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THE RECOVERY OF DAMAGES FOR LOSS OF EXPECTED PROFITS

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The principles which govern the recovery for anticipated gains of the plaintiff which by the defendant's wrongdoing have been prevented from accruing, are agreed upon by the courts with general unanimity, and their mere repetition here would be of little value. Yet most practitioners would agree that despite this unanimity, the attempt to predict the outcome of the application of these principles to any given case is pregnant with doubt and uncertainty. As a distinguished judge said in this connection, "There is no substantial difference in the general principles established by any of these decisions, and the question of ever-recurring perplexity for the courts is the correct application of the principles to the varying facts of the different cases."[1] There may be some utility, therefore, in the collection of a substantial number of the concrete instances in which the courts of this state have been called upon to pass upon specific claims for lost profits, as an aid in finding patterns for comparison when future claims arise. Having this purpose, the grouping is a purely pragmatic, and not a logical one, and it is hoped that it may reveal the court's manner of treating the problems which experience shows are likely to arise in connection with claims for profits. As it is a cross-section, it cuts across the categories of torts, contracts, and obligations imposed by law upon carriers and other public servants.

Unless the claim for lost profits is in the form of some standardized measure of recovery such as the difference between contract price and market value, it is classed as a claim for "consequential" or "special" damages, and the specific facts showing the nature of the expected profit, the probability of accrual of the profit, its amount, and the fact of its loss, must be particularly pleaded.[2]

The first main criterion which is usually laid down in the textbooks and opinions[3] is one which has to do with the situation *before*

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[1] Connor, J., in Harper Furn. Co. v. Southern Exp. Co., 148 N. C. 87, 62 S. E. 145 (1908).

[2] Sloan v. Hart, 150 N. C. 269, 27 L. R. A. N. S. 239, 134 Am. St. Rep. 911, 63 S. E. 1037 (1909); American Pure Food Co. v. Elliott & Co., 151 N. C. 393, 66 S. E. 451 (1909).

[3] Johnson v. Atlantic Coast Line R. Co., 184 N. C. 101, 104, 113 S. E. 606, 25 A. L. R. 910 (1922).

the claim accrued. It is the criterion of *foreseeability,* or as it is usually phrased, the requirement that the loss, if caused by a tort, be the "natural and probable" consequence of the wrong, or if arising from breach of contract, that it should have been "within the contemplation of the parties" when the contract was made.

In contract cases, this requirement is one of substantial importance, and as a practical matter, properly imposes on the claimant who seeks to recover for the loss of a profit on some outside transaction the necessity of demonstrating that his adversary at the time of the making of the contract was aware of the circumstances which rendered it probable that the claimant would lose this profit if the defendant should break his contract.[4] This element of notice is especially important in actions for delay or error in transmission of messages by telegraph companies. For example, in *Clark Manufacturing Company v. Western Union Telegraph Company*[5] the plaintiff's broker in New York wired to plaintiff asking if plaintiff would accept "if we can get offer," a named price for a certain class of textiles which plaintiff had for sale. In fact the broker already had an offer, but did not disclose it for fear plaintiff might seek to bargain further about the price. The plaintiff wired an acceptance, "if you can do no better." Both messages were delayed, and the sale was lost. The court held that on those facts the plaintiff could not recover for loss of the sale, because the telegraph company had no notice of the definite opportunity to sell, since the broker's message appeared on its face to be a mere trade inquiry. Brown, J., for the court said: "It seems to be an almost universal principle of the law of damage, imbedded in the jurisprudence of this country and Great Britain, and adopted by this State by unanimous decisions in many cases, that under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as necessarily arising, according

[4] Thus, in Critcher v. Porter Co., 135 N. C. 542, 47 S. E. 604, the plaintiff claimed as damages for breach of warranty of a sawmill engine, the loss of profits of a contract for the sale of his output, and the court said, "We think that, in the absence of any knowledge on the part of the defendants that the plaintiff had made such a contract, damages resulting from it could not be said to be within their contemplation."

