said that a court of equity can go nowhere except it has some specific case, like a plank to walk forth upon. As Judge TULEY remarked in the *Hamlin-Davis* case: "The law recognises the fact that the business of the world cannot be carried on without confidential relations existing, and also that man is '*unco*' weak and little to be trusted, and therefore declares the person occupying the fiduciary relation incapacitated, as against his employer to obtain any interest or advantage by a breach of the trust relation, or in the language of one of the judges, 'The wise policy of the law has therefore put the sting of disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation.'" (Per TULEY, C. J., decision in *Hamlin* v. *Davis*, not reported.

ADELBERT HAMILTON.

Chicago.

RECENT ENGLISH DECISIONS.

Court of Appeal.

MITCHELL *v.* DARLEY MAIN COLLIERY CO.

The plaintiff was the owner of certain land, and in 1867 and 1868, but not afterwards, the defendants worked a seam of coal lying under and near to the plaintiff's land, which subsided in consequence of the defendant's excavation. Some cottages of the plaintiff standing on his land were damaged by the subsidence and were repaired by the defendants. In 1882 a second subsidence of the plaintiff's land occurred owing to the defendant's workings in 1867 and 1868, and the plaintiff's cottages were again damaged. *Held*, that the plaintiff was entitled to maintain an action for the damage done to his cottages in 1882, and that his right to sue was not barred by the Statute of Limitations.

Nicklin v. *Williams*, 10 Ex. 259; *Backhouse* v. *Bonomi*, E., B. & E. 622; 9 H. L. Cas. 503; *Whitehouse* v. *Fellowes*, 10 C. B. (N. S.) 765, discussed; *Lamb* v. *Walker*, 3 Q. B. Div. 289, overruled.

ACTION for damages for injuries done to three cottages and six perches of land belonging to the plaintiff.

The writ of summons was issued on the 27th of December 1882, and the action itself came on for trial before HAWKINS, J., at the Summer Assizes held at Leeds in August 1883, and the following facts were admitted or proved:

On or about the 11th of December 1866, the plaintiff, by virtue of a deed of conveyance bearing date on that day, became the tenant in fee simple of six perches of land situate at Ward Green, in

Worsbrough, in the parish of Darfield, Yorkshire. Prior to the year 1878, six cottages had been erected thereon, and in or about that year, these six cottages were pulled down, and three cottages were erected on the site of them. The defendants were the lessees of a seam of coal about nine feet in thickness under the land upon which the plaintiff's cottages stood, and under certain adjoining land; they had worked the seam during the years 1867 and 1868, but not afterwards. A subsidence owing to the defendants' workings took place in 1868 and continued until 1871, and the plaintiff's six cottages which then stood upon his land were damaged by that subsidence, and were afterwards repaired by the defendants. In 1882 a further subsidence, caused either wholly or in part by the defendant's excavations during 1867 and 1868, occurred, and thereby damage was done to the plaintiff's land, and to the three cottages then standing thereon. The present action was brought to recover compensation for the damage done by the subsidence happening in 1882, and the defendants, amongst other defences, pleaded that the alleged causes of action did not arise within six years before the commencement of the action, and that the plaintiff's right to sue was barred by the Statute of Limitations.

The jury summoned to try the issues of fact having been discharged by consent, the action was reserved for further consideration, and ultimately HAWKINS, J., directed judgment to be entered for the defendants. The learned judge was of opinion that *Lamb* v. *Walker*, 3 Q. B. Div. 389, was an authority in point for the present action, and felt himself bound by the decision of the majority of the Queen's Bench Division in that case.

The plaintiff appealed.

Alfred Wills, Q. B. (*C. E. Ellis*, with him), for plaintiff.

John Forbes, Q. C. (*Pain*, with him), for defendants.

BRETT, M. R.—In this case the plaintiff has brought an action against the defendants for an injury to his property arising, as he alleges, from something done by the defendants on their own property. The plaintiff was the owner of property on the surface, and the defendants were, and are, the owners of the mines immediately under or close to the plaintiff's property. In 1868 the defendants worked out the whole of one seam of coal, said to have been a seam of about nine feet in thickness. It would seem that soon

