

NOTES ON LOSS OF PROFITS AS DAMAGES.

The question, which arises inevitably and repeatedly in practice, as to when a plaintiff, in an action for breach of a contract for the sale of goods, can claim loss of profits as damages, is not easily soluble. Text books are somewhat at variance upon the matter, and none seems to lay down a guiding principle. Arnold is somewhat more favourably disposed towards the inclusion of profits as damages than Mayne appears to be; even the former, however, treats the subject by citing particular instances rather than by outlining a clear rule to follow. The subject is, therefore, clouded by uncertainty and apparent contradiction, and incomplete through lack of analysis—for example, we find it stated as a principle of English law that such loss of profits is not ordinarily recoverable as damages, although that statement is immediately qualified;¹ Mayne strengthens this by comparing the English and Scotch laws as to damages, alleging that their dissimilarity exists in that the latter allows loss of profits as damages, while the former does not.² The reader, therefore, becomes excusably bewildered when he finds numerous English cases in which loss of profits has been taken into consideration, and in which it seems to have been treated as a principle rather than as a stray series of exceptions to a contrary rule. It is submitted that a study of these cases results in the enunciation, or in the extension of an often enunciated and familiar principle, which brings loss of profits, or rather of a reasonable expectation of profits, ordinarily within the field of damages for breach of contract for the sale of goods. Contracts for the sale of land are admittedly on a different footing; that is characteristic of the Common Law. It seems to be laid down definitely that the purchaser of real property cannot recover in an action for breach of contract, anything beyond his expenses incurred.³ If he seeks other damages it ought to be in an action for deceit.⁴

Before taking up *seriatim* the consideration of the various sets of circumstances arising from breach of contract to sell or carry goods, (since the same considerations apply to each), it is desirable to preface it with a note on the general principle of English law

¹ 4 Hals. 19 (carriage); Mayne, 9th ed., 53.

² Mayne, 9th ed., 58.

³ *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, at p. 206.

⁴ *Ibid.*, Lord Chelmsford, p. 207.

underlying the granting of damages for such breach of contract. The leading case that occurs to the mind of the reader is, of course, that of *Hadley v. Baxendale*.⁵ The facts of that case are too well known to need re-stating here, but the words of the rule covering damages, since adhered to unswervingly, can bear repetition:—

We think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, either such as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances, so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.

This rule has been much commented upon and arranged in various ways and at considerable length, but for convenience and clarity, and for the purpose of this article it may be stated shortly as follows:—

Damages recoverable from breach of contract are such as:—

1. Arise naturally therefrom, or
2. Arise under special circumstances in the contemplation of the parties when making the contract.

It is sufficient to say here briefly that the first of these subdivisions has never been questioned. The second has been glossed to the extent that mere communication of special circumstances, without more, is perhaps not enough.⁶ In that case their Lordships quoted *Mayne* as follows:—

The law says that everyone who breaks a contract shall pay for its natural consequences, and in most cases states what these consequences are.

⁵ (1854) 23 L.J. Ex. 179, at p. 182.

⁶ *Elbinger v. Armstrong* (1874), 43 L.J.Q.B. 211, at p. 214.

Can the other party by merely acquainting him with a number of further consequences, which the law would not have implied enlarge his responsibility to the full extent of all those consequences, without any contract to that effect?

And their answer was:—

We are not aware of any case in which *Hadley v. Baxendale* has been acted upon in such a way as to afford an answer to the learned author's doubts; and in *Horne v. The Midland Railway Company*,⁷ much that fell from the Judges in the Exchequer Chamber tends to confirm those doubts.

In the case referred to the facts were as follows:— It was a contract of carriage. The plaintiffs were under contract to deliver in London on a certain day a large number of shoes for the use of the French army during the Franco-Prussian war. They handed them over to the defendants, stating they were under a contract to deliver by the 3rd, but not stating the special nature of the contract, or the unusually high price—non-delivery on that date. It was held that the defendants were not liable for the difference between the ordinary market price and the special contract price, they not having been informed of the special circumstances. Kelly, C.B., says:—

If, then, they are bound to receive, and do so without more, what is the effect of the notice? Can it be to impose upon them a liability to damages of any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice without more could have any such effect. It does not appear to me that the railway company has any power, such as was suggested, to decline to receive the goods after such a notice, unless an extraordinary rate of carriage be paid. . . . In the absence of any such contract . . . it does not appear to me any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned.