[5] 152 N. C. 158, 67 S. E. 329, 27 L. R. A. N. S. 643 (1910). Compare Gardner v. Postal Tel. and Cable Co., 171 N. C. 405, 88 S. E. 630, L. R. A. 1916 E 484 (1916), where recovery was allowed for loss of a re-sale profit of retail dealer on order for cabbages which the telegraph company failed to deliver, though the message did not disclose the expected re-sale price.

to the usual course of things, from the breach of the very contract sued upon, or which *both* parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach." In contract cases generally, the obstacle is one that the plaintiff usually seems able to surmount, especially as the strict rule obtaining in some jurisdictions that the notice to the defendant of the special circumstances must be an explicit part of the contract or the negotiations leading up to it[6] so as to evidence an implied agreement to stand the particular loss, does not obtain in this state. It is quite sufficient here that the knowledge of the circumstances creating the probability of the particular unusual damage come to the defendant from any source, before the contract is made. Thus, in cases where an engine shaft was consigned to a furniture company,[7] and a sawmill-edger to a sawmill,[8] it was held that, from the names of the consignees and from the apparent vital nature of the machinery-parts shipped, the carrier was put on notice of the likelihood of the interruption of the factory and sawmill respectively. Similarly, where defendant breached a contract to ship to the plaintiff flues for curing tobacco, the court held that the absence of special notice that plaintiff's crop would be lost without proper flues for curing was immaterial, since the probability of such loss was a matter of common knowledge.[9]

The underlying reason for the rule in *Hadley v. Baxendale*,[10] limiting special damages in contract cases to those whose probability defendant was aware of when he entered the contract, seems to be based upon the fairness of requiring one who knows of special risks for which compensation might be claimed in the event of the breach of a proposed contract, to advise the other party of these risks before the latter has finally bound himself, so that the latter may withdraw or make new terms in view of the special risk. If this be so, in the case of an ordinary contract the notice must obviously be given at or before the time the contract is made. In the case of a carrier, telegraph company, or other public servant which is bound by its calling

[6] See Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171 (1903); WILLISTON, CONTRACTS, §1357.

[7] Harper Furniture Co. v. Southern Express Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A. N. S. 483, 128 Sm. St. Rep. 588 (1908), cited with approval in Builders Supply and Equipment Corp. v. Gadd, 183 N. C. 447, 111 S. E. 771 (1922).

[8] Story Lumber Co. v. So. Ry. Co., 151 N. C. 23, 65 S. E. 460 (1909).

[9] Neal v. Pender-Hyman Hdw. Co., 122 N. C. 104, 29 S. E. 96 (1898).

[10] 9 Ex. 341 (1854).

to enter into all contracts offered by the public, the rule requiring notice at the time of making the contract seems to have little reason to support it, though the distinction seems not to have been generally perceived. In one case, however, the suggestion, seemingly sound on principle as applied to these public service contracts, is made that notice of special damage is sufficient if brought home to the carrier or other public servant, in time to enable the carrier by reasonable efforts to avoid a breach of the contract.[11]

But in cases where the claim for lost profits is based purely upon a tort of the defendant, not arising from the mere failure to carry out an undertaking such as that of the carrier or another public service company, the requirement of foreseeability loses its significance. All that is required is that the loss be the "direct" or "the natural and proximate" result of the tort,[12] and this probably means merely that the defendant's wrongdoing must have been a substantial factor in producing plaintiff's loss.[13]

The greatest difficulty which the plaintiff who seeks to recover for loss of profits usually encounters is that of meeting the law's requirement of *certainty*. The accepted rule is that he must show, with certainty, the fact that profits were lost, that is, that they would have accrued but for defendant's wrongdoing, and did not actually accrue, and he must also prove with certainty the amount of such profits. Seemingly the latter requirement, as to amount, is less strict than the former, and in any event, the degree of certainty required is not

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[11] Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 155 N. C. 148, 71 S. E. 71 (1911).

