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# Damages

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appear that the contention of the petitioner has some merit. The opinion of the Attorney General in 1946 supports the petitioner's position.[48]

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Criminal Law—Sodomy—Penetration Whether penetration is necessary to constitute the crime of sodomy was decided for the first time in Washington in *State v. Olsen,* 42 Wn.2d 733, 258 P.2d 810 (1953). With proof of penetration lacking, the court reversed the conviction. This is the general rule. The court pointed out that the defendant could have been charged under the indecent liberties statute (RCW 9.79.080), and the proof would have been sufficient.

**Agreement with Wife as Defense to Crime of Non-Support.** In *State v. Prince,* 42 Wn.2d 314, 254 P.2d 731 (1953), the defendant was charged with the crime of non-support under RCW 26.20.030. As a complete defense he offered to prove an agreement with his wife that he would not be expected to support the children. It was held that to support this defense, the defendant must have proved that his wife agreed to support the children, that she had sufficient means for that purpose, and that he relied upon that agreement in good faith.

**Bribery—Application of Statute—Interpretation of "Upon Agreement and Understanding."** In *State v. Emmanuel,* 42 Wn.2d 1, 252 P.2d 386 (1953), the defendant secretary of the state land board was convicted under RCW 9.18.020 of soliciting a bribe. Since the statute providing for his office specifies no official duties, the defendant contended there were, in the words of the bribery statute, no "matters then pending," so he could not and did not influence the sale of timber lands within the meaning of the statute. He further argued that there was no testimony of an "agreement or understanding" as required by the bribery statute; and thus, the evidence was insufficient to support the verdict. *Held,* First, the bribery statute does not limit the crime to instances in which official duties are prescribed by statute; it is sufficient if the state officer, agent or employee is given official duties by direction of his superiors or by customary practice. Second, the provision of the bribery statute that the crime of asking a bribe, "upon an agreement or understanding" that the official's acts will be influenced thereby, does not require an understanding in the sense of an agreement with the person approached, but merely an understanding on the part of the bribe seeker himself that his official action shall be influenced. Evidence of such understanding and its communication to the person approached is sufficient within the meaning of the statute.

## DAMAGES

**Award of Nominal Damages after Finding of Substantial Damage —Duty of Trial Judge.** In *Gilmartin v. Stevens Investment Co.*[1] the plaintiffs had purchased from defendant a tract of land under contract of sale, and had built a house on the property. Defendant agreed by the contract to furnish an adequate water supply to the land, which

[48] Surveying the statutes in question in the instant case the Attorney General said, ". . . it is the opinion of this office that a person convicted of the crime of taking a motor vehicle without permission may not be sentenced to be punished by confinement . . . for a maximum term in excess of ten years." 46 OAG 774 (1946).

[1] 143 Wash. Dec. 267, 261 P.2d 73 (1953).

plaintiffs contended it had failed to do. It was agreed that the measure of damages should be the difference between the market value of the land as it stood, and the market value of the land with an adequate water supply. All of the evidence with regard to value was opinion testimony, and the witnesses were each challenged as to competency before testifying, the court holding each to be competent.

The case was tried before the court without a jury. In making the findings, the court stated that it questioned the credibility of all the testimony as to amount of damages but that there was sufficient proof that the water supply was grossly inadequate. The finding was made that plaintiffs had suffered "some substantial damage" by reason of the breach of contract, but that there was not sufficient evidence to determine the amount of such damage, and the court awarded plaintiffs nominal damages of $25.

On appeal to the Supreme Court, the judgment was set aside and the case remanded with directions to grant appellants a new trial on the question of damages. The dissent contended that the mere failure of proof is not sufficient grounds for a new trial.

As a general rule the problem of proof of damages is solved by the principle that certainty as to damages applies to the fact of damage and not to the amount; that once damage has been proved, uncertainty or difficulty in determining the amount of damages will not preclude a recovery for the plaintiff.[2] The application of this rule is usually liberal,[3] but it must be noted that in most cases in Washington the rule has been used to *sustain* a trial court award of damages to the plaintiff. Nevertheless, in *Gaasland v. Hyak Lumber*[4] the Supreme Court reversed a nonsuit, holding that where a prima facie case of damage had been made out, the amount of damage need only be reasonably ascertainable from the facts.

In the principal case, however, the court declared that this rule of certainty as to damage applies usually where the measure of damages is the amount of profits and losses, and that it was a serious question whether it had any application in a case of this kind. It is a little difficult to understand this distinction, inasmuch as this is an action for breach of contract in which the agreed measure of damages was the difference between the market value of the property with and

[2] Frazier v. Bowmar, 42 Wn.2d 383, 255 P.2d 906 (1953); Gaasland v. Hyak Lumber, 42 Wn.2d 705, 255 P.2d 784 (1953); Dunseath v. Hallauer, 41 Wn.2d 895, 253 P.2d 408 (1953).

[3] *Ibid.*

[4] *Supra* note 2.

without an adequate water supply. Perhaps the court implied that this was not an issue of profit or loss, since there was no evidence of a sale or contemplated sale. It is submitted, however, that the distinction made by the text writers cited in the opinion[5] is that the certainty rule applies to contract but not to tort actions.

