The other assignments of error are not sustained. The mere fact that the personal property was worth much more than it brought at the sheriff's sale was of no importance in itself, and the charge given to the jury upon the facts in evidence was entirely accurate. But for the first reason we have mentioned, a new *venire* must be ordered.

Judgment reversed, and a *venire de novo* awarded.

RECENT ENGLISH DECISIONS.

Court of Exchequer.

WILSON *v.* THE NEWPORT DOCK COMPANY.

The defendants, owners of docks in a river, agreed with the plaintiff, a shipowner, to receive his ship into their docks. When the time came for receiving the ship, they were unable to do so. The ship lay in the river, and, as the tide fell, she stranded, broke her back, and was seriously damaged. In an action for the breach of the contract to receive the ship into the dock, the plaintiff sought to recover for the injury to the ship as special damage. The judge asked the jury, first, whether there was a place of safety to which the ship might have been taken; and, if so, secondly, whether the captain or pilot had been guilty of negligence in not taking her there. The jury gave no answer to the first question, but, to the second, answered that the captain and pilot did the best they could under the circumstances, and were neither of them guilty of any negligence. The judge thereupon directed a verdict for the plaintiff for the damages claimed.

Held (per POLLOCK, C. B., CHANNELL and PIGOTT, BB.), that, upon the finding of the jury, the court could not decide whether the plaintiff was entitled to the damages claimed or not.

Held (per MARTIN, B.), that the plaintiff was entitled to the damages claimed. *Hadley* v. *Baxendale*, 9 Exch. 341, commented upon.

THE declaration was for the breach of a contract to receive the plaintiff's ship into the defendant's dock, alleging, as special damage, that the ship, being left in the river, as the tide fell, grounded and sustained injury.

The defendants paid £15 into court.

The plaintiff replied that this sum was insufficient; upon which issue was joined.

The action was tried before BYLES, J., at the last Monmouthshire Summer Assizes, and the facts proved were as follows:—The defendants were the proprietors of a wet-dock upon the Usk,

at Newport. In November 1863, the plaintiff's ship, Lord Elgin, was in a dry-dock higher up the river. The plaintiff wished to remove his ship to the defendants' dock, but for some time they had no room for her. On the 17th November they sent word to the captain that they could receive the ship if she came down with the first tide. In the morning she was towed down accordingly, the captain and a pilot being in charge of her. When she reached the dock-gates, the defendants, in consequence of an accident, were unable to take her in. The wind was rising at the time. A discussion took place between the captain and the pilot as to what should be done; but ultimately she was anchored in the river opposite the dock. As the tide fell she stranded on a bank and broke her back, and considerable expense was incurred in repairing her. There was a conflict of testimony as to whether she might safely have been taken up the river again, or to a secure anchorage lower down, or into deep water. It was doubtful whether she was sufficiently ballasted to be safely taken into deep water.

The plaintiff sought to recover the expense of repairing the damage thus done to the ship. The sum paid into court covered the expense of bringing the ship down the river to the dock-gates.

The learned judge left two questions to the jury—first, whether there was a place of safety to which the vessel might have been taken? Secondly, if so, whose fault was it that she was not taken there? was it the captain's or the pilot's? As to the first question the jury could not agree. To the second they replied that the captain and pilot did the best they could under the circumstances, and were neither of them guilty of any negligence.

The learned judge thereupon directed a verdict for the plaintiff, the amount to be ascertained out of court, with leave to the defendants to move to enter a verdict for themselves, the court to be at liberty to draw inferences of fact.

Huddleston, Q. C., in Michaelmas Term, accordingly obtained a rule nisi to enter a verdict for the defendants, on the ground that the damages were too remote; or for a new trial, on the ground that, upon the finding of the jury, the plaintiff was not entitled to the verdict.

Mellish, Q. C., *Cooke*, Q. C., and *Dowdeswell*, now showed cause.—The damage here is a direct injury to the subject-matter

of the contract, not consequential damage within the meaning of *Hadley* v. *Baxendale*, 9 Exch. 341; and the rule in that case is not to be extended to dissimilar cases: *Smeed* v. *Ford*, 7 W. R. 266, 1 E. & E. 616; *Gibbs* v. *The Liverpool Docks*, 5 W. R. 74, 1 H. & N. 439; *Collen* v. *Wright*, 5 W. R. 265, 7 E. & B. 301; *Randall* v. *Raper*, 6 W. R. 445, E. B. & E. 81; *Bridge* v. *The Grand Junction Railway Company*, 3 M. & W. 224; *Davis* v. *Garrett*, 6 Bing. 716.

Huddleston, Q. C., *Gray*, Q. C., and *Henry James*, in support of the rule, cited *Hadley* v. *Baxendale*, *ubi sup.*; *Fletcher* v. *Tayleur*, 17 C. B. 21; 1 Sedg. on Dam. 57–67, 2d ed.

