HOUSE OF LORDS.

Monday, May 8.

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

SANDERSON & SON *v.* ARMOUR & COMPANY, LIMITED.

(In the Court of Session, October 30, 1920, 1921 S.C. 18, 58 S.L.R. 355.)

Contract—Breach—Instalment Contract—Alleged Repudiation—Rescission—Arbitration Clause—Application of Clause—Right of Party Alleged to have Repudiated the Contract to Appeal to Arbitration Clause.

A quantity of American storage eggs of a specified brand were bought, c.i.f., to Glasgow and/or Liverpool to be delivered in three equal instalments, payment to be cash against documents on arrival of the goods. The buyers accepted the documents tendered and paid cash for the first instalment on its arrival. On the arrival of the second instalment they refused to take up the documents and pay the price until they had had an opportunity of examining the eggs. They thereafter brought an action of damages for breach of contract against the sellers, in which they averred that the first instalment was not of the brand specified and was largely unmerchantable, that the sellers had refused to allow them to inspect the second instalment before accepting the documents and paying the price, and that that instalment also was unmerchantable. They further averred that no proper policy of insurance had been tendered. Subsequently the pursuers wrote to the defenders stating that they (the pursuers) rescinded the contract in respect that it had been repudiated by the defenders. The defenders denied repudiation, and in defence to the action pleaded, *inter alia*, that the dispute fell to be referred to arbitration under a clause in the contract which provided—"Any dispute on this contract to be settled by arbitration in the usual way." *Held* (*affirming* the judgment of the First Division) that the pursuers' averments did not disclose that the defenders had repudiated the contract as a whole, to the effect that the contract, including the arbitration clause, was at an end, and accordingly that the action fell to be sisted in order that the dispute might be referred to arbitration.

Examination (*per* Lord Dunedin) of the law of Scotland with regard to clauses of arbitration in contracts and their effects.

Municipal Council of Johannesburg v. *D. Stewart & Company* (1902), *Limited*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20, *distinguished and commented on*.

The case is reported *ante ut supra*.

The pursuers appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—In this case I have had the advantage of reading the judgment about to be delivered by my noble and learned friend Lord Dunedin. In that judgment I concur, and there is nothing I wish to add to its terms.

VISCOUNT FINLAY—This is an appeal from the Court of Session against the affirmance by the First Division of an interlocutor by the Lord Ordinary (Lord Hunter) sisting procedure pending the decision of the matters at issue between the parties by arbitration.

The allegations made in the pleadings by the appellants (pursuers) are as follows:—(1) That they purchased from the defenders 600 cases of eggs to be delivered in equal quantities in September, October, and November 1919 in Glasgow; (2) that the first instalment of 200 cases was delivered and paid for without inspection of the eggs; (3) that the eggs were after delivery discovered to be to a great extent unmerchantable and not in accordance with the contract, and that the pursuers' loss upon them amounted to £566; (4) that a second instalment of 200 cases was offered to the pursuers on the 24th November, and that the pursuers refused to accept or pay for them unless on inspection they were satisfied that the eggs were in accordance with the contract, but the defenders refused inspection, and it is further alleged that the goods were in fact not in accordance with the contract; (5) that the delivery of defective and unmerchantable eggs in the first instalment, and the refusal to permit examination of the second instalment, and the fact that the eggs in it were not in accordance with the contract, together with the defenders' insistence on payment without inspection, amounted to repudiation by them of the contract, and that the pursuers on the 29th November rescinded the contract and notified the defenders that the contract had been rescinded, and that the pursuers held them liable in damages; (6) that the defenders on 17th December further tendered 200 cases of unmerchantable eggs which were rejected by the pursuers; (7) that the pursuers claim the amount of the loss they sustained on the first instalment and a further sum in respect of the loss of profits from the defenders' failure to make proper delivery under the contract.

The defenders in their answer (12) allege that by the terms of the contract all disputes were to be referred to the Arbitration Committee of the Scottish Provision Trade Association, and that that committee made awards in favour of the defenders in respect of the first and second instalments, and that the dispute as to the third instalment falls to be decided by arbitration also.

The pursuers' third plea-in-law is as follows:—"The defenders having repudiated their material obligations under the contract, and the same having been validly rescinded, the pursuers are entitled to

recover the amount of the damages due to them in a court of law."

The defenders' first plea-in-law is—"The action should be dismissed in respect that in terms of the contract any disputes arising thereunder fall to be referred to arbitration."