[12] "When a party commits a trespass, he must be held to contemplate all the damages which may legitimately follow from his illegal act. In Brown v. R. R., 544 Wis., 354, it is said: 'The general rule is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as the result of the act done.' Judge Christiancy, in Allison v. Chandler, 11 Mich., at p. 561, says: 'It is urged by counsel for the defendant that damages for the loss of profits ought not to be allowed, because they could not have been within the contemplation of the defendant. Whether, as a matter of fact, this is likely to have been true, we do not deem it important to inquire. It is wholly immaterial whether the defendant in committing the trespass actually contemplated this, or any other species of damage, to the plaintiff. It is a consideration which is confined entirely to cases of contracts, when the question is, what was the extent of the obligation in this respect, which both parties understood to be created by the contract. But when a party commits a trespass, he must be held to contemplate all the damages which may legitimately flow from its illegal act.' Stevens v. Dudley, 56 Vt., 158," Johnson v. Atlantic Coast Line R. Co., 140 N. C. 577-78.

[13] GREEN, THE RATIONALE OF PROXIMATE CAUSE, Ch. 5, §1.

that of a mathematical proof, but only a reasonable certainty.[14] Obviously, absolute certainty of demonstration that a profit expected in future would have actually been realized could almost never be attained, and a wrongdoer should not be allowed to insist upon an ideal and impractical standard of proving what would have been the results of an enterprise which his wrong has frustrated.[15] All he can insist upon, and all the law requires is that it be proved, with such certainty as men will act upon in their daily affairs, that a loss has occurred, and that in measuring the loss the court or jury should not resort to a mere guess, but should be guided by some rational *standard*.[16] Consequently, the process of development of this branch of the law of damages as in so many other parts of that subject, becomes chiefly a search for reliable standards by which to measure the profits claimed to have been lost.

Naturally, little difficulty is encountered when the profit lost is one which would have accrued to the plaintiff directly from the very contract with the defendant, as where the defendant's breach consists in the repudiation of a contract whereby he was to pay the plaintiff for services to be performed. Here the defendant is liable for the price he agreed to pay, less the anticipated cost of performance by the plaintiff. This was held to be the measure of damages in *Oldham v. Kerchner*[17] where the defendant agreed to have his corn ground in plaintiff's mill for a toll of eight cents per bushel, but failed to carry out the agreement. And in *Wilkinson v. Dunbar*[18] the defendant counterclaimed against plaintiff for plaintiff's repudiation of a contract to employ defendant to cut and haul certain timber at a fixed price per thousand feet. The plaintiff repudiated the contract while it had several years to run, but the court held that a recovery might properly be awarded on the counterclaim, based upon evidence as to the prospective payments less the estimated costs. The court, however, following the usual rule limited the claimant to the "present worth" of such anticipated profits, and held further that the costs of the claimant should be estimated as of the time of the breach, irre-

[14] Davidson Hdw. Co. v. Delker Buggy Co., 167 N. C. 423, 425, 83 S. E. 557 (1914).
[15] Stephany v. Hunt Bros. Co., 62 Cal. App. 638, 217 P. 797 (1923).
[16] Winston Cigarette Machine Co. v. Wells-Whitehead Tob. Co., 141 N. C. 284, 290, 291, 53 S. E. 885 (1906); and see Johnson v. Atlantic Coast Line R. Co., 140 N. C. 574, 53 S. E. 362 (1906). These two cases are guide-posts in the subject in this state.
[17] 79 N. C. 106 (1878).
[18] 149 N. C. 20, 62 S. E. 748 (1908).

spective of what the actual facts as to the later ruling prices of labor and material during the contract period may have turned out to be.[19] On principle, this latter holding seems open to some question.[20] A recent example of this type of "direct" profits is seen in *Nance v. Western Union Telegraph Company*[21] where a boarding-house keeper was allowed to recover, upon defendant's contract to board certain of its employees with plaintiff at a fixed rate, for the difference between the expected compensation and the estimated costs. The familiar cases where the seller of goods sues the buyer for refusal to accept the goods, where the seller recovers the difference between the price, and the anticipated cost, or if the goods are *in esse,* the difference between the price and the value of the goods at the place and time of delivery, are likewise to be put in this class.

