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The Rule of Law and the Legal Right

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THE RULE OF LAW AND THE LEGAL RIGHT

IT IS a common experience with a teacher of law to find in every department of the subject a number of hard knots that have resisted all the efforts of the courts and jurists to split them. These usually take the form of a hopeless contrariety of decisions, or of decisions which are impeccable in their logic but offend against what we usually speak of as a sense of natural justice. It is customary for us to dismiss these with a statement that the majority of decisions or the weight of authority favors the one conclusion or the other, and that possibly the only way to remedy the difficulty is by an appeal to the legislature. There seems to be a larger number of these refractory knots piled up in the subject of Damages than in other courses, and this is an attempt to reduce their number. It has been somewhat surprising and not a little disconcerting to find that so many of them depend upon simple logical fallacies. If the wrong horn of a dilemma is originally taken by a supreme court, its decision becomes a precedent from which its successors have difficulty in escaping. As this solution seems to be so very easy, it is here presented with due diffidence, and with deprecation of the charge of contempt of court. It is simply the observation that in our never ending struggle to steer between the two categorical legal necessities, certainty and flexibility, the courts have inclined toward the former where, without the violation of any legal principle, they might well have turned to the latter.

The emphasis on the study of cases during the last half century has had the revivifying and stimulating influence upon the science of law which is characteristic of every return to the sources. Because of this simple change in the method of approach we have made

our law more scientific, and whether the term be used as a reproach or a commendation, all of us, both theorists and practitioners, for better or for worse, have become case lawyers, in that we all believe that law is the body of rules recognized or acted upon in courts of justice. But we have frequently gone astray by following the rule without recognizing that return to the sources means a constantly repeated recurrence to the particular source, for the purpose of formulating new rules for the enforcement of steadily developing rights. A rule, a definition, or a maxim of law, established by a decision of the sixteenth century, under the influence of our theory of *stare decisis* and of the syllogizing tendency so prevalent in the courts affected by eighteenth century philosophy, may become a precedent for deciding a case which involves elements entirely different from those on the basis of which the rule was originally established. We have here the old familiar fallacy of the Schoolmen. "Man is a featherless biped," but "a plucked chicken is a featherless biped"; *ergo,* "a plucked chicken is a man." An unassailable conclusion, if we admit the validity of our major premise. And the only way to remedy this grotesque conclusion is to make a more careful analysis of the essential characteristics of man and, by a process of induction, to form a more accurate definition which may then be used as a corrected major premise.

As late as the middle of the nineteenth century the English court held that the word "annexation" could have only its original grammatical connotation; i. e., bound together in some material way, as by clamps or cement, because that had been the meaning in the sixteenth century.[1] According to this decision the Statue of Liberty, though weighing many tons would not be annexed to its base, if there were no physical interlocking of the material particles of the statue and the base. If annexation means interlocking, then, if there is no interlocking, there is no annexation. By starting with the definition as a major premise and proceeding deductively we reach inevitably a logical conclusion, which may or may not properly deter-

[1] Wiltshear v. Cottrell (1853), 1 E. & B., 2 Q. B. 674. Cf. note on "Epithetical Jurisprudence and the Annexation of Fixtures," 18 MICH. L. REV. 407. It should be acknowledged that Professor Evans Holbrook was the first to apply the term "Epithetical Jurisprudence" to this peculiar reasoning. Dean Pound has discussed the phenomenon at considerable length in his article on "Mechanical Jurisprudence," 8 COL. L. REV. 605.

mine the rights of the parties to the litigation. If, on the other hand, we start with all the facts in the controversy and proceed inductively to determine which party has the legal right to the property, we satisfy the reasonable expectations entertained by the parties as to the subsequent disposal of the chattel when they put it in place, and incidentally we establish a new rule of law; namely, that affixing by gravity is "annexation." That the latter process is just as legal as the former, is shown by the fact that the New York court, in the very next year, decided that "a thing may be as firmly fixed to the land by gravitation as by clamps or cement."[2]

This reliance upon the rule of law to the exclusion of any effort to determine the rights of the parties is more marked in the subject of Damages than in some other fields. Doubtless because we have in this branch of adjective law a gradual building up of rules of substantive law on the basis of specific sets of facts. Jurymen were originally summoned because they had been witnesses of the transaction out of which the dispute had arisen, and were therefore the most capable of passing upon the matter. But when their verdict was crystallized in a judgment, this, almost of necessity, became a rule of law for deciding analogous cases, and would be followed as a precedent.[3] But whenever a case involving a slightly different set of facts was decided under the old and narrower rule, we would get a decision that might or might not be just. What we need then to establish the right under the new set of circumstances, is a new induction from the broader or different state of facts. With this simple device a good many of the puzzles in the subject of Damages

