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Damages -- Carriers -- Measure of Damages for Loss of Small Part of Shipment in Bulk

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The Supreme Court, while recognizing the legality of suspending sentence, has not commended the practice,[15] but has indicated that evils would result from its indiscriminate use.[16] With the law governing the suspended sentence in its present state there is no assurance either to the community or to the convicted that under given circumstances sentence will be suspended, or on what conditions, or for what period, or that on a breach of condition the offender will be disciplined. The instant case suggests the need of a definite system of regulations designed to carry out the purpose of the suspended sentence, and to minimize the likelihood of its abuse.

W. T. COVINGTON, JR.

Damages—Carriers—Measure of Damages for Loss of Small Part of Shipment in Bulk

In a recent case the facts showed that the plaintiff purchased a carload of coal, while in transit. On arrival at destination there was a shortage of 5,500 pounds. At the time of arrival, plaintiff had not sold any of the coal. The shortage did not interfere with the maintenance of his usual stock, and no sales were lost as a result of it. The plaintiff did not go into the retail market to replace the shortage. Held, that the measure of damages was the wholesale price.[1]

It is the avowed aim of the courts in actions founded on contract to place the party injured in as good position pecuniarily as he would have occupied had the breach not occurred,[2] and damages are awarded, in the absence of special circumstances with this principle in mind.

The pertinent statutory expression is found in the so-called Cummins Act[3] which provides that the holder of a bill of lading for interstate rail shipment is entitled to recover for the "full actual loss" to his property. By judicial interpretation this has come to mean that such loss is to be ascertained with reference to the value at point of destination.[4]

[15] State v. Hatley, *supra* note 8.
[16] State v. Griffis, *supra* note 7; State v. Hilton, 151 N. C. 687, 65 S. E. 1011 (1909); State v. Everett, *supra* note 10.
[1] Illinois Cent. R. Co. v. Crail, 50 Sup. Ct. 180 (1930).
[2] Seaboard Air Line R. R. v. U. S., 261 U. S. 299, 43 Sup. Ct. 354, 67 L. ed. 664 (1922).
[3] 34 Stat. 593, 49 U. S. C. A. §20 (11).
[4] Chicago, etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 40 Sup. Ct. 504, 64 L. ed. 801 (1919).

Varying conceptions of "value" are to be encountered in the decisions. In general the rule is that value must be determined with reference to the quantity involved, and may not be determined with reference to a larger quantity.[5] This would seem to mean that if goods are bought in large quantities, the market price at retail is not the standard, but the market price at wholesale.[6]

Conversely, when it is sought to ascertain the value of goods in small quantities, or of a single chattel, (regardless, apparently, of the fact that it may have been one of a large number of like chattels, *e.g.*, the deliberate conversion of one article from the stock of a wholesale establishment) ordinarily the measure of damages is the retail price.[7]

The trend of decision is toward holding that where the consignee is under reasonable compulsion to re-purchase at retail rates to meet outstanding demands, the measure of damages should be based on retail rates.[8] However, this case is clearly out of that category. To allow the use of the latter standard would be to include all overhead expense of marketing at retail, such as clerk hire, rent, and bad debts, none of which had been incurred with regard to the shipment in question.[9]

The present decision satisfies the common law principle of full compensation for injuries received, at the same time bearing out the

[5] Bagley v. Findlay, 82 Ill. 524 (1876); James H. Rice Co. v. Penn Plate Glass Co., 117 Ill. App. 356 (1904); Grand Tower Co. v. Phillips, 90 U. S. 471, 23 L. ed. 71 (1874), in which it is declared that "the true rule would seem to be to allow the plaintiffs to show the price they would have had to pay for coal *in the quantities* which they were entitled to receive it under the contract." Compare this statement from Heidritter Lumber Co. v. Central R. R. of N. J., 100 N. J. L. 402, 122 Atl. 691 (1923), "the plaintiff was entitled to replace the coal at its value at destination because the quantity that was lost could not be bought at wholesale rates anywhere." It did not appear in this case that the plaintiff was compelled to purchase in the retail market to meet outstanding contract.

