The evidence affecting the claim of Rowe is not reviewed, since, as already indicated, there is evidence which, in the light of the statute as now interpreted, supports the concurrent action of the two courts below.

It is unnecessary to pass upon the contention, apparently first made here, that § 4529 does not apply to fishing vessels (see Notes to § 596, Tit. 46, U. S. C. A.), and that the "Dola Lawson," although licensed for the coastwise trade, must be deemed excluded from the operation of the Act because of her use as a fishing vessel.

In view of the unwarranted retention of the amount awarded to petitioners, as wages, by that part of the decree of the District Court from which no appeal was taken, the costs in the Court of Appeals will be divided, two-thirds to appellants and one-third to appellees, and the decree below as so modified will be

Affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* CRAIL, DOING BUSINESS AS P. McCOY FUEL COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 75. Argued January 10, 1930.—Decided February 24, 1930.

1. Under the Cummins Amendment and the common law of compensatory damages, the amount which a coal dealer is entitled to recover from a rail carrier for failure to make delivery of part of a car-load shipment of coal, is the full actual loss at point of destination. P. 63.
2. Where the shortage was capable of replacement and was, in fact, replaced in the course of the dealer's business from purchases made in car-load lots at wholesale market price without added expense, the recovery is measured by the wholesale price, including any profit over cost at the mine plus freight, and not by the retail market price, which includes costs of delivery to retail customers

not incurred by the dealer and a retail profit not earned by him by any contract of re-sale. Pp. 63–65.
31 F. (2d) 111, reversed.

CERTIORARI, 279 U. S. 833, to review a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court, 21 F. (2d) 831, against the Railroad Company in an action for non-delivery of coal. See also 2 F. (2d) 287; 13 *id.* 459.

Mr. Edward C. Craig, with whom *Messrs. Edwin C. Brown* and *R. V. Fletcher* were on the brief, for petitioner.

If respondent be paid the market value of the coal in car at destination he will be compensated for loss of what he would have had if contract of shipment had been performed. *Chicago, M. & St. P. R. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97; *Hicks* v. *Guinness,* 269 U. S. 71; *Southern Pacific Co.* v. *Darnell-Taenzer Co.,* 245 U. S. 531; *United States* v. *New River Collieries,* 262 U. S. 341, at pp. 343, 344.

The respondent did not buy this coal separate and apart from its being a part of the carload of coal. He did not buy any particular quantity. He bought a carload of coal which happened to contain so much coal.

The measure of damages is the difference between the market value of a car of coal delivered in accordance with the contract and the market value of the car as it was in fact delivered. *Barry* v. *Los Angeles & S. L. R. Co.,* 56 Utah 69.

In cases of damage to a carload of, for example, perishables, where the carrier's breach consists of failure to transport the shipment safely, the measure of damages and rule of computation are generally stated by the courts to be the difference between the fair, reasonable destination value of the carload in the condition in which it should have been delivered, i. e., undamaged, and the fair,

reasonable destination value of the carload in the condition in which it was delivered. In such cases plaintiff's "full actual loss, damage or injury" is invariably and properly computed by taking the difference between carload values, as such. *Gulf, C. & S. F. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 37; *New York, L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591, 616–7; *Peterson* v. *Case*, 21 Fed. 885, 891.

The fundamental thing in all breach of contract cases is not that plaintiff be paid the value of what is not delivered or lost, but that he be made whole. The primary thing is compensation to him for his loss; the secondary thing is the value of what was lost. The latter is only one method of arriving at the former.

Respondent if allowed to recover more than the market value of the coal in the car will be more than compensated for the loss suffered.

This case is but a case of a breach of contract and the damages are those which will compensate for the "full actual loss, damage or injury to such property." *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540; *Wehle* v. *Haviland*, 69 N. Y. 448, 451.

See the cases cited in the dissenting opinion below and in the case of *Brown Coal Co.* v. *Illinois Cent. R. Co.*, 196 Iowa 562.

Mr. Stanley B. Houck, with whom *Mr. W. Yale Smiley* was on the brief, for respondents.

