

Valuation Appeal Court would sit on 19th December 1918 to dispose of appeals for the year 1918-1919.

Two days before the sitting the assessor withdrew his appeal. The agents for the respondents had already instructed counsel to oppose the appeal and had incurred other expenses.

At the sitting of the Court counsel for the respondents moved for expenses on the ground that timeous intimation of withdrawal had not been made, and that the respondents had been thereby put to unnecessary expense.

The Court (LORD SALVESEN, LORD CULLEN, and LORD HUNTER) refused the motion on the ground that it would be an innovation on the ordinary practice of the Court to award expenses, and that the Court was not prepared in the present case to make an award without warning; but the Court intimated that in any future case it would consider itself at liberty to make an award of expenses where expenses had been incurred by a party which would not have been so incurred had the other party given timeous intimation of the withdrawal of his appeal.

Counsel for the Respondents—Gentles.
Agent—W. B. Rainnie, S.S.C.

COURT OF SESSION.

Saturday, December 21.

SECOND DIVISION.

[Lord Hunter, Ordinary.]

MARSHALL & COMPANY v. NICOLL & SON.

Sale—Breach of Contract—Damages—Measure of Damages—Available Market—“Market or Current Price”—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 51 (3).

The Sale of Goods Act 1893 enacts—Section 51—“(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed then at the time of the refusal to deliver.”

Manufacturers who had entered into a contract for the sale of goods to be made according to certain special specifications failed to deliver the goods, whereupon the buyers raised an action to recover damages. *Circumstances in*

which it was held (*diss.* Lord Salvesen), that for the purpose of assessing the measure of damages there was an available market for the goods at the date of the breach of contract, and that the fact that the goods were specially made to specification and not bought and sold on the open market did not exclude the criterion given by the Sale of Goods Act 1893, section 51 (3).

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), section 51, is quoted *supra in rubric.*

Marshall & Company, merchants, 45 West Nile Street, Glasgow, *pursuers*, raised an action against Nicoll & Son, iron and steel merchants, 1 Ward Road, Dundee, *defenders*, for payment of the sum of £10,633, 19s., being the amount of damages alleged to have been incurred through the defenders' failure to implement certain contracts for the supply of 430 tons of steel sheets entered into between the pursuers and the defenders.

On the question of damages the pursuers averred—“(Cond. 10) On or about 3rd February 1917 the market price of 430 tons of steel sheets of the class in question f.o.b. New York was £17,327, 14s. The contract price of 380 tons of said sheets was £5937, 10s., and of 50 tons was £756, 5s., together £6693, 15s. The loss suffered by the pursuers through the defenders' failure to make delivery is thus £10,633, 19s., being the sum sued for.”

The defenders averred—“(Ans. 10) Denied. Explained that any claim for damages falls to be ascertained as at 13th November 1916, and that in any event the claim made by the pursuers is grossly excessive.”

The pursuers pleaded—“The defenders having by their breach of contract caused loss and damage to the pursuers as condescended on, the latter are entitled to decree as concluded for.”

The defenders pleaded—“3. In any event the damages claimed are excessive.”

Proof was allowed and led, the import of which appears from the opinion of the Lord Ordinary (HUNTER), who on 20th November 1917 granted decree against the defenders for £2000 in full of the conclusions of the summonses.

Opinion.—[After dealing with a point with which this report is not concerned, his Lordship proceeded]—“It is, however, well settled that the value of goods which a seller has failed to deliver is to be estimated by the market price of the goods ‘independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for sale of the goods.’—(See opinion of Lord Esher, M.R., in *Rodocanachi, Sons, & Company v. Milburn Brothers*, 1886, 18 Q.B.D. 67, at p. 77; *Williams Brothers v. Ed. T. Agius, Limited*, [1914] A.C. 510, 52 S.L.R. 604). In their defences the defenders do not suggest that there was no market price for the goods, or that the method of estimating damages was not to be governed by the provision of the Sale of Goods Act, 56 and 57 Vict. cap. 71, sec. 51 (3). Holding as I do that the defenders are in breach of contract in so far as failure to deliver 225 tons of steel sheets is concerned, I have now to consider at what date

the damages payable by them falls to be estimated.

[His Lordship here considered the evidence, from which he drew the conclusion that the date at which the damages fell to be estimated was 3rd February 1917.]

