TORTS

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The volume of tort cases decided during this survey period was about the same as last year but there were probably fewer decisions of lasting importance. Virtually no railroad litigation found its way to the appellate courts whereas there was a marked increase in the number of defamation cases. Otherwise, no particular trends were noted and the decisions in this field were divided about as usual.

STATUTES

There were two statutory enactments of interest to practitioners in this field.

Prompted by the decision in *Maxwell v. State*,[1] the General Assembly specifically provided that a no-passing zone shall be marked by a solid yellow barrier line placed as the right-hand element of a combination stripe along the center or lane line.[2]

The Nonresident Users Act was amended so as to provide that where an action is brought jointly against a resident of Georgia and a non-resident in the county where the resident defendant resides, the jurisdiction of that court shall not be affected or lost by reason of the fact that the jury returns a verdict in favor of the resident joint defendant even though the accident, injury, or cause of action did not originate in the county wherein the suit is brought.[3]

DEFAMATION

Three cases involved allegedly defamatory headlines. A petition which had been filed by a man named Roy *Crook* to change his last name to *Cook* was reported in a newspaper story under the following headline: "Make Name 'Cook' a Crook Asks Court". Cook (formerly Crook) sued for damages because of the alleged libel. It was held that no cause of action was stated since the average reader would conclude from reading the article that the headline was simply a play

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1. 97 Ga. App. 334, 103 S.E.2d 162 (1958). It was held in that case that although a yellow line painted to the right of the center line had been explained in the manual of the State Highway Board, the meaning of such a yellow line had not been defined by law and the failure to observe such a device could not form the basis for a criminal prosecution.
2. Ga. Laws 1959, p. 144, amending GA. CODE ANN., § 68-1638.
3. Ga. Laws 1959, p. 120.

on words and did not in fact refer to any person as being a rogue or thief.[4] In another action the headline read: "Two Men Bound to Higher Court in Auto Theft", whereas the body of the article referred to the plaintiff and another man as being injured in an automobile accident, an entirely unrelated event. In reversing the Court of Appeals and affirming the order of the trial court sustaining a general demurrer, the Supreme Court held that the headline and body of the article must be construed together, that it was necessary to read the article in order to identify the men referred to in the allegedly libelous headline, and that upon reading the article it was obvious that the headline and the body of the article had no relationship to one another.[5] In the third case, it was held that the complaint stated a cause of action because the headline reading "4 More Wait Trial in Lottery", when construed with the article, might lead a reasonable and average reader to conclude that the plaintiff was charged with having participated in the racket therein referred to.[6]

Basing its decision squarely upon *Walter v. Davidson*,[7] the Court of Appeals held in a suit by an employee against his former employer, two supervisory employees and a resident physician, wherein it was contended that the defendants had made statements to the effect that the plaintiff was crazy, etc., that no cause of action was stated because there was no publication of the alleged libel since none of the individuals came within the category of those to whom a publication could be made.[8]

Actions Against Owners and Occupiers of Land

Of the usual large number of cases in this category only a few are worthy of particular comment.

Basing its holding upon the proposition that a fireman is a licensee and not an invitee since his right to go upon the premises to extinguish a fire is based on the permission of the law and not upon the owner's or occupier's invitation even if the owner or occupier had turned in the alarm, it was held in an action by a fireman who fell into an open manhole at night against the general contractor for an apartment building project that no cause of action was stated since the maintenance of such an excavation while construction was in progress did not constitute wanton conduct or a mantrap such as

4. Cook v. Atlanta Newspapers, Inc., 98 Ga. App. 818, 107 S.E.2d 260 (1959).
5. The Ledger-Inquirer Company v. Brown, 214 Ga. 422, 105 S.E.2d 229 (1958).
6. Ingram v. Atlanta Newspapers, Inc., 99 Ga. App. 246, 108 S.E.2d 151 (1959).
7. 214 Ga. 187, 104 S.E.2d 113 (1958).
8. Garrett v. Lockheed Aircraft Corp., 98 Ga. App. 443, 106 S.E.2d 333 (1958).

