RECENT ENGLISH DECISIONS.

Court of Appeal.

BRUNSDEN v. HUMPHREY.

Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods, is no bar to an action subsequently commenced for the injury to the person.

So *held* by BRETT, M. R., and BOWEN, L. J., Lord COLERIDGE, C. J., dissenting.

The plaintiff brought an action in a county court for damage to his cab, occasioned by the negligence of the defendant's servant, and having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence. *Held*, by BRETT, M. R., and BOWEN, L. J., Lord COLERIDGE, C. J., dissenting, that the action in the high court was maintainable, and was not barred by the previous proceedings in the county court.

Judgment of the Queen's Bench Division (L. R., 11 Q. B. Div. 712,) reversed.

APPEAL of the plaintiff against an order of the Queen's Bench Division making absolute a rule to enter judgment for the defendant. The plaintiff, whilst he was driving his cab, came into collision with a van of the defendant through the negligence of the defendant's servant, whereby he sustained bodily injury and his cab was damaged. The plaintiff, before the present action, sued the defendant for damage to his cab in a county court, and the defendant paid into court a small sum which was accepted, and thereupon the action in the county court was discontinued. Upon these facts the Queen's Bench Division entered judgment for the defendant: (L. R., 11 Q. B. Div. 712).

Waldy, Q. C., and *Crispe*, for plaintiff.

Murphy, Q. C., and *J. C. Hannen*, for defendant.

BRETT, M. R.—This case was heard before POLLOCK, B., and LOPES, J. The plaintiff was a cabman driving in his vehicle when he was run into by the defendant's vehicle. The collision was caused by the negligence of the defendant's servant. In the case in which the present appeal is brought, the plaintiff has sued the defendant for injury done to his person. The jury have found a verdict for 350*l.*, showing clearly that the personal injuries were serious. Before this the plaintiff had brought an action in the

county court for damage to his cab, by which he recovered a certain amount. In this second action it was urged that the plaintiff could not succeed, because no person can sue twice for one and the same cause of action. On the other side it was contended that there were two distinct causes of action, and that there was no law to prevent two actions; that it might be sometimes oppressive to bring two actions, but that in that event the court might summarily stay one of them, and that in the present case the two actions were not oppressive. The question is whether there are two causes of action, or whether there is only one; and if there is but one cause of action the present suit is not maintainable. For the defendant, reliance has, in effect, been placed upon the maxim, *interest reipublicæ ut sit finis litium:* and it has been contended that it enunciates an admirable rule of law. When that rule is applied to damages which are patent, it is a good rule; but where damages are afterwards developed, it is not a rule to be commended. It is a rule which sometimes produces a harsh result, and if it were now for the first time put forward, I could not assent to its being pushed to the length to which it has sometimes been carried; in fact it is never wanted except when injury, undeveloped at the time of action brought, is afterwards developed. However, the maxim exists, and it must receive a proper application. But, in order to apply it, we must often suppose what is not the case. It is to be assumed that the subsequent damage was in the contemplation of the person injured. The question, however, remains whether the cause of action is the same. In this case the injury was occasioned by the negligent driving of the defendant's servant. Suppose that by the negligent driving of the defendant's servant the van had run against the plaintiff's cab, and had injured him without doing any damage to the cab, an action would have lain, and any apparent bodily injury which the plaintiff might have sustained would be a cause of action. Suppose that the defendant's servant, by his negligent driving, had damaged the plaintiff's cab without injuring him personally; under circumstances of that kind the cause of action would be a damage to the plaintiff's property. The owner of property has a right to have it kept free from damage. The plaintiff has brought the present action on the ground that he has been injured in his person. He has the right to be unmolested in all his bodily powers. The collision with the defendant's van did not give rise to only one cause of action:

the plaintiff sustained bodily injuries, he was injured in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods; therefore the plaintiff is at liberty to maintain the present action. Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it; but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case. In the action brought in the county court, in order to support the plaintiff's case, it would be necessary to give evidence of the damage done to the plaintiff's vehicle. In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and of the sufferings which he has undergone, and for this purpose to call medical witnesses. This one test shows that the causes of action as to the damage done to the plaintiff's cab, and as to the injury occasioned to the plaintiff's person, are distinct. Therefore we are not now called upon to apply a legal maxim, the application of which ought not to be stretched. The plaintiff is entitled to recover the sum of 350*l.* awarded by the jury. Two actions may be brought in respect of the same facts, where those facts give rise to two distinct causes of action.