"The evidence as to what ought to be held as the fair market price at 3rd February 1917 of the 225 tons of steel sheets which I have held that the defenders were bound but failed to deliver to the pursuers is far from clear or satisfactory. The market in these goods between the date of the contracts and their breach was in an unsettled state. British manufacturers were not supplying such goods for ordinary customers. American manufacturers were undertaking such orders, but the conditions brought about by the state of war caused great fluctuations of price. Some manufacturers would not quote prices at all for the supply of thin sheets, while other manufacturers only quoted for such goods as compared with thicker sheets at much greater differences in price than normally prevail. The defenders have not pled that there was no market for the goods at any of the crucial dates in this case, and they did not lead any evidence upon the question of price. They did, however, maintain that the pursuers have not on the evidence established what was the market price at the date when they claim to have the damages payable to them in respect of breach of contract estimated. If the pursuers had bought goods for their Japanese customers to supply the place of those which the defenders failed to deliver, and if they had not paid an unnecessarily high price for the goods, the determination of the amount of damages to which they are entitled would have been a comparatively simple matter. From time to time the pursuers threatened to so buy in goods, but in fact they neither did so nor did they attempt to do so. They produce a number of quotations which they received in connection with other orders, but these do not of themselves afford any reliable criterion as to market prices. Upon 12th January 1917, and again on 5th February 1917, the pursuers placed small orders for sheets of 30 g., the price being £41, 15s per ton. As these sheets were galvanised a considerable deduction would require to be made for sheets as ordered by the pursuers from the defenders. There is no clear evidence what this deduction should amount to, but the pursuers suggest that £8 would be a reasonable deduction. Mr Geddes, the departmental manager to a Glasgow firm doing a large business with Japan, explains that on 26th February the New York house of his firm concluded a contract for the sale of 100 tons of steel sheets 6 feet by 3 feet, 13 to the bundle, of a somewhat heavier weight than in the defenders' contract. The price after necessary deductions is said to work out at £31, 4s. per ton f.o.b. New York, to which some addition would have had to be made if the sale had been effected in Glasgow. The inference I draw from the evidence is that the price would not have been so high on 3rd February as on 26th February. Another witness, Mr Conway, who speaks to prices shows very varying figures. On

12th February 1917 he says that his firm quoted a price of £27, 10s. for sheets of 28 gauge, and that sheets of 30 g. would certainly have been dearer.

"As I understood the pursuers' contention, they maintained that they were entitled to have damages fixed on the footing that the market price of all the sheets not delivered to them would have been £33, 15s. per ton. This has not in my opinion been proved, and the best consideration I have been able to give to the evidence on prices led before me satisfies me that an estimate based on such an overhead price would lead to an excessive award. As regards the two lots of 50 tons, the sheets were considerably thicker than in the case of the 125 tons. They would therefore be more easily obtained and cheaper. I received very little assistance to enable me to determine what the price of such sheets would be. In the case of *Rodocanachi*, to which I have already referred, L. J. Lindley at p. 78 said—'It must be remembered that the rules as to damages can in the nature of things only be approximately just, and that they have to be worked out not by mathematicians but by juries. I presume that where, as here, it is clear that the market price at the date of breach must have been greatly higher than at the date of the contract, but there is no evidence as to price on the exact date in question, I must make the best of the varying figures placed before me, and taking a broad view of the situation fix approximate prices upon which to base my award of damages. So treating the question, I propose to fix the market prices at the date of breach as higher than the contract prices to the extent of £10 in the case of 125 tons, and £7, 10s. in the case of the two lots of 50 tons. This leads to an award of £2000 in name of damages, which I accordingly make."

The defenders reclaimed, and argued—The pursuers had failed to prove damage in the manner selected by them. They had failed to prove that there existed an available market for the goods in question at the time of the breach of contract, and accordingly they were not entitled to claim as damages the difference which at that date existed between the contract price and the current market price. The pursuers had not succeeded in supplying the Court with a basis on which it could assess the damages. The pursuers had not discharged the *onus* which lay on them of proving their loss, and were therefore not entitled to more than nominal compensation for the trouble to which they had been put. The provision in the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), section 51 (3) regarding a market price only applied to such goods as were kept in stock or could at any time be bought in the market, and not to goods requiring to be specially manufactured or made to specification, such as those which were here under consideration. The following cases were cited:—*Dunkirk Colliery Company v. Lever*, (1878) 9 Ch. 20, *per James, L.J.*, at p. 25; *Rodocanachi v. Milburn*, (1886) 13 Q.B.D. 67, at pp. 76 and 78; *Williams Bros. v. Ed. T. Agius, Limited*, [1914] A.C. 510, 52 S.L.R. 604; *Jamal v. Moolla Dawood, Sons, & Company*

[1916] 1 A.C. 175, at p. 180; *Ströms Bruks Aktie Bolag v. J. & P. Hutchison*, [1905] A.C. 515, at p. 524, 7 F. (H.L.) 131, 42 S.L.R. 844; *Gunter & Company v. Lauritzen*, 1894, 31 S.L.R. 359; *Millar v. Bellvale Chemical Company*, 1898, 1 F. 297, at p. 300, 36 S.L.R. 214; *Duff & Company v. Iron and Steel Fencing and Buildings Company*, 1891, 19 R. 199, 29 S.L.R. 186; *Hinde v. Liddell*, 1875, 10 Q.B. 265; *M'Neill v. Richards*, 1899, 1 Ir. R. 79; *Mayne on Damages*, p. 215; *Gloag on Contract*, p. 816.

