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

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pension in the president; but it is no more difficult to imply the power of removal than that of suspension.

The result of this decision on governmental practice is likely to be much less important than is indicated by the length of the opinions and the emphasis of dissent. With regard to the great number of inferior presidential offices, the consent of the senate for appointments will probably continue, and will in effect operate to limit any possible tendency to excessive executive removals. For the more important administrative and quasi-judicial commissions, there will be more active opposition to any arbitrary removal; and if this should develop, it may be possible for Congress to constitute these bodies specialized courts with judicial tenure for their members.

JOHN A. FAIRLIE.

SPLITTING A CAUSE OF ACTION FOR INJURIES TO REAL AND PERSONAL PROPERTY.—[Mississippi] In a late number¹ of the ILLINOIS LAW REVIEW the writer discussed the question as to whether more than one action was permissible where the plaintiff's person and property were injured by the same wrongful act, and reached the conclusion that the rule against unreasonable vexation of a defendant normally limited the plaintiff to a single recovery.

A case² recently decided by the Supreme Court of Mississippi, which was not available at the time the former comment was written, presents another phase of the same general problem, namely, whether more than one action may be maintained where the plaintiff's real and personal property have been damaged as a result of the same negligent act. In that case the plaintiff's house and its contents were destroyed by fire alleged to have been negligently set out by the defendant railroad company. The plaintiff brought one suit for the destruction of his goods and chattels, and recovered a judgment. A second action was brought in the plaintiff's name for the benefit of an assignee, for the destruction of the building by the same fire. On the authority of the cases involving injury to person and property it was held that the second action was barred by the first recovery.

This appears to be the first case where the precise question has been determined. The books are full of cases dealing with injuries to person and property or to a number of chattels, but the combination of injuries to real and personal property seems to have escaped attention, although that situation must have frequently arisen.

Of course everyone is familiar with actions of trespass *quare clausum* embracing the taking or destruction of chattels by way of aggravation.³ Such cases settle nothing beyond the fact that the plaintiff may properly treat the injury as single and recover damages to both real and personal property by one action, and that when so framed the claim is treated as single. The only other case⁴ that the

1. ILLINOIS LAW REVIEW XXI 506.

2. *Fewell v. N. O. & N. E. R. Co.* (1926) 109 So. 853.

3. *Ellenwood v. Marietta Chair Co.* (1895) 158 U. S. 105.

4. *C. B. & Q. R. R. Co. v. Dawson* (1917) 245 Fed. 338.

writer has found, in which the question was directly raised, presented a peculiar state of facts.

A and B were the owners as tenants in common of a lot and a building thereon, A owning an undivided one-third interest, and B an undivided two-thirds. They carried on business in this building as partners, sharing equally. The building and contents were destroyed by the same fire. It was held that a recovery for the loss of the building did not bar a second action for the loss of the goods, because of this difference in titles, thus assuming that the general rule normally required that the damages to both classes of property should be recovered in one suit.

In a case⁵ in New York the plaintiff brought suit for the destruction of a building and its contents located in another state. The court held that the courts of New York had no jurisdiction of an action for injuries to foreign real estate, but might deal with the claim for the destruction of personal property, and, in declining to hold, as in *Ellenwood v. Marietta Chair Co.*, that the complaint should be construed as declaring solely for an injury to land with the injury to personal property merely by way of aggravation, observed:

"On the one side, the plaintiff contends that there are two causes of action,—a cause of action for the injury to the realty, and another for an injury to the personal property upon it. On the other side, the defendant contends that there is but a single cause of action for injury to the realty, and that the injury to the personal property is merely aggravation of damages. We think our decision in *Reilly v. Sicilian Asphalt P. Co.* (170 N. Y. 40) requires us to hold that two causes of action have been stated. In that case we held that where a single act works injury alike to one's person and to one's property, the causes of action are distinct. We pointed out that they are governed by different limitations. Like considerations are applicable here. A single act has injured realty and personalty. One cause of action is local and the other transitory. The act is single, but its consequences are divisible."

It may be noted that this discussion was not necessary to the solution of the problem before the court, namely, whether a complaint under the code, framed as a declaration for a trespass to land in another state with destruction of chattels by way of aggravation, might be construed as sufficiently setting forth a transitory claim for the loss of the chattels. Such a construction has quite generally been placed on similar complaints⁶ without regard to the question whether the claims are so far divisible as to support two actions. On the problem in hand, the courts of Mississippi are committed to the more generally accepted view that all damage resulting from the same wrongful act must be recovered in one action, and hence apply it to injuries to both real and personal property. Doubtless they would make the same exception where insurance on one class of

5. *Jacobus v. Colgate* (1916) 217 N. Y. 235.

6. *McGonigle v. Atchison* (1885) 33 Kan. 726; *Bruheim v. Stratton* (1911) 145 Wis. 271. But see *Ellenwood v. Marietta Chair Co.* contra.

property entitled the insurer to subrogation as to that part of the loss.⁷

The courts of New York are committed to the minority view that the claim is divisible where there is a substantial difference in the legal rules applicable to the different items of loss, and hence will probably follow the dictum in *Jacobus v. Colgate* when the question arises.