would be the basis for liability to a licensee.[9] In a somewhat similar case, it was held that a judgment n.o.v. for the defendant was properly granted in a suit by a photographer who fell into an open excavation when he went on premises at the invitation of the defendant to take pictures of defective construction work. Even though he was an invitee, said the court, he should have anticipated the existence of excavations and no reason was shown for his failure to see the one into which he fell since the accident happened in broad daylight.[10]

In a suit by an invitee against a golf range proprietor where the plaintiff fell as a result of an allegedly defective path leading down an eight foot bank, the court held that no cause of action was stated where the only defect pleaded was that there was "loose sand and gravel" on the path. The duty an owner or proprietor owes an invitee, said the court, is simply to exercise ordinary care to keep his premises "reasonably safe" for the invitee's use.[11]

The owner or occupier of land not only has the duty to protect an invitee against any defects in the premises but also from any dangers arising from the use of premises by himself or his licensees. This principle was applied by the Supreme Court in *Johnson v. John Deere Plow Company*,[12] which was a suit by a fair patron against the City of Atlanta, a fair association, a tractor manufacturer and tractor dealer for injuries sustained when the patron was struck by a moving tractor while seated on a bench at the fair. It was alleged that a child had started the tractor motor by turning the switch to the "on" position and pressing the starter button, that the tractor owner and dealer were negligent in placing the tractor on display in a condition which permitted it to be so easily started and in not taking any steps to avoid such an accident as this, and that the City and the Fair As-

9. Baxley v. Williams Construction Company, 98 Ga. App. 662, 106 S.E.2d 799 (1958). The holding that the plaintiff occupied the status of a licensee was based on Todd v. Armour and Company, 44 Ga. App. 609, 162 S.E. 394 (1913). Although concurring in the holding, Judge Quillian disagreed with this part of the decision because he felt it was contrary to the recent decision of the Supreme Court in Anderson v. Cooper, 214 Ga. 164, 167, 104 S.E.2d 90, 93 (1958) (the electric fan in the bakery shop case).

10. Nechtman v. Ben Thorpe & Company, Inc., 99 Ga. App. 626, 109 S.E.2d 633 (1959).

11. Misenhamer v. Pharr, 99 Ga. App. 163, 107 S.E.2d 875 (1959). It is interesting to compare this statement of the law with one appearing in a recent decision by the other division of the Court of Appeals, Knudsen v. Duffee-Freeman, Inc., 99 Ga. App. 520, 109 S.E.2d 339 (1959), where in discussing the duty of an owner or proprietor it was said: "While the rule has been variously stated, it may be fairly said that the duty to keep the premises safe (*not reasonably safe*) exists as to all persons who for any lawful purpose come upon the premises at the express or implied invitation of the owner . . . . " (Emphasis supplied).

12. 214 Ga. 645, 106 S.E.2d 901 (1959).

sociation were consequently responsible for the negligence of their licensees. The Court of Appeals had reversed a holding by the trial court that a cause of action was stated.[13]

Cases Involving Construction or Validity of Statutes

There were two cases involving the wrongful death statutes. In *Complete Auto Transit, Inc. v. Floyd,*[14] Code section 105-1310 (a codification of a 1952 Act authorizing the personal representative to recover for funeral expenses and expenses of last illness) was held to be unconstitutional insofar as it confers the right on a deceased wife's administrator to recover for such expenses. The husband was liable for these expenses prior to the 1952 Act and entitled to sue for their recovery, and the statute thus subjects a tortfeasor to a double recovery and constitutes a taking of property without due process of law. It was further held in that case that Code section 3-505 is constitutional and that an administrator may sue for pain and suffering of the decedent even though the decedent had filed no suit therefor prior to his death. In *Central of Georgia Railway Company v. Tucker,*[15] which was a suit by a mother for the death of her four year old daughter, it was contended by the defendant that section 105-1307 should be interpreted to mean that a parent may sue *only* in the event a child had attained marriageable age prior to death, this contention being based on the language in the statute: " . . . unless said child shall leave a wife, husband, or child." In rejecting this contention, the Court of Appeals emphasized that the only exception to the right of a parent to bring an action for the value of a child's life is where the child actually leaves a spouse and/or child or children surviving.

