[*24th February*, 1848.]

MESSRS. DUNLOP, WILSON, and Co., Ironmasters in Glasgow, *Appellants.*

MESSRS. VINCENT HIGGINS and SON, Merchants in Liverpool, *Respondents.*

Sale.—If an offer to sell be answered by a letter put into the post-office, the contract of sale is completed, and the purchaser is not answerable for delay in delivery of the letter, arising with the post-office.

Sale.—Damages.—The question of amount of damage for non-performance of a contract of sale, is not confined to the difference between the contract price and the market price on or about the day on which the contract was broken, but is to be left to the jury for consideration, upon all the circumstances of the case, of what will best compensate the party.

ON the 20th of January, 1845, the Respondents wrote the Appellants to know whether they could sell to them 2000 tons of pig iron. On the 22nd, the Appellants answered, "We will "be glad to supply you with 2000 tons of pig, at 65*s.* per ton "net, delivered here."

On the 25th, the Respondents wrote, "you say 65*s.* net for "2000 tons pig. Does this mean for our usual four months' "bill? please give us this information in course of post, as we "have to decide with parties on Wednesday next." To this the Appellants answered, on the 28th, "In reply to yours of the "25th instant, our quotation meant 65*s.* net, and not a four "months' bill."

On the 29th, the Respondents wrote the Appellants, "Your "offer is 2000 tons of pigs at 65*s.* per ton net delivered here. "Now, we want to know whether you mean 65*s.* net, for our

" usual and customary draft, and if delivery is to take place on " completion of present contracts, and in same quantities *per* " month? If you have not already despatched this information " to us, please do so in course of post, and at the same time, " state if you will accept of an order for 3000 tons instead of " 2000 tons."

The Respondents received the letter of the Appellants of the 28th on the 30th, and in the evening of that day they wrote them, " We will take the 2000 tons pigs you offer us. Your letter " crossed ours of yesterday, but we shall be glad to have your " answer respecting the additional 1000 tons. In your first letter " you omitted to state any terms; hence the delay." This letter was by mistake dated the 31st of January.

On the 1st February, the Appellants replied, " We have your " letter of yesterday, but we are sorry that we cannot now enter " the 2000 tons pig iron, our offer of the 28th not having been " accepted in course." On the 3rd February, the Respondents wrote, " On referring to our letter accepting your offer of 2000 " tons pig iron, we find we dated it 31st January, whereas it was " written on Thursday the 30th, and we can prove that it was " posted on that day. Of course the 2000 tons is now booked, " and we wait your answer to our inquiry respecting the addi- " tional 1000 tons."

On the 3rd of February, the price of pig iron was still 65*s.* per ton, but on the following day it rose 5*s.* per ton, and in the course of the month it reached 80*s.* per ton, and gradually ascended, until in the month of April it was as high as 110*s.*

At the time at which this correspondence took place, two mails were dispatched daily from Liverpool to Glasgow, one at 1 o'clock in the morning, the letter-box for which closed at mid-night; and the other at a quarter past 4 o'clock in the afternoon, the box for which closed at a quarter past 3 o'clock.

From the private post-mark on the letter, written on the 30th, but dated the 31st, it appeared that it had been put into

the post-office at Liverpool between a quarter past 6 and a quarter past 8 o'clock in the evening of the 30th. According to the regular course of post, this letter should have been dispatched from Liverpool at half-past 1 o'clock in the morning of the 31st of January, and it should have reached Glasgow in about twenty-two or twenty-three hours thereafter, or about half-past 11 at night of the 31st; but owing to some interruption of the mail it did not reach Glasgow until 1 o'clock in the afternoon of the 1st February, and the letters were of course not delivered to the merchants till later in the same day.

In these circumstances the Respondents brought an action against the Appellants, concluding for the damage incurred by them "in and through the refusal of the Appellants to deliver "the 2000 tons of pig iron in terms of their contract, and "generally in consequence of their breach and non-implement "of the same."

