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Damages

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from parole supervision on July 13, 1949. On March 11, 1950, he was sentenced for forgery committed while on parole. Petitioner asks for a construction of RCW 9.92.080 that would prevent his confinement for the latter offense to begin until the expiration of his previous fifteen year maximum sentence. The statute reads *inter alia:* ". . . whenever a person while under sentence of a felony commits another felony and sentenced to another term of imprisonment, such latter term shall not begin until the expiration of all prior terms. . . ." The Supreme Court denied the petition, holding that the statute in question should be interpreted as if the italicized words were added: ". . . whenever a person while under sentence of a felony commits another felony and is sentenced to another term of imprisonment, such latter term shall not begin until expiration of *incarceration under* all prior terms. . . ."

DAMAGES

Damages for a Private Nuisance. In the two recent cases of *Riblet v. Spokane-Portland Cement Co.*,[1] the plaintiff sought damages for injury caused by dust from defendant's cement plant. Plaintiff had built his "dream house" on high ground overlooking the plant; and was continually troubled by such annoyances as sludge in his swimming pool, encrustation of cement dust on his house, and a dusty sensation in his respiratory system. On the first trial, the trial court dismissed the action, relying on the case of *Powell v. Superior Portland Cement, Inc.*[2]

The decision in the well-known *Powell* case was handed down by the Washington Supreme Court in 1942. In that case it was held that one who voluntarily purchases property in a manufacturing community cannot be compensated for any injury caused by such inconveniences as dust, smoke or gases that are a necessary incident of lawful industrial operations. Neither injunction nor damages were granted. The concurring judges rested their opinion on the proposition that plaintiff had failed to prove any substantial injury to his property, and that no damages could be allowed for mere diminution of personal enjoyment of one's property. The court had ample authority for denying the injunction;[3] but in denying damages, it overruled much Washington authority to the contrary.[4] Shortly after the *Powell* decision, an excellent comment in the *Washington Law Review*[5] soundly criticized

[1] 41 Wn.2d 249, 248 P.2d 380 (1952), and 145 Wash. Dec. 323, 274 P.2d 574 (1954).
[2] 15 Wn.2d 14, 129 P.2d 536 (1942).
[3] Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 Pac. 306 (1924); Mattson v. Defiance Lumber Co., 154 Wash. 503, 282 Pac. 848 (1929).
[4] Bartel v. Ridgefield Lumber Co., *supra* note 3; Mattson v. Defiance Lumber Co., *supra* note 3; Hardin v. Olympic Portland Cement Co., 89 Wash. 320, 154 Pac. 450 (1916); Sterrett v. Northport Mining and Smelting Co., 30 Wash. 164, 70 Pac. 266 (1902).
[5] Comment, *Recovery of Damages for Private Nuisance,* 18 WASH. L. REV. 31 (1943).

the holding as one that did violence both to precedent[6] and to statutory provisions.[7] The author predicted that in view of overwhelming authority to the contrary, both in this jurisdiction and in others, the *Powell* decision would be re-examined.

This prediction proved to be quite accurate. When the decision of the trial court in the first *Riblet* case was appealed in 1952, the Supreme Court limited the *Powell* case to its facts and held it not to be controlling in the case at bar, which was then remanded for a new trial. On retrial, the plaintiff was awarded damages for depreciation in the rental value of his property caused by the dust nuisance over the period not barred by the statute of limitations. The plaintiff again appealed, contending that the amount awarded was grossly inadequate, and that the trial court had erred in not allowing damages for *personal discomfort.* The Supreme Court affirmed the judgment as to the property damage and also awarded $1000[8] for *personal discomfort,* thus reversing that portion of the trial court's judgment which held that to grant damages for both personal discomfort and for injury to property would subject the defendant to double damages. The court acknowledged that the latter award was "seemingly at variance" with the views of the concurring judges in the *Powell* case.

In awarding damages for injury to plaintiff's property, the court seems to be returning to the position it had adhered to prior to the *Powell* case.[9] In allowing plaintiff to recover for personal discomfort, it has adopted the prevailing rule that personal damages are recoverable as a separate item in an action on a private nuisance, and that such an award does not subject a defendant to double damages.[10] Before this case, no Washington decision had directly held on this point, though the court had strongly implied that such damages might be recoverable.[11] The apparent effect of the two *Riblet* cases is to overrule both

[6] Cases cited note 4 *supra.*

[7] RCW 7.48.020 declares that in the case of a nuisance an action may be brought ". . . by any person whose property is affected or whose personal enjoyment is lessened by the nuisance. . . ."

