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CAUSES OF ACTION BLENDED

BY CARL C. WHEATON*

THOUGH much has been written and spoken concerning the philosophy of the law, only one main theme can properly be the basis of that science. The ultimate purpose of law, as has so often been said, should ever be to reach as fair a practical result, taking everything and everyone involved into consideration, as is humanly possible. Sometimes courts, in announcing a legal doctrine, appear to be striving for this result, but do so illogically or stop halfway in their quest for justice. Again, they may be both unsound in their methods and incomplete in their work. My purpose at this time is to demonstrate that most tribunals have been thus doubly at fault in dealing with cases involving multiple breaches of an agreement or several injuries caused by a single tort.

SCOPE OF ARTICLE

An analysis of this problem shows that it deals with one phase of the definition of the term "cause of action," concerning which so many battles have raged. There is no intention, or need, to discuss this matter generally, for it has already been adequately covered. Professor McCaskill in his enlightening and interesting article on "The Elusive Cause of Action"¹ has outlined the conclusions of most of the authors on this matter, and has given his own views thereon. The writer, in another article,² has indicated his ideas.

Examining further, we discover that our topic relates to the *breadth* of a cause of action. We also find that it can only have to do with situations in which successive causes of action may arise in connection with a single contract or tort. This automatically eliminates from our discussion all instances in which it is held that there can arise but one cause of action from the breach of a single contract or the commission of a single tort. There are several such situations.

Thus, most of the judges and other writers who have passed on the matter have said that where there is a material breach of an installment contract, even though there is no outright repudia-

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¹(1937) 4 U. Chi. L. Rev. 281.

²The Code "Cause of Action": Its Definition (1936) 22 Corn. L. Q. 1.

tion thereof, the plaintiff must recover for his damages in one action, unless the circumstances show that the defendant intends to continue performance.³

Certain courts have held that the dismissal of a servant gives but one cause of action for damages for breach of contract. Other tribunals have stated that the servant is constructively in the service of the employer and can recover for wages due in the same manner in which he could have recovered, if he had rendered the service promised, except for certain deductions.⁴

Also, some decisions have been to the effect that, where a tenant vacates rented premises before the expiration of a term, the landlord has only one action to recover for all of the damage done him, on the theory that the tenant's action constitutes an entire breach of the lease. Contrary holdings are found.⁵

At times, torts cause permanent injuries. These wrongs must, it has been determined, be compensated in one action.⁶ What is, and what is not, a permanent injury, has occasioned much discussion. The usual view has been that injuries are permanent only where the defendant would have to commit a fresh wrong to undo them, as by going on the plaintiff's land to take down a structure placed there by the defendant. Otherwise, the tort may cease at any time, and may not be permanent. Dean Clark suggests that possibly Professor McCormick's view that, if the defendant does not cease his acts within a reasonable time, the plaintiff should have the option of treating the injury as temporary or permanent, is a better solution of the problem than that usually reached.⁷

Now we have limited the bounds of this paper, and we are prepared to proceed with the consideration of our problem.

THE AUTHORITIES

Let us first briefly state the present law pertinent to the subject matter of our discussion.

One may ordinarily sue for various breaches of a single con-

³*Pakas v. Hollingshead*, (1906) 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N.S.) 1042, 112 Am. St. Rep. 601; *Bates' Pleading, Practice, Parties & Forms*, 4th ed., sec. 455a; *Clark, Code Pleading 326-327*; *Phillips, Code Pleading*, 2nd ed., sec. 206; 5 *Williston, Contracts, Rev. ed.*, sec. 1292.

⁴*Bates' Pleading, Practice, Parties & Forms*, 4th ed., sec. 455a; *Clark, Code Pleading 327*; *Phillips, Code Pleading*, 2nd ed., sec. 205; *Note to Ann. Cas.* 1912B 1365.

⁵*Phillips, Code Pleading*, 2nd ed., sec. 206.

⁶*Clark, Code Pleading 330*; *Phillips, Code Pleading*, 2nd ed., sec. 213.

⁷*Clark, Code Pleading 331*.

tract as they occur, if such actions are brought before another violation of duty has occurred.⁸ One may recover from time to time for each recurring injury caused by the commission of a tort, provided an action is commenced to recover for such separate harm before any subsequent damage has occurred.⁹ The expected

⁸The usual statute reads as follows: "Successive actions may be maintained upon the same contract or transaction whenever, after the former action, a new cause of action arises therefrom." Alaska, Comp. Laws 1913, sec. 1314; Arkansas, Stats. (Crawford & Moses 1921) sec. 1083; California, Code Civ. Proc. (Deering 1931) sec. 1047; Colorado, Ann. Code Civ. Proc. (Courtright's Mills 1933) sec. 19; Idaho, Code Ann. 1932, sec. 12-604; Iowa, Code 1931, sec. 10956; Kentucky, Civ. Code Prac. (Carroll 1930) sec. 686; Montana, Rev. Code 1921, sec. 9819; Nevada, Comp. Laws (Hillyer 1929) sec. 9024; Oregon, Code Ann. 1930, sec. 7-103; Utah, Rev. Stats. 1933, sec. 104-54-11.

