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Splitting a Cause of Action for Injury to Person and Personal Property

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SPLITTING A CAUSE OF ACTION FOR INJURIES TO PERSON AND PROPERTY RESULTING FROM THE SAME ACT.—[Washington] A recent case[1] before the Supreme Court of Washington presented the vexed question whether a recovery of damages for an injury to property bars an action by the owner for personal injuries sustained at the same time and as a result of the same wrongful act. In that case the plaintiff was injured and her automobile damaged in a collision with a taxi operated by the defendant. The plaintiff's car was insured under a policy providing for the subrogation of the insurer to claims against a tort feasor. The insurer settled with the plaintiff for the loss of her car, and then, under the provisions of the policy and the terms of the settlement, brought a suit in the plaintiff's name against the defendant and recovered a judgment for the damage to the car. When the plaintiff later sued for her personal injuries, the defendant pleaded this recovery in bar. The trial court sustained the defense, and entered judgment for the defendant. On appeal this judgment was affirmed by the Supreme Court which held:

(1) That the defendant's negligent act, though it caused damage to the plaintiff's person and property, gave rise to a single cause of action which would not support two suits, and therefore that a recovery for a part barred the residue.

(2) That the suit by the insurer in the plaintiff's name under the provisions of the policy had the same effect as if the plaintiff had voluntarily instituted it herself.

On the first proposition, that the cause of action was single, and that a partial recovery barred a second action, the case is supported by decisions in Kentucky,[2] Minnesota,[3] Mississippi,[4] Missouri,[5] Pennsylvania,[6] and Tennessee,[7] and by dicta in Alabama,[8] Arizona,[9] Massachusetts[10] and Wyoming.[11] It is contrary to the decisions in England,[12] New Jersey,[13] New York,[14] Texas,[15] and a Federal Court.[16] Most of the cases, whether supporting the view that the cause of action is single and indivisible, or the contrary view that two causes of action arise which may be enforced by separate suits, attempt to solve the problem by the application of some definition of a cause of action, or an analysis of the elements

1. *Sprague* v. *Adams* (1926) 247 Pac. 960.
2. *Cassidy* v. *Berkovitz* (1916) 169 Ky. 785.
3. *King* v. *C. M. & S. P. Ry.* (1900), 80 Minn. 83.
4. *Kimball* v. *L. & N. Ry.* (1908) 94 Miss. 396.
5. *McCoy* v. *St. L. & St. F. Ry.* (1914) 186 Mo. App. 408.
6. *Fields* v. *Philadelphia Transit Co.* (1922) 273 Pa. 282.
7. *Smith* v. *Ry.* (1916) 136 Tenn. 282.
8. *Birmingham Ry.* v. *Lintner* (1904) 141 Ala. 420.
9. *Jenkins* v. *Skelton* (1920) 21 Arizona 663.
10. *Doran* v. *Cohen* (1888) 147 Mass. 342.
11. *Hazzard Powder Co.* v. *Volger* (1888) 3 Wyo. 189.
12. *Brunsden* v. *Humphrey* (C. A. 1884) L. R. 14 Q. B. D. 141.
13. *Ochs* v. *Pub. Serv. Co.* (1911) 81 N. J. L. 661.
14. *Reilly* v. *Sicilian Pav. Co.* (1902) 170 N. Y. 40.
15. *Watson* v. *T. & P. Ry.* (1894) 8 Tex. Civ. App. 144.
16. *Boyd* v. *A. C. L. Ry.* (1914) 218 Fed. 653.

making up a cause of action. In the main our law has not been evolved on any such basis. On the problem in question the cases do not lead to the conclusion that there is such fixed relation between the wrong and the remedy, as to settle the number of actions permissible. If A wrongfully entered on B's land, assaulted and beat B when requested to leave, and finally carried away some of B's chattels, it would probably be conceded that he was guilty of three distinct torts which might be redressed by three separate actions. But it is equally well settled that B might obtain redress for all three by a single action framed in a single count for trespass to land, setting out the other wrongs as matter of aggravation.[17]

In case of successive trespasses to land, it is clear that a plaintiff might maintain separate suits, or one suit with a separate count for each, or frame one count embracing all the trespasses.[18] The nuisance cases show that a single wrongful act may support successive actions,[19] while many tort and contract cases show that frequently a number of wrongful acts must be redressed by a single suit. In the case of an unlawful battery, every blow struck by the defendant is clearly a wrongful act, but no court would tolerate a separate suit for each. In a building contract case[20] where there were many deviations from the specifications, it was urged that since one deviation would support an action, the plaintiff had as many causes of action as there were breaches. The court quite naturally ignored this logic and held that the cause of action was single.