In 1957 the General Assembly amended the Nonresident Motorists Act by enlarging the meaning of the word "nonresident" to include a defendant who, although a resident of the State at the time of the collision, shall cease to be a resident at any time prior to the service of process in any action against him.[16] The constitutionality of the Act as thus amended was attacked in *Tomlinson v. Sadler*[17] but the Supreme Court transferred the case to the Court of Appeals because this question had not been properly raised. The facts of that case were that the defendant had been a resident of Ware County at the time of the accident and at the time suit originally was filed jointly against him and a Grady County resident in Grady County, and the

13. John Deere Plow Company v. Johnson, 98 Ga. App. 36, 105 S.E.2d 33 (1958).
14. 214 Ga. 232, 104 S.E.2d 208 (1958).
15. 99 Ga. App. 52, 107 S.E.2d 665 (1959).
16. Ga. Laws 1957, pp. 649, 650; Ga. Code Ann., § 68-808.
17. 214 Ga. 671, 107 S.E.2d 215 (1959).

defendant was properly served by second original. He later moved to Florida. The plaintiff then dismissed the suit and rebrought it against the defendant alone in Grady County. Applying the rule of strict construction, the Court of Appeals held that this was clearly contrary to the purpose of the Act and that the plaintiff was not entitled to maintain the second action in Grady County.[18]

Southeastern Truck Lines, Inc. v. Rann[19] was a suit against a nonresident motor carrier, its nonresident driver, and the resident driver of a vehicle in which the plaintiff was a guest. The jury found for the resident defendant and against the nonresidents. The Court of Appeals held that a nonresident motor carrier is considered a resident of the county in which the cause of action occurred (the accident had occurred in Bartow County and suit was filed in Paulding County) insofar as the constitutional provision regarding joint obligors is concerned, and that the trial court therefore lost jurisdiction to enter a judgment against the nonresidents when the jury found in favor of the resident defendant. The Nonresident Motorists Act does not apply to common carriers. Since the joint verdict was single and indivisible and thus must fall, the court said it was unnecessary to decide the constitutionality of the 1959 amendment to the Act,[20] which provides that jurisdiction over a nonresident defendant is not lost where a joint action is filed against him and a resident defendant in the county where the resident defendant lives but which is not the county wherein the cause of action arose and the jury then finds for the resident defendant.

Automobile Law and Proximate Cause

Since the cases dealing with questions of proximate cause involve automobile collisions these two topics are treated together.

An interesting factual situation was presented by *Landers v. French's Ice Cream Company*.[21] This was an action for injuries received by a five year old child against a number of defendants. Two of the defendants were driving automobiles and racing side by side in a northerly direction on a city street. An ice cream truck, which was owned by one defendant and driven by its employee, another defendant, was parked facing south at least four feet from the west curb, and serving the plaintiff from the east side of the truck. When the two racing vehicles reached the scene one passed to the west of the ice cream truck and one passed to the east and in the process struck the plaintiff.

18. 99 Ga. App. 482, 109 S.E.2d 84 (1959).
19. 214 Ga. 813, 108 S.E.2d 561 (1959).
20. Ga. Laws 1959, p. 120.
21. 98 Ga. App. 317, 106 S.E.2d 325 (1958).