A larger element of uncertainty, however, is likely to be injected when the plaintiff's claim arises from the frustration by defendant's wrongdoing of plaintiff's dealings with third persons from which plaintiff expected to derive a profit.

In the first place, the requisite certainty may be lacking in the demonstration that but for defendant's wrongdoing the claimed profits would have been forthcoming at all. This may well be illustrated by three cases, not all involving prospective profits but exemplifying the standard of certainty which would be applied. In *Walser v. Western Union Telegraph Company*[22] the plaintiff sued the company for its failure to deliver a telegram addressed to him from the Comptroller of the Currency, as follows: "Would you accept receivership First National Bank, Wilmington? Bond, thirty-five thousand. Compensation, two hundred dollars per month, subject to future modification." The plaintiff alleged that he would have accepted, and that the office was worth a large sum to him. The court denied recovery, partly on the ground that the term of employment was not fixed but chiefly on the ground that no final offer was made in the telegram and consequently that there was "no reasonable certainty that plaintiff would have been appointed to the office." In *Byrd v. Southern Express Company*[23] the plaintiff sought damages for the death of his son, due to defendant's delay in delivering certain medi-

[19] Accord, Hawks v. Lumber Co., 149 N. C. 10, 62 S. E. 752 (1908).
[20] See WILLISTON, CONTRACTS, §1339. Compare McCall v. Lumber Co., 196 N. C. 597, 146 S. E. 579 (1929).
[21] 177 N. C. 313, 98 S. E. 838 (1919).
[22] 114 N. C. 440, 19 S. E. 366 (1894).
[23] 139 N. C. 273, 51 S. E. 851 (1905).

cine ordered by the physician who was attending the son, who was sick with typhoid fever. The medical testimony was that the medicine was necessary and that if it had arrived promptly the chances for recovery would have been better. The court held that a non-suit was properly ordered, as the connection between the delay and the death was conjectural. A picturesque case is that of *Newsome v. Western Union Telegraph Company*.[24] The plaintiff sent a telegram ordering four gallons of whiskey which the company made an error in transmitting, in consequence of which the whiskey did not reach the plaintiff. He had ordered it pursuant to an agreement with his hands who were preparing to construct rafts to take his timber and rosin to Wilmington during a freshet. Without the whiskey, they refused to go into the water, and the benefit of the freshet was lost. In denying recovery, Brown, J., for the court, said: "It requires quite a stretch of the imagination to conceive that had the four gallons of corn whiskey arrived at Thomas, the raft would have been properly constructed, loaded and safely conducted over a heavy freshet to Wilmington and the merchandise duly and profitably marketed. Whiskey is very potential at times, but it cannot be relied upon to produce such beneficent results as is claimed for it in this case."

Another example of this want of certainty is afforded by a case[25] wherein a shipper sued a railway company for the latter's failure to carry out its agreement to present to the Interstate Commerce Commission the shipper's claim for the return of an overcharge for freight. Recovery was denied on the ground *(inter alia)* that the court could not know what decision the Commission would have made upon the claim. In a more recent case,[26] the seller of a roller-mill for grinding wheat sued the buyer for the price and was met by a counter-claim for damages for a defect in the mill, and one of the items asserted was loss of the profits from customers that were driven away by the failure of the mill to produce good results. Error was assigned to the admission of evidence of a witness that it was "likely" that he would have patronized the defendant's mill if it had ground good flour. The court held that the evidence ought to have been excluded as being too uncertain in nature for consideration by the jury.