If the number of rights invaded were the test, then where a number of chattels were taken or damaged the plaintiff would have as many causes of action as there were chattels, for he clearly has a right in respect to each. But the rule is settled in such a case that a single action must suffice.[21] As the court puts it in the *Farrington* case: "Suppose a trespass or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate suit for each barrel?" In other words the rule against splitting demands, which limits the plaintiff to a single action, is based on the notion of unreasonable vexation of the defendant, rather than the abstract nature or conception of a cause of action. When a defendant has committed several wholly distinct torts, there is nothing unreasonable in separate actions, though the plaintiff might be able to join his claims in one action, or even treat them as making up a single aggravated claim. Where it is impracticable to recover for future loss in one action, successive actions are permissible because not unreasonable. If this is the real basis of the rule, then the number of acts and the number of rights invaded are important only so far as they affect the question of whether more than one action is unduly oppressive.

17. *Bennett* v. *Alcott* (1787) 2 Term Rep. 166.
18. *Pierce* v. *Pickens* (1820) 16 Mass. 470.
19. *Mitchell* v. *Darley Colliery Co.* (1885) L. R. 14 Q. B. D. 125.
20. *Commissioners* v. *Plumb* (1878) 20 Kan. 147.
21. *Farrington* v. *Payne* (1818) 15 Johnson 432.

The New York Court of Appeals recognized the real problem, and concluded that two actions should be allowed where damage to both person and property resulted, because of various complications which might arise from the difference in legal rules applicable. The books are full of precedents where both sorts of claims were included in a single count. For example, actions of trespass where the plaintiff declared for running against his vehicle whereby it was overturned and broken and the plaintiff thrown out, etc.,[22] or actions on the case framed in the same way.[23] This practice indicates that ordinarily no particular difficulty has been found in dealing with a count embracing both kinds of damages.

The New York case points out three differences in legal rules: First, that claims for personal injuries die with the person, while claims for property damage survive to the administrator. Second, that in that state, and a number of others, different periods of limitations apply. Third, that in case of bankruptcy, claims for property damage pass to the assignee or trustee, while claims for personal injuries do not. It is difficult to see how the non-survival of claims for personal injuries has any bearing on the particular problem, since the question could not arise where that phase of the matter has been eliminated by death. The difference in the period of limitations may produce a difficulty if but one action is permitted. Then to have complete redress the plaintiff must sue within the shorter period. But it is hard to see how this works any particular hardship on the plaintiff. In any event he would be forced to bring a suit within the shorter period or lose the claim to which the shorter period was applicable. This simply means that the plaintiff would have greater freedom of action if permitted to treat the claim as double, but normally there would be less trouble and expense to both parties to seek full redress in the one suit.

The bankruptcy or insolvency of the injured person may cause a substantial difficulty. If the bankruptcy transfers the claim for property damage to the trustee so that he can enforce it without the consent of the bankrupt, then where bankruptcy has occurred, the law splits the claim, and an action by the bankrupt for his personal injuries ought not to be affected by the action of the trustee. But if it otherwise is desirable to treat a cause of action for damage to person and property as single, the fact that the law may split it in the case of bankruptcy does not furnish any convincing reason why the plaintiff should be able to split it at his own pleasure without the usual penalty. In the one case two suits are necessary to prevent great injustice, and in the other they are not.

A further complication might arise where it is sought to reach the claim for property damaged by creditors' bill on the insolvency of the owner. If an action is brought for all the damage in the name of the injured owner, there are difficulties in the harmonious

22. *Leame* v. *Bray* (1803) 2 East 593.

23. *Williams* v. *Holland* (1833) 10 Bing. 112; *Chicago Ry. Co.* v. *Ingraham* (1890) 131 Ill. 659.

management of the suit by the creditors and the insolvent, and in determining what part of the recovery goes to each. The latter difficulty might be obviated by framing the claims in separate counts, and this seems to be permissible as a matter of pleading.[24]

A greater difficulty arises where the doctrine of subrogation gives the insurer the benefit of the claim for property damage, as is likely to be the case in a large proportion of the automobile accidents. In the principal case the fact that the insurer was entitled to subrogation was thought unimportant because the plaintiff could not give another greater rights than she herself had. It may be conceded that after a right of action had accrued the plaintiff could not by voluntary assignment of a part escape the rule against splitting the cause of action. But it does not follow that a pre-existing right to subrogation might not make it reasonable to allow two actions. If the plaintiff had been the bailee of the car for an unexpired term, it is clear that he would not have been barred by a recovery by the bailor for the injury to his reversionary interest. The prior relation of the two parties would make two actions proper, because it was impracticable to give full redress in one action. The effect of the insurance might well create such different interests as to make two actions permissible. This rule was adopted by the Supreme Court of Mississippi although committeed to the general rule that the cause of action for injuries to person and property was normally single.[25] In that case the court recognized a real difference between a voluntary assignment of a part of and an assignment which the insured was legally obliged to make:

