stands in the position rather of the maker of a promissory-note, who undertakes payment of the amount therein contained to the payee or his order. Here the bank who advanced money on the cheque was the payee, and to that payee, being also the holder, payment must now be made by each and all of the makers or granters of it. I think the judgment of the Lord Ordinary should be affirmed.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuers and Respondents—Salvesen, K.C.—Younger. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Constable. Agents—Wallace & Pennell, W.S.

Wednesday, November 12.

FIRST DIVISION.

[Lord Low, Ordinary.

STEAMSHIP "DEN OF OGIL" COMPANY, LIMITED *v.* CALEDONIAN RAILWAY COMPANY.

Contract—Breach of Contract — Damages —Carriage of Goods — Measure of Damages—Consequential Damages—Notice of Special Circumstances — Carrier — Railway.

The owners of a steamer which had broken her piston, ordered another, and arranged for its carriage by passenger train. Through a mistake for which the railway company were admittedly responsible, the piston was several days late in arriving, with the result that the steamer was detained. The owners of the steamer brought an action against the railway company, claiming damages for the expenses to which they had been put, the wages and coal expended while waiting for the piston, and the loss of the profit which the steamer would have earned had she been able to sail. On a proof it was established that the servants of the railway company were aware that they were carrying a casting; that it was going to a ship, and that the effect of non-delivery would be that the ship would be unable to sail; but they were not informed of the size of the ship or the number of her crew. The Lord Ordinary awarded £10 as damages, being the amount of the extra expense incurred in fitting the piston owing to the fact that it ultimately arrived on a Sunday, and the expense incurred in seeking to recover it. On a reclaiming-note the Court *altered* the interlocutor of the Lord Ordinary and assessed the damages at £50, *holding* that while the pursuers were not entitled to damages for loss of profit, they were entitled to a portion of the amount expended on wages, coal, &c., while the ship was waiting for the piston.

This was an action at the instance of the Steamship "Den of Ogil" Company, Limited, against the Caledonian Railway Company for £300 in name of damages for the failure of the Railway Company to deliver timeously a piston which had been consigned to them for carriage by the Clyde Shipbuilding and Engineering Company, Limited, acting on behalf of the pursuers.

It was admitted on both sides that the steamship "Den of Ogil" had broken her piston; that in November 1900 she was lying at Plymouth unable to proceed for want of it; that on 27th November 1900 the Railway Company received from the Clyde Shipbuilding and Engineering Company a new piston for carriage from Port-Glasgow to Plymouth; that the piston was to be sent by passenger train at special rate; that it ought to have arrived at Plymouth on 28th November, but that through a mistake for which the Railway Company admitted responsibility the waggon containing the piston was sent back to Scotland, with the result that it did not arrive in Plymouth until Sunday, 2nd December.

The Railway Company in their defences did not dispute that they were in breach of their contract, and offered to pay £5 of nominal damages. The question between the parties therefore came to be solely as to the measure of damages.

The pursuers made the following averment of damage:—"(Cond. 5) The 'Den of Ogil' is a screw-steamer built of steel, and having a tonnage of 3920 gross and 2522 net register, and triple expansion engines, and she is classed 100 A1 at Lloyds; and the loss and damage sustained by the pursuers through the detention of said vessel by the fault of the defenders condescended on is moderately estimated at £300, the sum sued for."

The defenders pleaded, *inter alia*—"(4) The delay in delivery of the casting in question not being the proximate cause of the loss and damage sued for, the defenders ought to be assoilzied. (5) The loss and damage sued for not being the ordinary and natural consequence of the delay in delivery, and the defenders having had no notice of the consequences of delay in the case in question, the pursuers are not entitled to the special loss and damage sued for."

Proof was allowed and led. The import of the proof appears from the opinions of the Lord Ordinary and the Lord President *infra*.