[2] Snedeker v. Waring (1854), 12 N. Y. 170, 175. It is perhaps worthy of note that the New York court decided this point correctly because it resorted to the Roman Law for its principle of decision. For a similar helpful use of the Roman texts, see the article by Dean Pound on "Juristic Science and the Law," 31 HARV. L. REV. 1049. This litigation of a word rather than the determination of the rights of the parties as dependent upon their intention has been a marked feature of the discussion of "trade fixtures" in the English courts. In the case of Whitehead v. Bennett (1858), 27 L. J., Ch. 474, the court said there is a "broad distinction between trade fixtures and buildings used in trade." On the other hand, the United States court has said, in Van Ness v. Packard (1889), 2 Pet. (U. S.), 137, that buildings, "if designed for purposes of trade," could be removed.

[3] If this had not happened we never should have arrived at a *law* of damages; each verdict would have rested upon its own facts. Cf. SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES, p. 3.

may be solved and some apparently hopeless contradictions may thus be reconciled.

In many instances the difficulties produced by the stress upon deduction rather than upon induction have been solved by the courts themselves, after they have recognized that the syllogistic reasoning has brought them to conclusions that are not in accord with justice.[4] There was no recovery for mental suffering at common law.[5] In the case of *Mitchell* v. *Rochester Ry. Co.*,[6] the plaintiff, a pregnant woman, was standing on the street, waiting for a car. A horse car of the defendant was driven close to the plaintiff, so that she stood between the horses' heads. Because of the fright and excitement she became unconscious and suffered a miscarriage and consequent illness. The court in deciding that she could not recover said, "Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom." The following seems to be the reasoning of the court: Major premise, fright as a cause of action is zero. (As authority for this we have the case of *Lynch* v. *Knight*, cited in Note 5, (*supra*), also the imposing line of authorities quoted by counsel for the respondent in this New York case.) Minor premise, *ex nihilo nihil fit.* (See, LUCRETIUS, DE RERUM NATURA, I-159, first century before Christ. This of course goes back to the source used by Lucretius, namely, Epicurus, fourth century B. C., a venerable precedent). *Ergo*, the

[4] It may be remarked that the contradictory decisions are simply the surface indications of the deeper antinomy with which the courts are constantly struggling. Law must be certain, otherwise men would never know how their cases are to be judged, but it is just as necessary that law should be flexible, in order that it may secure a constantly developing justice under ever-changing conditions, and it is the business of courts, lawyers and jurists to reconcile this antinomy. This is, in a way, the peculiar function of the scientific jurist. The courts must decide cases and clear their dockets; lawyers must win their suits; it is the business of the jurisconsult to solve these problems.

[5] "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." Lord Wensleydale in Lynch v. Knight (1861), 9 H. of L. Cas. 577.

[6] Court of Appeals of New York (1896), 151 N. Y. 107. Cf. Proceedings of the Seventeenth Annual Meeting of the Association of American Law Schools, p. 130, note 2. In the case of Spade v. Lynn, 168 Mass. 285 (1897), the Massachusetts court followed the New York court in its decision, but avoided this logical pitfall in its reasoning.

result is zero. Q. E. D.—but it is wrong, because zero is used in the sense of a cause of action and not in the sense of the proximate cause of an injury. The fallacy of this reasoning has been pointed out since by the English court,[7] in a case in which the facts were practically identical with those in the New York case, (*supra*). If we approach this case, not through the rule of law, which is to be followed as a precedent, but from the standpoint of the legal right invaded, we start with an acknowledged legal wrong, the negligent act of the defendant. This is the proximate cause of the fright, which in turn induces the miscarriage, the injury complained of and proved. The chain of causation is complete, the fright being a connecting link between the wrongful act alleged and the proved detriment to the plaintiff.[8]

A SPURIOUS CANON OF INTERPRETATION

Aside from these cases where the courts have successfully extricated themselves from their difficulties by a process legally and logically unassailable, there is an interesting line of cases in which the same end has been accomplished by the invention of what seems to be a spurious rule of interpretation. In the ninth edition of SEDGWICK ON DAMAGES, at the end of the discussion of the canons of interpretation for distinguishing liquidated damages from penalty, an extra section is added on "Valuation and Pre-ascertainment."[9] From its position in the text it would seem that this is inserted as a new canon of interpretation and it is apparently so used in subsequent cases in the United States courts.[10] During the Spanish-American War the Sun Publishing Co. chartered a yacht from one Moore, for

[7] Dulieu v. White [1901], 2 K. B. 669.

