by the fault of the charterers. I think this would be quite out of the question. Suppose, by way of illustration, that the detention had been caused by a strike, which is another of the excepted causes, it could not be said that the Court would go behind the fact of the strike for the purpose of ascertaining whether it might have been avoided—whether, for instance, more wages ought to have been given to the workmen in order to avoid it. I think the only matter for us is, whether there was in point of fact "detention by railways," and if so, whether that was the proximate cause of the delay.

LORD M'LAREN—My opinion is, that if a *bona fide* order was given by the charterers, and if the trucks were not forwarded by the railway company, that will amount to "detention by railways" in the sense of the charter-party. It is another question whether the railway company were justified in not providing trucks, because even if it were proved that they were so justified, I think the refusal to send the trucks could be ascribed to nothing but the action of the railway company in the exercise of its rights, the very thing which the insertion of this clause in the charter-party was intended to guard against. For these reasons I concur with your Lordships.

LORD KINNEAR concurred.

The Court recalled the interlocutors appealed against, and sustained the first plea-in-law for the defenders.

Counsel for the Pursuers—C. S. Dickson—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders — Sol. Gen. Marray, Q.C.—Dundas. Agents—Thomson, Dickson, & Shaw, W.S.

Tuesday, December 1.

FIRST DIVISION.

[Lord Low, Ordinary.

DUFF & COMPANY *v.* THE IRON AND STEEL FENCING AND BUILDINGS COMPANY, LIMITED.

Contract — Breach of Contract — Loss of Profits—Damages.

A manufacturing company in this country entered into a contract for the sale of iron huts of a peculiar construction, for which they held patents, to a firm of merchants in South Africa, with a view to the huts being resold there by the merchants. The earlier consignments of huts sent in pursuance of this contract were sold by the merchants at a profit, but subsequent consignments were rejected as being disconform to contract.

In an action by the merchants against the manufacturers, it being proved that the pursuers were justified in their rejection of the huts, the Court in assessing the damages due by the defenders for their breach of contract, *held* that the pursuers were entitled to payment of a reasonable allowance for loss of the profits which they would probably have made if the contract had been fulfilled.

In the year 1889 the Iron and Steel Fencing and Buildings Company, Limited, Glasgow, who held certain patents for the construction of iron and steel buildings which could be erected without the use of bolts or rivets, entered into a contract for sale to Duff & Company, merchants, Cape Town, of a portable iron hut of a particular construction, which was to be called the "Pioneer" hut. The hut was formed of metal sheets, so many rectangular single sheets forming the walls, and an equal number of triangular double sheets forming the roof. The edges of the sheets were turned over in flanges, and when two sheets were put together a slotted tube was slipped over them, and the sheets were thus drawn together. The roof and walls were joined by a metal band called the "angle iron ring." Under the contract above mentioned Duff & Company were to buy the huts from the Buildings Company, and make what profit they could by reselling them in South Africa, and it was further agreed that they should have a monopoly of the sale of the "Pioneer" hut in South Africa so long as they ordered ten per fortnight.

In pursuance of this contract fifty-eight huts were shipped by the Buildings Company to Duff & Company in the months of August and September 1889, in three separate consignments, and these were sold or disposed of by Duff & Company in South Africa. Five subsequent consignments, containing 112 huts in all, were sent in the months of October and November. Of these huts four were sold, and the remaining 108 were, after some correspondence between the parties, rejected by Duff & Company on 27th February 1890, as being disconform to contract.

In June 1890 this action was raised by Duff & Company, and John Duff and Alexander Grigor Allan, the individual partners of the same, against the Iron and Steel Fencings and Buildings Company. The pursuers claimed payment (1) of £1783, 14s. 2d., being the price paid by them to the defenders for the rejected huts, together with interest and certain expenditure which they alleged had been made by them in connection with the huts, and (2) of £1000 in name of damages.

The pursuers set forth their contract with the defenders, and averred that the rejected huts were disconform thereto in respect both of defects of construction and injuries caused by insufficient packing.

The defenders denied that the huts were disconform to contract.

The pursuers pleaded—"(2) The defenders having, in breach of the express representations and warranties condescended on, and also in breach of their implied warranty as manufacturers of and dealers in the articles ordered from them by the pursuers, supplied to the pursuers as purchasing agents, and for the express purpose of resale to others,

articles disconform to contract and unmerchantable in quality and condition, the pursuers are entitled to reject the said articles, and to be repaid the price thereof and other disbursements, as condescended on. (3) The pursuers having suffered loss and damage in consequence of the defenders' breach of the special contract entered into with them as condescended on, are entitled to reparation therefor in terms of the second conclusion of the summons."