The Appellants pleaded in defence, that according to the practice of merchants in the iron trade, their offer was not binding unless accepted in course of post; and as it had not been accepted in time it was not binding.

This action was advocated from the Sheriff Court, in which it had been brought, to the Court of Session, where it was sent for trial, upon the following issue, "Whether about the end of "January 1845, the Pursuers purchased from the defenders "2000 tons of pig iron, at the price of 65*s.* per ton, and "whether the Defenders wrongfully failed to deliver the same, "to the loss, damage, and injury of the Pursuers."

Upon the trial of this issue, the Appellants objected to the examination of one of the post-office clerks, with a view to show when the letter dated the 31st January was put into the post-office at Liverpool, and ought to have arrived at Glasgow, because "the Pursuers having admitted that they were bound to "answer the Defenders' offer of the 28th, by letter written and "posted on the 30th, and the only answer received by the

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" Defenders being admitted to be dated 31st January, and " received in Glasgow by the mail, which in due course ought " to bring the Liverpool letters of the 31st, but not Liverpool " letters of the 30th—it is not competent in a question as to " the right of the Defenders to withdraw or fall from the offer, " to prove that the letter bearing date the 31st January, was " written and dispatched from Liverpool on the 30th, and pre- " vented by an accident from reaching Glasgow in due course, " especially as it is not alleged that the Defenders were aware, " (previous to the 3rd February,) of any such accident having " occurred."

This objection was overruled by the Judge who tried the cause, and an exception was thereupon taken by the Appellants to the admission of the evidence.

In the course of the trial a number of merchants were examined, as to the time within which the Respondents' offer should have been accepted;—some thought, where nothing was said about the course of post, that the party might take the day on which he received the offer to consider, and answer it on the following day. Others did not draw any distinction between an offer to be answered in course of post and one without that condition, and thought that both ought to be answered on the day on which they were received, without regard to whether a mail was despatched once or twice in the day. While others thought that an offer to be answered in the course of post should be answered by the very first mail dispatched after receipt of it.

In charging the jury, the Judge stated that " he adopted the " law as duly expounded in the rubric of the case of Adams and " Others, 6th June, 1818, in *Barnwell & Alderson*, and which is " as follows :—' A by a letter offers to sell to B certain specified " ' goods, *receiving an answer by return of post;* the letter being " ' misdirected, the answer notifying the acceptance of the offer " ' arrived two days later than it ought to have done; on the " ' day following that when it would have arrived, if the original

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" ' letter had been properly directed, A sold the goods to a " ' third person: Held that there was a contract binding the " ' parties from the moment the offer was accepted, and that B. " ' was entitled to recover against A in an action for not com- " ' pleting his contract.' "

Thereupon the Appellants tendered these four exceptions to the charge:—" In so far as his Lordship directed the jury, in " point of law, that if the Pursuers posted their acceptance of " the offer in due time according to the usage of trade, they are " not responsible for any casualties in the post-office establish- " ment.

" In so far as his Lordship did not direct the jury, in point " of law, that if a merchant make an offer to a party at a " distance by post letter, requiring to be answered within a cer- " tain time, and no answer arrives within such time as it should " arrive, if the party had written and posted his letter within " the time allowed, the offerer is free, though the answer may " have been actually written and posted in due time, if he is not " proved to be aware of accidental circumstances preventing the " due arrival of the answer.

" In so far as his Lordship did not direct the jury, in point " of law, that in the case above supposed, if an answer arrives, " bearing a date beyond the time limited as above for making " answer, and arrive by a mail, and be delivered at a time cor- " responding to such date, the offerer is entitled to consider " himself free to deal with the goods as his own, either to sell " or to hold, if he be not in the knowledge that the answer " received was truly written of an earlier date, and delayed in " its arrival by accident.

" In so far as his Lordship did not direct the jury, in point " of law, that in case of failure to deliver goods sold at a stipu- " lated price and immediately deliverable, the true measure of " damage is the difference between the stipulated price and the " market price, on or about the day the contract is broken, or

" at or about the time when the purchaser might have supplied " himself."