The question upon the present appeal is whether as was held in the Court of Session the claim ought to be referred to arbitration, or whether it should be entertained in the Court of Session.

By the terms of the contract it was subject to the rules of the Scottish Provision Trade Association, one of which is—"All disputes arising out of contracts subject to these rules shall on demand by either party be referred to the Arbitration Committee of the Association," and further, the last clause of the contract itself is—"Any dispute on this contract to be settled by arbitration in the usual way."

The grounds on which the pursuers contend that the defenders repudiated the contract are stated in condescendence 10—"The delivery of unmerchantable and 'unbranded eggs' at Glasgow by the defenders to the pursuers under the first instalment of the contract, their refusal to permit examination of the second instalment, the tender of unmerchantable and unbranded eggs in implement thereof, the failure to tender policies of insurance therefor, and their insistence that payment should be made on their allocation of a certain number of boxes, the contents of which were unknown and concealed from pursuers at Glasgow, amounted to a repudiation of the said contract by the defenders. On 29th November the pursuers rescinded the said contract, and intimated this to the defenders, and that they held them liable in damages." All these allegations are denied by the defenders in point of fact, and the further question arises whether assuming them to be true they would amount to a repudiation of the contract or would merely give a right to damages.

It was by reason of this alleged "repudiation" that the pursuers contended that their rescission of the contract was valid.

It is clear that all the allegations in condescendence 10 are the subject of dispute on the contract within the meaning of the last clause, and of disputes arising out of a contract subject to the rules of the Scottish Provision Trade Association within the meaning of the first of these rules subject to which the contract was made.

It is also clear that by virtue of the first section of the Arbitration (Scotland) Act 1894 the agreement to refer to the committee of the Association was valid and effectual by the law of Scotland.

In England the jurisdiction of the Courts was not ousted by an agreement for arbitration, and such an agreement could not be pleaded in bar to an action or suit, but by statute—the Common Law Procedure Act 1854, sec. 11, now repealed, and the Arbitration Act 1889 (52 and 53 Vict. cap. 49, sec. 4)—power was conferred upon the Court to stay legal proceedings by any party to a submission to arbitration. The exercise of this power is subject to the discretion of the Court. In Scotland, there is no such discretion. As Lord Watson said in *Hamlyn's* case—"The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to enter into and decide the merits of the case, while it leaves the Court free to entertain the suit and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration from any cause prove abortive the full jurisdiction of the Court will revive to the extent of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine* the proper course is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration."—*Hamlyn & Company* v. *Talisker Distillery*, 1894, 21 R. (H.L.) 25. The defender has a right to such an order whenever an action has been brought by one who is party to an agreement of reference in respect of the subject of the action, as was the case here.

It has, however, been strenuously contended that the decision of this House in the *Johannesburg* case (1909 S.C., H.L., p. 53) shows that the defender in such a case as the present has not the rights in this respect which ordinarily he would have had by the law of Scotland. The appellant asserts that the decision in that case establishes the proposition that if it be averred in the pleadings that the contract containing the clause for reference to arbitration was repudiated by the party seeking to refer, even if that averment be denied by the other party, the right to have the action sisted or referred to arbitration is at an end. In the present case this is averred by the pursuers, the present appellants, but it is denied by the defenders, the respondents. It was urged by the appellants that in such a case the Court must try the question of repudiation and dispose of the action on its merits. I do not think that the *Johannesburg* case establishes any such proposition. That case really turned on a question of English law. The contract provided that it was to be governed by English law. By English law there was no right to have the action stayed on the ground of this submission to arbitration; whether it was to be stayed or not was a matter in the discretion of the Court. The Lord Chancellor said (1909 S.C. (H.L.), p. 54) that even if the subject-matters in dispute fall within the arbitration clauses it would not follow that they must be referred to arbitration, and that the Court is not bound to refer "unless they think it is suitable and in their discretion right to do so." In the pleadings and in the argument of that case it appears to have been admitted that the defenders, who claimed the benefit of the arbitration clauses, had themselves in the most emphatic manner repudiated the contracts in which these agreements to refer were contained. The Lord Chancellor appears to have taken the view that an English court would not give them the benefit of a clause which with all the rest of the contract they

had themselves repudiated. If this be, as I think it is, the true meaning of the latter part of the Lord Chancellor's judgment in the *Johannesburg* case, it is obvious that it has no application to the present case, which falls to be determined by the law of Scotland—and in which repudiation is denied.