Other statutes worded differently, but meaning practically the same thing as the common enactment, are also found. Alabama, Code 1928, sec. 5721; Utah, Rev. Stat. 1933, secs. 65-0-9 and 102-55; West Virginia, Code 1932, secs. 4960 and 5664. See also *Faw v. Marsteller*, (1804) 2 Cranch (U.S.) 10, 2 L. Ed. 191; *Cross v. United States*, (1872) 14 Wall. (U.S.) 479, 20 L. Ed. 721; *Davis v. Preston*, (1844) 6 Ala. 83; *Liddell v. Chidester*, (1887) 84 Ala. 508, 4 So. 426, 5 Am. St. Rep. 387; *Stroud v. Conine*, (1914) 114 Ark. 304, 169 S. W. 959; *Robinson v. Exempt Fire Ins. Co.*, (1894) 103 Cal. 1, 36 Pac. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; *Burritt v. Belfy*, (1879) 47 Conn. 323, 36 Am. Rep. 79; *Calhoun v. Marshall*, (1878) 61 Ga. 275, 34 Am. Rep. 99; *Seaboard Air Line Ry. v. Hamilton*, (1915) 16 Ga. App. 646, 85 S. E. 942; *Cassleberry v. Forquer*, (1862) 27 Ill. 170; *Ade v. Ade*, (1913) 181 Ill. App. 577; *Williams-Abbott Electric Co. v. Model Electric Co.*, (1907) 134 Iowa 665, 112 N. W. 181, 13 L. R. A. (N.S.) 529; *Huffman v. Martin*, (1928) 226 Ky. 137, 10 S. W. (2d) 636; *Goodwin v. Cabot Amusement Co.*, (1930) 129 Me. 36, 149 Atl. 574; *Milske v. Steiner Mantel Co.*, (1906) 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N.S.) 1105; *Electrelle Co. v. Maguire*, (1913) 215 Mass. 550, 102 N. E. 904; *Thorne v. True-Hixon Lumber Co.*, (1933) 167 Miss. 266, 148 So. 388; *Adler v. Kansas City, Springfield & Memphis Ry. Co.*, (1887) 92 Mo. 242; *Cohen v. Clark*, (1911) 44 Mont. 151, 119 Pac. 775; *Pierce v. Rowe*, (1818) 1 N. H. 179; *Masonic Temple Ass'n of Elizabeth v. Kistner*, (1933) 11 N. J. Misc. 761, 168 Atl. 43; *Bendernagle v. Cocks*, (1838) 19 Wend. (N.Y.) 207, 32 Am. Dec. 448; *True v. Brainerd*, (1929) 134 Misc. Rep. 70, 235 N. Y. S. 209; *McPhail v. Johnson*, (1891) 109 N. C. 571, 13 S. E. 799; *Elworthy-Helwick Co. v. Hess*, (1918) 9 Ohio App. 200; *Weiler v. Henarie*, (1887) 15 Or. 28, 13 Pac. 614; *Bush v. Stowell*, (1872) 71 Pa. St. 208, 10 Am. Rep. 694; *Byren & Weil v. French & Kelly*, (1932) 103 Pa. Super. 573, 157 Atl. 367; *Atkinson v. Railroad Employees' Mutual Relief Soc.*, (1929) 160 Tenn. 158, 22 S. W. (2d) 631; *Community Theaters v. Weilbacher*, (Tex. Civ. App. 1933) 57 S. W. (2d) 941; *Spivey v. Stripling*, (Tex. Civ. App. 1933) 65 S. W. (2d) 1113; *Johnson v. Johnson*, (1906) 31 Utah 408, 88 Pac. 230; *Hare v. Winfree*, (1924) 131 Wash. 138, 229 Pac. 16, 42 A. L. R. 126; *Siddall v. Rawcliffe*, (1833) 1 Cr. & M. 483; *Conquer v. Boot*, [1928] 2 K. B. 336; *Clark*, Code Pleading 327; 3 Williston, Contracts sec. 2024.

⁹*Hill v. Empire State-Idaho Mining and Developing Co.*, (C.C. Ida. 1908) 158 Fed. 881; *Sloss-Sheffield Steel & Iron Co. v. Mitchell*, (1913) 181 Ala. 576, 61 So. 934; *St. Louis, I. M. & S. Ry. Co. v. Biggs*, (1889) 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174; *Kafka v. Bozio*, (1923) 191 Cal. 746, 218 Pac. 753, 29 A. L. R. 833; *Lavin v. Panhandle Lumber Co.*, (1931) 51 Idaho 1, 1 Pac. (2d) 186; *Atherton v.*

dearth of reasoning to support these results is found in the decisions, but occasionally one gets a fleeting glimpse of the working of a court's mind. The usual reason given for the opinion in the contract cases is that, for purposes of procedure, when an agreement calls for the doing of things at different periods, the separate stipulations are to be considered as distinct contracts.¹⁰ One court states that an owner may sue on each installment of a rental contract as it becomes due, and no vexatious litigation would thereby exist, for the policy of the law is to enforce prompt payment of installments of rent.¹¹ In nuisance cases it has been stated that each separate damage is considered as re-creating such nuisance.¹² In addition to this, it has likewise been said that the rule permitting successive actions for repeated injuries caused by a nuisance was occasioned by the necessity of providing a proper period of limitations for each separate damage so that it would not relate back to the original wrong.¹³

The conditional portion of the principle of law already set forth at the commencement of this paragraph suggests that bringing an action to recover amounts due on a contract, or to obtain compensation for damages caused by a tort, does not bar a later proceeding to obtain further sums subsequently becoming due on the same contract or because of the identical tort, and that is the

