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Demurrer As a Method of Objecting to Separate Items of Damage Alleged

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DEMURRER AS A METHOD OF OBJECTING TO SEPARATE ITEMS OF DAMAGE ALLEGED.—In the recent case of *Ohio-West Virginia Co.* v. *Chesapeake & Ohio Ry. Co.*,[1] certified to the Supreme Court of appeals of West Virginia on a question of the sufficiency of the declaration, the plaintiff, owner and operator of a service station, alleged that it received from the defendant in a tank car a consignment which was described in the freight bill delivered by the defendant to the plaintiff as gasoline; that, relying upon the defendant's representation as to the contents of the car, the plaintiff emptied the contents into its gasoline tanks, which were already partly filled with gasoline; that the tank car, in fact, was filled not with gasoline, but with kerosene, and the combination resulting from the mixture of the two fluids in the gasoline tanks was valueless. The plaintiff claimed damages (1) for loss of the gasoline and kerosene so mixed; (2) for loss of profits caused by sales of the mixture, before its nature became known to the plaintiff, to customers who became dissatisfied and ceased to deal with the

[1] 124 S. E. 587 (W. Va. 1924).

plaintiff; and (3) for resultant depreciation in the value of the plaintiff's plant as a going concern. The defendant filed a demurrer directed specifically to the allegations claiming special damages under the second and third items, which was sustained, both in the trial court and in the appellate court, on the ground that such damages were too remote and speculative to form the basis of a recovery.

This decision suggests the question, which apparently the court was not asked to decide, whether a demurrer is the proper method of testing the propriety of allegations the sole object of which is to enumerate, or itemize, different elements of damages.

It seems that the common law recognizes the true function of a demurrer to be to inquire into the bare right to recover, and not the amount of the recovery. This principle is exemplified in the rule that defective items in a declaration concerned purely with the cause of action will be disregarded on a demurrer to the whole declaration and the demurrer overruled as too large, provided there are any allegations in the declaration which show a right to a recovery, however small.[2] Another way of expressing the same principle is that " a demurrer complains of too little and not too much matter in a declaration."[3] The principle is further exemplified in the rule that a judgment overruling a demurrer, where the action sounds in damages, admits only nominal damages, a determination of the amount of the recovery being left to a writ of inquiry—in other words, to the evidence.[4] In most cases, a declaration can state a right to recover without any allegation showing damages. In such cases, the law implies at least nominal damages from the right to recover.[5] In fact, the allegation of damages is looked upon as being a mere conclusion, or inference, from the facts stating the cause of action.[6] Hence it is generally held that a demurrer, whether general or specific, goes only to the bare right to recover and not to the amount or items of damages claimed.

In *Western Union Tel. Co.* v. *Milton*,[7] an action on the case for mis-stating in a telegram the number of bales of cotton purchased, the defendant demurred to the claim for special damages alleged to have resulted from such mis-statement. The court says:

"In an action on the case for damages, if the declaration

[2] Robrecht *v.* Marling's Admr., 29 W. Va. 765, 2 S. E. 827 (1887); First Nat. Bank of Mannington *v.* Bank of Mannington, 76 W. Va. 356, 85 S. E. 541 (1915); First Nat. Bank of Pineville *v.* Sanders, 77 W. Va. 716, 88 S. E. 187 (1916).
[3] Bean *v.* Ayres, 67 Maine 482.
[4] Havens *v.* Hartford & N. H. Railroad Co., 28 Conn. 69 (1859).
[5] See authorities cited in note 10, *infra*.
[6] Jenkins *v.* Montgomery, 69 W. Va. 795, 72 S. E. 1087 (1911).
[7] 53 Fla. 484, 43 So. 495, 125 A. S. R. 1077, 11 L. R. A. N. S. 560 (1907).

makes a case entitling the plaintiff to any recovery whatever, though it be only nominal damages, a demurrer will not lie thereto, even if the declaration claims other or greater damages than the cause may legally entitle the plaintiff to recover; demurrer not being the proper way to test the extent of the recovery to be had. Such questions are properly raised and settled by objections to testimony at the trial, or by instructions to the jury as to the law applicable to the points raised * * * ."

In *Kennon* v. *Western Union Tel. Co.*,[8] where the plaintiff claimed damages for commercial losses due to delay in transmitting a telegram, the demurrer was directed "to so much of each of said counts, respectively, as seeks a recovery beyond the price of the telegram." The court, overruling the demurrer, says:

"Causes cannot be determined piecemeal on demurrer. The pleader must answer the whole complaint and for all purposes when he resorts to this mode of defense. When the cause of action is sufficiently stated to authorize a recovery, in this form of action counting on a single breach of contract, of any damages, a partial defense, going to a denial of the right to recover a part of the damages claimed, must be availed of and effectuated by motion to strike out the objectionable averments, or by objections to the evidence, and through instructions to the jury."

