LIMITATION OF ACTIONS—TORTS—MINES AND MINERALS—STATUTE OF LIMITATION ON ACTION FOR POLLUTION OF SUB-SURFACE WATER RUNS FROM TIME OF DISCOVERY.—*Gulf Oil Corp. v. Alexander*, 291 S.W.2d 792 (Tex. Civ. App. —Amarillo 1956, error ref'd n.r.e.).

Salt water from the defendant's disposal pit polluted the fresh-water strata underlying the plaintiff's farm and used by him for irrigation purposes. The plaintiff brought suit within two years of his discovery of the pollution, but more than two years after it had occurred, and recovered judgment in the trial court. *Affirmed.* The two-year statute of limitation for injury to property did not begin to run until the pollution of the sub-surface water was discovered.[1]

The purpose of statutes of limitation is to prevent a plaintiff from prosecuting a claim after evidence is no longer available or reliable.[2] The equitable doctrine of laches accomplishes basically the same purpose, but it has not been as rigidly applied as the statutes of limitation.[3] Generally, limitation will run on a cause of action even though the plaintiff does not know that he has been injured. However, an impressive variety of exceptions to this rule have been recognized, as in, for example, fraud,[4] mistake,[5] and malpractice suits.[6] Application of the statute of limitations does not seem unjust in the typical case, such as an action for personal injuries arising out of an automobile accident, for the plaintiff is aware of his damage and should sue before the claim is "stale." However, application of the statute so as to bar a plaintiff who was not at fault in failing to discover his cause of action earlier is hardly justifiable.

An action for injury to property must be brought "within two years after the cause of action shall have accrued."[7] This is the usual statutory language in this country.[8] If, in order to prove a cause of action, one need not show damage but only an invasion of a legally protected interest, as in trespass, the statute of limitations will run from the time of the invasion. If, however, damage is a necessary element of the cause of action, as in nuisance or negligence cases, the statute of limitations will not begin to run until the damage occurs or is discovered.[9] Accordingly, a cause of action for underground water pollution could be barred before its existence was known if the cause of action were held to accrue either at the time of the first invasion or at the time of damage.[10] Invasion or damage would seem to occur when the seepage first enters the land, the water sands, the water strata being pumped, or the fields, and in all of these it might remain undiscovered for the statutory period. However, the

[1] The holding of the principal case that a violation of Railroad Commission Rule 20 (protection of fresh water) creates a private cause of action, imposing strict liability on the defendant, is discussed in Keeton and Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1, 10–11 (1956).

[2] See Harrison Mach. Works v. Reigor, 64 Tex. 89, 90 (1885).

[3] 12 TEXAS L. REV. 478 (1934).

[4] 2 WOOD, LIMITATIONS 1358–1425 (4th ed. 1916).

[5] Emerson v. Navarro, 31 Tex. 335 (1868).

[6] 19 TEXAS L. REV. 206 (1941); Annot., 144 A.L.R. 212 (1943).

[7] TEX. CIV. STAT. art. 5526 (Vernon 1948).

[8] 32 NEB. L. REV. 124, 127 (1952).

[9] PROSSER, TORTS 409–10 (2d ed. 1955).

[10] *Cf.* 34 TEXAS L. REV. 480 (1956).

courts have generally held, in cases involving the analogous situation of waterlogging from overflow, that the statute of limitations runs from the time damage becomes apparent.[11]

Does this state of the law mean that the statute is inapplicable to sub-surface trespasses, or that there is some equitable doctrine that should toll its running in cases like these, or that the cause of action does not accrue until discovery of damage? The answer is not made clear. The cases bearing on the question do not discuss the statutory starting-point—the accrual of the cause of action—but concern themselves with the questions whether the damage results from a legal or an illegal act and whether the nuisance is permanent or recurrent.[12] If the act is legal, limitation does not begin to run until the damage occurs; if it is illegal, limitation runs from the time of the act, "be the damage however slight."[13] Presumably this distinction is the same as that pointed out above; that is, a cause of action arising from an "illegal act" is one requiring no damage (*e.g.*, trespass), and a cause of action arising from a "legal act" is one requiring damage (*e.g.*, negligence). Limitation will run from the time of the invasion of the legal interest in the first case, and from the time of damage in the second. Ordinarily, the damage and discovery are nearly simultaneous in overflow cases whether the theory of action is trespass or negligence; thus application of the rule that limitation runs from the time of damage does not produce an unjust result.[14] However, the damage in underground seepage cases is usually discovered long after it occurs; therefore, normally an unjust result will be reached unless the rule that limitation runs from the discovery of damage is applied, regardless of the theory of action.