[24] 153 N. C. 153, 69 S. E. 10 (1910).
[25] Edenton Cotton Mills v. Norfolk Southern R. Co., 178 N. C. 213, 220, 100 S. E. 341 (1919).
[26] Sprout, Waldron & Co. v. Ward, 181 N. C. 372, 107 S. E. 214 (1921).

More complex than the simple problem of causal connection, are the perplexities which arise in the search for some trustworthy criterion for the measurement of the *amount* of profits if the court finds that any would have been realized. A few examples of cases where the court was unable to find a reliable standard for assessment of such amount will serve to underline the problem.

A local landmark which has strongly influenced the drift of decision in this state and elsewhere is the well-known case of *Winston Cigarette Machine Company v. Wells-Whitehead Tobacco Company.*[27] The defendant, a manufacturer of cigarettes, agreed to exhibit and operate the cigarette-making machines made by the plaintiff, at the St. Louis Exposition, but failed to carry out the agreement, too late for the plaintiff to make other arrangements to exhibit. The plaintiff's evidence showed the cost and sales price of the machines, their advantages over others, and the fact that by exhibiting their operation, it had sold a large number of them in different parts of the world, but it did not show that it had received any orders contingent on the exhibition of the machines in St. Louis. The court held that evidence failed to disclose any basis for the award of damages except for expenses incurred on the faith of the contract. Similarly, in *Willis v. Branch,*[28] the plaintiff, a lessee of a hall used as a theater who sued his landlord for taking out the gas fixtures and the furniture, was denied recovery for profits which he might have made upon theatrical engagements, where the plaintiff failed to show that any engagements had actually been made. Likewise, in the leading case of *Reiger v. Worth*[29] it was held that the purchaser of seed rice, which was worthless and failed to sprout, could not recover for the loss of the crop which would have been made, and that evidence as to the average yield of rice on such land as the plaintiff's did not offer a sufficiently certain criterion.[30] A more recent case,[31] reaches a similar result, in an action by a tenant of a hotel barber-shop against his landlord for breach of an agreement to furnish hot water for the use of the shop. The plaintiff after running the shop for only two

[27] *Supra* note 16.
[28] 94 N. C. 142 (1886).
[29] 127 N. C. 230, 37 S. E. 217, 52 L. R. A. 362 (1900).
[30] The cases elsewhere are divided on the question of allowing recovery for prospective profits upon unmatured crops. SEDGWICK, DAMAGES (9th ed.), §191; SUTHERLAND, DAMAGES (4th ed.), §61; 16 A. L. R. 885, note.
[31] Brewington v. Loughran, 183 N. C. 558, 112 S. E. 257, 28 A. L. R. 1543 (1922).

months, abandoned it because of the alleged breach. He claimed damages for the value of the prospective profits of the business for the remainder of the year's lease. The court denied a recovery for such profits as too speculative, and said: "But the profits of running a barber shop are too uncertain, doubtful, and speculative to be capable of definite ascertainment. They depended upon many circumstances, among which are skill, ability to attract and hold patronage, the character of competition of others in the same business, and many other contingencies. One man may fail while another prospers; and the same man may fail at one time and prosper at another, though the prospective outlook may seem equally favorable at both times." The court held that the plaintiff would be limited to a recovery for the difference between the agreed rentals and the rental value of the premises. It is submitted, however, that the case is to be read in the light of its particular facts, especially the fact that the barber-shop had not been operated long enough to establish a reliable record of profits, and that the decision should not be construed as conflicting with an earlier case,[32] where for a similar breach of covenant, the tenant of a summer hotel was held entitled to recover for loss of profits upon her established business.

Passing to a consideration of standards which have been accepted as bases of measurement of profits, it will be found that where the plaintiff actually has on hand, at the time of defendant's wrong, orders for goods or services at fixed prices, compliance with which has been frustrated by defendant's conduct, the probable profits on such orders may be recovered.

