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THE CONTEMPLATION RULE AS A LIMITATION UPON DAMAGES FOR BREACH OF CONTRACT

By Charles T. McCormick

1. Basis of compensation in tort and contract cases. Occasionally in tort cases, an award by way of punishment may be made, but normally in all cases the truism remains true, that the primary aim in measuring damages is to arrive at compensation, no more and no less. In a case of tort—the breach of some duty which the law imposes on everyone—the general purpose of compensation is to give a sum of money to the person wronged which, as nearly as possible, will restore him to the position he would be in if the wrong had not been committed. In the case of a breach of contract, the goal of compensation is not the mere restoration to a former position, as in tort, but the awarding of a sum which is the equivalent of performance of the bargain—the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled. This distinction finds frequent expression and application in the decisions, but of course these wide generalizations are...
not adequate formulas for placing before juries the standards of compensation, nor for testing and regulating the amount of damages to be given for wrongs and breaches of contract. Other principles have been developed, which serve as limitations upon the extent of liability in these cases. Of these, the most constantly used are the principle which in contract cases restricts the damages to those which were in the "contemplation" of the parties when the contract was made, and the other principle, finding its chief employment in tort cases, which bars recovery for consequences not "proximately" caused by the defendant's conduct. Both of these doctrines give effect to major policies governing the larger outlines of risk, or liability, which the courts are willing to impose for given conduct. The "contemplation" doctrine, while not strictly to be classed as dealing with those more marginal questions of "damages" in the sense of questions of measurement of amount of award, yet procedurally is usually brought into play to aid in determining what elements of injury may be included in the award, rather than in turning the whole case in favor of the

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4 See par. 2, infra.
plaintiff or the defendant, and consequently has been classified in the digests and in the minds of lawyers under the heading of "damages."

2. The Rule of Hadley v. Baxendale. The modern rules governing the measure of damages, both in tort and contract cases, are the outgrowth of a widened control by the judge over the jury. Before the eighteenth century, the jury, by and large, had a free discretion when money damages were claimed to determine the amount of the award. When the judges began to subject this power to their control, by rulings upon evidence, and by the granting of new trials for excessive or inadequate awards, and finally by advising and then instructing them on the matter of amount, this control called for, and found, expression in rules and doctrines. Still, the idea of a free discretion in the jury to fix the amount of damages lingered and yielded slowly (and never entirely) to the oncoming encroachment of these rules successively formulated in particular kinds of contract cases. Such rules, for special kinds of contractual transactions, were the rule which limited the damages for non-payment of a debt to interest and then only when the debt was evidenced by a bill of exchange, and the highly restrictive rule of Flureau v. Thornhill, which curbed recovery against one who contracted to convey land, but failed to make title, to the bare expenses of the buyer, without any allowance for the loss of the bargain. The rules of damages, moreover, in case of the sale of goods, had, by the end of the eighteenth century, been announced in practically their present form. But no broad general principle had developed even down to the middle of the nineteenth century, by which the judges could justify keeping a firm hand upon amounts awarded for breach of contract, so as to confine such awards within the risks which the judges would believe to be in accord with the expectation of business men. Thus as

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5 The successive steps by which the judges took supervision and developed a law of damages may be traced in Washington, Damages in Contract at Common Law, (1931) 47 Law Q. Rev. 345, (1932) 48 Law Q. Rev. 90, and in Beale, Cases on Damages, 3rd ed., ch. 1.


7 (1776) 2 Wm. Bl. 1078.


9 In this the English law was more backward than the French, which had long since recognized that damages in contract against one who acts in good
late as 1853, the English Court of Exchequer, in dealing with a case in which damages were sought for failure to carry out a contract to complete certain machinery at a time set, and a claim was made for the loss of profits upon a transaction in which the plaintiff had planned to use the machinery, could lay down no more restrictive standard than this: "The jury are not bound to adopt any specific contract that may have been made; but if reasonable evidence is given that the amount of profit would have been made as claimed, the damages may be assessed accordingly." In short, apart from a few special rules for particular kinds of agreements, and some expressions to the effect that the damages must be the "natural" or "necessary" result of the breach, one who failed to carry out his contract was, so far as legal theory went, liable for any and all resulting loss sustained by the other party, however unforeseeable such loss may have been.

However, in the next year, 1854, the same court, through the same judge, handed down an opinion in the landmark case of Hadley v. Baxendale,10 which ever since has furnished the general standard by which English-speaking courts all over the world have tested claims for damages for breach of contract. This case was one brought by the owners of a steam grist-mill against a carrier for delay in delivering a shipment. The shipment consisted of the broken pieces of the shaft of the grist-mill, which was stopped to await a new shaft. The old shaft was sent to serve as a model for a new one, and the carrier was told when the shipment was made that the mill was stopped and that the shaft must be sent immediately, but he was not told that the stoppage of the mill was solely

faith must be limited to the foreseeable risk. See Pothier, Obl., pt. I, c. 2, art. III, secs. 159-172. The Code Napoleon (1804) includes clearly the idea adopted in Hadley v. Baxendale, in the following passage: "A debtor is only liable for the damages [and interest] which have been foreseen or which could have been foreseen at the time of the contract, when it is not owing to fraud on his part that the obligation is not fulfilled." (See French Civil Code, Rev. Ed., 1930, transl. by H. Cachard.) The judges in Hadley v. Baxendale were aware of the French rule and clearly were influenced by it. See, F. E. Smith (Lord Birkenhead), The Rule in Hadley v. Baxendale, (1900) 16 Law. Q. Rev. 275, 278; Washington, Damages in Contract at Common Law, (1932) 48 Law Q. Rev. 90, 102. See also, 8 R. C. L. 455; Grindle v. Eastern Express Co., (1877) 67 Me. 317, 24 Am. Rep. 31.


on account of the broken shaft, nor that no other shaft was available. The plaintiff claimed, as damages for delay, the loss due to the enforced idleness of the mill, and the jury allowed the claim. In holding that the trial judge should have directed the jury that this claim for "special damage" was not allowable, Alderson, B., formulated the long-needed principle of control, in these words:

"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. Now, if the special circumstances under which the contract was actually made were 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. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

The court held that the notice given was not sufficient to apprise the carrier that the delay would cause the mill to remain idle, though it would seem that this inference was at least sufficiently debatable on the facts to be left to the jury, if the jury had any function to play in applying the standard.