BOWEN, L. J.—The plaintiff in this case has recovered a verdict and 350*l.* damages for personal injuries sustained by him through the negligence of the defendant's servant in driving a van, which had come into collision with the plaintiff's cab, thrown the plaintiff from his box, and seriously injured him in his legs. Previously to bringing the action the plaintiff had sued the defendant in the county court for damages done to his cab in the collision, and the particulars delivered under his plaint had been confined to the damages which the cab had sustained. The defendant in the county court action paid 4*l.* 3*s.* into court together with 6*s.* costs, upon which the plaintiff had discontinued the county court plaint. The present action was now brought in the High Court for personal injuries, of the importance and extent of which the plaintiff alleged that he had been ignorant at the time of the county court proceedings. On a motion for a new trial the court below have entered a judgment for the defendant on the ground that the recovery of damages in respect of the cab in the county court is a bar to any further action for injury

to the plaintiff's person. The rule of the ancient common law is that where one is barred in any action, real or personal, by judgment, demurrer, confession or verdict, he is barred as to that or the like action, of the like nature, for the same thing forever. "It has been well said," says Lord COKE in a note to *Ferrer's Case*, 6 Coke 9 a., "*interest reipublicæ ut sit finis litium*, otherwise," says Lord COKE, "a great oppression might be done under color and pretence of law:" see, also, *Sparry's Case*, 5 Coke 61 a; *Higgens's Case*, 6 Id. 45 a; Year Book 12 Edward IV., p. 10 13,. Accordingly in *Hudson* v. *Lee*, 4 Coke 43 a, it was held to be a good plea in bar to an appeal of mayhem, that the appellant had recovered damages in an action for trespass brought for the same assault, battery, and wounding. So in *Bird* v. *Randall*, 3 Burr. 1345, it was decided to be an answer to an action for seducing a man's servant from his service, that penalties had previously been recovered by the master in satisfaction of the injury done him. So too in *Phillips* v. *Berryman*, 3 Doug. 287, a recovery in replevin was held to be good bar to an action on the statute of Marlbridge for an excessive distress, on the ground that the plaintiff had already had his remedy, and that a recovery in one personal action is a bar to all other personal actions on the same subject. The principle is frequently stated in the form of another legal proverb, *Nemo debet bis vexari pro eadem causa*. It is a well settled rule of law, that damages resulting from one and the same cause of action, must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit. "The principal consideration," says DEGREY, C. J., in *Hitchen* v. *Campbell*, 2 W. Bl. 827, is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case." "And one great criterion," he adds, "of this identity is that the same evidence will maintain both actions." See per Lord ELDON, in *Martin* v. *Kennedy*, 2 B. & P. 71. "The question," says GROSE, J., in *Sedden* v. *Tutop*, 6 T. R. 607, "is not whether the sum demanded *might have been*, recovered in the former action, the only inquiry is whether the same cause of action *has been* litigated and *considered* in the former action." Accordingly, "though a declaration contain counts under which the plaintiff's whole claim might have been recovered, yet if no attempt was made

to give evidence upon some of the claims, they might be recovered in another action:" *Thorpe* v. *Cooper*, 5 Bing. 129. It is evident therefore that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance.