Again, in *British Columbia Saw Mill Co. v. Nettleship*,⁸ Willes, J., said:—

The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.

*Cory v. Thames Iron Works*⁹ is another such case, where the plaintiff intended a derrick for a special use. The defendant believed that it was to be applied to an ordinary purpose. Held, that the plaintiff was entitled to be compensated only to the extent he would have

⁷ (1873) L.R. 8 C.P. 131, at p. 136.

⁸ (1868) L.R. 3 C.P. 499, at 509.

⁹ (1868) 37 L.J.Q.B. 68.

suffered from the loss of the obvious use of the derrick. It is still submitted, however, that the cases admit the general principle that where special circumstances are disclosed by the buyer at the time of making the contract, these terms are thereby imported into the contract, and the damages consequent upon breach would, because of that, flow directly therefrom. The case of *Simpson v. L. and N.W. Ry. Co.*,¹⁰ referred to at greater length hereafter, contains these words of Cockburn, C.J.:—

The principle is now settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known by the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.

Another striking case of the same character dealing decisively with profit as being contemplated by the parties, and thereby recoverable, is that of *Hydraulic Engineering Co. Ltd. v. McHaffie*,¹¹ decided two years after the *Simpson* case (*supra*) in the Court of Appeal. In *Grebert-Borgnis v. Nugent*,¹² affirming the *Elbinger* case (*supra*), Brett, M.R., at p. 90, says:—

But where the sub-contract was fully made known to him in all its terms, in my opinion the defendant would be liable; and the proper inference, and one which the jury might infer, would be that he had contracted with the plaintiff upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his sub-contract.

The limitation suggested, therefore, in *Horne v. Midland Railway Co.*, (*supra*), *Elbinger v. Armstrong* (*supra*) and the *B.C. Saw Mill* case (*supra*), seems to resolve itself into this—that where the circumstances are such that a reasonable man might have required additional consideration for the assumption of added risk, or where (as in the case of a common carrier) he was bound to enter into some contract, the plaintiff has the onus of proving a sufficiently clear communication to rebut any presumptions to the contrary, and to have enabled the defendant to see the risk undertaken. It must be clear to the point of certainty what was in the contemplation of the parties. This part of the rule in *Hadley v. Baxendale* (*supra*) has been elaborated at greater length in *Mayne*, 9th ed., pp. 28-41.

With these remarks, and keeping the principles enunciated therein before us, we can now approach the question:— Where a seller

¹⁰ (1875-76) 1 Q.B.D. 274, at p. 277.

¹¹ (1878) 4 Q.B.D. 670.

¹² (1885) 15 Q.B.D. 85.

(or carrier) commits a breach of a contract for the sale (or carriage) of goods, under what circumstances is a plaintiff entitled to include loss of profits in his estimate of damages? *Mayne*, 9th ed., p. 53, gives a ready answer to this question by saying:—

One very common instance in which damages are held to be too remote arises where the plaintiff claims compensation for the profits which he would have made, if the defendant had carried out his contract.

It is true that this is qualified by the following words:—

It is by no means true, however, that such profits can never form a ground of damage. Loss of profits is recoverable so far as it is the natural result of the breach of contract, but not when it is founded on a special contract for resale, unknown to the defendant, which is frustrated by that breach.

With all due respect to the learned author, it is submitted that the statement of principle is much too casually made, and that its effect, used with the qualification, (which is properly part of the rule), is embarrassing. The cases dealt with by *Mayne* are not merely a series of exceptions to the rule as laid down, and distinguishable from it—they stand for a principle of law which may be stated in almost the author's own words, with the substitution of "recoverable" for "too remote," and only from thence drawing necessary distinctions or deviations. The rule would then read:—"One very common instance in which damages are recoverable arises where the plaintiff claims compensation for the profits which he would ordinarily have made in the way of trade if the defendant had carried out his contract." At the present time, instead of the dog wagging his tail, we find the tail wagging the dog—a most unwieldy proceeding. It is true that under the new wording we have also to regard the tail, but it is then, in point of importance and location, only a tail.

