C. A. 1911

SMITH v. MARTIN AND KINGSTON-UPON-HULL CORPORATION.

her negligence. I am therefore of opinion that this appeal must be allowed.

Plaintiff's appeal allowed.

Solicitors for plaintiff: *Windybank, Samuell & Lawrence, for B. Pearlman, Hull.*

Solicitors for defendant Martin: *Baker & Nairn, for A. M. Jackson & Co., Hull.*

Solicitors for defendants the Kingston-upon-Hull Corporation: *Sharpe, Pritchard & Co., for H. A. Learoyd, Hull.*

W. J. B.

C. A. 1911 *May* 15, 16.

[IN THE COURT OF APPEAL.]

CHAPLIN *v.* HICKS.

Damages—Measure of—Breach of Contract—Remoteness—Inassessability.

Where by contract a man has a right to belong to a limited class of competitors for a prize, a breach of that contract by reason of which he is prevented from continuing a member of the class and is thereby deprived of all chance of obtaining the prize is a breach in respect of which he may be entitled to recover substantial, and not merely nominal, damages.

The existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment.

Richardson v. *Mellish*, (1824) 2 Bing. 229, and *Watson* v. *Ambergate, &c., Railway*, (1850) 15 Jur. 448, discussed.

APPLICATION of the defendant for judgment or a new trial in an action tried by Pickford J. and a common jury.

On November 5, 1908, a letter from the defendant, a well-known actor and theatrical manager, was published in a London daily newspaper, in which he said that, with a view of dealing at once with the numerous applications continually being made to him by young ladies desirous of obtaining engagements as actresses, he was willing that the readers of that newspaper should by their votes select twelve ladies, to whom he would give engagements. On the four following days the offer was published in detail in the newspaper. Ladies were invited to

send their photographs to the newspaper by November 24, 1908, together with an application form, in which they were to insert name, address, and general personal description. The defendant, with the assistance of a committee, would then select twenty-four photographs to be published in the newspaper, and the readers of the newspaper would out of those select the twelve winners, to the first four of whom the defendant would give an engagement for three years at 5*l.* a week, to the second four an engagement for three years at 4*l.* a week, and to the third four an engagement for three years at 3*l.* a week. On November 10 the plaintiff sent in a signed application together with her photograph. The response to the defendant's offer was so great that in the issue of December 9 an alteration of the conditions of the competition was announced. It was stated that about six thousand photographs had been sent in, and that from these the defendant or his committee had selected about three hundred, which would be published in the newspaper in the following way: the United Kingdom would be divided into ten districts, and the photographs of the selected candidates in each district would be submitted to the readers of the newspaper in that district, who were to select by their votes those whom they considered the most beautiful. After the voting was completed the defendant would make an appointment to see the five ladies in each district whose photographs so published obtained the greatest number of votes, and from these fifty the defendant would himself select the twelve who would receive the promised engagements. The plaintiff assented to the alteration in the terms of the competition. The fifty photographs were then published with numbers appended to them in the newspaper, together with a ballot paper on which the reader of the newspaper registered his vote for the particular number which he preferred, and added his signature and address. On January 2, 1909, the poll closed; the plaintiff's name appeared as first in her particular section, and she became one of the fifty eligible for selection by the defendant. On January 4 the defendant's secretary wrote a letter to the plaintiff asking her to call at the Aldwych Theatre at 4 o'clock on Wednesday afternoon [January 6] to see the defendant. This letter was addressed to

C. A. 1911

CHAPLIN v. HICKS.

the plaintiff's London address, which was the only address given by the plaintiff in her application, and was delivered there by the first post on January 5. The plaintiff was at that time fulfilling an engagement at Dundee; the letter was at once re-addressed to Dundee, where it reached the plaintiff on January 6, much too late for her to keep an appointment in London on that afternoon. The other forty-nine ladies kept their appointments, and on January 6 the defendant made his final selection of the twelve, of whom the plaintiff was not one. The plaintiff made attempts, but unsuccessfully, to obtain another appointment with the defendant, and eventually brought the present action to recover damages on the ground that by reason of the defendant's breach of contract she had lost the chance of selection for an engagement. The jury found, in answer to a question put to them by the learned judge, that the defendant did not take reasonable means to give the plaintiff an opportunity of presenting herself for selection, and assessed the damages at 100*l.*, for which sum Pickford J., after argument, directed judgment to be entered. The defendant appealed.