The court being divided, the following judgments were delivered:—

MARTIN, B. (after recapitulating the facts proved).—The question of damages is of constant occurrence, it arises in almost every action of contract except contracts for the payment of a certain fixed sum of money, and necessarily in every action for a wrong. Ordinary cases on contracts are actions for the non-delivery or non-acceptance of goods agreed to be sold, on agreements for the sale of land, for breaches of promises to marry, for non-acceptance or non-delivery of stock or shares, and an infinite variety of others might be named. So, also, in actions for wrongs it occurs every day; for instance, in actions for injuries sustained by accidents on railways, and by collision, which now constitute a very considerable number of the causes tried at Nisi Prius; in actions for libel and slander and for assaults or false imprisonment, and in numberless other cases. In some instances the measure of damages is fixed and ascertained by long-established usage; for instance, for the non-delivery of goods which are the subject-matter of common sale in the market, I apprehend a judge is bound to tell the jury that the measure of damages is the difference between the contract price and the market price, and that if he does not his summing up would be liable to objection; and there are other cases in which like long usage has fixed the measure of damages. So also in some case the matter of damages has been the subject of decision in the superior courts, and I apprehend that when this has been so the decision is a binding authority upon the same and other courts in like manner and to the same extent as other decisions. For instance, the case of *Hadley* v.

Baxendale, 9 Exch. 341, which was frequently referred to in the argument, is a decision of this kind. The plaintiffs, who were millers, had delivered to the defendants, common carriers of goods for hire, at Gloucester, a broken iron shaft to be carried by them to Greenwich and delivered to an engineer there in order to enable him to use it as a model for making a new shaft. They were told that the mill was stopped in consequence of the shaft being broken, and they promised that if the shaft was sent before a certain hour it would be delivered at Greenwich on the following morning. The delivery of the shaft was delayed by some neglect, and the plaintiffs did not receive the new shaft for several days after the time they otherwise would have done; and they claimed damages for the loss of profit which they would have made had the new shaft been delivered earlier. The late Mr. Justice CROMPTON left the case generally to the jury, who found a verdict for the plaintiffs; a rule was granted by the Court of Exchequer for a new trial for misdirection, because they were of opinion that the judge ought to have told the jury to exclude the loss of profit. This case is, therefore, an authority that in a similar case such loss of profits cannot be made an element of damages, and must be excluded; but it is an authority no further, and anything said by the court in delivering judgment is to be judged by its being consonant to law and reason. The decision in *Hadley* v. *Baxendale* is therefore no authority whatever in the present case, for no loss of profits is claimed, nor is it an authority that loss of profit is not a legitimate element of damages in many other cases—for instance, in a railway accident whereby a tradesman or workman is prevented from attending to his business by the injury sustained, the loss of his profits in such cases is a constant element of damages, and in a case tried the other day at Liverpool, where so large a sum as £7000 was given in a case under Lord Campbell's Act, the sole element of damages was the loss of profits of the deceased in his profession of a surgeon, and no objection was made on this ground, and I have no doubt whatever that if the judge had told the jury to exclude it there would have been misdirection. In regard to the present case there is no established rule and no decision, and the general rule is to be applied. This rule is—that the damage to be compensated for ought to be proximate to and not remote from the breach of contract or the wrong, and ought, fairly, and reasonably, and natu-

rally, to arise from them. I do not adopt the qualifications mentioned by Mr. Baron ALDERSON in the judgment in *Hadley* v. *Baxendale*, as applicable to every case. They may have been right there, but they are not of universal application. Naturally, he says, "means according to the usual course of things." But contracts are infinite in variety; and suppose, as in this case, no such claim of damage has ever been known to have been made, no usual course of things exists, but the damages to be recovered against the plaintiff are not, in my opinion, therefore, to be nominal. And he proceeds to say "or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it." Now this may properly enough be taken into consideration in the case of carriers and their customers, but in the bulk of broken contracts it has no application whatever. Parties entering into contracts contemplate that they will be performed and not broken; and, in the infinite majority of instances, the damages to arise from the breach never enter into their contemplation at all. As to *Hadley* v. *Baxendale*, I was a party to it, and have no desire to depreciate it. But in *Boyd* v. *Fitt*, 16 Ir. C. L. 43, the Court of Exchequer dissented from it, and approved of the views of the late Mr. Justice CROMPTON and Sir JAMES WILDE as being sounder exposition of the law as to remoteness of damages: *Smeed* v. *Ford*, 7 W. R. 266, El. & El. 616; *Gee* v. *Lancashire and Yorkshire Railway Company*, 9 W. R. 103, 6 H. & N. 221. The general rule is, therefore, to be applied to the present case, and ought, as all other general rules, to be fairly, candidly, and impartially applied. It has been said that the damage sustained here has been very great. Now, I am clearly of opinion that this ought to be no element whatever in the application of the rule, and whether the damages be £10 or £10,000 is immaterial. The circumstances are these:—In pursuance of the defendants' contract to admit the ship into the dock at a certain time upon a certain day, the ship was brought to the entrance of the dock. The defendants could not admit her in consequence of a defect in a chain of the dock-gate, and their contract is admitted to have been broken. No blame attaches to them. It was their misfortune that the chain had been broken. The ship was then left in the river, which is one emptying itself into the Bristol Channel, where the tide flows and ebbs to a very