The subject can be best explored by regarding the resultant situations from various forms of breach *seriatim*. They may be arranged as follows:—

1. Delivery of inferior goods.
2. Delayed delivery.
3. Non-delivery.

This listing enables us to approach our subject more easily.

INFERIOR GOODS.

If the buyer does not accept the inferior goods, the state of affairs is equivalent to a non-delivery. If he does accept, he would have an action for the damages resulting from such inferiority. What these damages would be does not come more than incidentally into

a discussion on loss of profits, and does not require special treatment here.

DELAYED DELIVERY.

This heading may be sub-divided for convenience as follows:—

1. Where the buyer agrees to the delay.
2. Where he does not so agree, but accepts on delivery.
3. Where he does not accept the goods.

1. The first is easily disposed of. If the buyer agrees to the delayed delivery, whatever the consideration therefor may be, he obtains performance of the substituted contract, and no question arises which need be discussed hereunder.

2. Where the buyer does not agree to a late delivery, but accepts the goods upon such delivery, it seems to be clearly laid down that he may sue for the difference, if any, between the value the goods would have had at the time and place of delivery, if delivered according to contract, and the value they had when received.¹³ The question is: Can the plaintiff show that the goods were less valuable to him when received than they would have been if properly delivered on the date set in the contract? In *Borries v. Hutchinson*¹⁴ there was a partial delivery, after the contract date. The defendant knew the buyer was purchasing for a foreign correspondent, in the way of trade, but did not know where or to whom the goods were going. By reason of the delay, additional freight and insurance had to be paid—the above principle was applied, and the additional cost was held to be recoverable. This case also is authority concerning non-delivery, and will be dealt with later in that connection. Similarly in *Wertheim v. Chicoutimi Pulp Co.*,¹⁵ the plaintiff was held to be entitled to recover damages due to a falling market. In that case, however, the market price on the due date was 70s. and on the date received it was 42-6; the plaintiff claimed this difference as damages. It was shown that he had realized 65s. and held that he was entitled to 5s. a ton only. The Privy Council said:—

And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, as far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. . . . When the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have

¹³ 25 Hals 270.

¹⁴ (1865) 34 L.J.C.P. 169.

¹⁵ (1911) L.J.P.C. 91, at p. 93.

been delivered worth to the purchaser what he could sell them for, or buy others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could sell them for in that market; but if in fact the purchaser . . . sells them at a price greatly in advance of the then market value, that presumption is rebutted and the real value of the goods to him is proved . . . and the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract . . . and be put, as far as money can do it . . . in a much better position.

The case of *Williams v. Agius*¹⁶ distinguishes the above case. In the *Williams* case (*supra*) there was a non-delivery, and it will be dealt with under the next heading. It is sufficient to say here that the *Wertheim* case (*supra*) is not overruled; there is, however, a distinction drawn between treatment of cases where there is a late delivery (and thereby a performance of some sort by the defendant) and where there is non-delivery and therefore no performance at all. If the plaintiff, by reason of the belated performance recoups some of what he would otherwise have lost, it would be unjust to allow him to go farther and make thereby a double profit, and that at the expense of the defendant. This is a common sense distinction, for such a set of circumstances cannot arise under a non-delivery.

*Fletcher v. Tayleur*¹⁷ is another case of late delivery. There a passenger ship was delivered after the contract period. It was held that the criterion was the difference in value when she was delivered and when she ought to have been. Delay in completion meant loss of freights. The plaintiff therefore was allowed to include the profits the ship would have earned in his claim for damages.

In the case of delayed delivery, the plaintiff actually receives the goods; if he can show that they are worth less than they would have been if delivered promptly, he can recover the difference. That value depends upon consideration of the actual cost as against the market price, and of profit-earning capacity, and this brings the plaintiff to the same net result as in the case of non-delivery—the method of attack is merely a little different. The test is value to the plaintiff at the time of breach.

3. Where the buyer is not bound to accept the goods, and does not accept them, the question can be treated as a non-delivery on the part of the defendant, and will be dealt with under the next following heading.

¹⁶ [1914] A.C. 510.

¹⁷ (1856) 25 L.J.C.P. 65.

NON-DELIVERY OF GOODS.

There are several aspects to be considered:—

1. Where the buyer can purchase in the market.

(a) Where he can purchase a substitute.

