largely a question of fact, to be determined by consideration of the circumstances and of the action of the respondent in these circumstances. It is a question on which the judge who sees the parties and hears their witnesses as well as reads the documents is in the best position for disposing of what is in this sense really a question of individual conduct, for the law on the subject is not obscure. In Scotland as in England it is that the pursuer is dispensed from waiting for the arrival of the stipulated period for performance if the defender has intimated in advance an intention to refuse to perform his obligations under it, and the pursuer elects to treat this as an entire breach and to act on it. If the defender has behaved in such a way that a reasonable person would properly conclude that he does not intend to perform the obligations he has undertaken that is sufficient. The defender's words and the state of his mind is less important than the intention to be gathered from what he does as evidenced by his attitude.

Keeping this principle in view, before considering what took place after the end of October, it is important to see what had taken place up to then. The respondent had

originally failed to disclose to the appellant that he had no title to enter into the contract of May to fell and transport the timber on lot 6. It was not until the end of October that he was in a position to begin to do what he ought to have been able to commence in May. Nor was he entitled to rely on the difficulties of transport which the state of the roads and railways would occasion, for his contract was to deliver on the railway, and it was for him whatever labour and plant might be required to effect this transport as fast as could reasonably be expected. To delay it until the end of October, when it might be expected to be even more difficult in winter weather, was certainly not to act up to the standard of his obligation. Moreover, as I have pointed out, he had on 22nd October instructed his agent not to deliver timber from lot 6 until other and independent current accounts were settled—a course which was unjustifiable in law, and in itself evinced an intention not to carry out his obligations.

In the argument presented for the respondent it was suggested that as an arrangement had in the end been come to with the landlord for permission to cut the timber on lot 6 after the end of October the delays and difficulties up to that date became unimportant. I am unable to accept this view. I think that the Judge who heard the proof was bound to take the record before the end of October into account in estimating the significance of the conduct of the respondent in the period which followed, and I am wholly unable to regard the delay which took place before the end of October as having become immaterial. For one thing the best weather of the season had been lost, partly because the respondent had not been able to provide himself with the title to fell which he ought to have secured before entering into the contract with the appellant—a loss which imposed on him extra diligence.

With these observations I turn to the character of the proceedings before us, and to the events which culminated in their being brought.

The summons in the action was signeted upon the 8th April 1919. The nature of the claim is made evident in the final form of the condescendence. It was a claim by the appellant for damages for repudiation by the respondent of the contract of May. To this action the respondent, in addition to putting in answers denying the alleged repudiation, rejoined by commencing a counter-action on 17th October 1919 in which he denied repudiation, and averred that the demands made by the appellant for delivery of the felled trees in full lengths were impossible of fulfilment, that he had commenced to deliver the timber within a reasonable time, and that the appellant had wrongly refused to accept delivery. On these grounds the respondent himself claimed damages for breach of contract.

If the conclusion is once arrived at that the appellant was entitled in the circumstances proved to repudiate the contract as rendered impracticable of fulfilment, that disposes of the respondent's counter-action, for no deliveries at all were rendered to the appellant under his contract until after the 8th of April, when he commenced his proceedings for damages for the repudiation which he then alleged to have been the outcome of the respondent's action. It is further stated at the Bar by the learned counsel for the appellant that if he is justified in his contention that repudiation by the respondent took place, no question is to be raised about the amount of the damages awarded as found by the Lord Ordinary's judgment in respect of that repudiation. The primary question before us is therefore whether the appellant was entitled to treat the respondent as having repudiated, regard being had to what took place after the end of October. In order to establish such a repudiation it was not necessary for the appellant to prove any express or even conscious intention on the respondent's part. It was enough if it could be shown that the latter had adopted and was following a course of conduct which would as its natural result put it out of his power to fulfil his contract when the time came for doing so. For if the appellant found that the respondent was acting thus he was entitled to take the conduct of the latter as the intimation of an intention.