The Lord Chancellor also expressed the opinion that the terms of the clauses of reference in that case would not include a total repudiation such as was averred there to have taken place. For the reasons which I have already indicated it appears to me clear that all the circumstances alleged by the pursuers in condescendence 12 in the present case as amounting to repudiation would fall to be determined under the arbitration clause.

The decision of the House of Lords in the *Johannesburg* case has really no application to the case now under consideration. The proposition that the mere allegation by one party of repudiation of the contract by the other deprives the latter of the right to take advantage of an arbitration clause is unreasonable in itself and there is no authority to support it. In the *Johannesburg* case Lord James of Hereford, Lord Atkinson, and Lord Gorell, concurred with the judgment of the Lord Chancellor without adding any observations of their own. Great reliance was placed by the appellants in this appeal upon some expressions in the judgment of Lord Shaw in that case, but these observations must be read by the light of the fact that the repudiation was admitted.

The appellants in the present case relied upon section 11 (2) of the Sale of Goods Act 1893—"In Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages." I cannot see how this helps the appellants. It states the consequences which follow from the failure of the seller to perform any material part of a contract of sale and mentions the right of repudiation as one alternative. But in the present case the question whether there had been such a failure by the sellers is itself in issue, and by the contract of the parties this would be a matter to be decided upon by arbitration by the committee of the Association. The arbitration clauses are in the most general form. The allegations of fact in condescendence 12, and the question whether repudiation can be properly inferred from these facts so far as established, fall precisely within the ambit of the arbitration clauses.

In my opinion this appeal should be dismissed, with costs.

LORD DUNEDIN—On the 14th August 1919 the respondents, who are wholesale provision merchants in Glasgow, entered into a contract with the appellants, who are egg merchants in Leith. The contract ran as follows:—"We have this day sold you the following goods, c.i.f., to Glasgow and/or Liverpool. Subject to the rules and regulations of the Scottish Provision Trade Association so far as they are not varied by or inconsistent with the conditions mentioned below:—

No. of Packages.	Description.	Brand.	Average lbs., about.	Price per cwt. Shippers' Weights.	Shipment (route at Sellers' option) in one or more parcels from the Packing House.
600 (six hundred)	American storage eggs	Armours	3'hd	p.hdd 28/6	About equal quantities September/October/November, in ordinary space, subject to space being available

"*Terms of Payment.*—Cash against documents on arrival of goods."

The rules of the Scottish Provision Trade Association contain, *inter alia*, the following provision:—"*Arbitration Rules.*—1. All disputes arising out of contracts subject to these rules shall on demand by either party be referred to the Arbitration Committee of the Association."

The first instalment of eggs, consisting of 200 cases, arrived in Glasgow per s.s. "Vitellia" early in October 1919. On 10th October 1919 the respondents presented to the appellants the endorsed bill of lading, the appellants thereupon paid the price, £955, 15s. 8d., took delivery of the cases, and forwarded them to their own house of business in Leith. On arrival at Leith the appellants aver that they proceeded to inspect the eggs and discovered that 95 of the cases were in unmarketable condition and had to be destroyed, that the rest of the eggs were damaged and had to be sold at a reduced price. They also aver that the eggs did not conform to contract in respect that they were not Armour's brand but were unbranded eggs. These averments are denied by the respondents, who say that they were Armour's eggs as provided by contract, and that if there was any deterioration, that deterioration must have occurred in transit—a risk which was upon the appellants and not on the respondents. On the 21st November the appellants raised a summons which forms the basis of the present action. The said summons as signeted on 21st November had a conclusion for £566, 15s. 9d., which was said to be the loss occasioned by the 95 cases which had to be destroyed and the impaired value of the remainder. The condescendence annexed to the summons dealt solely with the alleged breach of contract in respect of this first instalment; the summons contained a warrant to arrest on the dependence.