On 5th December 1901 the Lord Ordinary (Low) pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, decerns against the defenders for payment to the pursuers of the sum of £10 sterling in name of damages in full of the conclusions of the summons: Finds no expenses due to or by either party."

Opinion.—"In November 1900 the steamship 'Den of Ogil' broke her high pressure piston, and was in consequence unable to proceed on a voyage which she was ready to commence until the piston was replaced. The pursuers accordingly employed the Clyde Shipbuilding and Engineering Company of Port-Glasgow to supply a new piston, and instructed them to send the piston by passenger train to Plymouth, where the vessel was lying.

"The piston was ready for despatch on the 27th November, and the Clyde Shipbuilding Company arranged with the defenders' station-master at Port-Glasgow that a waggon containing the piston should be attached to the 7·19 p.m. passenger train for Glasgow, and should be sent on from Glasgow by the 9·5 p.m. train for London. In order to reach Plymouth the waggon required to be detached at Crewe and forwarded by Salop and Hereford. In the ordinary course of passenger train the waggon ought to have arrived at Plymouth at 6 p.m. on the 28th November, but by a mistake of the railway officials it was not sent forward from Crewe, but was returned to Scotland as an empty waggon, and the result was that the piston was not received in Plymouth until 1 a.m. on the 2nd December. The consequence was that the 'Den of Ogil' was detained at Plymouth between three and four days longer than she would have been if the piston had been sent straight on from Crewe.

"In these circumstances the defenders do not dispute that they were in breach of their contract, and the question at issue is, What is the measure of damages which falls to be applied in such a case?

"The pursuers claim the loss which they have sustained on account of the detention of the vessel, which includes the expenses incurred while she was lying at Plymouth and the profit which she would have earned if she had not been detained. The defenders on the other hand maintain that they are not liable to make good such loss, because it does not represent the damages arising naturally and in the ordinary course of things from the breach of contract.

"I did not understand the pursuers to dispute that if the contract with the defenders was simply to carry the piston to Plymouth without any notice of the special circumstances, the defenders would not be liable to pay for the detention of the vessel, but they maintain that the defenders were given such information in regard to the circumstances that the damages claimed must be supposed to have been in the contemplation of both parties when they made the contract, as the probable result of the breach of it.

"The first question therefore is—What were the instructions or representations upon which the contract was entered into? The matter was arranged verbally between Thomas Orr, a clerk in the employment of the Clyde Shipbuilding Company, and M'Gregor, the station-master at Port-Glasgow. Orr's evidence was as follows:—'I told him (M'Gregor) that this piston was in a big hurry; that it was a repair for the steamer 'Den of Ogil,' and that we wished it sent on as quickly as possible. I arranged with him for a special truck to be attached to the 7·19 passenger train from Port-Glasgow, and that that passenger train would stop at the goods station at Port-Glasgow to take on the truck. He told me that the truck would be forwarded by the 9·5 train from Glasgow Central, transferred at Crewe, and that it would arrive at Plymouth the following night at 6 o'clock.' Orr further said that he was sure that he described the goods to M'Gregor as a 'piston,' and not as a 'casting.'

"M'Gregor's evidence is summed up in this sentence—'All he (Orr) said was that he had a casting to go to the steamship 'Den of Ogil' at Plymouth; that it was to be sent through by passenger train, and that the ship would await its arrival. That exhausts as far as I remember what Orr said. . . . He said nothing to me about the nature of the casting. He did not tell me that the casting was a piston.'

"The conversation between Orr and M'Gregor took place in the booking-office, and the booking clerk Laurence was present and heard the conversation although he did not take part in it, but was engaged upon his ordinary duties. His evidence was as follows:—'As far as I heard and understood, the conversation had reference to a casting which was coming from the Clyde Shipbuilding and Engineering Company, and going to Plymouth; and Mr M'Gregor was going to ask the superintendent to have the 7·19 train stopped at Port-Glasgow to lift the casting, and that he would ask him to have it conveyed by the 9·5 from Glasgow. I heard no remarks made as to the casting being urgently required at Plymouth. I understood that quick despatch was wanted because they were arranging for passenger train. I heard nothing said about the casting in question being a piston. I heard nothing at all said as to the casting being required for a repair to a steamer at Plymouth.'

