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COMMON LAW PLEADING MODIFIED VERSUS THE FEDERAL RULES*

Marilyn E. Lugar**

Common law pleading, with statutory modifications, continues to be the backbone of procedure in West Virginia despite the adoption of so-called code pleading in the great majority of state courts and in the federal courts. Since the promulgation of the new Federal Rules of Civil Procedure, which became effective in 1938, the adoption of similar rules for state courts has been recommended by many writers. This reform has been urged not only for states having common law pleading but also for states which have long had code pleading, since the Federal Rules have eliminated many of the restrictive features found both in common law pleading and in the systems long found in code states.

It is not the purpose herein to propose the adoption in West Virginia of all the details of pleading embodied in the Federal Rules, although much might be gained thereby. If any revision in

* This article is the first of a series in which some of the West Virginia rules of pleading will be criticized.

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1 In addition to the thirty-two states and territories which have adopted code pleading, there are other jurisdictions which have been classified as quasi-code jurisdictions because they show a close approximation to the code practice. Clark, Code Pleading 23 (2d ed. 1947).

2 These rules are set forth in 28 U. S. C. A. following §723c (1941).


4 See articles cited in note 3 supra. If a state code of civil procedure patterned on the new Federal Rules be adopted, revisions therein should be considered when the federal rules are amended. See 33 J. Am. Jud. Soc'y 69 (1949).
West Virginia pleading be made along the lines herein suggested, a detailed examination of all related federal rules should be made. However, to accept either objective and adequately develop the subject herein would require a paper too lengthy for the average practitioner to find the time to read and digest. Several times the differences between the new procedure in federal courts and the West Virginia procedure have been called to the attention of the bar in a general way. No action to obtain changes in our procedure has followed. The writer believes that the advantages in the federal procedure will be more evident if smaller segments of the differences are examined more in detail. This will permit those who advocate a change in the West Virginia rules to give specific illustrations of what may be accomplished by adopting the federal procedure. Recently the Judicial Council of West Virginia has taken a step in this direction by a thorough study of the advisability of abolishing Rule Days and vacations between terms of court in West Virginia and accepting in lieu thereof the method used in federal courts for maturing a case for hearing.

There have been chosen for discussion in this paper certain rules of pleading in West Virginia which have resulted in unnee-

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5 Piecemeal reform may lead to greater confusion than the adoption of an entire integrated procedural system which embodies the desired changes. See Clark, Dissatisfaction with Piecemeal Reform, 24 J. Am. Jud. Soc'y 121 (1940).

6 Nesbitt, The Proposed Rules for Changes in Federal Practice, 43 W. Va. L. Q. 23 (1956), 110 (1937). This was an address delivered at an annual meeting of the West Virginia Bar Association. No encouragement to change our procedure is found in this address. Typical of the views expressed therein are these statements: "... We of the Virginias and of Maryland are about all that are left in defense of our common law Alcazar. Our turn to surrender has come. The glories of our past are but tales to be told. A new banner waves over our fortress. The revolution is here. On the first of September of next year, the conquerors plan to take charge. Sic transit gloria mundi." Id. at 119.

Sunderland, The New Federal Rules, 45 W. Va. L. Q. 5 (1938). This was another address delivered at an annual meeting of the West Virginia Bar Association, and the speaker stressed the objectives of the Federal Rules in the abstract without demonstrating that the West Virginia procedure failed to accomplish the same objectives. A similar approach was used without obtaining affirmative action when an attempt was made to convince the bar that the scope of the notice of motion for judgment procedure should be extended. Arnold, Simonon, and Havighurst, Report to the Committee on Judicial Administration and Legal Reform of the West Virginia Bar Association Containing Suggestions Concerning Pleading and Practice in West Virginia, 36 W. Va. L. Q. 1 (1959). The comments which were made on the proposed expansion of the motion procedure are subject to the same criticism. Clark, Methods of Legal Reform, 36 W. Va. L. Q. 106 (1929), 6th Rep. W. Va. Judicial Council 266 (1947); Sunderland, Comments on Proposed Changes in Procedure in West Virginia, 36 W. Va. L. Q. 119 (1929), 6th Rep. W. Va. Judicial Council 285 (1947).

sary delay in the determination of rights between the parties to
litigation. The operation of the Federal Rules not only has
emphasized that the rules to be analyzed have retarded unnecessarily
hearings on the merits but has also shown that an alternative
procedure is available which has deprived neither party of a fair
hearing on the claims between them. Others may believe that a
comparison between the two systems shows more glaring faults in
the West Virginia procedure which delay a hearing of claims on
their merits, but the ones which have been chosen herein for
analysis have been limited to rules which govern how a right must
be alleged and what rights may be asserted in one proceeding.

The writer originally intended to limit this study exclusively
to rules which apply to the latter problem and seem to require
unnecessarily more than one action to adjust rights between parties.
To a large extent that remains the objective of this study, but in
doing the research the writer became impressed with the many
delays in hearings on the merits which had resulted in West Virginia
merely from rules requiring needless precision in the manner in
which the right was alleged in the pleading. The temptation to
embody herein some observations on this somewhat related matter
could not be resisted since no clearer illustration of formalism
appears when contrasted with the liberality of statement permitted
in federal courts.

Criticism of the rules chosen has been limited largely to their
application on the law side of the court in West Virginia, for it
is there that the common law procedure, even as modified in West
Virginia, is most blameworthy. In the merged system of law and
equity found in the Federal Rules, the rules of equity pleading and
procedure have been accepted as guides. 8

As will appear more fully in the following discussion, some of
the rules criticized not only delay the hearing of a claim but in
practice may even defeat a meritorious claim. If the rules were
necessary for any useful purpose, their existence might be justified
even if they caused delays or defeated the assertion of rights. How-
ever, in operation the Federal Rules have shown either that these
rules were never necessary or that the purposes which they were
designed to serve can be better accomplished by other procedural
devices.

8 In some respects the Federal Rules are more liberal than the rules which
prevailed on the equity side of the court.
Any proposed change in procedure naturally meets inertia resulting from the lack of a desire to learn new techniques. Other more selfish reasons may prompt some to resist any change in existing rules of procedure. There may be some who believe that the present rules are so definite and so well understood by them that they need not have any fear of being defeated or delayed in the assertion of a meritorious claim, whereas this same definiteness of rules and knowledge thereof may be used to defeat or delay recovery by others less skilled in the art when a defense on the merits is doubtful. Perhaps the following discussion may disclose that the rules here to be considered are not so definite or well understood as was thought. Even if it develops that the rule is definite and known, it may be shown that it serves no purpose other than to be useful to defeat or delay a hearing on the merits. When a procedural rule becomes an end in itself rather than a means for the proper presentation of a case, not only does public criticism become deserved but also development of the substantive law is retarded for the decision of a case on a procedural point relieves the court from deciding the points of substantive law governing the merits of the case. For these latter reasons all lawyers, regardless of the degree of knowledge of existing rules possessed or the need to learn a new technique of pleading, should be interested in eliminating a procedural rule which is unnecessary for proper determination of the merits of the claims asserted.

The bench and bar of West Virginia have shown that they are willing to accept modifications in procedure where the existing rules have become mere technicalities or are not disposing of litigation as expeditiously as possible under some other feasible procedure. The many statutory changes in procedure and the more recent rules of procedure promulgated by the Supreme Court of

9 "Inertia is not peculiar to lawyers as a group. Most of those who comprise any profession or trade tend to venerate all its traditions, and are unable detachedly to inspect its customary ways." FRANK, COURTS ON TRIAL viii (1949).
10 The average practitioner is prone to rationalize the need for any existing rules of procedure, but he convives neither himself nor others when the rule is a mere technicality. Until such rules have been eliminated, business views litigation with distrust. This reason for modernizing legal procedure has been urged by many writers. Failure of the bar to take such action has resulted in advice to the public to avoid the courts. See, for example, HINSHMAN, HOW BUSINESS MEN AVOID LITIGATION (n.d.)
11 Many of these changes were made prior to the adoption of the code revisions in 1931. For example, statutes had dispensed with the necessity of many formal allegations in pleadings. See the discussion of these statutes in Carlin, The Common Law Declaration in West Virginia, 95 W. Va. L. Q. 1 (1929).
Appeals under its rule-making power have made this evident. So many changes of this nature have been made that many may feel that the existing procedure is now extremely liberal. The extensive changes made by the revisers of the West Virginia Code in 1931 did much to cause this feeling. A superficial examination of the general rules of procedure in this state does much to confirm the belief.

Despite the elimination of many of the technical rules of the common law, an examination of the application of existing rules with a comparison of treatment of similar facts under the Federal Rules may show that further revisions in procedure in West Virginia are highly desirable for the reasons previously mentioned. Facilities for research did not permit this examination at the lower-court level, where one might expect even more interesting illustrations, but one may obtain enlightening and, from the viewpoint of precedents, more valuable information in examining the application of these rules in the Supreme Court of Appeals.

With this explanation of what the writer hopes to accomplish through this study and why he has limited his field of discussion, there have been chosen for examination certain phases of West Virginia procedure which clearly contain many unnecessarily restrictive rules. Those chosen have the additional advantage of requiring little discourse to develop the preference for the federal rules covering the same situation, having first made the deficiencies in the West Virginia rule apparent. No attempt will be made to develop all of the possibilities under the Federal Rules as related to the problem in each subject, for that would unduly prolong discussion. Others have developed these matters in great detail and with clarity. The approach herein will be to show generally the common law background and more specifically how West Virginia rules in

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13 The effect of many of these changes has been summarized by members of the West Virginia bar. Carlin, Functions of a Demurrer under the Revised Code, 41 W. Va. L. Q. 313 (1935); Carlin, Parties to Actions and Suits under the Revised Code, 49 W. Va. L. Q. 87 (1937); Lynch, Pleading and Practice under the Revised Code, 37 W. Va. L. Q. 60 (1930).
14 The most comprehensive treatment of any point which may arise under the new Federal Rules will generally be found in Moore's Federal Practice. See also CLARK, CODE PLEADING; EDMUNDS, FEDERAL RULES OF CIVIL PROCEDURE; MANUAL OF FEDERAL PROCEDURE. For background material some of the earlier treatises on code pleading are helpful, for example, HEPBURN, HISTORICAL DEVELOPMENT OF CODE PLEADING (1897); PHILLIPS, THE PRINCIPLES OF CODE PLEADING (2d ed. Visselharn, 1932); and POMEROY, CODE REMEDIES (5th ed. Carrington, 1929).
application remain unduly restrictive, making reference to the Federal Rules applicable only to show that a less complex and more liberal procedure has been found to be successful in practice. In some cases it has been possible to indicate wherein the West Virginia practitioner would already have had experience with a similar procedure. Some reference will be made also to the earlier rules of code pleading to indicate that in application they were often subject to the same criticism made herein of the present West Virginia rules.

I. JOINDER OF PARTIES AND CAUSES OF ACTION

One of the problems facing the pleader who desires to expedite settlement of claims is the maximum breadth of his action. This may involve the extent to which parties and causes of action may be joined.\textsuperscript{15} Although each may serve as a limitation on the other, they can be separately analyzed. Joinder of parties, plaintiffs or defendants, will be used to refer to those cases in which two or more persons have an interest in a claim (plaintiffs) or owe a duty (defendants). Joinder of causes of action will refer to those cases in which one person asserts several claims against another person. The latter problem may be combined with the former where two or more persons assert a claim or have a claim asserted against them. Thus, the rules on joinder both of parties and causes of action need to be considered.\textsuperscript{10}

A. Joinder of Parties at Common Law

Joinder of plaintiffs at common law was required where their rights were joint,\textsuperscript{17} but they could rarely join where their interests

\textsuperscript{15} The writer does not intend to cover all phases of the problem as to what may or must be decided in one action. Professor Blume has reviewed the developments in this problem at common law, in equity, under the codes, and under the Federal Rules. Blume, The Scope of a Civil Action, 42 Mich. L. Rev. 237 (1943).

\textsuperscript{16} The restriction on joinder of causes applies when several plaintiffs or defendants or both are involved as well as when only a single plaintiff and a single defendant are involved. CLARK, CODE PLEADING 438.

\textsuperscript{17} Nonjoinder of plaintiffs. This was clearly true as to actions \textit{ex contractu}, and was equally true as to actions \textit{ex delicto} where the injury was to property or property rights and the interest therein was joint. 1 CHITT, PLEADING *8 (\textit{ex contractu}). *94 (\textit{ex delicto}) (15th Am. ed. 1859); \textit{STEPHEN, PLEADING} §§33, 37 (Andrews’ ed. 1901); 2 TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 210 (\textit{ex contractu}), 221 (\textit{ex delicto}) (1837). There seem to be no West Virginia cases on nonjoinder of plaintiffs in actions \textit{ex delicto}, but the common law rule was recognized in contract actions. Sandusky v. Oil Co., 63 W. Va. 269, 59 S. E. 1082 (1907); Assurance Co. v. Fristoe, 53 W. Va. 361, 44 S. E. 253 (1908).
were not joint. Thus, if the court determined the liability of the defendant to be joint and all of the interested persons had not joined as plaintiffs, the defendant by proper timely action could defeat the action. The result was usually the same if the court construed the duty of the defendant to be several and more than one of the interested parties had joined as plaintiffs. On timely objection, the misjoinder was fatal to the plaintiffs' case. This was true irrespective of the number of common questions of law or fact involved in the litigation. A single act of the defendant may have caused injury to many persons, but they could not join as plaintiffs unless they had a joint interest in property injured. A separate action as to the claim of each plaintiff was necessary. These rules as to joinder of plaintiffs applied both in tort and

18 Misjoinder of plaintiffs. The rule that they could not join applied with equal strictness to actions ex contractu and ex delicto. Pollock v. House & Hermann, 84 W. Va. 421, 100 S. E. 275 (1919) (ex contractu); Yeager v. Fairmont, 43 W. Va. 259, 27 S. E. 234 (1897) (ex delicto); 1 Chitty, Pleading *10 (ex contractu); *64 (ex delicto); 2 Tucker, op. cit. supra note 17, at 210 (ex contractu), 222 (ex delicto). The exception to the rule was that they might join or sever in a tort action "if the wrong complained of caused an entire joint damage." 1 Chitty supra *64.

19 Nonjoinder of plaintiffs in actions ex contractu, where the deficiency appeared on the face of the pleadings, was fatal on demurrer, on motion in arrest of judgment, or on writ of error. Where the deficiency did not appear on the face of the pleadings, the defendant might take advantage of the defect either by a plea in abatement or as a ground for nonsuit under the plea of the general issue. 1 Chitty, Pleading *12; Stephen, Pleading §§33; 2 Tucker, op. cit. supra note 17, at 210. Accord: Sandusky v. Oil Co., 63 W. Va. 260, 59 S. E. 1082 (1907); Assurance Co. v. Fristoe, 53 W. Va. 361, 44 S. E. 253 (1903).

Nonjoinder of plaintiffs in actions ex delicto could only be raised by the defendant by plea in abatement or by way of apportionment of the damages on the trial. 1 Chitty, Pleading *66; Stephen, Pleading §§37; 2 Tucker, op. cit. supra note 17, at 222.

20 Misjoinder of parties plaintiff in actions ex contractu or ex delicto could be raised by the defendant in the same way in either case. If the defect appeared on the face of the pleadings, the objection might be made by demurrer, motion in arrest of judgment, or writ of error; if the defect did not appear on the face of the pleadings, the objection might be made by plea in abatement or as ground of nonsuit under the plea of the general issue. 1 Chitty, Pleading *64, *66; Stephen, Pleading §§34, 38; 2 Tucker, op. cit. supra note 17, at 221, 222. These same rules applied to the manner in which an objection to the nonjoinder of plaintiffs in an action ex contractu might be raised. See note 19 supra.

21 This type of deficiency on the law side of the court has caused the great majority of courts to recognize that equity courts may exercise jurisdiction, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against a numerous body, where there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. 1 Tomeroy, Equity Jurisprudence §269 (Symons' ed. 1941). However, even the courts which have adopted this view differ as to the extent to which it should be applied. McClintock, Equity §§177, 178 (2d ed. 1948).
contract actions, although the defendant might be required to take advantage of the defect in different ways.\textsuperscript{22}

Joinder of defendants at common law was governed by similarly restrictive rules. Joint obligors or promisors had to be joined as defendants,\textsuperscript{23} although some exceptions were made to alleviate the harshness of the rule.\textsuperscript{24} The rule was relaxed also as to joint tortfeasors unless they as joint tenants or tenant in common failed to perform a duty. In the latter case they had to be joined since common title had to be proved.\textsuperscript{25} In other cases the plaintiff could sue joint tortfeasors jointly or severally or "any intermediate number.\textsuperscript{26} This relaxation of the rule made possible therefore a type of permissive nonjoinder. The question yet remained whether the tortfeasors were joint or several.\textsuperscript{27} If the court treated the acts of the wrongdoers as separate, no joinder was permitted;\textsuperscript{28} although the consequence of misjoinder was not so severe as it was for misjoinder of contract defendants. Here those defendants who were improperly joined were merely dismissed.\textsuperscript{29} Joinder of defendants

\textsuperscript{22} See notes 19 and 20 supra.

\textsuperscript{23} 1 CHITTY, PLEADING *42; STEPHEN, PLEADING §§35; 2 TUCKER, op. cit. supra note 17, at 215. The West Virginia court recognized this rule. See State ex rel. Kloak Bros. & Co. v. Corvin, 51 W. Va. 19, 27, 41 S. E. 211, 215 (1902); Hoffman v. Bircher, 22 W. Va. 537, 542 (1893). As to the method of taking advantage of the defect, see text at page 147 infra.

\textsuperscript{24} When the defendant pleaded or gave in evidence matter which barred the action against him only, that is, a personal defense, judgment could be given for such defendant and against the rest. The examples most frequently given were bankruptcy and infancy. See Hoffman v. Bircher, 22 W. Va. 537, 542 (1893); Snyder v. Snyder, 9 W. Va. 415, 419 (1876). Other examples are given in 1 CHITTY, PLEADING *42, *43, and in CLARK, CODE PLEADING §§58. For the West Virginia statute which has expanded the exception see text at page 151 infra.

\textsuperscript{25} 1 CHITTY, PLEADING *87; CLARK, CODE PLEADING 374; 2 TUCKER, op. cit. supra note 17, at 227.

