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Can Damages Be Recovered In An Action Of Unlawful Entry And Detainer Instituted In A Circuit Court?

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CAN DAMAGES BE RECOVERED IN AN ACTION OF UNLAWFUL ENTRY AND DETAINER INSTITUTED IN A CIRCUIT COURT?—This question would appeal to the writer as perhaps capable of being too easily answered to warrant discussion in the form of a note, if it were not for the fact that there seems to be a persistent impression among practitioners in West Virginia to the effect that damages for the detention of the property sued for is a legitimate item of recovery in an action of unlawful entry and detainer (or forcible entry and detainer, as it seems to be more usually designated) started in a circuit court. It can not be denied that such an impression may be readily justified by numerous analogies as to both common-law and statutory relief granted by the courts in West Virginia, in view of which the granting of damages for detention of the property would seem to follow as a part of the natural process of dealing out justice between the parties. In the action of detinue, both by the common law and by virtue of statute, damages for the detention of the property may be recovered.[1] Even in debt, the standard form of the declaration

[1] W. VA. CODE, c. 102, § 6.

still has an *ad damnum* clause, which at one time served the useful purpose of permitting the plaintiff to recover interest under the guise of damages for the detention of the debt, although it would seem that such an allegation is no longer necessary.[2] In ejectment the statute specifically provides that damages may be recovered for detention of the land.[3] Moreover, in the action of unlawful entry and detainer itself, when instituted before a justice of the peace, the statute provides that damages may be recovered.[4] And of course if such an action started before a justice of the peace be tried *de novo* on appeal in a circuit court, damages may be recovered in the circuit court, on the principle that on the trial of all cases *de novo* on appeal the circuit court has such jurisdiction as the justice had on the original trial.[5] Again, it is possible that provisions in some of the local forms may have suggested conclusions as to the substantive rights of the parties.[6]

It seems that the question under discussion has never been positively decided by the West Virginia Supreme Court, although it has on different occasions narrowly escaped adjudication. In *Bulkley* v. *Sims,*[7] the Supreme Court, reversing the judgment of the lower court on a demurrer to the evidence, rendered judgment for the plaintiff for the property and also gave one hundred dollars damages for the detention of the property, but no question seems to have been raised by court or counsel as to the propriety of the judgment for damages. In a recent case, *Payne Realty Co.* v. *Lindsey,*[8] the trial court rendered judgment for the plaintiff for the premises in controversy and for three hundred and twenty dollars damages. The Supreme Court, however, decided that the plaintiff had no right to possession of the property and the judgment was reversed solely on that ground. Here again no question seems to have been raised as to the damages, and perhaps for this reason the matter was not adjudicated. In an earlier case, *Montgomery* v. *Economy Fuel Co.,*[9] the question was brought

[2] HOGG, PLEADING AND FORMS, 263 *et seq.; Idem,* § 118, p. 88.
[3] W. VA. CODE, c. 90, § 30.
[4] *Idem,* c. 50, §§ 212-215.
[5] No case is noted directly in point, but the principle is illustrated in the cases holding that a circuit court has no jurisdiction to try a case *de novo* on appeal and grant relief where the justice had no jurisdiction originally, although the circuit court would have had jurisdiction on the same cause of action if instituted in the first instance in the circuit court. See Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 363 (1900).
[6] HOGG, PLEADING AND FORMS, 412, 414, Forms 161, 163. The author may have intended these forms for use in appeal cases, leaving it to the pleader to eliminate the allegation as to damages in actions instituted in the circuit court.
[7] 48 W. Va. 104, 35 S. E. 971 (1900). So far as the writer is able to determine this case and the other cases reviewed in this note were started in the circuit court, and are not cases appealed from a justice's court, although there is not enough in the opinion in all instances to make this absolutely certain.
[8] 91 W. Va. 127, 112 S. E. 306 (1922).
[9] 61 W. Va. 620, 57 S. E. 137 (1907).

squarely to the attention of the court. The Supreme Court affirmed the judgment of the lower court giving the plaintiff possession of the property and one hundred dollars damages for the detention thereof. But the judgment of the lower court as to damages was permitted to stand solely on the principle that, the amount in controversy not being large enough to confer appellate jurisdiction on the Supreme Court, the latter court had no authority to review or inquire into the propriety of the monetary phase of the judgment. Although expressly refusing to adjudicate the propriety or impropriety of permitting the plaintiff to recover damages, and taking care to leave the question open for future adjudication, it seems to have been the view of the court that damages should not have been allowed. In a very recent case, *Martin* v. *Cochran*,[10] the question arose on demurrer to a summons claiming damages for detention of the property. The Supreme Court in this case approved the judgment of the lower court overruling the demurrer on the familiar principle of pleading that surplusage will not vitiate a pleading. The court says that "the allegation of damages in a summons *may*[11] be treated as surplusage", but does not say that it *should* or *must* be so treated. It is not clear whether the court intends to hold that the plaintiff has asserted a right which he may waive in order to avoid any question as to the sufficiency of his pleading, or whether the allegation is surplusage in the sense that it can perform no function in the summons. Apparently the plaintiff may be in doubt as to whether he can safely prove damages and take judgment therefor on a trial of the action.