On the 22nd November the s.s. "Crown of Navarre" arrived in Glasgow, containing large quantities of eggs consigned to the respondents. The appellants at once executed arrestments on all the eggs; at the same time the respondents intimated to the appellants that they had appropriated to them 200 cases of the eggs as the second instalment due under the contract, and they tendered the bill of lading, which they were willing to endorse on being paid the price. The appellants, however, who as they say were suspicious as to the eggs, declined to pay without prior inspection. This the respondents refused. A correspondence ensued both as to this attitude

and as to the arrestments. The respondents tendered a guarantee by a bank and requested the arrestments to be loosed. The appellants agreed to loose the arrestments except in so far as they applied to the eggs appropriated to them, but they were not willing to loose the arrestments *in toto*. Both parties persisted in their attitude. Matters were brought to a crisis by the appellants on 29th November writing to the respondents the following letter:—"Dear Sirs—We have received a letter from Messrs Wright, Johnstone, & Mackenzie, from which it appears that Messrs Armour and Co. persist in their attitude towards the deliveries under the contract. They have already delivered a large portion of unmerchantable eggs, and they have now definitely refused our clients' inspection of the balance to be delivered. They have also intimated that our clients are bound to pay the price on presentation of the documents and a notification that certain boxes have arrived at the point of delivery. Our clients are advised that these proceedings are a definite repudiation of Messrs Armour & Co.'s material obligations under the contract. Our clients accordingly rescind the contract as at this date and hold your clients liable in damages for breach.—Yours truly, P. MORISON & SON."

To this the respondents replied as follows:—"Dear Sirs—We are favoured with your letter of the 29th ulto., and note your clients have decided to repudiate their contract. We are communicating your intimation to our clients for their instructions. Meantime we may say we do not understand your statement that our clients have repudiated any of their obligations under the contract. The only repudiation is the one by your clients, of which you now give us intimation, and our clients will hold your clients liable for any damage they may suffer in consequence. In view of the intimation you have now made, we presume you do not intend to make the motion intimated in your letter of 28th ulto., and we shall be obliged if you will give immediate instructions for the recall of the arrestment affecting the 200 cases still attached.—Yours faithfully, WEBSTER, WILL, & CO."

The case now having been called was enrolled on 3rd December, when the Lord Ordinary in respect of the guarantee recalled the arrestments *in toto*. Defences were duly lodged to the action as it originally stood, but the closing of the record was several times continued. Eventually on 24th February 1920 the appellants lodged a minute of amendment of the summons increasing the conclusions by the sum of £1000. The condescendence was amended to include a statement that the contract had been repudiated by the respondents as alleged in the letter above quoted—an averment was added that both the second and the third instalments were, as well as the first, unmarketable and disconform to contract. An additional ground whereon to found repudiation was added in respect that it was alleged that no insurance had been effected and no policy produced by the respondents. Damages were claimed in respect of breach of contract as to the second and third instalments as well as to the first. It ought also to be mentioned that on 9th December the respondents had tendered a policy of insurance and that on the 17th December the third instalment had arrived and had been tendered, but had been refused on the ground that the respondents had already repudiated the contract. The record was then, on the 24th February 1920, closed and the action assumed its present shape.

I have thus minutely detailed the various steps of process because an attempt was made in the course of the address by the learned Lord Advocate which in the interest of the rules of pleading in Scotland I wish to stigmatise as quite illegitimate. He wished us in judging of the attitude of parties as at 29th November 1919 to look at the statements in the record in respect that the summons was signeted on the 21st November 1919. By the older rules of pleading it would have been impossible to amend the conclusions of the summons to the effect of increasing the conclusions by an additional sum. A supplementary action would have been necessary. By the alterations effected by the Codified Act of Sederunt such an amendment was made possible, but when that is done it is clear that the date when the date is of moment must be taken to be the date of the allowance of the amendment and not the date of the original signeting of the summons. In so far therefore as it is of moment, I hold that the attitude of the appellants is defined by the letter of 29th November when the allegation of repudiation on the respondents' part is laid in respect of the grounds there expressed, and those alone. The point as to the non-tender of an insurance policy along with the bill of lading was an obvious afterthought and cannot be taken as the ground for the attitude taken up by the respondents in the letter of 29th November.

Whether the non-tender of the policy would have been a sufficient ground for refusing to pay the price and accept the consignment, or whether the insurance on an open policy at New York as averred by the respondents or the tender of a Lloyd's policy on 9th November would have been a sufficient tender I do not propose, as will be afterwards seen, to decide. In the meantime I revert to the present action as it assumed its final shape at the closing of the record.