"I have no doubt as to the complete honesty of all these witnesses, and the conclusion to be drawn from their combined evidence seems to me to be that Orr did not make clear to M'Gregor what the special circumstances, in view of which it is said that the defenders must be regarded as having undertaken special liability, were. Assuming that knowledge of the circumstances would render the defenders liable for the damages claimed, I am of opinion that that knowledge would require to be full and precise, and the evidence in my opinion negatives the idea that such full and precise knowledge was in fact communicated. The important circumstances were, that the 'Den of Ogil' was ready to start upon a voyage, but that she had broken her piston and could not put to sea until the new one had been put in, and that therefore delay in delivering the piston would involve still further detention of the ship. Even Orr's account of what he told M'Gregor falls short of a full

and explicit statement of these circumstances. Practically all that M'Gregor knew was that the early delivery of the article which he was asked to forward was so important that the senders were willing to pay the high rate charged for carrying it by passenger train. If he had known the exact circumstances he might very well have considered it prudent to take special precautions against delay by telegraphing to the railway officials at Crewe, or at any other place where the waggon required to change lines.

"I therefore think that it is impossible to say that when the defenders agreed to carry the piston they had such accurate knowledge of the circumstances that they must be presumed to have had in view that the result of their failure to carry out their contract would be that a large merchant ship, which was otherwise ready to proceed upon a voyage, would be detained at great expense to her owners.

"I think that the judgment of the Court of Appeal in England in the case of *Horne* v. *Midland Railway Company*, L.R. 8 C.P. 131, is entirely in favour of the conclusion at which I have arrived. I regard that as a case of great authority in view of the eminence of the judges who took part in the decision. It is true that the judgment in the case was not unanimous, but the circumstances appear to me to have been much more favourable to the party claiming damages than they are in this case. I may also refer to the case of the *British Columbia Sawmill Company* v. *Nettleship*, L.R. 3 C.P. 499.

"The question remains, what is the true measure of the damages? It seems to me that damages must be limited to the extra cost to which the defenders were put in fitting in the piston by reason of the delay in delivery, and any expenses which they incurred in waiting for and seeking to recover it. That amount I assess at £10."

The pursuers reclaimed, and argued—On the facts they had established that the Railway Company had notice that they were carrying a piston for a ship, and that the result of delay would be that the ship could not sail. Therefore the loss incurred by the ship not being able to sail was the proper measure of damages. It was, or should have been, in the contemplation of the Railway Company when they entered into the contract that such damages would result if they failed to perform it. The fact that the piston was carried by passenger train and on special terms was important as notice. This distinguished the present case from *Horne* v. *Midland Railway Company*, 1873, L.R., 8 C.P. 131, and *British Columbia Sawmill Company* v. *Nettleship*, 1868, L.R., 3 C.P. 499. These were the cases on which the Lord Ordinary relied, but they were not in point, because it was held in both that the parties in breach of the contract had not notice of the damage which in fact resulted. The present case approached more nearly to cases where goods were sent by a train intended for a particular market and were delayed in transit. In such cases the carriers were liable in damages caused by the loss of market, because these were in the contemplation of both parties when the contract was made—*M'Donald* v. *Highland Railway Company*, May 20, 1873, 11 Macph. 614; *Simpson* v. *London and North Western Railway Company*, 1876, 1 Q.B.D. 274. In any event, even if the loss of profit could not be claimed, the damages allowed by the Lord Ordinary were too low. The pursuers were entitled to what they had actually expended in wages, coal, &c., while waiting for the piston.

