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United Dominions Corporation (Jamaica) Ltd. *v.* Shoucair

Duffus P. in his dissenting judgment in the Court of Appeal, the Board will humbly advise Her Majesty to allow this appeal and to order that the costs of the proceedings in the courts below should be paid by the respondent. The respondent must also pay the costs of the proceedings before the Board.

Solicitors: *Simmons & Simmons; Druces & Attlee.*

S. P. K.

[HOUSE OF LORDS]

H.L.(E.).*
1967
June 12, 13, 14, 19, 20, 21, 22; *Oct.* 17.

KOUFOS . . . . . APPELLANT

AND

C. CZARNIKOW LTD. . . . . RESPONDENTS

[On appeal from C. CZARNIKOW LTD. *v.* KOUFOS]

Shipping—Charterparty—Damages—Remoteness of damage—Deviation by ship—Delay in voyage—Fall in market price of goods—Whether damages limited to interest on value of cargo—Whether damages decline in value of goods between due delivery and actual delivery—Measure of damages.

Damages—Remoteness—Shipping—Breach of charterparty—Delayed delivery of goods—Measure of damages.

Judicial Precedent—Decision long undisturbed—Shipping—90 years' old case cited in leading textbooks—Based on different conditions of ocean transport—Whether to be followed.

Judicial Precedent—United States decision—Commercial law—Desirability of uniformity—Measure of damages for delayed delivery of goods under charterparty.

By a charterparty for the consignment of sugar from Constanza to Basrah it was agreed between the charterers and the shipowner that the ship, then in Piraeus, was expected ready to load in Constanza about October 25–27, 1960, all going well, and that it would proceed therefrom with all convenient speed to Basrah. Lay days for loading were not to commence before October 27 and if the ship was not ready to load by November 10 the charterers had the option of cancelling the charterparty. The charterers also had the option of discharging the cargo at Jeddah.

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* *Present*: LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON, LORD PEARCE and LORD UPJOHN.

A The ship arrived at Constanza, pursuant to the charterparty, on October 27 and left, having loaded the sugar, on November 1. The reasonably accurate prediction of the length of the voyage was 20 days. The shipowner knew that the charterers were sugar merchants and that there was a sugar market in Basrah but had no actual knowledge that the charterers intended to sell the sugar promptly after its arrival. In breach of the charterparty the ship B deviated from the voyage by calling at Berbera, Bahrein and Abadan. Owing to those deviations the voyage was delayed by nine or ten days and the ship arrived at Basrah on December 2 instead of on November 22.

Prices on the sugar market at Basrah tended to fall in October and November to a low point in December. The price for sugar in that market between November 22 and 28 was C £32 10s. per ton and the price between December 2 and 4 was £31 2s. 9d. per ton, a difference of £1 7s. 3d. per ton. A claim by the charterers to recover that difference as damages having been referred to arbitration, pursuant to the charterparty, the umpire awarded the charterers the difference between the price of the sugar when it should have been delivered and the price when it was actually delivered as damages (£4,183 16s. 8d.). The ship-owner appealed on the ground that the charterers were only D entitled to interest on the value of the sugar during the period of delay as damages (£172).

Held, that the sole rule as to the measure of damages for any kind of breach of any kind of contract was that the aggrieved party was entitled to recover such part of the damage actually caused by the breach as the defaulting party should reasonably have contemplated would flow from the breach; that since prices E in a commodity market were liable to fluctuate, shipowners should reasonably contemplate that (*per* Lord Reid) it was not unlikely (post, p. 388E–F); (*per* Lord Morris of Borth-y-Gest) the result was liable to be or at least the result was not unlikely to be (post, p. 406D–E); (*per* Lord Hodson) the result was liable to be (post, p. 410F–G); (*per* Lord Pearce and Lord Upjohn) there was a serious possibility or real danger (post, pp. 414F—415D, F 425C) that, if their ships delayed their voyage, the value of marketable goods on board their ships would decline and that, therefore, where there was wrongful delay in the delivery of marketable goods under a contract of carriage of goods by sea the measure of damages was the difference between the price of the goods at their destination when they should have been delivered and the price of the goods when they were in fact delivered, G accordingly, the charterers were entitled to recover that difference (£4,183 16s. 8d.) as damages.

Hadley v. *Baxendale* (1854) 9 Exch. 341; *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd., Coulson & Co. Ltd. (Third Parties)* [1949] 2 K.B. 528; [1949] 1 All E.R. 997, C.A. and *Dunn* v. *Bucknall Brothers* [1902] 2 K.B. 614, C.A. applied.

The Parana (1877) 2 P.D. 118, C.A. and *The Notting Hill* (1884) 9 P.D. 105, C.A. not followed.

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Observations on the ambit of the decision in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.; Coulson & Co. Ltd. (Third Parties)* [1949] 2 K.B. 528.

Decision of the Court of Appeal [1966] 2 Q.B. 695; [1966] 2 W.L.R. 1397; [1966] 2 All E.R. 593, C.A. affirmed.

APPEAL from the Court of Appeal.[1]

This was an appeal by the appellant, Nicolas Demitris Koufos, from an order of the Court of Appeal (Diplock and Salmon L.JJ., Sellers L.J. dissenting) dated April 5, 1966, allowing an appeal by the respondents, C. Czarnikow Ltd., claimants in the arbitration, from an order of McNair J., dated December 2, 1965, whereby the Court of Appeal upheld the award of the umpire, Mr. Anthony Evans of counsel, in favour of the respondents, awarding them the sum of £4,183 16s. 8d. as damages for breach of contract.

The question which arose on this appeal was what was the correct measure of damages for wrongful delay by a shipowner in the performance of a contract for carriage of goods by sea.

By a charterparty made in London on October 15, 1960, between Loucas Nomicos (England) Co. Ltd. as agents for the appellant, the owner of the ss. *Heron II* (hereinafter called "the shipowner"), and the respondents, sugar merchants (hereinafter called "the charterers"), the charterers chartered the ss. *Heron II*, built 1944, commissioned 1949, classed 100 A.1, of 1,815 tons net register, then in Piraeus, undergoing dry docking, expected ready to load about October 25–27, all going well, to proceed to Constanza and there load a consignment of 3,000 metric tons of white sugar and to proceed therefrom with all convenient speed to Basrah. Lay days were not to commence before October 27 and if the ship was not ready to load by November 10 the charterers had the option of cancelling the charterparty. The charterers also had the option of discharging the cargo at Jeddah. Disputes having arisen between the parties under the charterparty, they were referred to arbitration, pursuant to the charterparty, each party appointing an arbitrator. The arbitrators, being unable to agree, appointed an umpire.

The following facts were found by the umpire. The vessel arrived at Constanza on October 27, 1960, and having loaded 2,985 metric tons of Hungarian sugar pursuant to the charterparty sailed from Constanza at 17.10 hours on November 1, 1960. The distance from Constanza to Basrah is 4,370 sea miles. Both at

[1] [1966] 2 Q.B. 695; [1966] 2 W.L.R. 1397; [1966] 2 All E.R. 593, C.A.

A the date of the charterparty and at the time when the vessel sailed from Constanza a reasonably accurate prediction of the length of the voyage was 20 days. The vessel deviated from the voyage by calling at Berbera. She arrived there at 16.35 hours on November 13, 1960, and sailed at 20.10 hours on November 16, 1960, having loaded livestock and fodder for Bahrein. The livestock consisted B of 2,107 sheep and 99 cattle. The vessel again deviated from the voyage by calling at Bahrein, where she discharged the above livestock and fodder. She arrived at Bahrein at 07.30 hours on November 26, 1960, and sailed at 06.20 hours on November 29, 1960. The vessel again deviated from the voyage by calling at Abadan for bunkers. She arrived at 03.10 on December 1, 1960, C and sailed at 06.45 on December 2, 1960. The shipowner caused the vessel to call at Berbera and Bahrein and to take on and discharge the livestock and fodder and to call at Abadan for bunkers without the knowledge or consent of the charterers. Account being taken of the period of the approach voyages to the above ports and of the time spent in each port and in resum- D ing the usual and proper course of a voyage from Constanza to Basrah, the voyage was prolonged by nine days, made up as follows: (a) the call at Berbera 3 days 12 hours; (b) the call at Bahrein 3 days 10 hours; (c) the call at Abadan 2 days 2 hours; total 9 days.

The call for bunkers at Abadan was made necessary by the E calls at Berbera and at Bahrein.

The vessel arrived at Basrah at 12.00 hours on December 2, 1960, and immediately commenced discharge of the sugar, completing discharge at 02.00 hours on December 4, 1960. The charterers were the shippers and owners of the cargo of sugar at shipment and at and after discharge. At the date of the charter- F party and at all times thereafter it was the intention of the charterers to sell the sugar cash promptly after arrival at Basrah and after inspection by merchants. They did in fact do so. Immediately after discharge the charterers proceeded to permit inspection and to negotiate sales; the total realisation on 2,950 tons of sound sugar (35 tons of the cargo having been damaged) G was £91,864 3s. 4d. or £31 2s. 9d. per ton. The charterparty provided for payment of freight in cash in London and the charterers paid £9,356 10s. 11d. by way of freight in accordance with the charterparty on about November 2, 1960.

Breach. The shipowner admitted that by reason of the vessel's calls at Berbera and Bahrein he was in breach of the charterparty. The charterers contended that he was in further breach of the

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charterparty by reason of the vessel's call at Abadan. The shipowner relied upon the P. & I. bunkering clause incorporated in the charterparty. The charterers conceded that that clause would exempt the shipowner from liability for the alleged breach, but they contended that by reason of the admitted deviations from the contractual voyage at Berbera and Bahrein the shipowner was not entitled to rely on it. In so far as it was a question of fact the umpire found, and in so far as it was a question of law he held, subject to the opinion of the court, that the shipowner was in further breach of the charterparty by reason of the vessel's call at Abadan and that the shipowner could not rely upon the clause to exempt him from liability for the breach.

Damages. The charterers contended that if the vessel had given discharge of the sugar at Basrah between November 20 and 28, 1960, it would have realised a price of £32 10s. per metric ton cash against documents.

The shipowner admitted liability to pay £159 9s. 6d. interest at 6 per cent. p.a. for 10 days (an error for 9 days) on the total value of the sugar, together with the sum of £12 10s. 6d. for cable expenses, but he denied liability to pay any further sum.

The umpire found the following facts in relation to damages: (a) There was at all material times a market for sugar in Basrah in the sense that sugar was regularly bought and sold in large quantities at prices which were published. (b) The total quantity of sugar sold on the Basrah market was in the region of 200,000 tons per annum. The prices fluctuated considerably. One of the factors which would normally affect prices was the arrival of a steamer carrying a cargo of sugar to be sold on or through the market. (c) The prices of sugar at Basrah did not conform to a set pattern, but they tended to decline during October and November to a low point in about December: thereafter the prices tended to rise. That was due in particular to the arrival of sugar from Formosa and from the European beet crop. (d) The London daily price of sugar was internationally recognised as an indicator of the current value of sugar. There was a tendency for the London daily price to fall during the months of October and November due to certain known factors, but the pattern was not invariable year by year. The London daily price was known to merchants in Basrah. It influenced the Basrah price, but the latter was not directly related to it. (e) The existence of the Basrah sugar market was known to the shipowner and to his brokers at and before the date of the charterparty and thereafter.

A His brokers knew the general state of the London sugar market, but neither they nor the shipowner had any detailed knowledge of the markets in Basrah or in London either at the date of the charterparty or at any time thereafter. (f) The carriage of sugar from the Black Sea to Iraqi ports, including Basrah, was a recognised trade. The shipowner had no knowledge in the usual B course of business whether a particular cargo had been or was to be sold prior to its arrival in Iraq or whether the sugar was being shipped "on consignment," namely, to be sold in the market on arrival. If there was a named discharging port in the charterparty or bill of lading the shipowner would assume the former, but if, as in the present case, the charterers have an option as C to the discharging port the shipowner would assume that the cargo had not been sold at the date of the charterparty. Shipowners and shipbrokers generally were aware that sugar was a perishable commodity and that there was some urgency in carrying sugar to its destination. (g) The cargo of the *Heron II* was the first occasion on which the charterers had shipped Hungarian sugar to D Basrah. Such sugar was not generally known in the Basrah market at the time of the voyage but by reason of that and successive shipments it established its name in the market. For marketing purposes it was comparable to Formosan sugar, which was better known in Basrah at the time of the voyage. (h) The shipowner and his brokers had no actual knowledge that the E charterers intended to sell the sugar promptly after its arrival at Basrah. (i) The cost of the sugar to the charterers c. & f. Basrah was £32 per ton. There was no evidence that the charterers had paid or incurred liability for insurance charges on the sugar. (j) The market price of Formosan sugar at Basrah was £1 per ton lower on December 2–4 than on November 23 and 24, 1960, F but such prices did not necessarily indicate the price at which a large quantity of sugar such as the cargo of the *Heron II* could have been sold on those dates. (k) The fall in price was caused, inter alia, by the arrival on schedule on November 29 of the ss. *Youmnly* carrying about 8,000 tons of Formosan sugar. The London daily price fell during November and the first half of G December, 1960. There was no evidence that the decline in the London and Basrah prices at those dates was caused by an unusual or unpredictable factor. The prices obtained for the sugar by the charterers were the best that could reasonably be obtained at Basrah on and after the dates when the sugar was discharged. (m) If the sugar had arrived at Basrah on November 22 and had been discharged between November 22, 1960, and

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November 24, 1960, the total quantity would probably have been sold at a price of £32 10s. per ton (cash against documents). The total realisation for 2,950 tons would have been £95,875.

In so far as it was a question of fact the umpire found, and in so far as it was a question of law he held, subject to the opinion of the court, that the value of the sugar at Basrah was £32 10s. per ton (cash against documents) on November 22–24, 1960, and £31 2s. 9d. (namely, the average price realised by sound sugar) per ton on December 2–4, 1960.

The shipowner contended that if the vessel had presented for loading on or shortly before November 10, 1960 (the cancelling date under the charterparty), and had proceeded to Basrah without deviation or undue delay she would probably not have arrived earlier than the date on which she did arrive there. In that connection the umpire found the following facts: (i) When the charterparty was made the shipowner's brokers were confident that the vessel could tender for loading at the commencement of the loading period. (ii) The brokers initially suggested that the first date for loading should be October 25 and the cancelling date November 10. The charterers required two further days in which to load the sugar into lighters for shipment and the first date for loading was agreed as October 27. The proposed cancelling date was accepted without discussion. (iii) The period of 14 days between the dates finally agreed was, if anything, shorter than was usual in a charterparty of this sort. (iv) The charterers did not inform the shipowner or his brokers at any time that there was a need for urgency or that delay would prejudice the charterers. (v) Before the charterparty was made, a director of the charterers spoke to a representative of the shipowner's brokers and sought assurances that the shipowner was reliable and would carry out the charterparty according to its terms. He was told to rest assured that the charterparty would be faithfully carried out.

The umpire, subject to the decision of the court, held that the charterers were entitled to recover as damages the difference between the price of the sugar when it should have been delivered at Basrah and the price of the sugar when it was in fact delivered, and he, accordingly, awarded the charterers £4,183 16s. 8d. damages, including £159 9s. 6d. for interest and £12 10s. 6d. for cable expenses. The shipowner appealed on the issue of damages only. McNair J. held that the charterers were only entitled to recover as damages interest on the value of the cargo during the period of delay, plus cable expenses and he, accordingly, awarded them

A £172. The charterers appealed. The Court of Appeal, by a majority, restored the umpire's award.

Michael Kerr Q.C. and *Michael Mustill* for the appellants. Two questions arise for determination on this appeal. First, what is the measure of damages in respect of delay occurring during the B carriage of goods by sea? In order to answer that question in the present case it has to be ascertained whether the events that caused the loss were too remote. Secondly, whether shipowners are liable in damages for what is called loss of market or accidental loss of market, that is, whether there is liability to pay the difference between the price subsisting at the date when the ship should have C arrived under the terms of the contract and that subsisting at the date when the ship did in fact arrive.

This case is of great general importance for two reasons: (i) Hitherto it has never been thought to be the law that shipowners or other carriers by sea, for example, charterers, were liable for loss of market, whenever occasioned by delay, for breach of contract unless D they had some knowledge wherefrom they could envisage circumstances arising in which a breach would be likely to lead to loss of market. (ii) It involves consideration of what is at the present day the correct formulation of the rule for remoteness of damage in contract.

1. The following views on the correct measure of damages are E the antithesis of one another. The first states that the consequence that causes the loss must be the natural and probable cause of the breach in the usual course of things, or the plaintiff must show that the defendant had notice of special circumstances which might occasion a particular consequence and that the defendant entered into the contract on that basis. This is the correct view in the F appellants' submission. At the other end of the spectrum is the view, for which *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.; Coulson & Co. Ltd. (Third Parties)* [2] may be cited as an authority, that it is sufficient if the consequence is foreseeable, that is, capable of being foreseen, as a real risk or serious possibility resulting from the breach. It so happens that the way in which G the test is formulated is very material in a case such as the present.

If the second of these views is put forward as the true test, it is demonstrably too wide for there are settled branches of the law, to which reference can be made, where such a test leads to remoteness; see, for example, *Liesbosch Dredger (Owners of)* v.

[2] [1949] 2 K.B. 528; [1949] 1 All E.R. 997, C.A.

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Owners of S.S. Edison [3] where impecuniosity as a cause of loss was held too remote. Similarly, failure to pay money under a contract to pay. This is foreseeable as a cause of loss in a time of credit squeeze but losses such as these have always been considered too remote for they are not the natural and probable result of the breach. It is to be observed in this connection that a carrier is not a merchant; he is concerned in the freight market and not in the commodity market. He is not concerned with market fluctuations at the place of destination.

As to non-delivery of goods by carriers, if the carrier fails to deliver the goods to their destination, because, for example, he loses them or does not carry them, it is settled law that the measure of damages is the market value which the goods would have had at their destination if they had arrived pursuant to the terms of the contract. This is a question of measure of damages and not of remoteness, for it is a question of valuing the goods. Loss of profit cannot be the measure of damages. The measure is the cost of replacement of the capital asset at the place of delivery at the date of delivery provided for, together with interest for the delay that has been occasioned.

Non-delivery is quite different from a case of mere delay. In the former case the law has to value the goods since they have to be replaced, but in the latter anything apart from interest for the period of delay is too remote unless the carrier knows of special circumstances which put him on inquiry. Cases of sale must be placed in a different category from contracts of carriage, for in cases of sale the defendant is much more likely to know the purpose for which the goods are wanted.

Cases of land carriage have invariably been concerned with carriage by rail and in some of them it has been held that damages for loss of market are recoverable. But there is a substantial difference between land and sea carriage because of the timetable factor. In the rail cases there is a fixed time of departure and a fixed time of arrival. It is not suggested that there is a special rule for carriage of goods by sea but merely that the factual situation is different because loss of market is usually irrecoverable. Another difference is that in land carriage, as appears from the cases, the transits are short in duration and there is no sale of the goods while they are in transit. The land carriage cases are explicable under the second rule in *Hadley* v. *Baxendale*.[4] It is not disputed

[3] [1933] A.C. 449, H.L.

[4] (1854) 9 Exch. 341.

A that there is room for the application of this second rule to cases of carriage by sea.

It is a vexed question whether the test for remoteness of damage is the same in contract and in tort. The basis of remoteness in tort is foreseeability, and foreseeability is the sine qua non for the recovery of damages in contract—the circumstance in question B must have been foreseeable at the date the contract was made and in fact it must have been foreseen by the parties to it.

There are only two consequences which are natural and probable as a result of delay in the carriage of goods: (a) the goods may deteriorate; (b) delay means loss of the power to use or physically to dispose of the goods during the period of delay. Thus C the law provides for the payment of interest on the locked-up value of the goods.

The House is invited to consider the facts of the present case with the following three submissions in view: (i) The parties did not contract on the basis that the goods would be delivered at their destination at any specific date or envisage that they would be D delivered at a date earlier or later than they were in fact delivered. (ii) " No reasonable assumption as to the state of the market at the time of arrival could have been a factor in the contract between the parties ": *Dunn* v. *Bucknall Brothers*,[5] *per* Collins M.R. (iii) When the contract was made the carrier did not know and could not reasonably be expected to have known: (a) where the goods E were to be delivered; (b) whether the charterers or some other person would be owner of the goods; (c) what the then owner of the goods intended to do with them after their arrival; (d) what their market value was at any time and how the market would fluctuate and, if it did, in what way.

