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Recent Decisions

William R. Bowes

William L. Struck

Although not adjudicating in any case the rights of a woman to compensation who marries a workman subsequent to his injury, the state of Georgia also fixes the time of the accident as the time at which dependency shall be determined, and provides further that "no compensation shall be allowed, unless the dependency existed for a period of three months or more prior to the accident." [12]

The cases containing the adjudication of this question are few, and the governing statutes are very similar in many respects. As was pointed out above, two statutes, worded in almost indentical language, were construed by the respective courts with directly opposite consequences as to the rights of the claiming woman. It is more generally stated in the affirmative, however, than in the negative, that the Workmen's Compensation Acts are to be liberally construed. Georgia, in a recent case, *United States Fidelity and Guaranty Co. v. Maddox*,[13] stated the attitude of the courts generally as to the construction of these Acts: "Compensation Acts, though in derogation of the common law, are highly remedial in character and should be liberally and broadly construed to effect their beneficial purposes. Such an act will be reasonably construed so as to prevent, if possible, a miscarriage of the objects and benefits for which it is designed."

In most states, therefore, in which the right of a woman so claiming still remains judicially undetermined, unless she clearly comes within the contemplation of the statute by express terms as she does in New York, Washington, and Texas, and although the majority of states profess liberality of construction of the Workmen's Compensation Acts, her rights will hinge, in most instances, upon the determination of the court as to whether dependency is to be fixed as of the time of the accident, in which case she will be excluded, or as of the date of the death of the injured workman; and this determination will be gathered, not from the express words of the statute, but from a general interpretation of its various sections read as a whole.

William J. Sheridan, Jr.

RECENT DECISIONS

APPEAL AND ERROR—AMENDMENTS.—The objectors to the current account of the executor of the estate of *S.* allowed the cause to be tried in the probate court and, on appeal, in the circuit court on a single issue, namely, whether the act of the executor in paying a brokerage house the balance on the deceased's account constituted completion of an executory contract of the deceased, or whether it was the payment of an unconditional debt or obligation of the deceased which the executor had the right to pay under the direction of the testator's will, with-

12 Ga. Laws 1920, pp. 188-190.

13 183 S. E. 570 (Ga. 1935).

out any specific order of the court. After the circuit judge had decided this question, the objectors asked leave, for the first time, to file objection to the executor's report, setting up negligence of the executor in not selling certain shares of stock, constituting assets of the estate, within a reasonable period of time. The trial court ruled that the additional issue of negligence could not be raised after the hearing was concluded. On appeal, the Illinois Appellate Court held that the circuit court had ruled correctly. The latter court, in the course of its opinion, said that although the trial in the circuit court, on appeal from the probate court, is a trial *de novo,* and the circuit court has power to permit a claimant to file an amended claim, yet such amended claim may not raise a new cause of action not presented to or passed upon by the probate court. *In re Schwartz's Estate,* 3 N. E. (2d) 289 (Ill. App. 1936).

The County Courts of Illinois have original jurisdiction in all matters of probate, and settlement of estates of deceased persons, and in proceedings by executors and administrators. ILL. REV. STAT. (1935) c. 37 § 202. Section 124 of the Administration Act (ILL. REV. STAT. (1935) c. 3 § 126) provides for appeals from all judgments, orders or decrees of the county court, in all matters arising under the Act, to the circuit court, and from the circuit court to the Supreme Court. The circuit court, in such cases, does not sit as a court of errors but tries the cause *de novo. Estate of Johnson v. Kilpatrick,* 250 Ill. App. 416, 421 (1928); *Cairo Meal & Cake Co. v. Estate of Brigham,* 268 Ill. App. 510, 512 (1932). The circuit court has power to permit the claimant to file an amended claim (*Estate of Johnson v. Kilpatrick, supra*) or an amended affidavit (*Martin v. Martin,* 170 Ill. 18, 48 N. E. 694 (1887)). That is, the circuit court has power generally to permit amendments in matters of appeal from the probate court (county court). Yet, on appeal to the circuit court, a claimant is not entitled, by amendment, to raise a new cause of action not presented to or passed upon by the probate court. *Elder v. Wittemore,* 51 Ill. App. 662 (1893); *Cairo Meal & Cake Co. v. Estate of Brigham, supra.* In the latter case an action was brought against the estate of the decedent for alleged liability, personally, for a breach of contract, and appealed to the circuit court with an amended claim upon an alleged director's statutory liability for the debts of a corporation. The court held that such an amended claim may not raise a new cause of action not presented to or passed on by the probate court. If this were not so, the court said, a claimant might file in the probate court a baseless claim, and then on appeal, in the circuit court, try issues and claims not presented to the probate court, the only court in which, under the statute, claims against decedents must be filed.