2. Where there is no market.

1. Where the buyer can purchase similar goods in the market, whether there be a re-sale or not, the rule is clearly laid down that the measure of damages is the difference between the contract price and the market price at the date of breach.¹⁸ Where the goods have already been paid for, the decisive date of ascertaining the damages is the date of judgment.¹⁹ This is spoken of in the Sale of Goods Act as a *primâ facie* rule for ascertaining the damages, but it is submitted that it has rather become a decisive element.²⁰ That the rule has been strongly entrenched is seen in the recent case of *Mohammed Ulla v. Bird*,²¹ which follows the *Rodocanachi* case as applied in *Williams v. Agius* (*supra*). There defendant contracted to supply railway sleepers and defaulted. The plaintiff made sleepers from other wood which he had, at a price lower than the contract price. It was argued that this should diminish the damages, but the Privy Council held that it ought not enter into consideration of the measure of damages. The following words of the judgment are worthy of note:—

In the present case had the appellant supplied the timber the respondents would have made their profit and would have still had the other timber to sell, upon which they were entitled to make such profit as they could.

Here again is a common sense application of the rule. The plaintiff was not bound to use his own wood; if he elected to do so, and prevent himself being sued he lost his wood for other uses—ought he to lose a profit he would otherwise have made on that wood? If the defendant had fulfilled, the plaintiff could not have asked for a deduction from the contract price merely because he could possibly have supplied the sleepers for less. Why, then, should the defendant after his own breach be permitted to take advantage of the plaintiff's industry or astuteness, when the latter could not have done so himself had the defendant performed? This would seem to arrive at a different result than in the case of delayed delivery, but that is not so, for there can be no question here, as there, of the plaintiff's making a profit by the breach.

¹⁸ *Sale of Goods Act, English Section 51 (3).*

¹⁹ 10 Hals. 612; *Arnold on Damages*, 88.

²⁰ *Rodocanachi* case (1887), 18 L.R. Q.B.D. 67; *Williams v. Agius* (*supra*).

²¹ (1921) 37 T.L.R. 405, at 407.

(a) Where the buyer can obtain a satisfactory substitute, he is entitled but not bound to do so. Even if the substitute is of a better quality, and, therefore, higher in price, he may obtain it, and recover the difference in price.²² Here defendants contracted to supply plaintiff with grey shirtings. They had no notice of a sub-contract, but the defendants knew that the sale was in the way of trade. There was no market for that particular kind of goods, but the plaintiff obtained a substitute of a higher grade and price. It was held that he was entitled to recover the difference. He had obtained no advantage from the increased price, and the rule was merely just. Blackburn, J., said:—

There was no market for this particular description of shirtings, and therefore no market price; in such a case the measure of damages is the value of the thing at the time of the breach of contract, and that must be the price of the best substitute procurable. *Borries v. Hutchinson (supra)*, is directly in point.

The word "best" would be used in this connection to mean "nearest." If the plaintiff had the choice of two equally satisfactory substitutes, but one was better than the other in point of texture, and, therefore, more expensive, he could not, by deliberately choosing the latter, subject the defendant to greater damages than necessary. It will be noticed that here also the test is value to the plaintiff at the time of breach.

WHERE THERE IS NO MARKET TO OBTAIN GOODS.

This is the portion of the subject which presents the greatest difficulty. Let us first take the case of a plaintiff buying in the course of trade, it being in the defendant's knowledge that he was occupied in trade. He may be in one of four positions after breach:

- (1) He may have effected a re-sale prior to the contract, which was communicated to the defendant at the time.
- (2) Such a re-sale effected may not have been communicated.
- (3) He may have effected a re-sale subsequent to the contract but prior to breach.
- (4) He may have had no re-sale.

(1) If the buyer has effected a re-sale, the terms of which have been communicated to the seller (or carrier), he can recover the difference between the contract price and the re-sale price as damages. This principle has never been questioned beyond the growth of a line of cases which query as to what constitutes sufficient communi-

²² *Hinde v. Liddell* (1875), L.R. 10 Q.B. 265, at p. 267.

cation (*supra*). Since this state of affairs has already been discussed hereunder, further treatment is therefore unnecessary. Subdivisions (2) and (3) will be considered together.

In both these events there can be said to have been no special circumstances imported into the contract. They may, therefore, be treated together, and must be considered upon the basis of principle rather than upon the special terms of the agreement. *Mayne*, 9th ed., at page 59, says:—

It is quite clear that loss of profits by a re-sale can never be contemplated, unless the re-sale has actually taken place at the time, and is communicated to the other party.