East Side Levee & Sanitary District, (1918) 211 Ill. App. 55; *Vandalia R. Co. v. Yaeger*, (1915) 60 Ind. App. 118, 110 N. E. 230; *City of Ottumwa v. Nicholson*, (1913) 161 Ia. 473, 143 N. W. 439, L. R. A. 1916E 983; *Walter v. Wagner*, (1928) 225 Ky. 255, 8 S. W. (2d) 421; *Kirk v. Kansas City, S. & G. Ry. Co.*, (1899) 51 La. Ann. 667, 25 So. 457; *Cumberland & Oxford Canal Corp. v. Hitchings*, (1876) 65 Me. 140; *Prestiss v. Wood*, (1882) 132 Mass. 486; *Kelly v. City of Cape Girardeau*, (1934) 228 Mo. App. 865, 72 S. W. (2d) 880; *Omaha & R. V. R. Co. v. Standen*, (1887) 22 Neb. 343, 35 N. W. 183; *Cheshire Turnpike Co. v. Stevens*, (1842) 13 N. H. 28; *Shepard v. Willis*, (1850) 19 Ohio 147; *City of Lawton v. Wilson*, (1927) 127 Or. 40, 259 Pac. 650; *Woods v. Pittsburgh Coal Co.*, (1911) 230 Pa. St. 197, 79 Atl. 499; *Clark v. Dyer*, (1891) 81 Tex. 339, 16 S. W. 1061; *Virginia Ry. Co. v. Jeffries Adm'r*, (1909) 110 Va. 471, 66 S. E. 731; *McHenry v. City of Parkersburg*, (1909) 66 W. Va. 533, 66 S. E. 750, 29 L. R. A. (N.S.) 860; *Crumbie v. Wallsend Local Board*, [1891] 1 Q. B. 503.

¹⁰*Faw v. Marsteller*, (1804) 2 Cranch (U.S.) 10, 2 L. Ed. 721; *Davis v. Preston*, (1844) 6 Ala. 83; *Badger v. Titcomb*, (1834) 15 Pick. (Mass.) 409, 26 Am. Dec. 611; *Elworthy-Helwick Co. v. Hess*, (1918) 9 Ohio App. 200; *Byren & Weil v. French & Kelly*, (1932) 103 Pa. Super. 573, 157 Atl. 367.

¹¹*Petersen v. Claire*, (1922) 118 Misc. Rep. 85, 193 N. Y. S. 543.

¹²*Prestiss v. Wood*, (1882) 132 Mass. 486; *Kelly v. City of Cape Girardeau*, (1934) 228 Mo. App. 865, 72 S. W. (2d) 880.

¹³*Kelly v. City of Cape Girardeau*, (1934) 228 Mo. App. 865, 72 S. W. (2d) 880.

customary law.¹⁴ This idea is so strong that, if one sues for sums due on a contract, and later brings an action to recover amounts subsequently becoming due on the same obligation, he may, in most situations, obtain a separate judgment in the first suit, though the rights dealt with in the second proceeding were adjudicated prior to a decision in the first case.¹⁵ Although the first action is discontinued for good cause without prejudice, the obligee may bring it again even if there is a judgment in the second proceeding prior to the recommencement of the first suit.¹⁶ It has been decided by the ordinary school of thought on our subject that, under at least one condition, judgment may be rendered in a suit for a breach of contract, and later an action may be brought to recover damages for violation of the same contract, though they occurred before the first suit had been brought. This is true, if the plaintiff, having entered into an agreement to settle a claim based upon breach of a contract, sues to recover for a later violation of the same contract and is, after the commencement of the second suit, released from the settlement compact.¹⁷

¹⁴*Cross v. United States*, (1872) 14 Wall. (U.S.) 479, 20 L. Ed. 721; *Moore v. Johnston*, (1895) 108 Ala. 324, 18 So. 825; *Higgins v. San Diego Sav. Bank*, (1900) 129 Cal. 184, 61 Pac. 943; *Hallack v. Gagnon*, (1894) 4 Colo. App. 360, 36 Pac. 70; *Marshall v. John Grosse Clothing Co.*, (1900) 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; *Epstein v. Greer*, (1882) 85 Ind. 372; *Hughes v. Chicago, B. & Q. Ry. Co.*, (1909) 141 Ia. 273, 119 N. W. 924, 133 Am. St. Rep. 164; *Board of Com'rs of Clay County v. Streeter*, (1896) 2 Kan. App. 498, 43 Pac. 985; *Carroll v. Fullerton*, (1926) 215 Ky. 558, 286 S. W. 847; *Hunt v. Tibbets*, (1879) 70 Maine 221; *Ahl v. Ahl*, (1883) 60 Md. 207; *Electrelle Co. v. Maguire*, (1913) 215 Mass. 550, 102 N. E. 904; *Raymond v. White*, (1899) 120 Mich. 165, 78 N. W. 1071; *Doescher v. Doescher*, (1895) 61 Minn. 326, 63 N. W. 736; *Williams v. Lockett*, (1899) 77 Miss. 394, 26 So. 967; *Van Hoozier v. Hannibal & St. J. R. Co.*, (1879) 70 Mo. 145; *Leon v. Barnsdall Zinc Co.*, (1927) 220 Mo. App. 1266, 290 S. W. 633; *Omaha & R. V. R. Co. v. Standen*, (1887) 22 Neb. 343, 35 N. W. 183; *Wheeler v. Bancroft*, (1847) 18 N. H. 537; *Bendernagle v. Cocks*, (1838) 19 Wend. (N.Y.) 207, 32 Am. Dec. 448; *Canfield v. Elmer E. Harris & Co.*, (1929) 226 App. Div. 617, 236 N. Y. S. 423; *Strangward v. American Brass Bedstead Co.*, (1910) 82 Ohio St. 121, 91 N. E. 988; *Mid-Continent Life Ins. Co. v. Walker*, (1927) 128 Okla. 75, 260 Pac. 1109; *Krebs Hop Co. v. Livesley*, (1911) 59 Or. 574, 114 Pac. 944, Ann. Cas. 1913C 758; *Merchants' Ins. Co. v. Algeo*, (1858) 31 Pa. St. 446; *Community Theaters v. Wellbacher*, (Tex. Civ. App. 1933) 57 S. W. (2d) 941; *Johnson v. Johnson*, (1906) 31 Utah 408, 88 Pac. 230; *Kenworth Sales Co. v. Salantino*, (1929) 154 Wash. 236, 281 Pac. 996; *Bristowe v. Fairclough*, (1840) 1 Man. & G. 143; *Conquer v. Boot*, [1928] 2 K. B. 336.