The carriers had no knowledge of any circumstance which made F the charterers' loss of market a probable or likely consequence of nine days' delay during the voyage for the following reasons: (i) The charterers could only suffer damage through loss of market if they had chartered the vessel for the purpose of conveying their own goods to the port of destination and selling them upon arrival. Thus, for example, if the goods had been sold on f.o.b. or c.i.f. G terms before shipment, or during the course of the voyage, the charterers would have suffered no damage from their late arrival. Such transactions are commonplace. Again, if the goods had been shipped for the purpose of holding them in stock at the port of destination, the fact that they were delayed in transit would have

[5] [1902] 2 K.B. 614, 623, C.A.

caused the charterers no damage. In his award the umpire specifically found [6] that the owner and his brokers had no actual knowledge that the charterers intended to sell the sugar promptly after its arrival in Basrah. The only other material finding [7] on this aspect is that if a charterer has an option as to the discharging port the shipowner would assume that the cargo had not been sold at the date of the charterparty. Quite apart from the validity of this assumption it would do no more than eliminate the possibility that the goods had already been disposed of on October 15, 1960, at least 12 days before the ship was due to tender for loading; it would still leave open the strong possibilities (to put it no higher) that the goods would be sold during the intervening period before loading or in the course of the voyage, or that they would be kept in stock by the charterers after discharge.

(ii) At the date of the charterparty the charterers retained the option to call for discharge at Jeddah. The special case contains no findings as to the state of the market at this port or as to the owner's knowledge of this market.

(iii) Although the special case contains findings [8] as to the general market trends in the London sugar market and as to the owner's brokers' knowledge of the general state of that market, and that the London price influences the Basrah price, there is no finding that the owner or his brokers were aware of this influence. Furthermore, it is expressly found that the Basrah price is not directly related to the London price,[9] and that neither the owner nor his brokers had any detailed knowledge of the markets in Basrah or London.[10] Thus, on the findings of the special case, the owner had no actual knowledge whether the market was likely to rise, fall, or remain steady, during any period of delay in delivery.

(iv) As McNair J. pointed out in his judgment,[11] Hungarian sugar was an experimental cargo (see the special case [12]), which is a further factor militating against any knowledge by the owner of the likely consequences of any delay in delivery.

(v) One of the causes of the fall in the market was the arrival of the *Youmnly* carrying a large quantity of Formosan sugar. There is no finding that the owner or his brokers knew of the existence of this vessel or of her likely date of arrival.

(vi) It is expressly found [13] in the special case that the charterers did not inform the owner or his brokers at any time that there was

[6] Ante, p. 355E.
[7] Ante, p. 355C.
[8] Ante, p. 354G.
[9] Ante, p. 354G.
[10] Ante, p. 355A.
[11] [1966] 1 Lloyd's Rep. 259, 274.
[12] Ante, p. 355D.
[13] Ante, p. 356E.

A a need for urgency or that delay would prejudice the charterers. The umpire found [14] that shipowners and shipbrokers generally were aware that sugar was a perishable commodity and that there was some urgency in carrying sugar to its destination, but this finding does not relate to market conditions affecting sugar but only to the danger of physical deterioration.

B (vii) The charterparty itself contains several provisions which might well be understood by a reasonable shipowner as showing that the charterer did not regard the early arrival of the cargo as a matter of consequence. Thus, (a) the vessel was described as " now in Piraeus undergoing drydocking." There could be no certainty as to the date on which drydocking would actually finish. C (b) Although the charterparty was entered into on October 15, the expected readiness date was not until October 25/27. Furthermore, the expected readiness date was qualified by the words " all going well." (c) The charterparty provided that lay days were not to count before October 27, 1960. In other words, the charterers did not wish to have use of the ship until at least 12 days after D the charterparty was entered into. (d) The cancelling date was not until November 10, 1960. Thus, the charterers had agreed to load the vessel, and remained obliged to do so, even if her arrival at the loading port had been delayed until nearly four weeks after the date of the charterparty. In that event the charterers would have sustained the same loss of market (assuming no further E market fluctuations) without any breach on the part of the owner. (e) The charterparty contained an option as to the discharging port, which was open for at least 10 days. This suggested that the charterers themselves had no firm plans as to the disposition of the cargo. (f) The vessel was comparatively small and old, and a vessel of this type would scarcely be selected if prompt arrival was a F necessity.

In these circumstances it is submitted, in the words of Sellers L.J.,[15] that

> " at the time of the making of this contract, if the charterers had been asked when, or even where, the goods would arrive they could have only replied that they did not know or vaguely G suggested a range of dates according to whether Jeddah or Basrah was to be the port of delivery."

On these facts the charterers cannot base their claim on any actual knowledge on the appellant's part of special circumstances making it probable that loss of market would follow from delay

[14] Ante, p. 355c.

[15] [1966] 2 Q.B. 695, 725.

in delivery, that is, the charterers cannot bring the case within the second rule in *Hadley* v. *Baxendale*.[16] This view is accepted, either expressly or implicitly, by all the judges in the courts below. Accordingly, if the charterers are to make good their claim within the statement of principle laid down in *Hadley* v. *Baxendale* [17] they must show that a loss of market "may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things," from a delay in delivery. In the appellant's submission this test is not satisfied for at least the following reasons.

First, as previously mentioned, the question whether the charterer sustains any damage through delay in delivery depends upon the nature and duration of his interest in the goods. The main situations which may arise in practice in this connection and which a shipowner could foresee when chartering his ship are the following: (i) The charterer has already agreed to sell the goods before the charterparty is entered into, for example, where he charters to fulfil an existing c.i.f. contract. (ii) He enters into a contract of sale between the date of the charter and the date of shipment. (iii) He ships for his own account and subsequently sells the goods afloat. (iv) He sells the goods in the market immediately on arrival at the port of destination. (v) He holds the goods in stock after delivery at their destination. (vi) He retains the goods for his own use or manufacture at the destination or elsewhere. (vii) He never has any interest in the goods, that is, he is speculating in freights.

It is only in situation (iv) above that a delay in delivery will cause the charterer to suffer damage through a fall in the market. This situation is no more likely to exist than any of the others. Indeed, it is substantially less likely than situations (i), (ii) and (iii).

Secondly, even if the charterer intends to sell the goods immediately on arrival, he will only suffer damage through delay in delivery if the market falls during the period of delay. It is not reasonable to impute to the shipowner knowledge of market conditions in respect of all goods which he may undertake to carry and in respect of all possible ports of destination. Thus, in the absence of actual knowledge, the question whether the market may fall during the period of delay is purely a matter of speculation; and it is equally possible that the market will rise or remain steady. In some cases a cargo-owner may in fact benefit from a later arrival or suffer a loss as the result of an earlier arrival; the relationship between the date of arrival and the market value of the cargo may be quite fortuitous and unpredictable.

[16] 9 Exch. 341.

[17] Ibid. 354.

A The judgment of McNair J.[18] is fully supported save for the emphasis placed on the predictable date of the voyage. As to the decision of the Court of Appeal,[19] the judgment of Sellers L.J.[20] is wholly supported. As to Diplock L.J.'s judgment,[21] it is not contended that *The Parana*[22] laid down any *rule* of law; only that it correctly applied *Hadley* v. *Baxendale*[23] to the facts of that B case.[24] The ratio decidendi of Salmon L.J.'s judgment[25] is that the word " probable " as used in *Hadley* v. *Baxendale*[26] is capable of meaning " less than an odds-on chance, a serious possibility or real risk." In the appellant's submission it is not correct.

The test applicable here is: would a reasonable shipowner in the position of the appellant have concluded at the time when the C charterparty was made that if, owing to a breach of contract, the sugar arrived at its destination nine days later than it would otherwise have done the charterers would, in the usual course of things, probably suffer a loss by reason of a fall in the market price of sugar at the destination?

The statements in Scrutton on Charterparties, 17th ed. (1964), D art. 169, p. 388, Carver on Carriage by Sea, 11th ed. (1963), vol. 2, paras. 1455, 1456, pp. 1191, 1192, and Halsbury's Laws of England, 3rd ed. (1961), vol. 35 para. 677, p. 475, on *The Parana*[27] do not differ from those to be found in the early editions of those textbooks since it has always been treated as good law: see, for example, Scrutton, 1st ed. (1886), art. 159, pp. 254, 255; Scrutton, E 11th ed. (1923), art. 160, p. 430; Carver, 1st ed. (1885), paras. 724, 726, pp. 734, 736–738; Halsbury, 1st ed. (1914), vol. 26, para. 394, p. 289.

As to the authorities, *Hadley* v. *Baxendale*[28] itself was a very strong case on its facts since it was on the cards that if there was no delivery of the shaft the mill would have to close down. The F whole of the material part of the judgment of Alderson B. is cited as the leading authority in English law by Viscount Sankey L.C. in *Banco de Portugal* v. *Waterlow & Sons Ltd.*[29]

Smeed v. *Foord*,[30] a sale case, is of value since an authoritative court considered that a fortuitous fall in the market was not within the first rule in *Hadley* v. *Baxendale*,[31] but that damages would have G been recoverable under this head if a fall had been foreseeable.

[18] [1966] 1 Lloyd's Rep. 259.
[19] [1966] 2 Q.B. 695.
[20] Ibid. 715G–725D.
[21] Ibid. 725D–737B.
[22] (1877) 2 P.D. 118, C.A.
[23] 9 Exch. 341.
[24] 2 P.D. 118.
[25] [1966] 2 Q.B. 695, 737C–745E.
[26] 9 Exch. 341.
[27] 2 P.D. 118.
[28] 9 Exch. 341.
[29] [1932] A.C. 452, 474, H.L.
[30] (1859) 1 E. & E. 602.
[31] 9 Exch. 341.

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Further, it shows that a carrier is in a stronger position to defend such a case than a merchant.

Gee v. *Lancashire and Yorkshire Railway Co.*[32] is the first of the railway cases. Wilde B.'s pessimism[33] proved unjustified for until the *Victoria Laundry* case[34] *Hadley* v. *Baxendale*[35] was considered as the authority that had laid down the rule as to the measure of damages in contract. *Collard* v. *South Eastern Railway Co.*[36] shows that in these railway cases they are approached on the basis that the goods are to be delivered on a certain day. Primarily this is a case of damage to goods by negligence. As to damage, their depreciation in value by deterioration had always been put on the basis of market value. This case[36] cannot on any view be taken as an authority that delay per se is within the first rule in *Hadley* v. *Baxendale*[37] and gives rise to a right to damages for loss of market value.

In *Wilson* v. *Lancashire and Yorkshire Railway Co.*[38] the plaintiff was held entitled to recover damages in respect of the deterioration in the value of the goods but not the loss of anticipated profits. *Cory* v. *Thames Ironworks Co.*[39] was rightly decided on its facts. It was a very different case from the present, it was a sale of goods case, and is no authority for a case where there is delay and a fluctuation in the market. See section 51 of the Sale of Goods Act, 1893, and Chalmers' Sale of Goods, 14th ed. (1963), p. 151.

British Columbia Saw Mill Co. v. *Nettleship*[40] is a leading case. The consequences of the loss of the crate there were peculiar to the plaintiffs' business, of which the carrier had no knowledge, and therefore the conventional measure of damages was applied and awarded. "Foreseeable" means a very high degree of probability. There was a correct application of *Hadley* v. *Baxendale*.[41] On the *Victoria Laundry*[42] principle the result would have been different; there would have had to be an investigation to discover what was a reasonable profit. The last submission also applies to *Horne* v. *Midland Railway Co.*[43]

Simpson v. *London and North Western Railway Co.*[44] accords with principle. It is a land carriage case and the carrier was aware that the goods must arrive at their destination by a particular date. It is plainly distinguishable.

[32] (1860) 6 H. & N. 211.
[33] Ibid. 221.
[34] [1949] 2 K.B. 528.
[35] 9 Exch. 341.
[36] (1861) 7 H. & N. 79.
[37] 9 Exch. 341.
[38] (1861) 9 C.B.N.S. 632.
[39] (1868) L.R. 3 Q.B. 181.
[40] (1868) L.R. 3 C.P. 499.
[41] 9 Exch. 341.
[42] [1949] 2 K.B. 528.
[43] (1872) L.R. 7 C.P. 583; affirmed (1873) L.R. 8 C.P. 131.
[44] (1876) 1 Q.B.D. 274.

A In *The Parana*,[45] Phillimore J. fell into error in equating the compensation payable for damage to goods with that payable for loss of market by delay to goods. This was reversed on appeal.[46] The Court of Appeal recognised the importance of the issue before it. It based its decision on the relative uncertainties of carriage by sea in comparison with carriage by land. The court fully recognised B that in a carriage of goods by sea case facts could be brought to the carrier's notice that would make him liable, if he defaulted, under the second rule in *Hadley* v. *Baxendale*.[47] But there was also recognition that loss of market is a factor which does not normally arise in carriage of goods by sea since sale on arrival is not usually in the minds of the parties in such cases. *The Parana*[48] C was followed in *The Notting Hill*.[49] See also: *Hawes & Son* v. *South Eastern Railway Co.*[50]

Smith, Edwards & Co. v. *Tregarthen*[51] was a case of non-delivery. It proceeded on the basis that *The Parana*[52] was good law but distinguished it on the facts. See Scrutton on Charter-parties, 17th ed., p. 390, n. (*k*). In *Rodocanachi* v. *Milburn*[53] it D was held that the measure of damages for non-delivery was the market value at the time when and the place where the goods ought to have been delivered. *Schulze & Co.* v. *Great Eastern Railway Co.*[54] follows *Wilson* v. *Lancashire & Yorkshire Railway Co.*[55]

Dunn v. *Bucknall Brothers*[56] is a most important decision E since it shows that there are cases which fall within the second rule in *Hadley* v. *Baxendale*[57] where damages can be recovered for loss of market against a carrier, whether land or sea. But the plaintiff must bring the case within the second rule. If the present case be correct then the distinction between this type of case and *The Parana*[58] type of case would be obliterated. The important F factor in *Dunn* v. *Bucknall Brothers*[59] is that it was known that if the goods arrived early the market price would be higher. This is what brings it within the second rule in *Hadley* v. *Baxendale*[60]; the carriers were assuming the risk that delayed delivery might affect the market value of the goods.

In *Wertheim* v. *Chicoutimi Pulp Co.*,[61] *Wilson*[62] and *Schulze*[63]

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[45] (1876) 1 P.D. 452.
[46] 2 P.D. 118.
[47] 9 Exch. 341.
[48] 2 P.D. 118.
[49] (1884) 9 P.D. 105, C.A.
[50] (1884) 52 L.T. 514.
[51] (1887) 56 L.J.Q.B. 437.
[52] 2 P.D. 118.
[53] (1887) 18 Q.B.D. 67, C.A.
[54] (1887) 19 Q.B.D. 30.
[55] 9 C.B.N.S. 632.
[56] [1902] 2 K.B. 614.
[57] 9 Exch. 341.
[58] 2 P.D. 118.
[59] [1902] 2 K.B. 614.
[60] 9 Exch. 341.
[61] [1911] A.C. 301.
[62] 9 C.B.N.S. 632.
[63] 19 Q.B.D. 30.

were cited for the proposition that in such cases the measure of damages is the difference between the contract price and the value of the goods to the purchaser when obtained. As to *Sargant (W. T.) & Sons* v. *East Asiatic Co. Ltd.*,[64] it must have been in the contemplation of the parties that the plaintiffs were entitled to the goods on arrival. At that time they were entitled to the cost of the goods and, therefore, the measure of damages for refusing to deliver the goods on production of the bills of lading was their market value. *R. and H. Hall Ltd.* v. *W. H. Pim (Junior) & Co. Ltd.*[65] was concerned with the second rule in *Hadley* v. *Baxendale.*[66] It is to be observed (a) that it related to sale of goods; (b) it was a case of non-delivery; and (c) it was a case where the event in question was expressly provided for by the contract.

In *Connolly Shaw Ltd.* v. *A/S Det Nordenfjeldske D/S.*[67] Branson J. correctly summarised the law on this topic as it had been understood for decades. There is clear recognition that in carriage by sea cases there is the distinction between (i) *The Parana*[68] and the present type of case, and (ii) the *Dunn* v. *Bucknall Brothers*[69] type of case. If the Court of Appeal be right here this view of a very experienced commercial judge is wrong. In *The Arpad*[70] Maugham L.J. does not suggest in referring to *The Parana*[71] and *The Notting Hill*[72] that they were wrongly decided. See also *Jensen* v. *Hollis Brothers & Co. Ltd.*[73] [Reference was made to *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (A/B).*[74]]

The decision in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[75] was right, inevitable and obvious. In itself the case makes no new law. The facts show that it was not only probable but also obvious that late delivery of the boiler would lead to damage to the plaintiffs' business. The facts bring the case within the second rule in *Hadley* v. *Baxendale*[76] because there were special circumstances on which the Court of Appeal strongly relied. The principles laid down in *Hadley* v. *Baxendale*[76] should be adhered to and in so far as the *Victoria Laundry* case[77] places any different meaning on the words "naturally" and "probable result" it is wrong. In any event the observations on

[64] (1915) 21 Com.Cas. 344, 348.
[65] (1928) 33 Com.Cas. 324, H.L.
[66] 9 Exch. 341.
[67] (1934) 49 Ll.L.Rep. 183.
[68] 2 P.D. 118.
[69] [1902] 2 K.B. 614.
[70] [1934] P. 189, 234.
[71] 2 P.D. 118.
[72] 9 P.D. 105.
[73] (1936) 54 Ll.L.Rep. 133.
[74] [1949] A.C. 196; [1949] 1 All E.R. 1, H.L.
[75] [1949] 2 K.B. 528.
[76] 9 Exch. 341.
[77] [1949] 2 K.B. 528.

Hadley v. *Baxendale* [78] were obiter in view of the facts of that case.[79] See the definition of " probable " in the Oxford Dictionary.

S.S. Ardennes (Cargo Owners) v. *S.S. Ardennes (Owners)* [80] supports the true rule in the present type of case. *Diamond* v. *Campbell-Jones* [81] supports the proposition that whilst the *Victoria Laundry* case [82] may have altered to a small extent the test laid down in *Hadley* v. *Baxendale* [83] it did not alter the law. Further, there is nothing in *The Wagon Mound* [84] or *Overseas Tankship (U.K.) Ltd.* v. *Miller Steamship Co. Pty. (The Wagon Mound (No. 2))* [85] to support the view that a wide meaning should be given to foreseeability in the law of contract.

As to *East Ham Corporation* v. *Bernard Sunley & Sons Ltd.*,[86] the observations of Lord Pearson on *Victoria Laundry* [87] were not necessary to the decision since the issue there was not one of remoteness but of the measure of damages—the cost of reinstatement. Moreover, the issue raised here on the appropriateness of the language used in *Victoria Laundry* [87] in explaining *Hadley* v. *Baxendale* [88] was never raised there.

For the treatment of damages for breach of contract in the leading textbook on damages: see Mayne on Damages, 2nd ed. (1872), pp. 8–20; 8th ed. (1909), pp. 16–21, 358–359; 11th ed. (1946), pp. 12–17, 329–331. The current edition, Mayne and McGregor on Damages, 12th ed. (1961), paras. 576–580, contains a strong criticism on what is there called " the rule in *The Parana*.[89] " In the appellant's submission there is no such rule.

Scotland and the Commonwealth.

The authorities show that it is a question of fact whether in the particular circumstances a case comes within the ambit of *The Parana* [89] or *Dunn* v. *Bucknall Brothers* [90]: see " *Den of Ogil* " *Co. Ltd.* v. *Caledonian Railway Co.*[91]; Gloag on Contract, 2nd ed. (1929), pp. 700–703; Walker, Law of Damages in Scotland (1955), pp. 321, 322; *Baulov Smith* [92]; *New Zealand Shipping Co. Ltd.* v.

[78] 9 Exch. 341.
[79] [1949] 2 K.B. 528.
[80] [1951] 1 K.B. 55; [1950] 2 All E.R. 517.
[81] [1961] Ch. 22; [1960] 2 W.L.R. 568; [1960] 1 All E.R. 583.
[82] [1949] 2 K.B. 528.
[83] 9 Exch. 341.
[84] [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404, P.C.
[85] [1967] 1 A.C. 617; [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709, P.C.
[86] [1966] A.C. 406, 449, 450; [1965] 3 W.L.R. 1096; [1965] 3 All E.R. 619, H.L.
[87] [1949] 2 K.B. 528.
[88] 9 Exch. 341.
[89] 2 P.D. 118.
[90] [1902] 2 K.B. 614.
[91] 1902 5 F. (Ct. of Sess.) 99.
[92] (1901) 40 N.S.R. 294 (Canada).

Black [93]; *Grove & Sons Ltd.* v. *Union Steamship Co. of New Zealand Ltd.*[94] A

United States

The fact that *The Parana* [95] is not followed in the United States is of little consequence, for in relation to measure of damages it is by no means unusual for the principles applicable to differ in B the two jurisdictions. For an example: see Carver on Carriage by Sea, 11th ed. (1963), art. 1397.