Thereafter the jury found a verdict for the Respondents, and assessed the damages at 1500*l.*

Upon the hearing of the exceptions, the Court (on the 2nd of July, 1847) disallowed them all, and against this interlocutor the appeal was taken.

Mr. Bethell and *Mr. Anderson* for the Appellants.—I. The offer of a merchant for the sale of his goods is in every case under an implied condition of acceptance within a certain time; and according to the custom of merchants, that is, the return of the post on the day on which the offer is received, till which time, and no longer, the offer enures.

This circumstance, of due acceptance of the offer, is, therefore, a condition precedent in the contract of sale,—until it is made there is no contract; for nothing can be substituted for performance of a condition precedent. The arrival of the day on which the post returned without any acceptance, purged the condition therefore, and put the offerer at liberty to treat the transaction as at an end. Where the condition is subsequent the matter is different; for non-performance of a condition subsequent there may be many excuses receivable, such as the act of God, of the king's enemies, or the impossibility of the thing. But where the condition is precedent nothing can excuse its non-performance, so as to admit of a right being vested in the party by whom the performance should be made. This is illustrated by the case of Brodie *v.* Todd, 17 *F. C.* 609. There Todd and Co. transmitted bills of lading for the goods sold, with a bill drawn for the price, which they requested might be returned "in course" of post. This not having been done they were held to be justified in re-landing the goods from the vessel, which had not yet left the port of shipment.

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acceptance there is no condition broken. In *Brodie's* case an express condition was broken.]

The condition here was, that the seller was to have acceptance within a given time, and no effort of the purchaser which did not accomplish that, could avail to give him a right against the seller. In *McDouall's Inst.* i., 4, 24, it is said, "An offer "has an implied condition of acceptance, whereby alone the "party accedes and converts the offer into a contract, so that "it is not binding but ambulatory or revocable till it is accepted, "and therefore revocation by the offerer, or death of either "party before acceptance, voids it."—In Horsley *v.* Hood, 6 *Durn. & East*, 710, where the condition of a policy of insurance against fire was, that the assured should procure the certificate of the minister and churchwardens of the parish that they knew his character, and believed he had sustained the loss without fraud, the obtaining the certificate was held to be a condition precedent to the right to recover, which was not purified by the wrongful refusal of the minister to grant the certificate. And in Davidson *v.* Mure, 3 *Doug.* 28, where the condition of a marine insurance against capture was that if, in case of capture, it should appear to a court martial that the best defence had been made, the insurers would pay, the finding of a court martial to this effect was held to be a condition precedent to the right to recover, not discharged by the circumstance that, during the war in which the capture occurred, there had not been any similar court martial held. The anxiety of the Respondents, therefore, however urgent, to accept the offer within the time necessary could not dispense with the necessity of that acceptance, although the delay was occasioned by a circumstance beyond their control. The consequences of any other doctrine would lead to anomalous and unjust results, for if posting acceptance is enough without regard to its receipt, what is the offerer to do where the market for the commodity offered is fluctuating: if he must wait a day the change in price may be most serious. Where the acceptance of an offer is not received, the inference

is as strong that the offer has been declined as that the acceptance has miscarried. At whose risk, while the market is fluctuating, is the offerer to wait in order to ascertain which is the correct inference? why should it be at his own when the delay is no way imputable to him? In the present case, if the market had fallen instead of rising during the delay, and no acceptance of the offer had ultimately arrived, the Appellants could not have come upon the Respondents for the loss; why should the Respondents be entitled to come upon them for the loss when the market went the other way? If they may, then an offerer *must* suffer unless the market be quite stationary, and without any limit to the amount of his risk, for many days may elapse before the miscarriage of the acceptance or refusal is discovered and rectified.