It has been contended that Section 124 of the Administration Act of Illinois, *supra,* was repealed by Section 8 of the Appellate Court Act (ILL. REV. STAT. (1936) c. 37, § 40) and Section 91 of the Illinois Practice Act (of 1907) (ILL. REV. STAT. (Cahill, 1929) c. 110, § 91). *Biggerstaff v. Spaulding,* 277 Ill. App. 48, 52 (1934). The latter Act provided for appeals from the county courts, circuit courts, etc., to the Appellate or Supreme Court. But it has been held by the Appellate Court that the later acts providing for appeals in *suits or proceedings at law or in chancery* do not apply to hearings in the county courts, as they are not *suits or proceedings at law or in chancery.* Such hearings are summary, informal statutory proceedings, bearing no analogy to the common law procedure or procedure in chancery. *Biggerstaff v. Spaulding, supra.* Section 77 of the 1933 Practice Act of Illinois provides for appeals to the Appellate or Supreme Court from orders or decrees of the county courts, etc., "under such limitations and conditions as may be imposed by law." It is said that under this Section "only final judgments, orders, or decrees are reviewable, as under the old practice."

ILL. CIV. PRAC. ACT ANN. (Ill. State Bar Ass'n, 1933) 292. Therefore, appeals from orders or decrees made in settlement of estate proceedings by the county courts still lie to the circuit courts.

With respect to the amending power of either the Appellate or the Supreme Court of Illinois, Section 92 of the Civil Practice Act of 1933 provides, *inter alia*, that the reviewing court may "exercise all or any of the powers of amendment of the trial court." Section 46 of the same Act, relating to amendments in the trial courts, provides: "(1) At any time before final judgment in a civil action, amendments may be allowed on such terms as are just and reasonable, introducing any party who ought to have been joined as plaintiff or defendant, discontinuing as to any plaintiff or defendant, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross demand.

"(2) The cause of action, cross demand or defense set up in any amended pleading shall not be barred by, lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross demand interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted when such condition precedent has in fact been performed, and for the purpose of preserving as aforesaid such cause of action, cross demand or defense set up in such amended pleading, and for such purpose only, any such amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended.

"(3) A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon such terms as to costs and continuance as may be just."

In considering the power of amendment under Sections 46 and 92 of the Illinois Civil Practice Act, certain limitations must be recognized. The power of amendment, even in the trial court, cannot be resorted to to substitute a cause of action over which the court would not have had jurisdiction if the cause of action had been brought originally in the manner set out in the amendment. The reviewing court is not authorized under its power of allowing amendments to permit an amendment to be made changing the cause of action to one over which the trial court would not have had jurisdiction. The trial court is authorized to allow amendments, at any time before final judgment, changing the cause of action (civil) or defense or adding new causes of action or defenses; and to allow pleadings to be amended at any time, before or after judgment, to conform the pleadings to the proofs. ILL. CIV. PRAC. ACT (1933) § 46. There is clearly a difference between the reviewing court allowing an amendment changing the cause of action where the issues of fact have already been determined and the trial court allowing such an amendment *before final judgment* has been rendered. The power of the reviewing court in this matter should be limited to allowing such amendments as conform to the facts established at the trial. See ILL. CIV. PRAC. ACT ANN. (Ill. State Bar Ass'n, 1933) 331.

William R. Bowes, Jr.

CARRIERS—DELAY IN TRANSPORTATION OR DELIVERY—DAMAGES—SPECIAL DAMAGES DEPENDENT ON KNOWLEDGE OF CIRCUMSTANCES.—Owing to the defendant's delay in transportation of a moving picture, the plaintiff was prevented from displaying the picture on a certain date, namely, Labor Day, 1930. The plaintiff had advertised that the picture would be shown on this date. The film was addressed to the "Gloria Theater, Charleston, South Carolina." This and other evidence tended to show that the defendant knew of the special purpose of the shipment and of the importance of prompt delivery at the place designated in the address. The Supreme Court of South Carolina held that the defendant was not entitled to a directed verdict on the claim for special damages and that it had sufficient notice at the time the contract was made that special damages would result from a delay in shipment. *Pastime Amusement Co. v. Southeastern Express Co.*, 186 S. E. 283 (S. C. 1936).