\textsuperscript{26} 1 CHITTY, PLEADING *86; CLARK, CODE PLEADING 374; 2 TUCKER, op. cit. supra note 17, at 227. This rule has been often recognized in West Virginia. See Hains v. Parkersburg, M. & I. Ry., 75 W. Va. 613, 622, 84 S. E. 923, 927 (1915), and the cases cited therein.

\textsuperscript{27} As to negligent injuries there is no comprehensive general rule which can be formulated to harmonize all the authorities concerning what constitutes joint liability. BURKS, PLEADING & PRACTICE §59 (3d ed. Williams and Burks, 1934); CLARK, CODE PLEADING 377; Prosser, Joint Torts and Several Liability, 25 CALIF. L. REV. 413 (1937). Typical of the problems here involved is that in Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744 (1897), wherein it was held that the owner of an injured building might maintain a joint action against the owners of two contiguous buildings which had fallen and caused the damage.\textsuperscript{28} 1 CHITTY, PLEADING *86; CLARK, CODE PLEADING 378; 2 TUCKER, op. cit. supra note 17, at 226.

\textsuperscript{28} The defendants improperly joined might demur, and if a verdict were taken against all, the judgment might be arrested or reversed on a writ of error; but the objection could be removed by the plaintiff's taking a verdict against only one defendant. 1 CHITTY, PLEADING *86; 2 TUCKER, op. cit. supra

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was also permissible in actions on contracts if the court construed the contract to be joint and several. Here the plaintiff could sue the obligors alone or together, but if he sued more than one he was required to join all of them. If the court construed the promises to be several, the obligors could not be joined.

One could defend these common law rules only on the basis of the common law concept of the nature of the substantive rights or duties of persons having joint or several interests or being under joint or several liabilities, taking into consideration the common law theory of a cause of action as an entity with the judgment being in solido. The courts generally made no attempt to justify the rules but were more inclined to bemoan the fact that they were bound by ancient precedents. The procedural law remained static. The courts seem never to have visualized the rules of joinder as a means to shorten litigation.

B. Joinder of Parties in West Virginia Prior to 1931

With this abbreviated statement of the common law, a brief comparison with the West Virginia law prior to its "modernization" may be an aid in revealing the extent to which recent changes have removed or left intact the common law impediments to speedy settlement of claims. Prior to the adoption of the revised code in 1931, the strict rules at common law as to nonjoinder and misjoinder of contract plaintiffs prevailed in West Virginia. There was a code provision which might have been used to cure such

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note 17, at 227; cf. CLARK, CODE PLEADING 378. In West Virginia the objection was raised by a demurrer if the misjoinder appeared on the face of the declaration, but the objection could be eliminated by the plaintiff's either dismissing the misjoined defendants or amending his declaration to show the community of action on the part of the defendants. Barger v. Hood, 87 W. Va. 78, 104 S. E. 280 (1920); Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S. E. 265 (1920). If the misjoinder appeared only in the evidence, the plaintiff might dismiss the action as to those not proved liable. Pence v. Bryant, 73 W. Va. 126, 80 S. E. 137 (1913).

30 1 CHITTY, PLEADING *43; STEPHEN, PLEADING §35; 2 TUCKER, op. cit. supra note 17, at 215. This rule was early recognized in the Virginias, with the exception that the judgment would be reversed if an intermediate number were sued even though the objection was not raised by plea in abatement. Leftwich v. Berkeley, 11 Va. (1 Hen. & M.) 61 (1806).

31 See note 30 supra.

32 1 CHITTY, PLEADING *44; STEPHEN, PLEADING §§35, 36; 2 TUCKER, op. cit. supra note 17, at 215.

33 The best treatment of this subject may be found in Jones and Carlin, Nonjoinder and Misjoinder of Parties in Common-Law Actions, 28 W. Va. L. Q. 197 and 266 (1922). No comprehensive discussion of the subject will be attempted in this paper, since it is important only for background purposes.

34 See notes 17 and 18 supra; Jones and Carlin, supra note 33, at 197 and 201.
nonjoinder, but it was apparently never urged upon or applied by the court for this purpose. The statute provided that whenever in any case a complete determination of the controversy could not be had without the presence of other parties, the court might cause them to be made parties to the action or suit by amendment.\textsuperscript{35} This statute was first enacted in 1882.\textsuperscript{36} In \textit{Sandusky v. West Fork Oil & Natural Gas Co.},\textsuperscript{37} decided in 1907, one of the joint promisees sued alone and recovered a judgment. The Supreme Court of Appeals reversed the judgment of the lower court because of the fatal variance between the declaration and the proof. Further, the court dismissed the action without giving the plaintiff an opportunity to amend. The court held that there could not be an amendment of parties plaintiff in an action at law on a joint contract. This was an application of the rule so often applied by the West Virginia court that an amendment cannot be made which changes the cause of action.\textsuperscript{38} The court was not asked to apply the statute concerning nonjoinder of parties, but if this had been done one might have expected the same treatment as was given this statute in an earlier case involving nonjoinder of contract defendants. In \textit{Rutter & Co. v. Sullivan},\textsuperscript{39} a defendant, having failed to plead the nonjoinder of defendants in abatement, attempted at the trial to have the other parties made defendants by amendment under this statute. The court refused to allow the amendment, stating that to apply the statute to the case and make new parties to the action would entirely destroy "a long established rule in pleading."\textsuperscript{40} May this not have been the purpose of the statute?

\textsuperscript{35} W. VA. CODE c. 125, §58 (Barnes, 1923). It was apparently thought that this statute applied only to suits in equity. For illustrative examples, see Werninger v. Huntington, 78 W. Va. 107, 88 S. E. 655 (1916); Wheeling Creek Gas, C. & C. Co. v. Elder, 54 W. Va. 335, 46 S. E. 357 (1903). See also note 40 infra.

\textsuperscript{36} W. Va. Acts 1882, c. 71.

\textsuperscript{37} 63 W. Va. 260, 59 S. E. 1092 (1907); accord, Hatfield v. Cabell County Court, 75 W. Va. 595, 84 S. E. 335 (1915); Phoenix Assurance Co. v. Fristoe, 53 W. Va. 361, 44 S. E. 253 (1903).

\textsuperscript{38} A forthcomng issue of this Review will discuss this limitation on amendments. Commentators approved the application of the rule in this case under strict common law principles, and recognized that the only remedy for the plaintiff was to sue out a new writ. Jones and Carlin, \textit{supra} note 33, at 199. Compare, however, the refusal of the court to decide whether an amendment to cure a misjoinder of parties plaintiff in a contract action would result in a change in the cause of action. Pollack v. House & Hermann, 84 W. Va. 421, 100 S. E. 275 (1919).

\textsuperscript{39} 25 W. Va. 427 (1885).

\textsuperscript{40} Id. at 430. Having held that the statute did not permit the addition of new parties defendant by amendment, the court declined to construe the statute.
As indicated by the Sullivan case, the common law rule as to nonjoinder of contract defendants prevailed in West Virginia, with two statutory modifications if the issue were raised by a plea in abatement. The law was not clear whether the issue had to be raised by a plea in abatement if the defect was apparent on the face of the declaration. If it was not apparent on the face of the declaration, the law was settled that the defendant could take advantage of the defect only by a plea in abatement. But if the defect was apparent on the face of the declaration, there were dicta to the effect that a plea in abatement was necessary, but the early Virginia cases, a number of which were binding authority in West Virginia, held that nonjoinder of contract defendants apparent on the face of the declaration could be raised by demurrer, motion in arrest of judgment, or writ of error. Two statutes made it important to decide how the objection might be raised. One statute provided that where pleas in abatement for nonjoinder of any person as a co-defendant were used, the issue on the plea should be found against the defendant so pleading if the other persons could not be sued because of the statute of frauds or the statute of limitations. Another statute prohibited the use of a plea in abatement unless the nonjoined defendants were residents of the state. Without proceeding to trial upon an issue on the plea in abatement, the plaintiff could amend his declaration and make the persons named in the plea, as joint contractors, defendants in the case along with the original defendant, appropriate provisions being made for costs depending upon who was shown liable by subsequent pleadings or proof.

Concerning the misjoinder of defendants in actions ex contractu, the common law rule was that the defendant might take advantage of the defect by demurrer, motion in arrest of judgment,

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43 Walmsley v. Lindenberger, 23 Va. (2 Rand.) 478 (1824); Leftwich v. Berkeley, 11 Va. (1 Hen. & M.) 61 (1806). These and other early Virginia cases are collected and discussed in Carlin and Jones, supra note 33, at 204.
44 W. Va. Code c. 125, §18 (Barnes, 1923).
45 "No plea in abatement, for the non-joinder of any person as a co-defendant, shall be allowed in any action, unless it be stated in the plea that such person is a resident of the state, and unless the place of residence of such person be stated with convenient certainty in an affidavit verifying the plea." W. Va. Code c. 125, §17 (Barnes, 1923).
or writ of error, if the misjoinder appeared on the face of the declaration.\(^47\) This rule prevailed in West Virginia.\(^48\) If the defect did not appear on the face of the declaration, it was finally recognized that the common law rule applied in West Virginia and the defendant could not plead the misjoinder in abatement but could only use it as evidence under the general issue.\(^49\) There existed a statute under which the harshness of the rule applied at common law might have been alleviated. It provided that in an action founded on contract, against two or more defendants, the plaintiff might have judgment against the defendants from whom he might have recovered if he had sued them only, on the contract alleged in the declaration, even though he might be barred as to recovery from some of the persons he had sued in the action.\(^50\) However, the West Virginia court refused to apply this statute in the way that the Virginia court had applied it, even though it was adopted into the West Virginia law from the Virginia Code in effect at the creation of the state.\(^51\) The Virginia court held that the statute permitted the plaintiff to recover against those defendants who were proved liable under the contract even where the other defendants were acquitted on grounds which went to the denial of the joint contract alleged in the declaration and was not limited to those cases where some of the defendants were excused by virtue of personal defenses.\(^52\) The common law had permitted the plaintiff to recover against the other defendants in the latter cases. The Virginia rule meant that the plaintiff could recover against those who would have been liable if he had started a new action at common law, but without the necessity of starting that action. The pending action would suffice.

Despite earlier dicta to the effect that the statute had enlarged the exceptions existing at common law (where some defendants were able to establish personal defenses),\(^53\) the West Virginia court

\(^{47}\) I Chitty Pleading *44; see also other treatises cited in note 32 supra.


\(^{50}\) W. VA. Code c. 131, §19 (Barnes, 1923).

\(^{51}\) VA. Code c. 177, §19 (1860).

\(^{52}\) Bush v. Campbell, 67 Va. (26 Gratt.) 403 (1875).

\(^{53}\) Roanoke Grocery & Milling Co. v. Watkins, 41 W. Va. 787, 796, 24 S. E. 612, 615 (1896); Snyder v. Snyder, 9 W. Va. 415, 419 (1876). In the latter case the court had referred to the statute as a qualification of the general rule, one required "to promote justice, and avoid litigation".
in the first case in which lack of joint liability on the contract was involved did nothing more than to affirm the common law exceptions.\textsuperscript{54} In the case some of the reasoning for denying the plaintiff any recovery was based on the fact that the defendants had all joined in the same plea. However, the basis of the decision was broad enough to cover separate pleas. The court said:

"Does this statute change the rule of the common law in case of a joint action against several defendants on an alleged joint promise, when the plea is joint, and the proof shows that all did not promise? Does not proof that one did not make the promise discharge all? Would not that fact establish a different cause of action, and constitute a fatal variance, not curable by amendment? . . .

". . . Plaintiff cannot allege a joint promise and recover on proof of a promise as to some of the defendants only."\textsuperscript{55}

This decision was not overruled, although the court did reach an inconsistent result on a later contract case by relying not on the statute but on a case involving a misjoinder of tort defendants.\textsuperscript{56}

There seem to have been no West Virginia cases on nonjoinder of tort plaintiffs, but the above discussion indicates strict adherence by the court to the common law rules which required all persons having joint interests to sue jointly in tort actions.\textsuperscript{57} Advantage of the defect could be taken only by a plea in abatement or by way of apportionment of the damages on the trial, whether the defect was on the face of the declaration or not.\textsuperscript{58} The statute above discussed on nonjoinder of parties plaintiff might have been used here,\textsuperscript{59} but from the treatment received in contract cases no help could have been expected.

On misjoinder of tort plaintiffs, the defendant was permitted to take advantage of the defect at common law in the same way that he might if it were misjoinder of contract plaintiffs.\textsuperscript{60} If the defect was not apparent on the face of the declaration, the objection could be raised by a plea in abatement or by a plea that traversed

\textsuperscript{54} Scott v. Nevell, 69 W. Va. 118, 70 S. E. 1092 (1911).
\textsuperscript{55} Id. at 123, 70 S. E. at 1094. Any liberalization in the rules of pleading concerning parties should be accompanied by explicit language to show that the rules are to apply regardless of former concepts of causes of action or misjoinder thereof. See the discussion of this problem in the text at page 201 infra.
\textsuperscript{56} Bolyard v. Bolyard, 79 W. Va. 554, 91 S. E. 529 (1917). For a more detailed criticism of this case, see Jones and Carlin, supra note 33, at 274.
\textsuperscript{57} See note 17 supra.
\textsuperscript{58} 1 CHITT, PLEADING *66; 2 TUCKER, op. cit. supra note 17, at 222.
\textsuperscript{59} See note 35 supra.
\textsuperscript{60} See note 20 supra.
the declaration. If the defect was apparent on the face of the declaration, the objection could be raised by a demurrer, a motion in arrest of judgment, or a writ of error. These principles were recognized in West Virginia.\textsuperscript{61}

As noted before, no objection could be raised at common law for nonjoinder of tort defendants, since one, or all, or any intermediate number of joint tortfeasors might be sued.\textsuperscript{62} This rule was recognized in West Virginia.\textsuperscript{63} Likewise, there was no way for persons properly sued to object to misjoinder of tort defendants.\textsuperscript{64} Those improperly joined could demur if the declaration showed the tort not to be joint. This type of misjoinder would usually involve misjoinder of causes of action; and where this is true, either defendant may demur.\textsuperscript{65} If the nonliability of the defendant was not apparent on the face of the declaration, he could file a plea traversing the declaration, and the plaintiff could on proof of his nonliability have a judgment as to the others.\textsuperscript{66}

In addition to the above general rules covering joinder and nonjoinder of parties in actions at law prior to the adoption of the Revised Code, two statutes had significance in limited fields. One statute was applicable to certain negotiable instruments and provided that as to them judgment might be given jointly against all liable by virtue thereof, whether drawers, endorsers, or acceptors, or against any one or any intermediate number of them.\textsuperscript{67} The other statute applied to proceedings for judgment on notice of motion (a summary procedure on contracts which provide for the payment of money). Under this statute, the plaintiff was permitted, as to any person liable for payment of the money, to move severally against each or jointly against all, or jointly against any inter-

\textsuperscript{61} Yeager v. Fairmont, 43 W. Va. 259, 27 S. E. 234 (1897).
\textsuperscript{62} See note 26 \textit{supra}. This was true whether the nonjoinder appeared on the face of the declaration or not.
\textsuperscript{63} See note 26 \textit{supra}. A statutory exception to the common law rule existed where the plaintiff brought an action of ejectment. \textit{W. Va. Code} c. 90, §5 (Barnes, 1923), now c. 55, art. 4, §4 (Michie, 1949). Under a similar statutory provision, the Virginia court held that nonjoinder of the occupant as a defendant must be pleaded in abatement. Matoaka Coal Corp. v. Clinch Valley Mining Corp., 121 Va. 522, 93 S. E. 799 (1917).
\textsuperscript{64} 1 \textit{Chitty, Pleading} *86; 2 \textit{Tucker, op. cit. supra} note 17, at 227.
\textsuperscript{65} Barger v. Hood, 87 W. Va. 78, 104 S. E. 280 (1920); Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S. E. 265 (1920); 1 \textit{Chitty, Pleading} *86; 2 \textit{Tucker, op. cit. supra} note 17, at 227. Here, however, the plaintiff could cure the misjoinder either by dismissing the action as to the misjoined defendants or by amending his declaration to show a joint liability. See notes 193 and 221 \textit{infra}.
\textsuperscript{66} Pence v. Bryant, 73 W. Va. 126, 80 S. E. 137 (1913).
\textsuperscript{67} \textit{W. Va. Code} c. 99, §11 (Barnes, 1923).
mediate number. There were other statutory provisions applicable to procedure where the plaintiff was unable to serve process or notice on all the parties defendant, but for the purposes of this paper notice of them is unnecessary. These two statutes are summarized here because of their importance as the basis of the present revised procedure.

C. Joinder of Parties Defendant in West Virginia Since 1931

In the Revised Code of 1931 a single section incorporates the substance of the former statutes dealing with joinder of parties defendant, and it applies both to common law actions and to proceedings by notice for judgments on motions. The part of the section pertinent to this paper reads:

"The holder of any note, check, draft, bill of exchange, or other instrument of any character, whether negotiable or not, or any person entitled to judgment for money on contract, in any action at law or proceeding by notice for judgment on motion thereon, may join all or any intermediate number of the persons liable by virtue thereof, whether makers, drawers, indorsers, acceptors, assignors, or absolute guarantors, or may proceed against each separately, although the promise of the makers, or the obligations of the persons otherwise liable, may be joint or several, or joint and several. . ."70

The breadth of the statute may not be certain, but it seems to cover all the liberalized procedure permitted formerly and has certainly extended the liberalization into fields formerly untouched.71 However, the modification as to joinder in this new section applies only to contract defendants. The statute is limited even in the contract field. The limitations will be discussed anon.

The procedure established by this statute seems objectionable in that it encourages piecemeal litigation by permitting separate actions against parties jointly liable without any excuse being necessary for a nonjoinder.72 The common law as to joint tort-
feasors, which was not altered, is subject to the same objection. What may be a more serious complaint is that the statute does not make any change as to either tort or contract plaintiffs so that the common law rules remain. This latter consideration becomes especially important in considering what real change the statute may have made as to permissive joinder of contract defendants, bearing in mind that in this section the revisers did not attempt to modify the court's concept of a cause of action and did not make any alteration in the common law rules as to joinder of causes of action.

Under the existing statute a plaintiff has the option on obligations falling within its provisions to change several contracts into joint contracts, joint contracts into several contracts, or either class into contracts intermediately joint and several. To the extent that this permits joinder of claims and speeds determination of liability, no objection is made. However, if this is done the statute fails to give the trial court discretion to sever parts of the action for trial even if necessary to avoid confusion. No consideration is given to trial convenience. On the other hand, the plaintiff has the option to change a joint contract, in which the questions of law and fact are likely to be common, into several contracts or contracts intermediately joint and several. Consideration is not given to speedy determination of liability, since this is permitted even where there is no excuse for a nonjoinder. To this extent the common law seems preferable. The statute did make the law consistent in actions at law and in proceedings for judgment on notice of motion, but the field in which these practices were permissible was more certain and more limited prior to the revision. An examination of the scope of the present section will make this evident.