The significance of the case lies not in the dictum that if notice is given liability will attach, for, as we have seen, unlimited liability had previously been the general standard. The history-making influence of the case lies in the decision that liability will not attach for damage which was not "in the contemplation" of the parties "at the time they made the contract." It lays down a general standard of foreseeability of damage as of the time of the bargain, by which judges can prevent or overturn the allowance by

13 Compare, however, the views of the learned writers in 3 Williston, Contracts, sec. 1356 ("an extension of the rule governing consequential damages") and 1 Sedgwick, Damages, 9th ed., sec. 147a ("no new rule has been introduced"). It is submitted that these interpretations can no longer stand, since the instant case has been set against its background by Mr. Washington, in his article cited above.
juries of claims which would saddle on the defendant losses thought by the judges to be unjust or disproportionate. This standard is in the main an objective one. It takes account of what the defendant, who made the contract might then have foreseen as a reasonable man, in the light of the facts known to him, and does not confine the inquiry to what he actually did foresee. If the loss claimed is unusual, then it becomes necessary to ascertain whether the defaulting party was notified of the special circumstances, but if it is the usual consequence of breach of the class of contracts to which this belongs, and particularly if the claim of damages is based upon the regular formula for damage in like cases, then the actual contemplation of the parties becomes unimportant. Losses of the unusual kind, not recoverable unless special notice has been given at the time of the contract, are termed "consequential" or "special" damages. This distinction between the usual and the unusual losses from breach of contract, with respect to the necessity of notice, corresponds rather closely with the distinction between "general" and "special" damages, in the sense of those which need not, and those which must, be specially claimed in the pleadings.

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14 When contracts are made, the parties usually—not always—count confidently on performance, and have no expectation of breach. This has often been pointed out, e.g., in Globe Ref. Co. v. Landa Cotton Oil Co., (1902) 190 U. S. 540, 543, 23 Sup. Ct. 754, 47 L. Ed. 1171; and in Daughtery v. Am. Union Tel. Co., (1883) 75 Ala. 168, 176, 51 Am. Rep. 435.

15 Such formulas are usually expressed in terms of value, such as the formula which allows the seller to recover the difference between the contract price and the market value when the buyer refuses to accept, or the formula which gives usable value or rental value for chattels or land detained, or the formula which allows the value of the use of money, i.e., interest, for delay in payment.

16 This is strikingly illustrated by Cory v. Thames Iron Works and Shipbuilding Co., (1868) L. R. 3 Q. B. 181, 37 L. J. Q. B. 68. In that case the defendants breached their contract by delay in delivering the hull of a boom derrick to the plaintiffs, dealers in coal. When the contract was made, the defendants supposed that the plaintiffs intended to use it in the ordinary way as a coal store. But in fact the plaintiffs intended a novel use, in transshipping coal from colliers to barges. The plaintiff was allowed to recover the loss of the value of the use of the hull in the ordinary way, and the damages were limited to that amount although the actual loss from inability to use it as actually intended was greater. Compare, however, Martinac v. Bakovic, (1930) 158 Wash. 193, 290 Pac. 847. There the plaintiff sued for damages due to defendant's delay in delivering a fishing vessel built for the plaintiff, and in his claim for damages mentioned only the loss incident to the plaintiff's contract to use the boat in the employ of a certain fisheries company. The proof showed that the latter contract was shown to the defendant when he agreed to build the boat. The court held that the plaintiff could not recover the loss of the reasonable charter or rental value of the boat during the delay, but must recover, if at all, only damages sustained under the fishing contract.

17 For use of the terms in the present connection, see Ruggles v. Buffalo
While it has occasionally been criticized, the acceptance in this country of the principle of Hadley v. Baxendale has been well-nigh universal by the courts, and it has found a place in some of the codes. Its effect, by subjecting all contract claims to a


Daughtery v. Am. Union Tel. Co., (1883) 75 Ala. 168, 176, 51 Am. Rep. 435 (criticizing the "contemplation of the parties" as a fiction); Bergquist v. Kreidler, (1924) 158 Minn. 127, 196 N. W. 964 (dictum of Mr. J. Stone, suggesting that the rule of causation used in tort cases should suffice to determine the allowability of damages in contract: the dictum ignores the evident purpose of the rule, to enable the judges to limit the liability for unknown risks, of one who enters a contract). See note, by J. G. Erde, in (1926) 11 Cornell L. Quar. 540; 17 C. J. 744, note.

See the cases cited in subsequent notes to this section. The American Law Institute, Restatement, Contracts, incorporates the rule in sec. 330, as follows: "Foreseeability of Harm as a Requisite for Recovery.—In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury."

E.g., Georgia, Ann. Civ. Code, (Parks 1914) sec. 4395, "Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach, and such as the parties contemplated, when the contract was made, as the probable result of its breach. In Louisiana, the provisions of the Code Napoleon (Book III, tit. III, arts. 1149-51, see n. 9, supra) have been substantially reenacted as follows:

"Art. 1934. Where the object of the contract is any thing but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications.

1. When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By bad faith in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will.

2. When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequence of the breach of that contract; but even when there is fraud, the damages can not exceed this." Louisiana, Rev. Civ. Code, (Saunders-Marr) 1920.