Argued for the pursuers—All the contracts had been proved, and the defenders had broken them all. At the time at which they did so there was an available market, and it was a rising one. That being so, the method by which the Lord Ordinary arrived at his estimate of the damage sustained by the pursuers was right, but his estimate was insufficient in amount. The pursuers ought to be held to occupy the same position in regard to damages as if the contract had been completed. The evidence disclosed sufficient information as to the price of similar goods to admit of a correct estimate being made of the loss sustained by the pursuers in consequence of the defenders' failure to implement the contracts in question. The facts as disclosed by the evidence were such as to entitle the pursuers to benefit by the provisions of the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), section 51 (2) and (3). The pursuers' loss could be gauged by the profit they would have made on a re-sale at the date of the defenders' refusal to deliver. The defenders had not given sufficient notice on record of their submission that there was no available market for the goods in question. Moreover, the possible profit to the pursuers could still be estimated even if the state of the market could not be tested. The following authorities were quoted—*Williams Bros. v. Ed. T. Agius, Limited (cit.)*, at p. 530; *Rodocanachi v. Milburn (cit.)*; *Gunter & Company v. Lauritzen (cit.)*; *Ströms Bruks Aktie Bolag v. J. & P. Hutchison (cit.)*.

At advising—

LORD JUSTICE-CLERK—[After dealing with a point with which this report is not concerned, proceeded]—It is not disputed that the contracts were not fulfilled—no part of the goods having been delivered—and it was conceded that the date of the breach must be taken, so far as the ascertainment of damage is concerned, as at 3rd February. The averments as to damage are to be found in condescence and answer 10. The pursuers maintain that they have proved a market price as at the beginning of February of over £40, while the defenders maintain that it has not been proved that there was any market for the goods in question, and therefore that no market price has been established, so that only nominal damages should be awarded to the pursuers.

I think it is undoubted that during the whole of the period from September to February there was a rising market for steel sheets, and that if the sheets contracted for in October had been at the pursuers' disposal in February they would have realised

much more than the contract prices. The last case in which, so far as I am aware, the question as to the measure of damages has been dealt with is the case of *Watts*, [1917] A.C. 227, 54 S.L.R. 650. I accept what Lord Dunedin said in that case—"The general rules for assessment of damages for breach of contract have been often stated, but nowhere more succinctly than by Parke, B., in *Robinson v. Harman*, 1 Ex. 350, at p. 855—'Where a party sustains a loss by reason of a breach of contract he is so far as money can do it to be placed in the same situation with respect to damages as if the contract had been performed.'" It is plain, I think, that a considerable sum of money would require to be paid to the pursuers if the damages were to be assessed in accordance with this rule, and I think it lies on the defenders to show sufficient reason why this rule should not be applied.

The Sale of Goods Act 1893 codifies the law on the subject so far as the question in this case is concerned in section 51. The defenders maintain that under condescence 10 unless a market and a market price have been proved by the pursuers, whatever else they may have proved, only nominal damages can be awarded.

I am of opinion that sufficient evidence has been led to enable us to hold that there was a market and a market or current price for steel sheets in the beginning of February. I agree that there was not proof of such a market or market price as one can usually get on the Stock Exchange or the produce market. But there is sufficient evidence, though not a superfluity, to establish that if the pursuers were to be placed, so far as money could do it, in the same position as if the contracts had been performed, a large sum of money would require to be given them in excess of the contract prices. Lord Justice James in his dictum in the *Dunkirk* case was dealing with a problem where the buyers had failed, and where therefore the point was—What price could the plaintiffs in that case have got for their coals? In the present case we are dealing with the seller's default, and I do not think it is equally legitimate to say that the pursuers must show what price they could have got for the sheets if they had had them to sell in February. The question is, What would they have had to pay for them in order to get the goods so that they might have them to dispose of? The sub-section in question—section 51 (3)—states as the measure of damages the difference between the contract price and the market or current price. In my opinion, interpreting market as equivalent to current price, there had been a large increase in that price since October.

I do not attach primary importance to the proof of the price of the particular gauge—a slight difference in the gauge would not, in my opinion, amount to a difference in kind in the goods so as to be material—*Hinde v. Liddell*, 1875, L.R., 10 Q.B. 265. So too allowance can easily be made, and I think what a fair allowance would be has been proved, between the price of galvanised and black sheets, so as to make the price of the former a legitimate admin-

icle of evidence for the purpose I am now considering.