McCardie (*A. R. Churchill* with him), for the defendant. Assuming a breach of contract, the plaintiff is not entitled to substantial damages, but to nominal damages only. Either the damages do not flow directly from the breach and are too remote, or they are so contingent as to be incapable of assessment. The question has been discussed in actions against carriers for damages for loss or delay in the carriage of goods. In *Watson* v. *Ambergate, &c., Railway* (1), which was decided at a time when the rule as to notice of the purpose for which the goods were required affecting the damages for their loss had not been authoritatively formulated, the question arose of the damages recoverable for the loss of a plan and model of a machine for loading colliers from barges, the plan and model being intended to be used in a competition for prizes; the Court seems to have decided that the measure of damages for loss of the plan and model was the value of the plan and model, and that the loss of the chance of obtaining the prize was not

(1) 15 Jur. 448.

capable of assessment; there was, however, a difference of opinion, Patteson J. thinking that damages might be given for the loss of the chance, Erle J. thinking that they could not. In Mayne on Damages, 8th ed., p. 70, it is suggested that the view of Erle J. was correct, and the author puts the question thus: "Was the plaintiff's chance of winning the prize a matter of such an ascertainable value at the time of entering into the contract of carriage, as to have been capable of contemplation by both parties?" In *Simpson* v. *London and North Western Railway* (1), where the defendants had notice of the purpose for which the samples delivered to them for carriage were required, loss of profit was held to be a natural and probable result of failure to deliver them in time. But substantial damages cannot be recovered where the claim is merely for the loss of a benefit which might or might not have accrued to the plaintiff; they certainly cannot be recovered where, in ordinary language, the odds are against the plaintiff ever deriving any benefit from his contract; that is not a mere question for the jury in assessing the amount of damages.

[FLETCHER MOULTON L.J. Take the case of a tontine of a hundred persons, of whom only three are left; if one of the three were improperly struck out, would he not be entitled to substantial damages?]

It is submitted that he would be entitled to nominal damages only; if he were held to be entitled to substantial damages, it would only be because a member of a tontine has an acknowledged right in property. It is clear that the law recognizes the existence of a liability which is incapable of being estimated. Such cases were directly provided for by s. 31 of the Bankruptcy Act, 1869, where a future and contingent liability, declared by an order of the Court to be incapable of being fairly estimated, was declared to be not provable in bankruptcy: see *Hardy* v. *Fothergill*. (2) The recent decision of Jelf J. in *Sapwell* v. *Bass* (3) is a clear authority in favour of the defendant. The cases in which damages have been given for the loss of a probability, such as *Frost* v. *Knight* (4), are not in point; a

(1) (1876) 1 Q. B. D. 274.
(2) (1888) 13 App. Cas. 351.
(3) [1910] 2 K. B. 486.
(4) (1872) L. R. 7 Ex. 111.

C. A. 1911

CHAPLIN v. HICKS.

probability is very different from a chance, which is a non-assessable possibility.