In the light of the authorities the appellant's submissions on the first question may be stated thus: (1) The true rule whether or not loss of market is recoverable as damage for delay in the carriage of goods—whether by sea or land—is to be found in the C contrast between the facts of cases such as *The Parana*,[95] *Connolly Shaw*,[96] *Jensen* v. *Hollis Brothers* [97] and the present case on the one hand, and *Dunn* v. *Bucknall Brothers* [98] and the *S.S. Ardennes* [99] on the other hand.

(2) The effect of this is that unless the facts can be brought within what for brevity is referred to as the second rule in *Hadley* v. D *Baxendale* [100] loss of market is not recoverable in cases of delay in the carriage of goods.

(3) The reason for this dichotomy is that an accidental *loss* of market, that is, a fluctuation due to unforeseen and unpredictable causes during the period of delay, is not in itself the natural and probable result of the delay. One cannot foresee that the foresee- E able fluctuation is likely to cause the plaintiff to suffer loss.

(4) *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[101] was a correct decision on the facts and under the second rule in *Hadley* v. *Baxendale*,[102] but in so far as its language lends itself to an obliteration of this dichotomy it is not in accordance with *Hadley* v. *Baxendale* [102] and wrong. The same applies to the F land carriage cases (if any) in which loss of market has been recovered as such.

(5) It is a question of fact whether or not damages for loss of market are recoverable against a carrier for wrongful delay in any particular case. The following common factual situations in relation to sea carriage may serve as illustrations: (It is to be assumed in G each case that the shipowner knows that the contractual cargo

[93] (1885) 3 N.Z.L.R. 288 (New Zealand).
[94] [1920] N.Z.L.R. 601.
[95] 2 P.D. 118.
[96] 49 Ll.L.Rep. 183.
[97] 54 Ll.L.Rep. 133.
[98] [1902] 2 K.B. 614.
[99] [1951] 1 K.B. 55.
[100] 9 Exch. 341.
[101] [1949] 2 K.B. 528.
[102] 9 Exch. 341.

A (once he knows what it is) is a marketable commodity and that the destination(s) is/are a place(s) at or near which it is marketable. This will be so in the great majority of cases. Note. There may be no "market" at the destination but only somewhere nearby, for example, where Hull is the destination the "markets" may be London and/or Glasgow and/or Manchester with different B market prices. *Wertheim* v. *Chicoutimi Pulp Co.*[103] held that in order to value the goods at the place of delivery under a sale contract the price at the nearest "market" should be taken.) (a) A charterparty (such as here) for a specified cargo with lay and cancelling dates, and an "expected readiness" date, that is, where the terms of the contract show (i) no particular urgency, (ii) that C the charterer in fact does not want the vessel immediately or even as soon as possible, (iii) that at the date of the contract the date of arrival at the destination can only be forecast approximately as lying within a wider or narrower bracket. (b) A charterparty as under (a) but for "lawful merchandise" or for a number of optional cargoes (or a combination of both as in the "Centrocon" D charter) and/or for a number (as here) or a range of discharging ports; or for port(s) to be ordered during the voyage. (c) Bills of lading (which will of course describe the cargo shipped but may or may not have options as to destinations) (i) issued under a charterparty as in (a); (ii) issued under a charterparty as in (b); (iii) issued to shippers on a general ship without any charterparty E being in existence. (d) Liner bills of lading, that is, issued by ships running at more or less regular intervals on a more or less precise schedule. (e) Any case in which the shipowner or his broker knows or should reasonably know from the circumstances or terms of the contract, or is told by or on behalf of the charterers, that the cargo is shipped with a particular market situation at the F destination in view,—as in *Dunn* v. *Bucknall Brothers,*[104] the *S.S. Ardennes*[105] and similar cases. In such cases there will usually be evidence that the parties have in effect contracted on the basis that the cargo is urgent, or that it is expected to arrive by a particular date, *and* that this has some bearing upon the G market value of the goods at the destination. "The state of the market at the time of arrival [will] have been a factor in the contract between the parties": see *Dunn* v. *Bucknall Brothers.*[106]

(6) The decisions since *The Parana*[107] have consistently

[103] [1911] A.C. 301.
[104] [1902] 2 K.B. 614.
[105] [1951] 1 K.B. 55.
[106] [1902] 2 K.B. 614.
[107] 2 P.D. 118.

recognised the distinction between (e) and any of the other foregoing situations, and that loss of market is only recoverable in (e).

The present case does not fall within (e) but within (a) or (b). Further, it is an a fortiori case to (a), since the charterers expressly requested that the earliest date for loading should be postponed beyond the date originally suggested on behalf of the owners: see para. 22 (ii) of the special case.[108]

The principle applied by the majority of the Court of Appeal in the present case would result in the award of damages for loss of market in all these cases and would in effect apply a conventional measure of damages in every case of delay in the carriage of marketable goods.

In the appellant's submission not only is this a wrong application of the principles of *Hadley* v. *Baxendale*,[109] but that even cases (a) to (d) should not be treated as being without distinction between them. Thus, on the basis of the land carriage cases it would be arguable that damages for loss of market should be recoverable in (d) and possibly in (c) (iii) as well as in (e), but in no case have such damages been awarded or suggested as being recoverable in situations comparable to (a), (b) or (c) (i) and (ii).

(7) In the light of the foregoing submissions it is an oversimplification and may be misleading to regard the question whether or not it is "probable" that the cargo will be "sold on arrival" as decisive. It is only in rare cases that, as here, a charterer, even if he is the owner on shipment, retains the property in a large cargo with a view to selling off the whole cargo immediately on arrival. Even in such a case sales are bound to be spread over a period of days (at least), and the availability of a large cargo unsold will itself have market effects, for example, the market price may be higher in the earlier stages of the selling than later, etc. The great majority of marketable cargoes are sold before arrival, and indeed agreed to be sold as unascertained goods before shipment, pursuant to c.i.f. or f.o.b. contracts where the sale is by means of the tranfer of bills of lading and other usual documents. In such cases the only engagement of the seller is as to the date of shipment and not as to the date of arrival. The buyers in such cases may buy (a) for consumption or stock; or (b) for re-sale of the whole or part of the cargo before arrival (by transferring the bills of lading) in which case the sub-buyers may buy for consumption or re-sale before or after arrival, and so on; or (c) for re-sale of the whole or part of the cargo on arrival, or (d) any buyer or sub-buyer may buy with a view

[108] Ante, p. 356D.

[109] 9 Exch. 341.

to selling the goods as opportunity offers after arrival; or (e) there may be a combination of any or all of these. In practice, in the absence of express notice, to a carrier by sea, a sale immediately on arrival could never be a probability in relation to his knowledge or means of knowledge, but merely one of a number of possibilities as regards all or part of the cargo, without any of these being more probable then any other.

(8) If the cargo consists of marketable goods (that is, any goods which are not obviously tailor-made for the use of a particular importer) it is always foreseeable (that is, capable of being foreseen) or " on the cards " that the goods may be sold on or shortly after arrival, but this cannot be a sufficient reason for treating an accidental fall in the market value of the goods at the destination during the period of the delay as the " natural and probable consequence " of the delay. Whether or not the goods are goods which may be sold on or shortly after arrival cannot by itself provide any test for remoteness. If this basis were adopted, loss of market would become an automatic or conventional measure of damages in all cases of delay in the carriage of marketable goods by sea, irrespective of the knowledge or means of knowledge of the carrier at the time when the contract was made. The effect would be to by-pass altogether the application of any *Hadley* v. *Baxendale* [110] tests of remoteness. Accordingly, the line to be drawn between cases in which loss of market is too remote as a measure of damages for wrongful delay in the carriage of goods is between cases falling within (e) under para. (5) above and any other cases.

(9) Claims against carriers for non-delivery or damaged delivery are nihil ad rem because the market price at the time and place of arrival is merely used as a conventional measure (irrespective of the actual loss suffered by the cargo owner) of the value of the undamaged goods which the carrier should have delivered.

2. As to the second question, *Rodocanachi* v. *Milburn* [111] decided that in an action against a carrier for non-delivery loss of market is always the measure of damages whether or not the plaintiff has suffered loss. This rule also applies in sale of goods cases but the question is open in this House in relation to delay. see *Williams Brothers* v. *Agius (Ed. T.) Ltd.* [112]; Mayne & McGregor on Damages, 12th ed., paras. 379–386, 400, 402, 562–565.

[110] 9 Exch. 341.
[111] 18 Q.B.D. 67.
[112] [1914] A.C. 510, 520–522, 524, 529, H.L.

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The question whether it is loss of market or the actual loss suffered has never been decided in any case covering a carrier. In the appellant's submission loss of market is only recoverable (a) when it is in the contemplation of the parties to the contract and, therefore, (b) it can never be recovered unless it has been suffered. But if this be wrong and loss of market is the measure of damages irrespective of whether such loss was in the contemplation of the parties can a carrier in the event of delay be sued for loss of this character? The answer should be: loss of market is only recoverable if it has been sustained *by virtue of* delay.

The first rule in *Hadley* v. *Baxendale* [113] is very limited indeed —the " natural " and " probable " loss of profit is not recoverable thereunder. To recover such loss under the second rule the plaintiff must prove that it was brought home to the defendant what the plaintiff stands to lose by the breach of the contract. There is nothing to show on the facts here that the parties contracted on the basis that loss of market was payable if there was delay.

The vital issue here is whether cases such as the present should be decided on their own facts (the appellant's submission) or whether there should be an authoritative measure of damages whereby the carrier always loses but the cargo owner obtains damages whether he has suffered any loss or not. There is nothing in *Hadley* v. *Baxendale* [113] to justify such a conclusion. Regard should always be had to the actual loss. [Reference was also made to *Slater and Another* v. *Hoyle & Smith Ltd.*[114]]

Anthony Lloyd Q.C. and *Julian Cooke* for the respondents. The appellants have advanced a wide ranging argument but the appeal in essence involves the answering of two short questions: (1) Have the respondents suffered a loss as a result of the appellants' admitted breach of the charterparty? (2) If so, is that loss recoverable under the first rule in *Hadley* v. *Baxendale* [115]?

As to (1), the respondents are well-known sugar merchants and in consequence of the breach of contract they had sugar delivered to them that was worth £4,000 less than it would have been if it had been delivered pursuant to the terms of the contract.

The fundamental purpose of damages is to put the plaintiff in the same position as he would have been if the wrong, be it breach of contract or tort, had not been committed: see *Livingstone* v. *Rawyards Coal Co.*,[116] *per* Lord Blackburn. The question is: is

[113] 9 Exch. 341.
[114] [1920] 2 K.B. 11, C.A.
[115] 9 Exch. 341.
[116] (1880) 5 App.Cas 25, 39, H.L.

there any reason why a loss which has in fact been suffered and which can easily be quantified should not be recovered? The answer is, there is not.

As to (2), it is said that (a) the loss claimed is too remote in law; (b) there is some special rule relating to contracts of carriage of goods by sea which takes it out of the general rule.

The respondents' submissions are:

(1) Remoteness in the law of contract is based on foresight or contemplation. The plaintiff is entitled to recover any loss actually suffered which the defendant can reasonably foresee is liable to result from the breach.

(2) The normal rule for delay in delivery of marketable goods whether under a contract of sale or carriage is that the plaintiff is entitled to recover the difference in market price between the date when the goods should have been delivered and the date when in fact they were delivered plus interest because this is the loss which the defendant can reasonably foresee as being liable to result from the breach.

(3) The normal rule applies to contracts of carriage by sea except possibly where the plaintiff has led the defendant to believe, expressly or by implication, that he is indifferent about the date of arrival.

(4) The decision in *The Parana* [117] was wrong. Alternatively it is an illustration of the possible exception in proposition (3).

(5) On the findings of the special case this case falls within the normal rule and not within the exception.

(1) If there be any difference between the formulation in *Hadley* v. *Baxendale* [118] and *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*,[119] *Victoria Laundry* [119] should be preferred. The alternative is to construe *Hadley* v. *Baxendale* [120] as though it were a statute which is what the appellants have done. Reliance is placed on the sixth proposition in the *Victoria Laundry* case.[121] *Hadley* v. *Baxendale* [122] is not a satisfactory decision: (a) because the formula there laid down has been split into separate rules; (b) because of the actual language in which the rules are framed.

What notice does under the second rule in *Hadley* v. *Baxendale* [122] is to widen the area of foreseeability. There is the same degree of probability under both rules.

As to how the word "probable" was understood by Alderson B.'s contemporaries: see Scrutton on Charterparties, 1st ed. (1886),

[117] 2 P.D. 118.
[118] 9 Exch. 341.
[119] [1949] 2 K.B. 528.
[120] 9 Exch. 341.
[121] [1949] 2 K.B. 528, 540.
[122] 9 Exch. 341.

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p. 254 where "probable" is equated with "natural." See also section 51 (2) of the Sale of Goods Act, 1893, which is said to be based on the language used in *Hadley* v. *Baxendale*.[122] It is significant that in the early cases which refer to *Hadley* v. *Baxendale*[122] in quoting the rules they omit the final words "as the probable result of the breach of it." If "probable" means something which can reasonably be foreseen the use of the word probable in the second rule is tautologous.

Foreseeability as the test in applying *Hadley* v. *Baxendale*[122] is supported by Mayne on Damages, 1st ed. (1856), p. 8. See also Sedgwick on Damages, 9th ed. (1912), pp. 263, 264, 265. Reasonable foreseeability as the test in contract makes sense. If it needs qualification then the observations of Lord du Parcq in *The Monarch Steamship Co.*[123] are adopted.

It is open to the House of Lords to hold that, except for special circumstances, the rule for remoteness is the same in tort and contract now that *In re Polemis and Furness, Withy & Co.*[124] has been virtually overruled: see *Overseas Tankship (U.K.) Ltd.* v. *Miller Steamship Co. Pty. (The Wagon Mound (No. 2))*.[125]

(2) This is an application of the general rule contained in (1). The loss which the plaintiff suffers by reason of the delay is that he is without the goods on the day when they should have been delivered. But he must give credit for their value when they arrive. In each case the value of the goods is measured by the market price. This rule was established for carriers by land by *Wilson* v. *Lancashire and Yorkshire Railway Co.*[126]; *Collard* v. *South Eastern Railway Co.*[127] (where the appellant's argument here was put forward in almost identical terms) and *Horne* v. *Midland Railway Co.*[128]

All the early cases assume that the plaintiff was entitled to recover the ordinary market value. The issue in those cases was whether there were some special damages that were recoverable. They also established that the rule does not depend upon actual knowledge of what the plaintiff intends to do: see *Collard*[129] and *Horne*,[130] and even less on any knowledge of what the state of the market might be. Business men who enter into contracts "must be taken to understand the ordinary practices and exigencies of the other's trade or business": *per* Lord Wright in *Monarch Steam-*

[122] 9 Exch. 341.
[123] [1949] A.C. 196, 233.
[124] [1921] 3 K.B. 560, C.A.
[125] [1967] 1 A.C. 617, 634, 635, 641–643; [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709, P.C.
[126] 9 C.B.N.S. 632.
[127] 7 H. & N. 79, 83.
[128] L.R. 7 C.P. 583.
[129] 7 H. & N. 79.
[130] L.R. 7 C.P. 583.

A *ship Co. Ltd.*[131] It is said that there are two objections to applying Lord Wright's observation in that (a) it is too wide, for it is normal for business men to make profits and profits are not recoverable; (b) if the normal rule is applied the plaintiff would be able to recover when he has not suffered loss.

As to (a) there is here a confusion in the way the phrase "loss
B of profits" is used in the cases. It can mean (i) loss of ordinary user profits; (ii) loss of profits made on a subsale; (iii) loss of special profits: see *Horne*[132] and *Victoria Laundry*.[133] Profits under head (i) are recoverable under the first rule in *Hadley* v. *Baxendale*.[134] Profits under heads (ii) and (iii) are recoverable only if they come within the second rule in *Hadley* v. *Baxendale*.[135]

C As to (b), it is not disputed that there is an overriding rule that a plaintiff cannot recover for a loss that he has not suffered. But here the plaintiff in fact suffers a loss by being deprived of the goods on the day when they should have been delivered. This was established for sale of goods by *Williams Brothers* v. *Agius (Ed. T.) Ltd.*[136] and for contracts of carriage by *Rodocanachi* v.
D *Milburn*,[137] "the value to be taken independently of any circumstances peculiar to the plaintiff," *per* Lord Esher M.R.[138] For an example of where a plaintiff recovered damages greater than his loss: see *Heskell* v. *Continental Express Ltd.*[139] [Reference was made to Sedgwick on Damages, 9th ed., vol. 2, pp. 1530, 1532–34, vol. 3, pp. 1765, 1768, 1769.]

E There is no logical difference between a case of non-delivery and one of delayed delivery for on the day in question the buyer is not to know whether the goods will be delivered late or will never be delivered. It was sought to make a distinction between these two types of case but so far as remoteness is concerned
F there is no distinction and the measure of damages is based on the market value in both cases. [Reference was made to *Smith Edwards & Co.* v. *Tregarthen*[140] and *Sargant (W.T.) & Sons* v. *East Asiatic Co. Ltd.*[141]]

(3) The respondents have not found any case apart from *Wertheim* v. *Chicoutimi Pulp Co.*[142] in which the plaintiff has
G recovered less than the market value. It is conceded that the

[131] [1949] A.C. 196, 224.
[132] L.R. 7 C.P. 583.
[133] [1949] 2 K.B. 528.
[134] 9 Exch. 341.
[135] Ibid.
[136] [1914] A.C. 510.
[137] 18 Q.B.D. 67.
[138] Ibid. 76, 77.
[139] (1950) 83 Ll.L.Rep. 438; [1950] 1 All E.R. 1033.
[140] 56 L.J. Q.B. 437.
[141] 21 Com.Cas. 344.
[142] [1911] A.C. 301.

market rule applies to non-delivery by sea and there is overwhelming authority that it also applies to delay by land. There is no reason why this rule should not apply to cases of delayed delivery by sea. The American authorities support the above submission: *United States* v. *Middleton* [143] (where the voyage was much longer than that in the present case) and *The Iossufoglu*.[144] which is very similar to the present case. *The Iossufoglu* [144] deals precisely with the argument that the goods are likely to be sold before arrival and, further, it shows that there is no material difference for present purposes whether the plaintiff buys for reselling or storing. The House is invited to state the rule as set out in 80 Corpus Juris Secundum (1953) Shipping, section 124, where the above two American cases are cited.

There is no class of case in which it is more important that the law of this country should accord with that of the United States of America than the present. If this charterparty had been governed by New York law, plainly the respondents would have been entitled to succeed.

As to the reasons put forward against adopting the above submission, it was contended that sea voyages are longer and less predictable than journeys by land. But at the present time sea voyages are often no longer than a journey from London to Edinburgh and, moreover, in a great number of cases the time likely to be taken for the voyage is predictable. There is no reason to distinguish between liners and tramps. It may be that the date of departure of a liner is more predictable but this is not so in the case of the date of arrival, for a liner calls at various ports and is likely to be delayed by strikes etc., in contradistinction to a tramp which is a vessel under charter proceeding direct from the port of departure to the port where the goods are to be discharged. Further, it was said that shipowners commonly know less about markets than merchants and are not likely to know the purpose for which the goods are being despatched but both these objections would apply equally to land carriers; nevertheless such objections have not been acceded to in the land carriage cases.

(4) *The Parana* [145] was a decision on the facts due to the length and unpredictability of the voyage in that case as was stated in *Dunn* v. *Bucknall Brothers*.[146] It is wrong to suppose that *The Parana* [147] lays down any rule of law for *Dunn* v. *Bucknall Brothers* [148] makes it plain that it does not do so. The House is

[143] (1924) 3 Fed.Rep.(2nd) 384, (U.S.A.).
[144] (1929) 32 Fed.Rep.(2nd) 928.
[145] 2 P.D. 118.
[146] [1902] 2 K.B. 614.
[147] 2 P.D. 118.
[148] [1902] 2 K.B. 614.

A invited to state that Sir Robert Phillimore's judgment at first instance in *The Parana* [149] is a correct statement of the law on this topic, alternatively, that the judgment of the Court of Appeal in that case [150] no longer accords with the commercial conditions of the 20th century.

It is said that *The Parana* [150] has stood for 90 years and that the B commercial community have conducted their affairs on the basis that it is a sound decision. As to the attitude this House will adopt in overruling a long standing decision: see the observations of Viscount Simon L.C. in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*,[151] which overruled *Chandler* v. *Webster*,[152] where he said: "If the view which has hitherto pre- C vailed in this matter is found to be based on a misapprehension of legal principles, it is of great importance that these principles should be correctly defined, for, if not, there is a danger that the error may spread in other directions, and a portion of our law be erected on a false foundation." *The Parana* [153] is in a weaker position as an authority than *Chandler* v. *Webster* [154] for it was D distinguished in *Dunn* v. *Bucknall Brothers*,[155] *S.S. Ardennes*,[156] and *Sargant (W.T.) & Sons* v. *East Asiatic Co. Ltd.*[157] and has not been followed in the United States.