Argued for the respondents—Admitting that there was a contract to carry the piston urgently, that did not amount to notice which would make the company liable for damages which were not the ordinary and natural result of their breach of contract. Even on the pursuers' view of the evidence, all they knew was that the piston was intended for a ship and that the ship was waiting for it. That was not enough. If they were to be liable for any consequential damages, full notice was necessary. Notice fully equal to that proved here had been given in all the English cases, and in none of them had consequential damages been given—*Hadley* v. *Baxendale*, 1854, 9 Ex. 341; *Portman* v. *Middleton*, 1858, 4 C.B. (N.S.) 322; *Horne* v. *Midland Railway Company* and *British Columbia Sawmill Company* v. *Nettleship* (cited *supra*); *Woodger* v. *Great Western Railway Company*, 1867, L.R., 2 C.P. 318; *Gee* v. *Lancashire and Yorkshire Railway Company*, 1860, 6 H. and N. 211; *Cory* v. *Thames Ironworks Company*, 1868, L.R., 3 Q.B. 181; *Candy* v. *Midland Railway Company*, 38 L.T.R. 226; *The Parana*, 1877, 2 Prob. Div. 118; *Thol* v. *Henderson*, 1881, 8 Q.B.D. 457; Mayne on Damages, 6th ed., p. 11. The rule laid down in *Hadley* v. *Baxendale* (cited *supra*), and followed ever afterwards, was that damages which would not arise in the ordinary case from breach of a contract, but which do arise from circumstances peculiar to the particular case, are not recoverable unless the special circumstances are known to the person who has broken the contract. Applying that test to the present facts there was no liability. If the defenders were to be made liable for the loss resulting from the detention of a large steamer they should have been expressly informed that this result would happen if they broke their contract. If they had lost the piston they would be liable for the amount it would cost to replace it, but there was no authority for making them liable for the loss resulting from the detention of the ship while the new one was being made. *Simpson* v. *London and North Western Railway Company*, 1876, 1 Q.B.D. 274, and *M'Donald* v. *Highland Railway Company*, May 20, 1873, 11 Macph. 614, were quite distinguishable. They were cases where the railway company carried goods expressly for a particular market, and must have had in view that detention would cause loss of market, and consequent damages.

At advising—

LORD PRESIDENT—The questions in this case relate to the measure and amount of the damages payable by the defenders to the pursuers in respect of delay in delivering a piston which was consigned by the Clyde Shipbuilding and Engineering Company, acting on behalf of the pursuers, by the defenders' railway from Port-Glasgow to Plymouth.

It was arranged by the Clyde Shipbuilding and Engineering Company, acting for the pursuers, with Mr M'Gregor, the defenders' station-master at Port-Glasgow, on 27th November 1900, that the piston should be sent in a waggon to be attached to the 7·19 p.m. train from Port-Glasgow to Glasgow, and thence forwarded from Glasgow by the London train at 9.5 p.m. The charge for the carriage by passenger train was £11, 14s. 4d., a sum greatly in excess of the ordinary goods rate. A label bearing the words "very urgent" was attached to the waggon, and it was arranged that the waggon should be detached from the train at Crewe, and thence forwarded to Plymouth, where it should have arrived at 6 p.m. on 28th November, but by some mistake on the part of the railway officials it was returned to Scotland as an empty waggon, and the piston did not reach Plymouth until 1 a.m. on 2nd December. The piston was intended to replace one of the pistons of the steamship "Den of Ogil," which had been broken, and she could not leave Plymouth until the new piston had arrived and been fitted in. The "Den of Ogil" is a screw steamer built of steel, having a tonnage of 3929 gross and 2522 net register, with triple expansion engines, and she is classed 100 A1 at Lloyd's. At the time in question she had a crew of fifty-seven hands.