The measure of damages for the loss in transit of a part of a shipment is the value of what has been lost at the time and place at which it should have been delivered, with interest, less the transportation charges, if they have not been paid. *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97; *Leominster Fuel Co.* v. *New York, N. H. & H. R. Co.*, 258 Mass. 149; *Crutchfield & Woolfolk* v. *Hines*, 239 Mass. 84; *Woonsocket M. & P.*

Co. v. *New York, N. H. & H. R. Co.*, 239 Mass. 211; *Hoover & Co.* v. *Denver & R. G. W. R. Co.*, 17 F. (2d) 881; *Allen* v. *Adams Express Co.*, 77 Pa. Super. Ct. 174; *Atlantic Coast Line Ry. Co.* v. *Roe* (Fla.), 118 So. 155.

If the commodity lost in transit be a staple which, like coal, is produced for sale and consumption, not for retention and long use, the only inquiry to be made in reckoning its value is its worth as an article of sale. If it be shown that at the destination, at the time the remainder of the shipment arrived there, there was a market in which like coal in like volume was openly bought and sold, the price current in such market will be regarded as its fair market value and likewise the measure of just compensation for its loss. *Cliquot's Champagne*, 3 Wall. 114, 125, 142; *Muser* v. *Magone*, 155 U. S. 240, 249; *Murray* v. *Stanton*, 99 Mass. 348; *Stanford* v. *Peck*, 63 Conn. 486, 493; *United States* v. *New River Collieries Co.*, 262 U. S. 341.

The market value at destination of the quantity of coal lost is the amount it would have been necessary for the shipper to pay in the open market, at the time and place of delivery, for such a quantity and kind of coal as the carrier failed to deliver as agreed. *Wendnagel* v. *Houston*, 155 Ill. App. 664; *United States* v. *New River Collieries Co., supra.*

There can be no quibble about the statutory liability being for the full, actual loss, damage or injury. Neither can there be any real doubt that where the property lost has a readily ascertainable market value at the proper time and place, that value is the measure of full, actual loss, damage, or injury. Such is the holding of this court in *United States* v. *New River Collieries Co., supra.* In that case also, this court answers petitioner's argument about the justness of a recovery at $13.00 per ton by holding that "the lower courts rightly held that market

prices prevailing at the times and place of the taking constitute just compensation."

Where the law has established a rule for measuring damage for breach of contract, such as loss in transit by a carrier, the parties are conclusively presumed to contemplate a measurement of such a loss by that rule. 1 *Sedgwick on Damages* (9th ed.) § 40, p. 45; 1 *Sutherland on Damages* (4th ed.), § 105, p. 367; *Brown* v. *Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342.

In determining the value of the commodity which has been lost, the inquiry is limited to the time when the shipment from which the loss occurred was delivered at destination. It is improper to inquire into later events such as whether plaintiff in error was under any necessity of making replacement, or did in fact replace, or that he was a coal dealer, making purchases in carload lots from time to time as his necessity required, which purchases included coal of the kind and quality here in question, of which, on the arrival of the carload from which the loss occurred, he had sufficient for his needs until the arrival of the next carload of the same kind which should be purchased, etc., *Stone* v. *Codman*, 15 Pick. (Mass.) 297, 300; *Olds* v. *Mapes-Reeve Construction Co.*, 177 Mass. 41, 44; *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, 534.

The simple market value, not its component parts nor the sources from which it is derived nor its other concomitants, shall measure such damages. *The Rossend Castle*, 30 Fed. 462; *The Erroe*, 17 Blatchf. (C. C.) 16, Fed. Cas. 4522; *Moelring* v. *Smith*, 7 Ind. App. 451; *Waggoner Undertaking Co.* v. *Jones* (Mo.), 114 S. W. 1049.

Messrs. Frederic D. McKenney, W. F. West, S. R. Prince, A. W. Blackman, F. M. Rivinus, Charles E. Miller,

M. K. Rothschild, W. E. Kay, F. G. Dorety, George A. Kingsley, C. W. Wright, E. E. McInnes and *Joseph M. Bryson,* by special leave of Court, filed a statement and suggestions in support of the petition for certiorari, on behalf of certain railroad companies, as *amici curiae.*

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted May 27, 1929, to review a ruling of the Court of Appeals for the Eighth Circuit upon the measure of damages recoverable in a suit brought under the Cummins Amendment of March 4, 1915, 38 Stat. 1197, as amended 41 Stat. 494 [49 U. S. C., § 20(11),] against a rail carrier for failure to deliver a part of an interstate shipment of coal.

