DAMAGES

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During the current survey period there was again no legislation of general interest pertaining to the law of damages. Most of the reported cases merely reiterated well settled rules, applying them to new factual situations.

One interesting group of cases demonstrates the rule that a general demurrer ordinarily is not sufficient successfully to attack a faulty allegation of the measure of damages, but rather that a proper written special demurrer is required.

Thus, in *Nimmons v. City of LaGrange*,[1] it was held that where a petition set forth a cause of action for damages resulting from the continuous maintenance of a nuisance which could be abated at the will of its creator, the correct measure of damages was such sum as would reasonably compensate plaintiff for his hurt, inconvenience and damage in the use and enjoyment of his property; not the difference between the market value of plaintiff's property before and after the creation of the nuisance, as plaintiff had incorrectly alleged. However, though such faulty allegation would have been open to attack by proper special demurrer, it was held not to be subject to general demurrer since it affirmatively appeared that the plaintiff had been damaged in some amount.

In *McGhee v. Floyd County*,[2] plaintiff sought to recover from the county for its taking for public purposes of his leasehold interest in certain property, alleging as the measure of damages the value of certain improvements on a building and the cost of moving certain equipment. The court held that the petition alleged an erroneous measure of damages but was subject only to proper special (not general) demurrer, stating:

> The correct measure of damages for the loss of use of leased property is the diminution in market value of the leasehold during the remainder of the unexpired term of the lease, less any rents to be paid by the lessee. . . . But the

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1. 94 Ga. App. 511, 95 S.E.2d 314 (1956).
2. 95 Ga. App. 221, 97 S.E.2d 529 (1957).

fact that the wrong measure of damages is alleged does not make the petition subject to general demurrer.[3]

Likewise, in *Bartow County v. Darnell*,[4] an action for damages to private property[5] resulting from the construction of a highway by the county in such a manner that water along the highway flooded plaintiff's realty, plaintiff alleged, "plaintiff's property had diminished in value not less than $5,000 which amount plaintiffs have been injured and damaged." The court held the petition was not subject to general demurrer, nor special demurrers on the grounds (1) the quoted allegation was a conclusion of the pleader, or (2) the damages claimed were appropriate solely to an action in tort or for maintenance of a continuing nuisance and not recoverable in an action of the nature instituted. The court went on to state, "Had the demurrer been predicated upon the failure of the petition to allege the correct measure of damages, a different question would have been presented."

Allied Enterprises, Inc. v. Brooks[6] was an action by a building contractor for the balance due on a contract to remodel the home of defendant. Defendant brought a cross-action alleging unworkmanlike performance enumerating various items of damage, and praying for damages in the amount of the difference in value of the home before and after the work done by plaintiff. At the trial the plaintiff made an oral motion in the nature of a general demurrer to dismiss defendant's cross-action on the ground, among others, that the measure of damages alleged by defendant was illegal and contrary to law. After a jury verdict for defendant the plaintiff brought error. As to this ground the court held that while the proper measure of the owner's damage would be the difference of the value of the house as finished by the building contractor and the house as it ought to have been finished under the terms of the contract,[7] since here the defendant had enumerated the various items of damage, the improper measure of damages alleged in the cross-action was subject only to a timely written special demurrer, not an oral motion to dismiss.

The case of *Richmond Concrete Products Company v. Ward*,[8]

3. 95 Ga. App. 221, 223, 97 S.E.2d 529, 531 (1957).
4. 95 Ga. App. 193, 97 S.E.2d 610 (1957).
5. The action was instituted under Code Section 2-301 which provides: "In cases of necessity, private ways may be granted upon just compensation being first paid by the applicant. Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid."
6. 93 Ga. App. 832, 93 S.E.2d 392 (1956).
7. Kendrick v. White, 75 Ga. App. 307, 43 S.E.2d 285 (1947).
8. 95 Ga. App. 419, 98 S.E.2d 130 (1957).

pointed up the distinction between "loss of ability to labor" and "decrease in earning capacity" as items of damages.