[8] SEDGWICK, ELEMENTS OF DAMAGE, p. 113. "The true view would seem to have been at length reached in Dulieu v. White and Simone v. Rhode Island, that negligence producing fright is not enough; that some material damage must be proved; that this material damage must be proximately caused by the negligence, and that fright may be one of the links in the chain of causation." See Janvier v. Sweeney [1919], 2 K. B. 316; also 18 MICH. L. REV. 332.

[9] SEDGWICK ON DAMAGES [9th Edition, 1912], revised by Arthur G. Sedgwick and Joseph H. Beale, Sec. 420a. This section does not appear in the 8th Edition (1891), but seems to be added here as a new canon of interpretation.

[10] 18 MICH. L. REV. 50; Wise v. United States (May, 1919), Adv. S. 343.

the purpose of gathering news in Cuban waters. The charter contained a provision that "for the purposes of this charter the value of the yacht" should "be considered and taken at the sum of $75,000."[11] The yacht was lost. In a suit for damages the supreme court decided that evidence could not be admitted to show that the actual value of the yacht was less than that sum, thus holding that the libellant was entitled to recover the whole sum of $75,000 as liquidated damages. A few years later the House of Lords decided[12] that a provision in a contract that "The penalty for later delivery (of a torpedo boat) shall be at the rate of 500 pounds per week," was to be regarded as "liquidated damages and not as a penalty." Lord Robertson gave as a reason for this decision that there had been in this case "a genuine pre-estimate of the creditor's probable or possible interest in the performance of the contract." In the case of the *United States* v. *Bethlehem Steel Co.*,[13] which was a suit for the breach of a contract containing the provision that "the penalty for delay in the delivery" of disappearing gun carriages should be at the rate of $35 a day, the court decided that this was a provision for liquidated damages and not for a penalty, and said further that "The principle decided in that case" (*Sun Publishing Co. Case*) is much like the contention of the government herein."

Some years ago[14] attention was called to the fact that even before this reference to the *Sun Case* by the court in the *Bethlehem Case*, the subordinate United States courts were citing the *Sun Case* as a precedent for their decisions on a state of facts which was entirely different from the facts in the *Sun Case* but identical with those in the *Clydebank Case* and in the *Bethlehem Case*. As our standard text on Damages[15] has brought the *Sun Case* and the *Clydebank Case* under the rubric of "Valuation and Pre-ascertainment," we seem to have established by the authority of the United States Supreme Court and the House of Lords a new canon of interpretation. But that no new canon has been established seems quite evident when it is recognized that the *Sun Publishing Co. Case* was decided on the

[11] Sun Printing and Publishing Co. v. Moore (1901), 183 U. S. 642.

[12] Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castaneda [1905], A. C. 6.

[13] 205 U. S. 105, 119.

[14] 9 MICH. L. REV. 588, 591, note 14.

[15] Cf. note 9, *supra*.

simple principle of estoppel by contract, on an almost unique state of facts; while the *Clydebank Case*, the *Bethlehem Case*, and all the subsequent cases in the United States courts and the various State courts, rest on the old canon of interpretation to the effect that "where independently of the stipulation the damages would be uncertain, or incapable, or very difficult of ascertainment, they may be liquidated."[16] All the cases in which this alleged new rule has been invoked have been decided correctly, but the confusion caused by the appeal to the rule as a canon of interpretation has certainly not added to the clarity and amelioration of our law. The deduction from this spurious canon of interpretation as a new major premise can only add to our bewilderment. The use of the terms "pre-estimate," "pre-ascertainment," or "pre-valuation" adds nothing to our knowledge nor do they aid in settling our hard cases. "No more since than before the decisions by the United States Supreme Court and the House of Lords, can the parties 'preascertain' and fix upon what is actually a penalty under the guise of liquidated damages."[17]

A SUPERFLUOUS CANON OF INTERPRETATION

As we have in the above instance the case of a spurious canon of interpretation from which we make unwarranted deductions, so in the subject of alternative contracts and liquidated damages we have a superfluous canon of interpretation by which the cases are decided deductively, by a process of purely grammatical interpretation, whereas the inductive interpretation on the basis of the rights of the parties, determined by their intention, will bring us to a rational conclusion and satisfy the demands of justice.