In what proceedings does the plaintiff have the option thereunder to join or not join parties as defendants? The broader of

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See the discussion of the problems which may arise where the rules as to parties are liberalized but no changes are made in the rules concerning the joinder of causes of action. Text at page 201 infra.

To this extent the change was commendable. The elimination of any difference between the rights and liabilities of parties because of the form of the remedy used by the litigant seems desirable. This was accomplished by the revisers. Revisers' note to W. Va. Code c. 55, art. 8, §7 (Michie, 1949): Carlin, supra note 69, at 97.
the former statutes had applied to any motion proceedings, but our court has consistently held that such proceedings may be used only on contracts which provide for the payment of money. By its language the new section applies to the "holder of any note, check, draft, bill of exchange, or other instrument of any character, whether negotiable or not, or any person entitled to judgment for money on contract, in any action at law or proceeding by notice for judgment on motion thereon." Ambiguity is embodied in the words "other instrument of any character" and "judgment for money on contract". It is not clear whether the court will construe the first phrase to apply only to instruments similar to those mentioned or will hold that they include all written contracts in the possession of the plaintiff on which he may sue, whether for the payment of money or for the performance of some other act. The second phrase, applying to those cases in which the plaintiff is entitled to recover judgment but is not the holder of any instrument, is ambiguous in that "on contract" may modify "money" or "judgment". Do the words mean "entitled to judgment on contracts which provide for the payment of money", the limitation heretofore placed on similar language in our statute dealing with proceedings for judgment on notice of motion? Or do they mean "entitled to judgment on contract", thus including any contract action, regardless of the nature of the contract? In any event, the section applies whether the instrument is negotiable or not, and

The statute provides that any person entitled to recover money by action on any contract may, on motion, obtain judgment for such money. W. Va. Code c. 56, art 2, §6 (Michie, 1949). To use this proceeding the plaintiff must show that money is due on a contract, it not being sufficient to show that he is entitled to damages for a breach of a contract. Beckley v. Craighead, 125 W. Va. 454, 24 S. E.2d 908 (1943); Hensley v. Copley, 122 W. Va. 621, 11 S. E.2d 755 (1940); Houston v. Lawhead, 116 W. Va. 652, 182 S. E. 780 (1935) (for the purchase price of a note under a warranty imposed by law); White v. Conley, 108 W. Va. 658, 152 S. E. 527 (1930). If the claim is for money due on a contract, the proceeding may be used even though the contract is one implied by law. Lambert v. Morton, 111 W. Va. 25, 160 S. E. 223 (1931); accord, Grinrod Process Corp. v. Rothwell, 117 W. Va. 709, 189 S. E. 100 (1936) (upon a judgment of a court of a sister state); Houston v. Lawhead, 116 W. Va. 652, 182 S. E. 780 (1935) (upon a warranty implied by law). But cf. Moundsville v. Brown, 125 W. Va. 779, 25 S. E.2d 900 (1943); Beckley v. Craighead, 125 W. Va. 484, 24 S. E.2d 908 (1943). Any doubt as to the availability of this proceeding to collect forfeitures payable to the state under any provision of law was removed by a recent statute. W. Va. Acts 1949, c. 94.

Supra.

These two ambiguities were first noted by Professor Carlin in his article on parties to actions under the revised code. See Carlin, supra note 69, at 102.

Note 76 supra.

This is expressly provided in the statute. See the quotation in the text at page 151 supra.
the former law requiring separate actions against a principal and a guarantor,\(^1\) and exhausting legal recourse against the principal as a condition precedent to suing the guarantor,\(^2\) has been changed.

Another ambiguity seems present in the section. Does the right to join a party exist if the liability is imposed by a separate instrument? For example, can a guarantor who is liable on a separate instrument be joined with the person primarily liable? He may be joined if it can be said that he is liable "by virtue of" the instrument or contract on which the other party is primarily liable. There is no other means of holding that the statute permits joining such parties.

That joinder of persons liable by virtue of the same transaction or series of transactions is unlikely if the liability is imposed by a separate instrument is apparent from an examination of two West Virginia decisions. The earlier of these cases indicated that such joinder might not only be possible but that it might even be required. In \(\textit{State ex rel. Connellsville By-Product Coal Co. v. Continental Coal Co.}\),\(^3\) the defendant coal company successfully interposed a plea of \textit{res adjudicata} on the following facts. The defendant coal company had secured an injunction against the (use) plaintiff and had executed an injunction bond for $12,500 (surety not named), and later had executed an additional injunction bond with the present joint defendant as surety. The conditions of the two bonds were identical, each binding the several obligors, in case the injunction should be dissolved, to pay all costs incurred and damages sustained by the plaintiff which the defendant coal company should fail to pay. At the trial of the plea it appeared that the plaintiff had earlier sued the coal company defendant and apparently joined the sureties on the first injunction bond, and further, that each item of damages alleged in the instant case had been put in issue in the earlier case. Three of the five judges held that the plaintiff's action was barred, stating, \textit{inter alia}, that separate actions by the plaintiff were not necessary even though the bonds differed in penalties and sureties. Referring to Chapter 55, Article 8, Section 7, of the Revised Code, the court

\(^1\)Stewart \textit{v. Tams}, 108 W. Va. 559, 151 S. E. 849 (1930) (maker and assignor of a non-negotiable instrument joined as defendants).

\(^2\)Thomas \textit{v. Linn}, 40 W. Va. 122, 20 S. E. 878 (1894) (assignee against the maker of a bond or non-negotiable note). The court recognized that there would be an exception if the debtor became insolvent before the bond became due or from some cause a suit against him would have been unavailing. Point 5 of the syllabus prepared by the court.

\(^3\)117 W. Va. 447, 186 S. E. 119 (1936).
stated that "Since the two bonds herein may be regarded as one instrument, the statute applies; and joinder of the several sureties in one action on the entire demand was optional with the obligee."

The two judges dissented, not on the basis of an improper interpretation of the statute, but took the position that permission to join the sureties did not settle the issue of res adjudicata.

The hope that this section might be thus liberally interpreted was dimmed by the decision in State ex rel. Shenandoah Valley National Bank v. Hiett. Here the plaintiff proceeded in one action against sureties on two supersedeas bonds filed in the same chancery cause and with the same conditions in each. As in the earlier case, the bonds had been executed at different times, were in different penalties, and had been signed by different sureties. The court held that the statute did not permit a joinder of these sureties as parties defendant for recovery on the bonds. The court expressly disapproved the earlier case as having been too liberal and as not supported by the cases cited therein because based on statutes too dissimilar from the West Virginia statute. This general view of the statute was stated, "We think it plain that such purpose to destroy the distinction between joint, joint and several, and several liabilities is confined to the parties liable on any instrument, . . . and is inapplicable to parties who are liable on different instruments." Judge Clark might classify this decision as one based upon a "narrow, legalistic interpretation of the words 'the same obligation or instrument.'"

Are the rules which prevent joinder of parties in other cases necessary to prevent the plaintiff from unduly complicating legal proceedings? This danger may be suggested by those who would oppose extension of permissive joinder. But, the common law rules, and even the early rules of code pleading, which regulated

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84 Id. at 453, 186 S. E. at 122.
86 The court indicates that a different conclusion might have been reached if the statute had provided for joinder by the plaintiff of several causes of action arising out of the same transaction. 123 W. Va. at 743, 17 S. E.2d at 880. Note the similarity between this language and the proposal made herein. See discussion in text at page 199 infra. The narrow problem here involved might be met by amending the statute to read as the rule does in some jurisdictions that indorsers, guarantors, and sureties, "whether on the same or by a separate instrument", may be joined as defendants. See Clark, Code Pleading §60 n. 171.
87 123 W. Va. at 742, 17 S. E.2d at 879.
88 Clark, Code Pleading 388. Note that the statute permits joinder of causes of action based on "separate contracts" if evidenced by the same instrument. See Stewart v. Tams, 108 W. Va. 539, 542, 151 S. E. 849, 850 (1930).
The joinder of parties or causes of action were not designed to protect the courts. In fact, they hindered the courts to the extent that they gave the courts no power to control what causes of actions might be joined within the arbitrary limits established by the rules or what disposition the court might make of trial procedure after the joinder had been made in accordance with the rules. The rules were designed primarily to keep the issues simple before the jury; but aside from the fact that cases were often submitted to the court in lieu of a jury, the rules permitted the submission of issues to the jury that were more complex than they would have been in many joinders which the plaintiff was not permitted to make. The complexity of the issues which may be joined at common law and under existing West Virginia rules will be developed presently. The real safeguard in these cases has been the desire of counsel to present his claims in a way that the jury or court may easily find their merits. He would not unduly complicate the trial in the average case, even if he were given greater freedom to join parties and causes. If he does find it tempting to abuse rules of permissive joinder because of the weakness of some claims and the strength of others, or for any other reason, the court should have the power to restrict the scope of the issues to be tried at one time if that is necessary to protect the defendant from being prejudiced by a confusion of issues. This discretion in the trial court would protect not only defendants, but also the court, in cases where no protection is now available under rules which arbitrarily determine the scope of the trial by what is joined and joinable in the pleadings.

There has been only one additional relaxation in the rule as to permissive joinder of parties defendant. In 1940 the Supreme Court of Appeals promulgated a rule which permits a person having

89 In part the rules were designed to simplify and abbreviate the process of pleading as much as possible in order to aid the judges at a time when the pleadings were oral. It was for these reasons that one of the basic rules of common law pleading was that the issue produced by the pleadings was required to be single. However, even at common law it was recognized that this principle applied only to a single issue in respect to each single claim, and several issues were permitted when each related to a distinct subject of demand. The reason assigned for the latter exception was that "otherwise there would be no determination of the whole matters in demand." Stephen, Pleading §194. The strictness of the rule itself became avoidable at an early date when the plaintiff was permitted to use several counts in respect to the same cause of action and the defendant was allowed to use several pleas. Id. at 489-90.

90 See text at pages 168-180 infra.

91 This has been demonstrated in code states where the rules as to joinder are more liberal than in West Virginia. See note, 36 W. Va. L. Q. 192 (1930).

92 The court has this power under the Federal Rules. See text at page 206 infra.
certain causes of action arising under insurance policies to join
the claims in one action. A comparison of the problem in the
Hiett case with the facts covered by this rule makes evident the
relationship between party-joinder and cause-joinder problems.
Elaboration on this recent rule will be postponed since it serves
well to illustrate an approach to the technique used under the
Federal Rules to meet the criticism made and to be made in this
paper as to the West Virginia rules on joinder of parties and causes.

Additional consideration of the failure to permit freer joinder
of defendants as related to joinder of causes of action will soon
follow. The weakness of existing rules on joinder can be better
stressed by first examining the present rules on joinder of plaintiffs
and causes of action.

D. Joinder of Parties Plaintiff in West Virginia
Since 1931

As noted above, at common law no permissive joinder of
plaintiffs was permitted if their rights were several and no change
was made by the code revisers in 1931 as to parties plaintiff. No
lessening of litigation is permitted even though the additional
actions would involve common questions of law and fact. No
rule is better settled in West Virginia. In City of Wheeling v.
Trowbridge, one of the earliest cases to come before the Supreme
Court of Appeals, a husband and his wife brought an action for a
wrong to the wife, such joinder for a wife's recovery being necessary
at that time. The husband sought to recover in the same action
sums of money expended by him in her recovery. A demurrer to
the declaration was sustained because the husband should have
sued alone for the latter sums. It was held improper to join these
different “causes of action” because the damages could not be
severed.

In a series of cases the court has held that owners of separate
interests in the same land who have been injured by a single act
of one defendant cannot join to recover damages. Here it is clear

93 Quoted in part in the text at page 206 infra.
94 A more detailed discussion of the changes made by the Revised Code of
1931 as to parties to actions and suits may be found in Carlin, Parties to Actions
and Suits under the Revised Code, 43 W. Va. L. Q. 87 (1937).
95 5 W. Va. 353 (1872). The court did hold that the declaration might
be amended. See note 193 infra.
96 A married woman may now sue or be sued alone the same as if she were
97 Swick v. West Virginia Coal & Coke Co., 122 W. Va. 151, 7 S. E.2d 697,
47 W. Va. L. Q. 67 (1940); Logan Central Coal Co. v. County Court of Logan
that most of the questions of law and fact will be the same. In fact, the rule applied by the court in determining the measure of damages when they sue separately may require the jury to decide what amount of damage was done to the other estate. What question of law or fact remains that is not common to both actions? What justification exists that another jury be required to hear all of the same evidence and make the same computation, assuming that the same evidence is available for the second trial? Conceding that neither should be permitted to recover damages covering injury to the entire estate, a simple instruction would solve the problem.

An interesting application of the rule appears in Yeager v. Town of Fairmont, wherein two plaintiffs sued for damages occasioned by a change of grade in the street adjoining the property of the defendant. In permitting the latter joinder the court stated: "Since the defendant's rights may be fully protected in the deliberation and conclusion of the jury by proper instructions, telling them what facts and circumstances call for temporary or special, and what for permanent, damages, he is fully protected against injury from confusion of issues." Lyons v. Fairmont Real Estate Co., 71 W. Va. 754, 758, 77 S. E. 525, 527 (1912). The joinder here suggested would create even less danger of confusion from the defendant's point of view, and the joinder would be permissive as to the plaintiffs. Even if it were compulsory, it is submitted that proper instructions would protect the plaintiffs against injury from confusion of issues as adequately as they did the defendant in the Lyons case. See Note, 36 W. Va. L. Q. 199, at 202-202 (1930). Compare also this reasoning by the court in a recent case in not permitting joinder of defendants: "To hold otherwise an incongruous situation would occur in the event a jury trial was had on the instant declaration. In the event the jury should believe that both defendants were guilty of breach of the covenant, but the breach of one of the principals was more grave than that of the other, the jury would be unable to award just and proper damages as between the two principals because an action in covenant does not permit the rendition of two separate verdicts." Morris v. Maryland Casualty Co., supra note 85, at 576, 44 S. E.2d at 684.

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88 Ibid. Note also point 5 of the syllabus prepared by the court.
89 If the owners of separate interests in the same land have been injured by a single act of one defendant and they desire to combine their claims in one action, the trial problems which would be presented are analogous to those presented when a single plaintiff seeks to recover in one action from a single defendant both temporary and permanent damages done to his land by the defendant. In permitting the latter joinder the court stated: "Since the defendant's rights may be fully protected in the deliberation and conclusion of the jury by proper instructions, telling them what facts and circumstances call for temporary or special, and what for permanent, damages, he is fully protected against injury from confusion of issues." Lyons v. Fairmont Real Estate Co., 71 W. Va. 754, 758, 77 S. E. 525, 527 (1912). The joinder here suggested would create even less danger of confusion from the defendant's point of view, and the joinder would be permissive as to the plaintiffs. Even if it were compulsory, it is submitted that proper instructions would protect the plaintiffs against injury from confusion of issues as adequately as they did the defendant in the Lyons case. See Note, 36 W. Va. L. Q. 199, at 202-202 (1930). Compare also this reasoning by the court in a recent case in not permitting joinder of defendants: "To hold otherwise an incongruous situation would occur in the event a jury trial was had on the instant declaration. In the event the jury should believe that both defendants were guilty of breach of the covenant, but the breach of one of the principals was more grave than that of the other, the jury would be unable to award just and proper damages as between the two principals because an action in covenant does not permit the rendition of two separate verdicts." Morris v. Maryland Casualty Co., supra note 85, at 576, 44 S. E.2d at 684.

101 49 W. Va. 259, 27 S. E. 234 (1897).
of the plaintiffs. One of the plaintiffs owned a life estate in the property, and the other owned the reversion or remainder, but both operated a joint mercantile business in the storehouse located on the property. Damages for all three interests were sought. The reasoning of the court is not impressive. In sustaining the contention that there had been a misjoinder of plaintiffs, the court said:

"... If it was proper to combine all three of these causes of action, it is difficult to determine in what manner the damages recovered should be apportioned among them. If the suit was in equity, the value of the life estate might be ascertained, and yet it would be difficult to say what portion of the damages should be awarded the life tenant and what portion to the remainder-man, and equally difficult to ascertain what portion the plaintiffs were entitled to jointly by reason of the injury to their mercantile business...."

One must inquire how this apportionment would become simpler in a separate action for each "cause of action".