Proof was allowed. The result of the evidence was to satisfy the Court that the huts were defectively constructed, and were injured by insufficient packing so as to be disconform to contract, and that the pursuers were entitled to reject them.

With regard to the amount for which the pursuers were entitled to decree under the first conclusion of the summons, it appeared that the amount actually paid by them to the defenders as the price of the huts, was £1486, 7s. 6d., and from that fell to be deducted the price of four huts sold out of the later consignments, £117, 9s., leaving £1368, 18s, 1d., the interest thereon amounting to £38, 5s. 11d.—making £1407, 4s. 5d. The balance of the sum first concluded for consisted of (1) expenses amounting to £111, 9s. 6d., actually incurred in connection with the rejected huts, for delivery and storage and other outlays of the kind, and (2) expense amounting to £215, 2s. 8d., incurred in advertising the "Pioneer" hut, in journeys made for the purpose of pushing its sale, and expenditure of a similar nature.

With regard to the claim of damages, it appeared that the cost of the huts to the pursuers at Cape Town or Port Elizabeth was £21, 11s. 7d., and that of the huts in the earlier consignments forty were disposed of to a Mr Ross at a profit of £7, 2s. 6d., and six to the other parties at a profit of £11, 10s.

As to the prospect of the huts continuing to be a profitable speculation Mr Duff deponed—"If the huts sent out had been in conformity with the samples, I am confident I would have made very large sales and a considerable sum of money; I believe I would have sold as many as a thousand if they had been up to the sample. Very large public works have been going on in Cape Colony — railways, telegraphs, and mining all over the colony — gold and diamond digging and prospecting for gold and diamonds all over. Trade began to fall off, particularly in Johannesburg, about December 1889, owing to the collapse in the gold-mining shares—there had been over speculations—but I may say the legitimate trade of the country was good. There were a great many railways in course of construction, the very thing these huts were wanted for. There was a large amount of business being done in the colony and the whole of South Africa for which these huts would have been useful. I am satisfied that I did not fail to sell a single hut except on account of their defective condition. The price was never once complained about; I always got the price I asked. I have a brother in South Africa who is superintendent of telegraphs for the colony. He has been there over thirty years. He has considerable influence, and that would have helped me very much. He is the principal person in connection with the making of the new telegraphs, and he was giving orders for material for the new railway up to Mashonaland, an extensive undertaking, and it was understood he would take a considerable number of huts. I had every reason to believe that owing to my brother's influence I would have had a large outlet for the huts, and also in connection with the Northern railway. I saw Mr Rhodes, and he liked the appearance of the huts, and referred me to his director, Mr Sievewright, who would have given me an order if the huts had been up to the mark."

On the other hand, Mr Ross, a witness for the pursuers, who had purchased the forty huts above mentioned for resale in Johannesburg, deponed that in his opinion the huts "wonld be intolerably hot in the climate of Johannesburg during the summer, unless they were erected in the shade or under an extra roof, and there was other evidence to a similar effect. Mr Duff also admitted that money for articles sold up country was often difficult of collection, and that in fixing the price of the huts he calculated on bad debts.

On 10th June 1891 the Lord Ordinary (Low) pronounced this interlocutor:—"Sustains the pursuers' second and third pleas-in-law: Repels the defences, and decerns against the defenders, under the first conclusion of the summons, for payment to the pursuers of the sum of £1518, 13s. 6d. sterling, with interest on the sum of £1480, 7s. 2d. thereof, as concluded for; and under the second conclusion thereof, for payment of the sum of £500, with interest on the said sum of £500, at the rate of 5 per cent. per annum, from the date hereof till payment, &c.

"*Opinion.*—[*After examining the evidence his Lordship came to the conclusion that the defenders had committed a breach of contract entitling the pursuers to reject the huts.*]

"The question remains as to the amount for which the pursuers are entitled to decree. The summons concludes for two sums—firstly, the sum of £1783, 14s. 2d., being the price which the pursuers paid to the defenders for the rejected huts, together with interest and certain expenditure which the pursuers allege they made in connection with the huts; and secondly, the sum of £1000 in name of damages. In regard to the first sum, the amount actually paid is stated at £1486, 7s. 6d., from which falls to be deducted the price of four huts sold out of the latter consignments, stated at £67, 9s., but which admittedly ought to be £117, 9s., leaving £1368, 18s. 6d., to which must be added interest as brought out, and which is admitted to be a good claim, £38, 5s. 11d.—making £1407, 4s. 5d., for which it is not disputed that decree must be given.