The Draft Civil Code of David Dudley Field seems to have embodied the Hadley v. Baxendale doctrine in modified form, as follows: "Sec. 1840. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, of which the party at fault had notice, at the time of entering into the contract, or at any time before the breach, and while it was in his power to perform the contract upon his part, would be likely to result from such breach, or which, in the ordinary course of things, would be likely to result therefrom." In this form it was enacted in California as sec. 3300 of the Civil Code of 1872. By an amendment to this section in 1874, however, the italicized clauses were stricken out, leaving the remainder unchanged, and
test of foreseeability by the contract-breaker of the loss at the
time of the making of the contract, diminishes the risk of business
enterprise, and the result harmonized well with the free-trade eco-
nomic philosophy of the Victorian era during which our law of
contracts became systematized. There has been but little variation
of the original phraseology in the use of the principle by American
courts, whose opinions still repeat the formula that damages are
limited to the "natural and probable consequences"\(^{21}\) and those
which in the light of the facts of which they had knowledge were
"in the contemplation" of the parties.\(^{22}\) The same idea is occasion-
ally expressed more simply and directly by stating that dam-
ages may be given only for those consequences of the breach which
were "reasonably foreseeable at the time the contract was entered
into as probable if the contract were broken."\(^{23}\)

so it now stands in California (Civil Code (Deering 1931), sec. 3300 and
annotations) and in the states which have copied the California Code (see,
e.g., Oklahoma, Stats. 1931, sec. 9963). Nevertheless, though the amendment
might have seemed to be intended to abrogate it, the Hadley v. Baxendale
rule is still read into the amended section. Hunt Bros. Co. v. San Lorenzo

\(^{21}\)Caldwell v. Guardian Trust Co., (C.C.A. 8th Cir. 1928) 26 F. (2d)
218; Tampa Term. Co. v. Richards, (1933) 108 Fla. 516, 146 So. 591 (quot-
ing Restatement, Contracts, sec. 330); Bremhorst v. Phillips Coal Co.,
(1927) 202 Iowa 1251, 211 N. W. 898; and numerous cases collected in
Dec. & Curr. Dig., Damages, sec. 22; 17 C. J. 742, (Damages, sec. 76).

\(^{22}\)Globe Ref. Co. v. Landa Cotton Oil Co., (1903) 190 U. S. 540, 544,
23 Sup. Ct. 754, 47 L. Ed. 1171 ("a person can only be held for such conse-
quences as may be reasonably supposed to be in the contemplation of the
parties at the time of making the contract"); Atlantic Oil Prod. Co. v.
Masterson, (C.C.A. Tex. 1929) 30 F. (2d) 481 (where defendant agrees to
drill test oil well but fails, plaintiff owning lease on adjoining land cannot
recover cost of drilling a well on his land—not in "contemplation"); W. B.
Davis & Son v. Ruple, (1930) 222 Ala. 52, 130 So. 772 (damages for assault
by defendant's superintendent cannot be recovered in action on contract for
wrongful discharge); Olive Hill Limestone Co. v. Gay-Coleman Const. Co.,
(1932) 244 Ky. 822, 51 S. W. (2d) 465 (allowing recovery for special
damages of highway contractor resulting from defendant's delay in furnishing
stone, defendant having made its contract with knowledge of plaintiff's
contract to build road); Greavy v. McCormick, (1930) 273 Mass. 250, 173
N. E. 411 (action by landlord against prospective tenant who breached
contract to take lease; damage consisting of expenditures to make premises
ready, and loss of rent, held to have been in "contemplation"); Mihoiveich
mobile insurance company fails to pay judgment against insured, who being
without means, was arrested under body execution; held recoverable, as
within "contemplation"); Bonhard v. Gindin, (1928) 104 N. J. L. 599, 142
Atl. 52 (repeating Hadley v. Baxendale formula in sustaining admission of
evidence of loss of profit on re-sale, in action by buyer against seller for
breach of contract of sale; but whether the defendant when contract was
made had notice of plaintiff's intention to re-sell does not appear); Smith v.
Pallay, (1929) 130 Or. 282, 279 Pac. 279 (repeating formula); Timmins v.
Williams Wood Prod. Corp., (1932) 164 S. C. 361, 162 S. E. 329 (for breach
of landlord's covenant to repair, damages for personal injury to plaintiff,
DAMAGES FOR BREACH OF CONTRACT

3. Applications of the Doctrine. Among the most frequent occasions for the application of the rule which denies recovery for unusual consequences of a breach of contract, where knowledge of the risk is not brought home to the defendant as of the time the contract was made, are cases where the buyer of goods sues for the seller's failure to deliver or for delay in delivering, or for breach of warranty of quality, and claims damages for the loss of profits upon prospective re-sales. Similarly, in actions by purchasers under contracts for the sale of land, against the vendor for failure to convey, the same doctrine is often used to limit recovery for loss of profits or other consequential damages. Again, in the growing class of actions brought by prospective borrowers against banks and others, for breach of contracts to lend money, the earlier tendency of the courts to deny liability altogether except for the increased interest paid upon securing the loan elsewhere has been generally modified to allow recovery for consequential damages, and the courts now rely upon a rather strict insistence upon the requirement that the hazard must have been "in contemplation" when the contract was made, to keep within bounds the risk imposed upon financial institutions by this contingent liability. 

child of tenant, not "within contemplation," and hence not recoverable in action on contract); McGuire v. Osage Oil Corp., (Tex. Comm. App., 1932) 55 S. W. (2d) 535 (breach by oil company of contract to compensate driller by assigning oil-lease, driller cannot recover expense of maintaining oil-rig on location, during defendant's delay necessitated by his contract with third person—not in "contemplation").

Eastern Adv. Co. v. Shapiro, (1928) 263 Mass. 228, 161 N. E. 240 (where defendant fails to take advertising space on bill-boards, plaintiff can recover expense of putting "fillers" on boards, in addition to contract-price).