An extreme application of the rule was made in Logan Central Coal Co. v. County Court of Logan County. Here a tenant for years was in possession of the land which the defendant illegally took for road purposes, thus injuring both the leasehold and freehold interests. The reversioners assigned to the tenant their right of action for a valuable consideration. The tenant coal company attempted to join the cause of action for injury to the leasehold and the one for injury to the freehold, designating itself as a plaintiff in its own right and designating the reversioners as plaintiffs suing for the use and benefit of the tenant. It was held that the joinder was improper, since the lessor and the lessee could not have joined. Other than citing precedents for its position, the

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102 It is not clear from the facts in the case whether it was the reversion or remainder; whether it was the one or the other is immaterial since the same rules of joinder would be applicable. Cases cited note 97 supra.
103 Id. at 264, 27 S. E. at 236.
104 Compare the rule to be applied by the jury when the separate actions are brought. See note 98 supra. Note also the criticism of this rule of joinder in the preceding paragraph of the text.
106 Because of the broader scope of the amended statute permitting an assignee to sue in his own name (note 113 infra), it should be noted that the court has taken the position that a defendant cannot defend an action on the ground that the assignment was without consideration, or question the motive or purpose of the assignor in making the assignment. Id. at 464, 132 S. E. at 884, and the West Virginia cases therein cited.
court on policy considerations has only this to say: "Such a joinder might in many instances tend to confusion rather than to clarity and exactness in issues." The court itself apparently was not pleased with the result, and suggested that a different result might be obtained by having such actions consolidated and tried together. The only reasoning to support this preference, whatever was meant by "consolidation" as used here, was that it would permit action which might be of value after verdict in determining the correctness of the finding. If counsel for the defendant has such fear from joinder, he may resort to the use of special interrogatories. The result in this case flowed from the common law rule which failed to recognize an assignment of a chose in action, except to permit the assignee to bring an action in the name of the assignor for the use and benefit of the assignee. Our statute at that time was not broad enough to permit the assignee in this

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108 President Woods, writing the opinion for the court, stated, "The fact that the owner of the leasehold is now the sole beneficiary of the entire recovery is, to my mind, a very persuasive argument for upholding the assailed pleading."
109 This dictum apparently was not intended to suggest that consolidation, as the term is normally used, could be employed to avoid the rules of joinder as to parties. Blume, Joinder of Claims, 45 Mich. L. Rev. 797, 803 (1947); Note, 36 W. Va. L. Q. 199, 202-204 (1929). To be "consolidated" the claims should have originally been joinable. See also note 154 infra.
110 W. Va. Code § 56, art. 6, §5 (Michie, 1949). It is realized that this statute is not mandatory and that whether special interrogatories shall be submitted to the jury is within the discretion of the trial court, subject to review. Richards v. Riverside Iron Works, 56 W. Va. 510, 49 S. E. 437 (1904). In sustaining the action of the lower court in refusing to submit to the jury special interrogatories, the court in one case applied this test: "Here the issues were too few, simple and clear-cut for the jury to have overlooked any of them in arriving at its verdict. Special verdicts would not have assisted the jury in arriving at a correct conclusion. Consequently interrogatories ... were not necessary in order to impress on the jury a deliberation of the facts mentioned therein, and we see no abuse in the discretion of the trial court in refusing them." Lovett v. Lisagor, 100 W. Va. 154, 157, 130 S. E. 125, 126 (1925). Even if the rules of joinder are further liberalized, no different test need be applied in determining whether special interrogatories should be submitted either to assist the jury or to test or explain the general verdict. No different test has been applied in the field where the rules have already been liberalized. In some cases it might be advantageous for the trial court to have the power to require the jury to return a special verdict in the manner provided by the federal rules, but that question is outside the scope of this paper. See Federal Rule 49. Such verdicts might render unnecessary the separation of issues for trial in some of the cases discussed later in this paper. See text at pages 205-206 infra.
111 Keyser Canning Co. v. Klots Throwing Co., 98 W. Va. 487, 128 S. E. 280 (1925) (claim arising out of tort); Barkers Creek Coal Co. v. Alpha-Pocahontas Coal Co., 96 W. Va. 700, 123 S. E. 803 (1924) (claim arising out of tort); Garland v. Richeson, 25 Va. (4 Rand.) 266 (1826) (claim arising out of contract; applying a statute but recognizing the common law).
case to bring the action in his own name on this assigned chose in action.\textsuperscript{112}

Under the statute, as revised, either the tenant or reversioner, having an assignment of the chose in action of the other, ought to be able to recover damages for the entire injury to the property. The statute now reads:

"The assignee of any bond, note, account, or writing, not negotiable, or other chose in action arising out of contract or injury to personal or real property, may maintain thereupon any action \textit{in his own name}, without the addition of 'assignee,' which the original obligee, promisee, payee, contacting party, or owner of such chose in action might have brought. . . . In every such action the plaintiff may unite claims payable to him individually with those payable to him as such assignee, provided it be otherwise proper to join them. But nothing in this section shall be construed to make assignable any right of action not otherwise assignable."\textsuperscript{113}

Presumably that part of the statute which attaches a condition to joining assigned claims with others of the plaintiff\textsuperscript{114} refers to the limitation on joinder of causes imposed by the common law rules concerning joinder of certain forms of action.\textsuperscript{115} This problem will be discussed in detail later,\textsuperscript{116} but this would seem to present no obstacle in the instant case. The only possible objection would be the joinder of trespass counts for injury to the possession and counts in trespass on the case for injury to the reversion. A statutory

\textsuperscript{112} The statute permitted an assignee to sue in his own name if he were an assignee of a "bond, note, account, or writing, not negotiable." W. VA. Code c. 99, §14 (Barnes, 1923). In an earlier case the court had held that the statute applied to claims or demands arising out of contract, express or implied, or some fiduciary relation, but excluded demands arising from tort, relying in part upon the language of the statute that such assignee might maintain in his own name any action which the original "obligee or payee" might have brought. Barkers Creek Coal Co. v. Alpha-Pocahontas Coal Co., 96 W. Va. 700, 123 S. E. 803 (1924).

\textsuperscript{113} W. VA. CODE c. 55, art. 8, §9 (Michie, 1949). Italics supplied. See the revisers' note to this section which states that the object of the changes was to make the statute apply to all assignable choses in action and indicates that the changes were designed specifically to overcome the holding in Barkers Creek Coal Co. v. Alpha-Pocahontas Coal Co., supra note 112.

\textsuperscript{114} "... provided it be otherwise proper to join them..." (the statutory condition for joinder).

\textsuperscript{115} The amendments in this section were made by the Revisers in 1931, and prior to that time Professor Carlin had suggested amendments similar to those which were made. Note, 36 W. Va. L. Q. 199, 204 (1930). He suggested that the condition be attached to prevent joinder of causes of action deemed incongruous, specifically mentioning causes sounding in tort with those sounding in contract. \textit{Id.} at 205.

\textsuperscript{116} See text at pages 168-180 infra.
change has made that joinder possible.\textsuperscript{117} Certainly there is nothing about the subject matter which would prevent joinder of permanent and temporary damages from a single act by one defendant.\textsuperscript{118}

Even though this statute offers possibilities of joining other types of claims, it involves the necessity of assigning the claim to another and the further question of whether the claim is one which is properly assignable.\textsuperscript{119} Even though the defendant can not question the purpose of the assignment,\textsuperscript{120} the statute is in no sense a real remedy for the problem of permitting plaintiffs with separate claims involving common questions of fact or law to join in an action to enforce those claims. The statute merely provides first that action on the assigned claim may be maintained in the name of the assignee, and then recognizes the common law rule that being his claim he may join it with another cause of action that he might have joined if both had originally been his.\textsuperscript{121}

An approach somewhat peculiar was taken by the West Virginia court in those cases which deal with recovery of the statutory penalty imposed where coal mining operations are conducted within five feet of the line dividing land from that of another person without his consent.\textsuperscript{122} In \textit{Shinn v. O'Gara Coal}

\textsuperscript{117} The action of trespass has been abolished; and in all cases in which it would have been the proper form of action, an action of trespass on the case will lie. \textit{W. Va. Code} c. 55, art. 7, §10 (Michie, 1949). This change permits joinder of counts which would not have been proper at common law, that is, counts in trespass with counts in trespass on the case. See text at page 170 \textit{infra}.

\textsuperscript{118} The court has gone further and permitted the plaintiff to recover in one action both permanent and temporary damages to his real estate even though part of the damages resulted from separate and distinct acts of the defendant where they were both done "upon the same premises and works injury of the same kind." See \textit{Lyons v. Fairmont Real Estate Co.}, 71 W. Va. 754, 759, 77 S. E. 525, 527 (1912); accord, \textit{Clifford v. City of Martinsburg}, 78 W. Va. 287, 38 S. E. 845 (1916).

\textsuperscript{119} Note that the statute expressly provides that it shall not be construed to make assignable any right of action not otherwise assignable. Quoted in text at page 161 \textit{supra}. See note 124 \textit{infra}.

\textsuperscript{120} See note 106 \textit{supra}.

\textsuperscript{121} The narrow problem which was solved by the amendment is well summarized by Professor Carlin. Note, 36 W. Va. L. Q. 199 (1930). The writer of a case comment on \textit{Logan Central Coal Co. v. County Court of Logan County}, \textit{supra} note 105, suggested that "the extreme conservatism of result" in that case could be remedied only by the adoption of a modern code. 38 \textit{Yale L. J.} 1153 (1929). The amendment followed the customary pattern in West Virginia of solving one problem at a time rather than meeting the larger problem by the adoption of provisions usually found in modern codes liberalizing the rules of joinder of parties and claims generally.

\textsuperscript{122} "No owner or tenant of any land containing coal shall . . . dig, excavate or work in . . . any coal mine within five feet of the line dividing such land from that of another person or persons, without the consent in writing of every
Mining Co., the court held that there could be but one recovery of the penalty, but that all beneficiaries under the statute might join in an action to recover the penalty. A life tenant and a remainderman were permitted to join in the action. The court refused to apply the common law rule since neither the right nor the remedy depended upon common law. In this case the court refused to say whether less than the whole number interested in recovery could sue for the penalty, but in a case decided a few months later the court held that the defendant could not defend on the basis that some of the persons suing for the penalty were not entitled thereto if other plaintiffs were entitled to recovery. In this case the court said that it was immaterial to the defendant whether it pays the penalty to one of plaintiffs or to all of them jointly because one payment discharges the defendant as to all. This reasoning would permit any person interested to sue alone, and this is stated by the court in the syllabus to be true. No case has been found in which the court decided whether or how the penalty is to be apportioned among those interested in the recovery. In effect, the plaintiffs are treated as if they have a joint interest in the property right violated, but at their election, or the

person interested in . . . such adjoining lands. . . . If any person shall violate this section, he shall forfeit five hundred dollars to any person injured thereby who may sue for the same." W. Va. Code c. 37, art. 5, §1 (Michie, 1949).

123 72 W. Va. 326, 78 S. E. 104 (1913).

124 If the court had not reached this conclusion independently of any statutory provision liberalizing the rules of joinder, the statute here discussed would offer no assistance on the joinder problem since the right of action for this statutory penalty is not assignable. Wilson v. Shrader, 73 W. Va. 105, 79 S. E. 1083 (1913).


126 Point 1 of the syllabus. The constitution provides that it shall be the duty of the supreme court of appeals to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case. W. Va. Const. Art. VIII, §5.

127 The right to recover the penalty was not given for the purpose of indemnifying an injured person, nor is the amount of recovery measured by the injury inflicted. The purpose of the recovery allowed is to punish for a violation of the statute, and an action for vindication of private right in property is not precluded thereby. See Doss v. Toole, 80 W. Va. 46, 49-50, 92 S. E. 139, 140 (1917); Gawthrop v. Fairmont Coal Co., 74 W. Va. 59, 41, 81 S. E. 560, 561 (1914); Wilson v. Shrader, 73 W. Va. 105, 109, 79 S. E. 1083, 1085 (1913). This being true, it seems that no question of apportionment need arise even though more than one person is interested in the adjoining land if only one of those interested sues for recovery of the penalty. The court has taken the position that there can be but one recovery of the penalty, and it might be held that if only one of those interested sues he is entitled to retain the full amount for his diligence. However, the writer is unable to see how the question of apportionment can be avoided when more than one of those interested have joined to recover the penalty and are unable to agree as to their respective shares therein.

128 See note 127 supra.
election of any one or more of them, the joint interest may be asserted by any number of those interested. To the extent that joinder is permitted, or one or more is permitted to sue for all, it avoids a multiplicity of actions which would be necessary if each owner of a separate interest in the land affected were required to sue separately, but if an apportionment is later to be made, additional litigation may become necessary under this procedure. Factually, the latter question however may never arise.

This approach was used in the one West Virginia case where the court refused to approve the rule requiring separate actions at common law by those with separate interests in the property injured. In Curry v. Buckhannon & Northern R. R. Co., four plaintiffs sued for damages to their real estate resulting from the construction and operation of the defendant's railroad. The plaintiffs alleged that they were the owners in fee of the property and introduced as proof the will under which they obtained their title. Upon construction of the devise contained in this will, the trial court directed a verdict for the defendant since the plaintiffs had not such estate in the property as to justify recovery upon the evidence showing entire damage to the real estate. The defendant contended that the plaintiffs each took a separate estate in the several parts of the house damaged and that after that estate expired, by the destruction of the house, they took a joint estate for their lives in the property with the remainder passing to their respective heirs. Under the earlier cases this construction would have made numerous actions necessary for complete recovery. The Supreme Court of Appeals held that the plaintiffs could recover the entire damages in one action whether they owned in fee or in the manner the defendant contended, because if the latter were correct it would be "absolutely impossible" for the owners of the separate interests to prove "any reasonable certain measure of damages as a basis for a recovery" in separate actions and because some of the owners of the separate interests were not even determined. All of the parties in being having an interest in the property were permitted to join in one action and recover the entire damages. The court said that they could apportion the recovery among themselves, and in case they could not agree, the court could decide for them. The court left open for future

129 87 W. Va. 548, 105 S. E. 780 (1921).
130 See earlier cases cited in note 97 supra.
131 Compare the problem discussed in the latter part of note 127 supra.
decision the question of correctness on principle of the earlier cases requiring separate actions by plaintiffs with separate interests in property injured by one act of the defendant, but had this to say of the instant decision: "This would make necessary only one suit, would save the owners the expense and vexation of prosecuting several suits, and the one who had inflicted the injury the like expense of making defense to several suits." 132

There was no dissent in the Curry case, but unfortunately before the question next arose the judge who had written the opinion in the Curry case and two other members of the court at that time ceased to be members of the court. 133 The question next arose in Shaw v. Monongahela Ry. Co., 134 wherein were also involved the common law rules both as to proper parties plaintiff where a joint tenant dies after a cause of action accrues and where one joint tenant assigns his right of action to another. At the time the real property was damaged it was owned jointly by five persons. When the action was brought two of the joint owners had assigned their rights of action to one of the plaintiffs, 135 who sued in his own name, and another of the original joint tenants had died, leaving to survive her her husband and three children. Her husband was also the person to whom the other original joint tenants had made the assignments. In the action the original joint tenants who had not assigned their rights joined with the assignee and the persons holding through the deceased original joint tenant. Applying the common law rules the court held that there was a misjoinder of parties as plaintiffs, although the court did state that the surviving joint tenants might maintain the action for the benefit of themselves and the others interested without joining the assignors for the use and benefit of the assignee. No authority was cited for this permissible nonjoinder, 136 but the court was unwilling to modify the other common law rules and permit the joinder of all parties interested in the recovery of complete damages. The liberal trend shown in the Curry case was

132 87 W. Va. 548, 557, 105 S. E. 780, 783 (1921).
133 Judges Ritz, Poffenbarger, and Lynch.
134 100 W. Va. 366, 130 S. E. 461 (1925).
135 One of the joint owners had assigned his right of action to this plaintiff after the action was instituted, but to simplify the statement of facts it is here stated that two of them had assigned their rights prior to the time the action was instituted since the difference has no effect on the result reached in the case.
136 The court seems to have forgotten that the assignors were also surviving joint tenants.
not extended, even though the court expressed dissatisfaction with the existing rules of pleading as to each point decided. As to nonjoinder of parties separately interested, Judge Hatcher, writing the opinion, stated:

"Curry v. Ry. Co., 87 W. Va. 548, contains a dictum which is not in accord with the Jordan and the Yeager cases. . . . The argument of the dictum in the Curry case is plausible, and I would be impressed by it if the proposition were a new one. But it is in conflict with one of the cardinal rules of pleading relative to action ex delicto which has come to us from the Common Law and the soundness of which is, according to Hogg, 'self-evident' . . . ."\(^{137}\)

Apparently the soundness of the rule was not so evident to Judge Hatcher. Equally critical remarks were made concerning the other rules applied, and concerning the decision generally the court stated:

"It is apparent that this opinion is based solely on the rules of Common Law pleading. Statutory systems of pleading usually if not invariably require all of the real parties in interest to be before the court. Equity procedure in this state so requires. The dictum in Curry v. Ry. Co. supra, indicates the trend of modern judicial thought when divorced from Common Law restrictions. But the Constitution of this state declares that the Common Law shall continue to be the law until altered or repealed by the Legislature. Therefore this court must uphold and require compliance with Common Law pleading until it is so changed. It should not be modified or disregarded because of supposed expediency or for other personal opinion of the court."\(^{138}\)

This West Virginia case and those which have applied the same rule\(^{139}\) prevent the joinder of plaintiffs who have separate interests in the complete relief which would be sought against the defendant. Separate actions are required. As stated in the Yeager case, "all the plaintiffs must have an interest in the subject matter of the action and in obtaining the relief demanded."\(^{140}\) This was also the language of many of the codes on pleading, soon to be discussed. It was often construed to mean that each plaintiff joined must have an interest in all of the relief demanded, and the conjunctive word

\(^{137}\) 100 W. Va. 368, 271, 130 S. E. 461, 462 (1925).

\(^{138}\) Id. at 374, 130 S. E. at 463.

\(^{139}\) Cases cited in note 97 supra.

in the rule was emphasized.\textsuperscript{141} This interpretation defeats permissive joinder unless the court stresses the unity of the sum of money sought to be recovered.\textsuperscript{142} (When even this is stressed, complete decision concerning the case is not possible, for the respective share of each plaintiff is not determined.)\textsuperscript{143} In part this narrow interpretation is the result of reading into the rule the common law arbitrary restrictions on joinder of "causes of action" or the similar code pleading restrictions.\textsuperscript{144} No consideration is given to trial convenience.

An examination of the rules as to joinder of causes of action will be helpful in explaining the limitations imposed thereby on joinder of parties. In addition, it will show that to permit a greater liberality in joinder of parties need not result in more confusing issues for trial than is now possible. This examination should indicate that the West Virginia rules have left both the court and parties defendant open to worse abuses than would a further liberalization of the rules of joinder as to both parties and causes of action if discretion is vested in the trial court to limit the issues to be tried at one time in settling the complete dispute.

\textbf{E. Joinder of Causes of Action Between the Same Parties in West Virginia Since 1931}

In the problem of joining causes of action, questions analogous to nonjoinder and misjoinder of parties arise. "Splitting a cause of action" is analogous to nonjoinder and is a rule designed to prevent a multiplicity of suits, unless the defendant assents thereto,\textsuperscript{145} where similar questions would be involved in each action. The numerous issues involved must be litigated; otherwise the plaintiff must forfeit some of his rights.\textsuperscript{146} Proper joinder of

\textsuperscript{141} Clark, Code Pleading 365; 3 Moore, Federal Practice 2716.

\textsuperscript{142} Ritter v. Callen, 27 Kan. 339 (1882); Hudson v. Aman, 158 N. C. 360, 74 S. E. 97 (1912). In the latter case sureties on a sheriff's bond had been compelled to pay in unequal amounts for the defalcation of the sheriff. The court held that there was no misjoinder of parties plaintiff or causes of action. Compare Curry v. Buckhannon & Northern R. R., supra note 129.

\textsuperscript{143} Cases cited in note 142 supra.