The Court of Appeals held that a cause of action was stated against all defendants. It said that there was a jury question as to whether the negligence of the driver of the ice cream truck was a concurring proximate cause.[22] On a point of first impression in Georgia, it further held that a cause of action was stated against the driver of the automobile which passed safely through without striking the plaintiff or anything else, the basis of this holding being that the act of racing on a public highway is itself negligence and that all those who engage in a race are liable for an injury sustained by a third person as a result thereof, regardless of which of the racing cars actually inflicted the injury.[23]

Hulsey v. Atlanta Transit System, Inc.[24] was an action for wrongful death sustained when an automobile in which the deceased was a guest struck the rear of a trackless trolley bus standing along the right hand curb. The accident occurred at noon. It was alleged that the bus was of "a faded yellow color which made it difficult for the driver of the car in which the deceased was riding to determine if such bus was moving", that there were no warning signs or persons stationed about the bus, that the bus was first visible to the driver of the automobile when it was a hundred yards away and that the driver did not become aware of the fact that the bus was not moving until the automobile was only a few yards from it. It was held that a general demurrer to this petition was properly sustained. The Court of Appeals recognized that the petition was almost identical to that in *Pittman v. Staples*[25] but observed that there were two differences: in the *Pittman* case the collision took place on a state aid road where vehicles would be expected to travel at higher speeds, and in that case the car in which the plaintiff was a guest did not see the parked vehicle until after passing another vehicle. On rehearing, it was further pointed out that in the *Pittman* case the defendant was guilty of negligence per se in having stopped his vehicle within 12 feet of the centerline, and that although in this case the defendant may have been guilty of negligence per se in leaving the bus unattended that there apparently would have been a collision even if an attendant had been present.

22. The court relied on Williams v. Grier, 196 Ga. 327, 26 S.E.2d 698 (1943), which severely criticized and reversed many earlier decisions of the Court of Appeals.
23. Of interest in this connection is an Act of the General Assembly of 1959 which makes it a misdemeanor for any person to operate a motor vehicle upon the public roads of this State so as to race or otherwise engage in a contest of speed. Ga. Laws 1959, p. 303.
24. 98 Ga. App. 1, 104 S.E.2d 618 (1958).
25. 95 Ga. App. 187, 97 S.E.2d 630 (1957). In that case the vehicle stopped on the highway was of a faded red color.

The negligence of a host driver was also held to be the sole proximate cause of a collisin in *Matheson v. Charles R. Shepherd, Inc.*,[26] which was a suit by a guest against the host and a highway contractor. No cause of action was stated against the highway contractor, said the Court of Appeals, even though it was obligated under the terms of its contract with the State Highway Department to erect barricades (it had not done so) since it was alleged in the petition that the host was speeding, not keeping a proper outlook and did not have his car under control.

In a suit against the driver of a disabled vehicle which had been left parked six feet from the centerline of a highway unlighted at night even though there was ample room to park off the paved portion, and also against a garage serviceman who was engaged to repair the vehicle but who had left the scene after first reaching it in order to get other tools from his shop, it was held that the petition stated a cause of action against both defendants: against the owner as the person in "general charge" of the vehicle, and against the garage man as one in "special charge", neither having assumed full authority to the exclusion of the other, and both therefore being in violation of Code section 69-1668 (b).[27]

It has repeatedly been held by the appellate courts that the operation and maintenance of traffic lights and other traffic control devices is a governmental function and that a municipality is not liable for the negligent performance thereof. In *Arthur v. City of Albany*,[28] in which it was alleged that a stop sign had been down on the ground at least four days, thus causing an intersection collision, the plaintiff sought to get around this rule in three ways: first, on the nuisance theory, second, that this amounted to a failure to keep the streets safe,[29] and finally because the failure to replace the sign after it was down was the negligent performance of a ministerial duty. It was held that no cause of action was stated on any theory.

