DEPARTMENT OF CARRIERS AND TRANSPORTATION COMPANIES.

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G. C. & S. F. RY. CO. *v.* GILBERT.[1] COURT OF CIVIL APPEALS OF TEXAS.

Carriers—Delay in Transportation—Special Damages.

1. In order to charge a carrier with such special damages for delay in transportation, as the rental value of machinery intended for immediate use, special notice of the intention must be given at the time of shipment and not afterwards. 22 S. W. Rep. 760, reversed.

2. The ordinary measure of damages for delay in transporting goods is the depreciation suffered, and the rental value of the goods for the time of the delay; these damages must be specially pleaded and proven. 22 S. W. Rep. 760, reversed.

THE MEASURE OF DAMAGES.

1. The ordinary measure of damages resulting from delay in the delivery of an article shipped, is the difference between the value of the article when due and when delivered.

2. Damages for the value of the use or rent of a machine can be recovered only when the special purposes of the shipment are made known to the carrier at the time of the contract of shipment.

Questions as to the measure of damages for breaches by a carrier of contracts of shipment of merchandise, present few novel or difficult problems. Since, however, such questions are of daily occurence, and since the text-books with their voluminous excerpts, refined distinctions and interminable references, rather confuse than enlighten the reader, it is believed that a short analysis of the subject, citing only new or leading cases, may be of practical value.

The general doctrine as to the measure of damages in cases of contract is summarily comprehended in a few pages of Pothier on Obligations: (Evans Poth. on Ob. (1st Am. Ed.) Vol. I. p. 80, *et seq.*) This summary statement is referred to in most of the leading cases and forms, confessedly, the basis of the entire jurisprudence of England and America upon the subject. It is unfortunately too long for reproduction here; but its substance is found in Article 1928 of the Louisana Civil Code of

[1] Reported in 23 S. W. Rep. 320.

1826, known as the "Louisana Rule," and said in Sedgwick on the Measure of Damages (Vol. I. p. 67), to be "the clearest and most definite rule that can be framed in this perplexing matter." That Article is as follows:

"Where the object of a contract is anything 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. Where 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. * * * *"

It is necessary to separate at once from the authorities to be considered, a class of cases comparatively few in number, but exceedingly troublesome. In this annotation cases will not be considered where the parties have put themselves outside of the general rules, by special notices or special contracts, and where the decisions turned entirely upon the sufficiency of such notices or the proof of such contracts.

It must be noted, moreover, that a carrier's contract should be considered, in respect to damages, without reference to decisions upon other kinds of contracts, supposed to be similar. Without going into nice distinctions on the subject, it is enough to say that contracts to build a boat, to repair machinery, to return a deposit, and to carry a shipment, differ from one another *toto caelo* on the very important point of implied notice. He who repairs machinery knows, or should know its probable use; but a carrier may take a shaft across the country without knowing whether it is intended for a steamship or a sugarhouse.

As a general rule, the measure of the carrier's liability is the market value of the shipment at its destination, computed at the time when it should have been delivered, less transportation charges, with interest.

1. It is an old contention on behalf of the carrier, which still occasionally reappears, that the value when shipped should be the measure; both on account of a supposed analogy to insurance, and because the destination value includes profits. The leading case on this point is that of Gillingham *v.* Dempsey, 12 S. & R., 183 Penn. (1824). It cites all the authorities back to the beginning of the century and lays down the rule that the destination value is the test. This is now the settled jurisprudence, and this measure has been used in all the cases cited under the different heads below. Other leading cases are: Spring *v.* Haskell, 4 Allen, 112 (1862); Dean *v.* Vaccaro, 2 Head, 488 Tenn. (1859).

But the prime cost or shipment value, plus expenses, is a mode of reaching the destination value, which may be used in the absence of direct proof, to which it yields: McGregor *v.* Kilgore, 6 Ohio, 358 (1834); North. Transp. Co. *v.* McClary, 66 Ill. 233 (1872); R. Co. *v.* Phelps, 46 Ark. 485 (1885); Rome Rd. *v.* Sloan, 39 Ga. 636.

2. The freight, if unpaid, is, of course, to be deducted from the destination market value.

It is obvious that any other rule

would place the shipper in the same position as if the contract had neen performed, without payment of the consideration: North. Transp. Co. *v.* McClary, 66 Ill. 233 (1872); Atkinson *v.* Castle Garden, 28 Mo. 124 (1859).

3. The market value is to be computed at the destination. By the destination is meant the terminus of the road, and not the final destination which the shipper may intend the freight to reach: R. Co. *v.* Hale, 1 S. W. Rep. 620 Tenn. (1886); Ingledew *v.* R. Co., 7 Gray (Mass.), 86; R. Co. *v.* Reynolds, 8 Kansas, 623 (1871); R. Co. *v.* Henry, 14 Ill. 156 (1852).

4. Contracts of shippers with the consignee or other persons, of which the carrier is not notified at the time of the shipment, are not to be considered in the calculation of damages as against the carrier.

In the following cases such damages were not allowed: Murrell *v.* Pacific Exp. Co., 14 S. W. Rep. 1098 Ark. (1890); Ramish *v.* Kirschbraum, 33 Pac. Rep. 70 Cal. (1893); Scott *v.* S. S. Co., 106 Mass. 468 (1871); R. Co. *v.* Mudford, 3 S. W. Rep. 814 Ark. (1887); Harvey *v.* R. Co., 124 Mass. 421 (1878); Lindley *v.* R. Co., 88 N. C. 547 (1883).

