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Carriers: Validity of Limitation Clause

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Heddles v. *Chi. & N. W. Ry. Co.,* 74 Wis. 239, 42 N.W. 237 (1889) (remitting the "unreasonable excess"). The Wisconsin court has conceded that this practice might result in impairing the defendant's right to a trial by jury guaranteed under the state constitution. *Heimlich* v. *Tabor,* 123 Wis. 365, 102 N.W. 10 (1904). And the accepted practice in Wisconsin now seems to be for the court to set the upper and lower limits within which the court would permit a jury to fix the amount, and to give the plaintiff the option to accept the lowest figure and to deny the defendant a new trial, [*Stangarone* v. *Jacobs,* 188 Wis. 20, 205 N.W. 318 (1925); *Foreman* v. *Milw. Elec. Ry. & Light Co.,* 214 Wis. 259, 252 N.W. 588 (1934)], and at the same time to give the defendant the option, in lieu of a new trial, of consenting to an entry of a judgment against him in an amount equal to the highest figure as set by the court. *Risch* v. *Lawhead,* 211 Wis. 270, 248 N.W. 127 (1933); *Guth* v. *Fischer,* 213 Wis. 323, 251 N.W. 223 (1933); see, *Ruepping* v. *Chicago & N. W. Ry. Co.,* 123 Wis. 319, 326, 101 N.W. 710 (1904). The verdict may be further modified by the appellate court but that court must always give the party so prejudiced the option of a re-trial. *Campbell* v. *Sutliff,* 193 Wis. 370, 214 N.W. 374 (1927); *Borowicz* v. *Hamann,* 193 Wis. 324, 214 N.W. 374 (1927). The practice in Wisconsin may result in a denial of a retrial as to damages. However the court, at the same time, is careful to have placed the party affected in the most favorable position in which a jury on re-trial would be permitted to have placed him. In cases where the damages are unliquidated, as in the principal case, an assessment (or guess) by the jury between limits determined by the court, (see *Arkansas Valley Land & Cattle Co.* v. *Mann,* (*supra*), is the essence of the constitutional guarantee. In the instant case the record does not disclose the extent of the injuries sustained by the plaintiff; there is nothing in the record to show that the abridged award represented the greatest sum a jury in its discretion might be permitted to award and in fact constituted an invasion by the trial court into the province of the jury.

ROBERT P. HARLAND.

CARRIERS—VALIDITY OF LIMITATION CLAUSE.—Three shipments of cherries, in all 4,266 barrels, were loaded in Italian ports and shipped with the defendant carrier, consigned to the plaintiff in New York. Due to improper stowage, the cargo arrived in bad condition. One hundred and sixty-two barrels were a total loss and there was damage to the others amounting to an entire loss of 581 barrels. The remaining portion of the cargo was sold for a price exceeding the value stated in the invoice plus the freight. This claim is made for the damaged portion of the cargo. The defendant carrier resists liability for damage to this portion because of a stipulation in the bill of lading which provided "that if, after deduction of all loss and damage, the remaining cargo, in its then condition, is worth more at destination than the entire cargo was worth at the time and place of shipment, the carrier should be exonerated from liability for the damaged portion." *Held,* the valuation clause here employed is unreasonable and contrary to public policy even if supported by a valid consideration. *The Ansaldo San Giorgio I,* 55 Sup. Ct. 483 (1935).