great height. The captain had to decide what was to be done under the circumstances in which he was placed. Four courses have been suggested as open to him—one, that he should remain and anchor where he was; secondly, that he should have gone up the river towards the place from whence he came; thirdly, that he should have gone down to West Point, where, it was said, the ship would, upon the ebb, have settled upon soft mud; and, fourthly, that he should have gone into deep water, where the ship would have always been afloat. Now I think the defendants had a right to a *bonâ fide* and reasonably sound judgment exercised upon this matter. The captain decided upon remaining where he was; the tide was ebbing and the weather threatening. If any of the other three courses had been adopted, it might have been that the ship would have sustained no damage; but it might have been that she would have been totally lost. But I think this was a question for the jury, and that they have decided it. They have found that the captain did the best he could under the circumstances, and was not guilty of any negligence. The consequence was, that when the tide ebbed, the ship took the ground and sustained damage; and the question which has been argued before us is, that the damage is too remote, and so unconnected with the cause of action, that it must, as a matter of law, be borne by the plaintiff, and that the defendants cannot be responsible for it. I do not concur in this view. There has been damage. It must be borne by some one. Neither the plaintiff nor his captain are in the slightest default. If the defendants had performed their contract, no damage would have occurred. In consequence of their default the captain was compelled to exercise his judgment and discretion; and the jury have found that he did the best he could, and was guilty of no negligence, by which I understood that in deciding to remain where he was he exercised such judgment and discretion as became a reasonable and prudent man. His doing so was, no doubt, the immediate cause of the damage, but in my opinion his remaining there was, in contemplation of law, the same as if the ship had been compelled to remain there by a *vis major*. The rule is that the damage must be proximate (not immediate), and fairly and reasonably connected with the breach of contract or wrong. As to what is so, different minds will differ, but many instances could be mentioned in which damages much more remote than the present were held to be the

subject of compensation: *Powell* v. *Salisbury*, 2 Y. & J. 394. There is a case of constant occurrence at Guildhall—A barge is injured by a collision in the Thames, she is taken to the nearest convenient and fitting place on the shore; upon the ebbing of the tide she comes down upon a pile and sustains further damage. My own belief is that compensation for such damage has been recovered over and over again without objection, and upon referring to some gentlemen of the bar, whose experience upon the subject is the greatest in the profession, I have been informed that it has constantly been so. Such damage is precisely analogous to the present.

Some possible cases were mentioned in the argument, and it was asked whether the defendants would have been responsible; one was, if the ship has been run down by another ship when at anchor. I think the liability in such case would depend upon the circumstances, and the material one would be whether the running-down ship was in the wrong. Another case put was, if the ship had been upset, when she was anchored, by a hurricane. That, I think, would raise a question for the jury whether, in all human probability, the same misfortune would not have happened to the ship wherever in the river she happened to have been. In my opinion the discussion of instances like these is of very little bearing or weight when the facts of the case to be adjudicated upon are clear and well-defined.

In questions of damages each case must be determined upon its own circumstances. But I think the point is decided by authority: *Jones* v. *Boyce*, 1 Stark. N. P. C. 495. The plaintiff was a passenger by a stage-coach, a rein broke, the coachman drove the coach towards the side of the road, and one of the wheels was stopped by a post. The plaintiff jumped off, and his leg was broken, and he brought the action against the coach proprietor for damages. Lord ELLENBOROUGH said there were two questions for the jury: first, as to the defendant's default (in regard to the rein), which is immaterial to the present case. The second was whether the defendant's default was conducive to the injury which the plaintiff had sustained, for if it was not so far conducive as to create such a reasonable degree of alarm and apprehension on the mind of the plaintiff as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action was not maintainable. Amongst observations upon the

peculiar circumstances of the case, he said, "That it was for the consideration of the jury whether the plaintiff's act was such as a reasonable and prudent mind would have adopted;" and he added, "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." I think the present case is analogous. The defendants did not perform their contract to admit the ship into the dock. They thereby imposed upon the captain four perilous alternatives; he adopted one. The jury found that he did the best he could, and was guilty of no negligence; and damage ensued to the ship. In my opinion the defendants' default directly conduced to this damage, and they are responsible for it upon the principle enunciated by Lord ELLENBOROUGH in *Jones* v. *Boyce*, which is equally good law and good sense. For these reasons I think the damage is not too remote; that the learned judge submitted the right question to the jury; and I concur with him that the verdict is unobjectionable, and that therefore the rule should be discharged.