"The remainder of the sum first con-

cluded for consists of the sum of £326, 11s. 9d. A considerable number of the items there set forth consist of advertising the 'Pioneer' hut, of journeys made for the purpose of getting orders, and expenditure of a like nature, which was undertaken in view of the business which Mr Duff hoped to establish, and the whole of which cannot be charged as expenditure made in connection with the rejected huts alone. It is impossible to split up such expenditure, and say how much is applicable to the rejected huts, and how much must be held to be recouped by the profits made upon the huts actually sold. I have therefore struck out all such items, and that reduces the sum of £326, 11s. 9d. to £111, 9s. 1d., which I hold to be the sum actually expended in connection with the rejected huts, and which when added to the sum of £1407, 4s. 5d. already brought out, gives a sum of £1518, 13s. 6d., for which I shall give decree under the first conclusion of the summons.

"In regard to the conclusion for damages, I am of opinion that the pursuers are entitled to an allowance for such expenses as advertising and travelling, which although, for the reasons stated, I have not allowed under the first conclusion, were incurred in view of the contract being fulfilled, and have in part been rendered unremunerative by the breach of contract. Further, the pursuers are entitled to something in respect of the time expended by themselves and their workmen upon the rejected huts.

"The pursuers, however, further claim damages for loss of the profit which they would have made if the contract had been fulfilled, and this raises a question of some difficulty.

"The ordinary rule in the case of a breach of contract to deliver goods which may be obtained in the market is, that the damage consists of the difference between the contract price and the price at which the buyer has or might have supplied himself in the market—the time at which the market price is to be ascertained varying according to circumstances. In the present case it is impossible to have recourse to any such test, because there was no market in which the huts could be purchased, as the defenders alone made them, and the peculiar method of construction was protected by patents.

"In such a case the general rule in England (which has also, I think, been recognised in this country) is, that the damages should be such as may fairly and reasonably be considered either to arise naturally (*i.e.*, according to the usual course of things) from the breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties at the time when they made the contract, as the probable result of the breach of it—*Hadley* v. *Baxendale*, 9 Exchequer, 341. That rule seems to me to allow of a reasonable sum being given for loss of profit in the present case. The defenders knew that the huts could not be obtained elsewhere; that the pursuers purchased them with a view of reselling them at a profit in Africa; and therefore both parties must have contemplated that a loss of these profits would result from a breach of the contract. This view is, I think, consistent with authority both in England and Scotland. In the English case of *Giebert-Borgnis* v. *Nugent*, L.R., 12 Q.B.D. 85, the plaintiff contracted with the defendants to supply them with skins of a certain shape and description, which he could not obtain in the open market. The defendants knew that the plaintiff had made, or was making, a contract to supply skins to a French customer, substantially the same as those which he ordered from them. On a breach of the contract the defendants were held bound to pay to the plaintiff not only the profit which he would have made upon the French contract, but also the damages which had been awarded against him in the French Courts for breach of his contract in that country. In the case of *Borries* v. *Hutcheson*, 18 C.B. (N.S.) 445, loss of profits was in somewhat similar circumstances awarded.

"Turning to the Scottish authorities, the case of *Watt* v. *Mitchell*, 1 D. 1157, also seems to me to support the view which I have indicated. In that case the contract was to ship hemp in Russia for Scotland on a certain day and at a certain price. The contract was broken, and about a year and a-half thereafter the purchaser raised an action for implement of the contract and for damages, and the question ultimately came to be as to the principle upon which damages fell to be assessed. The price of hemp in the home market rose continuously for some years after the date of the contract. The defenders tendered the difference between the contract price, and that at the time when delivery should have been given, while the pursuer contended that he was entitled to the difference between the contract price and the highest price which hemp attained between the date of the breach of contract and the verdict finding that the contract had been broken, which was not obtained until three years afterwards. The Court rejected both of these extremes, and fixed the damage at the difference between the contract price and the price eight months after the time when delivery ought to have been made. Now, what the Court truly did in that case was to allow a reasonable sum for the profit which the purchaser would have made if he had received the hemp and sold it in the ordinary course of trade. Lord Medwyn, who gave the leading opinion of the Court, considered the question whether there is any principle 'in our law for claiming as damage the profit which might have been made by a sale of the article in a rising market,' and after referring to Lord Stair's *dictum*, and to the Roman law, he says—'Now, this does seem to indicate that in estimating damage we are entitled to look at the use the one party intended to make of it' (the article sold), 'and which the other might presume was intended. It is upon this principle that the seller is only

bound to repair the loss which relates to the thing itself, and which results directly from it—not consequential damage. . . . And if the article were purchased by a dealer in it with a view to be re-sold for profit, and this was in the contemplation of both parties, I am unable to see how that can be laid out of view in estimating the loss sustained by non-delivery.'

