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LAW OF DAMAGES.[1]

Among the interesting questions which are daily arising in our courts of law we may certainly rank those which relate to the measure of damages awarded to the successful party in an action. These questions do not rest, nor therefore can they be argued, upon arbitrary or technical grounds, but only upon considerations of natural justice between man and man. The problem to be solved is the exact apportionment of redress for a given injury— a problem that has engaged the attention of moral philosophers, as well as of legislators and judges... Nice discrimination, and a steady hand to hold the balance, are often required for the purpose of accurately determining the amount of compensation. Varying, and dependent on the policy, climate, or condition of a people, has been the principle of assessment: sometimes the *lex talionis* has prevailed, "an eye for an eye, and a tooth for a tooth;" at other times a weregild, or money commutation, even for the life of a man. In a more practical point of view, it is a matter of importance for those who have suffered wrong to know with what measure compensation will be meted out to them— whether justice will open her hand liberally, or like a niggard. There are some verdicts, like the Highlander's horse "hard to

[1] 18 Jur. p. ii, 101.

catch, and not worth the catching;" and it is well to avoid the perilous pursuit, which, if successful, can only lead to such a result.

An important judgment upon this branch of our law has lately been delivered in the Court of Exchequer,[1] and a principle is there laid down which is capable of extensive application, and of settling many questions which hitherto have been left in uncertainty. The facts were briefly these:—The plaintiffs were the owners of a large flour-mill at Gloucester, which was worked by a steam-engine, the shaft of which having been broken, they, on the 14th May, 1852, delivered it to the defendants (more generally known by the name of Pickford & Co.) to take to Greenwich, where it was to serve as a model for the making of a new shaft A delay of six days beyond the time that was reasonably required for the carriage of the broken shaft took place, and in consequence a corresponding delay took place in the completion and transmission of the new shaft. It appeared that the shaft was an essential part of the machinery, and that, until the new shaft was supplied, all the hands about the mill were unemployed, and all the profits derived from the working of the mill were lost. The learned judge who presided told the jury that the plaintiffs were entitled to recover for the damage which they had sustained by reason of the stoppage of the mill for six days, and the jury gave 25*l.* damages, in addition to 25*l.* paid into court. This ruling was held to be wrong, and a new trial was granted. The court, in delivering their considered judgment, said that the true principle upon which damages should be assessed for a breach of contract is, that the damages should be such as either *result naturally from the breach, or may reasonably be supposed to have been in the contemplation of the parties at the time of the entering into the contract.* "If there were special circumstances, and they were communicated to the party who has broken the contract, then such special circumstances, being known, were in the contemplation of the parties, and may be taken into consideration in assessing the damages. . . . Suppose there had been another shaft at the mill, the delay would have had no effect on the profits; or if other machinery equally essential to its being worked had been out of order, the same result would have

[1] Headley and others *vs.* Baxendale and others, 9 Exch. R. 341.

happened. . . . It is obvious, that in the generality of cases of a miller sending a broken shaft, these consequences would not follow. Here the special circumstances were not communicated, and were entirely unknown to the defendants. We think," continued the Court, "that the judge ought to have told the jury that they ought not to take the loss of profits into consideration." In the course of the argument, Parke, B., referred, with approbation, to the rule of the French law, Code Civil, liv. 3, tit. 3, s. 1150—"Le débiteur n'est tenu que des dommages et intérêts, qui ont été prévu ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point exéctée." The same doctrine prevails in the American law. Thus it is laid down in 2 Kent's Com. 480, note, (4th ed.)—"Damages for breaches of contract are only those which are incidental to and directly caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties, and not speculative profits, or accidental or consequential losses."

It was also said by the Court that actions for not making out a good title to land contracted to be sold, and actions on bills of exchange and for non-payment of a specific sum of money, did not afford an exception to the above rule, but rather fell within the second branch of it, as each party may be said to have contemplated, upon entering into the contract, that in case the contract should be broken the damages should be in accordance with the *conventional* rule, which is well established, viz. in the first case, that the damages should be limited to the expense of investigating the title, and should not include the loss of the bargain; and in the second and third, only the precise sums agreed to be paid should be recovered.

The rule, as above laid down, doubtless tends to limit the liability of carriers and other contracting parties or bailees, in the absence of express notice, and shows the necessity of giving such notice, if the party who alone possesses the knowledge wishes to guard himself against loss. In numerous cases, as in the one under review, the loss of profit, the payment of wages to unemployed workmen, the liability on subsidiary contracts not performed because of the principal contract being broken, would form the only damage; and therefore, if these special circumstances be not communicated to the other party, the one who suffers the actual injury has no redress.

The shaft may have been essential to the machinery, the machinery to the working of the mill, the working of the mill to the employment of the men, to the realization of profits, and to the performance of other contracts; yet, for want of disclosing these facts, the shaft becomes, in the eye of the law, so many hundred weight of old iron the delivery whereof may be delayed without any injury or loss naturally resulting from it.

The adoption of such a principle cannot be said to be unreasonable. Here are two contracting parties—one possessing full knowledge, the other totally ignorant, of the *special* circumstances attending the contract, or, in other words, of the peculiar consequences that will accrue from a breach. If the former does not place the latter on an equal footing with himself in this respect, but induces him to undertake an extraordinary charge at the ordinary rates of risk, he has no right to complain if he is debarred from recovering the amount of his loss. He had the opportunity of stimulating the other party to the use of extra caution, and of making him responsible for all the injury accruing from neglect on his part. The other had a right to be forewarned, in order to be forearmed.

The principal thus clearly laid down will affect and practically overrule several previous decisions, in which the loss of profits, and damages which have been paid for non-performance of subsidiary contracts, have been allowed as damages for breach of the principal contract, although no notice has been brought home to the defaulting party (see, for instance, *Walters* vs. *Towers*, 8 Exch. 401); but it will not probably touch the class of cases where the contract may be said, from its very character, to involve notice of the natural consequences to be apprehended from a breach. Thus, in an action for a breach of warranty of a chain cable, the plaintiff was held entitled to recover the value of the anchor to which the cable was attached, on proving, that a link of the cable was broken, the crew slipped the cable in order to avoid danger, and that the anchor and cable were thereby lost. (*Borradaile* vs. *Brunton*, 8 Taunt. 535). So, the damages will probably still be affected by matter subsequent to the making of the contract; as if a man buy a horse with a warranty, and, relying thereon, resell him with a warranty, and being sued on the warranty by his vendee, he *offers* the defence