¹⁵*Electrelle Co. v. Maguire*, (1913) 215 Mass. 550, 102 N. E. 904.

¹⁶*Kieley v. Kahn*, (1906) 50 Misc. Rep. 309, 98 N. Y. S. 774; *Petersen v. Claire*, (1922) 118 Misc. Rep. 85, 193 N. Y. S. 543.

¹⁷*Claffin v. Mather Electric Co.*, (C.C.A. 2nd, 1899) 39 C. C. A. 241, 98 Fed. 699.

After announcing this freedom of action, most of our courts declare that one must, at the time he brings an action, include therein all claims then due him under one contract or because of the commission of a single tort, except those already sued on, since there is but a single cause of action for such unexcepted demands.¹⁸ It seems clear that, if one fails to sue until after more than one injury has occurred, his claim is enlarged by each harmful breach of his right by the wrongdoer; there is a *consolidation* of several causes of action into one by the mere efflux of time.¹⁹ It should be carefully noticed that by this merging the injured person loses nothing as far as the *amount of his recovery* is concerned. But *causes of action* are destroyed. The typical ground for such a decision is that the other view would result in vexatious litigation which should not be permitted, as that would be unfair to the obligor.²⁰ Another court probably has the same idea in mind when it says that any other rule would permit the plaintiff's

¹⁸Baird v. United States, (1878) 96 U. S. 430, 24 L. Ed. 703; Wilkinson v. Black, (1885) 80 Ala. 329; Stroud v. Conine, (1914) 114 Ark. 304, 169 S. W. 959; Hallack v. Gagnon, (1894) 4 Colo. App. 360, 36 Pac. 70; Burritt v. Belfy, (1879) 47 Conn. 323, 36 Am. Rep. 79; Tiedeman Mortgage & Finance Co. v. Carlson, (1930) 41 Ga. App. 406, 152 S. E. 909; McDole v. McDole, (1883) 106 Ill. 452; Williams-Abbott Electric Co. v. Model Electric Co., (1907) 134 Iowa 665, 112 N. W. 181, 13 L. R. A. (N.S.) 529; Whitaker v. Hawley, (1883) 30 Kan. 317, 1 Pac. 508; Reynolds & Henry Const. Co. v. City of Monroe, (1895) 47 La. Ann. 1289, 17 So. 802; Thomas v. Carpenter, (1923) 123 Maine 241, 122 Atl. 576; Rosenstein v. Hynson, (1929) 157 Md. 626, 147 Atl. 529; Loud v. General Builders' Supply Co., (1930) 249 Mich. 331, 228 N. W. 715; See v. See, (1922) 294 Mo. 495, 242 S. W. 949, 24 A. L. R. 880; Fidelity & Deposit Co. of Maryland v. Brown, (1933) 228 Mo. App. 160, 65 S. W. (2d) 1064; Cohen v. Clark, (1911) 44 Mont. 151, 119 Pac. 775; Bendernagle v. Cocks, (1838) 19 Wend. (N.Y.) 207, 32 Am. Dec. 448; Green v. Petersen, (1916) 218 N. Y. 280, 112 N. E. 746; McPhail v. Johnson, (1891) 109 N. C. 571, 13 S. E. 799; Woods v. Pittsburgh Coal Co., (1911) 230 Pa. St. 197, 79 Atl. 499; Barnes Bros. v. Black Diamond Coal Co., (1898) 101 Tenn. 354, 47 S. W. 498; State Life Ins. Co. v. Wilson, (Tex. Civ. App. 1933) 57 S. W. (2d) 355; Felt City Townsite Co. v. Felt Inv. Co., (1917) 50 Utah 364, 167 Pac. 835; Hare v. Winfree, (1924) 131 Wash. 138, 229 Pac. 16, 42 A. L. R. 126; Clark, Code Pleading 326-327; Phillips, Code Pleading, 2d ed., sec. 208.

¹⁹State v. Scoggin, (1850) 10 Ark. 326; Burritt v. Belfy, (1879) 47 Conn. 323, 36 Am. Rep. 79; Whitaker v. Hawley, (1883) 30 Kan. 317, 1 Pac. 508.

²⁰Seaboard Air Line Ry. v. Hamilton, (1915) 16 Ga. App. 646, 85 S. E. 942; Nickerson v. Rockwell, (1878) 90 Ill. 460; McDole v. McDole, (1883) 106 Ill. 452; Whitaker v. Hawley, (1883) 30 Kan. 317, 1 Pac. 508; Rosenstein v. Hynson, (1929) 157 Md. 626, 147 Atl. 529; Loud v. General Builders' Supply Co., (1930) 249 Mich. 331, 228 N. W. 715; Bendernagle v. Cocks, (1838) 19 Wend. (N.Y.) 207, 32 Am. Dec. 448; Kennedy v. New York, (1909) 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N.S.) 847; Eastland County v. Davisson, (Tex. Civ. App. 1929) 13 S. W. (2d) 673.

remedy to be perverted into a means of injustice and oppression.²¹ Again, some courts have taken even a broader view of the matter, believing that the reason for the suggested result is the state's interest in bringing an end to litigation,²² and its concern in the peace and repose of society.²³ It has, finally, been said that a judgment, in a situation like this, settles everything involved in the right to recover, including both the matters that were, and might have been, raised in the action.²⁴

One must admit that this is the common ruling, but it is not universal. Several decisions have treated separate breaches of one contract as creating a number of causes of action which were to be so considered even after more than one violation had occurred and no proceeding had been begun to enforce any of the alleged wrongs.²⁵ Reasons given for these opinions are that the investigation of the demandant's claims require separate inquiries and findings.²⁶ Again, it has been said,

"The true question in all such cases is, not whether the rule allowing separate actions to be maintained for separate items would lead to a multiplicity of suits or would operate oppressively, but it is whether the former action was for the identical cause or demand as that for which the subsequent one is brought."²⁷

Sometimes different persons obtain the right to sue on various claims arising under the same contract. It has been stated in such

²¹Williams-Abbott Electric Co. v. Model Electric Co., (1907) 134 Iowa 665, 112 N. W. 181, 13 L. R. A. (N.S.) 529.

