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Comment on Recent Decisions

ACTIONS—TWO DISTINCT CAUSES OF ACTION ARISE FROM AUTOMOBILE ACCIDENT—Defendant's testator negligently injured the plaintiff in an auto accident. Plaintiff filed an action for damage to his property, and defendant contends that only one cause of action arose from the accident, and that action abated with death of defendant's testator. *Held*, two distinct causes of action arose, one for injury to the person which abated, and the other for damage to property which survived under New York Decedent Estate Law. *Timian v. Whelan*, (1926) 128 Misc. 192, 218 N. Y. S. 108.

The general rule is that a single cause of action cannot be subdivided into several claims and separate actions maintained for each. *Succor v. Sturgis*, 16 N. Y. 548; *Nathan v. Hope*, 77 N. Y. 420. There is conflict of authority as to whether injury to both person and property from same wrongful act gives rise to distinct causes of action. In *Watson v. Texas & P. R. Co.*, 8 Tex. App. 144, 27 S. W. 924, an action for personal injuries sustained by the owner of horses while traveling with them on a drover's pass was not barred by a judgment for damages to horses. In *Boerum v. Taylor*, 19 Conn. 122, the court held an injury to property as direct result of a wrongful act and injury to health of plaintiff as indirect. Though growing out of the same act, two distinct causes of action may be brought. In *Chicago W. D. R. Co. v. Ingraham*, 131 Ill. 659, 23 N. E. 350, the court allowed recovery for injuries to person and damage to property though joined in same count of declaration. The case of *Reilly v. Scilian Asphalt Paving Co.*, 31 App. Div. 302, 52 N. Y. S. 817, which held that an action to recover for injury to person was totally extinguished by an action brought to recover for injury to property only, was promptly reversed on appeal. See 170 N. Y. 40, 62 N. E. 172. The court in the latter case held the prior action no bar where the injury to the person came out of the same accident. In *Egan v. New York Transportation Co. et al*, 39 Misc. Repts. 111, 78 N. Y. S. 209, an injury to person and damage to property by same wrongful act held to constitute two causes of action. The foregoing cases represent the minority view, treating the cause of action as consisting of the injury inflicted, rather than the act causing the injury so that a double injury would supply a double cause of action. The weight of authority, however, and better rule treats a single act causing injury as giving rise to but a single cause of action whether or not the act causes different injuries. *Lamb v. St. Louis C. & W. R. Co.*, 33 Mo. App. 489. Thus, injury to both person and property resulting from one negligent act constitutes but one cause of action: *Lamb v. St. Louis C. & W. R. Co.*, *supra*, and the law will not compel the plaintiff to bring two suits to recover his damages. *Pittsburgh C. C. & St. L. R. Co. v. Carlson* (Ind. App.) 56 N. E. 251. In *Doran v. Cohen*, 147 Mass. 342, court held plaintiff not entitled to bring more than one action for same tortious act; cannot bring action for injury to person and also one for damage to property. Likewise in *King v. Chicago M. & St. P. R. Co.*, 80 Minn. 83, 82 N. W. 1113, the court held one action for injury to person and property. Again in *Stickforth v. City of Saint Louis*, 7 Mo. App. 217, the court said, "The various forms or subjects of injury sustained by a party from a single wrongful act cannot multiply the causes of action." The same rule was applied in *Benmecker v. R. Co.*, 83 Mo. 660; *Mobile & O. R. Co. v. Matthews*, 115 Tenn. 172, 91 S. W. 194. A single cause of action for injuries to plaintiff's wife, house, and furniture, caused by single explosion was held proper in *Hazard Powder Co. v. Volger*,

3 Wyo. 189. Failure to state all he has suffered in one complaint defeats his right to sue for what he has omitted, as was held in *Birmingham Southern Ry. Co. v. Linter*, 141 Ala. 420. Injury to person and damage to bicycle good in one cause of action, *Braithwaite v. Hall*, 168 Mass. 38, 46 N. E. 398. Damage to person and clothing, one cause of action and recovery for former bars suit for latter. *Knoulton v. R. Co.*, 147 Mass. 606, 18 N. E. 580. Basis of the majority view is that as defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong. E. C. F. '27.

ASSAULT AND BATTERY—CRIMINAL RESPONSIBILITY—OFFENSES—ASSAULT WITH DANGEROUS OR DEADLY WEAPON.—One Williamson was indicted, tried, and found guilty of aggravated assault under a statute defining such assault with reference to the use of a deadly weapon in its commission. A writ of error was taken to this court and one of the grounds assigned for reversal was the finding of the jury that an automobile used in this assault was a deadly weapon. Held, that an automobile may be so used as to constitute a deadly weapon within the meaning of the statute and hence conviction was affirmed. *Williamson v. State*, (Fla., 1926), 111 S. 124.

Of course, in cases of this nature, the character of the weapon used constitutes the gist of the offense and distinguishes it from mere common assault. An assault with a dangerous or deadly weapon is, unless otherwise provided by statute, merely a common assault, although of an aggravated kind, *Commonwealth v. O'Donnell*, 150 Mass. 502, 23 N. E. 217. In cases where statutes have been enacted and specifically describe the weapons to be used, the weapon employed must comply with the specific description, *Commonwealth v. Hawkins*, 11 Bush (Ky.) 603. In most states, however, the statutes if there are any relating to this matter refer only in a general way to "dangerous or deadly weapons." Thus, the question resolves itself into one of construction of these terms. Webster, in defining a weapon, says in part that it is "an instrument of offensive or defensive combat;—anything used or designed to be used in destroying, defeating, or injuring an enemy, etc.;" and from the cases it appears as if the courts have practically followed this definition in construing the meaning of our term. A dangerous or deadly weapon is a weapon which in the manner in which it is used or attempted to be used may endanger life or inflict great bodily harm, *People v. Leyba*, 74 Cal. 407, 16 P. 200. Of course, a weapon capable of producing death is not necessarily deadly or dangerous, *Pittman v. State*, 25 Fla. 648, 6 S. 437; and conversely a weapon may be deadly or dangerous although not primarily made or designed for the taking of life or the infliction of injury, *State v. Scott*, 39 La. Ann. 943, 3 S. 83. In case the weapon is not deadly *per se*, its character will depend on the manner of its use, the size and physical condition of the parties, and its own nature, *State v. Archbell*, 139 N. C. 537, 538, 51 S. E. 801. So an axe may be a deadly weapon, *State v. Hertzog*, 41 La. Ann. 775, 6 S. 622; but it is not necessarily so, *Bush v. State*, 52 Tex. Cr. 398, 107 S. W. 348; a pistol is ordinarily regarded as a deadly weapon *per se*, *State v. Baker*, 20 R. I. 275, 38 A. 653; a striking with the fist is not an assault with a deadly weapon, *Little v. State*, 61 Tex. Cr. 197, 135 S. W. 119. The general trend of judicial opinion and the gist of the above cases is reflected in a decision by the U. S. Supreme Court when it held that "anything, no matter what it is—whether it was made by him for some other purpose—if it is a thing with which death can be easily and readily produced, the law recognizes it as a deadly weapon," *Acers v. U. S.*, 164 U. S. 388, 41 L. Ed. 481. In following and applying the above doctrine, the Illinois courts have twice held that an automobile may be a deadly weapon under some circumstances and in so doing have probably blazed a trail which will likely be oft trod in the future,