The real problem in this case would seem to be that the Supreme Court felt that competent evidence had been presented and an award of substantial damages should be made in the interest of justice, while still being confronted with the necessity of acknowledging and affirming the trial court's right to exercise its discretion with regard to the credibility of the evidence before it in any trial.[6] In order to resolve this problem, the Supreme Court based its opinion on the assumption that a finding of substantial damage is inconsistent with an award of nominal damages, relying on *Great Western Land & Improvement Co. v. Sandygren.*[7]

In the latter case, where two special verdicts were inconsistent with each other, and one was inconsistent with the general verdict, the court held that the case had not been disposed of, since there was no basis for a final judgment. The court in the principal case analogizes findings of fact to a special verdict and the conclusions of law to a general verdict, pointing out that since a judgment in a trial by jury must agree with a special verdict, regardless of the general verdict, where a case is tried without a jury, the judgment, a fortiori, must not be inconsistent with the findings of fact.[8] But it should be noted that here there were three findings: (1) that plaintiffs had suffered "some substantial damage"; (2) that the amount of the damage sustained was incapable of determination under the evidence presented (adding that the court was not willing to accept the testimony of the witnesses); and (3) in the absence of satisfactory proof of the actual amount, plaintiffs were entitled to nominal damages. These three findings, read together, would not seem to be inconsistent with the judgment.

[5] WILLISTON, CONTRACTS (rev. ed. 1937) 3776 § 1345; MCCORMICK, DAMAGES 105, § 28 (1935).

[6] J. S. Brown & Brown Mercantile Co. v. Sherrod, 53 Wash. 132, 134, 101 Pac. 481, 481 (1909), judgment affirmed: "The trial court saw the appellant, heard him testify, was in a position to pass upon his credibility, and evidently rejected his statement as unworthy of belief." Cited in Siegel v. Kracower, 144 Wash. 609, 258 Pac. 495 (1927); Bond v. Werley, 175 Wash. 659, 667, 28 P.2d 318, 321 (1933), judgment affirmed: "This whole matter involves principally questions of fact, which the trial judge, having appellants as witnesses before him, was in a better position to know what to credit, or discredit, of their testimony."

[7] 141 Wash. 541, 252 Pac. 123 (1927).

[8] State v. Twenty Barrels of Whiskey, 104 Wash. 382, 176 Pac. 673 (1918); Gerhard v. Worrell, 20 Wash. 492, 55 Pac. 625 (1899).

Nor, are the findings necessarily inconsistent with one another. It is true that failure to prove the amount of damages may mean failure to prove any fact of damage, and in such cases the courts have awarded nominal damages as penalty for breach of contract.[9] That is not the problem in the principal case. Here, we have no dispute as to the fact of damage, but rather inadequate proof as to the amount of damages, resulting in an award of nominal damages. In at least three such cases the Washington Supreme Court has approved awards of nominal damages.[10] Such an award of nominal damages is also clearly recognized by text writers.[11]

The court points out that on the basis of the evidence it would probably not have disturbed a trial court finding that there was *no substantial damage,* nor a finding as to *some amount* of damages greater than nominal damages. Thus, the case would seem to stand for the proposition that a trial court's direct finding of substantial damage precludes an award of any amount less than a substantial amount, despite the plaintiff's failure to prove any amount.[12] This is perhaps justified on the theory that the use of the word "substantial" in itself implies a previous comparative measurement.

ALICE D. HUBBARD

**Conversion of Business Property—Recovery for Value of Good Will.** In *Crutcher v. Scott Publishing Co.,*[13] the conditional vendee of

[9] McGuire v. White, 135 Kan. 517, 11 P.2d 698 (1930) (evidence of plaintiff as to value of sand removed from sandpit unsupported and incompetent); Livingston v. Indian Terr. Illuminating Oil Co., 91 F.2d 833 (10th Cir. 1937) (no evidence offered to establish value); French v. Paris (Sask.) 3 D.L.R. 555 (1928) (no evidence offered as to value of crop); Burtenshaw v. Bountiful Irr. Co. 90 Utah 196, 61 P.2d 312 (1933); Bigler v. Fryer, 82 Utah 380, 25 P.2d 598 (1933).

[10] Northwestern Equipment Co. v. Sofe, 91 Wash. 118, 157 Pac. 459 (1916), where a concrete mixer was taken from an outdoor location and later regained, the court held that plaintiff failed to give proper proof of the values agreed for the measure of damages and awarded damages of $1. The case was cited as controlling in Seattle Times Co. v. Murphy, 172 Wash. 474, 20 P.2d 858 (1953), where the court held that there was no evidence from which the jury could find the value of records and lists, and therefore a verdict awarding damages to plaintiff could not be sustained. Again there was no question as to the fact of damage. In Bell v. Scranton Coal Mines Co., 50 Wash. 659, 110 Pac. 628 (1910), the court stated that in the absence of proof of any actual damages, only nominal damages will be inferred.

[11] MCCORMICK, DAMAGES 91 (1935): "It is repeatedly announced by the courts that, where the plaintiff establishes the fact of loss, but not its amount, he may recover nominal damages."