I have already stated that no timber was tendered under the contract to the appellant before he commenced his action on 8th April 1919, and this notwithstanding that the appellant had paid down £5000 on its execution, and bound himself to pay £5000 more as soon as timber of that value had been put on the railway. The respondent had also refused to make deliveries until the appellant's firm had paid accounts relating to transactions altogether outside the contract. Moreover, the respondent had taken up the attitude that the appellant was not entitled to have the trees cut and delivered in full lengths. The appellant had secured in the letter of 3rd May an option as the trees were felled to peel and cross-cut them if he chose, but the contract really gave him the right to call for felling and delivery of the full length timber. In the denial of this right on the part of the appellant the respondent persisted until just before the action was begun, when he suggested that the right did not exist, and that instead of the appellant continuing to press for fulfilment they had better agree to cancel the contract.

It is clear from the correspondence that the appellant only abstained from pressing the respondent to carry out his undertaking under the contract even more strongly than he did because he was informed by the respondent that being now free to do so he would fell the timber on lot 6 and deliver it to the railway with expedition. There was no such expedition. The record of the operations of the respondent from the end of October until the commencement of the action is a record of nothing effectively done. No doubt the state of the weather and of the roads occasioned difficulties. But the respondent was cutting and delivering other timber in the neighbourhood along these very roads through this very time.

The appellant was constantly pressing for deliveries from lot 6, and the respondent was as constantly putting forward excuses for not accomplishing what he had bound himself to do. So the matter went on through the winter and till late in the spring.

Having considered the letters, and having the evidence of the parties and their witnesses before him, Lord Sands, the Lord Ordinary who tried the action, formed this opinion. He said in his judgment that the justification of the appellant in declaring the contract repudiated by the respondent lay rather in the attitude than in the action or inaction of the respondent. The latter, he observes, "had misled the appellant by non-disclosure when the contract was entered into; he was in breach of his contract in the summer of 1918; although the contract was nearly a year old and £5000 had been paid down at its inception, no timber had been delivered. The defender delayed and evaded and made counter-proposals when called on to proceed with the contract according to its terms. He disputed pursuer's contention that he was entitled to delivery without cross-cutting, promised a definite reply, and sent none."

On a review of all the circumstances the Lord Ordinary, for the reasons indicated, found that it must be inferred from the conduct of the respondent that he had repudiated the contract within the meaning of the principle I have referred to earlier. I am not myself disposed to dissent from a view for which I think there was full justification. Both as to the facts and as to the law I find myself in agreement with the learned Judge. In the Inner House the Second Division took a different view and reversed the Lord Ordinary's interlocutor. In this he had ordered the respondent to repay the original £5000 with interest, and also to pay £2500 as damages. He had in addition assoilzied the appellant from the conclusions of the respondent's counter-action. The Second Division reversed this and assoilzied the respondent from the conclusions of the action against him, but dismissed his counter-action, not on the ground that there had been no breach of contract by the appellant, but because they held that his amount of damages proved was extinguished by the £5000 originally paid by him on account of the contract.

The ground taken by the Lord Justice-Clerk was that the appellant could not be taken to have established that the respondent had ever intimated an intention to rescind or had in fact rescinded. He thought that the respondent professed himself anxious to keep the contract alive notwithstanding a possible claim for damages. But the real question was not what the respondent said but what he did, and the inference which the appellant was entitled to draw. I cannot but think that the Lord Ordinary was justified in holding that the conduct of the respondent was such as to afford amply sufficient reason for the appellant drawing the inference that the person with whom he had contracted was not seriously setting himself to comply with his obligations. Lord Dundas held that the real question was whether the conduct of the respondent amounted to a renunciation of the contract as a whole or absolute refusal to perform it. He thought that the onus of establishing this was a very heavy one and that the appellant had failed to discharge it. He criticises the Lord Ordinary's reference to the "attitude" of the respondent rather than his action or inaction. But I do not understand this phrase to mean more than that the Lord Ordinary, who had before him the whole of the evidence, took the view that the conduct of the respondent could not be severed into isolated elements, but must be looked at in the light of the spirit and motives that appeared to pervade it. Lord Salvesen took a similar view to Lord Dundas. He thought that the delay having been occasioned by circumstances over which the respondent had no control could not be evidence of an intention to repudiate. But the delay was the fault of the respondent, and the source of that fault he had from the beginning failed to disclose to the appellant. The intention to carry the contract out proved in the end to be an intention to carry out what could not have been a compliance with the terms of the contract as it was entered into. Everything in such a case as this turns on the case presented as an entirety and judged as an entirety. I think the conclusion come to by the Judge of first instance was more in accordance with the record established than in accordance with that of the Second Division.