In *Jones v. Call*[33] the plaintiffs sued for defendant's wrongful interference with their business of manufacturing and selling patent tobacco machines. The court held that the plaintiffs could recover only for loss of profits on the orders they already had in hand and not for expected profits on the subsequent continuance of their business, which seems to have been an established one, though of a nature to render its profits speculative. In *Johnson v. Atlantic Coast Line R. Co.*[34] the action was against the railroad for its destruction by fire of the plaintiff's building containing crates and baskets and materials for making the same. The plaintiffs offered evidence that they had a contract with fruit packers to deliver crates, which contracts would

[32] Cary v. Harris, 178 N. C. 624, 101 S. E. 486 (1919).
[33] 96 N. C. 337, 2 S. E. 647 (1887).
[34] 140 N. C. 574, 53 S. E. 362 (1906).

have yielded a profit of $3,500, and that at the time of the fire other crates with which to fill these contracts were not procurable on the market. This evidence was excluded in the court below on defendant's objection, but the Supreme Court held that it should have been admitted, saying that the profits might not perhaps be recoverable as such, but that they were at least evidence of the value of the contracts, which, despite some contingencies (such as the solvency of the buyers), were susceptible of practical valuation, and would be valued if plaintiffs had been selling their business. There was a dictum that only profits on contracts already made, not those on contracts which might be made, were recoverable. In *Pender Lumber Company v. Wilmington Iron Works*[35] defendant breached his agreement to repair the rollers in plaintiff's veneering machine, whereby the plaintiff was unable to fill orders for the sale of 25,000 crates. A verdict for $750 for the loss of profits upon these orders was sustained.

Where the plaintiff's business is that of selling goods at retail, and the defendant contracts to sell to the plaintiff to supply plaintiff's established retail trade, and the defendant fails to furnish the goods, and the plaintiff is unable to secure the goods elsewhere at wholesale,[36] the plaintiff may, on showing that he would have sold the goods, recover on the basis of the *retail selling price* less the cost of selling, even though he does not show any actual orders from his customers.[37] And, similarly, where a retailer orders goods by telegraph and the telegraph company fails to deliver the message, so as to prevent his getting the goods, it is liable for the retail profit he would have made.[38]

The authorities in most jurisdictions seem to approve, as an acceptable criterion for measuring lost profits, the record of performance of an *established* business (as distinguished from a new venture), where the business is of a type sufficiently stable to render its profits likely to continue on a fairly even level.[39] In North Carolina, however, considerable doubt is cast upon the proposition that the

[35] 130 N. C. 584, 41 S. E. 797 (1902).

[36] SEDGWICK, DAMAGES, §197.

[37] American Steel Co. v. Copeland, 159 N. C. 556, 75 S. E. 1002 (1912); Davidson Hardware Co. v. Delker Buggy Co., 167 N. C. 423, 83 S. E. 557 (1914).

[38] Gardner v. Postal Telegraph-Cable Co., 171 N. C. 405, 88 S. E. 630 (1916).

[39] Allison v. Chandler, 11 Mich. 542 (1863) (jewelry store); Central Coal and Coke Co. v. Hartman, 111 Fed. 96, 98 (C. C. A., 8th, 1901) (coal-dealer); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 47 Sup. Ct. 400, 71 L. Ed. 684 (1927) (photographers' supplies); SEDGWICK, DAMAGES. (9th ed.), §§182, 182a; 17 C. J. 795, 796.