after that excavation of theirs, and by reason of it, the surface was interfered with and sank, and in consequence of that sinking some property of the plaintiff's was damaged. The plaintiff made a claim in respect of that damage to his property, and it was repaired by the defendants. That seems to me to be precisely the same as if the plaintiff had brought an action against the defendants and had recovered damages; the money would have been wanted in order to enable him to execute the repairs. It is not alleged by the plaintiff that any further damage was done to any property of his by the actual subsidence which then took place, that is, soon after 1868. If the ground had not moved any more, there would have been no further injury to his houses. The houses had been repaired and there was an end of that. It seems clear to me that, perhaps in consequence of something that was done by somebody else, and certainly not in consequence of the defendants having done anything in the meantime, but having left this excavation as it was, a subsidence took place: not the same subsidence which had done the former injury, but a new subsidence; and the plaintiff alleges—and I think it must be taken to be so—that this new subsidence has done him some appreciable injury. Accordingly he brings this action in respect of an appreciable injury caused by that new subsidence. The objection taken to him is, that he has brought this action too late. The argument is that as he has brought this action more than six years after that first subsidence which gave him a cause of action, therefore he cannot maintain it, because in an action brought at the time of the former subsidence he might have recovered damages prospectively for what has since happened to him. That is the answer of the defendants. The reply on the part of the plaintiff is this: the fact of the defendants excavating their minerals gave him no cause of action; it did him no injury by itself; they had a right to do it; the mines were their own property, and they had a perfect right to do what they liked with their own, so long as they did not hurt him. When they excavated the minerals which were their own property, if they had then and there taken means to prevent the sinking of the plaintiff's property, he would have had no cause of action against them; what they did in excavating was perfectly lawful, if they had taken care that in so using their property, they did not hurt him: but in 1868, or immediately afterwards, they did something which did give him a cause of action, that is, they caused his land to subside, and that subsi-

dence caused by them was his cause of action; they caused that subsidence by mining, and by not propping so as to prevent the plaintiff's land subsiding afterwards. That cause of action was settled between them when they repaired his houses; but now they have done him a new and wholly independent injury; they have caused his land to subside again. It is true that in this case it is at the same spot as before, but it might have been a hundred yards off: it is a new subsidence. They have caused that subsidence by the excavation of the minerals in 1868, and by not having filled up that excavation before 1882. It is no answer to the plaintiff in respect of this new subsidence, which is the new injury to him, to tell him that the *causa causans* of that was the same as the *causa causans* of the old subsidence. That *causa causans* gave to the plaintiff no right of action at all in either case; but the two different results from it have given the plaintiff two causes of action, and although it is true to say that for the same cause of action, successive actions for damages cannot be maintained, yet there may be any number of successive causes of action. That is the whole dispute between the parties. Therefore we must consider what is the real cause of action.

In *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503, it was argued that the cause of action was the excavation, and that the subsidence was merely a damage resulting from the excavation. Upon that argument it was urged on behalf of the defendant that the action was brought too late, because it was brought more than six years after the excavation, although it was commenced within six years after the subsidence. The application of *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503, depends upon a view of the facts, which was raised by a question proposed to the learned judges. That question had nothing to do with successive subsidences, the consequence of one excavation. The question put to the judges was, in effect, that if there is only one subsidence, the result of one excavation, is the Statute of Limitations to run from the time of the excavation or from the time of the subsidence, the words of the Statute of Limitations being that an action must be brought within six years after the cause of action accrued? That raises the question, what, in such a case, is the cause of action? If the excavation was the cause of action, it having been rendered wrongful by the subsequent subsidence, even in that view the wrongful act was the excavation. But the House of Lords held that the excavation was not originally a wrongful act, and because it is not originally a wrongful act, it is not made

a wrongful act by something happening subsequently. An act which is right at the time when it is done cannot be turned into a wrongful act by something that happens subsequently. Therefore, it was held that the excavation was not the cause of action; it was only the cause of the cause of action; the cause of action was the subsidence, and that alone; the defendant had so used his property as to make the plaintiffs' property subside, and it was the making their property subside which was the cause of action. Thereupon, the law lords said, that the statute ran from the time when the cause of action accrued, and that was the moment of the subsidence. *Backhouse* v. *Bonomi*, seems to me not to have decided in direct terms the question of successive subsidences, although I think that it follows from *Backhouse* v. *Bonomi*, that successive subsidences, when they are independent subsidences, are independent causes of action, but as to this latter point *Backhouse* v. *Bonomi*, does not bind us by its authority.