For these reasons I think that we ought to recal the interlocutor of the Second Division and to restore that of the Lord Ordinary. The appellant should have his costs here and before the Second Division.

VISCOUNT FINLAY—[*Read by Lord Shaw*] —The appellant, a timber merchant, by letters dated 3rd and 4th May 1918, entered into a contract with the respondent for the purchase of all the timber on lot 6 of the respondent's timber estate at Kinloch Rannoch. The price was to be £10,000, as representing the value of the timber, in addition to further sums for felling and trimming and for drawing and hauling, £5000 to be paid forthwith for and on account of the general purchase, and a like sum of £5000 when timber to the value of £5000 had been railed. The appellant to have the option after the trees were felled to peel and cross-cut them, payments to be made each month at the rate of 1s. a tree for all trees felled and 25s. a ton for all timber loaded on to rails during the month. The appellant paid the first £5000 to the respondent on the 9th May.

No part of the timber has been delivered. On the 8th April 1919 the appellant brought an action in respect of the non-delivery. The pleadings have, by consent of all parties, been treated as claiming by amendment that the appellant was entitled to treat the contract as rescinded owing to the respondent's failure to implement the contract.

A cross action was brought by the respon-

dent on the 17th October 1919, claiming damages in respect of the appellant's failing to take delivery of the timber.

The cases came on for trial before Lord Sands, who decided in favour of the appellant in both actions and ordered the respondent to repay to the appellant, with interest, the £5000 which had been paid, and a further sum of £2500 as damages for breach of contract.

By decree of the Second Division this decision was reversed, and the respondent was assoilzied in the first action and the cross action was dismissed.

The only question raised in this appeal is whether the appellant was entitled to rescind the contract and did rescind it. The appellant asks for the restoration of the decision of the Lord Ordinary, but there was no appeal against the dismissal of the cross action.

The timber to which the contract relates was growing on the estate of Mr Cobbold at Kinloch Rannoch, being lot 6 of the timber there, all of which had been purchased by the respondent from Mr Cobbold, the proprietor.

In May 1918 the respondent proposed to begin cutting the timber on lot 6, but was stopped by his vendor Mr Cobbold, on the ground that such cutting would be an infraction by the respondent of his contract with Mr Cobbold, which required that other lots should be completed before lot 6 was done.

In the contract between the appellant and the respondent no definite date was given for delivery of the timber on lot 6. It follows that the respondent was bound to make delivery within a reasonable time, which of course involved setting to work upon lot 6 with reasonable promptitude as between himself and the appellant. This the respondent was disabled from doing by reason of his contract with Cobbold, and the respondent was thereby clearly in breach of his contract with the appellant.

A long correspondence ensued, running over the months of May, June, July, August, September, and October 1918. The appellant demanded that the cutting of lot 6 should be proceeded with, but it was not till 28th October that the difficulty with Cobbold was adjusted and the cutting begun.

I cannot doubt that if the appellant had asserted his right to rescind he might have done so up to the middle of October. But he did not assert any such right, and it is clear that any right to rescind in spite of the delay up to the 28th October was waived by the appellant. It was, however, urged that the respondent's delay and breach of contract at this stage are not wholly irrelevant to the present action, as the fact that so much time had been lost by the respondent's fault made it all the more incumbent upon him to proceed with all diligence when the difficulty owing to the proprietor's veto was at last removed. But the question for decision on this appeal is whether the respondent's conduct after October 1918 amounted to a refusal to perform the contract which would justify rescission by the appellant.