[FARWELL L.J. referred to *Richardson* v. *Mellish.* (1)]

That is the only case in which the question of a contingency or of the approval of a third person has arisen in respect of an assessment of damages, and it does not conflict with the general rule that the existence of a contingency which is dependent on the volition of a third person renders the damages for a breach of contract incapable of assessment. [He also cited *Horne* v. *Midland Railway* (2); *Walker* v. *Goe* (3); *Maw* v. *Jones* (4); *Addis* v. *Gramophone Co.* (5); *Lagunas Nitrate Co.* v. *Lagunas Syndicate.* (6)]

G. A. Scott, for the plaintiff, was not called upon.

VAUGHAN WILLIAMS L.J. I am of opinion that this appeal should be dismissed. The plaintiff relies upon a contract alleged to have been made with the defendant, a contract under which she asserts that she obtained the opportunity of appearing in a competition in which considerable prizes were offered. I need not discuss the facts in any detail; so far as the contract and its breach are concerned, even if neither of them is admitted on the pleadings, the matter has been discussed by Mr. McCardie in his able argument upon the basis that there was a contract and that there was a breach of that contract. It is contended, however, that the breach of contract was such that the damages (if any) obtainable in respect of it could only be nominal. The argument for the defendant was based upon two propositions, first, that the damages were remote, and, secondly, that they were unassessable, and we have to deal with both those contentions.

As regards remoteness, the test that is generally applied is to see whether the damages sought to be recovered follow so naturally or by express declaration from the terms of the contract that they can be said to be the result of the breach. This generally resolves itself into the question whether the

(1) 2 Bing. 229.
(2) (1873) L. R. 8 C. P. 131.
(3) (1859) 4 H. & N. 350.
(4) (1890) 25 Q. B. D. 107.
(5) [1909] A. C. 488.
(6) [1899] 2 Ch. 392.

damages flowing from a breach of contract were such as must have been contemplated by the parties as a possible result of the breach. Now, the moment it is admitted that the contract was in effect one which gave the plaintiff a right to present herself and to take her chance of getting a prize, and the moment the jury find that she did not have a reasonable opportunity of presenting herself on the particular day, we have a breach attended by neglect of the defendant to give her a later opportunity; and when we get a breach of that sort and a claim for loss sustained in consequence of the failure to give the plaintiff an opportunity of taking part in the competition, it is impossible to say that such a result and such damages were not within the contemplation of the parties as the possible direct outcome of the breach of contract. I cannot think these damages are too remote, and I need say no more on the question of remoteness.

Then came the point that was more strenuously argued, that the damages were of such a nature as to be impossible of assessment. It was said that the plaintiff's chance of winning a prize turned on such a number of contingencies that it was impossible for any one, even after arriving at the conclusion that the plaintiff had lost her opportunity by the breach, to say that there was any assessable value of that loss. It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiff's pecuniary loss. I am unable to agree with that contention. I agree that the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of the chance or opportunity of winning the prize. In the present case I understand that there were fifty selected competitors, of whom the plaintiff was one, and twelve prizes, so that the average chance of each competitor was about one in four. Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it

C. A. 1911

CHAPLIN v. HICKS.

Vaughan Williams L.J.

:s possible to apply the doctrine of averages at all. I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. I agree, however, that damages might be so unassessable that the doctrine of averages would be inapplicable because the necessary figures for working upon would not be forthcoming; there are several decisions, which I need not deal with, to that effect. I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages.

In early days when it was necessary to assess damages, no rules were laid down by the Courts to guide juries in the assessment of damages for breach of contract; it was left to the jury absolutely. But in course of time judges began to give advice to juries; as the stress of commerce increased, let us say between the reigns of Queen Elizabeth and Queen Victoria, rule after rule was suggested by way of advice to juries by the judges when damages for breach of contract had to be assessed. But from first to last there were, as there are now, many cases in which it was difficult to apply definite rules. In the case of a breach of a contract for the delivery of goods the damages are usually supplied by the fact of there being a market in which similar goods can be immediately bought, and the difference between the contract price and the price given for the substituted goods in the open market is the measure of damages; that rule has been always recognized. Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract. I do not wish to lay down any such rule as that a judge can in every case leave it to the jury to assess damages for a breach of contract. There are cases, no doubt, where the loss is so dependent on the mere unrestricted volition of another that it is impossible to say that there is any assessable loss resulting from