It was said that to overrule *The Parana* [158] would have far reaching consequences. The remedy is simple, namely, to insert a clause in the contract excluding this kind of liability.

E (5) There is a finding [159] that the carrier knew of the existence of the sugar market at Basrah. The present is a stronger case on the facts than the American cases. The plaintiff takes the risk of a fall in the market but not of a breach of contract by the carrier—especially where it is a deliberate breach by way of deviation.

F In conclusion, the House is invited to overrule or disapprove of *The Parana* [160] and to hold that *Dunn* v. *Bucknall Brothers* [161] was correctly decided on the facts. If *The Parana* [162] is overruled it would entail overruling also *The Notting Hill* [163] and *Hawes & Son* v. *South Eastern Railway Co.*[164]

All the early cases were correctly decided but the observation

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[149] 1 P.D. 452.
[150] 2 P.D. 118.
[151] [1943] A.C. 32, 44, 45; [1942] 2 All E.R. 122, H.L.
[152] [1904] 1 K.B. 493, C.A.
[153] 2 P.D. 118.
[154] [1904] 1 K.B. 493.
[155] [1902] 2 K.B. 614.
[156] [1951] 1 K.B. 55.
[157] 21 Com.Cas. 344.
[158] 2 P.D. 118.
[159] Ante, p. 354G.
[160] 2 P.D. 118.
[161] [1902] 2 K.B. 614.
[162] 2 P.D. 118.
[163] 9 P.D. 105.
[164] 52 L.T. 514.

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of Lord Campbell C.J. at the end of his judgment in *Smeed* v. *Foord* [165] must be regarded as per incuriam although the decision itself was correct. As to *Wertheim* v. *Chicoutimi Pulp Co.*[166] it has been heavily and effectively criticised by Scrutton L.J. in *Slater* v. *Hoyle & Smith Ltd.*[167] and criticised in Sedgwick on Damages, 9th ed., Vol. 2, sect. 735b, p. 1538, in Mayne & McGregor on Damages, 12th ed. para. 166, p. 156, and in Benjamin on Sale, 8th ed. (1950), p. 964. True it was approved by Lord Dunedin and Lord Atkinson in *Williams Brothers* v. *Agius (Ed. T.) Ltd.*[168] but it was distinguished. *Wertheim* v. *Chicoutimi Pulp Co.*[169] is no longer good law.

The House is invited to approve the decision in the *Victoria Laundry* case [170] and to uphold the judgments of Diplock and Salmon L.JJ.[171] below.

Kerr Q.C. in reply. The appeal has resolved itself into a number of narrow issues but issues of principle.

The first and very fundamental issue is: what did the first rule in *Hadley* v. *Baxendale* decide [172]?

It is conceded that remoteness in contract is based on foresight or the contemplation of the parties, but foreseeability does not circumscribe the limits of what is too remote and what is not. The limits of remoteness are narrower than the limits of foreseeing the consequences and narrower than consequences that can be contemplated.

Hadley v. *Baxendale* [172] laid down a policy, or rule of law, concerning the limits within which a party has to make compensation for the consequences resulting from his breach of contract. The test that was laid down was not simply: was it foreseeable or liable to happen? It is on any view narrower than that. The *Victoria Laundry* case [173] *did alter the law.* This was the view of Diplock and Salmon L.JJ. in the present case.[174] If *Victoria Laundry* [175] is looked upon as deciding obiter that a loss is recoverable if there is a reasonable possibility of it occurring that is a variant on the first rule in *Hadley* v. *Baxendale.*[176] The correct limit on pure foreseeability is "probability" or "likelihood." In the 19th century cases there is no trace of lowering the limit to "mere possibility." In fact the tendency was sometimes to make the limit too high, for example, that a loss was only recoverable if it

[165] 1 E. & E. 602, 615.
[166] [1911] A.C. 301.
[167] [1920] 2 K.B. 11.
[168] [1914] A.C. 510, 522, 524.
[169] [1911] A.C. 301.
[170] [1949] 2 K.B. 528.
[171] [1966] 2 Q.B. 695, 725, 737.
[172] 9 Exch. 341.
[173] [1949] 2 K.B. 528.
[174] [1966] 2 Q.B. 695, 730, 738.
[175] [1949] 2 K.B. 528.
[176] 9 Exch. 341.

A was a "necessary" consequence of the breach. The appellants do not support this latter proposition. For a statement of the highest authority on how *Hadley* v. *Baxendale* [176] was understood by this House: see *per* Lord Chelmsford in *Bain* v. *Fothergill*.[177] A precisely similar principle was applied in the *Monarch Steamship Co.* case.[178]

B The respondents relied on Scrutton on Charterparties, 1st ed., p. 254, but the exposition of the first rule in *Hadley* v. *Baxendale* [179] as there given, "the damages naturally and usually resulting from a breach of the contract," supports the respondents' contention.

Any suggested test of a "real risk" is unhelpful since it is unsatisfactory as a quantitative test in the present context; "likely"
C or "probable" is satisfactory and hitherto has always been used. This issue involves a question of policy and if the first rule in *Hadley* v. *Baxendale* [179] is to be changed it is suggested that it should be made plain that what has been decided is a change of policy.

The second issue is whether the ordinary rule in determining the
D measure of damages is the loss of market or the market value of the goods. But the present case concerns remoteness of damage and not measure of damages and the respondents have repeatedly failed here to draw this distinction in considering whether the same rule applies to both questions. The problem here is not to value the cargo-owner's loss but to decide whether it is recoverable
E at all. The problem may be illustrated thus: if a building contractor erects a building that has defects the measure of damages is the cost of reinstatement. That is inevitable. But if rain water seeps into the building and damages goods on the premises then a question of remoteness arises. Or again, an antique vase is sent to Christies where it is accidentally smashed by a prospective
F purchaser. The defendant must pay the value of the vase and no question of remoteness arises. A question of remoteness would only arise if the vase was one of a pair and the one that the owner still possessed was shown to have been diminished in value by the destruction of the other.

The issue here is whether loss of market is too remote to be
G recoverable. In other words, was it probable or likely at the date of the contract that if there was a delay of nine days the respondents would suffer a loss as a result of an admittedly fluctuating market? If one fails to observe the distinction between remoteness and

[176] 9 Exch. 341.
[177] (1874) L.R. 7 H.L. 158, 202, 203, H.L.
[178] [1949] A.C. 196, 215, 221, 224, 232, 233.
[179] 9 Exch. 341.

measure one by-passes *Hadley* v. *Baxendale* [179] entirely. The respondents' argument, in effect, is that loss of market is treated as the automatic measure of damages in all cases without posing the question whether it is a remote or proximate result of the breach.

The respondents rely on the land carriage cases. But the authorities do not support the proposition that there should be a conventional rule to cover all cases. Further, the land carriage cases are wholly unsatisfactory as a basis of decision that market loss is the automatic measure of damages in cases of delay in relation to carriage of goods. It is to be observed that in the three leading cases on land carriage, *Collard* v. *South Eastern Railway Co.*,[180] *Wilson* v. *Lancashire & Yorkshire Railway Co.*[181] and *Horne* v. *Midland Railway Co.*,[182] this point was never argued. All three cases were cited in *The Parana*.[183] *The Parana* [183] should apply to land carriage cases in addition to cases of carriage of goods by sea, for delay is a question of remoteness and that is an issue raising questions of foreseeability, that is, probability.

The third issue covers the basis of the rule that the market value is recoverable. The respondents' contention is that the justification for the market value, if it be the measure of damages, is that on the day when the goods should have been delivered the plaintiff is entitled to go into the market and obtain comparable goods there. This is wrong in respect of cases of delay as a matter of fact and of law. If it be asked how probable is the risk that the cargo owner is likely to go into the market on the day in question to replenish himself, the answer is that the situation is unreal. It becomes real in the case of non-delivery of goods because there he never receives them.

In cases of delay the measure of damages is damages for loss of user; the market value is only recoverable if the carrier has contracted to deliver on a specific date. *Wertheim* v. *Chicoutimi Pulp Co.* [184] was rightly decided: see *per* Lord Dunedin in *Williams Brothers* v. *Agius (Ed. T.) Ltd.*[185]

O'Hanlan v. *Great Western Railway Co.*[186] is plainly distinguishable in relation to the issues here. As to *Heskell* v. *Continental Express Ltd.*,[187] (i) the question whether loss of market was recoverable was not argued; (ii) *The Parana* [188] was not cited; (iii) it was a non-shipment case and not a delay in delivery case. If the goods are never shipped it must be foreseeable as a probable

[179] 9 Exch. 341.
[180] 7 H. & N. 79.
[181] 9 C.B.N.S. 632.
[182] L.R. 8 C.P. 131.
[183] 2 P.D. 118.
[184] [1911] A.C. 301.
[185] [1914] A.C. 510, 522.
[186] 6 B. & S. 484.
[187] 83 Ll.L. Rep. 438.
[188] 2 P.D. 118.

consequence that they will be worth less a year later. It cannot be treated as a decision on whether loss of market is too remote.

As to the American authorities, in *The Iossufoglu* [189] the point of loss of market was never argued, whilst in *United States* v. *Middleton* [190] there was proof of a trade practice which might have come to the carrier's notice.

It is emphasised that Branson J. correctly summarised the law on delay in the present context in *Connolly Shaw Ltd.*[191] It is not disputed that *Dunn* v. *Bucknall Brothers* [192] was rightly decided under both heads of *Hadley* v. *Baxendale.*[193]

As to the overruling of old authorities by this House, see the observations of Lord Wright in *Admiralty Commissioners* v. *Valverda (Owners).*[194] [Reference was also made to *Mehmet Dogan Bey* v. *G. G. Abdeni & Co. Ltd.*[195]]

Their Lordships took time for consideration.

October 17, 1967. LORD REID. My Lords, by charterparty of October 15, 1960, the respondents chartered the appellant's vessel, *Heron II*, to proceed to Constanza, there to load a cargo of 3,000 tons of sugar; and to carry it to Basrah, or, in the charterer's option, to Jeddah. The vessel left Constanza on November 1, 1960. The option was not exercised and the vessel arrived at Basrah on December 2, 1960. The umpire has found that "a reasonably accurate prediction of the length of the voyage was twenty days." But the vessel had in breach of contract made deviations which caused a delay of nine days.

It was the intention of the respondents to sell the sugar "promptly after arrival at Basrah and after inspection by merchants." The appellant did not know this, but he was aware of the fact that there was a market for sugar at Basrah. The sugar was in fact sold at Basrah in lots between December 12 and 22, 1960, but shortly before that time the market price had fallen, partly by reason of the arrival of another cargo of sugar. It was found by the umpire that if there had not been this delay of nine days the sugar would have fetched £32 10s. 0d. per ton. The actual price realised was only £31 2s. 9d. per ton. The respondents claim that they are entitled to recover the difference as damage for breach of contract. The appellant admits that he is

[189] 32 Fed.Rep. (2nd) 928.
[190] 3 Fed.Rep. (2nd) 384.
[191] 49 Ll.L.Rep. 183.
[192] [1902] 2 K.B. 614.
[193] 9 Exch. 341.
[194] [1938] A.C. 173, 194; [1938] 1 All E.R. 162, H.L.
[195] [1951] 2 K.B. 405; [1951] 2 All E.R. 162.

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liable to pay interest for nine days on the value of the sugar and certain minor expenses but denies that fall in market value can be taken into account in assessing damages in this case.

McNair J., following the decision in *The Parana*,[1] decided this question in favour of the appellant. He said[2]:

> "In those circumstances, it seems to me almost impossible to say that the shipowner must have known that the delay in prosecuting the voyage would probably result, or be likely to result, in this kind of loss."

The Court of Appeal[3] by a majority (Diplock and Salmon L.JJ., Sellers L.J. dissenting) reversed the decision of the trial judge. The majority held that *The Parana*[4] laid down no general rule, and, applying the rule (or rules) in *Hadley* v. *Baxendale*[5] as explained in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[6] they held that the loss due to fall in market price was not too remote to be recoverable as damages.

It may be well first to set out the knowledge and intention of the parties at the time of making the contract so far as relevant or argued to be relevant. The charterers intended to sell the sugar in the market at Basrah on arrival of the vessel. They could have changed their mind and exercised their option to have the sugar delivered at Jeddah but they did not do so. There is no finding that they had in mind any particular date as the likely date of arrival at Basrah or that they had any knowledge or expectation that in late November or December there would be a rising or a falling market. The shipowner was given no information about these matters by the charterers. He did not know what the charterers intended to do with the sugar. But he knew there was a market in sugar at Basrah, and it appears to me that, if he had thought about the matter, he must have realised that at least it was not unlikely that the sugar would be sold in the market at market price on arrival. And he must be held to have known that in any ordinary market prices are apt to fluctuate from day to day: but he had no reason to suppose it more probable that during the relevant period such fluctuation would be downwards rather than upwards—it was an even chance that the fluctuation would be downwards.

So the question for decision is whether a plaintiff can recover as damages for breach of contract a loss of a kind which the

[1] (1877) 2 P.D. 118, C.A.
[2] [1966] 1 Lloyd's Rep. 259, 274.
[3] [1966] 2 Q.B. 695; [1966] 2 W.L.R. 1397; [1966] 2 All E.R. 593, C.A.
[4] 2 P.D. 118.
[5] (1854) 9 Exch. 341.
[6] [1949] 2 K.B. 528; [1949] 1 All E.R. 997, C.A.

A defendant, when he made the contract, ought to have realised was not unlikely to result from a breach of contract causing delay in delivery. I use the words " not unlikely " as denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.

For over a century everyone has agreed that remoteness of B damage in contract must be determined by applying the rule (or rules) laid down by a court including Lord Wensleydale (then Parke B.), Martin B. and Alderson B. in *Hadley* v. *Baxendale*.[7] But many different interpretations of that rule have been adopted by judges at different times. So I think that one ought first to see just what was decided in that case, because it would seem C wrong to attribute to that rule a meaning which, if it had been adopted in that case, would have resulted in a contrary decision of that case.

In *Hadley* v. *Baxendale*[7] the owners of a flour mill at Gloucester which was driven by a steam engine delivered to common carriers, Pickford & Co., a broken crankshaft to be sent D to engineers in Greenwich. A delay of five days in delivery there was held to be in breach of contract and the question at issue was the proper measure of damages. In fact the shaft was sent as a pattern for a new shaft and until it arrived the mill could not operate. So the owners claimed £300 as loss of profit for the five days by which resumption of work was delayed by this E breach of contract. But the carriers did not know that delay would cause loss of this kind.

Alderson B., delivering the judgment of the court, said[8]:

> " We find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken F shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the G engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow."

[7] 9 Exch. 341.

[8] Ibid. 355, 356.

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Then, having said that in fact the loss of profit was caused by the delay, he continued [8]:

> "But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred."

Alderson B. clearly did not and could not mean that it was not reasonably foreseeable that delay might stop the resumption of work in the mill. He merely said that in the great multitude—which I take to mean the great majority—of cases this would not happen. He was not distinguishing between results which were foreseeable or unforeseeable, but between results which were likely because they would happen in the great majority of cases, and results which were unlikely because they would only happen in a small minority of cases. He continued [9]:

> "It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract."

He clearly meant that a result which will happen in the great majority of cases should fairly and reasonably be regarded as having been in the contemplation of the parties, but that a result which, though foreseeable as a substantial possibility, would only happen in a small minority of cases should not be regarded as having been in their contemplation. He was referring to such a result when he continued [9]:

> "For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants."

I have dealt with the latter part of the judgment before coming to the well known rule because the court were there applying the rule and the language which was used in the latter part appears to me to throw considerable light on the meaning which they must have attached to the rather vague expressions used in the rule itself. The rule [10] is that the damages "should be such as may fairly and reasonably be considered 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

[9] 9 Exch. 341, 356.

[10] Ibid. 354.

A been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

I do not think that it was intended that there were to be two rules or that two different standards or tests were to be applied. The last two passages which I quoted from the end of the judgment applied to the facts before the court which did not include B any special circumstances communicated to the defendants; and the line of reasoning there is that because in the great majority of cases loss of profit would not in all probability have occurred, it followed that this could not reasonably be considered as having been fairly and reasonably contemplated by both the parties, for it would not have flowed naturally from the breach in the great C majority of cases.

I am satisfied that the court did not intend that every type of damage which was reasonably foreseeable by the parties when the contract was made should either be considered as arising naturally, i.e., in the usual course of things, or be supposed to have been in the contemplation of the parties. Indeed the decision D makes it clear that a type of damage which was plainly foreseeable as a real possibility but which would only occur in a small minority of cases cannot be regarded as arising in the usual course of things or be supposed to have been in the contemplation of the parties: the parties are not supposed to contemplate as grounds for the recovery of damage any type of loss or damage E which on the knowledge available to the defendant would appear to him as only likely to occur in a small minority of cases.

In cases like *Hadley* v. *Baxendale* [11] or the present case it is not enough that in fact the plaintiff's loss was directly caused by the defendant's breach of contract. It clearly was so caused in both. The crucial question is whether, on the information avail- F able to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.

G The modern rule of tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified

[11] 9 Exch. 341.

in neglecting it. And there is good reason for the difference. In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made, and I need not stop to consider in what circumstances the other party will then be held to have accepted responsibility in that event. But in tort there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing. I have no doubt that today a tortfeasor would be held liable for a type of damage as unlikely as was the stoppage of Hadley's Mill for lack of a crankshaft: to anyone with the knowledge the carrier had that may have seemed unlikely but the chance of it happening would have been seen to be far from negligible. But it does not at all follow that *Hadley* v. *Baxendale* [11] would today be differently decided.

As long ago as 1872 Willes J. said in *Horne* v. *Midland Railway Co.*[12]:

> "The cases as to the measure of damages for a tort do not apply to a case of contract. That was suggested in a case in Bulstrode [13] but the notion was corrected in *Hadley* v. *Baxendale*.[14] The damages are to be limited to those that are the natural and ordinary consequences which may be supposed to have been in the contemplation of the parties at the time of making the contract."

And in *Cory* v. *Thames Ironworks Co.*[15] Blackburn J. said:

> "I think it all comes round to this: The measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract, not more than that, but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, viz. that if the damage were exceptional and unnatural damage, to be made liable for that would be hard upon the seller, because if he had known what the consequences would be he would probably have stipulated for more time, or, at all events, have used greater exertions if he knew that that extreme mischief would follow from the non-fulfilment of his contract."

[11] 9 Exch. 341.
[12] (1872) L.R. 7 C.P. 583, 590.
[13] *Everard* v. *Hopkins*, 2 Bul. 332.
[14] 9 Exch. 341.
[15] (1868) L.R. 3 Q.B. 181, 190, 191.

A It is true that in some later cases opinions were expressed that the measure of damages is the same in tort as it is in contract, but those were generally cases where it was sought to limit damages due for a tort and not cases where it was sought to extend damages due for breach of contract, and I do not recollect any case in which such opinions were based on a full consideration B of the matter. In my view these opinions must now be regarded as erroneous.

For a considerable time there was a tendency to set narrow limits to awards of damages. Such phrases were used as that the damage was not "the immediate and necessary effect of the breach of contract" (*per* Cockburn C.J. in *Hobbs* v. *London and* C *South Western Railway Co.*[16]). *The Parana*[17] was decided during that period. But later a more liberal tendency can be seen. I do not think it useful to review the authorities in detail but I do attach importance to what was said in this House in *R. & H. Hall Ltd.* v. *W. H. Pim (Junior) & Co. Ltd.*[18]

In that case Pim sold a cargo of wheat to Hall but failed to D deliver it. Hall had resold the wheat but as a result of Pim's breach of contract lost the profit which they would have made on their sub-sale. Three of their Lordships dealt with the case on the basis that the relevant question was whether it ought to have been in the contemplation of the parties that a resale was probable. The finding[19] of the arbitrators was:

E > "The arbitrators are unable to find that it was in the contemplation of the parties or ought to have been in the contemplation of Messrs. Pim at that time that the cargo would be resold or was likely to be resold before delivery; in fact, the chances of its being resold as a cargo and of its being taken delivery of by Messrs. Hall were about equal."

F On that finding the Court of Appeal[20] had decided in favour of Pim, saying that, as the arbitrators had stated as a fact that the chances of the cargo being resold or not being resold were equal, it was therefore "idle to speak of a likelihood or of a probability of a resale."