\textsuperscript{144} This is illustrated in the following sections of this paper. The treatment here mentioned was equally applicable to defendants as it was to plaintiffs, and the case most often cited to show the interrelation between the rules as to joinder of parties and of causes is Ader v. Blau, 241 N. Y. 7, 148 N. E. 771, 41 A. L. R. 1216 (1925). See note 319 infra.

\textsuperscript{145} Holbert v. Safe Insurance Co., 114 W. Va. 221, 171 S. E. 422 (1933); St. Lawrence Boom & Mig. Co. v. Price, 49 W. Va. 432, 38 S. E. 526 (1901).

causes of action will exist if the causes joined fall within the groups which may be joined at common law or under the modified rules of procedure. The problem is one of possible misjoinder, and is the matter to be considered here. At common law a violation of the rules was fatal to the plaintiff's action if raised by demurrer, motion in arrest of judgment, or writ of error.\textsuperscript{147} Under the West Virginia statute advantage of a misjoinder of causes may be taken only by demurrer, for it is cured after verdict;\textsuperscript{148} and if a demurrer is sustained, the declaration may be amended by eliminating either group of misjoined counts.\textsuperscript{149}

Under the common law rules the scope of the subject matter of the action was determined by the writ system and the forms of action. These rules were important for they applied whether the separate statements of facts or counts were joined to recover for distinct causes of action or to meet possible variances in the proof by giving different versions of the same cause of action.\textsuperscript{150} The rules concerning joinability of counts in the declaration were so conflicting that the pleader could rely only on precedent for a safe test.\textsuperscript{151} The cases were confusing as to whether the process, the form of action, the judgment or the plea which would be used for the counts joined gave the controlling test.\textsuperscript{152} This problem has been further confused in West Virginia by the abolition of certain

\textsuperscript{147} I Chitty, Pleading \*205.  
\textsuperscript{148} W. Va. Code c. 58, art. 1, \$2 (Michie, 1949); Norfolk & W. R. R. v. Wysor, 82 Va. 250 (1886) (joinder of tort and contract counts); see Fleming v. Nay, 190 W. Va. 625, 629, 200 S. E. 577, 579 (1938); Malsby v. Lanark, 55 W. Va. 484, 486, 47 S. E. 358 (1904). Under the codes too advantage of this defect must be taken at an early stage of the pleading. CLARK, CODE PLEADING \*72; 3 Moore, FEDERAL PRACTICE 1806.  
\textsuperscript{150} See the last paragraph of note 193 \textit{infra}.  
\textsuperscript{149} Shipman, Common Law Pleading 79 (3d ed. Ballantine, 1923), citing Gartin v. Draper Coal & Coke Co., 72 W. Va. 405, 78 S. E. 673 (1913). It may be assumed for the purpose of this paper that the pleader sets forth the separate statements of facts in separate counts and avoids the possibility of a count being bad because of duplicity or double pleading. This defect was a formal defect and was reached by a special demurrer. "The latter having been abolished in West Virginia, the remedy for such defect is a demand for specification of grounds of the action or defense. Ibid.
\textsuperscript{151} Many of the precedents are collected in 1 Chitty, Pleading \*199-\*201; Shipman, Common Law Pleading \$80.  
\textsuperscript{152} CLARK, CODE PLEADING \$67, citing inter alia, Blume, A Rational Theory for Joinder of Causes of Action, etc., 26 Mich. L. Rev. 1 (1927); Sunderland, Joinder of Actions, 18 Mich. L. Rev. 571 (1920). Professor Sunderland demonstrates that none of the criteria so often stated as the basis for a decision could be relied upon to predict the result in the case of joinder of other counts, and concludes that the common law created imaginary difficulties in joining actions. \textit{Id.} at 581.
forms of action and the permissible use of alternative forms in other cases.

The rules concerning permissive joinder of causes of action may originally have been intended to prevent many diverse issues in the same action and to avoid unduly complicating the trial. However, even under the common law rules various claims might be joined even though based on groups of facts having no relation to each other. An examination of the common law rules and the extension of permissive joinder by statutory changes in West Virginia will demonstrate that the rules can no longer prevent, if they ever did, complexity and confusion at the trial if counsel for the plaintiff chooses to take advantage of the rules. Such examination will also disclose that the existing rules continue to prevent combining some claims even though the facts all arose from the same transaction and are so closely interwoven than no confusion at the trial would result from their joinder.

The rules also often prevent counsel from combining in his declaration alternative theories concerning the law applicable or the facts which he may be able to prove, especially important as to the legal theory involved since he may not be permitted to amend his declaration to embody a different theory. From this viewpoint the rules produce an inconsistency since counsel is privileged to state alternative legal theories or facts if the possible variance can be stated in a form of action which is joinable.

Generally the West Virginia court purports to follow the common law rules concerning joinder of causes of action, but the confusion noted in other jurisdictions exists concerning the criteria to be used in deciding whether a misjoinder exists. Before discussing the West Virginia cases, it may be advisable to note the statutory changes concerning the forms of action which must or

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153 Professor Sunderland questioned whether there really were any foundations upon which the common law rules were based. Id. at 572. Professor Moore states that the rationale underlying the common law rules was never explained and that common law judges stated only the arbitrary rules. 3 Moore, Federal Practice 1803.

154 1 Chitty, Pleading *201; Kerwin, Cases on Common Law Pleading 539 (2d ed. 1994); Shipman, Common Law Pleading §80. Chitty points out that where the plaintiff had two causes of action which might be joined, he ought to bring one action only; and that if he did not, he might be compelled to pay the costs of an application for consolidation.

155 Amendments and the theory of the pleadings will be discussed in a forthcoming issue of this Review.

156 See text at page 168 supra.
may be maintained, which statutes have in turn broadened the
common law rules on joinder of causes of action.

When this state was created the constitution provided that
the law of Virginia should be the law of this state,157 and a Virginia
statute then provided that an action of trespass on the case might
be maintained wherever an action of trespass would lie.158 However,
trespass could not be maintained wherever trespass on the case
would lie.159 This statute was enacted to remove the hardships
which might arise from the nice distinctions between the cases in
which trespass was the proper action and those in which case was
proper.160 However, in an early Virginia case, binding precedent
in West Virginia by virtue of the constitution, it had been decided
that even though this may have been the purpose of the statute,
it also would permit the joinder of any counts in trespass on the
case though some of the causes of action embodied therein would
have been proper only in trespass at common law.161 The common
law rule that would not permit a joinder of counts in trespass with
those in trespass on the case had been fortuitously changed.162

The only problem which remained was to determine whether
the counts for which trespass would have been proper had been
made counts in trespass on the case. If the process were in case
and the declaration were wholly in case, no difficulty would be

W. VA. CODE c. 2, art. 2, §1 (Michie, 1949).
158 VA. CODE c. 148, §7 (1860). Compare W. VA. CODE c. 103, §8 (Barnes,
1929).
160 Parsons v. Harper, 57 Va. (16 Gratt.) 64, 72 (1860). Typical of the
nice distinctions which had to be drawn to determine whether trespass or
trespass on the case was the proper form of action was the difference between
the injury inflicted having been direct or consequential. The distinction was
often so fine drawn that the courts began to use reasoning which would justify
the bringing of either form of action. For example, through negligence a
vehicle is caused to strike forcibly another, injuring the vehicle and the
occupant. If the negligence of the driver is treated as the cause of action,
trespass on the case was proper; but if the act itself is treated as the cause of
action, trespass was proper. SHIPMAN, COMMON LAW PLEADING 88.
161 Parsons v. Harper, 57 Va. (16 Gratt.) 64 (1860); accord, Galizian v.
Henry, 71 W. Va. 292, 76 S. E. 440 (1912); Lively v. Ballard, 2 W. Va. 496
(1868); Beckwith v. Mollohan, 2 W. Va. 477 (1868).
162 BURKS, PLEADING & PRACTICE 899; SHIPMAN, COMMON LAW PLEADING 203.
Whether fortuitous or not, the change was a step in the right direction. The
logic in permitting such joinder is emphasized by Professor Moore when he
points out that the former rule would prevent such joinder even though the
two counts were only variations in presenting the underlying operative facts,
being nothing more than different statements of the same cause of action.
2 MOORE, FEDERAL PRACTICE 1804.
If the process were in trespass or only some of the counts were in case, difficulty might have arisen for the statute did not authorize joinder of trespass and case counts. This difficulty in determining whether trespass and case counts are joined should not arise under the present statute which requires an action of trespass on the case to be used wherever trespass would have been proper at common law. However, similar problems may arise under a West Virginia statute which permits, but does not require, an action of debt or assumpsit to be maintained on any note or writing, whether sealed or not, by which there is a promise or obligation to pay money, if the writing be signed by the party who is to be charged thereby. This statute permits assumpsit where experienced. If the process were in trespass or only some of the counts were in case, difficulty might have arisen for the statute did not authorize joinder of trespass and case counts. This difficulty in determining whether trespass and case counts are joined should not arise under the present statute which requires an action of trespass on the case to be used wherever trespass would have been proper at common law. However, similar problems may arise under a West Virginia statute which permits, but does not require, an action of debt or assumpsit to be maintained on any note or writing, whether sealed or not, by which there is a promise or obligation to pay money, if the writing be signed by the party who is to be charged thereby. This statute permits assumpsit where

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163 Said the court in Parsons v. Harper, 57 Va. (16 Gratt.) 64, 72 (1869): "... as the action is case, and the declaration purports in its introduction, to be wholly in case, those counts for the matters of which it is said trespass would lie, may be considered counts in case with as much propriety, as counts in trespass."

164 If the process were in trespass and some or all of the counts were in trespass on the case, the defendant could take advantage of the variance in the writ from the declaration only by a plea in abatement. Beckwith v. Mollohan, 2 W. Va. 477 (1868). The present statute so provides and in addition provides that the court may permit the plaintiff to amend the writ so as to correct such a variance whether it was the subject of a plea in abatement or not. W. Va. Code c. 56, art. 4, §30 (Michie, 1949).

If the process were in trespass on the case but some of the counts in the declaration were in trespass and others were in trespass on the case, it was not clear whether the court would have held the declaration to be one in trespass under some circumstances and that the case counts were therefore improperly joined. In the first case in which the question arose, the court dismissed a contention that the declaration was demurrable, since it contained counts applicable either to trespass or case, by stating that there was no cause for demurrer for this reason under the statute permitting case to be used where trespass was formerly proper. Beckwith v. Mollohan, 2 W. Va. 477, 481 (1868). In another case in which the same contention was made, the court avoided the problem by deciding that all of the counts were counts in trespass. Elk Garden Big Vein Coal Mining Co. v. Gerstell, 95 W. Va. 471, 473, 121 S. E. 569 (1924). In most of the cases in which the question of such joinder arose, the court merely held that the causes of action were jointable by virtue of the statute, and stated in the syllabus that the declaration was in trespass on the case. E.g., Coal Land Development Co. v. Chidester, 86 W. Va. 561, 103 S. E. 923 (1920); Galizian v. Henry, 71 W. Va. 292, 76 S. E. 440 (1912).

165 W. Va. Code c. 55, art. 7, §10 (Michie, 1949). It seems probable that a demurrer would be sustained to a declaration in trespass even though that were the proper form of action at common law. Under the statute when it permitted case where trespass would have been proper at common law, the court held that a demurrer would be sustained to a declaration in trespass where the proper form of action at common law was case. Barnum v. Baltimore & Ohio R. R., 5 W. Va. 10 (1871). An equally literal interpretation of the present statute would make a declaration in trespass improper today even though proper at common law.

only covenant may have been proper at common law\textsuperscript{167} and seems also to permit an action of debt where it would not have been proper at common law.\textsuperscript{168} Another statute is even broader in allowing an action of assumpsit where covenant would have been proper at common law. It permits an action of assumpsit in all cases to recover damages for the breach of any contract in writing whether under seal or not.\textsuperscript{169} The statute which abolished replevin probably does not affect joinder of causes of action.\textsuperscript{170} At common law the action of detinue included those cases where replevin was proper, namely, where there had been an unlawful taking.\textsuperscript{171} Accordingly, the plaintiff even at common law perhaps could join counts in debt when suing for a wrongful taking if he used counts in detinue rather than in replevin.\textsuperscript{172}

\textsuperscript{167} "The action of covenant lies for the recovery of damages for breach of a covenant, that is, a promise under seal, whether the damages are liquidated or unliquidated. When the damages are unliquidated it is the only proper form of action." \textsc{Shipman, Common Law Pleading} §55.

\textsuperscript{168} Even at common law the idea that debt would only lie where the amount due is fixed or can be reduced to a certainty by mathematical computation was expanded to include obligations to pay the reasonable value of services or goods even though this value was not fixed by the parties. \textsc{Shipman, Common Law Pleading} §54. This expansion was needed in order that common counts might be used in the action of debt. At common law there remained many cases in which debt could not be maintained though the promise was "to pay money", for example, to indemnify against loss by fire or to pay a debt out of a particular fund. \textit{Ibid}.

\textsuperscript{169} W. Va. Code c. 55, art. 8, §3 (Michie, 1949). Note that there is no limitation in this section that the action be on a writing by which there is a promise to pay money. Compare id. §2, \textit{supra} note 166.

\textsuperscript{170} W. Va. Code c. 55, art. 7, §4 (Michie, 1949). This section merely abolishes the action of replevin, and does not provide that another form of action shall be used where replevin was formerly proper. Compare W. Va. Code c. 55, art. 7, §10 (Michie, 1949), \textit{supra} note 165. This was unnecessary since detinue would have been the logical alternative form of action, and that form of action was a proper alternative at common law. See note 171 \textit{infra}. The relief available in an action of detinue was modified to give the plaintiff some of the advantages which might have been obtained in an action of replevin at common law. W. Va. Code c. 55, art. 6 (Michie, 1949); Note, 32 W. Va. L. Q. 137 (1926).

\textsuperscript{171} Replevin was proper where specific personal property had been wrong-fully taken and was wrongfully detained. \textsc{Shipman, Common Law Pleading} §49. The gist of the action of detinue is the wrongful detention of specific personal property, and some of the older books state that the action can not be main-tained where the defendant took the goods tortiously. \textit{Id.} §48.

\textsuperscript{172} Since detinue evolved from the action of debt, counts in these two forms of action can be joined at common law even though the pleas are different and the judgments are in different forms. At common law counts in replevin could not be properly joined with counts in any other form of action. \textsc{Clark, Code Pleading} 436, n. 4; \textsc{Shipman, Common Law Pleading} §80. See the question raised in note 185 \textit{infra} as to joining debt and detinue if the latter sounds in tort.
The scope of this expansion of the cases in which joinder of causes is now permissible in West Virginia can be seen from an examination, even though brief, of the cases in which joinder was permissible at common law. Some of the extensions have already been before the Supreme Court of Appeals, and little imagination is needed to predict the result in other cases if the court follows, as it probably will, the reasoning used in the cases already decided. At common law all of the various types of trespasses, both to the person and to property, might be joined in the same declaration. Also, several causes of action in trespass on the case might be joined with trover, the breadth of this permissible joinder being great because trespass on the case is the residuary action at common law. The earlier statute permitting case where trespass was proper at common law had been applied to the combination of trover, trespass, and case. Under that statute it was held that causes originally proper in trespass could be joined with causes proper in case; and along with either or both of those types, causes proper in trover could be joined. In brief, the statute permitted any cause of action sounding in tort, except those

172 1 CHITTY PLEADING *200; SHIPMAN, COMMON LAW PLEADING §202.
174 Spencer v. Pilcher, 35 Va. (8 Leigh) 565 (1837); 1 CHITTY, PLEADING *200; SHIPMAN, COMMON LAW PLEADING 202. This was one of the two exceptions to the rule that counts in different forms of action could not be joined, the other being that debt and detinue counts could be joined. Both exceptions were based upon the fact that one of the two forms of action developed historically from the other. ATKINSON & CHADBOURN, CASES ON CIVIL PROCEDURE 142, n. 6 (1948); CLARKE, CODE PLEADING 436 n. 4.
175 The action of trespass on the case arose under the statute of Westminster II which authorized the clerks in chancery to frame new writs in consimili casu with writs already known. These writs came to be viewed as a new form of action comprised of different species. Of these species two came to be known as trespass on the case “in assumpsit” and “in trover”. All others, which were used less frequently, were known as “case”. There was no strict limit to the action, and it was the authority invoked in extending tort liability. SHIPMAN, COMMON LAW PLEADING §38. But see Plucknett, Case and the Statute of Westminster II, 31 Col. L. Rev. 778 (1931). Because of confusion in terminology the code revisers changed the technical name of the action of trespass on the case in assumpsit to action of assumpsit. W. VA. CODE c. 55, art. 8, §3 (Michie, 1949).
176 See note 158 supra.
178 Hood v. Maxwell, 1 W. Va. 219 (1866). This case held that counts in trover could be joined with a count in case which count was proper in case only by virtue of the statute permitting case where trespass had been proper at common law. Although trespass and case could not be joined at common law, case and trover could be; therefore, by using case for the causes of action in which trespass formerly had to be used, causes of action proper at common law in trespass, case or trover might be joined.
in which the plaintiff sought to obtain possession of property, to be joined. That this expansion of joinder was not the purpose of the statute has been shown.

This scope of joinder in the tort field is automatic now that the plaintiff must bring his action in case wherever case or trespass was proper at common law. In the contract field, the plaintiff has the option of many joinders if he chooses the proper process and form for his declaration. Under the common law system he might join as many causes as he wished if they could be maintained in assumpsit, whether general or special assumpsit; and likewise, he could join as many causes as he desired if they could be maintained in debt, whether on a sealed or simple or implied contract or on a judgment. He might also join counts in debt and detinue, though probably only if the latter sounded in contract. At common law he could not join counts in assumpsit with covenant, but under the West Virginia statutes if he elects to use assumpsit on a sealed contract, he is in a position to combine counts for

179 Ejectment and unlawful entry and detainer for real property, and detinue and replevin for personal property, were the only tort actions which could not be joined.

180 See text at page 170 supra.

181 W. VA. CODE c. 55, art. 7, §10 (Michie, 1949). See also note 165 supra.

182 See note 164 supra as to this problem under the statute which permitted case where trespass was proper. On this point it must be remembered that even at common law the plaintiff could widen the scope of permissive joinder of causes by arrangement and selection of facts, or by the use of fictions, to cast his action in different forms. By these means he could set up a cause of action indifferently as one in case or assumpsit, debt or assumpsit, trover or replevin, assumpsit or trover, trespass or case, or debt or covenant. Sunderland, supra note 152, at 576.