the breach. In the present case there is no such difficulty. It is true that no market can be said to exist. None of the fifty competitors could have gone into the market and sold her right; her right was a personal right and incapable of transfer. But a jury might well take the view that such a right, if it could have been transferred, would have been of such a value that every one would recognize that a good price could be obtained for it. My view is that under such circumstances as those in this case the assessment of damages was unquestionably for the jury. The jury came to the conclusion that the taking away from the plaintiff of the opportunity of competition, as one of a body of fifty, when twelve prizes were to be distributed, deprived the plaintiff of something which had a monetary value. I think that they were right and that this appeal fails.

FLETCHER MOULTON L.J. I have come to the same conclusion. The contract was made when the plaintiff, in answer to the defendant's announcement, sent up her photograph as one to be submitted to the committee by whom the selection was to be made. About six thousand photographs in all were sent in, and three hundred, of which the plaintiff's was one, were selected; these appear to have been voted upon by the readers of the newspaper, and the plaintiff was the first of the group or district to which, for the purposes of the competition, she belonged; by the conditions of the offer fifty altogether were in the end to come before the defendant, and twelve appointments were to be given to twelve members of that body of fifty. The jury have found that the defendant did not keep his engagement with the plaintiff; she was afforded no reasonable opportunity of submitting herself to the judgment of the tribunal that awarded the prizes, but was excluded from the limited competition for which by the terms of the contract she had become eligible and had therefore no chance of winning a prize.

Mr. McCardie does not deny that there is a contract, nor that its terms are as the plaintiff alleges them to be, nor that it is enforceable, but he contends that the plaintiff can only recover nominal damages, say one shilling. To start with, he puts it thus: where the expectation of the plaintiff depends on a

C. A. 1911

CHAPLIN v. HICKS.

Fletcher Moulton L.J.

contingency, only nominal damages are recoverable. Upon examination, this principle is obviously much too wide; everything that can happen in the future depends on a contingency, and such a principle would deprive a plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with mathematical accuracy. The learned counsel admitted that it was very difficult to formulate his proposition, but he ultimately said that where the volition of another comes between the competitor and what he hopes to get under the contract, no damages can, as matter of law, be given. I can find no authority for that proposition; in fact, the decision in *Richardson* v. *Mellish* (1) is obviously in the teeth of it. I do not rely, however, on that or on any other authority; I would rather consider what is the right of a plaintiff as regards damages for breach of a contract, and regarding it as a matter of broad general principle, I do not think that any such distinction as that suggested by Mr. McCardie can be drawn. The Common Law Courts never enforced contracts specifically, as was done in equity; if a contract was broken, the common law held that an adequate solatium was to be found in a pecuniary sum, that is, in the damages assessed by a jury. But there is no other universal principle as to the amount of damages than that it is the aim of the law to ensure that a person whose contract has been broken shall be placed as near as possible in the same position as if it had not. The assessment is sometimes a matter of great difficulty. It is impossible in many cases to regard the damage that has followed the breach as that for which the plaintiff is to be compensated, for the injury to the plaintiff may depend on matters which have nothing to do with the defendant. For example, an innkeeper furnishes a chaise to a son to drive to see his dying father; the chaise breaks down; the son arrives too late to see his father, who has cut him out of his will in his disappointment at his not coming to see him; in such a case it is obvious that the actual damage to the plaintiff has nothing to do with the contract to supply the chaise. Therefore at an early stage the limitation was imposed that damages for breach of a contract must be such as might naturally

(1) 2 Bing. 229.

be supposed to be in the contemplation of the parties at the time the contract was entered into; damages, in order to be recoverable, must be such as arise out of the contract and are not extraneous to it. This limitation has been appealed to here. It has been contended in the present case that the damages are too remote; that they are not the natural consequences of a breach with regard to which the parties intended to contract. To my mind the contention that they are too remote is unsustainable. The very object and scope of the contract were to give the plaintiff the chance of being selected as a prize-winner, and the refusal of that chance is the breach of contract complained of and in respect of which damages are claimed as compensation for the exclusion of the plaintiff from the limited class of competitors. In my judgment nothing more directly flowing from the contract and the intentions of the parties can well be found.