Further as regards the precise advance in prices, there is, I think, a paucity of evidence. But taking the evidence as a whole, including both the general evidence as to the rising market and the evidence as to particular transactions and quotations, there is, in my opinion, enough to justify the Lord Ordinary's figures as being not higher than the market or current price in February. I cannot accept the view that for a buyer who wanted the sheets there was in February no available market and no current price.

But the defenders' position on this point, in my opinion, postulates too strict a reading of the record. The defenders' own record is not too frank; in particular it does not expressly state that there was no market by which a market price could be fixed. No doubt the sheets appear not to have been kept in stock but to have been manufactured just as and when ordered. But even if the evidence were (strictly regarded) not to be held sufficient to comply with sub-section (3) of section 51, I think there is sufficient evidence to establish a case under sub-section (2), and I do not regard the pursuers' record as so framed that they are not entitled to found on the measure prescribed by that sub-section in order to determine the quantum of damage if the test be what was required to put the pursuers, so far as money can, in the same position as if the contracts had been performed.

As to the precise figures to be taken I am prepared to accept the figures of the Lord Ordinary as not exceeding what, on the most favourable view for the defenders, would be a fair estimate of the damage suffered by the pursuers. I think we ought to allow the sum of £10 for the first 100 tons and £7, 10s. for the remaining 330 tons, and give decree for £3475. Further, having regard to the state of the trade, the precise character of the contract sheets, and the whole circumstances, I see no sufficient reason to increase the figures arrived at by the Lord Ordinary.

LORD DUNDAS—[After dealing with a point with which this report is not concerned]—The question of damages next arises, and is attended with some difficulty. The remedies of a buyer who seeks damages from a seller for breach of contract to deliver goods are defined by section 51 of the Sale of Goods Act 1893. Sub-section (2) practically states the well-known rule of *Hadley v. Baxendale*, 1854, 9 Ex. 341. Sub-section (3) provides that "where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed then at the time of the refusal to deliver." The pursuers aver (condescendence 10) that on or about 3rd February 1917 (which the parties now agree is the correct date at which to assess the damages, if any)

the market price of 430 tons of steel sheets of the class in question f.o.b. New York was £17,327, 14s.; that the total contract price of the goods was £6693, 15s., and that their loss thus amounted to £10,633, 19s., being the sum sued for. The defenders now argue that there was in February 1917 no available market for the goods, and therefore no market price; and that the pursuers can recover no more than nominal damages, or at most a moderate sum to compensate them for trouble and inconvenience. This argument has to my mind rather the appearance of an after-thought, but if it was originally contemplated then I think the defenders' answer to condescendence 10 was not candid pleading. They ought, in my judgment, to have raised the issue specifically. The pursuers might then have reconsidered their basis of claim or stated it more explicitly; they would at least have been warned that the point was to be contested. Even as matters stand, however, and assuming that the pursuers must be held limited by their record to their remedy under sub-section (3), I think they have sufficiently proved their case.

I take it to be well established that the buyer's right is to be put in the position in which he would have stood if the goods had been duly delivered—as if he had had them at the market value as at 3rd February 1917—that value being taken independently of any circumstances peculiar to the buyer, and therefore independently of any contract made by him for the sale of the goods. Where from the nature of the article there is no market in which it can be obtained, the buyer's remedy is not confined to nominal damages, but the amount due to him must be ascertained by some other measure. The question is, whether there was here on and about 3rd February 1917 an available market for the goods contracted for. I am unable to say that there was not. Mr Robertson depones that "at November 1916, subject to paying the price which the mills demanded, we could have obtained these 430 tons of sheets in the market. The same is true as regards February 1917. These goods were to be obtained in the market at both these dates." Mr Jamieson gives evidence to a similar effect. I am not aware of any definition of the words "available market," unless it be the somewhat tentative "notion of the meaning of a market under those circumstances" indicated by James, L.J., in *Dunkirk Colliery Company*, 1878, 9 Ch. D. at p. 25. I do not suppose that the learned Lord Justice intended to give a universal or complete definition of "available market," and, as the Lord Justice-Clerk has pointed out, the words were used with reference to circumstances by no means identical with those before us. But I think we have sufficient evidence here to comply with the learned Judge's "notion" of "a fair market where they could have found a" seller. The market for these steel sheets, especially of the higher grades, is, I suppose, always a special and limited one—not like the open market for coal or corn or cotton-seed—but I cannot think that fact sufficient to make the rule of section 51 (3) of the Act

