TORTS

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There were no major developments in the field of tort law during the period reported on; old rules were repeated, extended or retracted in small degree. In some instances they were confused. New rules, if there were new rules, were invariably brought forth as old rules in new dress by the courts. The time-honored rule allocating questions of negligence to the jury was not slighted, nor was the office of the defendant's general demurrer grossly enlarged.

There were several "falling down" cases, and it is fair to say that the standards of care owed by the faller to the maintainer of the premises, and vice versa, are hopelessly confused. No lawyer could, by application of the various rules stated in these cases, gain any inkling of how to state a cause of action for such a tort. In *Miller v. Bart*[1] it was held that plaintiff stated a cause of action when he alleged that he fell over an automobile jack extending out from under a jacked-up automobile at a filling station; in *Rich's Inc. v. South*[2] it was held that where plaintiff fell over a board protruding from a stack of lumber in an aisle adjacent to a department store stairway, the petition showed on its face that plaintiff was guilty of such contributory negligence as to be barred from recovery. The court attempted to distinguish *Miller v. Bart* in the *Rich's* case. In *King Hardware Company v. Teplis*[3] the court held that plaintiff stated a cause of action when she alleged that she tripped on a piece of two-inch mesh chicken wire which was in the aisle of the store. In *Wicker v. Roberts*[4] the court held that plaintiff stated a cause of action when it was alleged that she tripped upon an interlocking aluminum weather strip in a doorway through which she was passing to leave the premises occupied by one of the defendants. In *Mattox v. Atlanta Enterprises, Inc.* the court held that a plaintiff who fell on a dark stairway in a theatre had assumed the risk, and could not recover.

Each of these decisions, read separately, is plausible enough; it is

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1. 90 Ga. App. 755, 84 S.E.2d 127 (1954).
2. 91 Ga. App. 487, 85 S.E.2d 774 (1955).
3. 91 Ga. App. 13, 84 S.E.2d 686 (1954).
4. 91 Ga. App. 490, 86 S.E.2d 350 (1955).
5. 91 Ga. App. 847, 87 S.E.2d 432 (1955).

only when reconciliation between the several contradictory rules is attempted that the futility of such an attempt becomes obvious.

The court of appeals struck a blow for the young in heart when, in *Gordon County Broadcasting Company v. Chitwood*[6] it held that the owner of a two-story building, who operated a retail store on the first floor, had no cause to enjoin his carefree tenants on the second floor, who, plaintiff alleged, were wont to "cavort in a loud, violent and extremely noisome manner, whereby they stomp, kick and beat upon the floor of said second story to the annoyance, irritation, injury and damage of the plaintiff."

The court of appeals deflated somewhat a charge dear to the heart of defensive counsel when in *Healan v. Powell* [7] it held that a charge on the contributory negligence of a guest passenger plaintiff should be given only when evidence of such negligence has been adduced; this rule is fair enough, but has not, in recent years, been stringently applied.

In *Southland Butane Gas Company v. Blackwell,*[8] the supreme court reversed a decision of the court of appeals and held that where the deceased was prone in the highway in a drunken condition, the defendant driver was under no duty to anticipate the decedent's presence upon the highway in that position, or to avoid injuring him until his presence became known to the defendant. The plaintiffs apparently contended that the decedent was a "pedestrian," and that therefore the rule that the driver of an automobile must anticipate the presence of such "other travelers" on the highway and to have due regard for their safety was applicable. The supreme court, in disavowing this rule, stated, "The deceased in the instant case while lying prone in the highway, in a drunken condition, was not a pedestrian using the highway for the purposes of travel," but see the vigorous and interesting dissent of Mr. Justice Mobley.

The definition of a "guest passenger," as distinguished from an "invitee" was clarified in the case of *Taylor v. Austin*[9] where it was stated that a guest is a person gratuitously riding for his own benefit, and not conferring upon his host any substantial benefit.

The deceptively simple test defining and distinguishing the remedies of malicious abuse of legal process and malicious use of legal process are stated in *Mathis v. Lathrop's Hatchery, Inc.*[10] and in

6. 211 Ga. 544, 87 S.E.2d 78 (1955).
7. 91 Ga. App. 787, 87 S.E.2d 332 (1955).
8. 211 Ga. 665, 88 S.E.2d 6 (1955).
9. 92 Ga. App. 104, 88 S.E.2d 190 (1955).
10. 211 Ga. 320, 85 S.E.2d 764 (1955).

Josey v. Grayson-Robinson, Inc.[11] the requirement of arrest of the person of the plaintiff or attachement of his property is restated.

The so-called "unhumanitarian rule" which holds that no one is required to attempt to extricate another person from peril was inferentially questioned in the case of *London v. Atlanta Transit Company*,[12] where it was held, "One who observes another placed by emergency in a position of peril is under the duty to exercise ordinary diligence in an effort to extricate him from his dilemma, but is not required to jeopardize his own safety or that of other innocent persons in making the rescue." No authorities are cited for this rule requiring a rescue attempt, and it is submitted that the rule, as stated, is novel, if not anomalous.

The previous decision in *Tucker v. Carmichael*,[13] which held that a child could seek damages for pre-natal injuries received its logical extension in the case of *Porter v. Lassiter*[14] where it was held that a mother has a right of action for the homicide of her unborn child against the person precipitating the death, provided that the child was quick at the time of the homicide.

The unsolvable question of how to determine the full value of the life of a minor child who has no earnings experience was handed to that repository of other unsolvable questions, the jury, in the case of *Collins v. McPherson*,[15] wherein the court of appeals held that the jury is to be guided by its discretion in assessing the amount of future earnings.

Although the work of the appellate courts contains no startling new developments, the General Assembly of Georgia enacted a statute which certainly exceeded the frontiers of Georgia jurisprudence. At Georgia Laws, 1955, page 454, it is provided that every owner of a motor vehicle operated on the public highways of Georgia shall be liable and responsible for the death or injuries to personal property resulting from negligence in the operation of such motor vehicle, if said motor vehicle is being used in the prosecution of the business of such owner or if such motor vehicle is being operated for the benefit of such owner. To date, this statute has not been judicially construed. Pending the ineluctable ruling upon its constitutionality, it would seem that vehicle owners should part with their custody with extreme care.

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11. 90 Ga. App. 820, 84 S.E.2d 615 (1954).
12. 91 Ga. App. 759, 87 S.E.2d 103 (1955).
13. 208 Ga. 201, 65 S.E.2d 909 (1951).
14. 91 Ga. App. 712, 87 S.E.2d 100 (1955).
15. 91 Ga. App. 347, 85 S.E.2d 552 (1954).