Then the learned counsel takes up a more hopeful position. He says that the damages are difficult to assess, because it is impossible to say that the plaintiff would have obtained any prize. This is the only point of importance left for our consideration. Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question; it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallengeable case of injury, and the damages given in respect of it should be equivalent to the loss. But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize-winner. I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well-settled rules as to the measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs. In such cases the Court weighs the pros and cons and gives advice, and I may almost say directions, to the jury as regards the measure of damages. This is especially the case in actions relating to the sale of goods of a class for which there is an active

C. A. 1911

CHAPLIN v. HICKS.

Fletcher Moulton L.J.

and ready market. But in most cases it may be said that there is no recognized measure of damages, and that the jury must give what they think to be an adequate solatium under all the circumstances of the case. Is there any such rule as that, where the result of a contract depends on the volition of an independent party, the law shuts its eyes to the wrong and says that there are no damages? Such a rule, if it existed, would work great wrong. Let us take the case of a man under a contract of service to serve as a second-class clerk for five years at a salary of 200*l.* a year, which expressly provides that, at the end of that period, out of every five second-class clerks two first-class clerks will be chosen at a salary of 500*l.* a year. If such a clause is embodied in the contract, it is clear that a person thinking of applying for the position would reckon that he would have the advantage of being one of five persons from whom the two first-class clerks must be chosen, and that that might be a very substantial portion of the consideration for his appointment. If, after he has taken the post and worked under the contract of service, the employers repudiate the obligation, is he to have no remedy? He has sustained a very real loss, and there can be no possible reason why the law should not leave it to the jury to estimate the value of that of which he has been deprived. Where by contract a man has a right to belong to a limited class of competitors, he is possessed of something of value, and it is the duty of the jury to estimate the pecuniary value of that advantage if it is taken from him. The present case is a typical one. From a body of six thousand, who sent in their photographs, a smaller body of fifty was formed, of which the plaintiff was one, and among that smaller body twelve prizes were allotted for distribution; by reason of the defendant's breach of contract she has lost all the advantage of being in the limited competition, and she is entitled to have her loss estimated. I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury. They must of course give effect to the consideration that the plaintiff's chance is only one out of four and that they cannot tell whether she would have ultimately proved to be the winner. But having considered all this they may well think that

it is of considerable pecuniary value to have got into so small a class, and they must assess the damages accordingly.

This consideration decides the case, but I wish to refer to the decision of Jelf J. in *Sapwell* v. *Bass.* (1) That decision was, in my opinion, right on the facts of the particular case. The plaintiff had acquired by contract a right to send a mare during the following year to a renowned stallion belonging to the defendant, and the defendant broke his contract. The right to send the mare was coupled with the payment of a fee of 300 guineas. Jelf J. held that for the breach of contract the plaintiff was only entitled to nominal damages. The ground of the decision was that there was no evidence to shew that the right was worth more to the plaintiff than the 300 guineas which he would have had to pay for the services of the stallion, and that there was therefore no evidence that the damages were more than nominal. If, however, the learned judge meant to hold that there were no damages for breach of an undertaking to serve the mare, there is, in my opinion, no justification for such a view. The contract gave the plaintiff a right of considerable value, one for which many people would give money; therefore to hold that the plaintiff was entitled to no damages for being deprived of such a right because the final result depended on a contingency or chance would have been a misdirection. This appeal must be dismissed.