"The principle of alternative contracts has been much discussed, but decisions directly in point are difficult to find," says Arthur George Sedgwick.[18] "The whole subject seems to be involved in a good deal of difficulty," in the words of Theodore Sedgwick.[19] It is submitted that most of the difficulties would be brushed aside or avoided, if the subject were approached from the standpoint of the rights of the parties, determined from all the facts in the case, rather than from the determination of the grammatical question as to

[16] SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES, p. 243.
[17] 9 MICH. L. REV. 593.
[18] ELEMENTS OF THE LAW OF DAMAGES, p. 251.
[19] SEDGWICK ON DAMAGES [8th Edition], Sec. 424.

whether the word "or" is a disjunctive conjunction or something else. How difficult it is to find cases involving the principle of alternative contracts, is shown by the fact that an English case from the Court of Common Pleas is cited as the "leading case" on the subject, and the decision in this case is by a divided court. The facts in the case of *Deverill* v. *Burnell*[20] were that the plaintiff had shipped from London to South America certain goods, to be delivered to one Bollaert there, on his accepting certain drafts drawn by the plaintiff on him. The defendant was given the bills of lading and the drafts, to remit the proceeds thereof, if the same were paid, and, in case they should not be paid, "*either* to return them to the plaintiff *or* pay him the amount thereof." The bills were found to be worthless, and, in a suit for the breach of the contract, a verdict was rendered for a farthing damages. On a rehearing this was reversed and a verdict was given for 107 pounds, the face of the drafts. A dissent was expressed by Bovill, C. J. The argument in both opinions was a purely grammatical one. The court in the prevailing opinion said, "If, in the ordinary affairs of life, I say to a man, 'I will return your horse tomorrow, or pay you a day's hire for him', the only reasonable construction is that, if I do not return the horse, I will pay a day's hire." Bovill, C. J., in the dissenting opinion said, "we ought to construe the declaration strictly, and are not entitled to substitute words which import a condition that one alternative shall be performed, if the other is not, when the disjunctive conjunction 'or' being used, the natural meaning is a simple alternative." In neither of these statements is there any intimation that what the parties may have intended by their agreement is of any importance. A few years ago, in an attempt to decide this case on the basis of the rights of the parties rather than upon the grammatical interpretation of a word, Captain Sealby, the hero of the steamship "Republic", was asked how that contract should be interpreted. He promptly answered that according to the Custom of the Port of London the sea-captain had guaranteed the collection of the bills of exchange. This of course would make the recovery 107 pounds and not the farthing, the nominal value of the bills, and the verdict would determine the rights of the parties in accordance with their reasonable expectations at the time the contract was made. It should be noted, too, that this solution is strictly in accordance with law, in

[20] Court of Common Pleas (1873), L. R. 8, C. P. 475.

this case the Custom of London, following the precedent set by Lord Mansfield, who so often thus made the custom of merchants a part of our common law.

CONTINUING TRESPASS AND REPEATED WRONG

One of the most troublesome questions arising from the "hard decisions" that make our proverbial "bad law", is found in the application of the statute of limitations to the doubly ambiguous term "continuing trespass." Trespass in its primitive sense is an intrusion upon one's possession, either of property or person. But with the development of the action on the case, and particularly with a liberal construction of actions under the code, a trespass comes to be treated as an infringement upon one's right; i. e., a wrong, hence it occurs that while a trespass is always a wrong, not every legal wrong will be recognized by the courts as a trespass. The word "continuing" also tends to become confused with the word "repeated." An illustration of this is found in some of the recent malpractice cases. A surgeon negligently sews up a sponge in a wound and negligently allows it to remain there until after the statute of limitations has run on the original negligent act. The question then arises, is the injury produced from day to day by the foreign body in the wound the *result* of the original wrongful act, and is the action therefore barred by the running of the statute, or is there a *new injury* each successive day caused by a fresh irritation, and can a recovery be had for all injurious effects occurring within the statutory period?

The National Copper Co. v. *The Minnesota Mining Co.*[21] is one of those hard cases which reaches a conclusion at variance with what is ordinarily thought of as justice, but in which the court felt compelled by the logic of the law and the force of precedent to so decide. The Minnesota Co. blew a hole through the barrier left between its mine and the National Mine. Afterwards the Minnesota Co. "robbed" its mine and allowed the surface to cave in. Surface water flowed into the Minnesota Mine and later passed through the hole into the National Mine, which had been temporarily abandoned. Years afterwards the National Co. was put to large expense in removing this water, and therefore brought suit for damages caused

[21] (1885) 57 Mich. 83.