totally inapplicable, and to deprive the pursuers of any right to substantial damages. Because there may not be for a certain class of goods a regular fixed current market, such as exists for the staple commodities of commerce, it does not, in my judgment, necessarily follow that there is no "available market" for such goods. The Lord Ordinary seems to me to have gone about the matter carefully and upon sound lines. The pursuers' proof is scanty—possibly from want of due notice on record—but I think it is sufficient, and there is no counter-evidence. I refer, without going into detail, to the two orders by the pursuers from Weiss, Biheller & Brooks in January and February 1917, and to the evidence of Mr Geddes, in regard to all of which I thought the defenders' criticisms rather too strict and narrow. There was, in my judgment, an available market for these goods in February 1917. As regards amount, the Lord Ordinary appears to me to have adopted a reasonable method; and I am prepared to apply it to the additional breaches of contract which, differing from his lordship, I hold to be proved. If one assesses the damage by the scale of £10 in the case of 100 tons, and £7, 10s. in that of the remaining 330 tons, the result works out, as regards the whole 430 tons, to a total of £3475, for which sum I think that we should decern in the pursuers' favour.

LORD SALVESEN—[After dealing with a point with which this report is not concerned]—Assuming—as I understand your Lordships are prepared to hold—that the defenders committed a breach of contract, the important question remains—What damages have the pursuers proved that they sustained? On record their claim is thus stated (condescence 10)—“On or about 3rd February 1917 the market price of 430 tons of steel sheets of the class in question f.o.b New York was £17,327, 14s. The contract price of 380 tons of said sheets was £5937, 10s., and of 50 tons was £756, 5s., together £6693, 15s. The loss suffered by the pursuers owing to the defenders' failure to make delivery is thus £10,633, 19s., being the sum sued for.” The pursuers accordingly peril their case upon showing that there was a market price for the goods contracted for on the date of the breach, and the only measure of their claim which they suggest is the difference between the contract price and the market price.

It is somewhat startling to find that the loss said to have been suffered by the pursuers greatly exceeds the total amount which under the contract they would have had to pay for the goods themselves, but this might conceivably be the result if evidence has been adduced which demonstrates that if the goods had been supplied in the terms of the contracts the pursuers could have sold them at the prices which they aver were those current in the market. The Lord Ordinary treats it as conclusive against the defenders on the point that there was a market for the goods contracted for, that they did not expressly plead that there was no market; and accordingly, proceeding on this assumption, he endeavours

to reach the market price. In so doing I am of opinion that he has erred. It is for the pursuers to prove their damage, and it is sufficient for the defenders to meet the statement of claim by a simple denial. It becomes, then, the duty of the pursuers to prove what the market price was, and necessarily to demonstrate that there was a market for such goods.

The law of the case is succinctly and I think correctly stated in the judgment of the Court in *Elbinger Company v. Armstrong*, L.R., 9 Q.B. 473 at p. 476, in these terms—“It is, no doubt, quite settled that on a contract to supply goods of a particular sort, which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach. Where from the nature of the article there is no market in which it can be obtained, this rule is not applicable.” What then constitutes a market within the meaning of this rule? The only definition that I have been able to find in any of the opinions in the cases quoted is thus stated by Lord Justice James in the *Dunkirk Colliery Company v. Lever*, L.R., 9 Ch. D. 20, at p. 25—“What I understand by a market in such a case as this is, that when the defendant refused to take the 300 tons the first week or the first month the plaintiffs might have sent it in waggons somewhere else where they could sell it just as they sell corn on the Exchange or cotton at Liverpool—that is to say, that there was a fair market where they could have found a purchaser either by themselves or through some agent at some particular place. That is my notion of the meaning of a market under those circumstances.” In other words, that the commodity which is the subject of the contract can be bought or sold freely any day in the market, and that the market price can be ascertained by reference to transactions at or about the time when the breach is committed or by a market quotation. It is obvious that the mere fact that the commodity is capable of being bought or sold, as the case may be, does not prove that it has a market price within the meaning of the rule. In the *Dunkirk Colliery Company's* case the contract was for 15,000 tons cannel coal over a period at the price of 26s. per ton. When the buyer refused to take delivery the whole quantity was disposed of at 19s. per ton on similar terms as to delivery. Nevertheless it was held that there was no market for the coal within the meaning of the rule which establishes as the measure of the damages the difference between the contract price and the market price. In all subsequent cases where such difference has been taken as the measure of loss the commodity which was the subject of the sale was one which could be bought and sold daily. Thus in *Rodocanachi* a cargo of cotton-seed was the subject of the sale; in *Williams*, [1914] A.C. 510, 52 S.L.R. 604, it was a cargo of coal; in *Jamal*, [1916] 1 A.C. 175, it was a number of shares which were daily quoted on the Stock Exchange. In all these