The first question is, what instructions and information were given to the officials of the defenders when the contract for the carriage of the piston to Plymouth was entered into with them, and upon this point there is a conflict of evidence. Thomas Orr, a clerk in the employment of the Clyde Shipbuilding and Engineering Company, who arranged with Mr M'Gregor, the defenders' station-master at Port-Glasgow, for the carriage of the piston, states that he told the station-master that it was in a "big hurry," that it was a repair for the steamer "Den of Ogil," and that the Clyde Shipbuilding and Engineering Company wished it to be sent on as quickly as possible. Orr also says that he at the same time arranged with the station-master that a special truck should be attached to the 7·19 passenger train from Port-Glasgow, and that the train should stop at the goods station at Port-Glasgow to take on the truck. He adds that the stationmaster informed him that the truck would be forwarded by the 9·5 train from Glasgow Central Station and transferred at Crewe, so that it would arrive at Plymouth at six o'clock on the following night. Mr M'Gregor, the station-master, on the other hand, states that all that Orr said was that he had a casting to go to the steamship "Den of Ogil" at Plymouth, that it was to be sent through by passenger train, and that the steamship would await its arrival. He says that he was not informed as to the nature of the casting, and in particular that he was not told that it was a piston. The only person who heard the conversation between Orr and Mr M'Gregor was the booking-clerk Laurence, who says that, so far as he understood, Mr M'Gregor was going to ask the superintendent to have the 7·19 train stopped at Port-Glasgow to lift the casting in order that it might be conveyed by the 9·5 train from Glasgow. He states that he heard nothing said as to the casting being a piston, or as to its being urgently required at Plymouth, but that he understood that quick despatch was wanted from the fact that they were arranging for its being conveyed by a passenger train. He further states that he heard nothing as to the casting being required for early repair of the steamer at Plymouth.

Upon this evidence I do not think it can be held to be proved that Mr M'Gregor was informed that the casting was a piston, or that it was intended to replace a broken piston in the "Den of Ogil." It is, however, clear that Mr M'Gregor was informed that the conveyance was urgent, as also that the casting was to go to the "Den of Ogil," and that the "Den of Ogil" would wait its arrival. It appears to me to be sufficiently established by the evidence that the defenders' representative was made aware that the steamer "Den of Ogil" would not sail until the casting arrived. Whatever the reason may have been for the steamer awaiting the casting, *e.g.*, whether it was to supply a breakdown in her machinery or was to be carried by her as cargo, the material point, in my judgment, is that the defenders were apprised that the consequence of failing to forward the casting to Plymouth at the time contracted for would be to delay the sailing of the "Den of Ogil" until it had arrived; or in other words, that the non-fulfilment of the contract of carriage would infer the detention of the "Den of Ogil." The fact that the carriage was urgent was also evident from the piston being sent by a passenger train at a high rate of charge. The defenders were thus, in my view, affected with notice that the transit was urgent, and that the effect of its not being punctually fulfilled would be to delay the sailing of the "Den of Ogil." But, on the other hand, it does not appear that the defenders were informed that the "Den of Ogil" was so large a steamer having such a numerous crew.

Under these circumstances the question comes to be, what is the measure of the damages which the defenders are liable to pay for their admitted breach of contract? One of the claims made by the pursuers is for the loss of profit caused by the detention of the "Den of Ogil" for about three days, and I am of opinion that this is not a legitimate head of claim, for the reasons explained by Lord Justice Mellish in the case of "*The Parana*," 2 Prob. Div. 118. But while I think that the pursuers are