by the flow of the water through the hole. It was held that there could be no recovery because the Statute of Limitations had run on the original trespass; namely, the breaking down of the barrier, and that no further cause of action arose, either (1) from leaving the hole, or (2) from allowing the water to flow into the plaintiff's mine. This decision rested on a firmly established precedent[22] and has since been followed without question,[23] so that we may assume that it is settled law, unless a flaw may be found in its logic. An Ohio case involving the same principle but on a somewhat different state of facts was decided in the same way after prolonged litigation.[24] The facts in this Ohio case of *Gillette* v. *Tucker* were that Dr. Gillette, after performing an operation on the abdomen of the plaintiff, sewed up a sponge in the wound, and allowed it to remain there for many months. It was afterwards removed by another surgeon and the plaintiff, Mrs. Tucker, brought suit for malpractice, more than a year after the sponge was sewed up in the wound, but less than a year after she had ceased to take treatment from Dr. Gillette. In the common pleas court a decision was given for the defendant. This was reversed by the circuit court of appeals, which gave a decision for the plaintiff. The supreme court divided three to three, thus affirming the decision of the circuit court, but several years later, when the personnel of the supreme court had changed, it was decided by a four to two vote, that the decision of the common pleas court should prevail and that the decision of the circuit court should be reversed.[25] The Ohio Supreme Court thus finally denies a recovery to the plaintiff and puts this case of trespass to the person in the same category with trespass to property, as in the Michigan case

[22] Clegg v. Dearden (1848), 12 Ad. & El. (N. S.), 575; Kansas Pac. Ry. v. Mihlman (1876), 17 Kans. 224; Williams v. Pomeroy (1882), 37 Oh. St. 583; Farmers of Hampstead Water (1701), 12 Mod. 519.

[23] Duff v. United States Gypsum Co. (1911), 189 Fed. Rep. 236. It is said in this case that the dissenting opinion in Gillette v. Tucker has become the law of the state of Ohio. But Cf. 87 Oh. St. 408, post, note 36.

[24] Gillette v. Tucker (1902), 67 Oh. St. 106.

[25] McArthur v. Bowers (1905), 72 Oh. St. 656. This view as to the law of the case has since been adopted in Duff v. United States Gypsum Co. (1911), 189 Fed. 236, and may perhaps be considered to represent the weight of authority. The United States circuit court, in this last case, cited National Copper Co. v. Minnesota Mining Co. (1885), 57 Mich. 83, and Williams v. Pomeroy (1882), 37 Oh. St. 106, as controlling precedents.

of *The National Copper Co.* v. *The Minnesota Mining Co.* (*supra*).

It had been asserted in this Michigan case that "the history of mining upon Lake Superior will (not) disclose another instance of such reckless disregard of the rights of an adjoining mine-owner," and, although the logic of that case and of the precedents upon which it was based seem irrefragable, we have abundant evidence that neither the courts nor the legislatures have been satisfied with the conclusion. In the case of *Lewey* v. *The Fricke Coal Co.*[26] the defendant, "while mining coal on its own land, pushed an entry or passage under the plaintiff's lands and appropriated the coal removed therefrom." Action was brought in trespass to recover damages for this unlawful mining. It was held that the statute began to run *not* from the time of the original trespass but from the time of the *discovery* by the plaintiff. The court said, "The discovery of the fraud gives a new cause of action."[27] *E converso,* this would seem to mean that each day's concealment of the wrong gives rise to a new cause of action. The acceptance of this converse proposition would, as will later be shown, give a way to reverse our hard decisions that now seem so thoroughly established. The solution of the difficulty by the Pennsylvania court in cases of injury to property has been adopted by the Michigan court in cases of injury to the person. In *Groendal* v. *Westrate*[28] the facts were that a physician had concealed from his patient the fact that her shoulder was dislocated. The Michigan court held that a suit brought within two years after she *discovered* the fact, was not barred by the Statute. On a somewhat similar state of facts the California court has very recently allowed a recovery where action was brought more than a year after the initial negligent act of the surgeon, but within a year after he had ceased to care for the case.[29] It is believed, however, that the theory held by the court in this last decision is not the same as that of the Michigan court.

Although the injustice of the old decisions has thus been in part remedied, their logic is as yet unimpeached. But it is believed that

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[26] (1895) 166 Pa. St. 536.

[27] See Report, at p. 544.

[28] (1912) 171 Mich. 92. Decided under the provisions of MICH. COMP. LAWS OF 1897, Sec. 9729, as amended by Act No. 168, Public Acts of 1905.