cases there was a true market price easily ascertained satisfying the definition that I have already referred to. It is useful to contrast with these cases others in which it has been held that there was no market for the goods contracted for so as to admit of the application of what is called the ordinary rule. Thus in the *Elbinger Company's* case the contract was for the supply of 666 sets of wheels and axles according to drawings, and the plaintiffs were in that case allowed to recover their actual out-of-pocket costs after settling as best they could the claim made against them by the Russian Railway Company to whom they had sold waggons for which the wheels and axles were required. The alternative would have been apparently to give them nominal damages only. So in the case of *Hinde v. Liddell*, 1875, 10 Q.B.D. 265, where the contract was for the supply of 2000 pieces of grey shirting which the defendants failed to supply, the plaintiff, in order to fulfil his contract with a subvendee procured shirting of a somewhat superior quality at an increase of price which the vendee accepted but paid no advance in price to the plaintiff. It was held that there being no market for the articles contracted for, the plaintiff, having done the best thing he could to fulfil his own obligation, was entitled to recover this difference in the price to him. The reason given for there being no market in England was that the kind of shirting contracted for could only be procured by a previous order to manufacture it. The case of *Borries v. Hutchinson*, 18 C.B. (N.S.) 445, is even more instructive. The contract there was for 75 tons of caustic soda which the defendants failed to deliver at the stipulated time as regards a part, and as regards the remainder failed to deliver altogether. Owing to the late delivery the plaintiffs had to pay a higher rate of freight and insurance amounting to £40, 17s., on the part actually delivered; as regards the remainder they had to pay £159 as damages to a subvendee. This latter item was disallowed as being too remote and not within the rule laid down in *Hadley v. Baxendale*, 9 Ex. 341, but on the other hand they were allowed to recover the profit which they would have made on the sale to their own vendees. It appears from the report that the reason of this was, that while re-sale might naturally be contemplated by the original seller, it was not to be assumed that the parties contemplated that the seller would be held responsible for the failure of any number of subsales. The importance of the case for the purpose for which I am citing it appears from the following admissions on which the Court proceeded in assessing damages—"It was admitted that caustic soda is not an article which is kept in stock so as to be capable of being at any time bought in the market like most other articles of commerce. Consequently there was no well ascertainable market price." It would appear therefore that in order that the market price rule may govern, the article must be one which is kept in stock and may at any time be bought in the market, in contrast to an article which is to be made to specifica-

tion, like wheels and axles, or requires to be ordered from manufacturers like the special lot of grey shirting in *Hinde's* case, or like the cannel coal of a particular colliery. The same view has been acted on in Scotland in the case of *Gunter*, 1894, 31 S.L.R. 359, where the contract was for the supply of a quantity of Danish hay. It was held that the mere fact that the buyer might have picked up odd lots of similar hay at different ports did not necessitate the application of the market price rule, and that the loss fell to be ascertained on the principles laid down in *Hadley v. Baxendale*.

I pass now to consider whether the pursuers here have proved that there was a market for the goods and a market price ascertainable at the date of the breach, or if not whether they have proved any loss otherwise arising out of the contract to which they are entitled. Now it is plain from the evidence that the pursuers were informed that the defenders did not have the goods which they offered for sale in stock, but only that they had a contract with an American manufacturing company under which they were entitled to require delivery from their mills of black mild steel sheets of varying dimensions as they might specify. It was also well known to both parties that the pursuers bought the goods entirely for purposes of re-sale. They are merchants, not consumers. The actual orders which the pursuers gave, and which I am assuming the defenders accepted, were 100 tons close annealed steel sets, 6 ft. by 3 ft., 13 sheets per bundle of 107 to 109 lbs.; 50 tons, 10 sheets per bundle of 107 to 109 lbs.; 50 tons, 11 sheets per bundle of 107 to 109 lbs.; 100 tons, 13 sheets per bundle of 107 to 109 lbs.; 100 tons, 12 sheets per bundle of 108 lbs.; 163 tons, 12 sheets per bundle of 108 lbs.

In order to satisfy these contracts the sheets would have had to be rolled to a gauge of No. 31 according to the Birmingham scale in cases where thirteen sheets were to go to the weight of 107 to 109 lbs.; and to a gauge of No. 30 where twelve sheets went to the bundle, and to lower gauges where the bundles were to contain ten and eleven sheets only. The defenders failed to supply the pursuers, because the American mills declined to roll to gauges higher than 28, as indeed they were entitled to do under their contract with them. The orders therefore were not for commodities in stock or which were purchasable in the market, but for goods which required to be made to special specifications, these being, at all events as regards a large part of the total, unusual.