Settling once and for all the confusion arising from conflicting decisions of the Court of Appeals, the Supreme Court held in *Teague v.*

26. 99 Ga. App. 175, 107 S.E.2d 897 (1959).
27. Harmon v. Southwell, 98 Ga. App. 261, 105 S.E.2d 596 (1958).
28. 98 Ga. App. 746, 106 S.E.2d 347 (1958).
29. It is settled law that the function of a municipality in maintaining its streets and sidewalks to keep them safe for travel is a ministerial function and that a city is liable for defects therein where it had actual knowledge thereof or where the defect has existed for a sufficient length of time for notice to be inferred. In City of Macon v. Harrison, 98 Ga. App. 769, 106 S.E.2d 833 (1958), it was held that a charter provision undertaking to make the maintenance of the streets a governmental function was violative of the constitutional prohibition against passage of special laws in conflict with existing general laws.

Keith[30] that Code sections 68-1626 (a) and 68-1626 (c), while being too uncertain and vague as penal statutes, are not too indefinite to furnish rules of civil conduct, and that a violation of either section is negligence per se. This was based on the proposition that where a statute provides a general rule of conduct, although only amounting to a requirement to exercise ordinary care, the violation thereof is negligence as a matter of law, whereas in the absence of such specific statute the jury is left to determine whether such conduct constitutes negligence.[31]

Jocie Motor Lines, Inc. v. Burns Brick Company[32] was an action for damages arising from a collision against a motor common carrier and a shipper, the action against the shipper being based on several theories including the contention that the defendants had conspired to violate the laws of Georgia by an arrangement whereby the shipper could obtain transportation of its products more conveniently and cheaper than could be obtained from a qualified motor carrier for hire. It was held that a nonsuit was properly granted as to the shipper, thus making it unnecessary for the Court of Appeals to pass on what was perhaps the most interesting question in the case, namely, whether it was necessary to show a direct causal relation between the conspiracy and the act giving rise to the damages, or whether it would be sufficient simply to show that there was an overt act persuant to the conspiracy.

The question of imputable negligence is never involved in an action between an automobile owner and an automobile operator who drives the automobile in such a manner as to cause injury to the owner's person or property. This was again clearly pointed out by the Court of Appeals in *Morris v. Cochran*,[33] a suit by the owner against the operator of his automobile and the driver of the other car involved in the collision. The case was complicated by the fact that the owner proceeded on the theory that he was a guest and he alleged that the driver of his own automobile was guilty of gross negligence. In reversing the trial court and holding that a petition stated a cause of action against both defendants, the court first concluded that the owner could maintain a suit against his own driver without alleging he was a guest and that the characterization of gross negligence would be disregarded; and it then said that the question of whether his own driver's negligence, conceding that it was imputable

30. 214 Ga. 853, 108 S.E.2d 489 (1959).
31. Also of interest from the pleading standpoint is a holding in this case that, as against special demurrer, it is not necessary to allege the speed of the car in which the plaintiff was riding.
32. 98 Ga. App. 404, 105 S.E.2d 780 (1958).
33. 98 Ga. App. 786, 106 S.E.2d 836 (1958).

to him insofar as the third party was concerned, was greater than the negligence of the other driver was a question of fact for a jury.

It was held that the operation of an automobile by a nephew who was considered a member of the family was within the scope of the family purpose doctrine even though the nephew was an adult and was self sustaining,[34] although the evidence would not show any family purpose in that instance since the car was merely furnished for the accommodation of the nephew and the owner had no interest or concern in the purpose for which he would use it. This is a distinction not too clearly recognized in many cases.

MISCELLANEOUS

In a suit by a tenant, who had been injured when the ceiling fell in, against a speculative builder who conveyed the house to the plaintiff's landlord, the following interesting questions were presented: (a) where an owner conveys realty by a deed of conveyance, does such owner thereafter owe any duty to persons injured by a defective construction of the premises?; and (b) can a latent construction defect in a house be classified as a nuisance where it can affect only the premises on which the house is located and persons lawfully or rightfully present on those premises? In a 4-2 decision, the Court of Appeals answered both questions in the affirmative.[35] The majority concluded that the petition stated a cause of action on the theory of negligence because it was alleged that the seller knowingly furnished realty that was imminently dangerous without advising the purchaser of that fact.[36]