The judgment in *Watt* v. *Mitchell* was referred to in the House of Lords in *Dunlop* v. *Higgins* (6 Bell's App. 193) as settling the law of Scotland on the point, and I am not aware that the authority of the judgment has ever been impugned.

"I am therefore of opinion that the pursuers are entitled to a reasonable sum for the loss of profits which they would have made, and indeed I see no other way in which the loss which they have sustained through the breach of contract can be estimated.

"The amount which should be awarded for the loss of profits is a jury question, which must be determined upon consideration of the whole circumstances of the case. Now, I find that of the huts in the earlier consignments which were disposed of, forty were sold to Mr Ross at a profit of £7, 2s. 6d., and six were sold in Cape Town at a profit of £11, 10s. These, however, were first put upon the market, and the purchase of them must be looked upon as to some extent an experiment, and if the huts had turned out not to be so suitable for the purpose for which they were required as expected, the price of these first sold would not have been maintained. And one of the pursuers' own witnesses says that the huts were found to be intolerably hot. Further, Mr Duff says that money for articles sold 'up country' is often difficult of collection, and that in fixing the price of the huts he calculated on bad debts. But bad debts would reduce the average profit. It is also admitted that about the time when the rejected huts would have been put upon the market trade and enterprise in South Africa had become somewhat depressed. Taking all these matters into consideration I have come to the conclusion that a fair sum for loss of profits is £350. And I allow in respect of the other items of damage to which I have referred, £150. Making the total sum for which I shall give decree under the second conclusion of the summons, £500."

The defenders reclaimed, and argued—(1) The pursuers were not entitled to reject the huts. (2) The Lord Ordinary was wrong in allowing damages for loss of profits. What he had done was to give the pursuers the profits without the risks of speculation. The evidence showed that the huts had been found unsuited to the climate of South Africa, and also that at the time they would have been offered for sale trade in South Africa was much depressed. The rule for the assessment of damages for loss of profits in cases of breach of contract was that only such damages should be allowed as might reasonably be supposed to have been in the contemplation of both parties at the time the contract was made, as the probable result of the breach of it—*Hadley* v. *Baxendale*, 1854, 9 Exchequer, 341. The subsequent cases established that a buyer was not entitled to an allowance for loss of profits or market, unless he either tabled a sub-contract for sale of the goods at a profit, and proved that this sub-contract had been known to the sellers—see *Thol* v. *Henderson*, 1881, L.R., 8 Q.B.D. 457; *Giebert-Borgnis* v. *Nugent*, 1885, L.R. 12 Q.B.D. 85; *Hammond* v. *Bussey*, 1887, L.R., 20 Q.B.D. 79, or unless the goods had been specially ordered for sale at a particular season or market—see *The Parana*, 1877, L.R., 2 Prob. Div. 118; *The Agrutino*, 1888, L.R., 13 Prob. Div. 61. The Court was not entitled to assume that the huts, which were goods practically new to the market, would have been resold at a profit. This distinguished the case from *Watt* v. *Mitchell*, where the subject of the contract was a well-known commodity, namely, hemp. The Lord Ordinary was wrong in allowing the £150 he had allowed as the expense of pushing the sale of the huts, for the pursuers had already received under the first conclusion all that they were entitled to for expenses incurred in connection with the rejected huts. Assuming that the pursuers were entitled to an allowance for loss of profits, they could not receive interest as well.

Argued for the pursuers—(1) They were entitled to reject the huts. (2) On the question of damages they were content to rest their case on the opinion of Lord Medwyn in *Watt* v. *Mitchell & Company*, July 4, 1839, 1 D. 1157. The result of the authorities was merely to establish that where goods were contracted to be sold for purposes of re-sale, and the seller failed to deliver them, or delivered them in an unmerchantable condition, the buyer was entitled to a reasonable allowance for loss of profits—Mayne on Damages, 17, 171; *per* Lord Esher in *Hammond* v. *Bussey*, *supra*; *O'Hanlon* v. *South-Western Railway Company*, 1865, 6 B. & S. 484, *per* Justice Blackburn, 491; *Bates* v. *Cameron*, December 6, 1855, 18 D. 186. With regard to the sum of £150 allowed by the Lord Ordinary under the head of damages, that was allowed for separate expenses from those allowed under the first conclusion. The pursuers were also entitled to interest in addition to an allowance for profits, inasmuch as their claim for profits would have remained, even though they had not paid the price of the huts.