The law bearing upon this point has been clearly settled by a series of decisions of which *Freeth* v. *Burr* (1874, L.R., 9 C.P. 208) and the *Mersey Steel and Iron Company's* case (1884, 9 App. Cas. 434, pp. 438, 439, and 446) are the most important. If one of the parties to a contract either in express terms or by conduct leads the other party to the reasonable conclusion that he does not mean to carry out the contract, this amounts to a repudiation which will justify the other in treating the contract as at an end and claiming damages on that footing without waiting for the time when by the contract performance was to have taken place.

What your Lordships have in the present case to determine is whether in fact the respondent's conduct after October 1918 amounted to a repudiation of the contract of the 3rd and 4th May 1918.

One point made by the respondent was that owing to the state of the roads in the Rannoch district delivery was impossible during the months between October 1918 and April 1919. Lot 6 was situated about half-way between Struan Station on the Highland Railway and Rannoch Station on the West Highland Railway, being some fifteen miles distant from each. A bridge on the road to Struan was in bad condition and would not bear the passage of the traction engines required for the transport of long poles, and the Struan Station was not adapted for the handling of timber except in short lengths. Timber of all lengths might have been put on board at Rannoch Station, though there would have been some delay owing to the weather. I do not think that the respondent has established that the winter season made delivery during these months impossible. The whole of the timber of lot 6 could not have been despatched by the beginning of April 1919, but there was no total interruption by the respondent.

The respondent while giving to his agent at Rannoch instructions to cut the timber on lot 6, had told him not to deliver any of it to the appellant except on payment of sums due from the appellant on other accounts. These instructions were not communicated to the appellant, and I do not think that these instructions alone, although not legally justifiable, could have been treated as amounting to a repudiation of the contract, and indeed I do not think that the appellant relied upon such instructions taken by themselves as amounting to such repudiation.

There was another point which was insisted upon by the respondent as to the effect of the contract, on which, I think, he was in the wrong. The letter of 3rd May 1918 contained the following words:— "I" (Forslind) "am to have the option after the trees are felled to peel and cross-cut the same." The appellant elected to take delivery of the trees in full lengths and not to have any cross-cutting. It was contended for the respondent that in taking up this position the appellant acted unreasonably, but I think he was within his rights. The contract clearly gave the appellant the option as to cross-cutting, and I do not think it is possible to construe

it in the sense on which the respondent insisted. If the contract gave the appellant the right to the full lengths in all cases, it is not relevant to inquire whether insisting on this in all cases was or was not reasonable. The question, and the only question, in the case is, whether the conduct of the respondent as appearing in the correspondence between October 1918 and April 1919 in connection with the evidence can be properly treated as amounting to a refusal by the respondent to perform the contract. If there was such a refusal it would amount to a repudiation.

The correspondence extends over the months of November and December 1918 and January and February 1919. The letters are numerous and have been read and commented upon at great length. Upon these letters and the evidence I am of opinion that the Judges of the Second Division were right in their decision that there was no repudiation of the contract by the respondent.

I agree with the observation made by the Lord Ordinary that it is plain from the correspondence in 1919 "that by this time neither party was enamoured of the contract." He says—"If pursuer had justification it was in the attitude, not in the action or inaction of the defender." I share the difficulty which was expressed by the Judges in the Second Division as to the meaning to be attached to this expression in the Lord Ordinary's judgment. In order to establish the repudiation it is essential that the appellant should make out that something clearly amounting to repudiation of the contract was done or said by the respondent.

The Lord Ordinary, after reviewing the correspondence, sums up his conclusion as follows:—"In ordinary circumstances a party to a contract must assume that the other party will carry it out according to its terms. He is not entitled to demand a fresh undertaking or to break off the contract merely because he is suspicious of the other party's intention or ability to carry it out. But in the present case there were other elements present. Defender had misled pursuer by non-disclosure when the contract was entered into; he was in breach of his contract in the summer of 1918; although the contract was nearly a year old and £5000 had been paid down at its inception no timber had been delivered. The defender delayed and evaded and made counter-proposals when called upon to proceed with the contract according to its terms. He disputed pursuer's contention that he was entitled to delivery without cross-cutting, promised a definite reply, and sent none. In these circumstances, having regard to the nature of pursuer's business, and to the necessity of ordering his arrangements and commitments, I am of opinion that pursuer was justified in April 1919 in rescinding the contract."