Viscount Dunedin pointed out that it was for the court to G decide what was to be supposed to have been in the contemplation of the parties, and then said[21]:

> "I do not think that 'probability' . . . means that the chances are all in favour of the event happening. To make

[16] (1875) L.R. 10 Q.B. 111, 118.
[17] 2 P.D. 118.
[18] (1928) 33 Com.Cas. 324, H.L.
[19] Ibid. 329.
[20] (1927) 32 Com.Cas. 144, 151, C.A.
[21] 33 Com.Cas. 324, 329, 330.

a thing probable, it is enough, in my view, that there is an even chance of its happening. That is the criterion I apply; and in view of the facts, as I have said above, I think there was here in the contemplation of parties the probability of a resale."

He did not have to consider how much less than a 50 per cent. chance would amount to a probability in this sense.

Lord Shaw of Dunfermline went rather further. He said [22]:

> "To what extent in a contract of goods for future delivery the extent of damages is in contemplation of parties is always extremely doubtful. The main business fact is that they are thinking of the contract being performed and not of its being not performed. But with regard to the latter if their contract shows that there were instances or stages which made ensuing losses or damage a not unlikely result of the breach of the contract, then all such results must be reckoned to be within not only the scope of the contract, but the contemplation of parties as to its breach."

Lord Phillimore was less definite and perhaps went even further. He said [23] that the sellers of the wheat knew that the buyers "might well sell it over again and make a profit on the resale"; and that being so they "must be taken to have consented to this state of things and thereby to have made themselves liable to pay" the profit on a resale.

It may be that there was nothing very new in this but I think that *Hall's* case [24] must be taken to have established that damages are not to be regarded as too remote merely because, on the knowledge available to the defendant when the contract was made, the chance of the occurrence of the event which caused the damage would have appeared to him to be rather less than an even chance. I would agree with Lord Shaw that it is generally sufficient that that event would have appeared to the defendant as not unlikely to occur. It is hardly ever possible in this matter to assess probabilities with any degree of mathematical accuracy. But I do not find in that case [22] or in cases which preceded it any warrant for regarding as within the contemplation of the parties any event which would not have appeared to the defendant, had he thought about it, to have a very substantial degree of probability.

But then it has been said that the liability of defendants has been further extended by *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[25] I do not think so. The plaintiffs

[22] 33 Com.Cas. 324, 333.
[23] Ibid. 337.
[24] 33 Com.Cas. 324.
[25] [1949] 2 K.B. 528.

bought a large boiler from the defendants and the defendants were aware of the general nature of the plaintiffs' business and of the plaintiffs' intention to put the boiler into use as soon as possible. Delivery of the boiler was delayed in breach of contract and the plaintiffs claimed as damages loss of profit caused by the delay. A large part of the profits claimed would have resulted from some specially lucrative contracts which the plaintiffs could have completed if they had had the boiler: that was rightly disallowed because the defendants had no knowedge of these contracts. But Asquith L.J. then said [26]:

> "It does not, however, follow that the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected."

It appears to me that this was well justified on the earlier authorities. It was certainly not unlikely on the information which the defendants had when making the contract that delay in delivering the boiler would result in loss of business: indeed it would seem that that was more than an even chance. And there was nothing new in holding that damages should be estimated on a conjectural basis. This House had approved of that as early as 1813 in *Hall v. Ross*.[27]

But what is said to create a "landmark" is the statement of principles by Asquith L.J.[28] This does to some extent go beyond the older authorities and in so far as it does so, I do not agree with it. In paragraph (2) it is said [29] that the plaintiff is entitled to recover "such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach." To bring in reasonable foreseeability appears to me to be confusing measure of damages in contract with measure of damages in tort. A great many extremely unlikely results are reasonably foreseeable: it is true that Lord Asquith may have meant foreseeable as a likely result, and if that is all he meant I would not object further than to say that I think that the phrase is liable to be misunderstood. For the same reason I would take exception to the phrase [30] "liable to result" in paragraph (5). Liable is a very vague word but I think that one would usually say that when a person foresees a very improbable result he foresees that it is liable to happen.

[26] [1949] 2 K.B. 528, 543.
[27] (1813) 1 Dow. 201, H.L.
[28] [1949] 2 K.B. 528, 539, 540.
[29] Ibid. 539.
[30] Ibid. 540.

I agree with the first half of paragraph (6).[30] For the best part of a century it has not been required that the defendant could have foreseen that a breach of contract must necessarily result in the loss which has occurred. But I cannot agree with the second half of that paragraph. It has never been held to be sufficient in contract that the loss was foreseeable as "a serious possibility" or "a real danger" or as being "on the cards." It is on the cards that one can win £100,000 or more for a stake of a few pence—several people have done that. And anyone who backs a hundred to one chance regards a win as a serious possibility—many people have won on such a chance. And the *Wagon Mound* (*No.* 2)[31] could not have been decided as it was unless the extremely unlikely fire should have been foreseen by the ship's officer as a real danger. It appears to me that in the ordinary use of language there is wide gulf between saying that some event is not unlikely or quite likely to happen and saying merely that it is a serious possibility, a real danger, or on the cards. Suppose one takes a well-shuffled pack of cards, it is quite likely or not unlikely that the top card will prove to be a diamond: the odds are only 3 to 1 against. But most people would not say that it is quite likely to be the nine of diamonds for the odds are then 51 to 1 against. On the other hand I think that most people would say that there is a serious possibility or a real danger of its being turned up first and of course it is on the cards. If the tests of "real danger" or "serious possibility" are in future to be authoritative then the *Victoria Laundry* case[32] would indeed be a landmark because it would mean that *Hadley* v. *Baxendale*[33] would be differently decided today. I certainly could not understand any court deciding that, on the information available to the carrier in that case, the stoppage of the mill was neither a serious possibility nor a real danger. If those tests are to prevail in future then let us cease to pay lip service to the rule in *Hadley* v. *Baxendale*.[33] But in my judgment to adopt these tests would extend liability for breach of contract beyond what is reasonable or desirable. From the limited knowledge which I have of commercial affairs I would not expect such an extension to be welcomed by the business community and from the legal point of view I can find little or nothing to recommend it.

Lord Asquith took the phrases "real danger" and "serious

[31] [1967] 1 A.C. 617; [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709, P.C.

[32] [1949] 2 K.B. 528.

[33] 9 Ex. 341.

A possibility" from the speech of Lord du Parcq in *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (A/B)*[34] so I must examine that case. The facts were complicated but it is sufficient to say that a voyage was prolonged by breach of contract so that war broke out before it was completed, and by reason of an embargo imposed on the outbreak of war the cargo owner had B to incur great expense in transhipping his goods and having them carried to the contract destination. The contract was made in April, 1939. The question was whether he was entitled to recover this expense as damages for the breach of contract and that depended on whether the outbreak of war and consequent embargo were or ought to have been within the contemplation of the C contracting parties in April, 1939. By that time war was much more than merely a serious possibility. Lord Porter said[35]: "Accepting then the view that the appellants ought to have foreseen the likelihood of war occurring . . .". Lord Wright said[36]: "There was indeed in 1939 the general fear that there might be war. . . . The possibility must have been in the minds D of both parties." Lord Uthwatt said[37] that a reasonable shipowner "would regard the chance of war, not as a possibility of academic interest to the venture, but as furnishing matter which commercially ought to be taken into account." And Lord Morton of Henryton said[38] that the shipowner "would feel that there was a grave risk of war breaking out in Europe." On those E assessments of the situation holding that the damage which flowed from the outbreak of war was not too remote to be recoverable was well within the existing law.

I do not think that Lord du Parcq intended to say that his view was materially different. Indeed, he quoted[39] from Sir Winston Churchill, "No one who understood the situation could F doubt that it meant in all human probability a major war in which we should be involved" (The Second World War, vol. 1, p. 270). So there was no need for him to go further than the existing law and I do not think that he intended to do so. It is only by taking these two phrases out of their context that any such intention could be inferred.

G It appears to me that, without relying in any way on the *Victoria Laundry* case,[40] and taking the principle that had already been established, the loss of profit claimed in this case was not

[34] [1949] A.C. 196, 233; [1949] 1 All E.R. 1, H.L.
[35] [1949] A.C. 196, 219.
[36] Ibid. 222.
[37] Ibid. 232.
[38] Ibid. 235.
[39] Ibid. 234.
[40] [1949] 2 K.B. 528.

too remote to be recoverable as damages. So it remains to consider whether the decision in *The Parana*[41] established a rule which, though now anomalous, should nevertheless still be followed. In that case owing to the defective state of the ship's engines a voyage which ought to have taken 65 to 70 days took 127 days, and as a result a cargo of hemp fetched a much smaller price than it would have done if there had been no breach of contract. But the Court of Appeal held that the plaintiffs could not recover this loss as damages. The vital part of their judgment is as follows[42]:

> "In order that damages may be recovered, we must come to two conclusions—first, that it was reasonably certain that the goods would not be sold until they did arrive; and, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier at the time when the bills of lading were signed."

If that was the right test then the decision was right, and I think that that test was in line with a number of cases decided before or about that time (1877). But, as I have already said, so strict a test has long been obsolete. And, if one substitutes for "reasonably certain" the words "not unlikely" or some similar words denoting a much smaller degree of probability, then the whole argument in the judgment collapses. I need not consider whether there were other facts which might be held to justify the decision, but I must say that I do not see why the mere duration of the voyage should make much difference.

If *The Parana*[43] had always been regarded as laying down a rule so that carriage by sea was to be treated as different from carriage by land, one would have to consider whether it would be proper to alter a rule which had stood for nearly a century. But in *Dunn* v. *Bucknall Brothers*[44] it was held that there was no general rule that damages could not be recovered by loss of market on a voyage by sea, and for special reasons such damages have been awarded in a number of later cases. So, whether *The Parana*[45] is formally overruled or not, it cannot be relied on as establishing a rule so as to require the present case to be decided in a way inconsistent with the general law as it exists today.

Some importance was attached in argument to *Slater and Another* v. *Hoyle & Smith Ltd.*[46] and the earlier cases there cited.

[41] 2 P.D. 118.
[42] Ibid. 123.
[43] Ibid. 118.
[44] [1902] 2 K.B. 614, C.A.
[45] 2 P.D. 118.
[46] [1920] 2 K.B. 11, C.A.

A Those cases deal with sale of goods, and I do not think it necessary or desirable in the present case to consider what the rule there is, whether it conflicts with the general principles now established as to measure of damages, or whether, if it does, it ought or ought not to stand. Those are much too important questions to be decided obiter in the present case, and I refrain B from expressing any opinion about them.

For the reasons which I have given I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, the appellant (a shipowner) made a contract with the respondents (as charterers) C for the carriage of goods by sea. As a result of an admitted breach of contract on the part of the shipowner the goods were delivered at the port of destination several days later than they should have been delivered. The respondents as a result undoubtedly suffered financial loss. They had intended to sell the goods as soon as the ship arrived at its destination. They did D sell the goods after the ship arrived but in the period of the delay in arrival there was a fall in the market price. In consequence they suffered loss in that they received less than they would have received if the appellant had not been in breach. They claimed to recover their loss as damages for breach of contract.

E The classic judgment in *Hadley* v. *Baxendale* [47] has continuously been recognised as enshrining and formulating the guiding rules which are to be followed in deciding whether damage which has been the result of a breach of contract should be paid for by the contract breaker. The numerous reported decisions in the years since *Hadley* v. *Baxendale* [47] was decided F show that sometimes there have been problems relating to the meaning and intention of the words used in the judgment in that case and that sometimes the problems have been those of ascertaining facts and then of relating accepted principle to the facts as found. When consideration has been given to the meaning and intention of the words used in the judgment in *Hadley* v. *Baxen-* G *dale* [47] it has so often been manifest that words which are but servants to convey and express meanings—cannot always be servants of precision and may sometimes be given a dominance which is above their status. If "Language is the dress of thought," it is the thought that must be understood.

[47] 9 Exch. 341.

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In the present case the problem is that of relating principle to ascertained facts. The facts are carefully set out in the stated special case the clarity of which earned the commendation of the learned judge. It is not necessary to summarise them here. It will suffice to state that the umpire found that the respondents were the shippers and were the owners of the cargo of Hungarian sugar at shipment and at and after discharge. Had there been no breach of contract the vessel would have arrived at Basrah some nine days or so earlier than she did arrive. The time that would be taken in the voyage from Constanza to Basrah could with reasonable accuracy be predicted to be twenty days. At the date of the charterparty and at all times thereafter it was the intention of the respondents to sell the sugar cash against delivery order promptly after arrival at Basrah and after inspection by merchants. They did in fact do so. Immediately after discharge the respondents proceeded to permit inspection and to negotiate sales. Had there been no deviation and consequently no breach of contract the selling price of the sugar would have been one of £32 10s. 0d. per ton. The average price realised after the late arrival of the sugar was £31 2s. 9d. per ton. The fall in the market price was caused inter alia by the arrival on schedule (between the date, i.e., November 22, 1960, when the appellant's ship should have arrived had it not deviated and the date, i.e., December 2, 1960, when it did arrive) of a ship carrying 8,000 tons of Formosan sugar. The London price fell during November and the first half of December. The Basrah prices do not conform to a set pattern but they tend to decline during October and November to a low point in about December. There was, however, no evidence that the decline in the London and Basrah prices in November and the first half of December was caused by any unusual or unpredictable factor. To these facts it may be added that there was at all material times a market for sugar in Basrah. Sugar was regularly bought and sold there in large quantities at prices which were published. Some 200,000 tons were sold on the Basrah market in a year. Prices would fluctuate considerably. The arrival of a steamer with a cargo of sugar would affect the prices. The existence of the Basrah sugar market was known to the appellant at and before and after the date of the charterparty but the appellant did not have detailed knowledge of the markets in Basrah nor of those in London: the London daily price influences the Basrah price though the latter is not directly related to the London price. The carriage of sugar from the Black Sea to Iraqi ports including Basrah is a recognised trade

A but a shipowner would ordinarily have no knowledge whether a particular cargo has been or is to be sold prior to its arrival in Iraq, or whether the sugar is being shipped in order that it should be sold in the market on arrival. The appellant had no actual knowledge (nor had his brokers) that the respondents intended to sell the sugar promptly after its arrival at Basrah.

B The famous rule in *Hadley* v. *Baxendale* [48] postulates a contract which one party has broken and relates to the "damages which the other party ought to receive." They are

> "such as may fairly and reasonably be considered 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."

C

The judgment proceeds to give illustrative guidance.[49] Thus a contract may be one actually made under special circumstances. If they were

D

> "communicated by the plaintiffs to the defendants, 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 these special circumstances so known and communicated."

E If, however, such special circumstances were wholly unknown to the contract breaker then 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." [49]

F The judgment [49] proceeds to point out that if the special circumstances had been known, then the parties could have provided by special terms as to the damages to be payable in the event of a breach: it would be unjust to deprive them of the advantage of so providing.

G In the present case there was no special communication of special circumstances by reference to which the contract of carriage was made. The problem presented was therefore whether with the knowledge possessed by the parties at the time when the contract was made the loss in fact suffered by the respondents due to the delayed arrival (in breach of contract) of the sugar

[48] 9 Exch. 354. [49] Ibid. 355.

could fairly and reasonably be considered as arising naturally (i.e. according to the usual course of things) from such breach. When parties enter into a contract they do not ordinarily at such time seek to work out or to calculate the exact consequences of a breach of their contract. On the facts of the present case it is however pertinent to pose the enquiry as to what the natural ordinary and sensible answer of the appellant would have been if he had asked himself what the result for the respondents would be if he (the appellant) in breach of contract and therefore unjustifiably caused his ship to arrive at Basrah some nine or ten days later than it could and should have arrived. While the appellant did not know precisely what plans the respondents had made he could be reasonably sure of one thing, namely that they had contracted for the appellant's ship to proceed at all convenient speed to its destination because they wanted to have their cargo delivered at its destination at such time as the ship could be expected to arrive. The appellant knew when the charterparty was made (on October 15, 1960) that if the vessel arrived for loading at Constanza (it had been confidently expected that she would arrive, as she in fact did, on October 27, 1960) and if the respondents did not (not later than five days prior to the commencement of loading) declare that they exercised the option of discharging the cargo at Jeddah then there was the obligation after loading the cargo to proceed with all convenient speed to Basrah. The appellant could and should at the very least have contemplated that if his ship was nine days later in arriving than it could and should have arrived some financial loss to the respondents or to an endorsee of the bill of lading might result. I use the words "at the very least" and the word "might" at this stage so as to point to the problem which is highlighted in this case. It is here that words and phrases begin to crowd in and to compete. Must the loss of the respondents be such that the appellant could see that it was certain to result? Or would it suffice if the loss was probable or was likely to result or was liable to result? In the present context what do these words denote? If there must be selection as between them which one is to be employed to convey the intended meaning?

I think that it is clear that the loss need not be such that the contract-breaker could see that it was certain to result. The question that arises concerns the measure of prevision which should fairly and reasonably be ascribed to him.

My Lords, in applying the guidance given in *Hadley* v.

A *Baxendale* [50] I would hope that no undue emphasis would be placed upon any one word or phrase. If a party has suffered some special and peculiar loss in reference to some particular arrangements of his which were unknown to the other party and were not communicated to the other party and were not therefore in the contemplation of the parties at the time when they made their B contract, then it would be unfair and unreasonable to charge the contract-breaker with such special and peculiar loss. If, however, there are no "special and extraordinary circumstances beyond the reasonable prevision of the parties" (see the speech of Lord Wright in *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (A/B)* [51] then it becomes very largely a question of C fact as to whether in any particular case a loss can "fairly and reasonably" be considered as arising in the normal course of things. Though in these days commercial cases are not tried with juries, in his speech in the *Monarch Steamship* case [52] Lord du Parcq pointed out that in the end what has to be decided is a question of fact and therefore a question proper for a jury D and he added [52]:

> "Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality, and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or perhaps an inadequate, liability on a defendant. The court must be careful, however, E to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them."

If this approach is followed then I doubt whether the necessity arises to express a preference or any definite preference as between F words and phrases that were submitted for your Lordships' consideration. The result in any particular case need not depend upon giving pride of place to any one of such phrases as "liable to result" or "likely to result" or "not unlikely to result." Each one of these phrases may be of help but so may many others.

G In *Smeed* v. *Foord* [53] in 1859 Crompton J. referred in his judgment to the doctrine of *Hadley* v. *Baxendale*,[54] and said [55]:

> "The second branch of the rule there laid down appears to me to come to much the same thing as the first: for damages

[50] 9 Exch. 341.
[51] [1949] A.C. 196, 221.
[52] Ibid. 232.
[53] (1859) 1 E. & E. 602, 616.
[54] 9 Exch. 341.
[55] 1 E. & E. 602, 616.

which may reasonably be supposed to have been contemplated by the contracting parties, are damages which naturally arise from a breach of the contract. I doubt whether, in these cases, it is the duty of a judge to lay down more to the jury than that the plaintiff is entitled to such damages as are the natural consequences of the breach of contract. The question, what are such natural consequences is, I think, in each case, rather for the jury than for the judge; just as it is for them, not for him, to assess the amount of damages."

Somewhat comparable language was used in 1868 by Bovill C.J. in his judgment in *British Columbia Saw Mill Co.* v. *Nettleship*,[56] when he said:

> "The extent of carrier's liability is to be governed by the contract he has entered into, and the obligations which the law imposes upon him. He is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time of entering into the contract. It must be something which could have been foreseen and reasonably expected, and to which he has assented expressly or impliedly by entering into the contract."

In his speech in the *Monarch Steamship* case[57] Lord Porter refers to what "could reasonably have been foreseen" and to what "a shipowner ought to have foreseen" as "likely to occur." Later he spoke[58] of what a shipowner "ought reasonably to have contemplated." Lord Wright in the same case[59] refers to cases where "it would not be fair or reasonable to hold the defendant responsible for losses which he could not be taken to contemplate as likely to result from his breach of contract." Lord Wright pointed out that the court will assume that the parties, as business men, will have all reasonable acquaintance with the ordinary course of business, and he spoke[60] of what "reasonable business men must be taken to have contemplated as the natural or probable result if the contract was broken." Lord Uthwatt in his speech[61] referred to what a reasonable shipowner ought reasonably to have foreseen: he would in the circumstances of that case have regarded[62] the chance of war "not as a possibility of academic interest to the venture, but as furnishing matter which commercially ought to be taken into account." Lord du Parcq said[63]:

> "Damage arises 'according to the usual course of things' if, in the circumstances existing at the date of the contract,

[56] (1868) L.R. 3 C.P. 499, 505.
[57] [1949] A.C. 196, 214.
[58] Ibid. 215.
[59] Ibid. 221.
[60] Ibid. 224.
[61] Ibid. 231.
[62] Ibid. 232.
[63] Ibid. 233.