[29] Perkins v. Trueblood (Cal., May, 1919), 181 Pac. 642; CODE OF PROCEDURE OF CALIFORNIA, Sec. 340, Subd. 3. Cf. 18 MICH. L. REV. 679.

if deductions from a vague major premise be avoided and the cases be approached inductively from the standpoint of the rights of the parties under all the facts, the harsh operation of the Statute of Limitations may be avoided, and, in accordance with a somewhat attenuated and devious line of authority, the plaintiff may be given a verdict in the cases, both of injuries to land and of injuries to the person.

The facts in the English case of *Clegg* v. *Dearden,* (*supra*), and in the Michigan case of *The National Copper Co.* v. *Minnesota Mining Co.* (*supra*),[30] are identical. The wall of the plaintiff's mine was broken through and, after the lapse of the statutory period, water came in through the hole that was left, and injured the plaintiff. It was held in the English case that the defendant was not liable for "omitting to close up the aperture on his neighbor's soil." In the Michigan case it was held that "the flowing of the water through the opening" was not "a new trespass." It is necessary that each of these conclusions be examined in detail. In arguing the first of the above points, in the case of *Clegg* v. *Dearden,* the English court said, "there is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed on the land of another, * * * no cause of action arises from his omitting to re-enter the land and fill up the excavation; such an omission is neither a continuation of a trespass nor of a nuisance; nor is it a breach of a legal duty." The theory of the court here seems to be that the hole is not a continuing wrong from which a new cause of action will start from day to day, but that the hole is rather the *result* of the original wrongful act, as is argued by the Ohio court in the dissenting opinion in *Gillette* v. *Tucker,* (*supra*),[31] and that the first trespass together with all its consequences is barred by the statute. The Michigan court[32] answered the argument as to the wrong in leaving the opening in plaintiff's mine by saying that "there is no analogy between leaving a hole in a wall * * * and leaving * * * obstructions there." This last statement rests on abundant precedent; for example, the court in

[30] Cf. notes 21 and 22, *supra.*

[31] (1902) 67 Oh. St. 106. It should be remembered that it was this *dissenting* opinion that was finally adopted by the Ohio court in the later case of McArthur v. Bowers. Cf. notes 24 and 25, *supra.*

[32] National Copper Co. v. Minnesota Mining Co. (1885), 57 Mich. 83.

the case of *Kansas Pacific Ry.* v. *Mihlman*[33] says the doctrine of continuous trespass cannot be extended beyond those cases "in which something is carried to and placed on the land"; but nevertheless it seems to embody a logical fallacy which afterwards arises to confound us.

In what is called the prevailing opinion in *Gillette* v. *Tucker,* which was, however, reversed in the later Ohio case of *McArthur* v. *Bowers,*[34] the court said that the failure to remove the sponge was "a continuous and daily breach" of "a continuous obligation" to remove it, and cites the case of *Perry County* v. *Railroad Co.,*[35] as authority for its view. In this last case a bridge belonging to the county was destroyed by the fault of the railroad company, in 1871. The commissioners restored the bridge, at a cost of $3000, in March, 1878, after the statute of limitations had run on the original wrong; and, in October, 1882, the commissioners brought suit against the railroad for damages in that amount. The court said, "From the time the injuries complained of were committed, * * * the duty of the defendant to restore the bridge to its former condition of usefulness and safety was a continuing and subsisting obligation, and each day's failure to make full restoration was a fresh breach of such obligation, and lapse of time cannot avail to interpose a bar to recovery." It should be noted that although the court says that the principle in *Perry County* v. *Railroad Co.* is the same as that in *Gillette* v. *Tucker,* the facts are very different, for while the hole left in the road-bed by the destruction of the bridge and the sponge left in the wound each gave rise to a continuous obligation to remedy the wrong, the foreign body left in the wound was also a "repeated wrong", in that it produced each day a new irritation and inflammation. The *Perry County Case* decides that leaving the hole was a fresh wrong each day. The *Gillette Case* finally decides, after much vacillation, that leaving the sponge in the wound was the result of and a part of the original wrong of putting it there by a negligent act. The consequence is that the final decision of the Ohio court in the case of *McArthur* v. *Bowers* on the facts of the *Gillette Case* does not affect the decision in the *Perry County Case,* which is on an entirely different state of facts. Indeed the Ohio court in a late

[33] (1876) 17 Kans. 224.
[34] Cf. note 31, *supra.*
[35] (1885) 43 Oh. St. 451.

case[36] has said that the dissenting opinion of Davis, J., in the *Gillette Case* does not contradict the doctrine of the *Perry County Case,* as it is cited by Price, J., in the *Gillette Case.* It is important to recognize that the *Perry County Case* is still good law in Ohio because of the bearing of that decision upon the cases of *Clegg* v. *Dearden* and *National Copper Co.* v. *Minnesota Mining Co.*