[12] "We do hold, however, that since competent and undisputed opinion evidence was submitted as to the values comprising the agreed measure of damages, and the court did find that substantial damage had been sustained, the court had the *duty* either to make an award of substantial damages or to give appellants an opportunity to submit additional proof as to damages." *supra* note 1, at 294, 261 P.2d at 78. The opinion would seem to have overlooked the fact that the trial court might also have been given an opportunity to rewrite its findings.

[13] 42 Wn.2d 89, 253 P.2d 925 (1953).

a newspaper plant assigned his interest in the contract of sale to a publishing company. Because of the seemingly precarious financial position of the publishing company, the conditional vendor repossessed the plant without justifiable cause and sold it to the defendant. Plaintiff, as trustee of the now bankrupt publishing company, sued for conversion of the plant and the consequent destruction of the then going business. The Court awarded damages including $17,000 for injury to a "going established business."

The plaintiff had originally sought damages for conversion of the physical assets and, in addition, for the value of the goodwill.[14] This latter part of the complaint was rejected by the trial judge on the theory that goodwill could not be a subject of conversion.[15] By amending his complaint, plaintiff then sought compensation for damage to a "going established business." The proof submitted by him consisted largely of testimony usually used to prove the value of goodwill, such as gross receipts over a five-year period, amount of money removed from the business by the owners, and the opinions of several witnesses as to the market value of the newspaper plant, which included the value of the paper's circulation and its goodwill.[16]

Plaintiff made no attempt to prove the loss of any contracts or net profits during the period of operation, which are generally used to measure damages for interruption of a "going established business." The Court, citing *Seeley v. Peabody*,[17] merely stated that an owner may recover damages in a conversion action for injury to or interruption of an "established business." However in that case there was ample proof showing the transactions of business, items of expense and receipts, and net profit over a period of ten months.

As a general rule, the action of conversion is restricted to tangibles or to "things of value" closely associated with tangibles, and will not lie for such incorporeal species of property as goodwill of a business.[18] Washington has previously held that to recover future profits lost by interruption or injury to a business, the "lost profits" must be shown with a reasonable degree of accuracy and exactness.[19] To recover damages for interruption of a business, the plaintiff-owner must generally show that the business has been successfully conducted for a

[14] Appellant's brief, p. 38.
[15] *Ibid.*
[16] Respondent's brief, pp. 39-43.
[17] 139 Wash. 382, 247 Pac. 471 (1926).
[18] 53 Am. Jur., Trover And Conversion (1945) § 4; Meier v. Wilkins, 15 App. Div. 97, 44 N.Y. Supp. 275 (1897).
[19] Schultz v. Wells Butchers' Supply Co., 151 Wash. 382, 275 Pac. 737 (1929).

period of time sufficient to establish a standard for reasonably ascertaining potential future profits.[20] Only one decision in Washington specifically allowed recovery for loss of goodwill; it is distinguishable because a malicious, willful destruction of property and business operations, and not conversion, was involved.[21] The Court there stated that such facts did not require the usual degree of exactness in determining the total amount of the loss suffered. However, even in that case the plaintiff's evidence was quite detailed as to receipts, expenses and profits of the business for some time prior to its interruption.

The Court's decision in this case has weakened considerably its position that the value of goodwill cannot be recovered in a conversion action. Also, under the facts of the instant case, the jury, and in turn, the Court, in awarding damages, had to rely on opinion evidence of a highly speculative nature which has little probative value.

RICHARD K. QUINN

**Lease—Construction of Liquidated Damages Provision.** In *Mon Wai v. Parks*, 143 Wash. Dec. 518, 262 P.2d 196 (1953), the plaintiff lessors sought to collect from the defendant lessees unpaid rent which had accrued prior to the termination of the lease. The lease, which had been terminated for breach of covenant to pay, provided that in event of the lessees' failure to carry out the terms of the lease, lessors should have the option to terminate, "and all moneys paid by the Lessees to the Lessors shall be forfeited as liquidated damages to Lessors." In reversing judgment for plaintiff, the court held that by this provision, the parties limited lessors' damages, upon termination for breach, to moneys paid by lessees as their contribution toward construction of building on demised premises, and that therefore the lessor could not recover overdue rent.

## DOMESTIC RELATIONS

**Disposition of Property in Divorce.** In *High v. High*[1] all of the property before the court for disposition was held by the parties as tenants in common. The trial court awarded certain property to each of the parties, and in addition ordered that three tracts of land be sold by the parties within six months, recognizing that the tracts had been bought by the parties for speculation, were practically valuless now, but might become valuable at a later time. If not sold within the six months period, either party had the right to apply for an order of the court to have the property sold at public sale.

The Supreme Court reversed that portion of the decree providing

[20] Hole v. Unity Petroleum Corp., 15 Wn.2d 416, 131 P.2d 150 (1942). Bogart v. Pitchless Lumber Co., 72 Wash. 417, 130 Pac. 490 (1913).
[21] Seidell v. Taylor, 86 Wash. 645, 151 Pac. 41 (1915).
[1] 41 Wn.2d 811, 252 P.2d 272 (1953).