In a Vermont case,[9] the plaintiff sued the defendant railroad company for damages caused by derailment of a train, whereby plaintiff was injured and his wife was killed. On demurrer to the declaration, it was argued that the plaintiff could recover only for the injuries to himself and not for the death of his wife. The court said:

"But at all events the objection to the first count amounts to this that the plaintiff in this count asks for more damages than he is entitled to. If he cannot recover for the consequential damages he may for those done by the battery upon himself.

"The count is not demurrable because the plaintiff claims too many items of damage."[10]

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[8] 92 Ala. 399, 9 So. 200 (1890).

[9] Devino *v.* Central Vermont Railroad Co., 63 Vt. 98, 20 Atl. 953 (1890).

[10] Citing, "1 CHIT. PL. 349; Bayles *v.* Kan. Pac. R. R. Co., 13 Col. 181, 5 L. R. A. 480; Bayles *v.* Glenn, 72 Ind. 5; Moritz *v.* Spiltt, 55 Wis. 441."

"It is well settled that demurrer is not a proper method of determining what is the proper measure of damages, where a cause of action is presented entitling the plaintiff to some damages, even though they are merely nominal. And so a demurrer does not lie to a declaration because it claims other or greater damages than the case made legally entitles the plaintiff to recover. Such questions are, as a rule, properly raised and settled by objections to the testimony at the trial, or by instructions to the jury as to the law applicable to the points raised, or may be cause for reforming the declaration, when calculated to embarrass the fair trial of the case." 21 R. C. L. 514, §76.

"Where a part of the damages alleged are such as cannot form the basis of a recovery, the remedy is a motion to strike out and not a demurrer." 31 CYC. 299.

"It is enough, on demurrer, that he states a case which gives him at least a right to nominal damages." 2 SUTHERLAND, DAMAGES (4 ed.), 1353.

See numerous cases cited in support of the statements quoted above, and also cases cited in 39 CEN. DIG. 1742-3, § 439; 16 DEC DIG. 387, § 193 (8); 18 2nd DEC. DIG. 256 §193 (8); 6 STANDARD PROC. 912-913.

There are cases, however, where a declaration is demurrable if it fails to allege facts showing that the plaintiff has been actually damaged.[11] In such cases, the damages are said to be the gist of the action and will not be implied from the breach. Here, however, a demurrer is proper because failure to aver facts showing damage results in the statement of no cause of action. In such cases, it will be noted that the demurrer complains of too little, and not too much, alleged in the declaration.

It is well known, of course, that a demurrer directed to a specific part of a declaration is proper, provided the part to which it is directed constitutes a separable part of the *cause of action;*[12] but there the demurrer is aimed at a part of the cause of action—the right to recover—and not at a part of the damages. The two situations are clearly distinguishable but easily capable of being confused.

The impropriety of a demurrer as a means of testing the sufficiency of facts alleged solely as notice of damages claimed is further indicated by the fact that such facts are not issuable and can not properly be traversed. In *Smith* v. *Thomas,* [13] an English case, the court says:

> "The allegation of special damage in a declaration of slander is intended only as notice to the defendant, in order to prevent his being taken by surprise at the trial. Where the words are actionable in themselves, it is not the gist of the action, but a consequence only of the right of action. If the plaintiff proves his special damage, he may recover it; if he fails in proving it, he may still resort to, and recover, his general damages. A traverse, therefore, of such an allegation is immaterial and improper, as a finding upon it either way will have no effect as to the right to the verdict."

It will be noted that allegations of general damages and of special damages are governed by the same rule, except where, as hereinbefore indicated, the special damages constitute the gist of action.[14]

—L. C.

[11] Beck and Gregg Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. 930, 3 L. R. A. N. S. 420 (1904); Commonwealth, use of Brown *v.* Fry, 4 W. Va. 721 (1871). See SUNDERLAND'S CASES ON COMMON LAW PLEADING, 396, note.

[12] See cases cited in Note 2, *supra.*

[13] 2 Bingham's New Cases 372, 132 Eng. Reprint 146 (1835). See 4 SEDGWICK, DAMAGES (9 ed.), 2610, § 1274; Jenkins *v.* Montgomery, note 6, *supra.*

[14] Most of the cases cited in preceding notes involved questions as to the propriety of special damages alleged.

The problem dealt with in this note should be distinguished from the question decided in McGlamery *v.* Jackson, 67 W. Va. 417, 68 S. E. 105 (1910), whether a declaration is demurrable because it fails to state the monetary measure of damages claimed.