FARWELL L.J. I agree. The fallacy of Mr. McCardie's argument consists, in my opinion, in his failing to distinguish between the remoteness of the damage claimed and its assessment; the question of remoteness is for the judge; the assessment of damages is for the jury. I agree in thinking that the contention that the damages in the present case are too remote is unarguable; the case could not have been withdrawn from the jury, for damage might result not only from the loss of the opportunity of winning a prize but also from the slur upon the plaintiff in her professional capacity, which might result in a diminution of the value of her services as an actress when she applied for an engagement. In *Maw* v. *Jones* (2), which raised

(1) [1910] 2 K. B. 486.

(2) 25 Q. B. D. 107.

C. A. 1911

CHAPLIN v. HICKS.

Farwell L.J.

the question of the measure of damages in an action for the wrongful dismissal of an apprentice, Lord Coleridge C.J. said: "The plaintiff was entitled to recover for all the damage flowing naturally from the breach, and in considering what that would include the jury might take into account the difficulty that the plaintiff as a discharged apprentice would have in obtaining employment elsewhere." The jury may well have considered the difficulty which the plaintiff, after being passed over in this fashion by the defendant, would have in obtaining as good an appointment as before. I think, therefore, that the question of remoteness of damage does not arise here.

Then comes the question as to the ascertainment of the amount. In actions for unliquidated damages this is ordinarily for the jury, and to my mind it is not correct to say that the present is an exceptional case. It is contended that the amount of the plaintiff's loss is so entirely a matter of pure chance as to be incapable of assessment. I cannot for this purpose draw any distinction between a chance and a probability. In the Oxford English Dictionary one of the definitions of "chance" is "a possibility or probability of anything happening, as distinct from a certainty," and a citation is given from Reid's Intellectual Powers, "The doctrine of chances is a branch of mathematics little more than an hundred years old." The two words "chance" and "probability" may be treated as being practically interchangeable, though it may be that the one is somewhat less definite than the other. The necessary ingredients of such an action are all present; the defendant has committed a breach of his contract, the damages claimed are a reasonable and probable consequence of that breach, and loss has accrued to the plaintiff at the time of action. It is obvious, of course, that the chance or probability may in a given case be so slender that a jury could not properly give more than nominal damages, say one shilling; if they had done so in the present case, it would have been entirely a question for them, and this Court could not have interfered. But in the present competition we find chance upon chance, two of which the plaintiff had succeeded in passing; from being one of six thousand she had become a member of a class of fifty, and, as I understand it, was first in her particular division by the votes

of readers of the paper; out of those fifty there were to be selected twelve prize-winners; it is obvious that her chances were then far greater and more easily assessable than when she was only one of the original six thousand. If the plaintiff had never been selected at all, the case would have been very different; but that was not the case. In my opinion the existence of a contingency, which is dependent on the volition of a third person, is not enough to justify us in saying that the damages are incapable of assessment. The case of *Richardson* v. *Mellish* (1) affords a very good illustration on this point. There the question was raised whether in an action for breach of contract the jury could give damages for the loss of two voyages as captain of an East India-man, though the second had not been accomplished at the time of action, and in his judgment Best C.J. said (2): "It is clear that the plaintiff could only be appointed for one voyage, for the appointment of master is renewed every voyage. But though that is the case, may not parties look to that which is the practice of the East India Company, that though they renew the appointment, they renew it in the same person? If that practice be legal, may I not say, if you had appointed me for the first voyage, I should have continued for the second? You have deprived me of the profits I should have made not only on the first voyage, but on the second also. It requires no legal head to decide this: common sense says, you are not to be paid for consequences which might not turn up in your favour; but the plaintiff is entitled to have a compensation for being deprived of that which almost to a certainty happens in these cases." Now, the expression "almost to a certainty" means that the contemplated event is very probable, and the fact that it is very probable only increases the amount of damages which a jury would give. It is obvious that if the East India Company were in the habit of appointing the same man master for the next voyage, the chance of appointment of the plaintiff in that case was a very good one, and the jury assessed the damages accordingly. It is clear upon the authorities that damage resulting from the loss of a chance of winning in a competition is assessable. In

(1) 2 Bing. 229.