²²Goldberg v. Eastern Brewing Co., (1910) 136 App. Div. 692, 121 N. Y. S. 465.

²³Finnerty v. Hoppe, (1910) 150 Mo. App. 515, 131 S. W. 128.

²⁴Jenkins v. City of Scranton, (1903) 205 Pa. St. 598, 55 Atl. 788; Stradley v. Bath P. Cement Co., (1910) 228 Pa. St. 108, 77 Atl. 242, 139 Am. St. Rep. 993; Speier v. Locust Laundry Inc., (1914) 56 Pa. Super. Ct. 323.

²⁵William v. Hallett, (C.C. Or. 1872) 2 Sawy. 261, Fed. Cas. No. 14,123; Dulaney v. Panne, (1882) 101 Ill. 325; Wehrly v. Morfoot, (1882) 103 Ill. 183; McDole v. McDole, (1883) 106 Ill. 452; Breckenridge v. Lee, (1821) 10 Ky. 446; Sparhawk v. Wills, (1856) 5 Gray (Mass.) 423; Howe v. Bradley, (1841) 19 Maine 31; Andover Savings Bank v. Adams, (1861) 1 Allen (Mass.) 28; King v. Bates, (1889) 149 Mass. 73, 21 N. E. 237, 4 L. R. A. 268; McLaughlin v. Levenbaum, (1924) 248 Mass. 170, 142 N. E. 906; Boyce v. Christy, (1870) 47 Mo. 70; Schuricht v. Broadwell, (1877) 4 Mo. App. 160; Offield v. Wabash, St. Louis & Pacific Ry. Co., (1886) 22 Mo. App. 607; Bunten v. Chicago, R. I. & P. Ry. Co., (1892) 50 Mo. App. 414; McIntosh v. Lown, (1867) 49 Barb. (N.Y.) 550; Perry v. Dickerson, (1881) 85 N. Y. 345, 39 Am. Rep. 663; Lorillard v. Clyde, (1890) 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470; Frost v. International Rubber Co., (1915) 37 R. I. 406, 92 Atl. 1022; Morhardt v. S. P. & T. N. Ry. Co., (1884) 2 White & Willson, Civ. Cas. Ct. App. (Tex.) sec. 322.

²⁶Boyce v. Christy, (1870) 47 Mo. 70.

²⁷McIntosh v. Lown, (1867) 49 Barb. (N.Y.) 550.

an instance that each person can sue separately. This is so since the rule against splitting demands is not altogether an original legal right of a defendant, but it is an equitable interposition of courts to prevent a multiplicity of suits on the principles of public policy. The rule is confined to cases in which the demands are united in one person.²⁸ Going even further, it has been decided that, if one, through different assignments, becomes the assignee of the right to recover on several installments, he may sue in relation to them in different actions, though, at the time of the first suit, all sums involved were due. The reasons given for the result were that the plaintiff obtained his claims under different transfers and he would have to give separate and distinct proofs of his title to the different causes of action.²⁹ Moreover, it has been decided that one may waive his right to demand that a single cause of action consisting of a claim based upon several breaches of the same contract be not split.³⁰

Another very pertinent question deals with the statute of limitations. We must ask when one loses his right to sue upon the various claims based upon a single contract or tort. The orthodox result is that the statute of limitations begins to run against each claim as it accrues. If one fails to sue until several breaches of duty have occurred, the running of the statute against the bringing of a suit to recover for the first wrong is not stayed. Therefore, if one wishes to recover for all due him for various breaches of one contract or for many injuries occurring at different times, though caused by a single tort, he must sue before the statute of limitations has run against his right to recover for damage caused by the initial injury.³¹ Explanations for the holding are scarce, but

²⁸Lawrence v. United States, (1872) 8 Ct. Cl. 252.

²⁹Miller v. Union Switch & Signal Co., (1891) 59 Hun (N.Y.) 624, 13 N. Y. S. 711.

³⁰Claffin & Kimball v. Mather Electric Co., (C.C.A. 2nd Cir. 1899) 39 C. C. A. 241, 98 Fed. 699; Kavanaugh v. Shaughnessy, (1890) 41 Mo. App. 657; Fox v. Althrop, (1883) 40 Ohio St. 322.

³¹Knapp v. Knapp, (Alaska, 1893) 59 Fed. 641; Washington Loan & Trust Co. v. Darling, (1903) 21 App. D. C. 132; Sloss Sheffield Steel & Iron Co. v. Nance, (Ala. 1927) 113 So. 50; Dairs v. Herrington, (1890) 53 Ark. 5, 13 S. W. 215; Gaston v. Gaston, (1896) 114 Cal. 542, 46 Pac. 609, 55 Am. St. Rep. 86; Heakes v. Heakes, (1924) 157 Ga. 863, 122 S. E. 777; Cormana v. Naron, (1923) 37 Ida. 482, 217 Pac. 597; Schuler v. Schuler, (1904) 209 Ill. 522, 71 N. E. 16; Central Trust & Savings Co. v. Kirkman, (1920) 73 Ind. App. 633, 127 N. E. 452; Bennett v. Tomlinson, (1928) 206 Iowa 1075, 221 N. W. 837; Board of Com'rs of Clay County v. Streeter, (1896) 2 Kan. App. 498, 43 Pac. 985; May v. Ball, (1900) 103 Ky. 180, 56 S. W. 7; Gonsoulin v. John I. Adams & Co., (1876) 29 La. Ann. 598; Young v. International Paper Co., (1934) 179 La. 803, 155 So. 231;

they do exist. Thus, we have the assertion directly, or in effect, that, for the purpose of measuring the statute of limitations, different breaches of a single contract³² and separate injuries caused by a single tort³³ are to be treated as creating distinct causes of action. Somewhat akin to this thought is the declaration that the reason for the usual rule as to contracts is that suit may be brought to recover each payment owed under an agreement as soon as such sum becomes due.³⁴

