PLEADING

The Concept of a Cause of Action — Property Damage and Personal Injury from a Single Tort

Within the meaning of the rule against the splitting of causes of action, what constitutes a cause of action? Is a cause of action a fixed and inflexible concept, or can it be adapted to the purpose for which it is being used? To illustrate the problem, one situation will be considered; that of property damage and personal injury resulting from a single tort.

In Ohio the case of *Bilakan* v. *The Columbus Railway and Light Co.*, 10 Ohio N.P. (N.S.) 561 (1910), appears to be the first case on the point. Here, on a motion to separately state and number the causes of action, the court held that personal injury and property damage resulting from the same tort constituted one cause of action. This seems the more desirable rule under the circumstances. It simplifies the pleadings, as the plaintiff is only required to state the facts constituting the cause of action once.

Later the case of *Le Blond Schacht Truck Co.* v *Farm Bureau Mutual Automobile Ins. Co.*, 34 Ohio App. 478 (1929), came before the Court of Appeals. In this case the insured's automobile was demolished in a collision with defendant's truck. The insurer, under a policy containing a subrogation clause, paid the insured for all damages to the automobile and took a bill of sale therefor. After the insured had recovered judgment for his personal injuries, the insurer brought suit for damages to the automobile. Prior to this the case of *Cox* v. *Traction Co.*, 32 Ohio C.A. 487 (1922), had held that under the real party in interest statute one who has suffered an injury and has been fully indemnified by a liability insurance company cannot prosecute an action against those who caused the injury, but that such action must be brought in the name of the subrogated insurer.

The court in the *Le Blond Schacht* case found itself in an awkward situation. If the concept of a cause of action adopted in the *Bilakan* case were rigidly applied, the only party who could sue would not have a cause of action. The prior suit by the insured would be *res adjudicata* to the insurer's cause of action and the insurance company's claim would be barred. Rather than reach this very undesirable result the court modified the concept of a cause of action so as to accomplish justice in the particular case, and held that there were two causes of action in this situation. Thus it will be seen that in this situation the court adopted a concept of a cause of action to work the best results under the facts in question, and did not think of a cause of action as an inflexible stand-

ard to be applied arbitrarily under all circumstances without regard to the end to be achieved. The above case was followed upon identical facts in *North River Ins. Co.* v. *Redman*, 16 Ohio Abs. 516 (1933), and *Central Greyhound Lines, Inc.* v. *State Auto Ins. Co.*, 17 Ohio Abs. 419 (1934).

The question was presented on a different state of facts in *Mayfield* v. *Kovak, Jr.*, 41 Ohio App. 310 (1932). The plaintiff had suffered personal injuries and property damage from a single tort of the defendant. Plaintiff first filed a petition in the common pleas court against the defendant for personal injuries and later, while that case was pending, began action in the municipal court against the defendant for the property damage. The latter case was tried and judgment entered in favor of the plaintiff. The defendant then filed an amended answer in the common pleas court case, claiming that the judgment in the municipal court was *res adjudicata*. The court held that under these circumstances there was only one cause of action; but that the defendant would be held to have impliedly consented to a splitting where two actions are brought and he fails to object to the trial of the second action at the earliest opportunity, and submits the case upon the merits.

Interpreting the case from a legislative viewpoint, the court is holding that there is one cause of action here, but the effect of their holding is that, unless the defendant promptly objects to the bringing of the second suit, there will be two causes of action. The holding in the case seems desirable. The court refused to permit the defendant to sit back and allow the plaintiff to recover on his second cause of action without making any objection, and then, as soon as judgment is rendered, to take advantage of the mistake of the plaintiff's lawyers and defeat the plaintiff's claim by a plea of *res adjudicata*.

The latest Ohio case is *Wilmer* v. *Vail*, 22 Ohio Abs. 605 (1936), in which an action for property damage was brought and the plaintiff sought to amend after the statute of limitations had run and to include a claim for personal injuries suffered from the same act of negligence. The court held that a single tort which causes personal injury and property damage to an individual gives rise to but one cause of action.

Here also the court reached a desirable result by holding there was one cause of action. The defendant was put upon notice by the bringing of the suit for property damages. He would not have to prepare any new evidence and would not be prejudiced in any way by allowing the amendment after the statute of limitations had run. On the other hand, if the court had held that there were two causes of action under the circumstances, the plaintiff's right to damages for the personal injury would have been barred.

As will be seen from the foregoing cases, the courts have not regarded a cause of action as a fixed and inflexible concept to be applied inexorably in every instance, but as a concept that can be modified so as to reach the most desirable result upon the facts before the court. It is submitted that the concept of a cause of action should not be regarded as fixed and unyielding to be applied strictly under all circumstances, but as flexible and elastic to be modified so as to achieve the most desirable results under the facts of the case in question.

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ELECTION OF REMEDIES — REPUDIATION OF ELECTION DOCTRINE IN AMENDMENT OF PLEADINGS — INTERPRETATION OF SECTION 11363, OHIO GENERAL CODE

Plaintiff recovered judgment in an action for breach of a contract to deliver certain stock. The case was reversed by the Court of Appeals and remanded for a new trial. Plaintiff then filed an amended petition alleging substantially the same set of facts as the original petition, but added that defendant had failed to perform its agreement to deliver the stock and that thereafter plaintiff rescinded the contract and demanded that defendant return the money which had been paid. Defendant filed a motion to strike the amended petition from the files on the ground that it set up a different cause of action from that stated in the original petition. Held, that in the light of all the circumstances, there was no prejudicial error in overruling the motion, *Isaac* v. *Intercoast Sales Corp.*, 132 Ohio St. 289 (1937).

Defendant's contention was that the amended petition represented a new cause of action and that there had been an election of remedies by plaintiff when he filed the original petition. The court stated that the principle running through all of the decisions is toward liberality in amending pleadings in the furtherance of justice, especially where the facts are the same and where the amended pleading does not catch the defendant by surprise. It was pointed out that the prayer and essential facts of the original and amended petitions were the same, as was the defense in both trials, namely, that the stock had been delivered by defendant. Defendant knew that plaintiff wanted his money back for the reason that he had never received the stock, and plaintiff knew that the defense of defendant would be that it had delivered the stock. Since each side knew what the position of the other side was, the court thought that defendant was not caught by surprise by the filing of the amended petition.