The "usual" or normal damage is the difference between what the plaintiff would have had to pay in interest and expenses under the contract, and the interest paid and usual expenses for a corresponding loan elsewhere. Hixon v. First Nat'l Bank, (1924) 198 Iowa 942, 200 N. W. 710; Farabee-Treadwell Co. v. Union and Planters' Bank, (1916) 135 Tenn. 208, 186 S. W. 92; Culp v. Western Loan & Bldg. Co., (1923) 124 Wash. 326, 214 Pac. 145, (1923) 127 Wash. 249, 220 Pac. 766 (expenses); cases cited 36 A. L. R. 1411. To recover this no notice is necessary, but for recovery of other losses, including unusual expenses and lost profits, the defendant must have known of the risk when the contract was made, and this is usually the pivotal controversy in these cases. See, in general, Dec. & Curr. Dig., Damages, sec. 125, 17 C. J. 865; annotation 36 A. L. R. 1408, 1413, 3 Williston, Contracts, sec. 1411. Examples of cases where this requirement was held to be satisfied: Western v. Olathe State Bank, (1925) 78 Colo. 217, 240 Pac. 689, 44 A. L. R. 1484 (bank breaks contract, made in contemplation of trip by plaintiff, to honor plaintiff's checks; plaintiff recovers expense of ruined trip and for humiliation); Farabee-Treadwell Co. v. Union & Planters' Bank, (1916) 135 Tenn. 208, 186 S. W. 92 (loss on forced sale of grain contracted for by plaintiff); P.-B. Collins Inv. Co. v. Sallas, (Tex. Civ. App. 1924) 260 S. W. 261 (loss of equity in property, by foreclosure); Larson v. Union Inv. Co., (1932) 168 Wash. 3, 10 P. (2d) 557 (expenses of securing another
Among the reasons given by the courts for the rule which restrains the liability of one who makes a contract to the losses which he could then foresee is the suggestion that he is entitled to notice of any special risk, before the agreement is closed, so that he may modify his terms or withdraw if the risk seems too burdensome. Consequently, it might seem that if this is the foundation for the rule of Hadley v. Baxendale, it would have no application to the liability of such public utilities as railway carriers and telegraph companies, which are bound to serve all who come at uniform rates for like services, and who, consequently, cannot withdraw or modify their terms, when apprised of special danger of loss.

Loan, but compare Avalon Construction Corporation v. Kirch Holding Co., (1931) 256 N. Y. 137, 175 N. E. 651, comment (1931) 18 Va. L. Rev. 76; Merchants' Bank of Canada v. Sims, (1922) 122 Wash. 106, 209 Pac. 1113, comment (1923) 32 Yale L. J. 499 (loss from insolvency of corporation, forced out of business by defendant's breach of promise to make advances to it). Cases where the requirement was not satisfied: McMillain Lumber Co. v. First Nat'l Bank, (1927) 215 Ala. 379, 110 So. 603 (lost profits of saw-mill shut down because of failure to get promised loan, not recoverable because no proof that promisor knew when contract made that borrower would be unable to get money elsewhere—a truly exigent requirement; Nat'l Bank of Cleburne v. M. M. Pittman Roller Mill, (Tex. Comm. App. 1924) 265 S. W. 1024, 36 A. L. R. 1405 (bank agrees to make advances to milling company for buying wheat for use in mill; for breach company cannot recover re-sale profits that could have been made on wheat that would have been bought, use of wheat and not re-sale having been in contemplation when contract made).

Where the contract is not for a loan, but for the financing of an enterprise in which the person making the advance is to have a share, the courts seem to apply the same principles but with less strictness. Newby v. Atlantic Coast Realty Co., (1920) 180 N. C. 73, 103 S. E. 908 (measure for failure to furnish money for buying land under option is difference between option-price and reasonable re-sale price); Stern v. Premier Shirt Corp., (1932) 260 N. Y. 201, 183 N. E. 363 (for breach of contract to finance new corporation, of which one-half the stock was to be held by defendants, causing corporation to go out of business after two months, lost profits recoverable). Where the contract to lend is breached, consequential injury is not recoverable, unless plaintiff shows that he was unable to procure the money elsewhere. Lowe v. Turpie, (1896) 147 Ind. 652, 44 N. E. 25, 37 L. R. A. 233, 36 A. L. R. 1416. Quaere, whether the burden should not be upon the defendant to show that the plaintiff could have avoided the loss?

Upon this argument somewhat opposite conclusions have been built: (1) that as against common carriers no recovery at all for "consequential," i.e., unusual damage, should be allowed, regardless of notice. Horne v. Midland Ry. Co., (1873) 5 L. R. 8 C. P. 131, 136, 42 L. J. C. P. 59 (dicta of Kelly, C.B.), see comments of Lord Birkenhead (F. E. Smith), (1900) 16 Law Quar. Rev. 275, 283: (2) that in such cases liability should be extended, by permitting notice of the special risk to be given after the making of the contract, if given in time to enable the carrier to act upon the notice and by
Nevertheless, *Hadley v. Baxendale* was itself a case against a carrier, and in fact it is in cases of claims for delay, damage, and non-delivery of freight, and cases of delay and mistakes in transmission of telegraph messages that the doctrine has been used with most frequent and telling effect as a ground of defense against burdensome claims for "consequential" damage. The rule which discriminates in favor of one customer of such a public servant and against another customer paying the same rate, upon the basis of the extent of the notice given to the railway or telegraph clerk when the service was sought, is not entirely equitable, and limitations of liability contained in the bill of lading or message-form, and applicable unless a higher rate is paid, are now controlling in interstate commerce and in some of the states, and by their more drastic restriction of liability serve to render the earlier rule almost obsolete.