If the true test of the divisibility of a claim for damages is whether a division works unreasonable vexation of the defendant, there would generally be no more reason for two suits where real and personal property have been damaged than where two pieces of real property have been damaged,⁸ or where a number of chattels have been converted.⁹

A difference in title to the two classes of property, as in *C. B. & Q. Railroad Company v. Dawson*, may produce such complications as to make two actions reasonably necessary. If in that case the plaintiffs had been forced to include all the loss in one suit as a single and indivisible claim, there is certainly no common law means for compelling the jury to assess the damages separately, and hence a lump recovery would have resulted, making an accurate adjustment of their rights inter se impossible. Even in the case of the destruction of a number of chattels by the same act, differences in the rules of liability as to each may produce such complications as to require two actions, or at least render them permissible. Thus in a Wisconsin case¹⁰ a number of articles belonging to the plaintiff were destroyed by fire while in the hands of the railroad, which held a part of the goods as a carrier and a part as warehouseman. Because of the practical difficulty of dealing with such a claim as indivisible, a second action was sustained.

The fact that actions for injury to real property are local, while actions for injuries to chattels are transitory¹¹ would not seem to make any particular difference where the plaintiff can bring a local action and recover full damages, as he normally could in the railroad fire cases where the problem is most apt to arise. But where a local action is for the time impossible because the defendant is an absent non-resident, as might well happen in case of a fire set out by a touring motorist, the plaintiff must sue the defendant in a foreign jurisdiction and be limited to a recovery for loss of personal property. And even if the action were brought in, a federal court

7. *Lloyds Ins. Co. v. Traction Co.* (1913) 106 Miss. 244. In *Trask v. Hartford & N. H. R. Co.* (1861) 2 Allen 331, where buildings on two separate lots had been destroyed, the Supreme Court of Massachusetts held that the fact that the insurer for whose benefit the second action was brought was entitled to be subrogated to the claim for the loss of the building in question, did not affect the rule that a partial recovery barred the residue. At the time of the decision law courts had not absorbed so many equitable doctrines as they have of late.

8. *Trask v. H. & N. H. R. Co.* (1861) 2 Allen 331.

9. *Farrington v. Payne* (1818) 15 Johnson 432.

10. *Kronshage v. C. M. & St. P. R. Co.* (1878) 45 Wis. 500.

11. *Ellenwood v. Marietta Chair Co.* (1895) 158 U. S. 105; *Jacobus v. Colgate* (1916) 217 N. Y. 235.

the same limitation prevails.¹² In such a case substantial justice to the plaintiff demands that he should not be barred of a second action if the defendant afterwards comes within the local jurisdiction.

E. W. HINTON.

WILLS—CONSTRUCTION—WHEN “HEIRS” MEANS CHILDREN.—[Illinois] *Bushman v. Fraser*¹ furnishes another example where the strict common law meaning of the word “heirs” was departed from. The rule, of course, that “heirs” is to be taken to have been used in its technical sense, as a word of limitation,² and that the testator will be presumed to have so intended his use of the term,³ is so familiar that citation of cases in support of it would seem almost affectation. But the delimitation of the rule, possibly, is not so familiar and a comparison of the examples of such might be profitable.

Thus, in the principal case, the court seized upon the words “according to my receipts,” in the provision that his surviving heirs should share equally according to the receipts the testator had from them, and considered that unless the term “heirs” there be used as a word of purchase, and to mean children, the requirement that advancements be considered in the division would be meaningless. Similar considerations determined the departures in other recent cases, as in that where the word “living” with respect to “heirs” was held to give “heirs” the meaning of children;⁴ in that where the limitation was X to A, his wife, and then to the “bodily heirs” of B, C, D, E, F, and G, his children, and the court considered that if “bodily heirs” be given its strict legal sense, there would be intestacy if A survived the children; in a case⁵ where the real estate was devised by three clauses identical in language except as to the name of the son of the testator and the description of the property, thus: “Unto the heirs of my son, William L. Long, subject to his use, benefit, and control during the term of his natural life”, the court there being of opinion that the intention clearly was to vest a present estate in the children of the respective sons of the testator there named, each in fact having children at the time; in a case⁶ where the devise was to three children and if they “should not leave any heirs, their share shall be equally divided between the other two,” because it would be impossible for the other two to inherit the share of one deceased, if the deceased left no “heirs” using that term in its technical sense; and in a case⁷ where the direction to trustees was to divide the corpus between the heirs of the children

12. *Ellenwood v. Marietta Chair Co.* (1895) 158 U. S. 105.

1. (1926) 322 Ill. 579.
2. *Du Bois v. Judy* 291 Ill. 346; *Miller v. Brinton* 294 Ill. 184; *James v. Hawkins* 299 Ill. 207; *Pool v. Pool* 300 Ill. 562.
3. *Haight v. Royce* 274 Ill. 168.
4. *Jones v. Miller* 283 Ill. 353.
5. *Morris v. Phillips* 287 Ill. 635, 638.
6. *Risser v. Ayers* 306 Ill. 297.
7. *Smith v. Thomas* 317 Ill. 152, 155.