A both parties to it, supposing them to have considered the probable effects of a breach of the contract, with due regard to events which might reasonably be expected to occur, must be assumed as reasonable men to have foreseen such damage as at least a serious possibility."

Furthermore, in reference to the facts in that case, Lord du Parcq said [64]:

B "In order that the respondents might succeed in establishing their case, it was not necessary, in my opinion, that the parties to the contract should be shown to have contemplated the outbreak of war as something certain and unavoidable. They are not to be supposed to have had the gift of prophecy. It is enough if they may reasonably be assumed to have C contemplated a war, and the likelihood that it would lead to such an embargo as was in fact imposed, as a real danger which must be taken into account."

My Lords, the words, phrases and passages to which I have referred are useful and helpful indications of the application of the rule in *Hadley* v. *Baxendale*.[65] But they neither add to the D rule nor do they modify it. I regard the illuminating judgment of the Court of Appeal in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[66] as a most valuable analysis of the rule. It was there pointed out [67] that in order to make a contract-breaker liable under what was called "either rule" in *Hadley* v. *Baxendale* [68] it is not necessary that he should actually have E asked himself what loss is liable to result from a breach but that it suffices that if he had considered the question he would as a reasonable man have concluded that the loss in question was liable to result. Nor need it be proved, in order to recover a particular loss, that upon a given state of knowledge he could, as a reasonable man, foresee that a breach must necessarily result in that F loss. Certain illustrative phrases are employed in that case. They are valuable by way of exposition but for my part I doubt whether the phrase "on the cards" has a sufficiently clear meaning or possesses such a comparable shade of meaning as to qualify it to take its place with the various other phrases which line up as expositions of the rule.

G If the problem in the present case is that of relating accepted principle to the facts which have been found, I entertain no doubt that if at the time of their contract the parties had considered what the consequence would be if the arrival of the ship

[64] [1949] A.C. 233, 234.
[65] 9 Exch. 341.
[66] [1949] 2 K.B. 528.
[67] Ibid. 540.
[68] 9 Exch. 341.

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at Basrah was delayed they would have contemplated that some loss to the respondents was likely or was liable to result. The appellant at the time that he made his contract must have known that if in breach of contract his ship did not arrive at Basrah when it ought to arrive he would be liable to pay damages. He would not know that a loss to the respondents was certain or inevitable but he must, as a reasonable business man, have contemplated that the respondents would very likely suffer loss, and that it would be or would be likely to be a loss referable to market price fluctuations at Basrah. I cannot think that he should escape liability by saying that he would only be aware of a possibility of loss but not of a probability or certainty of it. He might have used any one of many phrases. He might have said that a loss would be likely: or that a loss would not be unlikely: or that a loss was liable to result: or that the risk that delay would cause loss to the respondents was a serious possibility: or that there would be a real danger of a loss: or that the risk of his being liable to have to pay for the loss was one that he ought commercially to take into account. As a practical business man he would not have paused to reflect on the possible nuances of meaning of any one of these phrases. Nor would he have sent for a dictionary.

The carriage of sugar from the Black Sea to Iraqi ports (including Basrah) is a recognised trade. The appellant knew that there was a sugar market at Basrah. When he contracted with the respondents to carry their sugar to Basrah, though he did not know what were the actual plans of the respondent, he had all the information to enable him to appreciate that a delay in arrival might in the ordinary course of things result in their suffering some loss. He must have known that the price in a market may fluctuate. He must have known that if a price goes down someone whose goods are late in arrival may be caused loss.

Since in awarding damages the aim is to award a sum which as nearly as possible will put the injured party into the position in which he would have been if the breach of contract had not caused him loss and if in all the circumstances he had acted reasonably in an effort to mitigate his loss, I think that it must follow that, where there is delay in arrival, in many cases the actual loss suffered (above the amount of which there ought not to be recovery) can be measured by comparing the market price of the goods at the date when they should have arrived and the market price when they did arrive. That prima facie is the measure of the damages.

I can see no fault, therefore, in the assessment of the damages in the present case unless there is some rule of law that in the case of carriage of goods by sea damages for delay in arrival will ordinarily be limited to interest on the value of goods over the period of their delay. It is said that such a rule underlies the decision in *The Parana*.[69] In reference to the suggestion that there is a special rule limiting damages for delay in delivery in the case of carriage of goods by sea Lord Porter in his speech in the *Monarch Steamship* case [70] said:

> "No doubt expressions of opinions to that effect are to be found, perhaps more frequently in the days of sailing ships when prolonged delay was to be expected, but it never was a rule of law—merely a working practice answering to the circumstances of the time and subject to the consideration that the contract must be reasonably performed."

The Parana [71] (which was decided in 1877) was a case in which, owing to the weakness and defective state of her engines, a ship took 127 days on a voyage from Manila and Ilo-Ilo to London for which a period of 65 or 70 days was said to be a fair average time. As a result an assignee of bills of lading of certain goods on the ship claimed to recover damages resulting from unreasonable delay in the carriage of goods. The owner of the ship admitted liability and what was in issue was the amount of the damages. As to one portion of the cargo damages were given for a deterioration in quality due to delay. As to another portion of the cargo the claim was for the difference between the market price at the time when the goods arrived and at the time when they ought to have arrived. As to that part of the claim the registrar, who was directed to report upon the amount of damages, considered that the court should refuse to entertain any claim for loss of market in such cases. In his report (see *The Parana* [72]) he said that the practice of the Court of Admiralty should be followed which was merely to allow a sum representing loss of interest for the period of delay on the capital value of the cargo. One reason given was that the loss of market "could not by any possibility have been within the contemplation of the parties" when the cargo was put on board at Manila. He appeared to think that a fall in the price of the goods could not have been in the contemplation of the parties when the contract was made because for aught they knew the price might have risen.

[69] 2 P.D. 118.
[70] [1949] A.C. 196, 219.
[71] 2 P.D. 118.
[72] (1876) 1 P.D. 452, 460.

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On appeal, in objection to the report of the registrar, it was held by Sir Robert Phillimore that the registrar ought to have included in the damages the difference between the market price of the cargo at the time when it was delivered and at the time when it ought to have been delivered. He said [73]:

> "Why should not the ascertained difference between the market price, when the goods might have been sold, had there been no delay, and the market price which they would fetch after the delay, be a reasonable measure of the loss of the merchant's profits? The depreciation is the direct consequence of the carrier's default; in other words, he must be taken to have known or contemplated that the merchant desired a safe and a quick transport of his marketable goods to their intended market."

On appeal to the Court of Appeal [74] the judgment was reversed, though the principle was accepted that if circumstances are known to the carrier from which the object of the sender 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. Mellish L.J. in his judgment [75] pointed to differences between cases where there was delay by carriers on land and cases of "carriage of goods for a long distance by sea." My Lords, I confess that the differences do not seem to me to be differences in principle. Mellish L.J. considered that there was an uncertainty as to whether the plaintiff was affected by the delay in arrival of the goods. Pointing to the circumstance that the plaintiff did not sell the goods on arrival, Mellish L.J. considered [76] that he might have acted in the same way if the goods had arrived in time—with the result that the delay did not affect the plaintiff and to give him damages would be to give him speculative damages. So far as principle is concerned I prefer the judgment of Sir Robert Phillimore. It is to be remembered, however, that Mellish L.J. accepted as applicable to carriage of goods by sea both the language used in *Simpson* v. *London & North Western Railway Co.*[77] (as cited by Sir Robert Phillimore [78]) and also the language of the Lord Chief Baron in *Horne* v. *Midland Railway Co.*[79] The language used by the Lord Chief Baron in *Horne's* case [79] was the language of *Hadley* v. *Baxendale.*[80] In principle it seems to me that the rule in *Hadley* v. *Baxendale* [80] must in these days

[73] 1 P.D. 464, 465.
[74] 2 P.D. 118.
[75] 2 P.D. 123.
[76] Ibid. 124.
[77] (1876) 1 Q.B.D. 274, 277.
[78] 1 P.D. 452, 463.
[79] (1873) L.R. 8 C.P. 131, 137.
[80] 9 Exch. 341.

be applied in cases of carriage of goods by sea. If the parties for some particular reason have contracted on the basis that there is no obligation to proceed normally to a destination, then delay would not constitute a breach. If, however, there is delay which amounts to a breach of contract I see no reason for adopting some special formula in the assessment of damages (such as giving interest on the capital value of the goods carried) or for any artificial divergence from the principles that govern the assessment of damages.

In *The Notting Hill*,[81] which was decided in 1884, Sir J. Hannen [82] expressed disagreement with the decision in *The Parana* [83] but reluctantly felt that he was bound by it. The Court of Appeal agreed that it was an authority binding on them. Brett M.R.[84] did not wish to say that, had it been for him to decide the case, he would have decided it differently.

In *Dunn* v. *Bucknall Brothers* [85] it was known to the defendants that the reason why the plaintiffs had shipped goods (on the ship of which the defendants were charterers) for carriage to Algoa Bay was so that the goods should be supplied to British troops in South Africa and the defendants knew that the goods would sell at a much higher price if delivered in due course than if delivered at a later time when a large importation of similar goods would force prices down. For a breach of duty which resulted in the delayed arrival of the goods the defendants were held liable in damages. It was contended in the Court of Appeal that damages for loss of market are not recoverable in the case of delay in carriage by sea and that a shipper is only entitled to interest on the value of the goods from the date when they should have been delivered down to the date of actual delivery. The contention was held to be ill-founded and Collins M.R., giving the judgment of the court consisting of himself, Stirling L.J. and Cozens-Hardy L.J., said that they did not understand *The Parana* [86] as establishing any such general proposition as that damages could not be recovered for loss of market on a voyage by sea. He said [87]:

> "There can be no absolute peremptory rule taking voyages by sea out of the principles which regulate the measure of damages on breach of other contracts. It is only because the possible length of voyages, and the consequent uncertainty as

[81] (1884) 9 P.D. 105, C.A.
[82] Ibid. 110, 111.
[83] 2 P.D. 118.
[84] 9 P.D. 105, 113, 114.
[85] [1902] 2 K.B. 614.
[86] 2 P.D. 118.
[87] [1902] 2 K.B. 614, 622.

to the times of arrival, may in many cases eliminate the supposition of any reasonable expectation as to the state of the market at the time of arrival that as a general rule damages for loss of market by late delivery are not recoverable from the carrier by sea. It is certainly not a rule of law, it is only an inference of fact, that from the circumstances of the case no reasonable assumption as to the state of the market at the time of arrival could have been a factor in the contract between the parties."

He proceeded to point out [88] that as the means of sea transit improved then voyages of three or four weeks duration could be accomplished with almost absolute certainty and furthermore that the state of the market at such reasonably calculated date of arrival could well be "a vital factor present to the minds of both parties at the time of making the contract." He then added [88]:

> "Wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea as of a land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases."

On the facts of that case it was known to the defendants that the goods would sell at a much higher price if duly delivered than if tardily delivered and the words I have quoted were uttered in that context. I do not consider, however, that where in breach of contract there is delay in delivery, damages will only be recoverable if there can be a calculation in advance of the precise financial consequences that delay will cause. If there can be such a calculation then the carrier would know at the time of his contract of carriage exactly what the effect would be if by delaying delivery he broke his contract. But I cannot think that he should be partially exonerated merely by the circumstance that he could not calculate in advance the extent of the damage that he would cause if he broke his contract. With the knowledge possessed by the appellant in the present case, if, at the time of the contract, he had considered what the consequences would be if, in breach of contract, he delayed the delivery of the goods he was carrying, he must at least have contemplated that there might well be market fluctuations as between the due date of delivery and the actual date of delivery. If by the actual date of delivery the market price had advanced he might be freed of any serious liability. But he must have contemplated that if the market went

[88] [1902] 2 K.B. 614, 623.

A the other way he would be causing loss. In running the risk of causing that loss it would not be reasonable to exonerate him merely because in advance the measure of the loss could not be calculated.

In *R. & H. Hall Ltd.* v. *W. H. Pim (Junior) & Co. Ltd.*[89] there was a failure by sellers to deliver goods to buyers: there B had been a sub-sale by the buyers and then a further sub-sale. The buyers were held entitled to recover both their loss of profit and also to recover the damages that they would have to pay to their sub-purchaser. It was a case where the parties had actually provided for the very case of sub-sales. Non-performance of the contract would therefore be known beforehand by both C parties to be non-performance of a contract in which intermediate sale might take place. A question was raised as to whether the parties would have considered all the damage to be probable. Lord Shaw of Dunfermline said[90]:

> "To what extent in a contract of goods for future delivery the extent of damages is in contemplation of parties is always D extremely doubtful. The main business fact is that they are thinking of the contract being performed and not of its being not performed. But with regard to the latter if their contract shows that there were instances or stages which made ensuing losses or damage a not unlikely result of the breach of the contract, then all such results must be reckoned to be within not only the scope of the contract, but the contemplation of E parties as to its breach."

Further Lord Shaw said[91] that he did not think—

> "that in such a contract people come to contemplate with any exactitude the particular probable results which would follow from a breach; say, that there would be a probable chance of reselling at a profit or that the chance of that would F be even with their not selling at a profit. What the parties to a contract such as this do is not to estimate that the chances will be one way or the other or will have this amount of probability or the other, but simply to contemplate that trade chances are not unlikely to occur, and to make a contract to cover such chances if any."

G In the same case Lord Phillimore referred[92] to damages "which naturally flow" from a breach of contract and to damages which "the law superadds in appropriate cases" being "those damages which, though they do not always or even usually flow from the breach of contract, are, at the time of making the contract,

[89] 33 Com.Cas. 324.
[90] Ibid. 333.
[91] Ibid. 335, 336.
[92] Ibid. 336.

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recognised by the parties as those which in the particular case may result from a breach." He added [92]:

> "These are called damages in the contemplation of the parties, not because the parties contemplate a breach of contract, but because they recognise that a breach is possible, and they reckon that these damages may flow from that breach. I designedly use the word 'may.' There may be cases where the word to be used might be 'will,' but there are also cases, and more common cases, where the word to use is 'may.'"

Though that case was one in which the parties had made express provisions in regard to sub-sales with the result that they must have "recognised" that a purchaser might have to pay damages to his sub-purchaser if the vendor failed to deliver, the expressions used in the speeches illustrate that damages could be recoverable in respect of a loss which might occur or which the parties could contemplate as not unlikely to occur. The present case is one in which no special information was given to the carrier as to what the respondents intended to do with the goods after they arrived at Basrah. In those circumstances in deciding what damages would fairly and reasonably be regarded as arising if the delivery of the goods was delayed I think that the reasonable contemplation of a reasonable shipowner at the time of the making of the charterparty must be considered. I think that such a shipowner must reasonably have contemplated that if he delivered the sugar at Basrah some nine or ten days later than he could and should have delivered it then a loss by reason of a fall in the market price of sugar at Basrah was one that was liable to result or at least was not unlikely to result. This results from the facts of this case. It is a question of what the parties contemplated. Even without notice of special circumstances or special considerations there may be situations where it is plain that there was a common contemplation. In his dissenting judgment in *The Arpad* [93] Scrutton L.J. said:

> "I am inclined to think that in contracts of carriage from wheat-producing districts, it is always so probable that the shipper is sending for resale, or for sale to a person who will resell, that the carrier will be liable if there is no market, for the effect on a contract of sale of his conversion or unjustifiable failure to deliver."

Whether this be so or not the appellant in the present case must at least have appreciated that the respondents wanted to have the

[92] 33 Com.Cas. 336.

[93] [1934] P. 189, 203, C.A.

goods at Basrah at the date when they should have been delivered there. What could clearly be foreseen was that the respondents would be without their goods at the place where, and on the date when, they were entitled to expect to have them. Had there not been delivery at all the damages would have been measured by relation to the market price of the goods at the date when they should have been delivered. In such an eventuality the respondents would have been entitled to acquire goods to replace those which, either by reason of their having been lost or for some other reason, were not delivered. By a parity of reasoning since the parties had not contracted on the basis that the appellant could deliver as and when he liked but on the basis that he should proceed at all convenient speed and so should deliver on the date that could with reasonable accuracy be predicted, the respondents would be entitled, if it were necessary, to acquire goods to replace those which had not arrived. If when the goods later arrived the market price had advanced the respondents would suffer no loss: if the market price had declined they would suffer loss. If they actually suffered loss it would prima facie be measured as the difference between the market price at the date when the goods should have been delivered and the market price at the date when they were delivered.

I would dismiss the appeal.

LORD HODSON. My Lords, the broad question which arises on the appeal is what is the correct measure of damages for wrongful delay by a shipowner in the performance of a contract for the carriage of goods by sea.

The respondents contend that the ordinary measure of damages for delay in delivery of goods for which there is a market is the difference between the market value of the goods at their destination on the date when they arrive, and the value at the date when they should have arrived if there had been no breach of contract. The loss so measured is one which arises naturally according to the usual course of things. This right to recover does not depend on any special knowledge of the party in breach. It applies to contracts of carriage by sea and by land in all ordinary cases.

The appellant contends, on the other hand, that except in special circumstances, which are not to be found in this case, the measure of damages is limited to the interest on the value of the goods during the period of delay.

In these circumstances the appellant admitted liability for £172 consisting of £12 10s. 0d. (cable expenses) and £159 9s. 6d.

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(interest at 6 per cent. per annum on the full value of the cargo during the period of the delay) upon the facts found and stated in the special case.

The umpire awarded the charterers, in addition to the above sum of £172, £4,010 16s. 8d. in respect of the fall in value of the goods during the delay. McNair J. on questions of law being submitted for the decision of the court as to (inter alia) the correct measure of damages held that the umpire was wrong in law and that the respondents were entitled only to the admitted sum of £172, made up in the main of interest charges.

The Court of Appeal, Diplock and Salmon L.JJ. (Sellers L.J. dissenting), restored the umpire's award.

The ultimate question for decision is whether, as a matter of law, contracts for the carriage of goods by sea are in a special class, having regard to the intrinsic differences there are between such contracts and contracts for the carriage of goods by land. For example, in the former class, it is pointed out that goods may be sold before shipment or during the voyage or intended for the purposes of stocking or consumption at the port of destination and that the contemplation of the parties that the goods may be resold by the charterer at the port of destination is not necessarily to be inferred. In addition it is urged that ocean voyages are liable to be affected by weather, by congestion at loading and discharging ports and similar factors which account for a different treatment being given to cases of carriage of goods by sea.

There is on the face of it no reason why the charterer should not be entitled to the value of that of which he has been deprived by the breach of contract independently of his intention to sell again and sale during the voyage or before the shipment is in any case irrelevant since the purchaser would stand in the charterer's shoes. There is nothing speculative about the claim and what the charterer does with the goods should not make any difference. This should apply to contracts of carriage by land or sea.

Consideration of sea and weather conditions has been thought to be the basis of the decision in *The Parana*.[94] This appears from the judgment of Sir Richard Henn Collins M.R. in *Dunn* v. *Bucknall Brothers*.[95] The uncertainties of the *Parana's* voyage were so great, said the Master of the Rolls in *Dunn* v. *Bucknall*,[96] that the parties could not be said to have contracted on the footing

[94] 2 P.D. 118.
[95] [1902] 2 K.B. 614.
[96] Ibid. 623.

A that the goods would arrive at any particular moment. The head-note to *Dunn* v. *Bucknall*,[97] however, concisely states as a summary of the judgment that there is no rule of law that damages cannot be recovered for loss of market on a contract of carriage by sea. This, I think, was really accepted by the appellant and also in the main by McNair J. although Sellers L.J. went so far B as to say that it was desirable in establishing a basis for damages to avoid fortuitous elements unless the parties have already contracted that the chance change of market price should fall on the shipowner if it happened to be less and not equal to or more than the price which could have been obtained without a breach of contract.

C That was in substance the position taken up by the appellant before your Lordships. He accepted the established authority of the judgment in *Hadley* v. *Baxendale*.[98] The case concerned a broken crankshaft delivered to common carriers to be sent to engineers for repair. There was a delay of five days in delivery and the issue was as to the measure of damages for breach of D contract. In the judgment of the court, which consisted of Parke, Martin and Alderson BB., it was said [99]:

> "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 such as may fairly and reasonably be considered either arising E 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."

The phrases beginning "either" and "or" are commonly said to F divide the rule laid down by the court into two parts, the one arising "according to the usual course of things" and the other relating to special circumstances in which the contract was made.

The appellant argued that the fluctuations of market due to unforeseen and unpredictable causes during the period of delay are not of themselves "according to the usual course of things." G He argued that there were no facts here to bring the second part of the rule into operation, and in this I agree with him, for no special notice was given. Hence he said that damages for loss of market are not recoverable and that these damages could only be recovered in special cases covered by the second part of the rule.