It is submitted that the learned author is not strictly accurate here. True it is that where there is a re-sale, the terms of which have not been disclosed, or a re-sale subsequent to the original contract, the buyer cannot always recover directly the actual difference between the contract price and the re-sale price. He can, however, recover something, and the loss of profits by re-sale not only may be contemplated, but in most cases will be the measure of damages.²³ What then is the rule?

The case of *Fletcher v. Tayleur* (*supra*), although dealing with late delivery, is valuable for its statement of principle. There the question was: "What was the loss in fact sustained by the non-delivery of the ship at the time stipulated for?" In other words, what was the value to the plaintiff at time of breach? *Borries v. Hutchinson* (*supra*) is also strong on this point. The seller knew the plaintiff was in trade; there is no evidence to show that he knew the soda was going to Russia. Nevertheless, it was held that the plaintiff was entitled to recover his lost profits—the value to the plaintiff was the decisive element in estimating damages, and that value was the price he would have received in Russia, less the cost of getting the goods there. In that case, therefore, loss of profits was considered to be a proper measure of damages. The case is also valuable in that it held that a penalty paid under the sub-contract was too remote, as not entering into the contemplation of the parties. Above all, it is important to note that there were no special circumstances imported into the contract. In the same year, in *O'Hanlan v. G. W. Rly.*,²⁴ an action for non-delivery, it was held that a reasonable sum for profits was properly allowable. Shee, J., there said:—

The reasonable price could be ascertained by calculating probable profits which dealers make on goods of that kind. The direction to the jury was

²³ *Stroud v. Austin & Co.* (1883), Cab. & Ell. 119.

²⁴ (1865) 34 L.J.Q.B. 154

right, and they could properly give the plaintiff damages, including something for his profit.

This was done, and the "usual importers' profits" given. *Bridge v. Wain*²⁵ is an old case, perhaps one of the earliest in which it was held that profits could be included as damages. In *McNeill v. Richards*,²⁶ an Irish case, the buyer was a timber merchant; there was no contract of re-sale. The Court held strongly that profits which would have been made in the ordinary course of trade were recoverable. The words of Porter, M.R., are forceful, and his reasoning, it is submitted, unassailable. He said, in part:

The defendant knew very well that the plaintiff was buying the timber, not for purpose of amusement, but to use in the way of his trade as a timber merchant. The measure of damages is in my opinion, the difference between the price paid for the timber according to the contract and the price which the defendant would have realised in the ordinary way of his trade. . . . I am satisfied that the proper way of assessing the damages here is to take the contract price of the timber, the expenses which would be necessarily incurred in cutting and removing it, and making it marketable, add them together, and on the other side to take the sums which the timber would have sold for, and to give the plaintiff the difference. This would not be a fancy profit, but the fair market price.

It is to be noted that here also there was no question of terms being imported into the contract. In *Simpson v. L. and N. W. Ry. Co.* (*supra*), a case where samples were to be exhibited at a show, and were not properly delivered by the defendant company, the plaintiff recovered damages, and Cockburn, C.J., said:—

The principle is now settled that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object. . . . The defendants had an agent on the ground at the Bedford agricultural show, where this contract was made, for the purpose of drawing custom to their line; and their agent must have known that the plaintiff had been exhibiting these goods, and that they were being sent to Newcastle for the same purpose. I, therefore, cannot doubt that there was in this case common knowledge of the object in view. As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but there is no reason for not awarding any damages at all.

These cases cannot readily be reconciled with the statement in *Mayne*. Such terms as "usual importers' profits" in *O'Hanlan v.*

²⁵ (1816) 1 Stark. 504.

²⁶ (1899) 1 I.R. 79.