Nicklin v. *Williams*, 10 Ex. 259, had occurred before *Backhouse* v. *Bonomi*. I do not think it was necessary in *Backhouse* v. *Bonomi*, for the House of Lords to determine whether *Nicklin* v. *Williams*, was right. I say again that the logical conclusion from *Backhouse* v. *Bonomi* is to show that *Nicklin* v. *Williams* was wrong, but it is not necessary to overrule it. If *Nicklin* v. *Williams* is right, we ought to give judgment in favor of the defendants, because that case raised the same point as is raised now. It is true that the question in that case was raised upon demurrer, but it was precisely the same as that now raised, because there an excavation had been made and a subsidence had happened. The defence was that the cause of action in respect of that subsidence had been satisfied. The plaintiffs pleaded as a new assignment, that they were not suing for that cause of action which had been satisfied, but for a new and different cause of action, namely, a subsequent subsidence. It was argued for the defendant that the new assignment was bad, for it is only a new assignment of a damage which was the result of the former cause of action. If that had been true, the objection of the defendant would have been good. The Court of Exchequer upheld the argument for the defendant, and they decided that the new assignment was bad. Although they did not so express themselves in terms, I think their judgment must have been based on the ground that the new assignment was really a claim for more damages than had been recovered in the first action, and that the

damages claimed were damages for the same cause of action. Therefore the result is that where an excavation has been left which causes one subsidence, if it is still left and causes another subsidence, then the second subsidence is a part of the damages of the first cause of action, and is not itself a new cause of action. But if the subsidence itself is the cause of action, and if the two subsidences are different and independent subsidences, although the *causa causans* of both is the same, it seems to me that there are two different causes of action, and then the decision in *Nicklin* v. *Williams* was wrong. I have already intimated that in my view the logical conclusion from *Backhouse* v. *Bonomi* shows distinctly that *Nicklin* v. *Williams* was wrong. Therefore, I am of opinion that *Nicklin* v. *Williams* cannot be supported as good law.

Then we come to the case of *Whitehouse* v. *Fellowes*, 10 C. B. (N. S.) 765. That was not a mining case, but it seems to me that it raised precisely the same principle, and the same kind of question. There the trustees of a turnpike road made a covered drain by the side of the highway. They made it in such a manner that it collected water in it, and that the collected water was caused to flow into the plaintiff's mines. The drain had been so built that it did not allow the water to go elsewhere than into the plaintiff's property. The trustees relied upon a statutory defence that they had made the drain more than three months before action; but it appeared that the plaintiff had sustained damage within three months. What is the difference between the two cases? In the one case an excavation is made in the earth by an owner in his property, the result of which is that his neighbor's property subsides. In *Whitehouse* v. *Fellowes*, *supra*, a drain was made which the trustees had power to alter, or to take up; they made it, not in the mine owner's property but in property over which they had a power, and which therefore, as far as the mine owner was concerned was a different property from his; it injured him and gave him a cause of action; and they kept the drain without altering it. The Court of Common Pleas said the *causa causans* of the injury to the property was a continuing cause; but that cause alone gave to the mine owner no cause of action, it was a cause which if thereby any damage was occasioned to the mine owner's property, would immediately give him a cause of action; it had given a cause of action some time ago, but since that the trustees continued it; they might have stopped it. the continuing *causa causans* remained, and remained in the power

of the trustees, and that caused a new injury to the mine owner's property; that was a new cause of action because it was an injury to the mine owner's property in each case. It seems to me that the case of *Whitehouse* v. *Fellowes* is in direct conflict in principle with the case of *Nicklin* v. *Williams*, and that it is impossible as a matter of principle to allow both those cases to stand together. Inasmuch as I have already expressed an opinion that *Nicklin* v. *Williams* was wrongfully decided, I come to the conclusion that *Whitehouse* v. *Fellowes* was rightly decided, and further that *Whitehouse* v. *Fellowes* is in accordance with the principles laid down in *Backhouse* v. *Bonomi*.