4. Notice of Special Circumstances; the Flexibility of the Doctrine of Hadley v. Baxendale. As we have seen, when the claim is for damages of the usual or standardized kind,—"general" damages—no showing as to notice or contemplation is needed. If the judge determines, however, that the loss for which damages are claimed is an unusual, or a "consequential" one, then the question whether knowledge of the circumstances creating the likelihood of the kind of loss which is claimed was brought home to the defendant before he signed or finally assented to the contract becomes the turning-point. Though the contract be a written one, an oral notification is sufficient. Notice after the contract is assented to, and hence after it is too late to withdraw, is ineffective, even though given before the person notified has broken the contract and inflicted the harm. It is said that notice may be

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In case of the ordinary contract to pay money owed on a debt (as distinguished from lending or advancing it) the rule remains that the only damages are the interest given for the delay after maturity. See n. 6, supra. *Beck v. Wilbois*, (1922) 194 Iowa 708, 190 N. W. 376; 3 Williston, Contracts, sec. 1410. Presumably, mere knowledge by the debtor, when the debt was con-
expressed or implied,29 and that if the circumstances known to the defendant fairly apprise him of the danger, information in detail as to just what loss will result from a breach is not essential.30 When the court feels that a recovery for the particular consequential loss is just and reasonable, the requirement of "notice" and "contemplation" is given a liberal interpretation. Thus, an express company which accepted a shipment of hog cholera serum (described as such in the receipt) and whose agent at the time was told that prompt forwarding was important was held to have had sufficient notice to render it liable for the death of a large number of hogs, owned by the consignee, from cholera, due to unreasonable delay in delivering the serum, even though there was no direct evidence that the express company's representatives knew that the consignee was a hog-raiser rather than a dealer in serum.31 Again, a telegraph company which contracted, on consideration of large payments, to maintain a fire alarm system in the plant of a packing company, connecting with a gong in the engine room, which system actually failed to give due alarm in the engine room on the occasion of a fire, resulting in a large loss because of a failure of the engineer to supply extra-water pressure, was not allowed to escape liability on the plea that there was no evidence that it had been notified that such increase in water-pressure would be necessary. The court dismissed the contract, of probable hardship on the creditor if the debt should not be paid would not make him liable for more than interest. Clarke v. Life & Cas. Ins. Co., (1932) 245 Ky. 601, 53 S. W. (2d) 968, 84 A. L. R. 1421 (where policy taken out by husband on life of wife, as a burial fund and purpose known to company when policy issued, husband cannot recover damages for mental anguish for company's failure to pay, though he had to beg and borrow money to bury her). But if the agreement is to pay not to the promisee but to a third person on his behalf a sum of money for a certain purpose (e.g., to take up commercial paper, to pay taxes, to discharge liens, or to relieve sureties) then special damages may be given for the defeat of this purpose. Dillon v. Lineker, (C.C.A. 9th Cir. 1920) 266 Fed. 688 (breach of a promise to pay off mortgage on plaintiff's property, resulting in loss of property by foreclosure); Miholevich v. Mid-West Mutual Auto Ins. Co., (1933) 261 Mich. 495, 246 N. W. 202, 86 A. L. R. 633 (liability insurance company willfully neglects to pay judgment against insured, damages allowed for his imprisonment under body execution); Dec. & Curr. Dig., Damages, sec. 125, 3 Williston, Contracts, sec. 1410; 17 C. J. 863, sec. 177. As to extent of liability of telegraph companies for failure to transmit money, see Sharp v. Western Union Tel. Co., (1932) 39 Ariz. 349, 6 P. (2d) 895, 80 A. L. R. 293, annotated.

29Raleigh Iron Works Co. v. Lee County Cotton Oil Co., (1926) 192 N. C. 442, 135 S. E. 343 (machinist who, in repairing cottonseed oil-mill machinery, caused side walls of presses to be warped, resulting in difficulties and delays in extracting cake from boxes, held answerable for resulting loss, since he knew of particular use to which machinery would be put).
A similar attitude is manifested by some courts in the telegraph cases, in holding that knowledge of the fact that a message is of an urgent business nature, and some notice of the kind of transaction involved, is sufficient to hold the company for special loss due to delay in transmission, without any notice as to the particulars of the transaction or of the danger from delay. Nevertheless, this same doctrine of "notice" and "contemplation," without any change in the form of its statement, is frequently used, when claims for special damage are asserted which the courts believe cannot be justly allowed, as a ground for denial of the claim though in fact the knowledge brought home to the defendant of the special circumstances creating the risk is at least as extensive as in the cases mentioned above. Usually the deficiency thus found in the establishment of the element of notice, in cases where the defendant concededly had ample knowledge of the special purpose of the contract, is the failure to show that the defendant had knowledge that the plaintiff could not attain this purpose, and avoid the special loss, by securing the same service which the defendant has promised from other sources. Thus, in Hadley v. Baxendale itself, the carrier was told of the use to which the broken shaft was to be put and that the mill was shut down, but it was held that this was not enough, since it was not told that another shaft was not available! Again, decisions in cases where damages are sought for special losses for breach of contract to make a loan, where the special purpose of the loan was disclosed, have turned on the borrower's failure to make known the fact that if money were not forthcoming he would be unable to secure a loan from other sources—a pessimistic view of his own credit

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30United States Bond & Mortgage Co. v. Berry, (1933) 249 Ky. 610, 61 S. W. (2d) 293 (dictum).
31Adams Express Co. v. Allen, (1919) 125 Va. 530, 100 S. E. 473.
33Davenport v. Western Union Tel. Co., (1932) 91 Mont. 570, 9 P. (2d) 172.
34Even the person who contracts for the service will often not know what the situation will be in regard to securing a like commodity elsewhere. In fact, in making contracts, men seldom go further in conveying information than to disclose their special needs and purposes.
which a zealous aspirant for a loan could seldom be expected to display. A signal instance of the use of the doctrine of notice in this way is a recent New York decision, in an action for breach of warranty of the quality of sugar sold under the defendant's special "Federal" brand. Inferior sugar was delivered, but recovery by the buyer of the special loss incurred by him in paying claims of his sub-vendees to whom he sold the sugar under an identical warranty was denied, on the ground that while the seller knew that the buyer might re-sell, he did not know that he would re-sell under the "Federal" brand and hence would be unable to substitute other sugar of the desired quality in supplying his sub-vendees.