POLLOCK, C. B.—This case comes before us on a point reserved at the trial, viz., whether the damages were too remote; and, to assist our judgment, we have, first, the notes of the learned judge taken at the trial; secondly, the answer of the jury, "that the pilot and the captain did the best they could" under the circumstances, and were "neither of them guilty of any negligence," and we have the fact that the jury (who were locked up till a late hour) could not agree on the question "whether there was in fact any place of safety to which the vessel might have been taken;" and the questions for our decision seem to be—First, ought the verdict to stand, a verdict not found by the jury, but entered for the plaintiff by the learned judge on the jury answering one question, and, being unable to agree upon another question, which we think the more important and decisive of the two; secondly, ought we to enter the verdict for the defendants; or, thirdly, ought we to direct a new trial. In deciding these questions it is necessary to ascertain the facts of the case as found by the jury, for with evidence so contradictory and repugnant we cannot find any verdict ourselves; it is not our province. If the facts can be ascertained, then what is the law applicable to them? We apprehend, when the facts are known, it is the province of the court to say for what matters damages are to be given, but the

amount of damages is a question for the jury quite as much as the credit due to the witnesses. When the result of the evidence is uncertain it is for the jury to find the facts, and, therefore, they will often have to find whether the facts fall within the rule of law to be laid down on the subject. The case of *Hadley* v. *Baxendale*, 9 Exch. 341, was cited at the trial, and much commented on during the argument. That case was very much considered, the argument took place several weeks before the judgment was given, and I know that great pains were bestowed upon it. Lord WENSLEYDALE, the late Baron ALDERSON, and my brother MARTIN were parties to it, and certainly it does not lessen the authority of that case that Lord CAMPBELL, in *Smeed* v. *Foord*, 1 E. & E. 602, said, that it merely affirmed what was to be found in Pothier, in Chancellor Kent's Commentaries 665, in the French Code, and in all the other authorities; and it may be added that Mr. Justice CROMPTON (against whose summing-up, it was directed) said, in that same case, he agreed with it as far as it went, which we consider to be agreeing with it altogether. That decision was not presented as any new discovery in jurisprudence, but we think it put in a clear and more distinct light a principle which had been previously recognised in prior cases, and the want of which in the English law had been pointed out. The authorities are all collected in a note to *Vicars* v. *Wilcox*, in 2 Smith's Leading Cases, 4th ed., by Mr. Justice WILLES and Mr. Justice KEATING. It is quite true, as remarked by Sir JAMES WILDE in *Gee* v. *Lancashire and Yorkshire Railway Company*, 6 H. & N. 221, that the case is not applicable to, and does not decide, every case; no rule, no *formula* could do that. Cases of damage differ as much as the leaves of a tree differ from each other, or rather the leaves of different trees—no two are exactly alike, and one description connot be applicable to all; no precise positive rule can embrace all cases, and, notwithstanding any rule of law that may be laid down, it must be admitted after all that the question of the amount of damages is one for the jury, and the jury only; and, provided the law on the subject be properly laid down by the presiding judge, and then the amount of damages be left at large to the jury, we apprehend a court would not interfere with their verdict, because the jury had, apparently, come to some compromise among themselves, and had not strictly observed the supposed rule of law. We think that the decision of twelve jurymen, in-

structed from the bench in the rule of law, but exercising their own judgment on a subject connected with the business of life, with which they are familiar, would practically lead to a result often more just and equitable than any mere rule of law could arrive at, and that there may be no mistake as to our meaning, we may add that, should this case go to a second trial, some of the jury might think the plaintiff entitled to recover the whole damage; others might think it the height of imprudence on the part of the master to attempt to remove a vessel from a dry-dock to a wet-dock about the time when the wind was blowing a hurricane, which, from his evidence, seems to have been the case, and from which charge of imprudence the verdict of the jury has not relieved him. The result might be a compromise which, we are confident, the court would not, and which, we think, they ought not, to disturb. We think we are not able to determine, from the materials before us, whether or no the loss was occasioned by circumstances which, according to the case of *Hadley* v. *Baxendale*, and the other authorities, would make the dock company liable for the damage the ship sustained. If the state of the weather was the efficient cause of the loss, we think the defendants are not liable. Now, as to the state of the wind, the evidence of the mate is—"not much wind blowing; pretty stiff; a fresh breeze." The evidence of the captain was—"It was only a few hours before a perfect hurricane." James Dunstan, the master-rigger, says, "It was blowing so hard it would not have been safe to take her into deep water." If the weather was such that, on being excluded from the dock, she had no alternative but to perish on account of the gale or hurricane, which seems to me to have been the opinion of the master, then it may be doubted whether she ought to have been taken to the dock gates at all in such a state of the weather; and the opinion of the jury, by a verdict, should have been obtained on these and other circumstances; and the verdict ought to have been found by them on a larger issue than whether the master and the pilot did their best, after they found that the vessel could not be received into the dock, which I take to be the only finding of the jury. It is clear that the pilot thought the master was obstinate, and determined to do nothing to save the ship. We cannot find the defendants liable to this damage, because the jury were disposed to relieve the captain and the pilot from the odium of a charge of negli-