The true and just view is, that there is no contract between the parties to enforce either way. The post-office must be regarded as their common agent; and as it failed in the due performance of its duty, the consequence ought to be, that no obligation arose on either side. The negotiation failed by an accident growing out of their mutual arrangement. This is a mode of solution consistent with reason and easy of perception: but to draw the construction, which the judgment below does, is contrary to reason and fraught with injustice. If the delay in acceptance was not occasioned by the fault of the Respondents, so neither was it occasioned by any fault of the Appellants. What reason is there, then, why the Appellants should bear the loss rather than the Respondents? but by declaring the negotiation at an end, and no obligation to have arisen out of it, as both are faultless, so both are remitted to their original position.

The case has been likened to that of a dishonoured bill, in which proof that the holder had put a notification into the post-office has been held sufficient to entitle him to recover, without regard to whether the notification was received; but there is the greatest difference between whether a party has lost a right to

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recover by laches on his own part, and whether another has gained an advantage by performance of something precedently required.

II. Where damages are claimed for non-fulfilment of a contract of sale, the true criterion of the amount of damage is the difference between the price at which the goods were sold and the market price of the day, on or about which the contract was broken. This was held in Gainsford *v.* Carroll, 2 *Bar. & Cr.*, 624, and other cases; and in Shaw *v.* Holland, 4 *Railw. Ca.*, 161, was recognised as an established rule. In the present case, the Judge did not lay down any such rule to the jury, but left the case with them upon its whole circumstances. The theory of the rule is, that the purchaser, having still his money in his pocket, may on the day on which the contract is broken go into the market and buy the article from another, and therefore all he can justly ask as damage is the difference between the price whlch he so pays, and that which he contracted to pay. This rule does substantial justice between the parties, and if the Respondents had followed it on the 3rd of February, when they received the Appellants' letter disavowing the contract, the damage would have been *nil*, as the price still continued the same, whereas the jury have assessed the damage at 1500*l.*

Mr. Wortley and *Mr. H. Hill* for the Respondents.—Where an offer is made generally, without any condition as to the period of acceptance, it binds so soon as acceptance is given, unless it have been previously recalled. And if the acceptance be made by letter through the post-office the contract is concluded, without regard to when the acceptance may reach the offerer, there is thenceforth *concursus et conventio in idem placitum.*—*Bell's Com.*, vol. i., p. 326. The necessities of trade have adopted the post-office as the means of conveyance of letters, and the law of the country allows of none other, but in no sense is the post-office the agent of the party—over it he has no control

one way or other; so soon as his letter is dropped into the mail-box he ceases to have any power over it. But in truth it is the act of acceptance not the receipt of the acceptance which binds the contract; and were it otherwise, as was observed in *Adams Lindsell*, 1 *Barn. & Ald.*, 681, where this question as to liability for the default of the post-office was raised and decided, no contract could ever be completed through the post-office.

In the present case no stipulation was made as to the acceptance of the offer in course of post, but even if it had been made, the course of post does not limit the party to the lapse of any particular period of time, but to the actual arrival of the post. This must be so where the mail is carried by sea, for no certain time of arrival can be secured, and may be so where it is carried by land, and snow-storm, or other uncontrollable accident, has prevented its arrival. If this is the case when an express stipulation as to course of post is made, how much more obviously must the party's right be exposed to these contingencies where, as in the present instance, he makes no such stipulation.

III. Whatever may be the rule in England, as to the mode of ascertaining the amount of damage in such a case, it is well established in Scotland, that this is peculiarly a question for the jury, to be decided on a view of all the circumstances having regard to what will fully compensate the party for breach of the covenant to give him, that which, if it had been given to him, would have been within his own power to hold or dispose of. This was fully recognised in Watt *v.* Mitchell and Co., 1 *D. B.* and *M.*, 1157, as the established rule in questions of this nature. Accordingly the exception upon this ground was but feebly argued in the Court below, where it was considered as having been abandoned.

LORD CHANCELLOR.—My Lords, everything which learning and ingenuity can suggest on the part of the Appellants has undoubtedly been urged by their Counsel, and if your

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Lordships concur in my view that they have failed in making out their case, your Lordships will have the satisfaction of knowing that you have come to that conclusion after having had everything suggested to you that by possibility could be advanced.