Now in order to prove the market price as at 3rd February 1917 the pursuers have produced a number of orders which they gave and quotations which they obtained with regard to steel sheets. On 12th January 1917 they purchased two small lots of 10 tons, one No. 28 gauge and the other No. 30, from a London firm at prices of £41, 10s. and £41, 15s. respectively. These sheets were of different dimensions from these contracted for, being 2 m. by 1 m., and they

were besides galvanised and not black. On 5th February they purchased 6 tons of the same specification from the same London sellers. The only other actual contract in thin steel sheets is spoken of by Mr William Geddes, who says—"I find that on 26th February 1917 our New York House quoted a contract for the sale of 100 tons of steel sheets, 6 ft. by 3 ft., of thirteen to the bundle. In that case the bundle was a somewhat heavier bundle than now in question, being a bundle of 117 lbs. These sheets were 30 G." In cross-examination he says—"With regard to the 100 tons of steel sheets, 6 ft. by 3 ft., of thirteen to the bundle of 117 lbs., which we got on 26th February 1917 I cannot tell whom we got them from, because the documents have not reached us. We accepted the contract from Japan and placed the order in New York. I cannot say that we have got the stuff. I cannot tell whom the order was placed with, because it was placed by our New York house and they did not report that. . . . In that case delivery was for June. I cannot tell whether delivery was made. I am giving this information from a report sent us by our New York house. That is the only case I am aware of during January, February, or March 1917 where 30 G. sheets of this specification have been sold."

The pursuers also produced a number of quotations which they received in October, November, and December 1916, but these being before the date of the breach are of little importance. It is noteworthy that the specification in hardly a single case corresponds with the specification contained in the contracts between the pursuers and the defenders. In some cases too the quotation is "subject to mill acceptance," and in none is it shown that actual transactions took place on the basis given.

So far from proving that there was a market for such sheets as were thus sold by the defenders to the pursuers, the only inference I can draw from this evidence is to the opposite effect. It is plain that such goods were not kept in stock by the manufacturers, although an occasional small lot approximating to the specification might be picked up at a ransom price. The goods were like the axles and wheels, the grey shirting, and the caustic soda—only to be obtained by ordering from the manufacturers, and the evidence is all to the effect that, owing to the conditions that then prevailed, the manufacturers would not undertake to roll such sheets at all, their mills being already fully occupied in rolling sheets of the thicker gauge. The extraordinary variety in the prices demanded for such sheets as individual merchants had to offer points in the same direction. The particular sheets for which the pursuers had contracted were, in short, unobtainable in the market as at the time when the breach was committed, and while there are two cases in which the pursuers bought sheets of different sizes and gauges, it may well be that these purchases were made merely for the purpose of laying a foundation for the present claim, for there is no

evidence that the pursuers re-sold them or that they were saleable to the Japanese or other customers at the extravagant prices paid. My conclusion from the documentary evidence coincides with that of Mr Robertson of the pursuers' firm. He says—"I do not know of my own actual knowledge of any case of a sale of that particular specification of steel sheeting in February 1917. (Q) Is there anything in the way of a current market price?—(A) There is no fixed price at all. There is nothing at that date that I would call a current market price of steel sheets." If so, the materials for fixing the damages on the principle to which the pursuers appeal are absent.

The pursuers, however, if they really suffered loss by the defenders' failure to fulfil the contracts, had an easy means of proving the extent of such loss. In their correspondence they refer to having re-sold the sheets contracted for to Japanese customers. The defenders sought to recover the documents relating to the alleged subsales, but were opposed by the pursuers on the ground that they were not claiming damages on this head, and the Lord Ordinary refused to grant the diligence applied for. The result is that we have no evidence that the oft-repeated assertion by the pursuers in their letters had any basis of fact. Assuming, however, that it had, I think it must be inferred from the attitude the pursuers took up, (1) that the pursuers were released from the subsales without loss, and (2) that the profits they would have made had the subsales been carried through were unsubstantial. Had the facts been otherwise there would have been no clearer case for the application of the rule of *Hadley v. Baxendale*. The goods sold to the pursuers were so sold for the purpose of re-sale, and if re-sold as they asserted their loss of profit on such re-sales was within the contemplation of both parties. One thing appears to be certain, viz., that the pursuers did not, as they repeatedly threatened, buy in against the defenders with a view to fulfilling their Japanese contract.

There is no evidence even that at any time after the contracts were made the goods could have been disposed of at a profit—still less what profit could have been realised—yet a claim for loss of profit naturally arises out of the failure to deliver goods sold to a merchant whose business consists in selling over again at a profit, and ordinarily he has no other claim. In my opinion the pursuers have entirely failed to prove that they suffered any loss, although nothing would have been easier if they in fact did so.

As, however, there has been a breach of contract, the pursuers would be entitled to some compensation for the trouble they have been put to looking to the defenders' attitude. In *Stroms Bruks Aktie Bolag*, [1905] A.C. 515, 7 F. (H.L.) 131, 42 S.L.R. 844, the First Division awarded £50; in another earlier case only £10 was allowed. I should have followed the later authority and given decree for £50 in full of the conclusions of the action.