gence. The verdict of the jury ought to have gone more into the merits, in order to fix the defendants with these damages. What the jury did not find, and could not agree upon, was quite as important as what they did find; and the result of their verdict seems to be—"We cannot agree as to the liability of the defendants, but we desire to throw no blame on the captain or the pilot." We are, therefore, of opinion that the jury have not found enough, in point of fact, to enable us to decide that the verdict entered for the plaintiff is what would have been their verdict, or (referring to the evidence actually given) ought to have been, if the entire case had been left to them to find a verdict for the plaintiff or the defendant. Looking at the evidence and the finding of the jury, we cannot come to any conclusion that would make the defendants responsible for the damage done to the vessel. If there was any place of safety to which the vessel might have been taken, and could have been taken (which we think is included in the learned judge's question) we think the plaintiffs are not entitled to recover. The jury could not agree on an answer to this question. If they had found this question in the affirmative, we think the plaintiff was clearly not entitled to recover; and we presume the judge would have directed a verdict for the defendants. But after many hours they could not agree, and it is plain that some of the jury were of opinion in the affirmative. It is true they found that neither the captain nor the pilot were guilty of negligence, but we think it very uncertain what they meant by that finding. They certainly did not mean by that finding inferentially to decide the other question, or they would have found it, and not ultimately disagreed about it. If there was a safe place to which the vessel might and ought to have been taken, a verdict for the plaintiff would be a great act of injustice, and we are invited to find this for the jury by a process of reason, when the jury would not, apparently could not, and certainly did not, find it for themselves. As to entering a verdict for the defendants there is a similar difficulty (though, perhaps, not so great, because if the plaintiff does not establish his case, the defendant is entitled to a verdict), but we think we cannot be certain what would have been the verdict of the jury if they had gone into, and had decided upon, the whole case for themselves. We think, therefore, there ought to be a new trial.

CHANNELL, B.—I wish to add a few words with the permission of the Lord Chief Baron. I have not thought it necessary to prepare a written judgment because the question is not yet properly laid before us. If no new light be thrown on the matter by the finding of the jury at the second trial, it is possible that the legal result may be that which my brother MARTIN has pointed out. But, without deciding that, the present question is, whether the verdict is to stand, and I think it cannot, for the case is not ripe for decision.

PIGOTT, B.—I agree with what my brother CHANNELL has said. I do not think the case ripe for decision, and on this ground I concur in the judgment of the Lord Chief Baron.

Rule absolute for a new trial.

We had occasion a short time since to remark on the distinction between what are called "reportable" and "unreportable" cases. We were then discussing the case of *Noble* v. *Ward*, 14 W. R. 397, which really added something to the ever-increasing mass of that English unwritten law which is supposed to be hidden in the breasts of the judges. The case to which we now invite our readers' attention is, in itself, of scarcely any appreciable importance, but it has been used by the barons of the Exchequer as a text for two most elaborate discourses on the subject of the measure of damages in actions of contract, and for that reason is worthy of careful consideration. The subject is a very difficult one, and the law upon it can hardly be considered yet as thoroughly settled.

The leading authority is the well-known case of *Hadley* v. *Baxendale*, 9 Exch. 341, 2 W. R. 602, which was decided in the Court of Exchequer, in the year 1854, by the present Chief Baron, Lord WENSLEYDALE, Baron ALDERSON, and Baron MARTIN. Great pains, the Chief Baron observed in the principal case, were bestowed on the judgment, which was delivered by ALDERSON, B., some weeks after the court had heard a long argument by the present Mr. Justice KEATING and Mr. Dowdeswell on one side, and the present Mr. Justice WILLES, Mr. Whately, and Mr. Phipson on the other. The plaintiffs in that case were the proprietors of the Gloucester Steam Mills, and they had delivered to the defendants, who were common carriers, a broken iron shaft, to be carried to Greenwich, for the purpose of its being there used as a model for a new shaft. The defendants were informed, when the shaft was delivered to them, that the mill was at a standstill, and that the shaft must be sent off immediately. In answer to an inquiry as to when it could be taken, the answer was that if it was sent up at any time before mid-day, it would be delivered at Greenwich on the following day. The delivery, however, was delayed through some neglect, and the consequence was that the plaintiffs did not receive the new shaft for several days later than they ought to have done. The working of their mill was thereby delayed, and they accordingly sought to recover from the defendants the profits they would otherwise have made. It was argued, on the part of the defendants, that these damages were too remote, but CROMPTON, J. (the judge who presided at the trial), having left the facts generally to the jury, they found a