At the common law carriers were held to the strictest degree of liability, being responsible for loss and damage of goods carried except in the case of destruction by Acts of God or the public enemy. *Coggs* v. *Bernard,* 2 Ld. Raym. 908, 92 Eng. Rep. 107 (1702). The late Justice Holmes disputes the assumption that this rule was settled prior to Lord Holt's decision. See Holmes, THE COM-

MON LAW (1881) 180. The strict common law liability was later relaxed to excuse performance by the carrier for losses due to the exercise of public authority, the fault of the shipper, and the inherent vice in the thing shipped. Goddard, *Liability of Common Carriers* (1915) 15 Col. L. Rev. 399. Up to the year 1848, the strictest liability was imposed on common carriers in the United States. At that time the Supreme Court through Justice Nelson rendered a decision in favor of a common carrier limiting this strict liability by agreement between the parties. See *New Jersey Steam Navigation Co.* v. *Merchant's Bank,* 6 How. 344, 382, 12 L.ed. 465 (1848). This doctrine was modified twenty-five years later by a case holding that a common carrier could limit its common law liability if the agreement were fair and reasonable. Almost any agreement except one releasing the carrier from liability for its own negligence or that of its servants was held reasonable. *N. Y. Cent. R. R. Co.* v. *Lockwood,* 17 Wall. 357, 21 L.ed. 627 (1872). In a few jurisdictions the common carrier has been permitted to release itself by agreement from liability for its negligence. In Illinois for example the carrier by contract with the shipper may be liable only for gross negligence. *Wabash R. R. Co.* v. *Brown,* 152 Ill. 484, 39 N.E. 274 (1894). In England the relaxation of the strict liability rule brought about a condition resulting in an increased number of accidents. Goddard, *Liability of Common Carriers, supra.* The carrier at that time could limit its liability by notice to the shipper. *Gibbon* v. *Paynton,* 4 Burr. 2298, 98 Eng. Rep. 199 (1769). The United States cases rejected this "notification doctrine." *Cole* v. *Goodwin,* 19 Wend. 251, 32 Am. Dec. 470; (N.Y. 1838); *Hollister* v. *Nowlen,* 19 Wend. 234, 32 Am. Dec. 455 (N.Y. 1838). To eliminate the doctrine of "notification" the Railway and Canal Act was passed in England. 17 & 18 VICT. c. 31, § 7 (1854). In the absence of a valid stipulation to the contrary, a common carrier's liability for the loss or damage to goods in transit is measured by the market value of the goods at destination in the condition in which they should have arrived. ROBERTS, CARRIERS (2nd ed. 1929) 391. This measure of damages may be reduced by a valid stipulation that in case of injury to the goods a certain fixed value for the goods shall be the basis of the damages. *Hart* v. *Pa. R. R.,* 112 U.S. 331, 5 Sup. Ct. 151, 28 L.ed. 717 (1884). However, he cannot contract for relief from all liability for his own negligence, even though he give a special consideration for that effect. See *Boston & Maine R. R. Co.* v. *Piper,* 246 U.S. 439, 444, 38 Sup. Ct. 354, 62 L.ed. 820 (1917); *Bank of Kentucky* v. *Adams Express Co.,* 93 U.S. 174, 23 L.ed. 872 (1876). The damages are computed in the regular way, but if they exceed the stipulation, no recovery for the excess may be had. See *Duplan Silk Co.* v. *Lehigh Valley R. Co.,* 223 Fed. 600, 603 (C.C.A. 2nd, 1915). In order to make such an agreement enforceable, consideration in the form of a lower rate must be granted to the shipper. *Adams Express Co.* v. *Croninger,* 226 U.S. 491, 33 Sup. Ct. 148, 57 L. ed. 314 (1913). In some instances carriers have stipulated that damages for injury to goods shall be computed on the invoice value; this is a true valuation clause. See *Phoenix Ins. Co.* v. *Erie & Western Trans. Co.,* 117 U.S. 312, 322, 3 Sup. Ct. 750, 29 L.ed. 908 (1885); *Gulf Colo. Ry. Co.* v. *Texas Packing Co.,* 244 U.S. 31, 36, 37 Sup. Ct. 487, 61 L.ed. 970 (1916). In federal cases alternative rates seem to be necessary in order to make the valuation clause valid. See *Western Transit Co.* v. *A. C. Leslie & Co.,* 242 U.S. 448, 453, 37 Sup. Ct. 133, 61 L.ed. 423 (1916). The weight of authority in state courts holds that no choice of rates need be offered to the shipper in order to uphold the validity, of such clauses. *Gratiot St. Warehouse Co.* v. *Mo. K. & T. R.* 124 Mo. App. 545, 102 S.W. 11 (1907); *Grubbs* v. *Atlantic Coast Line Ry.,* 101 S.C. 210, 85 S.E. 405 (1915). The limitation clause in the instant case was