Logically, it is ordinarily decided that the running of the statute against a claim under a contract will not bar the bringing of a suit upon a cause of action subsequently arising out of the same agreement.³⁵

The customary holding as to the running of the statute of limitations in cases in which there are several distinct injuries arising out of a single contract is not without its opponents. They hold that the statute does not destroy the right to sue on any claim due on a single contract until the statute has run against the right to sue and recover for the damage caused by the last

Burnham v. Brown, (1844) 23 Me. 400; Williams v. Taylor, (1904) 99 Md. 306, 57 Atl. 641; Austin v. Moore, (1843) 48 Mass. 116; Gallup v. Western Board & Paper Co., (1930) 253 Mich. 68, 233 N. W. 184; Wood v. Cullen, (1868) 13 Minn. 394; Stark Bros. Co. v. Gooding, (1914) 175 Mo. App. 353, 162 S. W. 333; Nares v. Bell, (1902) 66 Neb. 606, 92 N. W. 571; Masonic Temple Ass'n of Elizabeth v. Kistner, (1933) 11 N. J. Misc. 761, 168 Atl. 43; Green v. Petersen, (1916) 218 N. Y. 280, 112 N. E. 746; True v. Brainard, (1929) 134 Misc. Rep. 70, 235 N. Y. S. 209; Arrington v. Arrington, (1900) 127 N. C. 190, 37 S. E. 212, 52 L. R. A. 201, 80 Am. St. Rep. 791; Pelton v. Bemis, (1886) 44 Ohio St. 51, 4 N. E. 714; Oklahoma City v. Page, (1931) 153 Okla. 285, 6 Pac. (2d) 1033; Bartel v. Mathias, (1890) 19 Or. 482, 24 Pac. 918; Bush v. Stowell, (1872) 71 Pa. St. 208, 10 Am. Rep. 694; Gilbert v. Hayward, (1914) 37 R. I. 303, 92 Atl. 625; Barnes v. Black Diamond Coal Co., (1898) 101 Tenn. 354, 47 S. W. 498; Pollack v. Pollack, (Tex. Civ. App. 1931) 39 S. W. (2d) 853; Buell v. Duchesne Mercantile Co., (1924) 64 Utah 391, 231 Pac. 123; Williams v. Matthews, (1904) 103 Va. 180, 48 S. E. 861; Eells v. Chesapeake & O. Ry. Co., (1901) 49 W. Va. 65, 38 S. E. 479, 87 Am. St. Rep. 787; Kluender v. Fenske, (1881) 53 Wis. 188, 10 N. W. 370; Clause v. Columbia Savings & Loan Ass'n, (1908) 16 Wyo. 450, 95 Pac. 54; West Leigh Colliery Co. Ltd. v. Tunncliffe & Hampson Ltd., [1908] A. C. 27; 3 Williston, Contracts, sec. 2024.

³²Green v. Petersen, (1916) 218 N. Y. 280, 112 N. E. 746; H. J. McMullen & Co. v. Hammann, (Tex. Civ. App. 1931) 34 S. W. (2d) 909.

³³Bunten v. Chicago, R. I. & P. Ry. Co., (1892) 50 Mo. App. 414.

³⁴Stark Bros. Co. v. Gooding, (1914) 175 Mo. App. 353, 162 S. W. 333; Quackenbush v. Mapes, (1908) 123 App. Div. 242, 107 N. Y. S. 1047; Martel v. Mathias, (1890) 19 Or. 482, 24 Pac. 918.

³⁵Deposit Bank of Midway's Assignee v. Hearne, (1898) 104 Ky. 819, 48 S. W. 160; Green v. Petersen, (1916) 218 N. Y. 280, 112 N. E. 746. Apparently contra: Succession of Vidalat, (1924) 155 La. 1005, 99 So. 801.

breach of such agreement.³⁶ At least one court gives an explanation for such a decision. It says that the contrary rule would necessitate a multiplicity of suits, which would be opposed to the general policy of the law to avoid litigation. The contract being entire, the promisee is entitled to wait to sue, if he chooses, until the defendant has defaulted as to the entire contract and, in addition, until just before the length of the period of limitation given him has elapsed.³⁷

THE PROPER RULES

That is the legal thought on the problems before us. Which solutions are correct? It is, in these cases, easy to determine what the almost overwhelming weight of authority is in each case, but that does not necessarily, nor properly, end our quest for the truth. One should have a profound respect for the opinions of others, but he should never permit anyone else to do his thinking for him.

In reaching conclusions as to what the law in relation to the problems under consideration should be, we must carefully notice that the interests of several persons and groups are involved. We must, to be sure, not forget the rights of the parties to the proceedings with which we are directly dealing, but the public must likewise share our attention. By the public is meant the courts, other litigants than the parties to the suits under immediate consideration, the taxpayers, and any others who may be affected by our conclusions.

First to claim our attention will, naturally, be the litigants in the actions in which we are primarily interested. If a promisor has broken a term of a contract, or someone's tort has caused an injury to another, those harmed properly feel that they should

³⁶*Twin Falls Oakley Land & Water Co. v. Martens*, (C.C.A. 9th Cir. 1921) 271 Fed. 428; *Harris v. Thomas*, (1787) Kirby (Conn.) 267; *Glass v. Grant*, (1933) 46 Ga. App. 327, 167 S. E. 727; *Ade v. Ade*, (1913) 181 Ill. App. 577; *Schaffner v. Schaffner*, (1913) 182 Ill. App. 450; *Ferry v. Ferry*, (1848). 2 Cush. (Mass.) 92; *Cushman v. Carver County Comr's*, (1872) 19 Minn. 295; *Lovett v. Lessler*, (1926) 99 N. J. Eq. 251, 132 Atl. 77; *De Cordova v. City of Galveston*, (1849) 4 Tex. 470; *Grafton Bank v. Doe*, (1847) 19 Vt. 463, 47 Am. Dec. 697.