G. N. Rby. (supra) and the test of value to the plaintiff laid down in these cases, are at variance with that statement. It is submitted that these cases firmly establish the principle that, even where there are no special circumstances imported into the contract, where the parties know that the goods are being purchased in the ordinary way of trade, reasonable profits are recoverable, and that the actual price of the re-sale is always to be contemplated, and is usually an accurate guide to those profits. Whether the contract is for the carriage or the sale of goods, the principle is the same. Indeed the learned author himself seems a little diffident about his own remark, for in the same edition, at page 180, he says:—

Where there has been a failure to deliver goods which are not procurable in the market, and they have been resold by the purchaser previous to breach of contract, it often seems as if the question of liability to pay for profits, which has already been discussed, would arise for decision. In reality, however, the resale is an immaterial circumstance, except so far as it may go to prove what the real value was at the time of breach. Where the resale took place in the ordinary course of commerce, it would be reasonable to accept it as a test of the then value of the article. But where it was a special transaction, in which a special price was given, in consequence of the peculiar exigencies of the purchaser, no such inference could be drawn. Therefore notice of the resale would in the former case be unnecessary, in the latter probably be useless.

The distinction has been made in this regard by some writers between primary and secondary profits, but it is submitted that while that is sometimes a convenient distinction, it is not a necessary one. One need go no farther than the first portion of the rule in *Hadley v. Baxendale (supra)* for his principle. If the contract is between parties engaged in trade, the seller expects that the buyer will make a profit thereby, just as surely as the buyer believes the seller to be making his margin of gain. That is the thing that makes the wheels of commerce go round. If, therefore, the seller commits a breach, he knows that the buyer will lose thereby the trade profit which, in the ordinary course of events he would have made. That loss, is, therefore, one arising directly and naturally from the breach, and so within the first portion of *Hadley v. Baxendale (supra)*. They are not special damages, but very ordinary ones. The rule is well stated in the United States case of *Masterton v. Mayor of Brooklyn*.²⁷ as follows:—

It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependant upon the fluctuation of markets and the

²⁷ 7 Hill. 61, at p. 67.

chances of business, to enter into a safe or reasonable estimate of damages. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting. . . . When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependant, and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. . . . But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand on a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement.

The use of the words "contingent," "speculative," "uncertain," "dependent" and "collateral" as applied to profits, in contrast to those which are the "direct and immediate fruits of the contract" is illuminating and significant. The mere fact that damages must be to some extent a matter of speculation is not a reason for awarding no damages.²⁸

4. If we were to accept, in the event of breach of a contract by the seller (or carrier) the test of value to the purchaser at the time of breach, it is submitted that this brings within its ambit every case where the buyer is purchasing in the way of trade, and allows him probable profits as damages even when there is no re-sale before breach is committed. It is true that the position of the purchaser is somewhat different from that where he has already effected a re-sale, and it may be argued that he has suffered no damages which arise naturally from the breach of contract. But when the subject is thoroughly examined, no logical distinction can be made between the case where the buyer actually effects a re-sale and where he does not. It is true that in the former case he is liable to damages arising from breach of his contract of re-sale, but it is admitted that these are not directly recoverable as such in damages.²⁹ As has been stated, the terms of the re-sale may be put in as a guide to the extent of damage, and as evidence of what was the real value of the goods to the plaintiff, and thereby of the profits which might have been made in the

²⁸ *Simpson v. L. & N. W. Rly.* (*supra*).

²⁹ *Borries v. Hutchinson* (*supra*).

ordinary way of trade.³⁰ If the fact that a sub-sale was entered into is not to be used as an absolute rule in favour of the plaintiff in the one case, why should its absence be used for the defendant in the other? In both cases the buyer relies upon the promise of the seller—where there is a re-sale prior to breach it seems to be clear that he can recover ordinary trade profits as damages, of which the re-sale is an indication. But because there is no re-sale, ought he not be put in as good a position as he would have been if the breach had not been committed? If the goods are not obtainable in the market, the plaintiff loses, by reason of the defendant's breach, a position of advantage in which he had placed himself in reliance on the promise. Acting in the course of trade he would have relied upon that to form part of his year's undertaking, and earn part of his year's income. He would have measured his capacity to enter into other undertakings by the amount of time and effort this would have demanded, and restricted his activities thereby; in consequence of his promise he would have been obliged to forego other arrangements which he had a perfect right to make, but which were inimical to these made with the defendant, and consequently had to be foregone. If, therefore, the seller (or carrier) defaults, and the test of damages is value to the plaintiff at the date of breach, it is submitted that these considerations ought to apply, and the mere fact that he has or has not entered into a collateral arrangement with a stranger is irrelevant. The cases of *O'Hanlan v. G. N. Rly. Co.* (*supra*) and *McNeill v. Richards* (*supra*) are authorities for this proposition. Why should the defendant plead the absence of an independent and unconnected contract between the plaintiff and a stranger as excusing, to any extent, his breach? The aim of the Court is to put the parties as far as possible in the position in which they would have been but for the breach, and the test of that position is value to the plaintiff at the time of breach. The remarks on the rule in *Hadley v. Baxendale* (*supra*) in the last section are applicable also to this eventuality, and if they do not suffice, the Privy Council in the *Wertheim* case (*supra*) seems to be sufficiently strong on the point:—