These cases illustrate the flexibility of the doctrine of knowledge and contemplation, and this plastic principle generally proves adequate, in the hands of skillful trial and appellate judges, to prevent the recovery for breach of contract of damages beyond the standardized range, whenever such recovery seems unjust or unduly burdensome to business enterprise. The control is exerted with the usual deference to the jury's functions in the trial. If men could reasonably differ over the objective facts relative to the giving of notice, or over the question whether on the facts thus found the defaulter should, when the contract was made, reasonably have foreseen that such a loss as this would be the result of breach, then these questions of fact and inference are to be submitted to the jury. If either of these questions is so clear to the mind of the judge that he believes a contrary view would be unreasonable, the judge is to find the fact, or apply the standard, himself.

In determining whether to tighten or relax in a particular case the curb upon the damages in contract cases, which they exert through the flexible concepts of "notice" and "reasonable contemplation"...
plation,” it seems probable that two factors, of which the rule itself takes no account, exert a deep influence. First, the proportion between the burden which would be imposed on the defendant and the amount of compensation or gain which accrued to him under the contract. Second, the degree of fault attaching to the defendant. The French Civil Code clearly draws the line here, and protects against unforeseen risks of the breach of contract only one who has not acted in bad faith. Evidence that our courts share the tendency to widen the liability of the deliberate contract-breaker, as distinguished from one who has by misfortune or mistake failed to carry out his promise, is furnished by the instances where the courts in their opinions have called attention to the willfulness of the defendant. In the view of the present writer, this tendency is a wholesome one.

5. A further tightening of the Restriction upon Damages in Contract: the Rule that there must have been a Tacit Agreement to assume the particular Risk. In Hadley v. Baxendale the judges greatly narrowed the circle of the risk of liability imposed upon the maker of a contract, by limiting it to the range of the risks

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39See Missouri Dist. Telegraph Co. v. Morris & Co., (C.C.A. 8th Cir. 1917) 156 C. C. A. 179, 243 Fed. 481, where the large compensation received by the defendant was stressed, and see Hooks Smelting Co. v. Planters' Compress Co., (1904) 72 Ark. 275, 79 S. W. 1052, 1056 (compress company recovered $5,450, for suspension of operation of plant, due to delay in repairs to machinery, involving only $100 to $200 profit for repairer; reversed. "Now, where the damages arise from special circumstances, and are so large as to be out of proportion to the consideration agreed to be paid for the services to be rendered under the contract, it raises a doubt at once as to whether the party would have assented to such a liability, had it been called to his attention at the making of the contract, unless the consideration to be paid was also raised so as to correspond in some respect to the liability assumed."). Squire v. Western Union Tel. Co., (1867) 98 Mass. 232, 237, 93 Am. Dec. 157; McKinnon v. McEwan, (1882) 48 Mich. 106, 109, 11 N. W. 828, 42 Am. Dec. 458. In Campfield v. Sauer, (C.C.A. 6th Cir. 1911) 111 C. C. A. 14, 189 Fed. 576, 38 L. R. A. (N.S.) 837, the defendant's argument on the score of disproportion between his possible profit and the damages sought was said not to be "conclusive."

40See the section of the code set out n. 9, supra. The same provision survives in the Louisiana code, see n. 20, supra. It is applied in Lewis v. Holmes, (1903) 109 La. 1030, 34 So. 66, 61 L. R. A. 274.

known at the time of making to the party who later defaults. As we have just seen, this circle may be narrowed still further on occasion by a strict insistence upon complete knowledge of all possible factors contributing to the risk. Despite this elasticity, there have from time to time appeared decisions and dicta demanding a further curtailment of the field of liability in contract for consequential damage. Instances occur where it seems to the courts that a reasonable business man, under the circumstances, might be entirely aware of the probability of heavy damage to the other party in case of a breach, but would not understand or anticipate that he would be answerable for such damage if he should be unable to fulfill his undertaking. Often this is true in cases where the risk arises from some entirely separate, or "collateral," engagement of the other party with third persons, and where the hazard is so disproportionately heavy as not to be adequately compensated by the consideration received in the present venture by the one upon whom the liability would fall. Two English carrier cases raised the problem, not long after the parent case. In the Nettleship Case, a ship-owner had contracted to carry from Glasgow to Canada with reasonable promptness several cases of machinery intended, as the ship-owner knew, for the erection by the shipper of a saw-mill at Vancouver Island. At destination, it was found that one of the cases had been left behind. Without this, which contained essential machinery, the mill could not be erected. Was the ship-owner accountable for the delay in the commencement of operation of the mill? Again, in Horne v. Midland Railway Company, a railway received, for shipment to London, a large quantity of shoes, and was notified that the shipper had contracted to deliver them in London to another concern, on February 3, 1871. In fact, though this was not communicated, the shipper had sold them at an unusually high price to a jobber who was buying them for the French army then fighting the Germans. Was the railway, which delayed delivery until too late to meet the sale, liable for the shipper's loss of profit? In each case, the court denied liability for the "special" loss, and gave recovery only for the ordinary damage for the delay. In the latter

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42 See par. 2, supra pp. 499-504.
43 See par. 4, supra pp. 507-511.
44 "British Columbia and Vancouver's Island Spar, etc., Co. v. Nettleship, (1868) L. R. 3 C. P. 499, 37 L. J. C. P. 235.
45 (1872) L. R. 7 C. P. 583, (1873) L. R. 8 C. P. 131, 42 L. J. C. P. 59, 5 Eng. Rul. Cas. 506.
case, and possibly in both, this result could readily have been based upon the insufficiency of the carrier's knowledge of the risk, but in both cases a new restrictive formula was suggested. In the language of Willes, J., in the earlier case:

"Though he [shipowner] knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge without more would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. . . . Knowledge on the part of the carrier is only important if it forms part of the contract. . . ."46

This suggestion seems to have been carried little further in England,47 but there has been a sprinkling of judicial approbation of it in various American state courts,48 and it has been adopted

46(1868) L. R. 3 C. P. 499, 508, 509, 37 L. J. C. P. 235.