It is admitted on all hands that repudiation may be shown by conduct, but I fail to find in the judgment of the Lord Ordinary any clear indication of what it was which in his opinion constituted conduct amounting to repudiation.

In the Inner House the Lord Justice-Clerk said—"Early in 1919 I think both parties would have been quite pleased to have got rid of the contract if they could have agreed on the terms, and various proposals were made with a view of reaching this result." In this sentence the Lord Justice-Clerk appears to me to have correctly summed up the effect of the correspondence and evidence. The respondent was unable to agree to the terms proposed by the appellant, but there was nothing in this refusal to justify the contention that he had repudiated the contract; on the contrary, he adhered to it. I also agree with the view expressed by the Lord Justice-Clerk in the following passage of his judgment:—"In my opinion the buyer has not made out that the seller had ever intimated an intention to rescind the contract, which is the case averred by the buyer, nor had the seller, in fact, ever abandoned or rescinded that contract. On the contrary, down to a date even after the buyer's action was raised, the seller's attitude was that he recognised that the contract was a binding and subsisting one unless the parties mutually agreed otherwise."

Lord Dundas in his judgment says with great force—"It is not, I think, without significance that when the action was brought into Court the pursuer's averment was simply that the defender had refused to implement the contract; the statements that he had no intention of doing so and had shown by his conduct that he repudiated it being only added at adjustment of the record; while the sole plea-in-law, though it may be read in a sense wide enough to cover the case now made, seems better adapted to that originally averred."

I entirely concur in Lord Dundas's conclusion—"The defender's letters during this period do not, in my judgment, indicate repudiation of the contract, but rather recognition of it, while making (not illegitimately) suggestions for its modification, in the hope that one or the other of these might be accepted by the pursuer."

Lord Salvesen arrived at the same conclusion upon similar grounds.

Mr Macmillan, for the appellant, admitted that the delay up to the end of October had been condoned by the appellant and that his case rested upon what afterwards happened. The fact that time had been lost by the default of the respondent might supply an additional motive for pressing on with the work under the contract, but it has not much bearing upon the question whether the respondent's subsequent conduct amounted to repudiation.

A review of the correspondence after October 1918 appears to me to show that there was nothing to justify the allegation of repudiation put forward by way of amendment at the adjustment of the record, and that the appellant did not treat what had passed as repudiation.

In a letter dated 15th November 1918 the appellant complained of the slowness with which the cutting was proceeding, and

says that it may cause trouble, and in his letter of 18th November he adds—"If it is your intention that the work should be carried on in such a slow manner, I think the best you can do is to proceed for damages." On the 2nd December the appellant says that he will hold the respondent responsible for any loss on account of delay in delivering to rail, and adds—"and the quicker you deliver the better for you." Letters follow with reference to details as to the execution of the contract; they are dated 12th, 13th, 16th, 17th, and 18th December. In this last letter of December 18th the respondent says—"Unfortunately snow is now falling heavily. This will, with the holidays also coming on, naturally impede deliveries. Motor traffic is now suspended until better conditions prevail. Everything points to us having a clear field for deliveries from lot 6 for long poles about February, and short stuff for motors when the turn of year comes, say April 1st." On the 10th January the appellant telegraphs inquiring as to the early delivery of 20 poles of specified length, and the respondent replies on the same day that this can be done only out of the balance of the "Rannoch order."

Up to this date I can see nothing which can be considered as amounting to repudiation.