not entitled to loss of profit I consider that they have right in name of damages to a part at least of any outlays which were rendered necessary by the detention of the steamer while awaiting the arrival of the piston at Plymouth, and which became unprofitable in consequence of that detention. If the defenders had been made aware of the size of the "Den of Ogil" and the number of her crew, I think that the pursuers would have had a strong claim for the whole of such outlays during the period of detention, as it has been said that in such cases the measure of the damages is the amount of the loss which might naturally be expected by the parties in the state of knowledge which they had when they entered into the contract to result from a breach of it. A part, therefore, at all events of the wages of the crew while waiting at Plymouth for the piston after by the terms of the contract of carriage it should have arrived there, seems to me to be a legitimate charge against the defenders, and also a part of the cost of provisions, stores, &c., consumed by them, or necessarily used in the vessel during the period of detention. It further appears that the fires of the "Den of Ogil" were banked in order that she might be ready to start immediately upon the piston being fitted in after its arrival, and I think that part, at all events, of the cost of the coal so consumed during the period between the time at which by the terms of the contract the piston should have arrived and the time at which it actually did arrive, forms a legitimate item of charge against the defenders, as well as a part of any other outlays rendered necessary by the delay and not otherwise useful or available for the purposes of the ship. The Lord Ordinary says that it seems to him that the damages must be limited "to the extra cost to which the defenders were put in fitting in the piston by reason of the delay in delivery, and any expenses which they incurred in waiting for and seeking to recover it." This statement would seem to include the items which I have indicated appear to me to form proper heads of claim, but the Lord Ordinary has assessed the total damage at £10, and I am of opinion that this sum is inadequate. I think that £50 should be awarded in name of damages.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court altered the interlocutor of the Lord Ordinary, and awarded £50 in name of damages.

Counsel for the Pursuers and Reclaimers—Jameson, K.C. — Younger. Agents — Boyd, Jameson, & Young, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—Deas. Agents—Hope, Todd, & Kirk, W.S.

Friday, November 14.

FIRST DIVISION.

[Lord Stormonth Darling, Lord Ordinary on the Bills.

SMITH *v.* MAGISTRATES OF IRVINE.

Burgh — Audit — Appointment of Burgh Auditor—Statute—General and Local—Nothing in General to "Supersede, Prejudice, or Affect" Provisions of Local—Town Councils (Scotland) Act 1900 (63 *and* 64 *Vict. cap.* 49), *secs.* 94, 95, *and* 117 *—Irvine Burgh Act* 1881 (44 *and* 45 *Vict. cap. lxxi.*)

The provisions of the Town Councils (Scotland) Act 1900, relative to the appointment of auditors of burgh accounts by the Secretary for Scotland, do not apply in cases where the audit of the burgh accounts is provided for by a local Act.

The question in this case was whether the right of the Corporation of the Burgh of Irvine to appoint an auditor of the burgh accounts under the provisions of the Irvine Burgh Act 1881 was superseded by the Town Councils (Scotland) Act 1900.

The provisions of the Irvine Burgh Act, so far as material to the present report, are quoted in the opinion of the Lord President, *infra*.

The Town Councils (Scotland) Act 1900, after providing (sections 91, 92, and 93) for the accounts of a burgh being made up yearly to the 15th of May in each year, enacts:—Section 94—"The Secretary for Scotland shall annually appoint an auditor for the purpose of auditing the accounts of the burgh, and in case of dispute, shall, on the application of either party, fix the fee to be paid to such auditor; and in case the office of such auditor shall, before such accounts are audited by him, become vacant by death or from any other cause, shall, subject to the like incidents, appoint an auditor to supply such vacancy." Section 95—"The council shall deliver to the auditor, as soon as may be after the said fifteenth day of May annually, all the accounts, together with their books and vouchers; and it shall be the duty of the auditor to audit such accounts, and either make a special report thereon in any case where it appears to him expedient so to do, or simply confirm the same, provided that the auditor shall make a special report in every case where he is of opinion that any statutory or other requirement with respect to the repayment or extinction of debt has not been observed, or that any debt is not being duly repaid." Section 117—"Nothing in this Act contained shall supersede, prejudice, or affect the provisions of any local Act applicable to any burgh, or the forms of prosecutions and procedure in use therein under such Act."

Thomas Smith, C.A., Glasgow, was appointed by the Secretary for Scotland, under the powers conferred by section 94 of the Town Councils (Scotland) Act 1900, (quoted *supra*), to audit the accounts of the Town Council of the Burgh of Irvine for