Plaintiff brought an action for personal injuries sustained when the automobile she was driving struck a concrete block which had fallen off of defendant's truck, seeking to recover for loss of ability to labor and for permanent injuries, but not for a decrease in her earning capacity. The trial court charged that the plaintiff was seeking a recovery for "permanent injuries or permanent decrease in her earnings", and then charged on how to arrive at this item of damages and how to reduce the value of the plaintiff's life to its present cash value. After a jury verdict for plaintiff, defendant's motion for new trial was denied. On exceptions the court of appeals reversed, saying:

> Although the pleadings and the evidence authorized a charge on loss of ability to labor, the charge with reference to loss of earning capacity and the method of reducing the value of the plaintiff's life to its present cash value were error requiring the grant of a new trial.[9]

In answer to a certified question from the court of appeals,[10] the supreme court settled any doubt as to whether settlement of property damages only will bar recovery of damages for personal injuries resulting from the same tortious act, holding:

> A single wrongful or negligent act, which injures both one's person and his property, gives but a single cause of action, and a settlement of the property damages will, where pleaded, bar an action on account of injuries to the person, where both items of damages are the result of a single wrongful or negligent act.[11]

Jones v. Ely[12] was an action for breach of a written contract to furnish labor and materials for improvement of defendant's realty, the prayer being for damages in the amount of the contract price. The court held that where a contractor undertakes to furnish goods and services for improvement of real estate but is thereafter prevented by the owner from performing the contract, the measure of damages is the difference between the contract price and what it would have cost the contractor in labor and materials to have performed the contract, not the amount of the contract price.

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9. 95 Ga. App. 419, 421, 98 S.E.2d 130, 132 (1957).
10. See Gregory v. Schnurstein, 94 Ga. App. 330, 94 S.E.2d 514 (1956).
11. Gregory v. Schnurstein, 212 Ga. 497, 93 S.E.2d 680 (1956).
12. 95 Ga. App. 4, 96 S.E.2d 536 (1957).

In *Simonton Construction Co. v. Pope*,[13] an action for breach of contract, the amount sued for was $32,490.71 while the auditor to whom the case was submitted found against the defendant in the principal sum of $25,949.18 plus $6,000 attorney's fees. This reduction by $6,541.53 of the principal sum sued for was held a material amount so as to require application of the well settled rule[14] that, in an action *ex contractu*, a finding of attorney's fees based upon the bad faith and stubborn litigiousness of the defendant is reversible error (if not written off) where the amount of the defendant's liability is found to be substantially less than the amount sued for.

In a bail trover action[15] for a Buick Sedan the plaintiff elected to take a money verdict. The court of appeals held the charge that the plaintiff might recover the highest proved value between the date of conversion and the date of trial *plus* hire was error requiring reversal. Also, the fact that the verdict was lower than the value at time of conversion, as testified to by the plaintiff, did not render the error harmless inasmuch as "juries are not absolutely bound by testimony as to market value and may reach an independent conclusion as to value from data in evidence before them, such as the cost of the articles, their quality, and the like."[16]

Selman v. Davis[17] was an action for personal injuries sustained in an automobile accident. At the trial there was a conflict in the evidence as to whether the injuries sustained by the plaintiff were of a permanent character. The trial judge instructed the jury that they should determine whether the injuries were permanent, and also that they might use the table of mortality figures or not, as they might see fit. There was no express instruction to the effect that the table could only be used if it were determined that the injuries were of a permanent character. The court of appeals reversed a jury's verdict for plaintiff on the ground that the trial judge erred in failing to instruct the jury as to the proper time at which to consider the mortality table. The court stated that while this holding could not be reconciled with two prior decisions of the court of appeals,[18] it felt constrained to follow the supreme court[19] on this point.