The next stage of the correspondence is initiated by a letter of 17th January 1919 from the respondent to the appellant, in which he suggests to the appellant some proposals for the modification of the abandoned contracts. On the 20th January the appellant writes that he would not depart from the original contract, and complained that though nearly nine months have elapsed since the purchase of lot No. 6 not a single tree had yet been delivered, and that the respondent had preferred to make deliveries from other lots to get his timber marketed at war prices, and he adds that now that the war is over the respondent would probably begin to deal with lot No. 6. The appellant concludes this letter by saying—"For the time being I wish to have nothing further to say, but will leave this question to you for consideration." On the 22nd January the respondent replies asking the appellant whether he desired to cancel the contract for lot 6, and pressing for payment of sums on other accounts up to 31st December 1918. The respondent adds that he wants to go to Monte Carlo and to put the matter on a working basis before he leaves. On the 27th the appellant writes that the respondent should go to Monte Carlo and that the appellant will not give any trouble during his visit there. There follows a letter from the respondent dated 8th February asking for payment of £4187, which he says is due in respect of delivering contracts up to 31st December 1918, and proposing a transfer of one-half of the acreage of lot 6. To this the appellant replies on the 10th February by a letter written without prejudice, but which was read without objection, proposing an arrangement on the basis of a transfer of the whole of lot 6.

On the 12th February the respondent writes stating his proposals under twelve heads. The appellant by his letter of the 14th says that he will not depart by an item from the conditions under which lot 6 was first sold, but adds that he can only agree that the respondent should cut down and load on to rail as the trees are required by the appellant.

On the 17th February the respondent writes suggesting that they should discuss the matter on the basis of cancelling lot 6 sale altogether and repaying by contra account the £5000 which had been paid, the appellant taking from the respondent on specified terms all the long spruce poles he could supply, and also "butts" and "cuts." There is another letter from the respondent of the same date (17th February) in which he acknowledges receipt of the appellant's letter of the 14th and presses for some definite arrangement, making several proposals.

There follows a letter of the 10th March from the appellant to the respondent, which is as follows:—"I have very carefully gone over your letters of the 12th and 17th ult., and I cannot see any reason why I should depart from the original purchase of lot No. 6. You have undertaken to do the work, that is, the felling, dressing, cutting, and loading on to rail the whole of the trees in lot 6, *without any reservation whatsoever, and this is what I expect you to do, and over such period as I can accept delivery.* Twelve months have now practically expired since you first agreed to commence delivery, but not one tree has yet been delivered. You know I have lost my market, and suffered a heavy loss, and it is now your duty to arrange the delivery to suit my orders; as a matter of fact, I insist upon this. The trees must also be sent on in the full lengths, except under special permission by me or my agent. The dimensions of the trees are too big to convert into props, they can only be used for shipyard work or converted into mining timber, and for this purpose the full lengths of the trees are required up to 5 inches top in redwood and 4 inches top in whitewood. If you like to cross-cut for your own convenience at this diameter, you may do so, on the understanding that the off-cuts up to 2½ inches top are also sent on in separate waggons. You suggest that I should cancel the purchase. Providing I agree to do so, what are you prepared to offer for so doing? If you offer something substantial, I would probably agree to meet you."

There is an interview between the appellant and the respondent on the 20th March, and on the 21st the appellant sent to the respondent a record of the conversation which then took place. It is there stated that the respondent said that the delay in delivery was caused by transport, while the appellant denied this. Towards the end of this record the following sentences occur:—"Mr Crundall further mentioned that he had 4 years in which to cut down and remove the timber, and Mr Forslind told Mr Crundall that in this period he had ample time to deliver the timber on to rail

as orders were supplied to him by Messrs Forslind. Mr Crundall was distinctly told that the contract would not be cancelled, neither would the conditions be altered, but that he had to deliver the full quantity up to 23,000 trees which Mr Crundall's manager told Mr Forslind was in the forest."

On the 24th March the respondent wrote acknowledging the receipt of the "record of the conversation," to which he made one addition and remarked—"This leaves between us, with the exception of a trifling order for beech, only the matter of lot 6 to deal with. There is of course the balance of our accounts for goods delivered up to date outstanding, about £4000, which must now be paid as it has no connection whatever with lot 6 transaction." He adds that he will write further after seeing his solicitors.