Respondent, plaintiff below, a coal dealer in Minneapolis, purchased, while in transit, a carload of coal weighing at shipment 88,700 pounds. On delivery at destination, the respondent's industrial siding, there was a shortage of 5,500 pounds. At the time of arrival, respondent had not resold any of the coal. It was intended to be, and was, added to his stock of coal for resale, but the shortage did not interfere with the maintenance of his usual stock. He lost no sales by reason of it, and purchased no coal to replace the shortage, except in carload lots. In the course of his business, respondent could and did, both before and after the present shipment, purchase coal of like quality in carload lots of 60,000 pounds or more, delivered at his siding, at $5.50 per ton, plus freight. The market price in Minneapolis for like coal sold at retail in less than carload lots was $13.00 per ton, including $3.30 freight.

The case was twice tried. On the first trial, the District Court gave judgment for the wholesale value of the coal not delivered. 2 F. (2d) 287. The Court of Appeals reversed the judgment, holding that it should have been for the retail value of the coal. 13 F. (2d) 459. Upon

retrial, the District Court gave judgment accordingly, 21 F. (2d) 831, which was affirmed below. 31 F. (2d) 111.

By the Cummins Amendment the holder of a bill of lading issued for an interstate rail shipment is entitled to recover for failure to make delivery of any part of the shipment without legal excuse, "the full actual loss, damage or injury to such property" at point of destination. *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97.

It is not denied that a recovery measured by the wholesale market price of the coal would fully compensate the respondent, or that the retail price, taken as the measure of the recovery allowed below, includes costs of delivery to retail consumers which respondent did not incur, and a retail profit which he had not earned by any contract of resale. But respondent contends, as was held below, that the established measure of damage for non-delivery of a shipment of merchandise is the sum required to replace the exact amount of the shortage at the stipulated time and place of delivery, which, in this case, would be its retail value, and that convenience and the necessity for a uniform rule require its application here.

This contention ignores the basic principle underlying common law remedies that they shall afford only compensation for the injury suffered, *Milwaukee & St. Paul R. Co.* v. *Arms*, 91 U. S. 489, 492; *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co., supra*, 100; *Robinson* v. *Harman*, 1 Exch. 850, 855; Sedgwick, Damages (9th Ed.), 25; Sutherland, Damages (4th Ed.,) § 12; Williston on Contracts, § 1338, and leaves out of account the language of the amendment, which likewise gives only a right of recovery for "actual loss." The rule urged by respondents was applied below in literal accordance with its conventional statement. As so stated, when applied to cases as they usually arise, it is a convenient and accurate method of arriving at an amount of recovery which is

compensatory. As so stated, it would have been applicable here if there had been a failure to deliver the entire carload of coal, since the wholesale price, at which a full carload could have been procured at point of destination, would have afforded full compensation, *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co., supra; Central of Georgia Ry. Co.* v. *American Coal Co.,* 28 Ga. App. 95; *Wendnagel* v. *Houston,* 155 Ill. App. 664; *Lake Erie, etc. R. R. Co.* v. *Frantz,* 85 Ind. App. 569; *Cutting* v. *Grand Trunk Ry.,* 13 Allen 381; *Crutchfield & Woolfolk* v. *Director General of R. R.,* 239 Mass. 84; *Smith* v. *N. Y. O. & Western Ry. Co.,* 119 Misc. Rep. (N. Y.) 506; *Yazoo & M. V. R. Co.* v. *Delta Grocer Co.,* 134 Miss. 846; *Chicago, R I. & Pac. Ry. Co.* v. *Broe,* 16 Okla. 25; *Roth Coal Co.* v. *Louisville & Nashville R. R.,* 142 Tenn. 52; *Quanah A. & P. Co.* v. *Novitt,* 199 S. W. 496 (Tex. Civ. App.), or, in some circumstances, if respondent had been under any constraint to purchase less than a carload lot to repair his loss or carry on his business, for in that event the measure of his loss would have been the retail market cost of the necessary replacement. *Haskell* v. *Hunter,* 23 Mich. 305, 309. But in the actual circumstances the cost of replacing the exact shortage at retail price was not the measure of the loss, since it was capable of replacement and was, in fact, replaced in the course of respondent's business from purchases made in carload lots at wholesale market price without added expense.