At advising—

LORD M'LAREN delivered the opinion of the Court:—This is a reclaiming-note against a judgment of Lord Low in an action of damages for the breach of a contract for the supply of portable iron huts for sale in South Africa. The judgment is to the effect that the huts which were rejected (108 in number) were, by reason of defective construction and insufficient packing, so difficult of erection as to be unfit for the purpose for which they were purchased, and also that they are disconform to the sample huts, and to the repre-

sentations and warranty of the defenders. [*His Lordship then expressed his concurrence with the Lord Ordinary as to the results of the evidence on the question of breach of contract, and the pursuers' right to reject the huts.*]

There remains for consideration the question of the estimation of the damage consequent on the defenders' breach of contract, and its amount. In such cases the rule which is most usually applied is, that the damage is the difference between the contract price and the market price at the time when the breach of contract is ascertained—that is generally on the arrival and examination of the goods. This rule certainly presupposes that a purchaser for resale is not to lose his profit on the adventure, because if he acts upon the rule—that is, if he supplies himself with goods at the market price of the day—he is able to make the same profit on the substituted goods that he would have made on the goods to be supplied under the contract, only his profit is paid to him in two portions, so much by the sub-vendee, and the balance by the seller who is liable in damages. The principle seems to be this, that the first purchaser has a duty to do what is within his power to lessen the loss to the seller by replacing the goods at the current price of the day, and that if he fails in doing so he will only recover from the seller the same sum which the seller would have had to pay in case the purchaser had supplied himself elsewhere? But is it to be said that if such goods cannot be had at any price in the place of delivery, then the seller, who is in fault, is to pay nothing, and the whole loss is to fall on the purchaser who has fulfilled his part of the contract by paying the price. The affirmative was in substance maintained by the defenders' counsel, because they contended that there was no precedent for assessing the damages otherwise than by a reference to market price as the standard of value. But plainly where there is no such standard the damage must be ascertained in some other way, so that the seller shall be put to indemnify the purchaser against such inconvenience as the parties might necessarily foresee or contemplate as the result of a failure of duty on the part of the seller.

In the present case the huts were in the makers' knowledge sent to South Africa for re-sale. It could not be supposed that the pursuers would want 108 Pioneer huts for their personal use in the colony, and besides it appears from the documents that the defenders had constituted the pursuers their sole "agents" for sale within the colony. If huts could have been obtained in the colony at wholesale prices, it would have been the pursuers' duty to supply themselves so as to lessen the loss to the defenders, but as this could not be done, I am afraid the consequence is that the whole loss must fall on the defenders. That loss is of course the commercial profit which the pursuers have been prevented from making on that part of their capital which is locked up in the defenders' hands. I agree with the Lord Ordinary that when a claim of damage is based on estimated profit we ought to be very cautious in accepting the estimate presented to us. I should not be disposed in any case to allow more than ordinary commercial profit, even if it were clearly proved that in the circumstances of the place of shipment larger profits might have been made, because ordinary commercial profit represents the loss which the seller contemplates, or ought to contemplate, as the result of his negligence, and according to the opinions expressed in *Hadley* v. *Baxendale* and cognate cases, this is the measure of the seller's liability.

The Lord Ordinary has awarded £500 in two sums, viz., £350 for loss of profit, and £150 for travelling expenses and outlays specially proved. The sum of £350 is equal to a profit of about £3, 7s. on each of 108 huts rejected. The profit on the huts which were sold is proved to have been from £7 to £11, 10s., and the Lord Ordinary's estimate is therefore a low one.

This leads me to say in conclusion that my opinion is—and in this I think your Lordships agree—that the pursuers are not entitled to separate awards of interest on the price and damages; and for this reason, that the estimation of profit presupposes that a price is due and is paid. But we are satisfied that but for the allowance of interest the Lord Ordinary would have given a larger sum in name of damages, and therefore I do not propose to your Lordships that we should make any alteration on the terms of the interlocutor.

The Court adhered.

Counsel for the Pursuers—Comrie Thomson—M'Lennan. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders — Ure — J. Clark. Agents—Maconochie & Hare, W.S.

Wednesday, December 2.

FIRST DIVISION.

[Lord Low, Ordinary.

HOILE *v.* CHAPLIN AND OTHERS.

MORE *v.* CHAPLIN AND OTHERS.

Trust—Liferent—Irritant Clause—Construction—Bankruptcy—Trustee—Power of Sale.

A disposition and settlement which conveyed certain estates in liferent and fee, prohibited the liferenters from "selling, mortgaging, or otherwise disposing" of their interest, and provided that "such sales and mortgages" should be void, that "all deeds or instruments purporting to be a sale or mortgage of such interest or any part thereof" should be null and void, and that "all parties signing such deeds or instruments" should thereby forfeit their rights in favour of the person next in