[8] There was no express allowance for prospective damages in this award, as is usually made in cases involving a permanent nuisance. It might also be noted that the figure of $1000 was arrived at rather arbitrarily. However, this can probably be explained by the fact that the court was rendering somewhat of a compromise verdict in hope of terminating a protracted and profitless litigation.

[9] *Supra* note 4.

[10] McCORMICK, DAMAGES, 503, § 127 (1935); *Note,* 142 A.L.R. 1307 (1943); Millet v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N.W. 641 (1920); Phillips Petroleum Co. v. Ruble, 119 Okla. 37, 126 P.2d 526 (1942).

[11] Mattson v. Defiance Lumber Co., *supra* note 3, where the jury found no substantial property damage, but allowed damages because plaintiff's home had been rendered less inviting and less comfortable.

the majority and the concurring opinions in the *Powell* case, thus returning this jurisdiction to the majority rule on this point.

Interest on Disputed Claims. A narrow issue with a troubled history in this jurisdiction is the question of whether or not interest is allowable on a claim where plaintiff sues on a contract to pay money, and the defendant disputes the amount due. A reading of our cases on the subject will reveal no small amount of confusion as to just what facts must be present in order that interest may be allowed on such a claim. In the case of *Mall Tool Co. v. Far West Equipment Co.*,[12] the court made an attempt to clarify the matter.

That case was an action brought by Mall on an open account for goods sold and delivered. Far West disputed the amount due on the account, claiming that it had not received certain items of merchandise. It was Far West's position that if a defendant in an action such as this one in good faith disputes all or part of the plaintiff's claim, it becomes an unliquidated demand, and will not bear interest prior to judgment. The trial court found for the defendant on the disputed items, and refused to allow interest on the balance. On appeal, the Supreme Court held that it was error not to allow interest ". . . because *the claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.*"[13] For convenience, the court called this type of claim a "determinable claim."

As a general rule, a liquidated claim will bear interest before judgment, while an unliquidated claim will not.[14] A claim that is fixed, or one that is ascertainable by computation is usually considered liquidated.[15] Washington, however, classifies claims not fixed as unliquidated, and has alternately allowed[16] and disallowed[17] interest on them. In the case of *Dickenson Fire and Pressed Brick Co. v. F. T.*

[12] 145 Wash. Dec. 145, 273 P.2d 652 (1954).

[13] *Id.* at 161, 273 P.2d at 663, 664.

[14] 47 C.J.S. 28, § 19 (1946).

[15] *Ibid.*; MCCORMICK, DAMAGES, 213, § 54 (1935). McCormick says, "A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion. . . ."

[16] Dickenson Fire and Pressed Brick Co. v. F. T. Crowe & Co., 63 Wash. 550, 115 Pac. 1087 (1911); Parks v. Elmore, 59 Wash. 584, 110 Pac. 381 (1910); Modern Irrigation & Land Co. v. Neely, 81 Wash. 38, 142 Pac. 458 (1914); Barbo v. Norris, 138 Wash. 627, 245 Pac. 414 (1926).

[17] Ryan v. Plath, 20 Wn.2d 663, 148 P.2d 946 (1944); Wright v. City of Tacoma, 87 Wash. 334, 151 Pac. 837 (1915); Meyer v. Strom, 37 Wn.2d 818, 226 P.2d 218 (1951).

Crowe & Co.,[18] the court made the unqualified statement that interest *is* allowable on a claim under a contract to pay money where the amount due is ascertainable by computation, and that counterclaims and setoffs won't preclude recovery. In several other cases, interest was allowed without discussion.[19] In *Parks v. Elmore*,[20] the court held that interest is allowable on an *unliquidated* demand where the amount is ascertainable by computation. A similar decision was reached in *Barbo v. Norris*.[21] In one case,[22] the court held that interest is allowable on an unliquidated demand where the equities of the case so demand. This holding stands by itself.