183 Horner v. Speed, 2 Pat. & H. 616 (Va. 1857) (special assumpsit with special assumpsit); Kennaird v. Jones, 50 Va. (9 Gratt.) 183 (1852) (general assumpsit with special assumpsit); I Chitty, Pleading *200; Shipman, Common Law Pleading 202.

184 Somerville v. Grim, 17 W. Va. 803 (1881) (debt on a single bill joined with the common counts); Eib v. Pindall's Ex't, 32 Va. (5 Leigh) 109 (1834) (debt on a specialty and a simple contract); I Chitty, Pleading *200; Shipman, Common Law Pleading 202. Note that this joinder is permitted even though the pleas are different. The general issue in debt on simple contracts and statutes is "nil debet", on a specialty it is "non est factum", and on judgments it is "nulla tia record". Shipman, Common Law Pleading §§184-186.

185 I Chitty, Pleading *200; Shipman, Common Law Pleading §80. Note that this joinder is permitted though the judgments are different, that in detinue being at common law in the alternative for either the goods or their value. Shipman takes the position that detinue and debt may be joined even though this be an exception to the general rule that actions ex contractu cannot be joined with those in form ex delicto. Chitty takes the position that the joinder of these two forms is permissible only if both be founded on contract, citing Tidd. See Tidd, Practice *11 n. b.

186 See citations in note 185 supra.

187 The statutes are cited in notes 166 and 169 supra.
any causes of action for which assumpsit is proper, including counts under the statute on other sealed contracts. Likewise, under the statute he may use an action of debt even though the obligation on the contract to pay money is not for a sum certain or capable of being made certain\(^{189}\) and combine with that cause claims for which debt is proper at common law and also claims for recovery in detinue,\(^{186}\) including perhaps those claims in which an action in replevin would have been proper at common law.\(^{191}\) In brief, any causes of actions, including those for recovery of personal property but excluding those for recovery of real property, may be joined as long as actions \textit{ex contractu} are not joined with those \textit{ex delicto}.\(^{192}\)

All of these joinders of causes of action are permitted without any discretion in the trial court to eliminate confusion by requiring a severance or separation of the many possible issues for trial convenience. Contrariwise, a limitation on joinder which the court has steadfastly maintained and which has caused reversals or delays in many cases is that actions \textit{ex contractu} cannot be joined with those \textit{ex delicto}.\(^{193}\) If it were always clear before trial what facts

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188 Analogy drawn from the cases which permitted joinder of causes proper in trespass and case at common law under the West Virginia statute which formerly permitted case to be maintained where trespass was proper at common law. See notes 157-164 supra and the text to which those notes are appended.

189 See notes 166, 168, and 188 supra.

190 See notes 185 and 188 supra.

191 See notes 170-172, 185 and 188 supra.

192 Caveat as to detinue if based on a wrongful taking. See note 185 supra.

In this summary the writer has omitted the action of account which lies where one has received goods or money for another in a fiduciary capacity, to ascertain and recover the balance due. It lies where there is an obligation to account, and the amount due is uncertain and unliquidated. \textit{Shipman, Common Law Pleading} §56. Although this action has not been abolished in West Virginia, it seems to be obsolete. The common counts in assumpsit or a bill in equity for an accounting seems to have taken its place. See, however, \textit{W. Va. Code} c. 35, art. 8, §13 (Michie, 1949).

193 Shepherd v. Pocahontas Transportation Co., 100 W. Va. 703, 131 S. E. 548 (1928) (tort with common counts); O'Neal v. Pocahontas Transportation Co., 99 W. Va. 456, 129 S. E. 478 (1925) (tort with common counts); Shafer v. Security Trust Co., 82 W. Va. 618, 97 S. E. 290 (1918) (case with common counts); Creel v. Brown, 40 Va. (1 Rob.) (1842) (case with assumpsit). As stated by Judge Lynch in Shafer v. Security Trust Co., \textit{supra} at 621, 97 S. E. at 291: "The rule forbidding joinder of counts in assumpsit and tort is well established, so well indeed as not to provoke elaborate argument or need much citation of authority. It is elementary, and, if infringed, makes the declaration subject to successful challenge by demurrer."

Although the rule is well established, it is not always clear whether the counts will be treated as being both in tort or contract, or one in tort and the other in contract. Much may depend upon slight differences in the allegations therein. Compare Shafer v. Security Trust Co., \textit{supra}, where one count was held to be in tort since the allegation that the defendant "undertook
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would be established, some justification for this limitation might be made if joinder of counts be merely to meet possible variances in proof, but it seems questionable whether a client should be required to suffer the delay necessary for a new action when the legal theory on which any recovery might have been obtained was not clearly in tort or on contract. Should the claim have been asserted on the theory of breach of contract or on the basis that tort liability existed? If the problem resolves itself into one solely
to sell" was not, when considered with the other averments, deemed equivalent to an allegation that the defendant "undertook", with Hill v. Ansted National Bank, 95 W. Va. 649, 123 S. E. 417 (1924), where both counts were held to be in tort, the one count being "in form ex contractu" but it did not directly allege "an undertaking" by the defendant. See Maloney v. Barr, 27 W. Va. 381 (1886), in which the common counts were joined with two special counts, and the court held that the second of the special counts was in assumpsit because the general conclusion of the declaration was a part of that count and in the conclusion an express promise to pay was averred. The court concedes that otherwise the count averred that the defendant's liability arose from a tort. Id. at 384. No contention was made that the first of the special counts was improperly joined, but unless it was made a count in assumpsit by this same line of reasoning, it appears to be a count in debt and improperly joined with assumpsit at common law. See also McKay v. Ohio River R. R., 34 W. Va. 65, 11 S. E. 737 (1889); Burks, PLEADING & PRACTICE §99 (3d ed. 1954).

One should remember that even this rule does not prevent the plaintiff from joining the same causes of action if he casts his actions in different forms of action. See note 182 supra. The real limitation imposed by this rule is the denial of a right to the plaintiff to recover for any cause of action in one action if the facts proved or the theory of law determined to be applicable in the litigation shows a right to recovery in a contract form when the plaintiff's counsel originally and perhaps justifiably thought the right could be more easily shown in a tort form of action, or vice versa. An excellent illustration of the problem may be found in Schaffner v. National Supply Co., 90 W. Va. 111, 92 S. E. 580 (1917), wherein the plaintiff was permitted to join a count for false warranty with a count for deceit. The action was in case for both counts, and the joinder was proper on the basis of precedents holding that an action for false warranty may be brought in either assumpsit or case. These precedents are based on the historical development of the action of assumpsit through trespass on the case, in which development reliance was placed on a fiction of deceit where there was no "undertaking" by the defendant. Ames, LECTURES ON LEGAL HISTORY 140-145 (1913). For other causes where the plaintiff has no such election to make his action sound in either tort or contract, such joinder is not permitted although it may be equally desirable.

The plaintiff may amend the declaration by eliminating either group of misjoined counts; and when so amended, the writ may be changed to conform to the amendment. O'Neal v. Pocahontas Transportation Co., supra at 460, 129 S. E. at 479; Shafer v. Security Trust Co., supra at 622, 97 S. E. at 291, and the cases cited therein. This procedure offers no solution for the problem. This point will be discussed more fully in a forthcoming issue of this Review.

194 The trial lawyer needs no citation of incidents to demonstrate that this is seldom the case. The layman has been well advised of the uncertainty concerning "facts". Franke, COURTS ON TRIAL (1949), especially the chapter therein entitled, "Facts Are Guesses".

195 For example, see McKay v. Ohio River R. R., 34 W. Va. 65, 11 S. E. 737 (1889), in which the plaintiff recovered a judgment for $539.17 for damages sustained as a result of having been ejected by a conductor without unnecessary
of factual uncertainty and the possibilities can be set forth in counts which are joinable, the plaintiff can protect himself against the variance in proof;\textsuperscript{198} but even this he can not do if the alternative facts must be set forth in a count which is not joinable.\textsuperscript{197} Further, what may be set forth as an apparent fact variance in the allegations of different counts of a declaration may in reality be needed only to meet a variance in the possible theory of recovery.\textsuperscript{198}

Have these limitations on the forms of action which may be joined been further restricted on the basis that the causes joined must have a common relationship? This question was never clearly answered by the well known commentators on common law pleading. They frequently stated that the causes joined must be "of the same nature", but no distinction was drawn except on the basis of the forms of action which might be joined according to common law precedents. Causes "of the same nature" seems to have meant only that the forms of action were joinable.\textsuperscript{199} The problem here is to determine whether the West Virginia court has adopted any additional limitation to prevent free joinder of any causes within the possibilities already developed. If not, counsel may take advantage of the statutory liberalization to confuse issues at the trial\textsuperscript{200} even though he might be barred from recovery in one action for one cause of action by the restrictions which remain.

In \textit{Galizian v. Henry},\textsuperscript{201} in permitting joinder of a cause of

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\textsuperscript{197} E.g., \textit{Burks, Pleading & Practice} §899, 482; \textit{Shipman, Common Law Pleading} §80. These statements can be traced to Chitty, where they seem to have no different meaning. \textit{1 Chitty, Pleading} *200, *201.

\textsuperscript{199} The trial court in West Virginia has no power to separate or sever the issues for trial purposes. Federal courts may. See text at pages 200, 206 infra.

action for malicious prosecution and one for false imprisonment, the court said:

"Nor is there a misjoinder of counts rendering the declaration bad as a whole. By statute trespass on the case lies in any case proper for trespass vi et armis at common law, and these two causes of action grow out of the same transaction, involving substantially the same evidence. Hence joinder thereof is clearly allowable. . . ."202

The court cited as authority for these statements the earlier cases which had held such causes of action properly joinable without any limitation as to whether they grew out of the same transaction or involved substantially the same evidence.203 In fact, the reasoning in the earlier cases would refute any such limitation, for the decisions were based entirely upon the fact that the statute permitted case where trespass was proper at common law; the result following that such causes of action being properly asserted in case counts, they might be joined as freely as causes properly asserted only in case counts at common law. The limitation therefore seems to be dictum, the court merely intending to emphasize that on these facts the joinder was "clearly allowable".

In Pan Coal Co. v. Garland Pocahontas Coal Co.,204 a similar comment was made by the court, although the action unlike that in the Galizian case involved only a question of permissible joinder without the aid of the statute. The plaintiff sued to recover the value of coal taken from its premises and for damages for the injury done to its unmined coal. The court stated:

". . . That the two demands are joined in the same declaration makes no difference. They grow out of the same tort; that one count in effect is in trespass de bonis asportatis, that is, for carrying away part of plaintiff's coal, and the other in trespass quare clausum fregit, that is, for breaking and entering plaintiff's premises and doing injury to other of plaintiff's coal, is not objectionable. . . ."205

203 Cases cited in note 161 supra.
205 Id. at 373, 125 S. E. at 228. Italics supplied. Apparently these two causes could have been joined in one count of trespass quare clausum fregit, the taking and carrying away of the coal being alleged by way of aggravation. Cook, READINGS ON THE FORMS OF ACTION AT COMMON LAW 71 n. 28 (1940). Other types of trespass could also be alleged by way of aggravation. Id. at 55 n. 24. Comparable joinder of causes of action has been permitted generally by statutes which per-
Here again the emphasis was upon the joinder of trespass counts, which was proper at common law, and reference to the same transaction being involved in each count was a factual statement rather than a legal limitation.

Application of the rules in other cases leaves no doubt but that they permit joinder even though the causes arose from widely separated groups of facts. For example, in Coal Land Development Co. v. Chidester,\textsuperscript{206} the plaintiff joined two independent causes of action, one for an assault and battery by the defendant upon one of the plaintiff's agents while in the course of his employment and the other for slander against it as a corporate entity. The defendant's demurrer for a misjoinder of counts in the declaration was overruled.

In another case,\textsuperscript{207} the same principle was applied, although the acts of the defendant were apparently not as distinctly separate transactions as they seem to have been in the Chidester case. Here the plaintiff sought to recover damages from two acts of the defendant, one being the construction of a huge fill partly on the plaintiff's land and the other being the construction of a roof on defendant's house, located on the lot where the remainder of the fill was made, in such manner as to collect water and cast it on the plaintiff's lot. The court, in justifying the joinder of the latter cause of action, said:

"... This may be regarded as an act separate and distinct from the construction of the embankment and wall, but it was done by the same party and upon the same premises and works injury of the same kind, for which reasons we see no valid objection to the inclusion thereof in the declaration along with the other acts complained of."\textsuperscript{208}

Although the language sounds somewhat restrictive, the caution seems to relate to proper joinder of parties rather than to a limitation on joinder of forms.\textsuperscript{209} In other cases where joinder of forms has been permitted, the court has more clearly reserved for future

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\textsuperscript{206} 86 W. Va. 561, 103 S. E. 923 (1920).
\textsuperscript{207} Lyons v. Fairmont Real Estate Co., 71 W. Va. 754, 77 S. E. 525 (1912).
\textsuperscript{208} Id. at 757, 77 S. E. at 527. Italics supplied.
\textsuperscript{209} Limitations on the joinder of causes by virtue of the difference in parties involved are discussed in the text at page 181 infra.
decision whether joinder of the forms of action would be permitted if the problem of proper joinder of parties was present.210

Since the court seems never to have held that the joinder of forms of action is controlled also by the causes having arisen from the same transaction, statements recognizing this fact made in cases where the forms of action were properly joined may indicate that the court would favor such a limitation. This is a limitation found in code pleading.211

The West Virginia court has frequently made other vague statements concerning the scope of permissible joinder of counts. It has stated that to be joinable the causes of action must be of "similar quality or character",212 "of the same general nature"213 and that the form of action in each, if asserted separately, would be "the same and admit of the same plea and judgment".214 However, the court has held that the pleas may be different if the judgment is the same in each.215 In addition to applying the rule to permit joinder of causes arising from different transactions,216 the court has stated that the rule is not so limited.217 One may assume therefore that these general statements have reference to the problem of what forms of action are joinable based on precedents218 and have no limiting effect on the groups of facts from which the various causes of action arise.

The West Virginia court has also been concerned with what Professor Sunderland included in the second class of cases in which

211 See text at page 202 infra.
213 Coal Land Development Co. v. Chidester, 86 W. Va. 561, 565, 103 S. E. 923, 925 (1920).
214 Ibid. Language to the same effect from Chitty and Hogg is quoted with approval in Wells v. Kanawha & M. Ry., 78 W. Va. 762, 763, 90 S. E. 357 (1916), although the quotation from Hogg concedes that there need not be the same pleas. See note 215 infra.
216 Cases cited notes 206 and 207 supra.
217 "He may join a claim of debt on a bond with a claim of debt on simple contract or any number of such claims, in the same suit, and whether they grew out of the same or different transactions." Shafer v. Western Maryland Ry., 93 W. Va. 300, 306, 116 S. E. 747, 749 (1923). Compare note 224 infra.
218 The scope of permissive joinder within these precedents, as aided by statutory changes as to the forms of action, has been discussed and criticized in this paper. See text at pages 168-177 supra.
the common law discovered a misjoinder of causes of action, namely, misjoinder resulting from diversity of capacities or rights in which the same parties sue or are sued in the several causes joined.219 This misjoinder results irrespective of the forms of action which are joined.

Typical of the cases in which the problem arose is Malsby v. Lanark Co.,220 wherein the plaintiff joined three counts in assumption in his declaration, two of which alleged causes of action accruing to the plaintiff in his own right and the other count alleged a contract between the defendant and the partnership of which the plaintiff was a member. This was held to be a misjoinder of counts for an individual demand could not be joined with a partnership demand, neither partner being dead. That the rule also applies to defendants was held in Kellar v. James,221 where the plaintiff joined a cause of action against the husband and one against the husband and wife. Joinder was not permitted because a recovery on the declaration "would make the wife liable for the husband's tort."

That either the application of this principle or the rule preventing a joinder of certain forms of action will be equally fatal to a declaration on demurrer is indicated in Hunter v. Gore.222 Here the plaintiff, as a de jure officer, sought to recover against a de facto officer and certain sureties on a bond which he had executed when he entered into said office. The declaration contained the common counts declaring upon a joint promise and a special count which the court treated as being upon an implied promise without any allegation to show that the sureties received

219 Sunderland, Joinder of Actions, 18 Mich. L. Rev. 571, 575 (1920). Chitty stated the rule to be that "a person cannot in the same action join a demand in his own right, and a demand as representative of another, or autre droit; nor demands against a person on his own liability, and on his liability in his representative capacity." 1 Chitty, Pleading *201. Caveat: for injuries to property committed after the death of the intestate, an administrator may sue in his own name. Kent v. Bothwell, 152 Mass. 341, 25 N. E. 721 (1890).
221 63 W. Va. 139, 59 S. E. 939 (1907); accord, Hunter v. Gore, 105 W. Va. 1, 141 S. E. 393 (1928); Knotts v. McGregor, 47 W. Va. 566, 55 S. E. 899 (1900) (cause against the decedent's estate with cause against personal representative individually). The defect is fatal on demurrer; but if there be no demurrer, the defect is cured after verdict by virtue of statute, and after demurrer sustained the plaintiff may amend his declaration by electing which cause he will proceed upon. Id. at 574; 35 S. E. at 902. Compare also note 193 supra.
222 105 W. Va. 1, 141 S. E. 393 (1928).
any part of the emoluments of the office. Therefore, since the special count was good only as to the principal defendant and not as to the sureties, the declaration contained a misjoinder of causes of action. The court applied this reasoning:

"... The general rule is that in order that causes of action against several defendants may be joined, they must each affect all of the defendants. It is also true that a cause of action upon which defendants are jointly liable cannot be joined with another upon which one of the defendants alone is liable... Then again, the special count may be said to be in the nature of one sounding in tort, which would likewise render the declaration demurrable, since the first count sounds in contract..."