held void and against public policy in the lower court because its effect was to relieve the carrier from the consequences of its own negligence, *i.e.,* though some goods might be lost, if the remainder brought a price equal to the invoice value of the whole the carrier would not pay any damages for the lost or injured articles. *The Ansaldo San Giorgio* I., 73 F. (2d) 40 (C.C.A. 2nd, 1934). The liability of a common carrier for goods lost through negligence is not merely a breach of contract, it is also tortious. See *Pearse* v. *Quebec,* 24 Fed. 285, 287 (S.D. N.Y. 1885). If the invoice price is used as a basis of determining the damages on each article injured this would not be against public policy. See *The Merauke,* 31 F. (2d) 974 (C.C.A. 2nd, 1929).

The carrier is responsible for each item of the cargo, and thus in case of injury to any item damages must be paid by the carrier. While by valid stipulation these damages may be limited to the invoice price, this must be interpreted to mean the invoice price of each unit and not of the cargo as a whole. To permit the carrier to offset the increment in value at point of destination against the partial loss sustained through damage in transit, is to deprive the shipper of his profit, a rightful incident of commerce.

OLIVER H. BASSUENER.

CONSTITUTIONAL LAW—CODES—DELEGATION OF POWER.—The plaintiff, a retail automobile dealer, seeks to restrain the defendant administrative officials of the Wisconsin Motor Vehicle Retailing Code from enforcing the provisions thereof. The code was adopted under Chapter 110 of the Wisconsin Statutes 1933, entitled Emergency Promotion of Industrial Recovery, which provides that, if a preponderant majority of any trade or industry submits a code of fair competition, the governor upon finding it to conform to certain specifications may give it the force of law. The plaintiff attacks the constitutionality of the code and the constitutionality of Chapter 110 on four grounds: 1) the exemptions granted code industries from prosecution under the anti-trust laws is unreasonably discriminatory; 2) the plaintiff is prevented from carrying on a lawful business in a lawful manner; 3) prices are regulated in an industry not affected with the public interest; and, 4) there is an unauthorized delegation of power. The trial court found the chapter constitutional. On appeal, *Held,* the chapter is a clearly unauthorized delegation of legislative power. *Gibson Auto Co. Inc.,* v. *Finnegan, Atty. Gen., et al.,* (Wis. 1935) 259 N.W. 420.

Section I of Article IV of the Wisconsin Constitution, providing that legislative power be vested in a senate and assembly, is interpreted to mean that the legislature must determine whether or not there shall be a law. *State ex rel. Wisconsin Inspection Bureau* v. *Whitman,* 196 Wis. 472, 220 N.W. 929 (1928). There is no clause in Chapter 110 giving the governor a power comparable to that given the President in the national act [48 STAT. 199 (1933), 15 U.S.C.A. § 703 (d) (1934] to formulate and impose a code of fair competition on a reluctant industry which has not voluntarily come forward with one. Thus the basic determination as to whether or not there shall be a code, which is no less than a law for a particular industry, rests with the preponderant majority of the industry, and upon this fundamental defect the entire chapter is declared unconstitutional. The court in the instant case refers to *Panama Refining Co.* v. *Ryan,* 55 Sup. Ct. 241, 79 L.ed. 223 (1935), as throwing some light on the subject, but it must be pointed out that the unauthorized delegation in that case was to a definite person (the President), and was illegal because it was unlimited, while in the instant case