[97] [1902] 2 K.B. 614.
[98] 9 Exch. 341.
[99] Ibid. 354.

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The word "probable" in *Hadley* v. *Baxendale* [100] covers both parts of the rule and it is of vital importance in applying the rule to consider what the court meant by using this word in its context. The common use of this word is no doubt to imply that something is more likely to happen than not. In conversation, if one says to another "If you go out in this weather you will probably catch a cold" this is, I think, equivalent to saying that one believes there is an odds-on chance that the other will catch a cold.

The word "probable" need not, however, bear this narrow meaning. In *R. & H. Hall Ltd.* v. *W. H. Pim (Junior) & Co. Ltd.*,[101] Viscount Dunedin, after stating his belief in a general agreement that the law as to calculation of damages, due under breach of a contract, was settled by the case of *Hadley* v. *Baxendale*,[102] said that the difficulty lies in the application to the facts of each case.

The instant case furnishes an example of this difficulty. Assistance is to be gained from some of the expressions used in *Hall* v. *Pim* [103] which concerned a loss of profit on resale. On failure by sellers to deliver goods to buyers, the buyers were held entitled to recover the damages they would have to pay to a sub-purchaser. Lord Dunedin [104] thought it was enough that there was an even chance of a resale happening. Lord Shaw of Dunfermline [105] thought it not unlikely that a resale would take place and Lord Phillimore [106] that the parties contemplated that a resale may take place.

In the *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (A/B)* [107] Lord du Parcq used in applying the first part of the rule in *Hadley* v. *Baxendale* [108] the words "serious possibility" and "real danger" while Lord Morton of Henryton [109] spoke of "grave risk."

A close study of the rule was made by the Court of Appeal in the case of the *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[110] The judgment of the court, consisting of Tucker, Asquith and Singleton L.JJ., was delivered by Asquith L.J., who referred to the *Monarch Steamship* case [111] and suggested the phrase "liable to result" as appropriate to describe the degree of probability required. This may be a colourless expression but

[100] 9 Exch. 341.
[101] 33 Com.Cas. 324, 328.
[102] 9 Exch. 341.
[103] 33 Com.Cas. 324.
[104] Ibid. 330.
[105] Ibid. 335.
[106] 33 Com.Cas. 336.
[107] [1949] A.C. 196, 233.
[108] 9 Exch. 341.
[109] [1949] A.C. 196, 235.
[110] [1949] 2 K.B. 528, 540.
[111] [1949] A.C. 196.

I do not find it possible to improve on it. If the word "likelihood" is used it may convey the impression that the chances are all in favour of the thing happening, an idea which I would reject.

I find guidance in the use of the expression "in the great multitude of cases" which is to be found in more than one place in the judgment in *Hadley* v. *Baxendale* [112] and indicates that the damages recoverable for breach of contract are such as flow naturally in most cases from the breach, whether under ordinary circumstances or from special circumstances due to the knowledge either in the possession of or communicated to the defendants. This expression throws light on the whole field of damages for breach of contract and points to a different approach from that taken in tort cases.

True that where the facts are the same in two cases the damages will no doubt be the same whether the claim is made in contract or in tort; compare *The Notting Hill* [113] where although the claim was in tort the Court of Appeal in a case like *The Parana* [114] followed the later decision.

The approach in tort will, however, normally be different simply because the relationship of the parties is different. The claim against the tortfeasor who has inflicted tortious damage is not the same as the claim against an opposite party for breach of contract for the latter claim depends on the contemplation of the parties to the contract and questions of remoteness as such do not arise. Consequently liability in tort may often be of a wider kind. The observations of Willes J. in *Horne* v. *Midland Railway Co.*[115] state the distinction in clear language in the passage cited by my noble and learned friend Lord Reid [116] and I agree that this passage is to be preferred to the opinion sometimes expressed that the measure of damages is the same in tort as it is in contract.

It seems that Mellish L.J. in *The Parana* [117] took a different view of the rule in *Hadley* v. *Baxendale* [118] when he said:

> "In order that damages may be recovered, we must come to two conclusions—first, that it was reasonably certain that the goods would not be sold until they did arrive; and, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier at the time when the bills of lading were signed."

[112] 9 Exch. 341.
[113] 9 P.D. 105.
[114] 2 P.D. 118.
[115] L.R. 7 C.P. 583, 590.
[116] Ante, p. 386D–E.
[117] 2 P.D. 118, 123.
[118] 9 Exch. 341.

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With respect to the Lord Justice this is putting the test too high. The conclusion reached on the facts of the case in *The Parana* [119] need not, however, be criticised because the voyage took about twice as long as might have been expected and no reasonably accurate prediction of the length of the voyage could be expected. He did, however, make use of the general observations which have no doubt been treated as laying down a practice to be followed.

In reaching the conclusion that the registrar and merchants were right in their report he stated [120]:

> "They said that it had never been the practice in the Court of Admiralty to give such damages, and though it constantly happened that by accidents such as collisions goods were delayed in their arrival, it never had been the custom to include in the damages the loss of market; and we are of opinion that the conclusion which the registrar and merchants came to was right."

This decision [121] has been treated as authoritative by text writers in this country and has never been overruled but the rule of practice which it purports to lay down is not followed universally and is insecurely based.

In the United States of America it seems that the courts have never followed the principle of assessment of damages laid down in *The Parana*.[121] Salmon L.J. has pointed out [122] that in the Corpus Juris Secundum (1953), vol. 80, p. 930, para. 124, it is stated that

> "in the ordinary case of deviation and delay, the measure of damages is the difference in the market value of the goods at the time when actually delivered and when they should have been delivered. . . ."

In the case of the *United States* v. *Middleton* [123] and in other cases in the United States of America this position has been accepted.

It would, I think, be unfortunate if the law as to the measure of damages based on the decision in *Hadley* v. *Baxendale* [124] in the two countries should be held to have developed on different lines and I am glad to find that in my opinion it has not in truth done so.

I have not dealt in detail with the facts of the instant case. These have been sufficiently set out in the opinion of my noble and learned friend Lord Reid. I need only say that I agree with

[119] 2 P.D. 118.
[120] Ibid. 124.
[121] 2 P.D. 118.
[122] [1966] 2 Q.B. 695, 745.
[123] (1924) 3 Fed.Rep.(2d) 384.
[124] 9 Exch. 341.

A the majority of the Court of Appeal that, on the correct application of the decision in *Hadley* v. *Baxendale* [124] to the facts stated in the special case, although no special circumstances bring the second rule in *Hadley* v. *Baxendale* [124] into operation, the appellant is liable in damages for breach of contract in the larger sum awarded, viz. £4,188 10s. 8d., a sum which includes damages for B loss of market which in this case arise "according to the ordinary course of things."

I do not find it necessary to say that the decision in *The Parana* [125] was wrong on the facts. Somehow or other from the language used in the judgment it appears to have been elevated to a pronouncement on legal principle which is not sustainable.

C Lastly there is, in my opinion, no need to enter into the difficult question whether there may be differences between cases of non-delivery by carriers and cases of delay by them. Certain decisions upon this topic have been criticised and I express no opinion about them.

I would dismiss the appeal.

D

LORD PEARCE. My Lords, in *Hadley* v. *Baxendale* [126] the court attempted to clarify and define the boundaries of damages in contract. In the *Wagon Mound* [127] the Privy Council attempted a similar task with regard to damages in tort. In the present case (as in the *Wagon Mound* (*No.* 2) (reported as *Overseas Tankship* E (*U.K.*) *Ltd.* v. *Miller Steamship Co. Pty. Ltd.*[128])) it was suggested in argument that there was or should be one principle of damages for both contract and tort and that guidance for one could be obtained from the other. I do not find such a comparison helpful. In the case of contract two parties, usually with some knowledge of one another, deliberately undertake mutual duties. F They have the opportunity to define clearly in respect of what they shall and shall not be liable. The law has to say what shall be the boundaries of their liability where this is not expressed, defining that boundary in relation to what has been expressed and implied. In tort two persons, usually unknown to one another, find that the acts or utterances of one have collided with the rights G of the other, and the court has to define what is the liability for the ensuing damage, whether it shall be shared, and how far it extends. If one tries to find a concept of damages which will fit both these different problems there is a danger of distorting the

[124] 9 Exch. 341.
[125] 2 P.D. 118.
[126] 9 Exch. 341.
[127] [1961] A.C. 388.
[128] [1967] A.C. 617.

rules to accommodate one or the other and of producing a rule that is satisfactory for neither. The problems certainly have one thing in common. In both the use of words with differing shades of meaning in the various cases makes it hard to discern with exactitude where the boundaries lie. See *Wagon Mound (No. 2)*.[128]

The underlying rule of the common law is that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed" (Parke B. in *Robinson* v. *Harman*[129]). But since so wide a principle might be too harsh on a contract-breaker in making him liable for a chain of unforeseen and fortuitous circumstances, the law limited the liability in ways which crystallised in the rule in *Hadley* v. *Baxendale*.[130] This was designed as a direction to juries but it has become an integral part of the law.

Since an Olympian cloud shrouded any doubts, difficulties and border-line troubles that might arise in the jury room and the jury could use a common sense liberality in applying the rule to the facts, the rule worked admirably as a general guidance for deciding facts. But when the lucubrations of judges who have to give reasons superseded the reticence of juries, there were certain matters which needed clarification. That service was well performed by the judgment of the Court of Appeal in the case of *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[131] I do not think that there was anything startling or novel about it. In my opinion it represented (in felicitous language) the approximate view of *Hadley* v. *Baxendale*[132] taken by many judges in trying ordinary cases of breach of contract.

It is argued that it was an erroneous departure from *Hadley* v. *Baxendale*[132] in that it allowed damages where the loss was "a serious possibility" or "a real danger" instead of maintaining that the loss must be "probable," in the sense that it was more likely to result than not. But, over twenty years before, in *R. & H. Hall Ltd.* v. *W. H. Pim (Junior) & Co. Ltd.*[133] Viscount Dunedin had said that it was enough if there was an even chance of the loss happening. Lord Shaw of Dunfermline said[134] that the two parts of the rule need not be antithetically treated but might run into each other and be one; and he read[135] "probable" as meaning a "not unlikely" result. Lord Phillimore said[136]:

[128] [1967] A.C. 617.
[129] (1848) 1 Exch. 850, 855.
[130] 9 Exch. 341.
[131] [1949] 2 K.B. 528.
[132] 9 Exch. 341.
[133] 33 Com.Cas. 324, 330.
[134] Ibid. 334.
[135] Ibid. 335.
[136] Ibid. 336.

> " [They] are called damages in the contemplation of the parties, not because the parties contemplate a breach of contract, but because they recognise that a breach is possible, and they reckon that these damages may flow from that breach. I designedly use the word 'may.' There may be cases where the word to be used might be 'will,' but there are also cases, and more common cases, where the word to use is 'may.' "

Lord Blanesburgh expressed [137] agreement with the others, and presumably did not dissent from the views set out above. Viscount Haldane [138] dealt with the matter as one of construction: " Whether such a resale was likely or not does not matter if, as I think, the buyers stipulated for power to make it being provided."

I believe that even at that date those observations would not be regarded as novel. And the fact that the case was not included in the Law Reports may be some slight confirmation of this belief. Inevitably there is some evolution of thought in such matters, and such as there was tended in the direction of taking a wider view of probability. In 1948 in *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (A/B)*,[139] a case of damages for delay in carriage by sea, Lord du Parcq [140] used the words " at least a serious possibility " and " a real danger which must be taken into account." Lord Uthwatt [141] spoke of " the chance of war, not as a possibility of academic interest . . . but as furnishing matter which commercially ought to be taken into account." And Lord Morton of Henryton [142] spoke of " a grave risk."

Accordingly in my opinion the expressions used in the *Victoria Laundry* case [143] were right. I do not however accept the colloquialism " on the cards " as being a useful test because I am not sure just what nuance it has either in my own personal vocabulary or in that of others. I suspect that it owes its attraction, like many other colloquialisms, to the fact that one may utter it without having the trouble of really thinking out with precision what one means oneself or what others will understand by it, a spurious attraction which in general makes colloquialism unsuitable for definition, though it is often useful as shorthand for a collection of definable ideas. It was in this latter convenient sense that the judgment uses the ambiguous words " liable to result." They were not intended as a further or different test from " serious possibility " or " real danger."

The whole rule in *Hadley* v. *Baxendale* [144] limits damages to

[137] 33 Com.Cas. 345.
[138] Ibid. 327.
[139] [1949] A.C. 196.
[140] Ibid. 233.
[141] Ibid. 232.
[142] Ibid. 235.
[143] [1949] 2 K.B. 528.
[144] 9 Exch. 341.

that which may be regarded as being within the contemplation of the parties. The first part deals with those things that "may fairly and reasonably be considered as arising naturally, i.e. according to the usual course of things." Those are presumed to be within the contemplation of the parties. As Lord Wright said in the case of the *Monarch Steamship* [145]:

> "As reasonable business men each must be taken to understand the ordinary practices and exigencies of the other's trade or business. That need not generally be the subject of special discussion or communication."

After referring to the *Banco de Portugal* case [146] he continued [147]:

> "Both parties were tacitly taken to be acquainted sufficiently with the general business position. The same is true in many cases of complicated consequences flowing from an unanticipated breach of contract, but the damages are not treated either as special or remote if they flow from the normal business position of the parties which the court assumes must be reasonably known to them. It would not be helpful to cite the familiar authorities which are numerous but depend primarily upon the facts of each case."

Even the first part of the rule however contains the necessity for the knowledge of certain basic facts, e.g. in *Hadley* v. *Baxendale* [148] the fact that it was a mill shaft to be carried. On this limited basis of knowledge the horizon of contemplation is confined to things "arising naturally, i.e. according to the usual course of things."

Additional or "special" knowledge, however, may extend the horizon to include losses that are outside the natural course of events. And of course the extension of the horizon need not always *increase* the damages; it might introduce a knowledge of particular circumstances, e.g., a subcontract, which show that the plaintiff would in fact suffer *less* damage than a more limited view of the circumstances might lead one to expect. According to whether one categorises a fact as basic knowledge or special knowledge the case may come under the first part of the rule or the second. For that reason there is sometimes difference of opinion as to which is the part which governs a particular case and it may be that both parts govern it.

I do not think that Alderson B. was directing his mind to whether something resulting in the natural course of events was an odds-on chance or not. A thing may be a natural (or even

[145] [1949] A.C. 196, 224.
[146] [1932] A.C. 452, H.L.
[147] [1949] A.C. 196, 224, 225.
[148] 9 Exch. 341.

A an obvious) result even though the odds are against it. Suppose a contractor was employed to repair the ceiling of one of the Law Courts and did it so negligently that it collapsed on the heads of those in court. I should be inclined to think that any tribunal (including the learned baron himself) would have found as a fact that the damage arose "naturally, i.e., according to the usual B course of things." Yet if one takes into account the nights, week-ends, and vacations, when the ceiling might have collapsed, the odds against it collapsing on top of anybody's head are nearly ten to one. I do not believe that this aspect of the matter was fully considered and worked out in the judgment. He was thinking of causation and type of consequence rather than of odds. C The language of the judgment in the *Victoria Laundry* case [149] was a justifiable and valuable clarification of the principles which *Hadley* v. *Baxendale* [150] was intending to express. Even if it went further than that, it was in my opinion right.

Nor do I consider that the *Victoria Laundry* case [151] is inconsistent with the actual decision on the facts in *Hadley* v. *Baxendale*.[152] D The carriers were asked (without special directions, as the court found) to transport a broken shaft away from a mill. "In the great multitude of cases" (to quote the learned baron's own phrase [153])—one would not expect the whole working of a mill to be stopped by a delay in transportation. The mere absence of urgent instructions spoke strongly against such a contingency. E The fact that the shaft was to be used immediately by engineers for measurements (which one would have rather expected to go on paper by post) for making a new shaft would not, I think, have been in the contemplation of the carriers, on the meagre information available.

The facts of the present case lead to the view that the loss F of market arose naturally, i.e., according to the usual course of things, from the shipowner's deviation. The sugar was being exported to Basrah, where, as the respondents knew, there was a sugar market. It was sold on arrival and fetched a lower price than it would have done had it arrived on time. The fall in market price was not due to any unusual or unpredictable factor.

G Had this been a case of non-delivery on sale of goods whether by sea or land it is uncontested that the defendants would be liable for the loss of market. Had it been a case of delay in sale of goods the prima facie rule is that the damage is the difference

[149] [1949] 2 K.B. 528.
[150] 9 Exch. 341.
[151] [1949] 2 K.B. 528.
[152] 9 Exch. 341.
[153] Ibid. 356.

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between "the value of the article contracted for at the time when it ought to have been and the time when it actually was delivered" (*per* Blackburn J. in *Elbinger Actien-Gesellschaft* v. *Armstrong* [154]). Nor can it really be contended that it would have been otherwise if this had been a case of delayed delivery in carriage by land. For this has been long established by such cases as *Collard* v. *South Eastern Railway Co.*[155]; *Wilson* v. *Lancashire and Yorkshire Railway Co.*[156]; and *Horne* v. *Midland Railway Co.*[157]

It is however argued that different considerations arise in delay in carriage at sea. The decision in *The Parana*,[158] it is said, established a special principle or practice with regard to delay in carriage by sea which should apply to this case and should confine the damages to loss of interest on the value of the goods. The Court of Appeal in *The Parana* [158] appeared to decide largely on the ground that it was not "reasonably certain" that the goods would not be sold until they arrived and that they would be sold as soon as they did arrive. The estimates of the duration of the voyage appear to have varied between 65 days and 90 days; and in fact it took 127 days. And no doubt the chief factor which influenced the court was that the uncertainties of the voyage were so great that the parties could not be said to have contracted on the footing that the goods would arrive at any particular moment. Sir Richard Henn Collins M.R. said this when he dealt with *The Parana* [158] in *Dunn* v. *Bucknall Brothers*.[159] He pointed out that

> "It is certainly not a rule of law, it is only an inference of fact, that from the circumstances of the case no reasonable assumption as to the state of the market at the time of arrival could have been a factor in the contract between the parties."

In the latter case [159] the court did award damages for loss of market. So too in *S.S. Ardennes (Cargo Owners)* v. *S.S. Ardennes (Owners)*.[160]

In the United States the Corpus Juris Secundum (1953) vol. 80, p. 930, para. 124, states that:

> "In the ordinary case of deviation and delay, the measure of damages is the difference in the market value of the goods at the time when actually delivered and when they should have been delivered, with interest."

[154] (1874) L.R. 9 Q.B. 473, 477.
[155] (1861) 7 H. & N. 79.
[156] (1861) 9 C.B.N.S. 632.
[157] L.R. 7 C.P. 583; L.R. 8 C.P. 131.
[158] 2 P.D. 118.
[159] [1902] 2 K.B. 614, 623.
[160] [1951] 1 K.B. 55; [1950] 2 All E.R. 517.

In 1924 in *United States* v. *Middleton*,[161] His Honour Judge Rose of the Federal Court of Appeals said:

> "*The Parana*[162] was decided 47 years ago. It is by no means certain that, even in England, it would now be unhesitatingly followed. . . . Nearly half a century has elapsed since the decision of *The Parana*[162] and more than two decades since that of *Dunn* v. *Bucknall Brothers*.[163] In the meanwhile steam has more and more taken the place of the shifting winds as the motive power upon the sea, with the result that the duration of voyages may now be calculated with at least some approach to certainty, even when they are to the ends of the earth. In these days merchants make their calculations accordingly, and it is not unreasonable to insist that shipowners shall do the like. There would seem to be little injustice in so doing, when it is remembered that they are not answerable at all when they are able to show that the delay was caused by something which due diligence on their part was powerless to prevent."

In *The Parana*[164] (and in the present case) reliance was placed on the fact that in cases of carriage by sea the goods are likely to have been sold in transit while still afloat and that therefore the shippers would not suffer by their late arrival. But, if they were so sold, under the bill of lading the buyer would stand in the shoes of the shipper, would suffer the loss, and would sue in respect of it. This fact makes the contemplation of the loss neither more nor less likely.

In my opinion the line of approach in *Dunn* v. *Bucknall Brothers*[165] and in the United States cases is correct. In most cases the loss of market will be found to be within the contemplation of the parties in carriage of goods by sea. It is however ultimately a question of fact. And it may be that in some unusual cases it will be found that the situation between the parties showed that the shipper was indifferent to the time of arrival and that the parties did *not* contract on the basis that in case of deviation or delay the shipowner should be liable for loss of market. But the absence of an express clause (which could easily be inserted) to that effect will obviously make it hard to establish. I have not dealt with the various particular facts in this case by which Mr. Kerr's able argument seeks to show that these particular parties did not contemplate damage by loss of market. For I agree with the remarks of the majority of the Court of Appeal on this subject.