48Southwestern Bell Tel. Co. v. Carter, (1930) 181 Ark. 209, 25 S. W. (2d) 448 (delay in putting through telephone call for broker; damages for special loss on flour contract denied, though telephone employee knew nature of plaintiff's business; "the facts and circumstances in proof must be such as to make it reasonable for the judge or jury trying the case to believe that the party at the time of the contract tacitly consented to be bound to more than ordinary damages in case of default on his part." Snell v. Cottingham, (1872) 72 III. 161, 170 (counterclaim against railway construction contractors for delay in completing road; held, although contractors knew that delay would entail large loss by owners of road through necessity of paying interest upon a bond issue of $1,200,000, under the terms of the owners' contract with the company to which the road had been leased, yet they are not liable for this loss: "It is, no doubt, true, if the road had been completed by the 1st day of January, 1872, appellants would have obtained a rebate of the interest on the total amount of the construction bonds; but if it was intended to hold appellees responsible in case of non-performance of their contract, according to the terms of their private agreement with the lessee of the road, they should have made it a part of the contract that the damages should be so measured. Although appellees may have known there was such an agreement between appellants and the lessee, they will not be presumed to have contracted with reference to any such mode of ascertaining the damages, and in the absence of any special contract they are bound by no such rule. Had it been known it was expected appellees would be held responsible for such extraordinary damages, it is hardly probable they would have entered into the contract, for the consequences of a failure for only a few days would be
with trenchant emphasis by the federal Supreme Court in the leading case of Globe Refining Co. v. Landa Cotton Oil Co. This was an action by a Kentucky buyer against a Texas seller, in the federal court, for breach of a contract to sell, and to deliver into the buyer's tankcars to be sent by the buyer to the seller's mill in Texas, a quantity of cottonseed oil. The seller failed to deliver the oil though the buyer sent cars as agreed. The damages claimed were not only for the difference between the contract price and the market value (the "normal" recovery) but also for the special expense of fruitlessly sending the cars from Kentucky to Texas and for the loss of use of the cars. These latter items were necessary to bring up the amount claimed to the minimum amount required to give jurisdiction to the federal court. The petition set out the written contract which contained the provision that the seller agreed to furnish cars, but there was no recital in the contract of danger of special loss in respect to sending the cars. The petition did allege, however, that the defendant knew when it made the contract that such loss would be incurred. Nevertheless, such special loss was held not recoverable on the face of the petition by the trial judge, who consequently dismissed the case for want of jurisdiction. This was affirmed, and Holmes, J., for the court said:

"But a man never can be absolutely certain of performing any contract when the time of performance arrives, and, in many most disastrous. The damages insisted upon, under this rule, exceed $44,000—a sum enormously out of all proportion to the amount to be paid for the entire work."); McKinnon v. McEwan, (1882) 48 Mich. 106, 109, 11 N. W. 828, 42 Am. Rep. 458 (denying damages for loss of profits for seller's delay in delivering boilers for buyer's mill, although seller knew purpose of boilers); Booth v. Spuyten Duyvil Rolling Mill Co., (1875) 60 N. Y. 487, 494 (special damages for loss of re-sale profit allowed for seller's failure to deliver caps for steel rails though seller did not know of price fixed in re-sale contract; approving, however, the view "that a bare notice of special circumstances which might result from a breach of the contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient."); Lindley v. Richmond & Danville R. Co., (1883) 88 N. C. 547, 553 (delay by carrier of freight, consequential damages denied for want of notice; dictum approving Horne v. Midland Railway Co., (1873 L. R. 8 C. P. 131, 42 L. J. C. P. 59); Owens v. North American Elec. and Impr. Co., (1912) 91 S. C. 417, 74 S. E. 1067 (action for breach of contract to furnish electricity for plaintiff's dairy; held, sufficient to allege knowledge of defendant when contract made, of risk of special damage, without alleging that contract was made "with reference to such damages," but latter issue must be submitted to jury if doubtful). Many of the earlier American decisions, cited above, show the influence of Mayne's treatise on Damages, which adopted the view that a tacit agreement was required. Wood's Mayne, Damages, 50 (1st Am. ed.). See also the illuminating discussion by Prof. R. S. Bauer, Consequential Damages in Contract, (1932) 80 U. of Pa. L. Rev. 686.
cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation, and, whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind. For instance, in the present case, the defendant's mill and all of its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented performance of the contract. If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach. . . . It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods."

The court held further that an allegation that the defendant "maliciously" caused the plaintiff to send its tanks a thousand miles, all the while intending a breach of its contract, did not strengthen the claim for special damages.