[6] 4 SUTHERLAND ON DAMAGES (4th ed.) §1098, p. 4178; Wendnagel v. Houston, 155 Ill. App. 664 (1910).

[7] 1 SEDGWICK ON DAMAGES (9th ed.) §248a, p. 500; SUTHERLAND ON DAMAGES, *supra* note 6. Compare: ". . . where part of a stock of goods is converted, the value of the goods in the retail market is not the measure of damages in an action of trover." Sedgwick, *supra*.

[8] Cobb v. Illinois C. R. Co., 39 Iowa 601 (1874); Bridgman v. The Emily, 18 Iowa 510 (1865); Kyle v. Laurens R. Co., 44 S. C. L. 382, 70 Am. Dec. 231 (1857).

[9] SUTHERLAND ON DAMAGES, *supra* note 6. See opinion of Cant, District Judge, in Crail v. Illinois Cent. R. Co., 21 F. (2d) 836 (D. C. Minn. 1927).

statutory requirement that awards are to be made for actual loss suffered.[10]

T. J. GOLD, JR.

Mortgages—Tenancy in Common—Right to Improvements

In the case of *Layton v. Byrd*[1] the defendant had purchased a tract of land from three tenants in common, *A, B,* and *C*. The interests of *B* and *C* were unencumbered, that of *A* was subject to a mortgage to *T,* unknown to the defendant. Defendant before foreclosure by *T,* and after purchase from *A, B,* and *C,* made permanent improvements on the land. Plaintiff subsequently purchased the one-third undivided interest formerly owned by *A* at foreclosure sale by *T*. In a bill for partition by plaintiff, *Held,* The rule entitling the tenant in common to the value of his improvements on partition[2] is inapplicable, the rule that improvements made on mortgaged lands by the mortgagor or one claiming under him inure to the benefit of the mortgagee[3] must be applied, and the plaintiff is entitled to a proportionate part of the improvements.

The court reaches its conclusion on the reasoning that, at the time the improvements were put upon the land, there was no tenancy in common in existence, but the land was held by Byrd, defendant, as sole owner. Consequently, since there was no co-tenant against whom he could assert his equity the tenant in common rule cannot

[10] Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374 (1875); WILLISTON ON CONTRACTS (1920) §1338. Several cases have recognized the anomalous but equitable doctrine that occasionally the measure of damages cannot be determined by reference to either the wholesale or retail price. See Clark v. Parsons, 109 Mo. App. 432, 84 S. W. 1019 (1905). Thus in the United States v. New River Collieries Co., 262 U. S. 341, 43 Sup. Ct. 565, 67 L. ed. 1014 (1923) it was held that where coal was appropriated by the government, and where there was a free market for export coal, and the coal could have been sold in such market, the owner was entitled to the export price, although this was higher than domestic rates.

[1] 198 N. C. 466, 152 S. E. 161 (1930).

[2] If one tenant in common makes improvements on the common property he will be entitled upon partition to the value of his share in the land in its unimproved condition and the value of the improvements, if this can be done without prejudice to his co-tenants. Pope v. Whitehead, 68 N. C. 191 (1873); Collett v. Henderson, 80 N. C. 337 (1879); Fisher v. Toxaway Co., 171 N. C. 547, 88 S. E. 887 (1916); see Note (1919) 1 A. L. R. 1189; Bayley v. Nichols, 263 Ill. 116, 104 N. E. 1054 (1914); Crafts v. Crafts, 13 Gray 360 (Mass. 1859); Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384 (1898).

[3] Wharton v. Moore, 84 N. C. 479 (1881); Belvin v. Raleigh Paper Co., 123 N. C. 138, 31 S. E. 655 (1898); see also Note (1926) 41 A. L. R. 601.