profits of an established business may ever be used as a basis of measurement of damages, by the expressions used by the court in several cases. In an early leading case,[40] the court set its face against the allowance of damages for lost profits on the business of making patented tobacco machines, and said: "If they were making machines at the time of the interference, as the referee finds, at a profit at the rate of $6,000 per annum, what assurance was there that this would continue, or that they might not make them at a loss of $6,000 the subsequent year? As was said by counsel: 'Who knows when they would have stopped, or what misfortune would have befallen them, or what other patents would have superseded this one, or whether they could by any possibility have made the same profits on machines, or would have made any?'" The meager facts do not show how long the business had been running, nor how stable the demand for its products, but it may be conjectured that it was a business of a hazardous and speculative type. In a later case, *Johnson v. Atlantic Coast Line R. Co.*,[41] the plaintiff sued for the destruction of his crate factory by fire. On appeal, the court had before it only the question of whether evidence of loss of profits on particular orders which the plaintiff had in hand was competent, but the case served as the text for a general discussion of lost profits. In an earlier part of the opinion the court quoted with seeming approval the following statement from a text-writer:[42] "If a regular and established business is wrongfully interrupted, the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of." But in a later part of the opinion, said: "The jury having found that plaintiff's factory was destroyed by the negligence of defendant, they are entitled to recover all such damages as naturally and proximately flow from the trespass—the value of the contract in the light of the facts proposed to be shown by the question asked the witness should be considered as coming within the rule. This, of course, excludes any evidence in regard to profits not covered by contracts. They would be speculative. There might be no demand for crates, prices might decline, a short crop of berries might decrease the demand or a large crop enhance it. These and many other contingencies not remote, would enter into the problem, which would render any conclusion unreliable and unsatisfactory." So, in the

[40] Jones v. Call, *supra* note 33.
[41] *Supra* note 16.
[42] SUTHERLAND, DAMAGES, §70.

case of a "mill,"[43] a flour-mill,[44] a furniture-factory,[45] where in each instance an interruption had been caused by a delay in delivering machinery, the plaintiff was restricted to the recovery of legal interest on the capital invested, pay of idle hands, and other expenses during the period of interruption. .On the other hand, in *Cary v. Harris,*[46] already referred to, in which damages for loss of profits were awarded to the keeper of a summer hotel, the result was placed in part on the ground that it was an "established business."[47] Likewise, in *Harrell v. Brinkley,*[48] where the defendant contracted to permit plaintiff to operate a sawmill on defendant's premises, and plaintiff established a mill there, and defendant wrongfully interfered so as to force its discontinuance, it was held that plaintiff might recover the value of the business destroyed and that its past profits as an "established business" were evidence of such value. A survey of the decisions, therefore, leads one to conclude that in spite of some adverse holdings and expressions in the past, the court is likely to follow the orthodox practice in this respect of using past profits of an established business, where it is of sufficiently stable character, as evidence of, if not as a measure of, the loss.

In a case where loss of profits is decided to be a proper element of damage, care is necessary to avoid a double recovery. Thus it would seem improper to allow recompense both for an expense which has been incurred which would be a necessary outlay by the plaintiff in any event if the profit is to be realized and also a recovery for the estimated amount of the prevented profit.[49]

There remain to notice some situations where denial of recovery for anticipated profits, though avowedly based upon the usual grounds of want of foreseeability or of certainty, seems essentially grounded upon underlying notions of economic danger in extending the scope of responsibility too far in certain directions. For example, a railway negligently sets fire to certain timber. One who is not the owner of the timber, but who has a contract with the owner to cut the timber

[43] Foard v. Atlantic & N. C. R. Co., 53 N. C. 235 (1860).
[44] Sharpe v. Southern R. Co., 130 N. C. 613, 41 S. E. 799 (1902).
[45] Harper Furniture Co. v. Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A. N. S. 483, 128 Sm. St. Rep. 588 (1908); compare also C. B. Coles and Co. v. Standard Lumber Co., 150 N. C. 183, 192, 63 S. E. 736 (1909).
[46] *Supra* note 32.
[47] 178 N. C., at page 630.
[48] 184 N. C. 624, 113 S. E. 770 (1922).
[49] Bowen v. King, 146 N. C. 385, 59 S. E. 1044 (1907). Seemingly this principle may not have been observed in Dorsey v. N. C. Talc & Mining Co., 177 N. C. 60, 97 S. E. 746 (1919).