The respondents deny the appellants' averments as to the discrepancy to contract and unsaleable character of the various consignments. They table a prejudicial plea in the shape of the clause of arbitration. The Lord Ordinary gave effect to that plea and sisted the action in order that the dispute might be settled by arbitration as provided for in the contract. On a reclaiming note the First Division adhered to the Lord Ordinary's interlocutor and an appeal has now been taken to your Lordships' House. The appellants argue that the clause of arbitration is gone in respect that they allege that the respondents had by breach repudiated the

contract, and contend that this is the effect of the decision in your Lordships' House of the case of *Municipal Council of Johannesburg* v. *Stewart*, 1909 S.C. (H.L.) 53.

Before I examine that case I think it expedient to examine the law of Scotland as to clauses of arbitration in contracts and their effect. This is all the more necessary as the *Johannesburg* case was concerned with a contract in which it was specially provided that the contract should be construed according to the law of England, and it is the fact that the development of arbitration law in relation to the Courts of Justice has not been at all the same in the two countries.

If one of the two parties to a contract alleges that the other is in breach of the contract, which allegation is denied by the other party, it is clear that it would be within the power of the parties to agree to refer this disputed question to arbitration. This would be done by a submission which would in that case be necessarily a separate instrument from the contract itself. But by the law of Scotland it has always been possible for the parties in framing the original contract to insert a clause binding themselves to refer future possible disputes to arbitration. This clause may be of two characters. It may be of a limited character generally known as executory arbitration providing for the adjustment of disputes concerned with the working out of the contract. But it may also be of a universal character, submitting all disputes which may arise either in the carrying out of the contract or in respect of breach of the contract after the actual execution has been finished. Whether the clause is of the one sort or the other is a matter of construction, but of the admissibility of a clause of the larger character there cannot be the slightest doubt. Two authorities may suffice—Lord Rutherfurd Clark in the case of *Mackay* v. *The Parochial Board of Barry*, 10 R. 1046, where the reference clause was, "Should any dispute arise as to the true nature, sufficiency, times, or extent of the work intended to be performed under the specification and drawings, or as to the works having been duly and properly completed, or as the construction of these presents, or as to any matter, claim, or obligation whatever arising out of or in connection with the works, the same shall be submitted and referred to . . . Alexander M'Culloch, C.E. . . ." and the action was raised by the contractor for extras and also for claims disallowed and the employers pleaded the clause—said as follows—"The contracting parties may create a tribunal for settling differences which may occur in the course of executing the works and which has no other function. But of course they may do more and extend it to the decision of any claim which may arise out of the contract." Lord Watson in *Hamlyn & Company* v. *Talisker Distillery*, 21 R. (H.L.) 21, spoke to the same effect—"The law of Scotland has from the earliest times permitted private parties to exclude the merits of any dispute between them from the consideration of the Court by simply naming their arbiter." In an earlier passage he points out that this is not in the strict sense ousting the jurisdiction of the Court. The action may remain, but (I again quote) "when a binding reference is pleaded *in limine* the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration." The clause of reference there was —"Should any dispute arise out of this contract the same to be settled by arbitration by two members of the London Corn Exchange or their umpire in the usual way." At that date, *i.e.*, before the Arbitration (Scotland) Act 1894, a reference to unnamed arbiters would by Scotch law have been invalid. Accordingly the actual controversy in the case turned on whether the contract was English or Scotch, but Lord Watson's remarks which I have quoted were directed to the law of Scotland.

It is the fact that the English common law doctrine—eventually swept away by the Arbitration Act of 1889—that a contract to oust the jurisdiction of the Courts was against public policy and invalid never obtained in Scotland. In the same way the right which in England pertains to the Court under the said Act to apply or not to apply the arbitration clause in its discretion never was the right of the Court in Scotland. If the parties have contracted to arbitrate, to arbitration they must go.

I do not think that it admits of any doubt that the arbitration clause in the present case is of the ample variety which includes every form of dispute. Indeed that was hardly contested by the appellants. Their whole argument rested on the effect of the Sale of Goods Act when applied to the decision in the *Johannesburg* case. Section 11, sub-section 2, of the Sale of Goods Act provides that in Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages. The appellant says, I have averred that you have committed a breach and therefore I treat the contract as repudiated. If it is repudiated, then under the authority of the *Johannesburg* case you cannot plead the clause of arbitration, and inasmuch as any statement by a pursuer must be taken *pro veritate* to the effect of asking a proof, I am entitled to a proof to show you are in breach.