Then I come to the case of *Lamb* v. *Walker*, 3 Q. B. Div. 389, and, to show how difficult all this is, in the case of *Lamb* v. *Walker*, which was decided after the other two cases and after *Backhouse* v. *Bonomi*, eminent judges of great learning were in direct conflict of view, and anything more directly in conflict than the views of the Lord Chief Justice and MANISTY, J., cannot be conceived. They are just as much in conflict as the case of *Whitehouse* v. *Fellowes* is in conflict with *Nicklin* v. *Williams*. We have had these judgments carefully analyzed before us; and I think that we must agree either with the Chief Justice or with MANISTY, J., and if we agree with one of them we must disagree with the other. I cannot help thinking that the judgment of the Lord Chief Justice, which he might have founded entirely upon *Backhouse* v. *Bonomi*, examines the whole subject afresh, and gives the most weighty reasons to show, that in such a case as this the only cause of action is the subsidence of the plaintiff's land, and if that subsidence has been brought about by the defendants—whether or not by the omission of something after commission, that is, without taking precautions against the consequences of an act of commission by them—each subsidence is a new cause of action. I cannot see myself any answer to the case put by the Lord Chief Justice, which is this. Where an excavation has been made, and a subsidence has taken place, it may be true that for all the effects, both existing and prospective, of that subsidence, the person injured ought to sue at once, and I incline to think that he ought. It is not necessary to determine that in this case, but I am strongly inclined to think that he ought. But what is to be done as to a new subsidence? The mine-owner has excavated in his own property; he knows that he has caused a subsidence to his neighbor's property, and he knows that

that neighbor is entitled to damages for it; will he run the risk of allowing that excavation to continue, the effects of which he may obviate by immediately putting a wall or propping up his own property? There is nothing to prevent him; will he allow that to continue or will he not? If he does nothing, he is not counteracting the effects on his neighbor's property of something which he has done on his own; he is not counteracting that mischief to his neighbor by doing something on his own property; and if there is a new subsidence that will give his neighbor a new cause of action. The Chief Justice says it is difficult to conceive that the jury, which is the tribunal that is to give damages for the first subsidence that is existing, ought to give damages for a prospective new subsidence which the defendant has the option and the right to prevent; so that, although before the verdict of the first jury is given, or although at the time that that verdict is given the mine owner is doing that which will prevent any future damage, nevertheless the jury in the first action ought to take into consideration the prospective injury which might be thought likely to occur at the time when the action was brought. That seems to me to be a proposition which, when it is well sifted out and examined, cannot stand, and therefore, the Chief Justice's reasoning, of itself, and without reference to *Backhouse* v. *Bonomi*, is conclusive to show that each subsidence is a fresh cause of action. Besides that, it seems to me in accordance with what was decided in *Backhouse* v. *Bonomi* and to be the logical result of *Backhouse* v. *Bonomi*. Therefore, with great deference to my Brother MANISTY, I think the judgment of the Chief Justice is to be preferred. I think that the judgment of MELLOR, J., in that case was not a judgment of his own mind, acting independently, but only an inquiry whether he was concluded by authority, and at that moment and at that time it may be that the case was. Therefore, I agree with the Lord Chief Justice's view that each subsidence is a new cause of action, although the *causa causans* of each subsidence may be the same.

It may be argued that the *causa causans* is not the same. The *causa causans* of the first is the excavation; the *causa causans* of the second is, as a matter of fact, the excavation unremedied, or the combination of the excavation and of it remaining unremedied. Therefore, whilst I am strongly of opinion, although it is not necessary to decide it in this case, that in respect of the same subsidence the jury ought to take into account, not only the actually existing

damages caused by that subsidence, but also the prospective damages which may be the result of that subsidence, yet I think that where there is a new and further subsidence, that is a new cause of action. If that is so, the plaintiff is right in this case, and is entitled to succeed. The result of our judgment is, that this case will be referred to some arbitrator who will have to determine the amount of damages caused by this second subsidence. What the measure of damages is in that inquiry, is not for us now to determine.

BOWEN and FRY, L. JJ., delivered concurring opinions.

That a statute of limitations does not commence to run until the plaintiff has a complete and perfect cause of action, is, of course, elementary law. That a complete cause of action does not exist until the plaintiff has sustained some damage, is equally true; though its application is not always clearly understood, or perhaps correctly made. Lord HOBART, C. J., long ago, in *Waterer* v. *Freeman*, Hob. 267 *a*, laid down the rule thus: "There must be not only a thing done amiss, but also a damage, either already fallen upon the party, or else inevitable." And long before that it had been declared in the Year Book of 19 Hen. VI. 44, "If a man forge a bond in my name, I can have no action, *yet;* but if I am sued, I may, for the wrong and damage, even though I may avoid the bond by plea."