There is no greater inconvenience in the application of the one standard of value than the other and we perceive no advantage to be gained from an adherence to a rigid uniformity, which would justify sacrificing the reason of the rule, to its letter. The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise

not applicable. See *Wilmoth* v. *Hamilton*, 127 Fed. 48, 51; *Theiss* v. *Weiss*, 166 Pa. St. 9, 19; *Pittsburg Sheet Mfg. Co.* v. *West Penn Sheet Steel Co.*, 201 Pa. St. 150; Williston on Contracts, §§ 1384, 1385. In the absence of special circumstances, the damage for shortage in delivery by the seller of fungible goods sold by quantity is measured by the bulk price rather than the price for smaller quantities, both at common law, see *Morgan* v. *Gath*, 3 H. & C. 748; *Avery* v. *Wilson*, 81 N. Y. 341, and under § 44 of the Uniform Sales Act. Likewise, we think that the wholesale market price is to be preferred as a test over the retail when in circumstances like the present, it is clearly the more accurate measure, *Brown Coal Co.* v. *Illinois Central R. R. Co.*, 196 Iowa 562; see *State* v. *Smith*, 31 Mo. 566; *Wendnagel* v. *Houston, supra*, 666, 667; *Wood Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 320 Ill. 341. Compare *Heidritter Lumber Co.* v. *Central R. R. of N. J.*, 100 N. J. Law, 402, *Leominster Fuel Co.* v. *New York, N. H. & H. Ry. Co.*, 258 Mass. 149, cited as supporting the conclusion of the court below In these cases it does not clearly appear whether the consignee suffered special damage by reason of the shortage, measured by the retail price, or whether he did or could replace it at the wholesale price in the ordinary course of business.

The court below thought that the fact that the award to respondent of the expense and profit, included in the retail price to consumers, did not militate against the rule it applied, for the reason that the wholesale price, as is often the case where market price is the measure of loss, likewise included a profit over mine cost plus freight. But respondent had done every act and incurred every expense prerequisite to procuring delivery at destination. Any profit included in its market value at the stipulated time and place of arrival was, therefore, appropriately included in the measure of his loss. In this respect it is

distinguishable from the expense and prospective profit not actually incurred or earned by respondent, represented by the retail price. See *Central of Georgia R. R. Co.* v. *American Coal Co., supra; Yazoo & M. V. R. Co.* v. *Delta Grocer Co., supra,* 146. Compare *Cincinnati, N. O. & T. P. Ry. Co.* v. *Hansford,* 125 Ky. 37; *Smith* v. *N. Y. O. & Western Ry. Co., supra; Quanah A. & P. Co.* v. *Novitt, supra.*

Reversed.

CARLEY & HAMILTON, INC., ET AL. *v.* SNOOK, CHIEF OF THE DIVISION OF MOTOR VEHICLES, STATE OF CALIFORNIA.

COTTINGHAM ET AL. *v.* SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Nos. 86 and 267. Submitted January 9, 1930.—Decided February 24, 1930.

1. Fees exacted by the California Motor Vehicle Act for the registration of specified classes of motor vehicles used for intrastate transportation of passengers for hire and of property, the revenue from which fees is applied by the Act to the support of the State Division of Motor Vehicles and to the construction and maintenance of public roads, *held* exactions made in the exercise of the state taxing power for the privilege of operating such vehicles over public highways, expended for state purposes, and not in conflict with the due process clause of the Fourteenth Amendment. P. 71.
2. There is nothing in the Federal Constitution which requires a State to apply such fees for the benefit of those who pay them. P. 72.
3. The proposition that, although the fees are not *per se* disproportionate to the privilege of operating over all the highways of the State, owners are entitled to licenses limiting the operation of their motor vehicles to a few highways which they wish to use (e. g. to streets in particular cities) upon payment of correspondingly reduced fees, is not supported by any constitutional principle. P. 72.