(2) 2 Bing. at p. 239.

C. A. 1911

CHAPLIN v. HICKS.

Farwell L.J.

Ex parte Waters, In re Hoyle (1), Mellish L.J. said: "It is difficult to imagine any kind of contract (I speak of business contracts) in respect of which, if broken before, or put an end to by, the bankruptcy, a jury could not point out a fair way of estimating the damages under the direction of the judge." I agree with Mr. McCardie that the principles on which the Bankruptcy Court acts are wider and more extensive than those applicable to cases of mere breach of contract, for the effect of bankruptcy proceedings is to make a clean sweep of contractual relations; but it makes no difference whether the proceedings are taken for closing a bankrupt's estate or for payment of compensation to a plaintiff who has been injured by breach of a contract. I see no difficulty in the assessment of damage in the present case. It was a question for the jury, and, that being so, this Court is not entitled to interfere with their finding. The case of *Watson* v. *Ambergate, &c., Railway* (2) affords us no assistance at all. That decision is discussed by the learned author of Sedgwick on Damages (3), who says: "The question of damages was not necessarily involved in this decision. In a similar case in Pennsylvania, the opinion expressed in it was disapproved, the Court holding that the value of the opportunity to compete for the premium furnished the measure of the plaintiff's damages. If the company were informed of the object of the transmission, the loss of the privilege of the competition was in view of both parties when they entered into the contract; and if not, the loss was still the result of the carrier's negligent breach. But it appearing from the evidence of one of the committee by whom the prizes were awarded, that the plaintiff must at any rate have failed to obtain the prize, he was held entitled to nominal damages only: *Adams Express Co.* v. *Egbert.* (4)" To a great extent that expresses my own view; where a railway company has no notice of the special purpose for which goods are to be carried, it is not possible to hold them liable for the special damages resulting from their loss. I need only refer shortly to *Sapwell* v. *Bass.* (5) In that case there was no jury, and Jelf J., exercising the

(1) (1873) L. R. 8 Ch. 562, at p. 567.
(2) 15 Jur. 448.
(3) 7th ed., i. 128.
(4) (1860) 36 Pa. 360.
(5) [1910] 2 K. B. 486.

functions of a jury, did not see his way towards assessing the damages at a larger sum than one shilling; if there had been a jury, and the learned judge had withdrawn the case from them on the question of the amount of damages, I think he would have been wrong. And in the present case, if the jury had given only a shilling, we could not have interfered. I agree that the appeal must be dismissed.

C. A. 1911

CHAPLIN v. HICKS.

Farwell L.J.

Appeal dismissed.

Solicitors for plaintiff: *Chas. Anderson & Co.*
Solicitors for defendant: *J. D. Langton & Passmore.*

W J. B.

[IN THE COURT OF APPEAL.]

C. A. 1911 *July* 4, 5, 6.

BILLERICAY RURAL DISTRICT COUNCIL *v.* GUARDIANS OF THE POOR OF THE POPLAR POOR LAW UNION AND KEELING.

Highway—Extraordinary Traffic—Average Expense of repairing Highways in the Neighbourhood — Extraordinary Expenses — Damage recoverable— Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12.

In an action by a local authority under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by the Locomotives Act, 1898, s. 12, to recover expenses as having been incurred by them in the repair of a highway by reason of damage arising from extraordinary traffic, the local authority must, in order to succeed, prove that those expenses were "extraordinary," and, for the purpose of determining whether they were so, regard must be had to the average expense of repairing similar highways in the neighbourhood.

APPEAL from the judgment of Channell J. (1) in an action tried by him without a jury.

The action was brought, under the Highways and Locomotives (Amendment) Act, 1878, s. 23, as amended by the Locomotives Act, 1898, s. 12, by the plaintiffs, the Billericay Rural District Council, as being the authority liable to repair a certain highway in parishes within their district, against the guardians of the

(1) Reported [1911] 1 K. B. 734.