While the opinion seems almost perverse in its anxiety to make all intendments against the pleader in order to reach the doctrinal point, and in its seeming indifference to the elements of wanton bad faith on the one hand, and of severe hardship on the other, which the pleader attempted to portray, it has naturally made a deep impress upon later Federal decisions.50

50It has been applied to deny recovery for special losses, in Armstrong Rubber Co. v. Griffiths, (C.C.A. 2nd Cir. 1930) 43 F. (2d) 689 (counter-claim by buyer of tires, a retail dealer, for loss of good-will because of defects in tires; held, knowledge by seller that tires were to be re-sold, not sufficient to fix liability); Mitsubishi Shoji Kaisha v. Davis, (D.C. N.Y. 1922) 291 Fed. 885 (action against carrier for non-delivery; carrier's knowledge that goods were for re-sale, insufficient); Stebbins v. Selig, (C.C.A. 8th Cir. 1919) 257 Fed. 230 (action for breach of contract to dig a well on plaintiff's land, to irrigate rice farm; held, though defendant knew purpose, not liable for loss of rice-crop, since parties did not contemplate that he would be so liable when contract made). The two cases last cited hold that the doctrine is one of "general law" as to which the local state decisions are not controlling in the federal courts. Examples of federal decisions in which the requirement of the Globe Refining Co. Case was held to be met: Stamford Extract Mfg. Co. v. Oakes Mfg. Co., (C.C.A. 2nd Cir. 1925) 9 F. (2d) 301 (buyer recovers damage due to seller's delay in delivering goods, causing buyer to pay demurrage for vessel waiting for goods: "We agree that mere notice of the extent of the promisee's loss is not conclusive; the loss must be within the promisor's undertaking. That is no doubt a fictitious standard to apply, for a contract is not a promise to perform or pay damages. Yet we know of no test other than the loose one that the loss must be such that, had the promisor been originally faced with its possibility, he would have assented to its inclusion in what he must make good. It seems to us quite unreasonable to suppose that a seller in the plaintiff's position could have refused to recognize, under these circumstances, that he was chargeable with so direct a loss as this."—opinion by Learned Hand, Circ. J.); Fairbanks-Morse & Co.
Nevertheless, the doctrine that there must have been an assumption of the special risk, express or implied from circumstances reaching further than mere knowledge, has been occasionally definitely rejected in state decisions,\(^{51}\) and usually the *Hadley v. Baxendale* formula of "notice" and "contemplation" is recited as the test, with no mention of the later innovation. The neatness of a theory which makes compensation for breach of contract depend in this instance upon the existence of a promise by the defaulter to compensate—a promise, moreover, which concededly need not conform to the usual rule in written contracts that all terms must be embraced in the writing—has been assailed by an eminent writer on contracts.\(^{32}\) The "implied agreement" theory, however, if properly ridden, need never carry the court to an unjust result. It adds the fiction of a tacit promise to the original fiction of "contemplation," and seldom is there anything in the situation more definite and mandatory than the judge's sense of justice to tell him to find the presence or absence of this silent promise to assume the risk.\(^{32}\) The recurrent cropping up of the idea in the opinions of the courts indicates that some of the judges have found the conception useful in giving expression to this sense of the justice of the situation.\(^{54}\) If so, this serves as its justification.

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\(^{51}\) In McKibbin v. Pierce, (Tex. Civ. App. 1917) 190 S. W. 1149, the fact—raised the issue with unusual neatness. A landlord sued a tenant for the latter's failure to carry out an agreement to give up possession of the premises by a certain date, to make way for a new tenant, to whom the landlord had agreed to pay $10 per day as liquidated damages, for delay in turning over the premises. The evidence showed that the old tenant, before he made the agreement to get out, was told of this liability of the landlord for $10 per day, and was told that the landlord would hold him responsible for this if he did not get out. The reply was that he would "not get under" the landlord's contract, but would "back up his own contract" to get out. The old tenant was held responsible, nevertheless, for the landlord's loss under the new lease contract, due to his inability to give possession. The court said: "The law, if the party had the notice, impresses the rule, and the parties cannot exclude the rule by his mere statement that he will not be bound if he continues in making the contract."


\(^{53}\) See decisions cited in note 50, supra.

\(^{51}\) However useful the idea may be for inclusion in appellate opinions, its-
A generalization wider than the formulas of "notice," "contemplation," and "implied agreement" has been suggested by Dean Green, which probably describes the ends which the courts are seeking better than these formulas do. He says:

"The formula is one for use in determining whether the interest involved is protected by the agreement. And it is not a contemplation of consequences from a possible breach, but a contemplation of interests which may be protected by the contract. Parties, in making contracts, rarely contemplate the losses which would result from its breach. But they do count the advantages they will gain from its performance. What interests does the contract promote or serve? These are actually considered in most part, and those which are shown to have been considered or reasonably falling within the terms in view of the language used and the background of the transaction, mark its boundaries—the limits of protection under it."

The customary instructions to juries in these cases would more closely focus upon the aim for which the rules were devised if they were re-cast in terms of "interests intended to be served" rather than of "losses which should reasonably have been contemplated," but "losses" are more familiar to jurors than "interests," so that the traditional phraseology is more suited to the listeners.

In concluding the discussion of the successive steps in the progress of our courts toward a satisfactory technique for limiting the damages for breach of contract so as to satisfy the desires of the business man without unduly sacrificing the interests of his customers, it seems fitting to hark back to a suggestion thrown out earlier in the discussion. Would not our courts enhance the realism of the rules and make them easier for juries to accept if they gave formal approval to the tendency, written large upon the actual results of the cases, to discriminate between the liability for consequential damages of the wilful and deliberate contract-breaker on the one hand, and of the party who has failed to carry out his bargain through inability or mischance? Our rules should sanction, as our actual practice probably does, the award of

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55Green, Rationale of Proximate Cause 51.

56See par. [4], supra, notes 40, 41.
consequential damages against one who deliberately and wantonly breaks faith, regardless of the foreseeability of the loss when the contract was made. We shall then have completed the process, begun piece-meal in Hadley v. Baxendale, of borrowing from the French Civil Code its theory of damages in contract.