LORD GUTHRIE—I concur.

The Court recalled the interlocutor of the Lord Ordinary and decerned against the defenders for the sum of £3475.

Counsel for the Defenders (Reclaimers)—Sandeman, K.C.—Macquisten. Agents—Alex. Morison & Co., W.S.

Counsel for the Pursuers (Respondents)—Moncrieff, K.C.—Scott. Agents—Kessen & Smith, W.S.

Tuesday, January 7.

SECOND DIVISION.

(EXCHEQUER CAUSE.)

ARCHIBALD THOMSON, BLACK, & COMPANY, LIMITED v. INLAND REVENUE.

Revenue—Income Tax—Profits—Deduction—Expenses Incurred in Reducing Capital of Limited Company—Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, First Case.

The Income Tax Act 1842, section 100, enacts—“The duties hereby granted, contained in the schedule marked D, shall be assessed and charged under the following rules:— . . . Schedule D, First Case.—*Duties to be Charged in respect of any Trade.*— . . . Rule First—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade. . . . Rule Third—In estimating the balance of profits and gains chargeable under Schedule D . . . no sum shall be set against or deducted from such profits or gains on account of . . . any sum employed or intended to be employed as capital in such trade, and [Rules applying to the First and Second Cases, First Rule] for any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purposes of such trade. . . .”

A limited company which had incurred a large debit balance on its profit and loss account applied to the Court to have its capital reduced so as to enable it to resume the payment of dividends out of profits which would otherwise have fallen to be applied in extinguishing the debit balance. Held that the expense of carrying out the reduction was not a proper deduction from the profits for the purpose of assessment to income tax, in respect that it was not made for the purposes of the trade of the company, but for the purpose of distributing the profits of the trade after they had been earned.

Archibald Thomson, Black, & Company, Limited, wire rope manufacturers, Glasgow, appellants, being dissatisfied with an assessment made on them under Schedule D of the Income Tax Acts for the year ending 5th April 1917, amounting to £2089 less depreciation allowance £896, took a Case in which

J. Batty, surveyor of taxes, was respondent. The appellants claimed £300, being the amount expended by them in the year to 31st December 1915 in reducing the capital of the company, as an allowable deduction from their profits for income tax purposes.

The Case stated—“The following facts were admitted or proved:—1. The appellants in the year 1914 reduced their capital from £30,000, divided into 15,000 preference shares of £1 each and 15,000 ordinary shares of £1 each, to £18,829, 16s., divided into 15,000 preference shares of £1 each and 12,766 ordinary shares of 6s. each. 2. The circumstances under which the reduction was effected were that for several years between 1906 and 1912 the company had not been successful, with the result that a balance had accumulated at the debit of profit and loss account until at 31st December 1912 it reached £10,010, 7s. 11d., and at 31st December 1913 it stood at £8397, 11s. 4d. There were also certain assets which were unrepresented by value. 3. The object of the reduction was to enable the company to resume the payment of dividends out of the balance of each year's trading, which would otherwise have fallen to be applied in reducing the debit balance in the profit and loss account until it was extinguished. 4. In reducing their capital as aforesaid the appellants incurred legal expenses consisting of accounts due to solicitors in Glasgow and Edinburgh, counsels' fees, printing, Court dues, and other incidental expenses. No objection was taken to the amount of the said expenses, and it was admitted that they had been incurred.

“The Commissioners, after hearing parties, were of opinion that the legal expenses incurred in reducing the capital of the appellants were not admissible as deductions from profits assessed under Schedule D of the Income Tax Acts, and they dismissed the appeal accordingly.”

Argued for the appellants—The sum in question was a legitimate deduction from profits in respect that it had been incurred not only for the purpose of the trade but in order to earn profits. A company's commercial success was dependent on its reputation, and if it was so encumbered that it could not pay a dividend its reputation and therefore its profits suffered. There was nothing to prevent an item of revenue expenditure being incurred once for all. Profits meant the surplus of the assets at the end of one accounting period over the assets at the preceding, and according to this standard the expenditure in question was a legitimate deduction—*Usher's Wiltshire Brewery, Limited v. Bruce*, [1915] A.C. 433, per Lord Loreburn at p. 443, 52 S.L.R. 894; *Smith v. Lion Brewery Company, Limited*, [1911] A.C. 150, 48 S.L.R. 1083; *in re Spanish Prospecting Company, Limited*, [1911] 1 Ch. 92. The deduction in question did not fall within the express prohibition of the Income Tax Acts—Income Tax Act 1842 (5 and 6 Vict. cap. 35), sections 1 and 159.

Argued for the respondent—The deductions claimed were not allowable under the Income Tax Acts. The profits were in no way