If this is the law it is clear that a general clause of arbitration is of no avail, for all that one party has to do is to aver a breach on the part of the other and then the question whether there has been breach or not will fall to be determined by the Court instead of by that very tribunal which it was the condition of the contract should be invoked instead of the Court, as expressed in the words of Lord Watson already quoted. I therefore turn to the *Johannesburg* case. In that case a Scottish firm had contracted to do electrical work for the municipality of

Johannesburg. The contract contained two additional provisions—one that it was to be construed according to the law of England, and another referring certain disputes to arbitration. The Scottish firm did a certain amount of work, but owing to difficulties they intimated to the municipality that they did not intend any further to carry out the contract. The municipality raised an action of damages against the Scottish firm in the Court of Session in Scotland. The defenders pleaded the arbitration clause. Now the first question that naturally arose was, Did the arbitration clause apply to the breach alleged? The Scottish Court seeing that the contract had to be interpreted according to English law, which to them was a question of fact, ordered a case to be submitted to the English Court to see whether the arbitration clause did or did not apply. But on appeal that judgment was reversed in your Lordships' House and the case remitted to the Court of Session with intimation to allow a proof.

The Lord Chancellor based his judgment on two separate grounds. He said—"If the course of action which is established be that there has been repudiation or a breaking of contract in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clause in either of these contracts." Now that is a decision that the clause in question was one of the limited and not the universal scope. Once that was decided it was clear that there had to be a proof. The Lord Chancellor was entitled to decide it because the clause had to be construed according to English law, and he sitting in this House might say what was the English law, but with the utmost respect I still fail to see how the Scottish Court could have come to that conclusion seeing that they were not entitled to know what the English law was. The moment, however, that you decide that the arbitration clause was of the merely executory order, then *cadit quæstio* when a breach of the whole contract is averred.

The other ground on which the Lord Chancellor goes—viz., that the contract being an English contract the English Court under the arbitration clause might or might not refer the matters falling under these clauses to arbitration in their discretion and therefore the Scottish Court might do the same—need not be here considered as it does not touch the point.

Lord Shaw, who gave the only other opinion, concurred in the view that the clause in question was merely an executory clause. He, however, made one other observation, which has really been the sheet anchor of the appellants' argument. His Lordship said—"It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated."

The argument founded upon the remark of my noble and learned friend is, I think, another instance of the old danger of forgetting that every remark of a judge must be understood *secundum subjectam materiem*. Unless I am greatly mistaken, what was in my noble and learned friend's mind was the fact that there was an admission in the pleadings by the defendants that they had repudiated the contract by giving formal notice that they did not intend to further carry out, and by, in fact, stopping all work. But it is quite another matter to fasten on the word "repudiate" and then because the same word is used in the Sale of Goods Act to apply the dictum to a case where the defender strenuously denies that he has committed any breach. If that is done the whole law of arbitration in Scotland is turned upside-down, which I am sure was far from my noble and learned friend's thought.

This is not the first time that this subject has engaged my earnest attention. In the case of *Hegarty and Kelly* v. *The Cosmopolitan Insurance Corporation*, 1913 S.C. 377, where there was a general clause of arbitration and an action of damages for breach of contract, the defenders pleaded the arbitration clause. The pursuers averred breach of contract and founded on the *Johannesburg* case—a view which was given effect to by the Lord Ordinary. This judgment was reversed. Lord Mackenzie pointed out the distinction which I have just pointed out, namely, that in the *Johannesburg* case there was an admission. I further pointed out that Lord Watson in *Hamlyn's* case quoted with approval the case of *The Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company*, where procedure was sisted to allow of arbitration, and quoted the reference clause in that case—"All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement or the mode of carrying the same into operation"; and I then said what I have now said again, that I did not think that the well-established law of Scotland to the effect that you could have a general arbitration clause which entitled you to go to arbitration instead of to proof in court had been altered by the *Johannesburg* case.

I ought to add that the course taken in the *Caledonian Railway* case was again followed in a well-known case which had the authority of Lord President Inglis, namely, *Levy & Company* v. *Thomsons*, 10 R. 1134, where again a general clause was upheld.

Before closing I should say a single word as to the case of *Jureidini*, [1915] App. Cas. 499. That case has in my view no application, for the simple reason that the clause of reference there was not a reference of all disputes, but only a reference as to the evalution of loss. In other words, the clause was not a clause of the universal sort which we have here.

I think the right view in this case was taken both by the Lord Ordinary and the First Division. I should have been content to concur with them, but as the question turns on the true import of a decision in this House, and as I am aware that the *Johannesburg* case has given rise to great doubts in the Scottish Courts, I have thought it right to go very fully into the

matter. I think that the appeal should be dismissed with costs.