A somewhat related question was presented in *Hand v. Harrison*,[37] which was a suit by a school maintenance supervisor against a building contractor grounded on the defendant's alleged negligence in making a faulty gas line connection with the result that an explosion occurred and injured the plaintiff. It was held that the petition stated a cause of action because this came within the "imminently dangerous" exception to the rule that a contractor ordinarily has no liability to third persons after he has completed the work and turned the build-

34. Robinson v. Hartley, 98 Ga. App. 765, 106 S.E.2d 861 (1958).
35. Bray v. Cross, 98 Ga. App. 612, 106 S.E.2d 315 (1958).
36. The dissenting judges concluded that while there were allegations that the seller knew of the defect there was no allegation that the seller had actual knowledge of the *danger*, and that in the absence of such an allegation plus the further allegation that the seller had reason to believe the buyer would not discover the condition or realize the risk, there is no liability on a seller for a defective condition after he has sold the house. In other words, there must be actual fraud based on a failure to disclose and none was alleged here, they believed.
37. 99 Ga. App. 429, 108 S.E.2d 814 (1959).

ing over to the owner. It was held that no cause of action was stated on the theory of breach of warranty, however, since there was no privity between the parties.

Applying the same rule applicable to a spectator attending a baseball game,[38] and in a case of first impression, the Court of Appeals declared that people on a golf course must assume the risk of being injured from a deflected or hooked or sliced ball. A golf player must give adequate notice to those who are in apparent danger of being hit by him but here, said the court, there was no apparent danger.[39]

One of the more interesting decisions of the survey period was *Chronister v. City of Atlanta*.[40] This was an action by a homeowner against the City of Atlanta to recover damages because of the City's alleged negligence in permitting the use of a runway that resulted in airplanes flying continually over the plaintiff's property at altitudes of 50 to 100 feet. In holding that a cause of action was stated, the Court of Appeals concluded that the fact that the Federal Government has pre-empted the field of interstate aerial transportation, including the location and altitude of landing operations, does not in any manner determine whether the rights of surface owners have been violated by such flights, and said that an owner whose rights have been violated has a remedy against the person, corporation or agency responsible for the invasion.

In one of the few cases in recent years in which the attractive nuisance doctrine has been applied, the Court of Appeals upheld a verdict in a suit by a seven year old child against a telephone company for injuries resulting from a sharp wire left on the premises of the plaintiff's father by the defendant's workers.[41]

Of interest and importance was the holding in *Planters Electric Membership Corporation v. Burke*[42] that the violation of a safety rule set forth in the National Safety Code was not negligence per se in Georgia; and furthermore, the Code could not be plead and proved as a standard of ordinary care since this would preclude the exercise of the right of cross examination.[43] This was a suit by a mother for the death of her son resulting when a TV aerial he was helping to move came in contact with an uninsulated, high voltage electric transmis-

38. See Hurt v. Thomasville Baseball Company, 80 Ga. App. 572, 56 S.E.2d 828 (1949), where a general demurrer was sustained.
39. Rose v. Morris, 97 Ga. App. 764, 104 S.E.2d 485 (1958).
40. 99 Ga. App. 447, 108 S.E.2d 731 (1959).
41. Southern Bell Telephone & Telegraph Company v. Brackin, 99 Ga. App. 77, 107 S.E.2d 864 (1959).
42. 98 Ga. App. 380, 105 S.E.2d 787 (1958).
43. The court added that it did not mean to imply that an expert can not predicate his opinion upon information gained from authoritative or authentic books as well as upon his own experience in the field.

sion line maintained 12 feet above the mother's land (this being at a height lower than that specified in the Code). It was held that this action by the mother should not be barred because of her own negligence since it did not appear that she knew of the dangerous character of the wires merely because they were uninsulated and, to the contrary, the very fact that they were only 12 feet above the ground indicated they were harmless.