From this examination it appears that through a desire to eliminate technicalities as to the form of action that must be used, not causing cases to be thrown out of court on the nice distinctions which existed at common law, the plaintiff has been fortuitously given a wide range of possible ways in which he may in some cases combine different causes of action or state one cause in various ways to meet the proof. However, since the latter considerations were not the objectives of the statutes, in many cases the plaintiff has not been permitted to state his case so that he may avoid difficulties at the trial stage when he is in doubt concerning the facts which may be proved or the law which will be held applicable. In addition, no cognizance of trial convenience has been indicated. Often two or more trials are needed even though the causes all flow from one transaction and require practically the same evidence to prove each of them, although the rules permit other causes

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223 Id. at 3, 141 S. E. at 393. Compare, however, the court's attempt to distinguish this case in Gilkerson v. Baltimore & Ohio R. R., 129 W. Va. 649, 660, 41 S. E.2d 188, 195 (1946). In the latter case the counts in the declaration alleged joint liability against all of the defendants, but one count failed to show a duty except as to one defendant. This count was held demurrable, but the court held that its joinder with the other counts did not make the declaration demurrable. The Hunter case was distinguished on the basis that it involved contract liability whereas the instant case was an action of tort in which case liability is generally both joint and several, not as in contract actions where there may be either, but not both, joint and several liability. The basis for the decision in the Hunter case would make the declaration demurrable, whether in contract or tort action, if each count did not affect all of the parties. The later case can be reconciled only by treating the faulty count as nonexistent. The Virginia court held that in an action for malicious prosecution counts against several defendants jointly could not be joined with counts against each defendant severally, citing Chitty to the effect that all causes joined must be stated to be joint, whether ex contractu or ex delicto. McMullin v. Church, 82 Va. 501 (1886).
flowing from entirely separate and distinct occurrences to be heard at the same time. In no case is the court empowered to separate the issues for trial, even if the plaintiff has taken advantage of the existing rules to join many diversified causes to introduce complexity into the trial. At the same time counsel is not permitted to join claims growing out of the same transaction, if the rules are not satisfied, irrespective of how conveniently the issues might be resolved at the trial stage.

F. Interrelation of Parties and Causes of Action on Joinder Problem

The restrictive rules on joinder of parties often prevent joinder of causes at law where there are multiple parties, even though the forms of action can be joined. The substantive rights or duties of the parties determine whether the actions can be joined. Thus, no consideration is given to trial convenience. Permissive joinder is not affected by a common question of law or fact being involved. On the other hand, in equity the question of trial convenience is considered as the test subject to the rules on multifariousness, which are not arbitrary as at law but rest in the discretion of the trial court with the objective of settling the entire controversy in one suit. The approach in equity results

224 Even without the extension as to joinder of forms of action permitted by the West Virginia statutes, the common law went far in this direction. Professor Moore sets forth this example: "... assume that A and B had become involved at various times in a series of unrelated matters that gave rise to the following claims by A against B: malicious prosecution; slander; negligent injury; deceit and conversion. All of these claims could be joined in one action, because the first four were claims in case, and the last a claim in trover. This joinder is not to be criticized, because ... these claims can be pleaded in one complaint as well as in five. But it can be seen that a system which permits this type of joinder and denies the joinder of trespass and case ... although they were often only different stories of the same claim—was not based on any rational foundation." 3 Moore, Federal Practice 1804.

The West Virginia statute has made possible a joinder of trespass and case as well as other forms which could not be joined at common law, but the basic inconsistency will continue to exist as long as limitations are placed on the forms of action that may be joined.

225 The party-joinder rules at common law, discussed above in the text, clearly were not based on such considerations. The West Virginia statutes have not adopted this goal, although the changes as to certain contract defendants may be used to advantage where common questions of law or fact are present. See text at page 151 supra.

226 3 Moore, Federal Practice 1804. The following is a conclusion based on Virginia and West Virginia cases: "Courts of equity have declined to announce a general rule applicable to all cases of multifariousness, being guided by considerations of convenience in each particular case rather than by any absolute rule." Hogg, Equity Procedure §156 (3d ed. Miller, 1943). To the same effect, see Story, Equity Pleadings §530 (10th ed. 1892). The position is not taken here
in a more liberal concept of a cause of action, being broad enough in most cases to cover all of the operative facts involved in a transaction.\textsuperscript{227} In addition, the community of interest which is found to exist between the parties in equity often amounts to no more than a common question of law or fact being involved and a multiplicity of suits would otherwise result.\textsuperscript{228}

There are two West Virginia cases which well illustrate this difference between joinder of causes of action and parties in equity and at law. In Farley \textit{v. Crystal Coal \\& Coke Co.},\textsuperscript{229} one plaintiff sought damages for injury to his land caused by the action of six different coal mining corporations which polluted and partly filled a river flowing through the plaintiff's land. The mines of these different companies were located at different places on the tributaries of the river, and there was no allegation that the defendants acted in concert or pursuant to a common design. The court held

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that the objection of multifariousness has not unnecessarily at times prevented the joinder of equitable causes of action in which common questions of law or fact might have been expeditiously determined in one suit. Examples may readily be found in Story, \textit{Equity Pleadings} §§272-286b. Therein may also be found many illustrations that this occurred much less often in equity than at law. One basic difference to exemplify this fact is the rule in equity that it is not indispensable that all the parties shall have an interest in all the matters contained in the suit, it being sufficient if each party has an interest in some matters in the suit and they are connected with the others. \textit{Id.} at §271a; Keigwin, \textit{Cases in Code Pleading} 439 (1926).
\textsuperscript{227} 3 \textit{Moore, Federal Practice} 1805. By this liberal approach in determining what is "a cause of action", the equity courts avoid to a large extent the complexities with which the law courts are confronted as to joinder of causes. It becomes especially important to adopt the equity approach if legal and equitable remedies are combined under a system of code pleading. \textit{Id.} at §206; Clark \textit{Code Pleading} §19. Advantages to be gained from a combined procedure will be discussed in a forthcoming issue of this Review.

\textsuperscript{228} 3 \textit{Moore, Federal Practice} 1805, citing Story, \textit{Equity Pleadings} §§284, 530. Many illustrations of the truth of this statement may be found in 1 Pomerooy, \textit{Equity Jurisprudence} §§255-261t. These sections deal with those cases in which equity entertains jurisdiction of suits by a number of persons having separate and distinct interests against one person or, the converse, suits by one person against a number of persons each of whom has a separate and distinct claim in opposition to the general right asserted against all. Typical of the reasons given for exercising jurisdiction in such cases is this statement quoted therein from a federal case: "They have thus a community of interest in the questions of law and fact upon which the issue between the railroad company and each plaintiff depends... The fact that the several tracts of land here in dispute were entered at different dates, and by different persons, is of no consequence, as the validity of each entry, as against the railroad company, depends upon precisely the same questions of law and fact. \textit{Id.} at §261a. By way of contrast compare State ex rel. Shenandoah Valley National Bank \textit{v. Hiett}, 123 W. Va. 739, 17 S. E.2d 878 (1941), decided on the law side with the equity suit in Hibner \textit{v. Ebersbach}, 110 W. Va. 177, 157 S. E. 176 (1931). See also Lilly \textit{v. Bowling}, 120 W. Va. 169, 197 S. E. 299 (1938).\

\textsuperscript{229} 85 W. Va. 595, 102 S. E. 265 (1920).
\end{quote}
that there was no joint liability because the injury resulted indirectly from the independent action of each, nor could any one of them be held liable for the entire damage. Therefore, the declaration was held defective because of the misjoinder of parties defendant. Neither the absence of direct injury from the defendants' acts nor the absence of joint action absolved them from liability; but it did prevent the plaintiff from joining them in the same action even if his recovery were limited to recovering from each the damages caused by its acts. This result follows irrespective of whether inconvenience at the trial is likely to result.

In contrast with this case stands a case on the equity side of the court. In *McMehen v. Hitchman-Glendale Consolidated Coal Co.*, the facts were almost identical with those in the Farley case. Several plaintiffs sought to enjoin several defendants from doing acts by which a stream of water had been obstructed and turned out of its course and thus damaged lands of the plaintiffs in which they had no joint interest. It was not shown that the deposits were made at the same place by the defendants. The defendants did not seriously deny liability, but they invoked the doctrine of multifariousness because of their joinder as defendants. The court was not impressed by this contention since their acts were treated in effect as one "cause of action." The court expressed it this way:

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230 In reaching this conclusion, the court expressly overruled Day v. Louisville Coal & Coke Co., 60 W. Va. 27, 53 S. E. 776 (1906), and distinguished Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744 (1897), which had held that the separate owners of separate buildings were joint tortfeasors when the buildings had fallen upon a third building because of the owners' neglect to keep the walls in repair. The latter case was distinguished on the basis that the injury there was "the direct and immediate result of the wrongful act." The resurrection of the distinction between trespass and trespass on the case, trespass being proper if the injury is immediate. *Shipman, Common Law Pleading* 70. Fortunately, the trespass versus case analogy was not applied in a later case which holds that a master and servant may be joined as joint tortfeasors when another is injured by the negligent act of the servant. Lee v. Standard Oil Co., 105 W. Va. 579, 144 S. E. 292 (1928); accord, Wills v. Montfair Gas Coal Co., 97 W. Va. 476, 125 S. E. 367 (1924). The master was not liable in trespass for injuries caused by the negligence of his servant, whereas the servant who forcibly struck another through negligence was liable in trespass, although the rule was relaxed by most courts to permit an election of trespass or case. *Shipman, supra* at §36. In neither of these cases did the court mention the Farley case, but the Johnson case was cited in the Wills case for the proposition that both parties guilty of concurrent negligent acts may be joined even though they had no common purpose and there was no concert of action.


232 See note 227 *supra*. The difference between suing at law and in equity was tersely stated by the Maine court as to similar facts. "The acts of the respondents may be independent and several, but the result of these several acts
"... Limited in its functions to a mere matter of compensation for damages, a court of law could not, under all circumstances, treat it as an entirety, but a court of equity can do so, because of its more extensive remedial powers.

"Without further discussion of the matter, it suffices to say the authorities uniformly recognize and uphold jurisdiction in courts of equity to enjoin, in one suit, all who participate in the diversion of the waters of a stream, or pollution thereof, in violation of the legal rights of a riparian owner, whether they do it by joint or separate acts. ... The same rule ... extends to parties plaintiff as well as parties defendant."233

Having come to this conclusion on the joinder of the defendants, the court went further to hold that equity, having taken jurisdiction to abate the nuisance, could in the same suit assess and decree the resulting damages even though the defendants were not jointly liable. It was therefore immaterial whether the deposits were made at the same place by the defendants for it was not necessary to show joint liability.

If the damages for which each of the defendants is liable can be ascertained in one suit in equity, why can this not be done in one action at law? Of course, the parties are entitled to trial by jury on the law side, and this might make severance of issues for trial necessary if the right to trial by jury is not waived; but even severance would not be necessary if the issues are not likely to be confusing to the jury. However, if trial by jury is waived, which often will happen where the issues are likely to be confusing to a jury, wherein lies the difference whether the proceeding be one at law or one in equity? Further, many cases may be settled before trial, and the problems of possible prejudice or confusion at the trial stage may never be encountered.

A series of cases involving actions against the insured and the insurer who had issued the insured a liability insurance policy presents an interesting treatment of the joinder problem both as to parties and causes of action. In O'Neal v. Pocahontas Transportation Co.,234 the plaintiff filed a declaration consisting of two counts, the first of which contained the common counts in assumpsit and

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the second asserted that one defendant had qualified as a common
carrier of passengers for hire and that the other defendant, who
had executed the indemnity insurance policy, had impliedly con-
tracted with the plaintiff for safe carriage when she became a
passenger on a bus operated by the other defendant. The de-
fendants objected on the basis of misjoinder of parties defendant
and of "counts" or causes of action. On the second contention, the
court held that the second count sounded in tort, the name by
which it was called not being important, since it claimed damages
peculiarly arising out of tort and therefore the declaration was bad
for a misjoinder with a count sounding in contract. The court
also held that there was a misjoinder of parties defendant since
it was not shown that the defendant insurance company was
*primarily* liable to the plaintiff either under the insurance contract
or the statute by virtue of which the policy had been obtained.
Both propositions were reconsidered and affirmed in *Shepherd v.
Pocahontas Transportation Co.*,\(^{235}\) wherein the court resolved the
doubt concerning the special count by holding it to sound in tort
and therefore that the counts were improperly joined.

The question of joinder in this type of case next arose in
*Conwell v. Hays*.\(^{236}\) Counsel for the plaintiff conceded that under
the *O'Neal* case there was no direct liability on the defendant by
virtue of the general provisions of the policy or the statutory pro-
visions under which it had been executed. However, a rider on the
policy provided that the promises of the policy should inure to
the benefit of any person sustaining the injury or damage provided
for in the policy. The court held that this provision permitted the
injured party to maintain an action directly against the insurance
company and that the insured and insurer might be joined in one
action. Nevertheless, a demurrer to the declaration was sustained
because of a misjoinder of causes of action since the liability of the
insured was predicated on a tort whereas the liability of the insurer
was based on a contract.

Several years later a case arose in which the policy contained
the direct public liability clause involved in the *Conwell* case.\(^{237}\)
The plaintiff joined the insured and the insurer in an action of
assumpsit to recover damages for personal injuries which she
suffered from the alleged negligent operation of the vehicle covered

\(^{235}\) 100 W. Va. 703, 131 S. E. 548 (1926).

\(^{236}\) 109 W. Va. 69, 156 S. E. 604 (1927).

\(^{237}\) Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).
by the insurance policy. With no discussion of whether the declaration was truly in assumpsit, no consideration being given to those features which had been treated as important in the *Shepherd* case, 238 the court decided that the action might be maintained in assumpsit on the “alleged breach of contract” of the insured to keep the vehicle in good repair. Accordingly, the insurer was properly joined as a defendant because of its consent thereto in the public liability clause, as construed in the *Conwell* case. Although the court did not discuss the joinder of these forms of action, the joinder was obviously proper because both sounded in contract and were asserted in assumpsit. The approach used by the court in this case was also followed in *Cramblitt v. Standard Accident Insurance Co.* 239 to permit the joinder of the insurer and the insured in an action of assumpsit to recover damages sustained when the vehicle in which the plaintiff was a passenger was wrecked.

Even assuming that the plaintiff may be able to obtain a greater amount of damages in some cases if he causes his action to sound in tort, and assuming further that there is some justification for requiring his action to “sound in tort” in order to obtain these additional damages, wherein lies the justification for not permitting him to bring an action sounding in tort against the person causing the injury and join the other party who has agreed to pay him those damages? If he is not permitted to do so, he may be required to bring two actions before he can obtain a judgment against the insurer. Our court has held that even the direct public liability clause does not permit the injured person to proceed against the insurer alone until his claim is liquidated, either by a final judgment against the insured or by an agreement to which the insurer is a party. 240 Joinder of the causes of action is permissible if the plaintiff is able to recover all of his damages in an action in assumpsit and is able to allege his cause so that it is held to be in fact in assumpsit, but two actions are necessary if his entire

238 In the *Shepherd* case the court had emphasized the general principles on which a count should be construed to be one in tort rather than in contract if there be any doubt as to which it is, and had pointed out that neither the nature of the action stated in the writ or declaration nor the allegation of the contract of transportation is necessarily controlling in this determination.


damages can be recovered only in trespass on the case or if the court holds that the cause as stated against the tortfeasor sounds in tort. Clearly the difference in procedure in these two cases does not arise from considerations of trial convenience or from fear of prejudice to the insurer. The difference can be explained only on the basis of the arbitrary rules of common law concerning joinder of tort and contract claims. No attempt is made by the court to justify the difference on any other basis.\footnote{Professor Sunderland's comment on the sacredness of ancient authority on the joinder problem seems appropriate. "Chitty, the greatest expounder of the common law system of pleading, reverently followed by generations of judges as the 'word' behind which it was vanity to attempt to look." Sunderland, \textit{Joinder of Actions}, 18 Mich. L. Rev. 571, 573 (1920).}

That the statutory changes permitting joinder of additional forms of action have been helpful in speeding litigation but that the existing rules have no consistency of purpose because of the limitations as to joinder of parties, is well illustrated in \textit{Beuke v. Boggs Run Mining \& Mfg. Co.}\footnote{100 W. Va. 141, 150 S. E. 132 (1925).} Plaintiff was the owner of a .672-acre tract of coal land and was also the owner of the surface of a contiguous tract of 18.5 acres. Both of these tracts had been purchased from the defendant mining company which had later leased the coal underlying the latter tract to Ramsay, who had assigned his rights to Cotts, the other defendant. Cotts proceeded to take out the coal. The plaintiff alleged violation of his rights and set out his damages in a declaration in trespass on the case in three separate subdivisions. He alleged, first, that coal was mined underlying his .672-acre tract without his consent and without leaving any support for the overlying strata, second, that there was a failure to protect the mining under the 18.5-acres tract so that the surface would not fall in, and third, that, without the consent of the plaintiff, there were four invasions within five feet of the line dividing the coal between the two tracts and asked for the statutory penalty for each violation.\footnote{The statute is quoted in part in note 122 supra.} Both defendants demurred to the declaration. The demurrer was sustained as to the mining company but overruled as to Cotts. Since the statutory penalty may be recovered either in an action of debt\footnote{Sims v. Alderson, 35 Va. (6 Leigh) 479 (1856); see West v. Rawson, 40 W. Va. 490, 492, 21 S. E. 1019 (1895).} or trespass on the case,\footnote{Mapel v. John, 42 W. Va. 30, 24 S. E. 608 (1896).} the plaintiff could use the latter form of action and join other causes in that form whether originally proper in trespass or
case). Accordingly, the causes of action were properly joined against Cotts. However, liability asserted against the mining company for the acts set forth in the declaration was based on its being the lessor of the other defendant who committed the acts. Part of the acts complained of pertain to the .672-acre tract which the lease did not cover. The mining company was therefore dismissed from the action because causes of action may not be joined against several defendants unless they "affect all of the defendants." Why should the mining company not have been left in the action as to damages to the larger tract of land? If any confusion was likely to result from the issues concerning the smaller tract, the court should be permitted to separate those issues for trial; but if confusion was unlikely, the complete liability from the same transaction involving largely the same evidence might have been settled in one action.

G. Consequences of Nonjoinder and Misjoinder of Parties and Causes of Action Since 1931

Although no great liberalization in the common law rules as to joinder of parties, plaintiff or defendant, has been made in West Virginia procedure, the consequences of misjoinder or nonjoinder of parties have been greatly altered. Generally, a failure to comply with the rules is no more serious in its consequences than it would be under the new Federal Rules. Federal Rule 21 provides that misjoinder of parties is not ground for dismissal of an action and that parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Noticeably absent from the West Virginia statute is the provision that any claim against a party may be severed and proceed with separately.