LORD SHAW—I agree with the opinion of my noble and learned friend Lord Dunedin.

The appeal on its own merits would not appear to be sustainable. The facts in a word are these—In a contract of sale, the delivery of goods to extend over a period of time, the parties came seriously to differ. The appellants refused to pay for a certain part delivery without prior inspection of the goods, that prior inspection in their judgment being necessary on account of their dissatisfaction over prior deliveries. The respondents refused this demand for prior inspection, and maintained their right to deliver and to get payment as *per* contract.

Had the question arisen on the instant it would have been beyond question clear that it fell within the following stipulation:—"Disputes arising out of contracts to be referred to arbitration under the rules and regulations of the Scottish Provision Trade Association." Put in a word, however, the appellants' position is this—They construe the respondents' demand as "a definite repudiation of Messrs Armour & Co.'s material obligations under the contract."

Following upon this they present to this House, as they did to the Court of Session, an argument that this so-called "definite repudiation" put an end to the contract altogether, and dispossessed the respondents of the right to the arbitration which the contract contains. To this argument the respondents answer that there is no sort of repudiation of the contract by them, that upon the contrary they stood then, and they stand to-day, upon the contract. If the appellants' view be sound the result would be indeed peculiar. It would be thus open to one party to deprive the other of his rights under a contract by simply accusing that other of having broken it, and thereby of having constructively repudiated it. There is no law for such a position. A case of breach of contract averred on the one hand and denied on the other is the typical case in familiar mercantile bargains such as the present for bringing in an arbitrator to settle the dispute, and not a case for ousting or dispensing with him.

There is no need for a reference to the practice of the law of Scotland further than that given by Lord Dunedin, in whose survey I entirely acquiesce.

But the appellants found the appeal, and found it almost entirely, upon the *Johannesburg* case. That case was in its circumstances very singular and very special. The points of specialty may be thus noted—(1) It was a case not of constructive repudiation but of real repudiation, and it was a case not of repudiation averred and questioned, but of actual and admitted repudiation and rejection by one party to a contract of his obligations under it. These facts were all admitted. They are stated clearly in one sentence of the opinion of Lord Dunedin, then Lord President of the Court of Session—"Nobody," says his Lordship, "can say that the breach was not of the essence of the contract, for as a matter of fact according to the allegation the defenders (Stewart & Company) did not supply proper plant at all, threw up the whole contract, and allowed the town to go into darkness and the tramways to stop."

In the argument of the case before this House no denial was given to that as a substantially accurate statement of the existing facts.

(2) Furthermore, however, the *Johannesburg* case was extremely complex, and the complexity was dealt with in this House in a manner which differed from the view which the Court of Session had been disposed to take, the complexity being here treated as bearing directly upon the issue whether arbitration could in the circumstances be forced upon the parties. In the Court of Session it was thought that the complexity could be fairly easily unravelled although there was arbitration. In this House it was thought that that was not so.

If I may refer to the opinion which I myself delivered I dealt with this topic of complexity in this language—"In the first contract a certain arbitrator in this country was named, in the second an arbitrator in the Transvaal, and in the third no arbitrator at all"; and after alluding to the main and the "running" contracts I say that they "were so interlinked and intermixed as to make it most difficult and in all likelihood impossible to extricate by separate arbitration the rights emerging under the respective contracts. In these circumstances it does not appear to me that either under the law of Scotland or the law of England courts of law are bound by a judicial enforcement of an arbitration clause to place the parties in a situation not only embarrassing but unworkable."

The specialisation of the case was thus very plain. But (3), and finally, it must be kept in view that the *Johannesburg* case was not truly a Scottish case but was an English case—that is to say, it had, *per* the contract terms, to be determined by the law of England, taking into account the English Arbitration Act of the year 1889. Upon that matter the Court of Session not unnaturally thought that its best course was to remit the case to the English Court for determination of the point of law involved. When the case came to the House of Lords that House was, of course—being also an English tribunal—able to do what the Court of Session could not itself have done, *i.e.*, deliver itself upon the point of English law which was the subject of the remit. It did so, and the majority of your Lordships' House held with the Lord Chancellor that there being repudiation—which I take to be repudiation of the broad and admitted kind already referred to—the English Courts would not have held the arbitration clause enforceable. It being thus got rid of, the Scotch Courts were declared to have jurisdiction to determine the dispute.