The last letter which need be referred to is that of the 2nd April 1919 from the respondent to the appellant—"Further, in reference to my letter of the 24th ult., I have not seen my solicitors, but carefully perused the correspondence and considered the position of matters between us. My desire is equally with yourself as expressed in your letters to eliminate any cause for possible friction between us, and to continue if possible our business relationships with the good feeling that has hitherto existed, and I feel that possibly the best way out of the difficulty is for us to cancel the contract for sale and purchase of lot 6 Rannoch, I repaying to you the £5000 you sent me with interest at 5 per cent. per annum up to date. With regard to the outstanding account amounting to about £4000, or whatever the exact amount is in respect to the deliveries made under other contract, you are to pay, but without interest, this concession to compensate you for any outlay in expense you have been put to—the difference to be adjusted in our account and a credit note sent you. You will note that I make no observations whatever, but make this proposal for your acceptance without prejudice to the rights of either parties. Of course in the event of the cancelment of the present contract, we shall be pleased, if you wish to purchase any goods from our Rannoch office, to deliver same as a fresh bargain, which you can negotiate direct with Mr Walter Simpson at Rannoch, and I am sure he will do all he can for you."

On the 8th April the action was commenced.

The perusal of this correspondence appears to me to demonstrate that there was no repudiation of the contract by the respondent. On the contrary, both parties treated the contract as in force, and were engaged in negotiations for a settlement of the differences which had arisen in carrying it out.

It is to be remarked that in the action as originally framed no case of repudiation by the respondent was set up. The appellant's plea-in-law was—"The defender having failed to implement his contract with the pursuer as condescended on, and the pursuer having thereby sustained loss and damage to the extent of the sum sued for, the pursuer is entitled to decree as concluded for." The claim was for payment of money and damages.

As was pointed out by the Judges in the Second Division, the statement that the respondent had shown by his conduct that he repudiated the contract was only added at the adjustment of the record. The claim on this footing appears to have been an afterthought. Until the amendment was made the pleadings were on the same lines as the correspondence in which the contract was treated as subsisting and damages were claimed for breach.

One other consideration must be referred to. It was, of course, obvious that if the contract was repudiated the £5000 which had been paid under it would have to be accounted for. The respondent, while negotiating for modifications in that contract or for its cancellation on terms to be agreed, abstained from doing or saying anything which would have entailed the return of the £5000 which he had received, and it appears to me to be clear that he had no intention of putting himself under a liability to return this money.

It is clear law that to constitute a repudiation of contract for the purpose of enabling the other party to sue at once for a breach there must be something which amounts unequivocally to a repudiation. In my opinion nothing of the kind has been shown in the present case, and I think that the decision of the Second Division was right and should be affirmed.

LORD DUNEDIN—There is a case decided by this House which has not received the attention it deserves from the fact of its being only reported in the Scotch reports—*Carswell* v. *Collard*, 1893, 20 R. (H.L.) 47, 30 S.L.R. 939. I cite it because I think Lord Chancellor Herschell put the true criterion which is to be applied to the facts in a case where a party to a contract says he is entitled to be free of it owing to repudiation on the other contractor's part. Lord Herschell says—"Of course the question was not what actually influenced the defender, but what effect the conduct of the pursuer would be reasonably calculated to have upon a reasonable person." Applying this criterion to the facts of the present case, I take the same view as that expressed by Lord Haldane, which is also the view of the Lord Ordinary. I think that, if I may use the expression, the respondent assumed such a shilly-shallying attitude in regard to this contract that the appellant was entitled to draw the inference that the respondent did not really mean to fulfil his part of the contract timeously, although he might if he found it suited him go on to deliver timber. Such conduct, I think, amounted to a repudiation which entitled the appellant to say he would no longer be bound. I therefore agree with the motion to be made by my noble and learned friend.

LORD SHAW—I join with the noble Viscount on the Woolsack in agreeing with the judgment of the Lord Ordinary in this case. I am also in substantial concurrence with Lord Haldane in his narrative of the facts. But the facts in a case of the kind

before the House may appear differently according to the legal point of view from which they are judged, and it is the variety of language used in the authorities to express this point of view that appears still productive of some perplexity. I venture accordingly these observations. Where one party to a contract treats the non-performance by the other of the latter's obligations as equivalent to a repudiation of the contract, then (1) the conduct so treated must not be in some incidental or accidental particular, but it must fundamentally affect the fair carrying out of the bargain as a whole; and (2) the burden of proving that it does so rests upon the person putting forward that plea.