The case certainly appears to me one which requires great ingenuity on the part of the Appellants, because it does not appear that, in the facts of the case, there is anything to support it. The contest arises upon an order sent from Liverpool to Glasgow, or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins and Co., bearing date the 31st of January; a proposition had been made by the Glasgow house of Dunlop, Wilson and Co., to sell them 2000 tons of pig iron. The answer is of the date of the 31st of January, "Gentlemen, we will take the 2000 tons pigs, you offer us." Another part of the letter refers to other arrangements, but there is a distinct and positive offer to take the 2000 tons of pigs. To that letter there is annexed a postscript, in which they say, "We have accepted your offer unconditionally, but "we hope you will accede to our request as to delivery and "mode of payment by two months' bill."

That, therefore, is an unconditional offer by the letter dated the 31st of January, which was proved to have been put into the post office at Liverpool on the 30th, but it was not delivered owing to the state of severe frost at that time, which delayed the mail from reaching Glasgow at the time at which, in the ordinary course, it would have arrived there. It ought to have arrived on the following day, on the 31st of January, but it did not arrive till the 1st of February.

It appears that between the time of writing the offer and the 1st of February, the parties making the offer had changed their mind, and, instead of being willing to sell the 2000 tons

of pig iron on the terms proposed, they were anxious to be relieved from that stipulation; and on that day, the 1st of February, they say, "we have yours of yesterday, but are "sorry that we cannot enter the two thousand (2000) tons "of pig iron, our offer of the 28th not having been accepted "in course."

Under these circumstances the parties wishing to buy, and by that letter accepting the offer, instituted proceedings in the Court of Session for damages sustained by the non-performance of the contract. I say very little on the first and fourth exceptions, because very little arose on them at the Bar.

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is, that "his Lordship "did not direct the jury, in point of law, that if the pursuers "posted their acceptance of the offer in due time, according to "the usage of trade, they are not responsible for any casualties "in the post-office establishment."

Now, there may be some little ambiguity in the construction of that proposition. It proceeds on the assumption that by the usage of trade the 30th was the right day on which the answer should have been put into the post; that by the usage of trade an answer ought to have been returned by the post, and that the 30th was the right day on which that acceptance ought to have been notified. Then comes the question, whether, under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, whether the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course?

I cannot conceive how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there be a usage of trade to accept such an offer, and to return

an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control? Is it not the same as if the date of the party's accepting the offer had been the subject of a special contract, as if the contract had been, "I make you this offer "but you must return me an answer on the 30th?" If he puts his letter into the post office on the 30th, that is undoubtedly what the usage of trade would require. He, therefore, did on the 30th, in proper time, return an answer by the right conveyance, the post office.

If you were not to have reference to any usage constituting the contract between the parties but to a specific contract it is quite clear to me that the rule of law would necessarily be that which has obtained by the usage of trade. It has been so decided in cases in England, and none have been cited from Scotland which controvert that proposition, but the cases in England beyond all doubt support it. It is not disputed that it is a very frequent occurrence that a party having a bill of exchange tenders it for payment to the acceptor, and is refused. He cannot get payment. He is bound to give notice to the party who is the drawer, although he may be distant many miles from him, but if he puts a letter into the post at the right time it has been held quite sufficient. He has done all that he is expected to do. As far as he is concerned he has put the letter into the post, and whether that letter is delivered, or not, is a matter quite immaterial, because the act of the post office is one for which he is not responsible.