The difficulty in the application of this principle is to determine in what cases damages do arise, or are presumed to arise, immediately upon the execution or completion of an act, so as to give an immediate cause of action, and when not. And without considering the subject of actions upon contracts, but only those arising from torts, positive or negative, some light may be gathered from a few illustrations. The question always is, was the act done itself, and under all circumstances, a legal wrong; an invasion of a fixed and absolute right, to which the law always imputes at least nominal damages, or was it an act harmless in itself, and only a legal injury when attended or followed by actual injurious consequences to another? If one commit an assault and battery upon another, the latter's right of action is of course at once complete and perfect at the commission of the offence; some damage instantly accrues, and no subsequent increase or development of the injury, however great, or however subsequent in time, so long as it is a consequence of the original tort, can ever constitute a new cause of action, as was clearly established in *Whitney* v. *Clarendon*, 18 Vt. 258; *Hodsoll* v. *Stallerbrass*, 3 P. & Dav. 203; 11 Ad. & E. 306; *Gustin* v. *Jefferson*, 15 Iowa 158, and other cases. Consequently the statute of limitations begins to run from the time of the assault, and not from the time of its subsequent consequences.

If personal property is wrongfully taken from the possession of the owner, his cause of action is complete and perfect at the moment, and he acquires no new or second cause of action by the fact of a subsequent injury to or destruction of the chattel by the wrongdoer; consequently the period of limitations arises from the original act of taking, and not from the subsequent destruction: *Granger* v. *George*, 5 B. & C. 149; *Clarke* v. *Marriott*, 9 Gill 331; *Johnson* v. *White*, 13 Sm. & Marsh. 584.

And if such property is wrongfully taken from the possession of a lessee or bailee for a fixed term, *his* right of ac-

tion commences immediately, for the act of taking is, *per se*, an invasion of his right of present possession, and no other proof of damage would be necessary; but the lessor or bailor would not have a right of action without proof of actual damage or injury to the chattel itself; *i. e.*, his reversionary rights thereto. Consequently the statute of limitations would run only from that time.

If a person utters some kind of slanderous words, such as are slanderous *per se*, some damage is presumed at once, and the cause of action arises, once for all, upon the utterance; but if he utters some other words, such as not slanderous *per se*, no cause of action exists until some special or actual damage has been occasioned to the plaintiff, which may be a long time subsequent to the speaking: *Swan* v. *Tappan*, 5 Cush. 104; consequently the limitation does not commence until that event.

On similar grounds it has been held, that in an action by a father for the mere loss of his daughter's service, caused by her seduction and subsequent confinement, the limitation begins to run when the loss of service accrued, and not from the time of seduction: *Hancock* v. *Wilhoite*, 1 Duv. (Ky.) 313; though as to an action for the mere seduction, it might be different.

So, if an officer has been guilty of negligence in serving or not serving legal process, committed to him by a plaintiff, the latter's cause of action does not arise at the time of the negligence, but only at the time he sustains actual perceptible damage as the result of such negligence; and, consequently, his right is not barred until the statutory period has elapsed after the occurrence of such damage. This was elaborately vindicated in *The Bank of Hartford Co.* v. *Waterman*, 26 Conn. 324. See, also, *Williams* v. *Mostyn*, 4 M. & W. 145; *Planck* v. *Anderson*, 5 T. R. 37; *Commercial Bank* v. *Ten Eyck*, 48 N. Y. 305; *Roberts* v. *Read*, 16 East 215; *Gillon* v. *Boddington*, 1 C. & P. 541; *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765.

If a party sustains an injury to his land by the obstruction of a watercourse, his right of action commences when he sustains the damage, and not necessarily when the obstruction is erected; and therefore the statute commences from the time of the injury: Angell on Lim. § 300; *Union Trust Co.* v. *Cuppy*, 26 Kans. 756.

In other words, if an act, in and of itself, always gives a cause or right of action at once and immediately upon its commission, then there can be but one suit for such act, and all damages, prospective as well as existing, must be recovered in the first action or not at all. No new development of damages, not suspected or known before, can give a right to a second suit. But where an act is itself innocent, and does not give a right of action unless coupled with or followed by actual appreciable damage, then as two facts must concur in order to support a suit, there can be no complete cause of action until the second event happens, and, consequently, the statute of limitations does not begin to run until that time.

Therefore, to apply the foregoing suggestions to the facts involved in the principal case. Every man has a right to excavate on his own land—that act alone gives a neighbor no right of action until his land falls in consequence, and he thus sustains actual damage. If the party excavating shores up the neighboring land, and stays its subsidence, he is not liable. Therefore, it is clear an action would not lie for such excavation until the first subsidence. But the more delicate question is, whether, if there has been one action based on the first subsidence, a second action can be maintained for a second subsidence? or whether that should have been anticipated in the first suit, and recovered as prospective or reasonably to be anticipated damages in the first suit.