I have now to consider the application of the above doctrine to the case of the present action; and the question to be decided is whether the damage done by the negligent driving of the defendant's servant to the plaintiff's cab is in substance the same cause of action as the damage caused by such negligence to the plaintiff's person. Nobody can doubt that if the plaintiff had recovered any damages for injuries to his person, he could not have maintained a further action for fresh bodily injuries caused by the same act of negligence, merely because they had been discovered or developed subsequently. See *Fetter* v. *Beal*, 1 Ld. Raym. 339. "The jury," says the court in that case, "have in the former action considered the nature of the wound and given damages for all the damage that it had done to the plaintiff." This authority, however, leaves still open the point I now have to determine, whether the cause of the action arising from damage to the plaintiff's cab is in substance identical with that which accrues in consequence of the damage caused to his person. In order clearly to elucidate this question, let me assume, for the sake of argument, that the damage had been caused by some act of the defendant himself, and not merely an act of his servant. According to the old distinctions of forms of actions which still have a historical value as throwing light upon the principles and definitions of the common law, the form of action upon such an hypothesis would have been trespass to the person for the personal injury; trespass to goods for the damage to the vehicle. Injury would have been done to the plaintiff in respect of two absolute and independent rights, the distinction between which is inveterate both in the English and Roman law. Every one in this country has an absolute right to security for his person. Everybody has further an absolute right to have his enjoyment of his goods and chattels unmeddled with by others. In the hypothetical case I am assuming both these rights would have been injured, and though the two injuries might have been combined in one suit, could it have been said that the subject-matter of each grievance was the same? Applying the test of identity furnished by DE GREY, C. J., in *Hitchen* v. *Campbell*, 2 W. Bl.

827, the first matter that is obvious is that the same evidence would not have supported an action for trespass to the person and an action for the trespass to the goods. In the one case the identity of the man injured and the character of his injuries would be in issue, and justifications might conceivably be pleaded as to the assault, which would have nothing to do with the damage done to the goods and chattels. In the other case the plaintiff's title to the goods might have been in issue in addition to the question of the damage done to them. Different provisions of the Statute of Limitations might possibly have applied in each case. And finally, the damage in one case might have been directly due to the wrongful act complained of; in the other case it might not. There is no authority, so far as I know, in the books, for the proposition that a recovery in an action for a trespass to the person would be a bar to the maintenance of an action for a trespass to goods, committed at the same time. In the present instance, as the defendant himself was not driving, but his servant, trespass would not have lain under the old law, and the plaintiff's remedy would have been in an action on the case for negligence, based on the negligent management by the servant of his master's horses, a negligence for which, in the eye of the law, the master or employer is responsible. Now, what is the gist of such an action on the case for negligence? If the whole of the plaintiff's case were to be stated and the entire story told, it seems to me that it would have comprised two separate or distinct grievances, narrated, it is true, in one statement or case. Actions for the negligent management of any animal, or any personal or movable chattel, such as a ship or machine, or instrument, all are based upon the same principle, viz., that a person, who, contrary to his duty, conducts himself negligently in the management of that which contains in itself an element of danger to others, is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which, in such an instance, will, as a rule, involve, and have been accompanied by specific damage. Without reverting to the Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made, either by judges or juridical writers, of the terms "*injuria*" and "*damnum*," it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain

class of cases the mere violation of a legal right imports a damage. "Actual perceptible damage," says PARKE, B., in *Embrey* v. *Owen*, 6 Ex. 353, at 368, "is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage." But this principle is not, as a rule, applicable to actions for negligence which are not brought to establish a bare right, but to recover compensation for substantial injury. "Generally speaking," says LITTLEDALE, J., in *Williams* v. *Morland*, 2 B. & C. 916, "there must be temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case." See *Fay* v. *Prentice*, 1 C. B. 835, per MAULE, J.

This leads me to consider whether, in the case of an accident caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there is one cause of action only, or two causes of action which are severable and distinct. This is a very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the court below and from the great authority of the present chief justice of England. According to the popular use of language, the defendant's servant has done one act and one only, the driving of the one vehicle negligently against the other. But the rule of law, which I am discussing, is not framed with reference to some popular expressions of the sort, but for the sake of preventing an abuse of substantial justice. Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in *one* sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which if no damage had ensued would have been legally unimportant. It certainly would appear unsatisfactory to hold that the damage done in a carriage accident to a man's portmanteau was the same injury as the damage done to his spine, or that an action under Lord CAMPBELL'S Act by the widow and children of a person who