I have given every effect to that second proposition in my study of the judgments of the learned Judges of the Second Division, but I cannot say that after full reflection I see any reason to doubt that the judgment of Lord Sands (Lord Ordinary) was correct both in fact and in law.

I desire to add this reference to the decided cases. *Freeth* v. *Burr* (1874, 9 C.P. 208) was referred to in this House with approval in the *Mersey Steel Company* v. *Naylor*, 1884, 9 App. Cas. 434. The language of Lord Coleridge is well known and I do not dissent from it. It may be too late to do that, but I must keep myself right by saying that I incline to go further than did the noble Lord. His language is—"Where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract." In another passage his Lordship says—"The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." But in one view of the matter it may be an extremely difficult task for a person willing to be bound by his contract to enter the region of the mind of the other, and to say, "I gather from what you have done what is your intention, and your intention is to back out of the contract." This may in many cases be plain to see, but there are other cases in which the psychological operations within the mind of a party to a contract may be very difficult to analyse into an intention one way or another. The party may lack decision or clearness of purpose; he may have no gift whatsoever of what may be called business faculty, and he may really have no intention one way or another except to go on procrastinating in the hope that something may turn up which would enable all puzzles to be smoothed out. In such circumstances, with the urgencies of business and of markets necessitating prompt compliance with obligations, I think upon the whole that it is fair, without abandoning the idea underlying Lord Coleridge's language, to take the proper and more workable propositions of Lord Selborne in the *Mersey Steel and Dock* case—"You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other"; and of Lord Herschell in *Carswell* v. *Collard* (1893, 20 R. (H.L.) 47, 30 S.L.R. 939)—"Of course the question was not what actually influenced the defender, but what effect the conduct of the pursuer would be reasonably calculated to have upon a reasonable person." If, in short, A, a party to a contract, acts in such a fashion of ignoring or not complying with his obligations under it, B, the other party is entitled to say "My rights under this contract are being completely ignored and my interests may suffer by non-performance by A of his obligations, and that to such a fundamental and essential extent that I declare he is treating me as if no contract existed which bound him."

The accent of the psychology is not upon the mind of the person who is defiant or heedless of his obligations, but, as Lord Herschell put it, upon the mind of the person who is suffering from the defiance. In business over and over again it occurs, as in my opinion it occurred in the present case, that procrastination is so persistently practised as to make a most serious inroad into the rights of the other party to a contract. There must be a stage when the person suffering from that is entitled to say "This must be brought to end. My efforts have been unavailing, and I declare that you have broken your contract relations with me." These points are in practice points of fact. The question whether the stage has been reached when procrastination or non-performance may be so construed, that is an inference of fact upon which I should be slow to disturb the verdict of a jury or a judge of first instance.

I refer also to the judgment of my noble and learned friend Lord Dunedin in *Wade* v. *Waldon*, 1909 S.C. 571, 46 S.L.R. 359. I entirely agree with him when he says—"It is familiar law and quite well settled by decision that in any contract which contains multifarious stipulations there are some which go so to the root of the contract that a breach of those stipulations entitles the party pleading the breach to declare that the contract is at an end. There are others which do not go to the root of the contract but which are part of the contract, and which would give rise if broken to an action of damages."

And I add that in my own opinion it is abundantly clear in the present case that the breach of contract by the respondent satisfied the first of these propositions.

I agree that the judgment of the Second Division should be reversed and the judgment of the Lord Ordinary reverted to.

Their Lordships reversed the judgment of the Second Division and restored the judgment of the Lord Ordinary with costs.

Counsel for the Appellant—Macmillan, K.C.—Hon. W. Watson, K.C.—Carmont. Agents—Beveridge, Sutherland, & Smith, W.S., Edinburgh—Downing, Middleton, & Lewis, London.

Counsel for the Respondent—Mackay, K.C.—Macintosh. Agents—W. & F. Haldane, W.S., Edinburgh—W. Norris & Company, London.