It is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been if the contract had been performed. . . . The rule which prescribes as a measure of damages the difference in market prices at the respective times above-mentioned is merely designed to apply to this principle.

³⁰ *Grebert-Borgnis v. Nugent* (*supra*); *O'Hanlan case* (*supra*); *McNeill v. Richards* (*supra*).

If, then, the plaintiff, where there is no re-sale in question can prove that, through his own position and capacity to handle the goods, he had a reasonable expectation of making a profit, the same principle can readily and properly be applied.

WHERE THE PURCHASE IS NOT IN THE WAY OF TRADE.

This is the only case now unconsidered, and since here no question of loss of profits could arise, it does not come within the scope of this article. Other elements will be applied in assessing damages, and it is not proposed to add to the length of these remarks by discussing them. It remains, then, merely to conclude briefly, the thoughts and propositions made herein.

Summing up the remarks which have just been made, we may repeat the rule in *Hadley v. Baxendale* (*supra*) as follows:—

Damages recoverable from breach of contract are such as:

- (1) Arise naturally therefrom.
- (2) Arise under special circumstances in the contemplation of the parties when making the contract.

It is submitted that this rule is sufficiently broad to cover loss of profits which were reasonably anticipated in the ordinary course of trade. A distinction between the English and Scotch law has been referred to, and *Dunlop v. Higgins*²¹ is the case cited in that connection, but it is submitted that the majority of the English cases dealt with here have been decided since that date (1848), and that in practice no such distinction exists. With all due respect, it seems that the reasoning of the Lord Chancellor regarding the "market" rule therein is not easily followed, and it is perhaps because of that difficulty that the apparent distinction can be drawn. He puts the hypothetical case of where A contracts to sell 2,000 tons of pig iron to B, to be delivered on a certain day. B re-sells to C delivery on the same day. A defaults, and C buys in the market, B losing his sale. Lord Cottenham then says:—

If pig-iron had only risen one shilling a ton in the market, but the purchasers had lost £1,000 upon a contract with a railway company, in my opinion they ought not only to recover the damage which would have arisen if they had gone into the market and bought the iron at the increased price; but also that profit which would have been received if the party had performed his contract. No other rule is reconcilable with justice, nor with the duty which the jury had to perform, that of deciding the amount of damage which the party had suffered by the breach of his contract.

²¹ *Mayne*, 9th ed., 58.

In the ordinary course of events this is not likely to happen. There would usually be a hiatus for delivery under the re-sale, and that being so, B could buy in the market and so fulfil and get all his profit under his re-sale. But let us examine the facts as Lord Cottenham has put them. All that happens in the market is that pig-iron goes up 1s. a ton. But B loses £1,000 more than the market rule could give him, on his contract of re-sale; he must therefore have re-sold at a price exceeding even the advanced price at date of breach. It is unlikely where there is a market that, even for the purpose of obtaining a steady supply, the railway company would contract to pay a price so much above the market price. The seller gets the advantage of assured shipments, which is as much to him as an assured supply is to the purchaser, and it is submitted that buyers in the course of trade are not so improvident, and that, under the circumstances, the potential profits spoken of would not be ordinary or anticipated. But we must take it for granted that the parties knew what they were about, and so let us deal with another case, which is more readily realized. Suppose the market to be a fluctuating one, and that it was low when A made his contract of sale, and that it goes up and drops again, B making his re-sale when it was high. Here if C bought, B would not receive the profits he would have gotten under the contract, nor if the market went below the original contract price would he get any damages at all. Under these circumstances it would seem to work an injustice to B. But so much of this depends upon B's own actions that it would be unfair to saddle A with all these consequences. As said before, there was a market in which to obtain the goods. A prudent man might provide for a space between the first and second contracts for re-sale, and that being done his position would be secure. Further, in the ordinary course of events, he could by enquiry anticipate the breach by A and purchase in the market to fulfil the re-sale. But beyond these we must remember that B could, when he made his contract of re-sale, and rendered himself liable to the consequences of breach, have prudently insured against possible loss therefrom. This is the strongest answer to Lord Cottenham's theory. The market rule is one which works substantial justice; if B, because he has made an unusually attractive re-sale with an incautious buyer, loses, he is not suffering a loss of ordinary trade profits. It may be, of course, that he has already made his contract with C, and, therefore, has no control over the question of time. If that be so he ought to have communicated the terms of the re-sale to A, and secured himself. The obvious answer to Lord Cottenham's hypothetical case is that such circumstances clearly bring