has been killed in a railway collision, is barred by proof that the deceased recovered in his lifetime for the damage done to his luggage. It may be said that it would be convenient to force persons to sue for all their grievances at once, and not to split their demands; but there is no positive law (except so far as the county court acts have from a very early date dealt with the matter) against splitting demands which are essentially separable (see *Seddon* v. *Tutop*, 6 T. R. 607), although the High Court has inherent power to prevent vexation or oppression, and by staying proceedings or by apportioning the costs, would have always ample means of preventing any injustice arising out of the reckless use of legal procedure. In the present case the plaintiff's particulars in the county court were confined to the damage done to his cab; the injury to his person, therefore, was neither litigated nor considered in the county court. The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second: see *Seddon* v. *Tutop*, 6 T. R. 607. With all respect, I do not see how it can be said that *Nelson* v. *Couch*, 15 C. B. N. S. 99, so decides. That case established only the converse rule, viz., that the maxim, "*nemo debet bis vexari*," cannot apply where in the first action the plaintiff had no such opportunity of satisfying his claim. The language of COLERIDGE, J., and the other members of the court, *Hodsoll* v. *Stallebrass*, 11 A. & E. 305, must, I think, be read by the light of the special circumstances of that case; and so read, is not inconsistent with the view at which I have here arrived. I am in no way departing from the language of this authority, in holding, as I do in the present instance, that the damage, for which the plaintiff is now suing, accrues from a different injury, and, therefore, a different wrong from that for which he recovered damages in the county court. The view at which I have arrived, is in conformity with the reasoning of the judgment recently pronounced by this court in the case of *Mitchell* v. *Darley Main Colliery Co.*, L. R., 14 Q. B. Div. 125, where it was held, reversing *Lamb* v. *Walker*, 3 Q. B. D. 389, that each fresh subsidence of soil in the case of withdrawal of support gave rise to a fresh cause of action. Nor do I feel called upon to extend the application of the sound and valuable principle of law, that none shall be vexed twice for the same cause of action, to a case to which it has never yet been applied, and to which it can only be applied by pursuing analogy to lengths, which would involve practical injustice. The present case

is one in which I am conscious that lawyers of great authority do differ, and will differ. But on the whole, in my opinion, the judgment of the Queen's Bench Division ought to be reversed, and the judgment entered at the trial for the plaintiff be restored with costs to the plaintiff, including the costs below and of this appeal.

LORD COLERIDGE, C. J.—In this case, I am, with much regret, unable to concur in the judgment of my Brother BOWEN, to which I understand the Master of the Rolls to assent. I should have been glad in the face of this difference of opinion to have given reasons at length for my inability to agree in the judgment. But the plaintiff very naturally presses for judgment, and I am unable to do more than shortly to express my dissent. It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same: that the injury done to the plaintiff is injury done to him at one and the same moment, by one and the same act in respect of different *rights*, *i. e.* his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured, his trousers which contain his leg, and his coat-sleeve, which contain his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it. I think that the court below was right, and that this appeal should be dismissed.

That the same act—the same tort—may cause two injuries, and subject the party to two different suits, is, of course, legally possible. The most obvious instance is where two different persons are injured in their person or individual property by one and the same act of the defendant. There, clearly enough, the wrongdoer is liable to a suit by each; and if one steals the property of A., and other property of B. at the same time, he is liable to two indictments and two punishments; for really it is two larcenies, although only one act of taking: *Commonwealth* v. *Sullivan*, 104 Mass. 552; *Commonwealth* v. *Andrews*, 2 Id. 409; *State* v. *Thurston*, 2 McMullan 382; *United States* v. *Beerman*, 5 Cranch C. C. 412, a valuable case on the point.

But where only one person is injured by one isolated and single act, not continued or repeated, whether that injury be to two portions of his person, as his leg and his arm, or to his person and also to his property, or only to two different articles of his personal property, it is not easy to see, upon the well-established principles, how there are two *causes* of action, or why there should be, or need be, two different suits to recover the whole amount of damage sustained.

That in the last instance given above,