From the nuisance standpoint, if the injury is regarded as permanent, limitation runs from the initial invasion,[15] but if the nuisance is considered recurrent, limitation runs independently on each invasion.[16] For example, assume that there was periodic seepage commencing three years before suit. If the original invasion is deemed permanent, all recovery will be barred by the two-year statute of limitations.[17] But if the invasion is deemed recurrent, the plaintiff may recover for all damage that occurred within the two years before suit.[18] It might be argued that any invasion of salt water is "permanent," in the sense that once the salt contamination of fresh-water sands exceeds a minimum percentage a substantial period of time will be required to clear the sands, and thus recurrent invasions will not make matters much worse. The questionable practice of treating a nuisance as permanent was originally designed to allow a plaintiff at his option to recover for all past and future damage in one suit. This option has since been converted into a mandate;

[11] Beck v. American Rio Grande Land and Irrigation Co., 39 S.W.2d 640 (Tex. Civ. App. 1931, error ref'd); Annot., 5 A.L.R.2d 302 (1949).
[12] See Houston Water Works v. Kennedy, 70 Tex. 233, 8 S.W. 36 (1888).
[13] Houston Water Works v. Kennedy, *supra* note 12, at 236, 8 S.W. at 37.
[14] Baker v. Ft. Worth, 146 Tex. 600, 210 S.W.2d 564 (1948).
[15] See 30 TEXAS L. REV. 635 (1952).
[16] Austin & N.W. Ry. v. Anderson, 79 Tex. 427, 15 S.W. 484 (1891).
[17] Tennessee Gas Transmission Co. v. Fromme, 153 Tex. 352, 269 S.W.2d 336 (1954).
[18] Clark v. Dyer, 81 Tex. 339, 16 S.W. 1061 (1891).

the plaintiff has only a single cause of action despite the multiple injuries, and limitation begins to run from the time of the original injury.[19] This commonly applied restriction would seem to encourage early litigation for trivial cause, and punish the good neighbor who refuses to sue until he has suffered significant damage. The geological facts in many areas are such that once salt-water seepage begins, sub-surface fresh-water pollution in nearby tracts is nearly inevitable. Nothing in the principal case should be taken to imply that because a plaintiff may sue when he discovers damage he must wait until damage is discoverable. The availability of re-injection wells today[20] makes it even more reasonable for a court to permit this potential nuisance to be enjoined from its inception.

The opinion in the principal case implies that the plaintiff had no cause of action until the salt water invaded the area of the strata from which he was pumping.[21] Arguably, the plaintiff suffered damage before this invasion and could have recovered under a negligence theory if he had known of the injury. However, regardless of the point at which the damage occurred, the court held that the statute of limitations began to run only when the damage was discovered. Once the theories behind trespass and negligence are distinguished, as above, the "legal-illegal act" approach of the *Kennedy* case[22] is explained away as unhelpful at best. Nor does the distinction between permanent and recurrent nuisances afford a basis for the court's decision, for the plaintiff apparently sued on a permanent-nuisance theory which should have set limitation running from the time of the initial invasion.[23]

The theory behind the court's conclusion in the principal case is not clear. However, in protecting the plaintiff who is unaware of his cause of action, the result does much to aid justice and protect the valuable water resources of the state, and does little to pervert the purpose of the statute of limitations. The injustice caused in numerous instances by the rule that limitation runs from the time the cause of action accrued has left the rule encrusted with exceptions. Legislative revision could be used to remove both the doctrinal difficulties surrounding the exceptions, and the harshness of the strict application of the general rule.[24]

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MARRIED WOMEN—HOMESTEAD—LIENS—DEEDS OF TRUST—MARRIED WOMAN'S ACKNOWLEDGMENT TAKEN BY TELEPHONE VOID.—*Charlton v. Richard Gill Co.*, 285 S.W.2d 801 (Tex. Civ. App.—San Antonio 1955).

A bona fide purchaser of a builder's and mechanic's lien and deed of trust on the homestead of a husband and wife sued for foreclosure. Al-

[19] This result is criticized in McCormick, *Damages for Anticipated Injury to Land*, 37 HARV. L. REV. 574 (1924); MCCORMICK, DAMAGES 511–15 (1935).

[20] Comment, 33 TEXAS L. REV. 370, 379–80 (1955).

[21] 291 S.W.2d at 795.

[22] 70 Tex. 233, 8 S.W. 36 (1888).

[23] Tennessee Gas Transmission Co. v. Fromme, 153 Tex. 352, 269 S.W.2d 336 (1954).

[24] See MO. REV. STAT. § 516.100 (1949) ("the cause of action shall . . . accrue . . . when the damage . . . is capable of ascertainment . . .").