In the following case there was such notice and accordingly such damages were allowed: Deming *v.* R. Co., 48 N. H. 455 (1869).

The English authorities to this effect are cited and discussed in Deming *v.* R. Co., and Harvey *v.* Co., *supra;* and in Langdon *v.* Robertson, 13 Ontario Reports, 497; 30 A. & E. R. R. Cas. 23.

5. Depreciation in the market, during delay, is not too remote for consideration, and forms an element in the measure of damages.

The leading case to the contrary was Wibert *v.* R. Co., 19 Barb. 36 (1854). There was great conflict of authorities in New York on this point for many years, but the rule was finally settled as above stated in Ward *v.* R. Co., 47 N. Y. 29 (1871). In other States the rule was earlier settled: Cutting *v.* R. Co., 13 Allen, 381 (1866); Sisson *v.* R. Co., 14 Mich. 489 (1866). The rule is now uniformly accepted and hundreds of cases might be cited.

6. But in cases where the shipment is intended for a particular market day, damages resulting from delay beyond that day, are not recoverable unless the carrier had express notice, or implied notice from a custom so general and well-known as to amount thereto, that the shipment was intended for that particular market day: R. R. Co. *v.* Lehman, 56 Md. 209 (1881); Hamilton *v.* R. Co., 3 S. E. Rep. 164 North Carolina (1887). But in R. Co. *v.* Case, 23 N. E. Rep. 797 Indiana (1890), and in Ayres *v.* R. Co., 43 N. W. Rep. 1122 Wisc. (1889), such damages seem to have been given with little, if any, proof of notice.

7. The loss of profits from an intended special use of the shipment are not recoverable, unless notice as to that use was given at time of shipment: Cooper *v.* Young, 22 Ga. 269 (1859); Hadley *v.* Baxendale, 9 Ex. 341; R. Co. *v.* Ragsdale, 46 Miss. 459 (1872); and English cases cited Harvey *v.* R. Co., *supra.* The case of R. Co. *v.* Pritchard, 77 Ga. 412 (1887), often cited as contra, was really controlled by the peculiar language of the Georgia Code, as will be seen on examina-

tion of the Georgia cases which it cites as precedents.

8. In cases of refusal or failure to receive for shipment, the measure of damages is the difference between the destination value and the shipment value, less transportation charges. If the shipper can lessen the damages by shipping in another way, he may and should do so: Grund *v.* Prendergast, 58 Barb. 216. But not if this action will increase the damages: Ward's etc. Co. *v.* Elkins, 34 Mich. 439 (1876). The shipper may charge carrier for storage, deterioration, etc., while pending notice of refusal: R. Co. *v.* Flannagan, 14 N. E. Rep. 370 Indiana (1887).

9. In cases of delay and injury the shipper or consignee cannot abandon the goods and sue for their entire value: Hackett *v.* R. Co., 35 N. H. 390 (1851); Shaw *v.* R. Co., 5 Rich. (Law), 462 South Carolina (1852); R. Co. *v.* Tyson, 46 Miss. 729 (1872); Briggs *v.* R. Co., 28 Barb. 515 (1858). This is true except under very extreme circumstances, amounting practically to total loss: R. R. Co. *v.* Warren, 16 Ill. 502 (1855).

10. The Texas case annotated, states that the rental value of machinery intended for use cannot be recovered without notice given at the time of shipment of the intended use.

This is the rule laid down in R. Co. *v.* Ragsdale, 46 Miss. 459 (1872), generally considered the leading case. And the case of British Col. Saw Mill Co. *v.* Nettleship, L. R. 3 C. P. 499, demands that the carrier should have very full notice and knowledge.

The case of Priestly *v.* R. Co., 26 Ill. 205 (1861), is directly contrary to the current of authorities as well as to the general principles of the law. It allows "a fair value for the use of the machinery" during the period of the delay, claiming that this furnishes fair compensation to the shipper; but no consideration is given to the point that such damages could not be even approximately estimated by the carrier at the time of shipment, without special information. "A fair rental" for machinery, after deducting interest on its value, depreciation from time and use, and other items, either disallowed or allowed under other heads, would be a puzzle for an expert, even if he were fully informed as to the facts. It can hardly be supposed that a carrier contracts with reference to such damages and has them in his mind when he is asked for a rate simply on a shipment of machinery.

11. Expenses incurred in looking afrer goods were allowed in Deming *v.* R. Co, 48 N. H. 455 (1869); but refused in Ingledew *v.* R. Co., 7 Gray, 86 Mass.; R. Co. *v.* Kennedy, 41 Miss. 671 (1868); Briggs *v.* R. Co., 28 Barb. 515 (1858). When these expenses have actually resulted in decreasing damages, they are, of course, allowed: R. Co. *v.* Akers, 4 Kan. 452 (1868). Such expenses have generally been so small, comparatively, in amount, that the courts have devoted very little time to their consideration.

It may be observed, in conclusion, that the English and American cases are in unusual harmony upon this entire subject; and that frequent citations in the decisions, from the Code Napoleon, the works of Pothier, and the Corpus Juris Civilis, show how far this harmony is due to the labors of the civilians.

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