On the other hand, there is a sizable number of cases where interest was not allowed. Interest was refused in *Ryan v. Plath*[23] because "certain items of the account were controverted." In *Wright v. City of Tacoma*,[24] interest was not allowed, the court holding that "Where . . . the demand is for something which required evidence to establish the quantity or amount of the thing sold, or the value of the services rendered, interest will not be allowed prior to judgment."[25] This passage from the *Wright* case was quoted with approval in the more recent case of *Meyer v. Strom*.[26]

The extent to which this decision does away with the confusion on the subject is open to question. The court could have followed either of two distinct and opposite lines of cases and cleared up the matter once and for all, but instead, it limited its holding to a particular type of fact pattern, leaving the status of much preceding case authority still in doubt. As far as it goes, however, this holding does shed considerable light on the matter. Within the fact pattern to which this holding is limited, *i.e.*, where there is a claim on a contract to pay money, and the amount due is ascertainable by computation with reference to a fixed standard contained in the contract, this decision sets at rest the conflict shown by the cases discussed above. It is readily seen that this fact pattern includes a large number of the possible cases where the issue of interest on damages might arise. It is submitted that the court has made a substantial contribution to certainty and predicta-

[18] *Supra* note 16.
[19] Royal Dairy Products Co. v. Spokane Dairy Products Co., 129 Wash. 424, 225 Pac. 412 (1924); Hartman Shoe Co. v. Hanson, 135 Wash. 512, 238 Pac. 17 (1925).
[20] *Supra* note 16.
[21] *Supra* note 16.
[22] Modern Irrigation & Land Co. v. Neeley, *supra* note 16.
[23] *Supra* note 17.
[24] *Supra* note 17.
[25] 87 Wash. at 353, 151 Pac. at 844.
[26] *Supra* note 17.

bility in the law of damages in this state; but that it missed an excellent opportunity to make a much greater one.

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Cost Plus Contract. *Walsh Services, Inc. v. Feek,* 145 Wash. Dec. 269, 274 P.2d 117 (1954) involved a contract to remodel a house on what the court construed to be a cost plus basis. When the job was finished, plaintiff building contractor presented a bill to defendant that came to about double the price quoted in plaintiff's original estimate. The defendant refused to pay the bill and plaintiff sought to foreclose a mechanic's lien on defendant's property. The Supreme Court affirmed the trial court's decision that plaintiff could recover only what the job *should have cost.* This figure was arrived at by the computations of a reputable architect. It was held that a cost plus contractor must exercise the same skill and ability he would use on a contract for a fixed sum, and that the contractor must show that money he claims to have expended on the job was *necessarily* expended for labor and materials on the job. If the contractor cannot show these facts, he may recover only the reasonable cost, plus his percentage.

Reasonableness of Expense Incurred. In *Cudmore v. Tjomsland,* 44 Wn.2d 308, 266 P.2d 1058 (1954), plaintiff sued for defendant's breach of a warranty that certain livestock was free from disease. The only issue before the Supreme Court was the amount of damages. The court sustained defendant's contention that the amount of a veterinarian's bill was not established by competent evidence, since there was no testimony as to the reasonableness of the bill. The court relied on *Carr v. Martin,* 35 Wn.2d 753, 215 P.2d 411 (1950), as authority for its holding. The *Carr* case and those cited therein involved medical, hospital and nursing expenses incurred as a result of personal injuries, however, and may be rather dubious authority for the holding in the *Cudmore* case.

DOMESTIC RELATIONS

Divorce—Child Custody. In *Habich v. Habich*[1], the mother was awarded the custody of the children, then six and four years of age, in 1948, in an interlocutory decree of divorce. For three years the children had lived at the respective homes of the mother's mother, the father's parents, and of the mother, followed by nearly two years at the home of the father. This had been due to the father's failure to make support money payments, the mother's past ill health, and the father's unwillingness to surrender the children during school terms. When the mother remarried and desired to take the children back, the father instituted this proceeding to modify the divorce decree by transferring the custody of the children to him. The court found that the mother and her new husband were "very suitable as guardians for these growing children"[2] and that there were adequate school, church, and recreational facilities,

[1] 44 Wn.2d 195, 266 P.2d 346 (1954).
[2] *Id.* at 200, 266 P.2d at 349.