Fortunately, the above somewhat labored vindication of the *Perry County Case,* as cited by Price, J., in the *Gillette Case,* is now unnecessary, as the Ohio court has since re-established the validity of the decision in the *Gillette Case.* In the case of *Bowers* v. *Santee*[36a] the facts were that the plaintiff sustained a fracture of her leg, on December 29, 1913, and the defendant, a surgeon, set the broken limb. The surgeon continued his treatment until May, 1914. An action for malpractice was begun in April, 1915, more than a year from the date of the fracture but less than a year from the date the patient was discharged. The Court, Wanamaker, J., said in deciding the case, "If *McArthur* v. *Bowers,* (*supra*), was rightly decided, we still hold that under the allegations of the petition the statute of limitations did not begin to run until May, 1914. We, however, most respectfully disagree with and disapprove the *McArthur Case* and we approve and reaffirm the doctrine in the *Gillette Case.*" This last decision was concurred in by five other justices, but with Nichol, C. J., expressing dissent. The Ohio court gives no reasons for this final decision, but it is submitted that it is quite in accord with the theory offered in this paper.

The decision in the *Perry County Case* is directly contrary to the decision of the English court in the case of *Clegg* v. *Dearden,* (*supra*), on the same state of facts. The English court, in this last

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[36] Palmer v. Humiston (1913), 87 Oh. St. 401, 408. Cf. also Railroad v. Commissioners, 31 Oh. St. 338, 351. "The obligation to restore is * * * a continuing condition, * * * against the right to insist upon the performance of which no lapse of time is available." It should be noted also that the malpractice case of Palmer v. Humiston involves injury to the person of a private person. The Ohio court thus seems to have adopted the principle decided in Railroad Co. v. Commissioners, 31 Oh. St. 338, and in Perry Co. v. Railroad Co., 43 Oh. St. 451, both of which involved injury to a public person, as equally applicable whether the plaintiff be a public or a private person.

[36a] 99 Oh. St. 361 (1919). Mr. Joseph A. Yager, of the Toledo Bar, called my attention to this decision after this paper was ready for the press.

case, decided that leaving the hole in the plaintiff's mine was not a wrong from which a new cause of action would arise. It also said that there was no "continuing obligation" on the defendant to prevent the flow of water into the plaintiff's mine, but the court gave no reason for this conclusion, contenting itself with the statement that "the plaintiffs have not alleged any such obligation * * * nor is their action founded on a breach of any such duty." The Michigan court, on the other hand, in the case of *The National Copper Co.* v. *The Minnesota Mining Co.*, while following the case of *Clegg* v. *Dearden* as a precedent, simply adopted without discussion the doctrine of that case, on the point that the hole was not a continuing trespass, but argued at greater length the other question as to whether "the flowing of the water through the opening" was a new trespass, and decided that it was not. The joint result of the English case and of the Michigan case is then that neither the leaving of the hole in the mine wall nor allowing the water to flow into the mine gives the plaintiff a cause of action, if the facts are presented to the court in the same way as they were in the Michigan case. If, however, a "repeated wrong" rather than a "continuous trespass" should be alleged as the gist of the action, the Michigan court would decide in favor of the plaintiff, as is shown in the recent case of *Gregory* v. *Bush*[37] in which the court said, "one cannot collect and concentrate * * * waters and pour them through an artificial ditch in unusual quantities upon his adjacent proprietor." And in the case of *Hurdman* v. *N. E. Ry. Co.*[38] the English court said that "if any one by artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbor's land and thus substantially to interfere with his enjoyment, he will be liable." In the *National Copper Co. Case* the owners of the Minnesota Mine, by allowing the surface of their mine to cave in, had diverted the surface water, falling upon their land and therefrom naturally passing over the surface of the National Mine, in such a way as to throw it into the neighboring mine, to its serious detriment, and a new right of action would arise for each successive flooding, even though the right of action for the original trespass in breaking through the wall was barred by the statute. It should be noted that this solution of the difficulty by the well established principles re-

[37] (1887) 64 Mich. 44. See also Yerek v. Eineder (1891), 86 Mich. 28.
[38] C. of A. (1878), L. R., C. P. D. 168.

lating to surface and percolating waters does not invoke the doctrine of the cases that deal with the intent with which the water is collected and with subsequent negligence in keeping it. The law of surface and percolating waters deals with an absolute liability, not with the question of intent or negligence.