the matter outside an ordinary and reasonable expectation of profits. If we adopt Lord Cottenham's viewpoint, we place the buyer in every contract of sale in the same position as if he had communicated the terms of his re-sale at the time of making the contract—an obviously unfair position. It is hard to believe that the Scotch law would go as far as this. The seller would be subject to the terms of every contract of re-sale, no matter how ill-advised or extortionate, or how incautious or ill-informed the buyer under that re-sale might be. Our principle is a general one, and therefore does not always fit the unusual case. The case put does not come within the rule in *Hadley v. Baxendale* (*supra*). It must be remembered that, unless the market drops below the contract price and B is unable to obtain other goods, he would always get something by the market rule, and that something is the loss ordinarily contemplated. We can agree with Lord Cottenham in principle but not in degree.

There is nothing inequitable or unnatural in the inclusion of loss of ordinary trade profits in damages where there is no market or communicated re-sale. Where there is a market, the plaintiff can by taking advantage of the "market rule" always recover the profits he would actually have made, whether he had previously re-sold or not. He is put in the position he would have occupied but for the breach, and it is regarded as natural that he ought to receive the fruits of his business activity. Why then should the absence of a market, a circumstance which is entirely beyond the control of the plaintiff, take away from his rights? Why should the fact that he has not entered into a re-sale, a fact entirely unconnected with the defendant's breach, diminish the plaintiff's rights? Both parties contracted in the common belief that the plaintiff was going to make something out of the contract. The only justification for refusing to consider such damages is the impossibility of ascertaining them, and it is neither impossible to ascertain usual and reasonable trade profits, nor indeed to go further: *Simpson v. L. N. Rly.* (*supra*). Furthermore, merely allowing the plaintiff to recover as damages expenses actually incurred is not putting him in the position he would have occupied—it is overlooking entirely the element which every trader has paramountly before him, that of an expectation of profit from the venture, and, in reliance upon that, the refrainment from making other legitimate business arrangements. As said in *McNeill v. Richards* (*supra*), this would not be a fancy profit, nor could an unusually attractive bargain be allowed for, in the absence of communication of that bargain as already discussed hereunder. The rule seems to be fair, and sufficiently established, and ought to be recognized as such, that ordin-

arily in contracts for the sale of goods, since such ordinary contracts are those made in the way of trade, loss of profits consequent upon breach are recoverable. Once a reasonable expectation of profits is established, the amount covered thereby ought to be included in the damages.

RAYMOND GUSHUE.

St. John's, Newfoundland.

WHAT IS WRONG WITH THIS?—Base Fee shall mean exclusively that estate in *fee simple* into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred (The Estates Tail Act, R.S.O., Cap. 113, Sec. 2(b)).

Fee Simple is the greatest estate known to the law. It embraces all the freehold, and no remainder can be expectant on its determination.

Therefore, Fee Simple=Base Fee plus remainder.

But "Base Fee"="that estate in fee simple," etc.

That is, a part=a whole.

Q. E. A.

PLAIN TALK.—Mr. Lovat Fraser in a recent number of the *London Quarterly Review* writes an interesting article on Chief Justice Marshall, of the Supreme Court of the United States, in which he says that the Americans "exaggerate the greatness of Marshall as they exaggerate the greatness of all their famous men". By the recession of the spirit of the age and the social circumstances which conspired to make Marshall a notable man, a more accurate estimate of his place in history can now be arrived at. Some day it may be established that Marshall was great because of his exceeding great courage rather than the range and equipment of his mind.

C. M.