"We see a difference between this case and the *Kimball case*.[26] Mr. Kimball brought both suits against the railroad company. The entire cause of action was in him when he filed his first suit. . . . This is not so in the case before us. Mr. O'Neil had assigned all of his right and interest against the traction company for damages to his automobile before he filed suit for personal injuries. When the suit was entered by him he had no cause of action against the company for damages to the automobile. This disposition by him of his right to damages to the automobile was in pursuance of a policy of insurance written for him by the appellant company. . . . Appellant had an equitable interest in the automobile at the time of the collision by reason of having written the policy of insurance. When it was damaged, then, by virtue of the contract of insurance and the article of subrogation, appellant had such an interest in the claim for damages. This interest became a right to sue at law when appellant paid Mr. O'Neil the amount owing to him for loss under the policy and received from him an assignment of his claim. . . . It would not conserve the ends of justice, but would work an injustice, to hold that Mr. O'Neil could, as claimed, destroy the right of appellant, vested in the manner above shown, to sue for damages to the automobile by bringing suit for injuries to his person."

There are other cases of subrogation where unquestionably full redress must be obtained in one action. For example, where

24. *M. & O. Ry.* v. *Matthews* (1905) 115 Tenn. 172.
25. *Lloyd's Ins. Co.* v. *Traction Co.* (1913) 106 Miss. 244.
26. *Kimball* v. *Ry.* (1908) 94 Miss. 396.

the loss exceeds the insurance, and the action must be brought in the name of the insured,[27] or jointly by the insurer and insured where the code permits.[28] Such cases present little difficulty for the interests of the parties are substantially alike.

In the principal case their interests were distinct and dissimilar which is likely unduly to complicate the trial of a case in the name of the insured. As between hardship on the plaintiff and vexation of a defendant already found guilty, the plaintiff ought to be favored. E. W. HINTON.

STATUTES—RETROACTIVE EFFECT OF AMENDMENTS AFFECTING TIME WITHIN WHICH TO BRING PROCEEDINGS FOR REVIEW—[Illinois] The case of *Superior Coal Company* v. *Industrial Commission*[1] recalls the three cases[2] that were decided at the time the right to review workmen's compensation judgments of the circuit court in the Supreme Court was changed from a right to proceed in the Supreme Court any time within two years from the rendition of the judgment to the requirement that application be made by the second day of the succeeding term of the Supreme Court, as it is now. Of the three cases cited above, the first held that the amendment did not apply to judgments entered before the amendment became effective upon the authority of cases[3] holding that, in the absence of clear legislative intention to accomplish such a result, limitation acts will not be given retroactive effect. The case following that, *City of Chicago* v. *Industrial Commission*,[4] arrived at an opposite conclusion upon the theory that the amendment in question was not a limitation act, but was an act that changed the method of procedure by which the statutory right which the Workmen's Compensation Act introduced might be availed of.

The last of the three cases just cited expressly holds as did the first of the three, repudiates the holding of the second and relies upon section 4 of the Illinois statute.[5]

Now comes the principal case and holds that a change in the time within which a review of proceedings may be had is purely a matter of procedure and governed by the law in force at the time that the right of review is sought to be availed of. This,

27. *Cable* v. *Dock Co.* (1855) 21 Mo. 133.

28. *Pratt* v. *Radford* (1881) 52 Wis. 114.

1. (1926) 321 Ill. 240.

2. *Clark Co.* v. *Industrial Com.* 291 Ill. 570; *City of Chicago* v. *Industrial Com.* 291 Ill. 411; *Vulcan Detinning Co.* v. *Industrial Com.* 295 Ill. 143.

3. *George* v. *George* 250 Ill. 251.

4. *Supra* note 2.

5. (1925) Cahill's Ill. R. S. ch. 131, sec. 4 "No new law shall be construed to repeal a former law, whether such former law is repealed or not, as to any offense committed against the former law, as to any act done, any penalty, forfeiture or punishment incurred or any right accrued or claim arising before the new law takes effect, save only that the proceedings shall conform, so far as practicable, to the law in force at the time of such proceeding. . . ."