It would seem that the confusion in the results depends in the main upon the use with varying connotation of three terms; namely, (1) continuing trespass, (2) continuing obligation, (3) repeated wrong. The case of *Clegg* v. *Dearden,* (*supra*), decides that keeping the hole open was not "a continuation of the trespass." In the *National Copper Co. Case,* (*supra*), the Michigan court approves and follows this decision. This is undoubtedly right, if by "trespass" we mean intrusion upon one's possession. A hole in the wall certainly does not fall in this category. But the Ohio court in the case of *Perry County* v. *Railroad Co.* (*supra*), decided that it was the *duty* of the defendant to fill up the hole in the road caused by the destruction of the bridge, that this duty was "a continuing obligation", and that each day's failure to perform this duty was "a fresh breach of such obligation", i. e., a new *wrong.* If then the allegation in the English case or in the Michigan case had been, that the leaving of the hole was a "continuing wrong", the plaintiff would have succeeded.[39] It has been shown above[40] that the decision of the Ohio court in *Perry County* v. *Railroad* has not been overturned by the decision in *Gillette* v. *Tucker,* as affirmed in *McArthur* v. *Bowers,* and we may assume that the Ohio court still believes the hole, as a continuing wrong, gives rise to a continually recurring new cause of action. But, furthermore, the final decision of the Ohio court in *Gillette* v. *Tucker,* as affirmed in *McArthur* v. *Bowers,* may be called in question on the facts. The sponge left in the wound is a fresh source of harm each day and we thus have in this case a "repeated wrong", a repeated trespass to the person, which no court has ever denied gives rise to a new cause of action on each repetition.[41] The case of *Lewey* v. *Fricke Coal Co.* (*supra*),[42] although apparently

[39] It should be noted that in the English case the action was in *case* and not in *trespass.* The allegation should therefore have been construed as an infringement upon a right, not as an intrusion upon possession.

[40] Cf. Note 36, *supra.*

[41] Perkins v. Trueblood (Cal., May, 1919), 183 Pac. 642; 18 MICH. L. REV. 679.

[42] Cf. Note 26, *supra.*

decided on the "equitable rule that the statute of limitations runs only from the discovery" really belongs in the class of "repeated wrongs", the wrong being the concealment of the fraud from day to day. The same may be said of the cases decided under statutes that do not bar the action, if the defendant fraudulently conceals from the plaintiff that there is a cause of action.

The law then finally seems to be as follows: the English court and the Michigan court have decided that leaving the hole is not a "continuing trespass". The Ohio court has decided that leaving the hole is "a continuing wrong" and this decision is left untouched by the later Ohio decisions, which, though apparently contradictory, are decided on a different state of facts. The malpractice cases may all be construed as cases of "repeated wrong" for which no court denies a recovery. Furthermore although the original Michigan case decides that the flowing of the water is not "a continuing trespass", the same court has later declared that the throwing of water upon an adjacent proprietor is a wrong, for which a fresh cause of action will arise as often as it is "repeated". In the use by the courts of the three terms above cited; namely, (1) continuing trespass, (2) continuing obligation, (breach of which is a continuing wrong), (3) repeated wrong, it will be observed that there is first a confusion of trespass in its original sense with that in the broader sense of wrong, and then a further confusion of "continuing" in its ordinary sense with that in the different sense of "repeated". It would then seem to be good legal tactics for the plaintiff in every such case to allege a "repeated wrong" and not a "continuing trespass", and this irrespective of whether the wrong be a trespass to land, as in the mining cases,[43] an intrusion upon one's personality as in the malpractice cases,[44] or a wrong to reputation as in the slander or libel cases.[45] The *pons asinorum* of continuous trespass could thus be avoided and a recovery assured in each case.

It should be said in conclusion that the criticisms here offered are not strictures on the courts but rather on the lawyers. The trouble arises from bad pleading. It would be impossible for the Michigan

[43] Clegg v. Dearden and Williams v. Pomeroy, Note 22, *supra;* National Copper Co. v. Minnesota Mining Co., Note 32, *supra.*

[44] Gillette v. Tucker, Note 24, *supra;* Perkins v. Trueblood, Note 29, *supra.*

[45] Dick v. Northern Pac. Ry. Co. (1915), 86 Wash. 211. Cf. 18 MICH. L. REV. 679.

court to come to any other conclusion than the one arrived at in the *National Copper Co.* v. *Minnesota Mining Co.* on the case as it was presented to the court. Furthermore, the errors in the decision, if they be such, have all been corrected by the courts themselves in subsequent cases; and in the handling of the same questions, if they should arise in these courts again, the later cases may be given their proper stress.

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