³⁷*Glass v. Grant*, (1933) 46 Ga. App. 327, 167 S. E. 727. It may be added at this point that the text writers usually support the orthodox views mentioned herein. *Bates' Pleading, Practice, Parties & Forms*, 4th ed., secs. 455-455b; *Clark, Code Pleading* 324-329; *Maxwell, Code Pleading* 96; *Phillips, Code Pleading*, 2nd ed., secs. 208, 213, 266; *Sutherland, Code Pleading, Practice & Forms*, secs. 218-222.

have immediate recourse to the courts. That, at first thought, seems plausible. But, "Wait," says the wrongdoer,

"I may break that same agreement again, or my alleged tort may cause some later injury. Let the damaged person defer proceedings until all possible injury under the contract or from the tort has occurred. If he fails to do this and sues as each item of harm occurs, a multiplicity of suits will result. This will be an undue burden upon me and the public."

That may sound well, but what right has he to talk about added burdens to himself caused by the bringing of various lawsuits? His action may cause distinct injuries, and it is not unfair for him to compensate the one harmed as each bit of damage is done. Yet we must not be oblivious to the rights of the others mentioned by the tort-feasor. The added trials will be costly, both from the viewpoint of time and money, and other suitors will not get so speedy hearings of their cases as would be possible if our plaintiff should bring but one suit for all possible claims against the transgressor. Plainly, two sets of interests clash. Which is to be favored? It seems that in this instance the right of the claimant is so strong that he should be permitted to sue as each item of damage occurs. Otherwise, it is possible that he would have to wait for years before he could bring an action. This might result in a practical loss of any substantial compensation to him, for the wrongdoer's first breach of duty might cripple the injured person so seriously that the latter would be forced to settle past and future losses with the former for little or nothing.

Next, must one set forth in a single cause of action his claim to recover for all damages suffered up to the time of suit, when he has brought no proceeding until there has been more than one breach of contract, or until several distinct injuries have been occasioned by one tort? Here again, opposing interests exist. The argument against allowing a multiplicity of actions applies and weighs heavily in favor of forcing the claimant to bring but one lawsuit. But that does not mean, necessarily, that he should be treated as having merely a single cause of action. It may be that, within the court's discretion, he should be forced to state his entire claim in a single proceeding, alleging in separate counts the different causes of action that have arisen from the various breaches of duty involved. But how can it logically be said that the mere passage of time destroys a cause of action and makes it

become a portion of a different and expanded claim? That seems fantastic!

It may be said that this talk is a tempest in a teapot; that it harks back to the days of technicalities; that it results in slavery to words and in forgetfulness of the rights of everybody but the claimant. A careful examination of the result will disclose that this is not the truth. The injured person will not be permitted the use of several *lawsuits* in which to recover his claims existing when he sues, unless the judge believes circumstances warrant a different procedure. Thus, there will be no unfair burden cast upon others than the wrongdoer. As to him, we should not often worry, as he usually deliberately causes or permits the distinct injuries. By the suggested procedure, we logically recognize that actions once existing as separate causes of action continue to endure as such. This result is desirable for at least two reasons. If one believes in the statute of limitations, under the suggested theory, it can logically and properly be said that it begins to run against each separate cause of action as it arises. One may say that he gets the same result under the present state of the law. Most often, but not always, the *practical* result is the same as that suggested.³⁸ However, the common conclusion as to the running of the statute is unsound, if there is a merger of one cause of action into another.

Let us consider a single example. Presume that A and B enter into an installment contract. A fails to pay the first installment when it becomes due. B has a cause of action, but fails to sue thereon until after another payment is owing and unpaid. Under the orthodox doctrine B has but a single cause of action against A for the two sums due him, *but* the statute of limitations has been running against the claim for the first sum due since it became due and unpaid. Thus we have the strange, illogical, and unjustifiable situation of a cause of action against part of which the statute has been running for some time and against another portion of which it has just begun to run. It is submitted that, if there is to be but a single cause of action for several breaches of duty, the statute of limitations should not ultimately begin to run against any of that claim until it commences to run against all of it.

³⁸See *supra* notes 31 through 37.

Moreover, it may be just under certain circumstances to permit a claimant to bring several lawsuits against the transgressor for various breaches of a single contract, or to recover for divers distinct injuries caused by a single tort. For instance, the alleged wrongdoer may admit some liability as to part, but not all, of the alleged breaches of duty which have occurred at a particular time. He may want to talk settlement as to them. It might, therefore, be unwise to sue upon those claims, but, as to the others, an immediate action might be expedient. Under the usual law one would lose his right to recover on the demands concerning which the alleged tort-feasor admitted possible liability unless the proceeding against him covered them. This result is ill-advised, for it discourages the spirit of conciliation.