[161] 3 Fed.Rep.(2d) 384, 393.
[162] 2 P.D. 118.
[163] [1902] 2 K.B. 614.
[164] 2 P.D. 118.
[165] [1902] 2 K.B. 614.

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Accordingly if *The Parana*[166] purported to lay down any general proposition or rule of law, it was wrongly decided. Even if it was merely purporting to draw an inference of facts from the particular case, I have some doubt of its correctness even at that date, and it has no applicability today. And in my opinion *The Notting Hill*[167] which applied *The Parana*[168] to a case of tort, was wrongly decided.

I would dismiss the appeal.

LORD UPJOHN. My Lords, this appeal is concerned solely with the proper measure of damages for an admitted breach of contract by a shipowner resulting in the late delivery of a cargo which he contracted to deliver to the port of discharge. The practical question is whether the charterer can claim damages for loss of market as the cargo of sugar was to be delivered to a port where there is a market in that commodity.

The general principle upon which damages are assessed for breach of contract is succinctly stated by Parke B. in *Robinson* v. *Harman*[169]: "Where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed," a statement approved in your Lordships' House in *Watts, Watts & Co. Ltd.* v. *Mitsui & Co. Ltd.*[170] The same rule has been laid down in your Lordships' House for the assessment of damages generally including torts (see *Livingstone* v. *Rawyards Coal Co.*[171]).

Such general principles were, however, applied rather strictly for until *Hadley* v. *Baxendale*,[172] decided in 1854, the rule was that the damage resulting must be the proximate damage: thus in *Smeed* v. *Foord*[173] during argument when *Hadley* v. *Baxendale*[174] was under discussion Lord Campbell C.J. interjected[175]: "The old rule was that, in estimating damages, only the proximate injury sustained could be looked to." With the increasing complications of life and the upsurge of industrial activities these simple rules failed to give sufficient guidance to juries or indeed judges for the assessment of damages for breach of contract in more complicated cases. But when Messrs. Hadley, owners of a flour mill in Gloucester, having sent a broken mill shaft by the well-known carriers Pickfords to their suppliers in Greenwich to

[166] 2 P.D. 118.
[167] 9 P.D. 105.
[168] 2 P.D. 118.
[169] 1 Ex. 850, 855.
[170] [1917] A.C. 227, 241, H.L.
[171] (1880) 5 App.Cas. 25, 39, H.L.
[172] 9 Ex. 341.
[173] 1 E. & E. 602.
[174] 9 Ex. 341.
[175] 1 E. & E. 602, 608.

provide a pattern for a new shaft and there being a delay in delivery by Pickfords amounting to a breach of contract, claimed damages on the footing that the whole activities of their mill were held up for want of the shaft, it was clear that the rule, though requiring some expansion, must nevertheless receive some limitation. This led to the famous statement of Alderson B. in that case.[176]

> "Now 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 such as may fairly and reasonably be considered 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. . . ."

Though stated by the learned baron in one sentence it contains and has always been interpreted as containing two branches and for my part I care not whether it is regarded as stating two rules or two branches of one rule, though I prefer the latter. Thus:

(1) Damages should be such as may naturally and usually arise from the breach, or

(2) Damages should be such as in the special circumstances of the case known to both parties may be reasonably supposed to have been in the contemplation of the parties, as the result of a breach, assuming the parties to have applied their minds to the contingency of there being such a breach.

See *Hammond and Co.* v. *Bussey*[177] approved in this House in *R. & Hall Ltd.* v. *W. H. Pim (Junior) & Co. Ltd.*[178] However, there is no dichotomy between these branches for as Lord Shaw of Dunfermline pointed out in the last-mentioned case[179] "they may run into each other and, indeed, be one."

In *British Columbia Saw Mill Co. Ltd.* v. *Nettleship*[180] it was decided on the second branch of the rule that there must not only be common knowledge of some special circumstances but liability for damages resulting therefrom must be made a term of the contract. This was followed in *Horne* v. *Midland*

[176] 9 Exch. 341, 354.
[177] (1887) 20 Q.B.D. 79, C.A.
[178] 33 Com.Cas. 324.
[179] Ibid. 334.
[180] L.R. 3 C.P. 499.

Railway Co.[181] I do not see why that should be so. If parties enter into the contract with knowledge of some special circumstances, and it is reasonable to infer a particular loss as a result of those circumstances that is something which both must contemplate as a result of a breach. It is quite unnecessary that it should be a term of the contract. I agree with the learned editor of the Halsbury's Laws of England, 3rd ed., Vol. II (1955), p. 243, n. (m.), that those authorities ought not to be followed. In any event, as Diplock L.J. has pointed out,[182] this point had little application in practice.

So the claim for damages must be the natural consequence of the breach or in the contemplation of both parties. But in tort a different test has been adopted in expanding the basic law of damages and I cannot accept the argument addressed to your Lordships that they remain the same. The test in tort, as now developed in the authorities, is that the tortfeasor is liable for any damage which he can reasonably foresee may happen as a result of the breach however unlikely it may be, unless it can be brushed aside as far fetched. See the *Wagon Mound* cases.[183]

This difference is very reasonable. Once an examination of the facts establishes a breach of duty on the part of the tortfeasor, the acts and omissions of the innocent party are irrelevant until the question of contributory negligence comes to be considered. A tortfeasor may and frequently is a complete stranger to the innocent party but he is, however fleetingly in many cases, his neighbour for the purposes of the law and bound to act with due regard to his neighbour's rights whomever he may be. If he fails in such duty the law has rightly laid down a more stringent test for the assessment of damages. But in contract the parties have only to consider the consequences of a breach to the other; it is fair that the assessment of damages should depend on their assumed common knowledge and contemplation and not on a foreseeable but most unlikely consequence. The parties may moreover agree to limit or exclude liability for damage, or agree on a liquidated sum, or one party can disclose to the other special circumstances which will render a breach especially serious to him. So the rules as to the assessment of damages have diverged in the two cases, and nowadays the concept of "foreseeability" and "contemplation of the parties" are different concepts in the law. It is true that as a matter of language there will in many cases be no great difference between foreseeing the possibility of

[181] L.R. 8 C.P. 131.
[182] [1966] 2 Q.B. 695, 728.
[183] [1961] A.C. 388; [1967] A.C. 617.

A an event happening and contemplating the possibility of that event happening and in some of the cases, from Blackburn J. in *Cory* v. *Thames Ironworks Co.*[183a] onwards the word foresee or foreseeable is used in connection with contract but it is clear that it has really been used in the sense of reasonable contemplation and in my view it is better to use contemplate or contemplation in the B case of contract, leaving foresee or foreseeability to the realm of torts.

The rule in *Hadley* v. *Baxendale*[184] was approved in express terms in Your Lordships' House in *Banco de Portugal* v. *Waterlow & Sons Ltd.*[185] and in *Monarch Steamship Co. Ltd.* v. *Karlshamns Oljefabriker (A/B)*,[186] and has been followed in a multitude C of cases ever since it was decided. I think that apart from some very early criticisms it would be true to say that it stood without question until the case of *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[187] when it received a colourful interpretation from Asquith L.J. delivering the judgment of the court.

My Lords, in my opinion this appeal renders it necessary to D determine the following questions:

(1) Has the *Victoria Laundry* case[187] purported to alter the law and establish a somewhat different rule from that laid down in *Hadley* v. *Baxendale*[188] for the assessment of damages in contract?

E (2) What, as a practical matter, is the test to be applied in ascertaining whether any particular consequences of a breach of contract should lead to recoverable damages as arising either naturally or such as may have been within the contemplation of the parties in the special circumstances of the case?

F (3) Applying that test, what on the facts of this case is the proper measure of damages? unless

(4) Is there some special rule of practice in relation to carriage of goods by sea established by *The Parana*[189] which precludes the recovery of damages beyond interest on the value of the goods over the period of the delay, G unless the plaintiff can bring the case on its special circumstances within the second branch of the rule?

(1) Upon the first point it is, I think, clear that on a fair

[183a] L.R. 3 Q.B. 181, 188.
[184] 9 Exch. 341.
[185] [1932] A.C. 452.
[186] [1949] A.C. 196.
[187] [1949] 2 K.B. 528.
[188] 9 Exch. 341.
[189] 2 P.D. 118.

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reading of the judgments of the majority of the Court of Appeal they considered that the *Victoria Laundry* case [190] did alter the law. That case was one plainly within the second branch of the rule, but nevertheless the observations of Asquith L.J. were in general terms applicable to both branches. I do not myself think that the learned Lord Justice intended to alter the law. He was paraphrasing it and putting it into modern language, and I shall refer to this under the next heading. If he was doing more, I would disagree with him. But for my part I prefer to state the broad rule as follows: What was in the assumed contemplation of both parties acting as reasonable men in the light of the general or special facts (as the case may be) known to both parties in regard to damages as the result of a breach of contract; I omit for the moment any adjectival qualification of the result which I deal with in (2) below. Lord Wright pointed out in *The Monarch* [191] that each must be taken to understand the ordinary practices and exigencies of the other's trade but it must be remembered when dealing with the case of a carrier of goods by land, sea or air, he is not carrying on the same trade as the consignor of the goods and his knowledge of the practices and exigencies of the other's trade may be limited and less than between buyer and seller of goods who probably know far more about one another's business.

(2) Upon the second point, what as a practical matter is to be taken as within the contemplation of both parties as the result of a breach? The words "probable result" held the field at first; they were used in the enunciation of the rule itself and by Lord Esher M.R. in *Hammond* v. *Bussey* [192] and adopted by Viscount Dunedin in *Hall* v. *Pim* [193] who, however, was careful to add that "probable" in his view did not mean more than an even chance. Lord Shaw of Dunfermline in that case [194] interpreted the word probable in the sense of the not unlikely result. In *The Monarch* [195] their Lordships used a variety of different expressions. I will very briefly enumerate them—likelihood; possibility must have been in the minds of both parties; a matter commercially to be taken into account; a serious possibility or a real danger; a grave risk.

Asquith L.J. in *Victoria Laundry* [196] used the words "likely to result" and he treated that as synonymous with a serious

[190] [1949] 2 K.B. 528.
[191] [1949] A.C. 196, 224.
[192] 20 Q.B.D. 79, 88.
[193] 33 Com.Cas. 324, 330.
[194] Ibid. 335.
[195] [1949] A.C. 196.
[196] [1949] 2 K.B. 528, 540.

possibility or a real danger. He went on to equate that with the expression " on the cards " but like all your Lordships I deprecate the use of that phrase which is far too imprecise and to my mind is capable of denoting a most improbable and unlikely event, such as winning a prize on a premium bond on any given drawing.

But in my opinion Asquith L.J. was not attempting to do more than explain the rule in the light of the observations made in this House in *The Monarch*.[197] It is curious that *Hall* v. *Pim*[198] seems to have escaped citation in all the later cases until this appeal to your Lordships.

It is clear that on the one hand the test of foreseeability as laid down in the case of tort is not the test for breach of contract; nor on the other hand must the loser establish that the loss was a near certainty or an odds-on probability. I am content to adopt as the test a " real danger " or a " serious possibility." There may be a shade of difference between these two phrases but the assessment of damages is not an exact science and what to one judge or jury will appear a real danger may appear to another judge or jury to be a serious possibility. I do not think that the application of that test would have led to a different result in *Hadley* v. *Baxendale*.[199] I cannot see why Pickfords in the absence of express mention should have contemplated as a real danger or serious possibility that work at the factory would be brought to a halt while the shaft was away.

(3) Applying this test to the facts of this case the first and most important matter for consideration is the contract contained in the charterparty which was dated October 15, 1960. It provided that the *Heron II* should proceed to Constanza and there load 3,000 tons of sugar and then proceed with all convenient speed to Basrah. At the date of the contract the ship was dry-docked in Piraeus and was expected to be ready to load about October 25/27, 1960, so it was provided that lay days were not to run before then. It was further provided that if the ship was not ready to load by November 10, 1960, the charterers were to have the option to cancel the charterparty. The charterers were also given the option of discharging the cargo at Jeddah to be declared five days before the commencement of loading. The distance from Constanza to Basrah is 4,370 miles and a reasonably accurate prediction of the length of the voyage was 20 days. The *Heron II* arrived at Constanza on October 27, duly loaded and sailed on November 1, 1960. Due to a number of breaches

[197] [1949] A.C. 196.
[198] 33 Com.Cas. 324.
[199] 9 Exch. 341.

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of contract which I need not specify the vessel took 29 days to complete the voyage instead of the predicted 20. The shipowner knew of the existence of a sugar market at Basrah but had no detailed knowledge thereof. Those in essence are the relevant facts upon which the question of damages has to be determined. It is common ground that the question falls within the first branch of the rule in *Hadley* v. *Baxendale*.[199]

Both McNair J.[200] in the court of first instance and Sellers L.J.[201] in his dissenting judgment in the Court of Appeal were impressed by the fact that the ship might lawfully have presented itself for loading at any time up to November 10, 1960, and might have been directed to go to Jeddah and this circumstance influenced each of them in reaching the conclusion that loss of market due to delay could not have been within the contemplation of the parties. I cannot agree with this; Diplock and Salmon L.JJ. have, in my opinion, answered this point.[202] The cancellation clause was put in to protect the charterer from undue delay if the repairs to the ship in dry-dock should take longer than anticipated; its existence does nothing in my opinion to alter the common contemplation of the parties as to the consequences of a failure of the ship to carry out the primary obligation to proceed on its journey with all convenient speed; if anything it supports the view that time was an important element in the voyage. Nor can I see the relevance of the fact in this respect that another port of discharge might have been designated. It was not, and the *Heron II* was under contract to carry with all convenient speed one cargo to one port of discharge where there was a market for that cargo.

This case is quite different from those cases where cargo ships used in the old days literally to tramp up and down, for example, the Mediterranean, with liberty to call at any port in any order (though that phrase, as the authorities show, must receive a limited and not a literal construction) collecting and discharging cargo as they steamed from port to port; so that delay in carrying a cargo to a particular port within a particular time or even with all convenient speed cannot have been within the contemplation of the parties as giving rise to damage for loss of market—see, for example, *Connolly Shaw Ltd.* v. *A/S Det Nordenfjeldske D/S*,[203] *per* Branson J. *S.S. Ardennes (Cargo Owners)* v. *S.S.*

[199] 9 Exch. 341.
[200] [1966] 1 Lloyd's Rep. 259, 274.
[201] [1966] 2 Q.B. 695, 724G.
[202] Ibid. 735G–736D, 742G–743C.
[203] (1934) 49 Ll.L.Rep. 183, 191.

A *Ardennes (Owners)*[204] might have been such a case if the facts had not brought it clearly within the second branch of the rule.

It has long been established that in carrying marketable goods by rail to a place where there is a market it must be assumed to be in the contemplation of the parties as a grave danger that the goods may be sold on arrival so that if there is a delay one of the B consequences may be loss of market. See *Collard* v. *South Eastern Railway Co.*[205] and *Horne* v. *Midland Railway.*[206] The plaintiff failed in the last case because there was no market loss and he failed to communicate the circumstances which led to his special loss. Is there any reason why this rule should not in principle apply to carriage of goods by sea?

C As long ago as 1902 in the case of *Dunn* v. *Bucknall Brothers*[207] Collins M.R. pointed out that sea voyages of three to four weeks' duration are accomplished with almost absolute certainty and the state of the market may well be a vital fact present to the minds of both parties at the time of making the contract.

D In *Jensen* v. *Hollis Bros. & Co. Ltd.*[208] Branson J. did not over-exaggerate when he said that ships with modern facilities run with somewhat of the regularity of railway trains. So I see no reason why in principle the normal rule as to carriage of goods by land should not apply to the type of voyage undertaken by the *Heron II.* I do not refer to the authorities to which your E Lordships were referred where there is a complete loss of, or some physical damage to, goods such as *Rodocanachi* v. *Milburn,*[209] for though the same general principles apply, both Lord Dunedin and Lord Atkinson pointed out in *Williams Brothers* v. *Ed. T. Agius Ltd.*[210] that there are substantial differences in practice between late delivery and non-delivery. Where marketable goods F are lost it is almost axiomatic that the market price measures the damage; the same cannot be said of delay; it all depends on circumstances. Different considerations apply to cases between buyer and seller, as I have already pointed out. Nor do I think it necessary to discuss *Wertheim* v. *Chicoutimi Pulp Co.*[211] and the criticisms of Scrutton L.J. of that case[211] in *Slater & Another* G v. *Hoyle & Smith Ltd.*[212]; that controversy was really concerned with the measure of damages on subsales.

[204] [1951] 1 K.B. 55.
[205] 7 H. & N. 79.
[206] L.R. 8 C.P. 131.
[207] [1902] 2 K.B. 614, 623.
[208] (1936) 54 Ll.L.Rep. 133, 137; [1936] 1 All E.R. 140.
[209] (1887) 18 Q.B.D. 67, C.A.
[210] [1914] A.C. 510, 522, 529, H.L.
[211] [1911] A.C. 301, P.C.
[212] [1920] 2 K.B. 11, 23, 24, C.A.

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But the *Heron II* took very nearly 50 per cent. more than the reasonably predicted time and for no other reason than her owner's breaches of contract.

It is perfectly true that at the time of the contract nothing was said as to the purpose for which the charterer wanted the sugar delivered at Basrah; he might have wanted to do so to stock up his supply of sugar or to carry out a contract already entered into which had nothing to do with the market at Basrah; or he might sell it during the voyage, but all that is pure speculation. It seems to me that on the facts of this case the parties must be assumed to have contemplated that there would be a punctual delivery to the port of discharge and that port having a market in sugar there was a real danger that as a result of a delay in breach of contract the charterer would miss the market and would suffer loss accordingly. It being established that the goods were in fact destined for the market the shipowner is liable for that loss.

(4) I turn, then, to the last question. Does *The Parana*[213] lead to the conclusion that in the case of carriage of goods by sea there is a different rule of practice; it is not suggested that there is any different rule of law. McNair J.[214] and Sellers L.J.[215] thought so and that damages were limited to loss of interest on the value of the goods detained.

No doubt in the days of sail pure and simple, when ships might be delayed by head winds for days, loss of market would not be within the contemplation of the parties. In 1877, when *The Parana*[216] was decided, the steam engine was coming into its own, but it was still the golden age of sail and over half the ships built in this country were sailing ships at this time; these matters may well have influenced Mellish L.J.[217] when he pointed out the difference between delay in delivery by carriers on land and cases of carriage of goods on long voyages by sea. Perhaps he was right as matters then stood, but the rapid improvement in the steam engine led to a different statement of principle in *Dunn* v. *Bucknall Brothers*,[218] a statement in accordance with general principle and which must govern the assessment of damages today. *The Parana*, which has only once been followed in *The Notting Hill*[219] and frequently criticised, must be regarded as either obsolete, being overtaken by events or as overruled. It

[213] 2 P.D. 118.
[214] [1966] 1 Lloyd's Rep. 259, 274, 275.
[215] [1966] 2 Q.B. 695, 725B–D.
[216] 2 P.D. 118.
[217] Ibid. 123.
[218] [1902] 2 K.B. 614.
[219] 9 P.D. 105.

A may be noted that *The Parana* [220] was not treated by Mellish L.J. as a tramp steamer in the sense in which I have used that phrase earlier in this judgment.

In *Dunn* v. *Bucknall Brothers* [221] an explanation of the decision in *The Parana* [222] was suggested, that the estimates of the proper time for completion of the voyage of *The Parana* [222] B varied very greatly so that the time of arrival was not predictable. This explanation was not given by Mellish L.J. himself and I doubt if it is valid.

Even today, when very long journeys half-way round the world are undertaken, the estimate of the time which a ship ought to take may vary within wide limits; see, for example, two cases in C the U.S.A., *United States* v. *Middleton* [223] (an Atlantic port to Japan 60 to 90 days) and *The Iossifoglu* [224] (Philippines to a U.S. Atlantic port 46 to 66 days). Nevertheless, in both those cases it was held that in the case of marketable commodities being carried to a market, if the ship greatly exceeds the larger estimate through breach of contract and the cargo owner thereby misses his market D he is entitled to damages for loss of market. I agree with those decisions, so far as the judges who decided those cases felt no difficulty by reason of the fact that the time of arrival could only be estimated within broad limits.

For these reasons I would dismiss this appeal.

E *Appeal dismissed.*

Solicitors: *Ince & Co.; William A. Crump & Son.*

J. A. G.

F [220] 2 P.D. 118.
[221] [1902] 2 K.B. 614.
[222] 2 P.D. 118.
[223] 3 Fed.Rep.(2nd) 384.
[224] (1929) 32 Fed.Rep.(2nd) 928.

G