My Lords, the case of Stocken *v.* Collin in *7th Mee. & Wel.*, 515, is precisely a case of that nature, where the letter did not arrive in time. In that case Mr. Baron Parke says, "It was a "question for the jury whether the letter was put into the post "office in time for delivery on the 28th, the post office mark

" certainly raised a presumption to the contrary, but it was not " conclusive. The jury have believed the testimony of the wit- " ness who posted the letter, and the verdict was, therefore, " right. If a party puts a notice of dishonour into the post, so " that in due course of delivery it would arrive in time, he has " done all that can be required of him, and it is no fault of his " that delay occurs in the delivery." Mr. Baron Alderson says, " the party who sends the notice is not answerable for the blun- " der of the post office, I remember to have held so in a case on " the Norwich circuit, where a notice addressed to Norwich had " been sent to Warwick. If the doctrine, that the post office is " only the agent for the delivery of the notice were correct no one " could safely avail himself of that mode of transmission. The " real question is, whether the party has been guilty of laches."

There is also the other case which has been referred to, which raises the same doctrine, the case of Adams and Lindsell, in 1*st Bar.* & *Ald.*, 681. That is a case where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it in proper time. The party, however, who originally sent the offer, not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, " I withdraw my offer," therefore he said, " before I " received your acceptance of my offer I had withdrawn it." And that raised the question when the acceptance took place, and what constituted the acceptance. It was argued that " till " the Plaintiff's answer was actually received there could be no " binding contract between the parties, and that before then the " Defendants had retracted their offer by selling the wool to " other persons." But the Court said, " If that were so, no " contract could ever be completed by the post. For if the

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"Defendants were not bound by their offer when accepted by "the Plaintiffs till the answer was received, then the Plaintiffs "ought not to be bound till after they had received the notifi- "cation that the Defendants had received their answer and "assented to it. And so it might go on *ad infinitum*. The "Defendants must be considered in law as making, during every "instant of the time their letter was travelling, the same iden- "tical offer to the Plaintiffs, and then the contract is completed "by the acceptance of it by the latter."

Those two cases leave no doubt at all on the subject; common sense tells us that transactions cannot go on without such a rule. Those two cases seem to be the leading ones on the subject, and there has been no case cited to show the contrary.

Mr. Bell's commentary lays down the same rule as existing in Scotland, and the contrary to that does not appear to exist.

Now, whether I take that proposition as conclusive upon the objection, or whether I consider it as a question entirely open, whether the putting the letter in the post was or not in time to constitute a valid acceptance, it appears to me, that the learned Judge was right in the conclusion to which he came.

The next exception is the third, which says, "In so far as "his Lordship did not direct the jury in point of law, that if a "merchant make an offer to a party at a distance by post letter, "requiring to be answered within a certain time, and no answer "arrives within such time as it should arrive, if the party had "written and posted his letter within the time allowed, the "offerer is free, though the answer may have actually been "written, and posted in due time, if he is not proved to be "aware of accidental circumstances preventing the due arrival "of the answer."

That raises, first of all, a proposition that does not arise in this case at all. It assumes a contract that requires an answer within a certain time, and it assumes (which is already disposed of by what I have said in answer to the second exception) that

the putting a letter into the post is not a compliance with the requisition of the offer. In my opinion the putting a letter into the post is a compliance with the requisition of the offer; but that question does not arise at all in this case because it is assuming a special contract, and there is no special contract here.

It only remains to call your Lordships' attention to the fifth. The fifth exception is "in so far as his Lordship did not "direct the jury in point of law, that in case of failure to deliver "goods sold at a stipulated price, and immediately deliverable, "the true measure of damage is the difference between the "stipulated price and the market price, on or about the day "the contract is broken, or at or about the time when the pur-"chaser might have supplied himself."

That raises the proposition generally, and not as the learned Counsel have very properly put it at the Bar on the absence of any special damage, or because there is no rule for damage. If that be the law, if that be the rule of damage in all cases of special damage, or in cases of this sort, almost every case must differ as to the amount of damage, and the circumstances which gave rise to that damage. The proposition here is, that if a party proposes to deliver goods at a certain time, the damage against him by a party who suffers by his default, is to be measured by the market price at or about the time of the failure of the contract. They say you are to take it within the time of the failure or at the time when the failure takes place, and the contract is broken. It is laid down as the rule of law that that is the measure of damage that the party is to receive.