Let us summarize. The great majority of present opinions state that one may sue in relation to each breach of a contract or injury caused by a tort as the breach or injury occurs, for a cause of action has arisen in either instance. If one fails to sue until more than one breach or injury has occurred, he must sue in one count for all his loss, for he has but a lone cause of action for damage done to him up to the time of bringing his action. This is, as previously suggested, illogical. The statute of limitations commences to run against each breach or injury as it occurs and the happening of another breach or injury does not stay the effect of the statute as to those previously occurring. This, though fair and logical if there were no blending of causes of action, becomes unjust when such blending exists. The courts have striven to reach an equitable, practical outcome by avoiding a multiplicity of actions, and then have stopped halfway in their search for justice and have laid down a harsh, unjustifiable rule as to the application of the statute of limitation. It is maintained that the proper rule is that each breach of a single contract and every separate injury caused by one tort creates a complete cause of action which continues to exist unaltered by the happening of other breaches and injuries. The statute of limitations commences to run against each cause of action from the time it comes into existence. The court should have the power, within its discretion, to order the plaintiff to join in different counts in a single proceeding all claims existing at the time of a suit, in relation to one contract or tort. This would lead to a logical procedure which would be fair to everyone concerned. Multiplicity of suits, except when proper, would be avoided, and, at the same time, the unusual situation

arising when justice might demand that the claimant be permitted to bring several actions would be provided for. The statute of limitations would have full play without injury to the complainant's rights.

The only possible difficulty with the proposed law is the lack of power in the courts to order a consolidation of *causes of action*. There are today many states having legislation providing for the consolidation of two or more lawsuits *pending* at one time between the same parties and in the same court upon causes which might have been joined.⁴⁰ In addition to this general law we find others that seem to require the consolidation of causes of action in one lawsuit though no proceedings are pending in relation to them. Thus, provision is made in one state for compulsory joining in one lawsuit of separate claims of a husband and wife for injury to the latter, and for a consolidation in one proceeding of demands of a parent and child for an injury to the child.⁴⁰ In another commonwealth we find a similar enactment relating to causes of action of an infant to recover for personal injury inflicted upon him by another and of its parent to obtain compensation for the cost of curing the child of that hurt.⁴¹ In Colorado there exists a consolidation law which might almost be used as a model, if it were given general application. It says that in all suits which shall be commenced before a justice of the peace, each party shall, at the time of beginning such suit, bring forward against the other all of his or her demands which shall then exist and which are of

³⁹Ala., Code 1928, sec. 9497; Alaska, Comp. Laws, 1913 sec. 1315; Ariz. Rev. Code, 1928 sec. 3804; Ark. Stats. 1921, secs. 1080 and 1081; Cal. Code of Civ. Pro. (Deering 1931) sec. 1048; Colo. Code Civ. Pro. (Courtright's Mills) sec. 20; Del. Rev. Code 1915, sec. 4504; Fla. Comp. Gen. Laws 1927, sec. 4224; Ga. Code 1933, sec. 3-112; Hawaii, Rev. Laws 1925, sec. 2389; Idaho, Code Ann. 1932, secs. 12-605 and 12-606; Ill. Civ. Prac. Act 1933, sec. 51; Ia. Code 1931, sec. 11226; Kan. Rev. Stat. 1923, sec. 60-765; La. Code Prac. (Dart, 1932) secs. 422 and 423; Md. Ann. Code (Bagby, 1924) art. 50, sec. 7; Mass. Gen. Laws 1932, ch. 231, sec. 84; Mich. Comp. Laws 1929, sec. 13962; Mason's 1927 Minn. Stat. sec. 9264; Mo. Rev. Stat. 1929, secs. 943 and 944; Mont. Rev. Codes 1921, sec. 9820; Neb. Comp. Stat. 1929, sec. 20-703; Nev. Comp. Laws (Hillyer 1929) sec. 9025; N. J. Comp. Stat. 1910, p. 4088, sec. 115; N. M. Stat. Ann. 1929, sec. 105-828; N. Y. Civ. Prac. Act (1920, as amended) secs. 96, 97, 97a; N. Y. Court Claims Act, 1923, sec. 20; N. Y. City Court Act 1930, sec. 18a; N. D. Comp. Laws 1913, sec. 7965; Ohio Code (Throckmorton, Baldwin's Rev. 1934) secs. 11369, 11933; Oklahoma, Stat. 1931, sec. 257; Or. Code Ann. 1930, sec. 7-104; R. I. Gen. Laws 1923, sec. 4869; S. D. Comp. Laws 1929, sec. 2100; Tenn. Code (Michie 1932) sec. 7950; Tex. Rev. Civ. Stat. (Vernon, 1925) sec. 2160; Utah, Rev. Stat. 1933, sec. 104-54-12; Wis. Stats. 1933, sec. 269.05; Wyo. Rev. Stat. 1931, sec. 89-1069.

⁴⁰Pennsylvania, Stat. 1920, secs. 30-37.

⁴¹Virginia, Code Supp. 1934, sec. 5331a.

such a nature that they can be consolidated into one action or defense, and, on refusing or neglecting to do this, they shall forever be debarred from the privilege of suing for any such debt or demand.⁴²

It may be claimed that it is folly to support the program suggested here as the proper one to follow, for it is hopeless to expect legislatures and rule-making bodies to enact the necessary consolidation statutes within a brief period. My answer is that, if my proposition is valid and its becoming law means progress, the suggested difficulty should not deter one from sponsoring it and attempting to make it a part of our jurisprudence. Advance has almost always been slow and difficult, but that has not discouraged courageous men and women of the past, neither should, nor will, it daunt the resolute of today or tomorrow. What will be easiest to do is to get the law changed to provide that the statute of limitations shall finally begin to run against no part of a blended cause of action until it would, under the present rule, start to run against that part of it coming into existence latest. This means that the statute would begin to run against a claim for a breach of a single contract or against a demand arising because of damage caused by a single tort as soon as the breach occurred, but that when another breach or injury relating to such contract or tort happened, suit not yet having been brought to recover damages for the first injury, the statute would begin to run anew as to the first claim as of the date of the more recent one. Such an innovation can be worked out without the enactment of any statutes or rules of court. But that should merely be the entering wedge. We should, I assert, proceed at once to attempt to effect the complete change recommended, including an abandonment of the idea of blended causes.

⁴²Colorado, Comp. Laws 1921, sec. 6061.