for a certain price, from which he expected to reap profits, sues the railway for the loss of the profits. He loses. "No recovery can be had for an indirect, unintended injury to one arising from a tort to another."[50] Perhaps also a recent case[51] of wrongful ejection of a passenger from a train before reaching destination, also represents a judicial limitation on liability for the economic reason of avoiding too heavy a burden upon public carriers. The passenger sought damages for the loss of profits on a logging contract, due to his inability to meet an engagement at his destination with certain laborers whom he was to employ. The court held the carrier not liable for these special damages, because the carrier was not apprized of the passenger's mission, and hence the risk of loss was not "in the contemplation of the parties," but the question suggests itself whether the carrier should be held liable even though made aware when the ticket was bought, of the plaintiff's mission.[52] The economic considerations involved are made clear by the following excerpt from the opinion: "Responsibility for damages which would include his failure to realize the benefit of every contract or business transaction of the passenger thus ejected from a train would render transportation of passengers too hazardous and destructive in character to be undertaken by any prudent persons or association of them." Another class of cases in which the courts, prompted by a sense of the danger to the commercial community from a different course, show marked reluctance to award damages for loss of profits, are those where damages are sought for the breach of a promise by the defendant to pay or advance money to the plaintiff. While recovery is usually denied on the ground that the profits were not "in contemplation," yet the willingness to infer notice from surrounding circumstances[53] which obtains in other situations is much less evident here. Thus in *C. B. Coles & Co. v. Standard Lumber Company*,[54] a purchaser of a large amount of lumber to be prepared and delivered by the seller, who was to make partial advances upon the price from time to time as deliveries were in progress, was held not liable for interruption of the seller's business due to inability to finance it be-

[50] Thompson v. Seaboard A. L. R. Co., 165 N. C. 377, 379, 81 S. E. 315 (1914).
[51] Johnson v. Atlantic Coast Line R. Co., 184 N. C. 101, 106, 113, S. E. 606, 25 A. L. R. 910 (1922).
[52] Compare Southern Ry. Co. v. Myers, 87 Fed. 149 (1898).
[53] See notes 7, 8, and 9, *supra*.
[54] 150 N. C. 183, 63 S. E. 736 (1909).

cause of the buyer's failure to make the advances. In another case, however, where the defendant agreed to advance money to enable the plaintiff to take up an option in real estate for their joint account, for resale, the recovery of the profit which would have been made upon the resale, was held to be proper.[55]

Finally, an examination of a large number of the cases, in which claims for lost profits are asserted, leaves one with a feeling that the vagueness and generality of the principles which are used as standards of judgment in this field, are by no means wholly to be regretted. It results in a flexibility in the working of the judicial process in these cases—a free play in the joints of the machine—which enables the judges to give due effect to certain "imponderables" not reducible to exact rule.[56] This is apparent when one compares the different results of the application of the same general formula of damages to cases where the defendant is a malicious or a deliberate wrongdoer, from those in cases where he is merely negligent or improvident. It is apparent also in the court's treatment of the situation where large profits are sought against one who has entered into a contract under which he himself could only secure a very meager return, as in the telegraph cases. As has been said, more definite and mechanical rules would lead to greater certainty, but it would be the "certainty of injustice."

[55] Newby v. Atlantic Coast Realty Co., 180 N. C. 51, 103 S. E. 909 (1920).

[56] "Life has relations not capable of division into inflexible compartments. The moulds expand and shrink." Glanzer v. Shepard, 233 N. Y. 236, 241, 135 N. E. 275 (1922), quoted in CARDOZO, THE GROWTH OF THE LAW, p. 19. An illuminating discussion of the technique of judging is to be found in Prof. Leon Green's article, *The Duty Problem in Negligence Cases*, 28 COL. L. REV. 1014-1026.