Now, my Lords, in the action, and the proceedings here for damage, the party comes to receive compensation for the damage he has sustained. If there be a rule established that in a certain case a certain measure of damage ought to be given, the jury ought not to be permitted to go out of that general rule. But if it is a question for the jury, I cannot see how you can be dis-

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satisfied whether they give 1000*l.* or 10,000*l.*; and the learned Counsel for the Appellants felt the force of that. What do you come here for? To obtain compensation for the party not performing his contract. What was there for the pursuer to show? That he had by the contract between the parties entitled himself to 2000 tons of pig iron, and the defendants had subjected themselves to make compensation to him for the damages sustained by their breaking that contract. I am now putting it generally without the cases—that seems to me the good sense of the thing. In my opinion the jury, have performed the duty that belonged to them in ascertaining the amount of damage. Suppose, for instance, a party who has agreed to purchase 2000 tons of pig iron on a particular day, has himself entered into a contract with somebody else, conditioned for 2000 tons of pig iron to be delivered on that day, and that he not being able to obtain the 2000 tons of pig iron on that particular day, loses the benefit arising from that contract. If pig iron had only risen a shilling a ton in the market, but by this contract he had lost 1000*l.* upon a contract with a Railway Company, in my opinion he should not only have the damage which would have arisen if he had gone into the market and bought the pig iron, but also that profit which he might have received if the party had performed his contract. Otherwise it is difficult to say how it is reconcilable with justice, or how it is reconcilable with the duty which the jury had to perform in ascertaining what the party has suffered by the breach of his contract. It may be, that there may be some general rule, but how that general rule can be applicable to such cases it is difficult to understand.

We have not before us the course which has been adopted by some Courts in this country, we have nothing to do but to look to the law of Scotland; and by the law of Scotland in the case which has been referred to of Watt *v.* Mitchell, no doubt is left as to what the rule of law in Scotland is. Lord Medwin

very laboriously considered that case, and goes through all the early authorities on the subject in Scotland, and after having done so draws this result from those early authorities in page 1163. He says "these are all the Scots cases referred to, and "I certainly deduce from them this, that our Court rejects the "plea of the Defenders, that the price at the time of the "delivery as the time when the breach of contract takes place, "should be the measure of the damages due where the De-"fenders has failed to implement." He, therefore, in terms on the authority of the many cases he refers to, ultimately lays down, that that is not the law of Scotland; that the law of Scotland is to look into all the circumstances, that the law of Scotland is to do what was done here, to call upon the jury to exercise their judgment and sanction what is reimbursement to the party who has sustained loss by the original contract, and that without reference to what the price of the article at the particular time may produce.

My Lords, in what I have said I have wished to confine myself to the law of Scotland. I have not had an opportunity of saying anything on the subject of the law of England. I am contemplating now what I find to be the established law of Scotland, and the question is, whether in the face of that law, and in defiance of all the authorities referred to on the law of Scotland; and in the absence of any authorities in the law of Scotland raising a contrary proposition, your Lordships are to adopt a principle which would go to destroy that rule, and to lay down another, which, according to my opinion, is less calculated to do justice to all parties than the one upon which the Court has proceeded. It is very desirable no doubt that the law between the two countries should be assimilated; but that is no ground why your Lordships should introduce into the law of Scotland a rule, which if your Lordships were to introduce it would do great violence to the law of that part of the kingdom. My Lords, I think that the learned Judge most properly at the

trial, decided that he was not bound to put the question in the way the Defenders suggested, and that there was sufficient to lead him to the conclusion at which he arrived, that the jury were at liberty to look into all the circumstances for the purpose of measuring the damage.

My Lords, this exhausts the whole of the objections made, and my advice to your Lordships is to affirm the judgment of the Court.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed. And it is further Ordered, That the Appellants do pay or cause to be paid to the Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant, &c.

DUNLOP and HOPE—JAMES DODD, Agents.