After reflection after this lapse of time I repeat what I still consider to have been a leading and special feature of the *Johannesburg* case, *i.e.*, admittedly a repudiation *de facto*, and *ex concessu*, a simple defiance by

one party of the obligations which it had entered into with the other. The actual words I used were—"As these averments stand this contract was wholly repudiated. It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated." Had I said—"As these averments with the admissions thereof stand, this contract was wholly repudiated. It does not appear to me to be sound law to permit a person to admit that he has repudiated a contract and then specifically to found upon a term of that contract the repudiation of which he has thus admitted"—then the argument of precedent for this appeal would have been unstateable. Yet any careful reading of the case would show that what was said meant nothing else than what has now been amplified.

LORD SUMNER—[*Read by Lord Dunedin*]—That the Lord Ordinary was right in sisting procedure in this cause pending the decision of the matters at issue between the parties by arbitration I do not doubt, but I must confess to having found some difficulty in reconciling the opinions delivered by the noble and learned Lords who took part in the *Johannesburg* case, as they are reported, with what I understand to be the settled law of Scotland with regard to arbitration. The decision itself that the Court should proceed with that cause presents no difficulty, for the contract being under its terms governed by English law the Court was free and in the view of your Lordships' House was bound to do so. If it be regarded as being really an authority on English law, any observations there made as to the powers of the Court under the Scotch law of arbitration would be in strictness *obiter dicta*, but still, in view of the authority which must always attach to any opinions of the two noble and learned Lords in question, they were dicta of the greatest weight, and until I had the advantage of becoming acquainted with the opinion which my noble and learned friend who has just preceded me proposed to express in the present appeal I must confess that I read those dicta as purporting to lay down what is now confessed to be an innovation in Scotch law approximating it in a material respect to the law of England. The explanations, however, now given of the meaning and effect that were really intended to be conveyed in the *Johannesburg* case have removed my difficulties. I do not understand it to have been intended to make any change in the law of England either in regard to arbitration or as to repudiation of contracts, and therefore I think it unnecessary to examine further either that case or the judgments pronounced in the present case in the Courts below, though I do not wish to be taken as accepting all the propositions which are to be found in the different judgments.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellants—Lord Advocate (Morison, K.C.)—J. C. Dickson—Ronald Smith. Agents—P. Morison & Son, W.S., Edinburgh—Lumley & Lumley, Solicitors, London.

Counsel for the Respondents—Moncrieff, K.C.—A. C. Black—A. A. Baorlein. Agents—Wright, Johnston, & Mackenzie, Solicitors, Glasgow—Webster, Will, & Company, W.S., Edinburgh—F. L. Long, Solicitor, London.

Monday, May 8.

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

NORTH BRITISH RAILWAY COMPANY *v.* STEEL COMPANY OF SCOTLAND, LIMITED.

(In the Court of Session, January 15, 1921, S.C. 304, 58 S.L.R. 207.)

Railway — Emergency Legislation—Detention of Waggons—Charge for Detention —Free Time—Reasonableness of Charges —Statutory Right to Arbitration Superseded—Ministry of Transport Act 1919 (9 *and* 10 *Geo. V, cap.* 50), *sec.* 3 (1) (*c*) *and* (*e*) *— Railway Rates and Charges, No.* 25 (*North British Railway, &c.*) *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap. lxiii*), *sec.* 5.

Held (*aff.* judgment of the Second Division) that so long as the Ministry of Transport Act 1919 remained in operation the Minister had power, under and subject to the provisions of that Act, to prescribe the "free time" to be allowed for loading and unloading waggons, and also to fix the charges payable for their detention beyond that time, that his decision in regard to both must be deemed to be reasonable, and that any right to appeal to arbitration under section 5 of the schedule to the Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lxiii) was, so long as the Minister remained in charge, superseded.

The defenders appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—In this case an action was brought by the respondents to recover from the appellants the sum of £64, 11s. 6d., which was the amount of an account for the undue detention by the appellants of certain railway waggons, the property of the respondents. The way in which the amount was arrived at was this—It was based upon a rate per waggon per day fixed by the Minister of Transport, under the powers of the Ministry of Transport Act of 1919, as the rate to be charged for demurrage after the expiration of certain free time specified in the Minister's Direction. The scheme was that not only should the waggon arrive and be delivered to the consignee who should unload it, but that he should have a certain time for unloading it,