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Continuous Trespass and Repeated Wrong

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CONTINUOUS TRESPASS AND REPEATED WRONG.—In the recent case of *Perkins v. Trueblood*, (Cal., May, 1919), 191 Pac. 642, the facts were that, in March, 1912, the defendant, a surgeon, set the leg of the plaintiff, but as the fracture did not heal satisfactorily "the defendant separated the surfaces of the bone during the month of April, 1912, and again set the plaintiff's leg." In a suit for malpractice, begun on April 9, 1913, it was *held*, that the cause of action "was not barred by the CODE OF PROCEDURE, Article 340, subd. 3, prescribing a one year limitation period in such cases." It is difficult to tell from the report of the case what the theory of the court was as to the cause of action and the running of the statute of limitation, but it is evident that the court must have considered this not a case of "continuous trespass," with the old connotation of that term, but rather as a case of "repeated wrong," and that the statute began to run not from March, 1912, when the leg was originally set, but from April, 1912, the date when it was negligently reset.

The confusion of these two phrases, above quoted, has caused the courts a great deal of trouble, but wherever the facts have been of such a nature as to allow an initial wrong with continuing results to be differentiated from an initial wrong afterwards followed by a new wrong, they have reached the conclusion found in the California case. In the English case of *Clegg v. Dearden*, (1848), 12 Ad. and El. (N.S.) 575, a trespasser had broken through a wall in a mine and, after the statute had run on the original trespass, water had run through the hole and injured the plaintiff. It was held in an action on the case that there could be no recovery because leaving the hole was not a continuous trespass but only the result of the initial trespass, and the running of the statute had barred that trespass together with its results. In the case of the *National Copper Co. v. Minnesota Mining Co.*, (1885) 57 Mich. 83 the facts were identical with those in the English case and the conclusion was the same. In the case of *Gillette v. Tucker* (1902) 67 Ohio St. 106, a surgeon sewed up a sponge in a wound and left it there until after the statute had run on the original negligence of sewing it in the wound. The holding in this case, finally affirmed by the Ohio court in *McArthur v. Bowers*, (1905) 72 Ohio St. 656, was the same as in the cases of injury to land, above cited. The injury caused by the sponge remaining in the wound was held to be the *result* of the original wrongful act and not a new wrong, and recovery was denied the plaintiff because the statute had run on the original trespass. But in the case of *Perry County v. Railroad Co.* (1885), 43 Ohio St. 451, it was held that "each day's failure" to restore a bridge destroyed by fault of the defendant "was a fresh breach of an obligation" so to do; i. e., the leaving the hole in the road was a "repeated wrong" each successive day that it was so left.

In line with this last decision of the Ohio court it has recently been held in *Judd v. Blakeman* (1917), 175 Ky. 848, that each successive overflow of the plaintiff's land, caused by the negligent construction of the defendant, gave rise to a new cause of action, each successive overflow being treated as a "repeated wrong." There was a similar holding on the same state of facts in *Scheurich v. Empire District Electric Co.* (Mo., 1916), 188 S. W. 114. In the case of *Dick v. Northern Pac. Ry. Co.* (1915), 86 Wash. 211, where there was a continuous publication of a libel, each publication was held to constitute a separate libel and therefore a "repeated wrong," for which a recovery would be had, even if more than the statutory period had elapsed since the first insertion.

It would seem wise then to bring one's suit for "repeated wrong" rather than for "continuous trespass," and this too whether the action be for an injury to land, a wrong to the person or a slander to reputation. A more extensive consideration of this subject will appear in a later issue of this *Review*.

J. H. D.