In *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145, 5 Eng. Rul. Cas. 502 (1854), the court stated two rules for determining the amount of damages for the breach of a contract where damage in fact results from the breach: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

"The right to the performance of a contract is an absolute right and any breach of the contract is a wrong to the other party, whether actual damage follows or not. As a consequence of this principle, the plaintiff may always recover for breach of a contract at least nominal damages even though he is unable by evidence to establish that any particular loss has been suffered." 2 SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (9th ed.) § 610. In the usual case, however, the plaintiff has suffered damage in fact as a result of the breach of a contract by the other party (defendant). Damage in fact, as the rule in *Hadley v. Baxendale* indicates, is of two types: First, the damages that are a normal result of the breach; and, secondly, those damages which are not a normal result of the breach but which result from the breach due to the special circumstances involved in the transaction. Under the rule in *Hadley v. Baxendale* there can be no recovery for the damages due to special circumstances unless the defendant had notice of the special circumstances. The cases are not unanimous in the application of this branch of the rule of *Hadley v. Baxendale.*

There is authority for the proposition that mere notice to the defendant is not sufficient, in order to recover special damages for the breach of a contract, but that he must in effect agree to be responsible for the consequences of a default under the special circumstances. In *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 131, 5 Eng. Rul. Cas. 506 (1873), Blackburn, J., said that notice of the special circumstances would not be material unless it were such as to create a special contract to bear the exceptional loss. In *Southwestern Bell Telephone Co. v. Carter*, 181 Ark. 209, 25 S. W. (2d) 448 (1930), the court held that the plaintiff was not entitled to special damages from the defendant telephone company for its failure to complete a long-distance call placed by him by which he intended to cancel a contract for the sale of flour because of price advance, though the company's employee knew the nature of the broker's business and had been informed by him that if his calls could not be placed promptly he should be informed by it so that he could use the telegraph. Accord *Snell v. Vottingham*, 72 Ill. 161 (1874). See, also: 19 HARV. L. REV. 531; MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES

(1935) 576-578. If this view is sound it does away with the whole doctrine of notice, for if the notice of the special consequences is incorporated into the contract, that is, if the contract provides against the special loss, the loss, if it happens, is not a *consequential* but a *direct* result of a breach of the contract. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (9th ed.) § 160.

The general rule seems to be that the notice must be more than a knowledge on the defendant's part of the special circumstances. "It must be of such a nature that the contract was to some extent based upon the special circumstances." SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (9th ed.) § 159; *Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. R.*, 71 S. E. 71 (N. C. 1911). Even in the application of this general rule, the courts are far from being unanimous. This rule may be applied liberally when the court thinks that a recovery for the special consequences would be just and reasonable. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES (1935) 572. "Thus, an express company which accepted a shipment of hog cholera serum (described as such in the receipt) and whose agent at the time was told that prompt forwarding was important, was held to have had sufficient notice to render it liable for the death of a large number of hogs, owned by the consignee, from cholera, due to unreasonable delay in delivering the serum, even though there was no direct evidence that the express company's representatives knew that the consignee was a hog raiser rather than a dealer in serum. Again, a telegraph company which contracted, on consideration of large payments, to maintain a fire alarm system in the plant of a packing company, connecting with a gong in the engine room, which system actually failed to give due alarm in the engine room on the occasion of a fire, resulting in a large loss because of a failure of the engineer to supply extra water pressure, was not allowed to escape liability on the plea that there was no evidence that it had been notified that such increase in water pressure would be necessary. The court dismissed the contention almost impatiently. A similar attitude is manifested by some courts in the telegraph cases, in holding that knowledge of the fact that a message is of an urgent business nature, and some notice of the kind of transaction involved, is sufficient to hold the company for special loss due to delay in transmission, without any notice as to the particulars of the transaction or of the danger from delay." MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES (1935) § 140.

In determining whether to give a liberal application to the rule as to special damages in contract cases, "it seems probable that two factors, of which the rule itself takes no account, exert a deep influence: First, the *proportion* between the burden which would be imposed on the defendant and the amount of compensation or gain which accrued to him under the contract. Second, the degree of *fault* attaching to the defendant." MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES. (1935) § 140. There is ample evidence in the cases of the tendency of the courts to widen the liability of the contract breaker, where the breach is wilful. See: *Shannon v. Comstock*, 21 Wend. 457 (1839); *Benton v. Fay & Co.*, 64 Ill. 417 (1872); *Overstreet v. Merritt*, 186 Cal. 494, 200 Pac. 11, 16 (1921); *Hanson & Parker, Ltd., v. Wittenberg*, 205 Mass. 319, 328, 91 N. E. 383 (1910); *Miholevich v. Mid-West Mutual Auto Ins. Co.*, 261 Mich. 495, 246 N. W. 202, 203, 86 A. L. R. 633 (1933). See, also, Bauer, *Consequential Damages in Contracts*, 80 U. OF PA. L. REV. 687, 699, 700, 701.

The general rule is that notice of the special circumstances must be given before the agreement is closed in order to create liability for the special risk. *Missouri Pac. R. Co. v. S. L. Robinson & Co.*, 188 Ark. 475, 65 S. W. (2d) 902 (1933); *Percy v. Chicago, R. I. & P. Ry. Co.*, 207 Iowa 889, 223 N. W. 879 (1929); *Hadley v. Baxendale, supra*, per Alderson, B.; MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES (1935) 570. This rule gives the party subject to liability for the special loss