13. 95 Ga. App. 211, 97 S.E.2d 590 (1957).
14. See Crump v. Ojay Spread Co., Inc., 87 Ga. App. 250, 73 S.E.2d 331 (1952) and cases cited therein.
15. Hayes v. O'Shield Buick Company, 94 Ga. App. 177, 94 S.E.2d 44 (1956).
16. 94 Ga. App. 177, 181, 94 S.E.2d 44, 47 (1956).
17. 94 Ga. App. 450, 95 S.E.2d 44 (1956).
18. Draper Canning Co. v. Dempsey, 91 Ga. App. 593, 86 S.E.2d 678 (1955); and City of Macon v. Yaughn, 83 Ga. App. 610, 64 S.E.2d 369 (1951).
19. See Western & Atlantic R. Co. v. Knight, 142 Ga. 801, 83 S.E. 943 (1914); and Western & Atlantic R. Co. v. Smith, 145 Ga. 276, 88 S.E. 983 (1916).

In *Pittman v. West*,[20] also an action for damages resulting from an automobile collision, the court held that plaintiff's testimony to the effect that two weeks before the collision the automobile was worth $1,600 and that he had refused to take that for it, and after the collision it wasn't worth anything on the market except for junk, that it couldn't be moved, that it wasn't advisable to repair it, and that it couldn't be worth $50, was sufficient evidence of damages to go to the jury. And, as to defendant's contention that there was no evidence of present or future pain and suffering so as to authorize a charge which would allow recovery for those items of damages, the court held that "the law infers bodily pain and suffering from personal injuries."[21] So where the evidence showed that at the time of the trial the plaintiff had not fully recovered from the injuries sustained in the collision, such a charge was not erroneous.

Gleason v. Rhodes Center Pharmacy, Inc.[22] was likewise an action for damages sustained in an automobile collision. The court held that where there was a "large volume of conflicting evidence" as to whether the plaintiff was in fact so badly injured as to justify the time she remained away from work after the infliction of her injuries, there was no error in charging provisions of Code § 105-2014 relating to the duty of an injured person to lessen the damages so far as is practicable by the exercise of ordinary care and diligence.

And in *Camp v. Mapp*,[23] which was an action for damages to plaintiff's automobile sustained in a collision, evidence as to what plaintiff would have received on trade-in if the automobile had not been in a wrecked condition was held irrelevant, but its admission was harmless error in a trial before a judge with no jury where it only went to rebut or explain other irrelevant evidence elicited by the movant's counsel.

Other cases decided during the survey period, but not warranting detailed comment, held: one suing for damage to property cannot recover for mental anguish not accompanied by damage to property;[24] exemplary damages can never be allowed in cases arising on contracts;[25] the measure of damages for breach of a lease contract by the lessor is the difference between the rental price agreed upon and the actual value of the premises at the time of the breach;[26] no recovery is al-

20. 95 Ga. App. 149, 97 S.E.2d 387 (1957).
21. 95 Ga. App. 149, 151, 97 S.E.2d 387, 389 (1957).
22. 94 Ga. App. 439, 95 S.E.2d 293 (1956).
23. 95 Ga. App. 262, 97 S.E.2d 623 (1957).
24. Anderson v. Atlanta Newspapers, Inc., 212 Ga. 776, 95 S.E.2d 847 (1956).
25. Nichols v. Williams Pontiac, Inc., 95 Ga. App. 752, 98 S.E.2d 659 (1957).
26. Strickland v. Flournoy, 95 Ga. App. 315, 97 S.E.2d 638 (1957).

lowed under a petition alleging only special damages which are not recoverable, and not praying for general or nominal damages;[27] where the entire injury sued for is not the peace and happiness of the plaintiff, it is error to charge Code Section 105-2003[28] in its entirety;[29] and a petition seeking recovery on a quantum merit basis is an action for an unliquidated amount and no interest is recoverable since the interest does not begin to run until the verdict and judgment in the case.[30]

27. *Ibid.*
28. "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of all the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed. The verdict of a jury in such case should not be disturbed, unless the court should suspect bias or prejudice from its excess or its inadequacy."
29. Sharpe v. Frost, 94 Ga. App. 444, 95 S.E.2d 309 (1956).
30. Noble v. Hunt, 95 Ga. App. 804, 99 S.E.2d 345 (1957).