verdict for the plaintiff. A rule was subsequently granted in the Exchequer for a new trial, the court being of opinion that the judge ought to have told the jury to exclude the loss of profits in estimating the damages, and it was in the course of the judgment that the two principles as to the measurement of damages were enunciated, which have ever since been regarded as authoritative. As we shall see immediately, however, more than one learned judge has expressed disapproval of their extension. They were laid down by Baron ALDERSON, in the following terms:—"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 such as may be fairly and reasonably considered as *either* 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." Here then are two *criteria*—first, the natural consequence; and, secondly, the contemplated, though possibly not the natural, consequence.

Now, it must be admitted that both these tests are sound and in accordance with the *dicta* of French and American jurists, but the difficulty is in their application. Indeed, the second test is almost unintelligible unless we adopt the explanation of it given by CROMPTON, J., in *Smeed* v. *Foord*, 1 E. & E. 616, 7 W. R. 266, that it only means that the damages should be "such as are natural, and such as the parties would naturally look for." As MARTIN, B., remarked in the principal case, "parties when they enter into contracts contemplate that they will be performed and not broken, and in the infinite majority of instances, the damages to arise from the breach never enter into their contemplation at all." To talk, therefore, of what the parties contemplated as a measure of damages is really illusive, unless it be where the contract is to pay a sum certain, when both promissor and promissee would only be able to contemplate one and the same measure of damages, viz., the money agreed to be paid, with interest. Any attempt to apply this second test in cases of breaches of a special contract, or of torts, will only fortify the opinion expressed by WILDE, B., in *Gee* v. *Lancashire and Yorkshire Railway Company*, 6 H. & N. 221, 9 W. R. 103, that although an excellent attempt was made in *Hadley* v. *Baxendale* to lay down a rule of practice, it has been found that that rule will not meet all cases. "It will probably be found practically," he adds, "that in this (contract of bailment with a carrier), as in many other cases of contract, there is *no measure of damages at all*, and that we are seeking to find a rule where none can be made."

The safest test, therefore, in estimating damage is the first of the two given in *Hadley* v. *Baxendale*, viz., that the damage recoverable must be the *natural* consequence of the breach of contract or duty by the defendant, and what that consequence is depends on a variety of circumstances which will be different in different cases. "Cases of damage," said the Chief Baron in the principal case, "differ as much as the leaves of a tree differ from each other, or rather the leaves of different trees." It is impossible to frame an inflexible rule of law which shall fit them all, and indeed, when fairly considered, the decision in *Hadley* v. *Baxendale* does not attempt to do so. All that was said there was that the judge ought to have told the jury not to include loss of profits in estimating the damages. And so at present, if an attempt were made at the trial to prove damages obviously too remote, it would be the judge's duty to warn the jury to exclude them. But, generally speaking,

we apprehend it would be sufficient for the judge to direct the jury to give such damages as they considered *reasonably* to have arisen from the defendant's default. "It must be admitted, after all," observes the Chief Baron, "that the question of the amount of damages is one *for the jury, and the jury only*. We think that the decision of twelve jurymen instructed from the bench in the rules of law, but exercising their own judgment on a subject connected with the business of life with which they are familiar, would practically lead to a result often more just and equitable than any mere rule of law could arrive at."

It is unnecessary to allude to the facts of the principal case. The court were divided in their opinion as to whether the findings of the jury were, or were not, sufficient to fix the defendant with responsibility. The value of the case solely consists in the elaborate discussions on the measure of damages contained in the judgments of POLLOCK, C. B., and MARTIN, B. The effect of both judgments, we think, will be still further to limit the application of the rules—or at any rate of the second rule—in *Hadley* v. *Baxendale*. The decision in that case, it is gradually being discovered, contains principles which, whilst sound in themselves, are incapable of being applied generally in all cases of damage arising from breach of contract or duty.—*Solicitors' Journal.*

Court of Common Pleas.

SMITH *v.* THACKERAH AND ANOTHER.