It is the opinion of the writer that it was not the intention of the legislature that damages should be recovered in an action of unlawful entry and detainer instituted in a circuit court, and this opinion is based on the following considerations: (1). The action is purely statutory. Hence the plaintiff is entitled to only such relief as the statute gives him. Chapter 89 of the Code authorizing the action in the circuit courts gives no hint that damages may be recovered. (2). Chapter 50 of the Code containing provisions for bringing the action before a justice of the peace expressly provides that damages may be recovered there. If the legislature thought an express provision necessary for the recovery of damages under chapter 50 of the Code, it would not have left any contemplated right to recover damages under chapter 89 en-

[10] 119 S. E. 174 (W. Va. 1923).
[11] Italics ours.

tirely to implication.[12] (3). Section 2 of chatper 89 provides that "a jury shall be impaneled to try whether he unlawfully withholds the premises in controversy." This provision defines what the jury is to try and no direction is given as to finding damages. It would seem that the principle of *Expressio unius est exclusio alterius* should control. This conclusion is further fortified by the fact that section 214 of chapter 50 of the Code, relating to actions in a justice's court, expressly provides that the justice or the jury shall assess damages if claimed by the plaintiff. (4). Furthermore, the form of verdict prescribed by section 3 of chapter 89 has no provision for the assessment of damages. (5). The fact that chapter 89 goes so far in defining specifically what the jury is to do indicates that such an important additional function as the finding of damages would not have been left to implication. (6). Section 4 of chapter 89 expressly provides that the judgment in an action of unlawful entry and detainer shall not be a bar to an action of trespass. The purpose of the statute would seem to be to indicate that the plaintiff shall have his action of trespass for the purpose of recovering damages for the detention of his property, which was his regular action for recovering mesne damages at common law after an ouster from and re-entry upon realty.[13] (7). Finally, so far as the writer has been able to determine, the decisions rendered by courts of other states are unanimous to the effect that damages can not be recoverd in an action of unlawful entry and detainer in the absence of a specific statutory provision therefor.[14]

If it be conceded that damages should not be recovered in an action of unlawful entry and detainer instituted in a circuit court, it is pertinent to inquire into the propriety of inserting in the summons an allegation purporting to claim damages. That it has been decided that such an allegation does not make the summons demurrable has already been indicated.[15] On the other hand, the decision establishing the latter proposition does not say that the allegation of damages may be used for purposes of a recovery.

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[12] This distinction is noted by the court in Montgomery *v.* Fuel Co., *supra.*

[13] In this connection, it is worth noting that section 217 of chapter 50, similarly to the last section of chapter 89, provides that the judgment in the section of unlawful entry and detainer shall not be a bar to an action of ejectment, but it is silent as to whether the plaintiff may have a future action of trespass, presumably because he may recover his damages in the action of unlawful entry and detainer. The conclusion to be drawn from the comparison is obvious.

[14] The following decisions cited in 26 C. J. 862 will be found to be in point: Poe *v.* Bradley, 44 Ark. 500 (1884), and cases cited; Barnes *v.* Stark, 4 Cal. 412 (1853); Minor *v.* Knowles, 1 Root 142 (Conn. 1789); Keating *v.* Springer, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544 (1893), and cases cited; Stover *v.* Hazelbaker, 42 Nebr. 393, 60 N .W. 597 (1894); Hart *v.* Ferguson, 176 Pac. 396 (Okla. 1918). See 11 R. C. L., Title Forcible Entry and Detainer, § 37.

[15] Martin *v.* Cochran, *supra.*

Assuming that, for reasons already stated, a judgment for damages would be erroneous, it follows that the plaintiff can not make any legitimate use of the allegation claiming damages, although, on the authority of *Montgomery* v. *Fuel Co.*, cited, the plaintiff might illegitimately take judgment for as much as one hundred dollars without incurring the danger of having his judgment reversed in the Supreme Court.[16] On the other hand, if the plaintiff should take judgment for one hundred dollars or for any nominal amount, and such judgment should not substantially compensate him for the damages which he has suffered, he would run the risk of being estopped by virtue of a plea of *res adjudicata* from claiming any additional damages in a future action. Indeed, it would seem that this question of estoppel might be seriously raised on the mere basis of the allegation claiming damages, although the judgment should be entirely silent as to the recovery of damages. Hence it is doubtful whether the plaintiff should make use of the allegation as a mere formality, as he may be considered as doing in the action of debt. A plaintiff in an action of debt may still theoretically recover interest as damages for the detention of the debt, although the statute permits him to recover it as interest. Hence the allegation in debt, if formal in the sense of unnecessary, is still logical and consistent, and can lead to no harmful question of estoppel.

After all is said, however, the writer can see no reason why it would not be expedient for the statute to provide that damages may be recovreed in an action of unlawful entry and detainer instituted in the circuit court. If there is any reason why there may be such a recovery in ejectment and in unlawful entry and detainer in a justice's court, the same reason would seem to indicate that there should be a similar recovery in an action of unlawful entry and detainer started in the circuit court. Such a method of procedure would seem to be convenient, economical and in accord with many common-law and statutory analogies; and no reason is perceived why it would lead to any complications or confusion such as are urged against joinder of dissimilar causes of action. —L. C.

[16] *Quaere*: If the validity of such a judgment can not be considered on writ of error, could it be tested by a writ of prohibition from the Supreme Court? See Jennings *v.* Judge, 56 W. Va. 146, 49 S. E. 23 (1904); City of Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152 (1898); Wilkenson *v.* Hoke, 39 W. Va. 403, 19 S. E. 520 (1894).