The plaintiff was entitled to lateral support for his land, but not for the wall upon it. The defendant dug a well in his own land, adjoining the land of the plaintiff, and when he no longer required it, filled it up, but the material used for the filling up sunk. The consequence was a subsidence of earth towards the place where the well had been, and this subsidence included particles of the plaintiff's earth, and caused the fall of the plaintiff's wall; but there would have been no appreciable injury to the plaintiff's land if the wall had not been upon it.

Held, that there was no cause of action.

DECLARATION; for that the plaintiff was possessed of land, which received lateral support from land adjoining thereto, and the defendants dug on the said adjoining land a well near to the land of the plaintiff, and the defendants thereby, and for the want of keeping and continuing the sides of the well shored up, or otherwise preventing the consequences hereinafter mentioned, wrongfully deprived the plaintiff's land of its support, whereby it sank and gave way, and divers walls of the plaintiff on the said land sank and were damaged, and the plaintiff was thereby obliged to pull down the said walls and to rebuild the same, and incurred great expense, &c., and lost the profit which would otherwise have accrued to him in the letting or use of the premises.

Pleas.—Not guilty, and not possessed.

Issue on these pleas.

The facts, proved at the trial before ERLE, C. J., at the last Kingston Assizes, were as follows:—

The plaintiff was a publican at Bermondsey, and the defendants were employed as contractors to construct a line of railway past his premises, and for the purposes of their works they sunk a well in a lane adjoining the plaintiff's tavern, and about one foot from the kitchen wall. The sides of this well, which was about twenty feet deep by ten feet in diameter, were shored up by wooden supports: but when the well was no longer required, the defendants filled it up with loose earth, and removed the wooden supports with which the sides were shored up. The consequence of this was that the filling up of the well sunk nine inches in the centre, the foundation of the wall gave way, and the wall itself had to be shored up, and subsequently pulled down and rebuilt. It was conceded that the plaintiff's house was a new building, and that the right to support was in respect of the land only. There was uncontradicted evidence of a subsidence of the plaintiff's land caused by the sinking of the loose material with which the well had been filled up, and that this subsidence would have occurred even if there had been no building on the land; but the jury found that, supposing no building to have been on the land, the plaintiff would not have suffered any appreciable damage; and, on that finding, the verdict was entered for the defendants.

A rule was then obtained, pursuant to leave reserved, to enter the verdict for the plaintiff for such sum below £15 as the court should direct, on the ground that the facts proved at the trial entitled the plaintiffs to the verdict without proof of any pecuniary damage.

Joyce showed cause and contended that the defendant had only exercised a natural right on his own land, and that if the plaintiff's land had remained in its natural state no damage would have happened, and that, therefore, the action was not maintainable: *Bonomi* v. *Backhouse*, 7 W. R. 667, El. Bl. & El. 637; *Brown* v. *Robins*, 4 H. & N. 186.

Robinson, Serjt., and *Sharpe* were called on to support the rule.—As there would have been a subsidence of the plaintiff's land, whether there was a building upon it or not, he is at least

entitled to nominal damages, for he is clearly entitled to lateral support for the land. It is actionable to deprive a man of a right given him by law, though no damage has thereby been occasioned; for *injuria sine damno* may be the foundation of an action: *Ashby* v. *White*, 1 Sm. Lead. Cas. 216; 2 Ld. Raym. 955; Broom's Commentaries, p. 85, 3d ed. But, further, the plaintiff is entitled to substantial damages, for the case is on all fours with *Brown* v. *Robins*, *supra*. There the plaintiff's land sank in consequence of the defendant's excavations, and it would have sunk just the same, whether there was a house on it or not, and it was held, as the sinking was not caused by the weight of the house, that the plaintiff was entitled to recover, whether he had a right to lateral support for his foundations or not, and that he was entitled to recover for all the damage that ensued. So here the injury to the kitchen wall should be considered with reference to the amount of damages consequent on the actionable wrong committed by the defendants, and as a direct consequence of it. If a man goes to great expense in laying out a level lawn, and a neighboring excavation causes the land to sink without appreciable damage to the land itself, and yet so as to mar the smoothness of the lawn, would it be said that he had no right to damages?

ERLE, C. J.—I am of opinion that this rule should be discharged. It was said that the plaintiff was entitled to the verdict, and to some damages, and the case of *Ashby* v. *White* was relied on, where the returning officer refused to admit a vote, and the voter maintained his action for this against the returning officer, although the persons for whom he meant to vote were elected. It is true that where you infringe on another man's legal right, although no damage follows, you commit an actionable wrong: but where there are two adjoining owners, and one of them does a lawful act of ownership, without invading any right of his neighbor, and the act constitutes no harm to his neighbor taken by itself—that may or may not become actionable according as appreciable damage is committed. We cannot draw a distinct line, but must consider the annoyance, and the circumstances under which that annoyance arose. Thus, if there are adjoining houses in London, and dancing in one of them causes a vibration to no appreciable extent in the other, that is no cause of action; but if the houses were built so slightly that the vibration was

serious, and the dancing was continued after notice, that might become actionable. Many such cases might be put—as, for instance, annoyance caused by a particular trade, as that of a coffin-maker or a boiler-plate maker. Under some circumstances, the acts complained of would be perfectly lawful; under others, not.

Here the question arises between two adjoining owners, the defendant having, in exercise of his rights of ownership, sunk a well on his own land, and afterwards removed the supports and filled it up. When, however, it had been filled up to the surface, it turned out that improper materials had been used for the purpose, and there was a subsidence of nine inches in the centre of the well. On the evidence, I think it must be taken that there was a subsidence of particles towards the place where the well had been, and amongst them some particles of the plaintiff's land. But then the question was left to the jury, Did the plaintiff suffer any appreciable damage, supposing the building not to have been there? and they said that he did not; and on that the verdict was entered for the defendants. A lawful action may become unlawful if there is a certain amount of damage attached to it, and if there be unreasonable conduct, as between neighbors. Where the defendant set up smelting works, and by noxious vapors destroyed the vegetation on the plaintiff's land, there was a good cause of action; but the House of Lords said that if the defendant had sent vapor from his works which did no sensible or material (which I take to be the same as appreciable) injury, there would have been no cause of action (see *The St. Helen's Smelting Co.* v. *Tipping*, 13 W. R. 1083, 35 L. J. Q. B. 66).

Byles, J.—I am of the same opinion. The Chief Justice left the case to the jury almost in the very words used in *The St. Helen's Smelting Co.* v. *Tipping*. He said, did the sinking cause any appreciable damage, *i. e.*, which any of the senses could discover, and that was leaving the case favorably for Mr. Sharp; and the jury found it did not.

Montague Smith, J.—I am of the same opinion. We are concluded by the finding of the jury. They said that, in point of fact, there was no damage in the sense in which the law understands it. Mr. Sharpe says if there is subsidence there must necessarily be damage, but it may be to an extent utterly inap-

preciable. There is no *injuria* here to support an action without actual damage. In these cases the court will not act without the assistance of the jury, and we must assume their finding, as to whether there is or is not damage, to be correct.

Rule discharged.

The grounds upon which the court came to their decision in the foregoing case, seem to have been that the plaintiff was only entitled to support for his land, and not for any additional weight put thereon; that if the land had been left in its natural state the subsidence would have caused no appreciable damage; that actual damage is necessary to give a right of action of this nature, and that therefore the plaintiff had not proved that upon which his right of action depended, viz., actual damage caused by an illegal act of the defendant. Whether this decision be really in strict accordance with former decisions and with principles now long recognised, or whether it be an instance of judge-made law, it is equally deserving of attention. The principle involved in the case is of considerable importance. It is clear as a general rule that where a loss is necessarily and directly caused to the plaintiff by an illegal act of the defendant, the plaintiff may recover compensation for such loss. In the principal case it was found by the jury at the trial that the fall of the plaintiff's wall was caused by the subsidence of the plaintiff's land, which subsidence had been caused by the excavation of the defendant's well. It would seem, therefore, that in such a case as this, the plaintiff, in accordance with the ordinary rule of law relating to the measure of damages in actions like the present, ought to be entitled to recover from the defendant compensation for the loss occasioned by the fall of his wall. But the Court of Common Pleas argued that as there would have been only an inappreciable loss inflicted on the defendant if the wall had not existed, the plaintiff was not entitled to recover anything merely because he had erected a wall upon his land, for which he was not entitled to a right of support. This view of the case may perhaps be considered fairly open to objection. It is true that if there had been no wall upon the plaintiff's land he would not have been entitled to bring any action; and it was very well pointed out in the judgment of ERLE, C. J., that this is not a case in which the law implies damage—not a case of *injuria sine damno*—but it is necessary to prove actual damage. The reason why the plaintiff could not have brought an action if the wall had not been injured is—not because the defendant's act was a lawful one,—but because the damage caused thereby was so small that it could not be estimated; and actual damage is the ground upon which the action rests. It cannot be said that it is lawful for one landowner to cause the land of his neighbor to give way even to the slightest extent; but it may well be said that unless such giving way causes appreciable damage, the plaintiff shall not be entitled to an action; in short, such an action on the part of the defendant must be considered an unlawful act, although not one necessarily giving a right of action. The building of the wall by the defendant was a perfectly lawful act, and the excavation of the defendant to such an extent as to cause the plaintiff's land to give way was unlawful. Of course there could be no doubt but that the fall of the wall was directly caused by the defendant's excavation. We have thus the fact that the unlawful act of the defendant caused a