246 See text at page 170 supra.
247 Some of the changes to be discussed herein have already been called to the attention of the bar. Carlin, Parties to Actions and Suits under the Revised Code, 43 W. Va. L. Q. 87, 105 (1937).
248 The common law rules on party joinder and the consequences of violating those rules have been discussed. See the text at pages 142-150 supra and the notes thereto. Modifications in the common law rules as to joinder have been mentioned and criticized. See the text at pages 151-167 supra. The consequences of failure to comply with the existing rules remain to be noted.
250 The last sentence in Federal Rule 21 so reads. Although misjoinder of actions seldom will be present under the liberal rules as to joinder of parties and actions (see discussion in text at pages 199, 204 infra), this rule permits the court to sever "the misjoined claim" for trial and removes the necessity of
It will be noted that an additional action for such claims would be required in West Virginia.

Two sections of the West Virginia Code, as revised, have removed the necessity of starting a new action merely because of misjoinder or nonjoinder of parties. One section provides that no action or suit shall abate or be defeated by the misjoinder or nonjoinder of parties, plaintiff or defendant, and that misjoined parties may be dropped at any stage of the cause or nonjoined parties may be added at any stage of the cause before final judgment or decree.\(^{251}\) The other section, designed to operate irrespective of elimination of parties, adopts for contract defendants the common law rule as to tort defendants.\(^{252}\) It provides that in actions or motions, founded on contract, against two or more defendants, the fact that one or more of the defendants is found not liable on the contract shall not prevent the plaintiff from having judgment against any other defendant or defendants who are liable. This section applies at any stage of the cause.\(^{253}\)

A statute similar to this latter section had been in the law before,\(^{254}\) but as noted above the court had so construed it that judgments against contract defendants had to be taken, if taken at all, against all contract defendants except where some of the defendants had personal defenses.\(^{255}\) The revisers eliminated the possibility of this narrow construction by providing expressly that the rule now to be applied is the same as if the action were against tort defendants.\(^{256}\)

Concerning the statute which provides that misjoinder or nonjoinder of parties shall not cause the action to abate or be...
defeated, commentators have expressed the opinion that this
eliminated the possibility of using a demurrer or a plea in abate-
ment for nonjoinder or misjoinder of parties. The court, however,
has taken the position that the defect may and should be raised
by demurrer, basing its decision on the revised section of the code
which provides that the sufficiency of any pleading may be tested
by a demurrer. The commentators base their conclusion on the
theory that the function of a demurrer is to defeat the action where
a defect goes to the operative effect of the pleading and that the
function of a plea in abatement is to abate the action. Technically
these are the proper functions of a demurrer and a plea in abate-
ment, and the phraseology of the statute does not permit either
result to occur. However, by statute a demurrer must state
specifically the grounds relied on, and the statute concerning
misjoinder and nonjoinder of parties contains an additional pro-
vision that a correction of parties shall be made whenever the
nonjoinder or misjoinder appears "by affidavit or otherwise," an
affidavit being required only as to the residence of a nonjoined
party before he may be added as a new party. Relying upon this
part of the statute, a "demurrer" in proper form seems to be one
way to call the court's attention to the defect, although this reason-
ning does not support the court's position that a demurrer should be
used. Any other means of pointing out the defect ought to be
sufficient even though an affidavit may be required before a new
party is added.

257 See note 251 supra.
258 Carlin, supra note 247, at 107; Lynch, Pleading and Practice under
the Revised Code, 37 W. Va. L. Q. 60, 68 (1930); 44 W. Va. L. Q. 228, 229 (1938).
259 Mainella v. Board of Trustees of Policemen's etc., 126 W. Va. 183,
27 S. E.2d 486 (1943).
261 Id. at 471, 194 S. E. at 81.
262 See note 258 supra, especially Carlin, supra note 247, at 107.
264 "Whenever such misjoinder shall be made to appear by affidavit or
otherwise, . . . and such nonjoinder shall be made to appear by affidavit or
265 Professor Carlin states that the proper method would be to make a
motion to eliminate or add parties, with the presentation of an affidavit showing
the misjoinder or the nonjoinder and the required facts as to a nonjoined
person's residence. He suggests that a plea in abatement might be used as a
substitute for the motion and affidavit since such plea should embody all the
facts required to go into the affidavit and must be under oath. Carlin, supra
note 247, at 107. The statute does expressly require an affidavit as to the
residence of a nonjoined person before he may be added as a party, but there
is no provision therein requiring an affidavit for any purpose as to misjoined

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The important consideration is that the proper parties be present to protect their interests and that those not interested be dismissed, and that the action be not defeated or abated by the nonjoinder or misjoinder, regardless of the way in which it is made to appear to the court. In a recent declaratory judgment proceeding the plaintiff failed to join two necessary parties defendant. The question was raised by a demurrer, and the court in effect sustained the demurrer but remanded the cause with directions that the two omitted persons be made parties before the case proceeded further.\textsuperscript{267} The court cited in support of this direction the statute providing that the action should not be defeated by a nonjoinder of parties. This indicates that the old rule which generally prevented an amendment where nonjoinder or misjoinder of parties was made to appear\textsuperscript{268} has been abolished, regardless of the method used to raise the objection. What the court may do if the demurrer is sustained and no amendment is made is not clear. Although the statute indicates the action is not be to defeated, dismissal from failure to prosecute may follow.\textsuperscript{269}

Two other problems may arise under this statute. First, may this statute be used to correct an error where the wrong person sues or is sued, either by joining the proper party with the wrong one or by joining him and then asking that the other be dropped, in effect, substituting the proper party? Although the section does permit amendments which were deemed changes in the cause of action at common law,\textsuperscript{270} it does not permit the "substitution of a different cause of action." In \textit{Crook v. Ferguson},\textsuperscript{271} the wrong person was named as plaintiff. A rental agent for a disclosed principal sought to maintain an action of unlawful entry and detainer against the lessee. The court held that the error was fatal to the

\textsuperscript{267}\textit{Mainella v. Board of Trustees of Policemen's etc.}, supra note 266; accord, Mullens v. Davidson, 57 S. E.2d 1 (W. Va. 1949) (misjoinder of party plaintiff).

\textsuperscript{268} Carlin, supra note 247, at 106.

\textsuperscript{269} W. VA. CODE c. 56, art. 4, §6 (Michie, 1949) provides: "If the plaintiff . . . shall, at any time after the defendant's appearance, fail to prosecute his suit, he shall be nonsuited."

\textsuperscript{270} See note 268 supra. Limitations on the right to amend will be discussed in a forthcoming issue of this Review.

\textsuperscript{271} 123 W. Va. 490, 16 S. E.2d 620 (1941).
action, not being curable either by joining the principal as co-plaintiff or by substituting her as sole plaintiff. Under this section the general rule, as stated by the court, is that there can be no amendment as to parties which will result in a complete change of plaintiffs or defendants. In effect the decision treats an action brought by a person having no interest in the subject matter as a nullity.

The other problem which may arise under the statute is whether it alters the equity rule that a decree on the merits will not be rendered unless all of the persons jointly interested in the subject matter are parties to the action. Will the suit abate for the nonjoinder of an indispensable party? Although the West Virginia court has not passed directly upon this point, the one case in which the court found that “necessary parties” had not been joined as defendants was remanded with directions that they be made parties before the case proceeded further. This was a proceeding for a declaratory judgment, but the relief sought was in part equitable in nature. The federal rule has not been held to excuse the joinder of indispensable parties, and the action will be dismissed where they are not joined.

272 The courts are not in agreement as to whether Federal Rule 21 permits the substitution of parties, plaintiff or defendant. Moore, Federal Practice 2907. Professor Moore terms a failure to permit such substitution an “unduly narrow restriction” of the rule, pointing out that this is especially true since the same result can be attained by a liberal interpretation of the rule on amendments. Id. at §15.08. The amendment rules will be discussed in a forthcoming issue of this Review. Note here however, Kingman Mills v. Furner, 89 W. Va. 511, 109 S. E. 600, 28 W. Va. L. Q. 241 (1921), which permitted what the dissent termed “a substitution of an artificial person for no person at all.” Under the statute, which is now W. Va. Code c. 56, art. 4, §29 (Michie, 1949), allowing an amendment to correct a misnomer, the plaintiff was permitted to substitute “The Kansas Flour Mills Company, a corporate body, trading as The Kingman Mills” for “Kingman Mills, a branch of the Kansas Flour Mills Company”.

273 Mainella v. Board of Trustees of Policemen’s etc., 126 W. Va. 188, 27 S. E.2d 486 (1943).

274 “The general theory as to who are indispensable and necessary parties applies to suits for declaratory judgments. Obviously, an indispensable party must be joined in a declaratory judgment action, just as in any other, since the court could not proceed to enter an equitable judgment in the absence of such a party.” Moore, Federal Practice 2197.

275 Greenberg v. Giannini, 140 F.2d 550, 152 A. L. R. 966 (2d Cir. 1944); United States v. Washington Institute of Technology, 138 F.2d 25 (3d Cir. 1943). This construction is aided by Federal Rule 19 which expressly indicates that the rule as to indispensable parties is not changed. Professor Carlin concludes that the West Virginia statute does not change the rule as to such parties, that a decree will not be entered unless they are parties, and that the suit will be dismissed if they are not made parties. Carlin, supra note 247, at 107. See also discussion in text at page 193 supra.
The former law had permitted nonjoinder of persons against whom an action was barred by the statute of frauds or the statute of limitations. If these defenses were available to the nonjoined defendants, the defendant who raised the issue on a plea in abatement had the issue found against him. The revisers omitted those provisions of the earlier law since the defenses were personal and might not be raised by the omitted persons if they were joined. The importance of this change has been lessened by the statutory broadening of the cases in which the plaintiff may at his option omit persons jointly liable, a revision already criticized herein, but the change is important where the plaintiff is not given the option. To the extent that the elimination of this preliminary issue is applicable, it permits a complete determination of liability in one proceeding and is not subject to the criticism directed to the section which permits the plaintiff to proceed severally against persons jointly liable without any excuse for the nonjoinder.

None of these statutes eliminates the necessity of two actions where there is a misjoinder of causes of actions which misjoinder may be involved where parties are improperly joined. Where causes are misjoined the action may even be defeated unless amendments are made in the pleadings to drop one group of the misjoined counts. The federal rule as to parties does not purport to be different in its effect, but other rules under that system have liberalized what causes may be joined.

Before completing a discussion of the effect of misjoinder of parties, one other statutory change made by the revisers should be mentioned. Bills in equity which are multifarious often involve a misjoinder of parties. Prior to the revision of the code such misjoinder of parties could not be cured by an amendment because of the technical rule that a multifarious bill could not be amended to cure a misjoinder of causes of action. This rule had not been

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276 W. Va. Code c. 125, §18 (Barnes, 1923).
278 See the text at pages 151-155 supra.
279 In a recent case the West Virginia court held that the lower court had properly sustained a demurrer to a declaration which alleged liability against three defendants since there was a misjoinder of rights of action, "resulting in a like misjoinder of parties defendant." State ex rel. Alderson v. Holbert, 56 S. E.2d 114 (W. Va. 1949). See also text at pages 180-182 supra.
280 See notes 193, 221 supra.
282 See the text at pages 199, 204 supra.
283 County Court of Harrison County v. Hope Natural Gas Co., 80 W. Va. 286, 92 S. E. 726 (1917); Cecil v. Karnes, 61 W. Va. 543, 56 S. E. 885 (1907).
followed in West Virginia even on the law side, and the revisers expressly abolished it.

Although these statutes have gone far in modifying the consequences of misjoinder or nonjoinder of parties at common law, the changes did not go far enough. Only slight modifications were made in other sections to permit joinder of parties where it was not permitted before, and no necessity exists for the present limitations on joinder of causes which may prevent joinder of counts which could be used to avoid additional actions. The emphasis has not been on deciding what matters can conveniently be tried by the court in one action without any prejudice resulting to either party.


As previously shown, the rules as to joinder of parties in law actions in West Virginia continue to be based largely on the common law. Little consideration has been given to the objective found in equity rules of joinder, namely, to settle an entire transaction in one proceeding if it can be done conveniently and without prejudice to the parties. The saving of time and expense involved in many unnecessary actions has not been the goal generally. The only analogy to equity practice is the revision as to consequences where there has been a misjoinder or nonjoinder of parties.

I. Code Pleading. The rules of equity joinder were used as the basis of joinder of parties in the earlier codes. Persons united in interest were required to be joined as plaintiffs or defendants, subject to the exceptions formerly allowed by equity

284 Cases cited in note 221 supra.
285 "... the court ... may ... permit any pleading to be amended ... eliminating from a multifarious bill all but one of the equitable causes of action alleged." W. Va. Code c. 56, art. 4, §24 (Michie, 1949). See also the revisers' note to this section. The rules on amendments will be discussed in a forthcoming issue of this Review.
286 See the text at pages 151-167 supra.
287 CLARK, CODE PLEADING 353. See also note 228 supra.
289 In referring to the provisions of the earlier codes and the decisions thereunder, the past tense will be used herein to accentuate the contrast between results under those codes and what may be accomplished under the Federal Rules of Civil Procedure and codes containing provisions similar to those rules. By using the past tense the writer does not intend to imply that many code jurisdictions are not at the present time burdened with the unduly restrictive rules herein discussed.
290 For a detailed discussion of the adoption of the equitable principles as to parties in the early codes, see KEGWIN, CASES IN CODE PLEADING §§38, 39, 41, 42 (1926); PHILLIPS, CODE PLEADING §§250-259.
courts.\textsuperscript{201} All persons having an interest in the subject of the action and in obtaining the relief demanded might be joined as plaintiffs;\textsuperscript{202} and any person might be made a defendant who had or claimed an interest in the controversy adverse to the plaintiff or who was a necessary party to the complete determination or settlement of the question therein.\textsuperscript{203} Because of the interpretation which was placed on these provisions for permissive joinder by many courts, the liberality permitted in equity courts was not allowed.\textsuperscript{204}

As to plaintiffs in actions formerly triable at law, it was often held that they must have an interest both "in the whole subject of the action and in all the relief demanded,"\textsuperscript{205} and the mutual interest required in the relief demanded prevented joinder where the parties were each seeking money damages.\textsuperscript{206} For example, contractees, under contracts which were separate but involved common questions of law or fact, were not permitted to join in suing the obligor. However, under these provisions owners of separate interests in the same land were permitted to join to recover damages for an injury to the land caused by one act of the defendant.\textsuperscript{207} However, if the defendant's act injured lands of which the plaintiffs each owned separate parcels, they were not permitted to join in an action for damages, even though a joinder would have been permitted if an injunction had been sought in a comparable case.\textsuperscript{208} This suggests that the rules of joinder as to plaintiffs under

\textsuperscript{201} CLARK, CODE PLEADING 359, 381. One of the exceptions stated is that an unwilling plaintiff may be made a defendant, an exception recognized in Vinson v. Home Insurance Co., 123 W. Va. 522, 526, 16 S. E.2d 924, 926 (1941). It may be questioned whether this fact alone is sufficient to give equity jurisdiction. 48 W. Va. L. Q. 184 (1942).

\textsuperscript{202} CLARK, CODE PLEADING 365.

\textsuperscript{203} Id. at 382.

\textsuperscript{204} The restrictive interpretations placed upon these provisions are discussed in the following paragraphs of the text. Judge Clark believes that the reason for the departure from the liberal equity rules rested in two defects in language. He writes: "... they are couched in terms of absolute declaration and restriction, rather than as general directions to guide, but not to bind, the court in the exercise of discretion. And they contain the troublesome requirement of an 'interest in obtaining the relief demanded' in all the plaintiffs." Id. at 369.

\textsuperscript{205} Id. at 366. Italics supplied.

\textsuperscript{206} Some courts realized that this interpretation of the rule required an unnecessary multiplicity of actions and permitted obligees with separate interests in the same instrument to join in an action against the obligor, stressing for the purpose of the rule that lump sum recovery was sought. \textit{Ibid}. Compare the West Virginia rule at pages 157-'167 \textit{supra}.

\textsuperscript{207} \textit{Ibid}. Compare the West Virginia rule at pages 157-'162 \textit{supra}.

\textsuperscript{208} CLARK, CODE PLEADING 367. Compare the West Virginia cases discussed in the text at pages 184-'186 \textit{supra}. 
these provisions were not greatly different from those which prevail in West Virginia.\textsuperscript{299}

As to permissive joinder of defendants under the earlier code provisions, experience thereunder showed that the common law rules had not been greatly different. In part, this was a result of the restrictions placed by code provisions on joinder of causes of action. This problem will be developed presently.\textsuperscript{300} A few examples will here suffice. Joinder was permissible if the court could find that the defendants were joint tortfeasors even though they had not acted in concert, for example, if the wrongful acts had been concurrent and had resulted in a single injury to the plaintiff.\textsuperscript{301} If the separate acts which resulted in the injury were not concurrent and joint liability was not recognized, the defendants generally could not be joined unless the plaintiff sought relief in equity.\textsuperscript{302} This again shows the similarity to West Virginia law.\textsuperscript{303} A special code provision, similar to the West Virginia statute,\textsuperscript{304} was generally inserted to permit the plaintiff to join all or any persons severally liable on the same obligation or instrument.\textsuperscript{305} Here again, even with the general language liberality of other provisions of the code, courts were reluctant to permit a joinder of defendants where their liability arose from separate documents covering the same transaction\textsuperscript{306} unless the statute expressly provided that this was immaterial.\textsuperscript{307} The West Virginia court reached the same conclusion.\textsuperscript{308} Some courts went so far as to

\textsuperscript{299} To avoid repetition of the West Virginia law as to the points in this paragraph, there has been included in the note on each point a cross reference to the pages in the text at which the applicable West Virginia law was discussed.

\textsuperscript{300} See text at page 202 infra. Judge Clark believes that another reason for the restrictive interpretations placed on the code provision as to joinder of defendants was the restrictive rules applied to joinder of plaintiffs. \textit{Id.} at 383, 391.

\textsuperscript{301} \textit{Ibid.} See the West Virginia case discussed in note 27 supra.

\textsuperscript{302} \textit{Id.} at 384. The West Virginia cases are discussed in the text at pages 184-186 supra.

\textsuperscript{303} See notes 299, 301, and 302 supra. There was a split of authority as to whether master and servant might be joined when within the scope of his employment the servant by a negligent act had injured the plaintiff. \textit{Clark, Code Pleading} 385. The more liberal view that such joinder is permitted prevails in West Virginia on common law principles. \textit{Lee v. Standard Oil Co.}, 105 W. Va. 579, 144 S. E. 292 (1928).

\textsuperscript{304} Discussed in the text at pages 151-155 supra.

\textsuperscript{305} \textit{Clark, Code Pleading} 386.

\textsuperscript{306} \textit{Id.} at 387. The reason given was that there were "two causes of action" and that neither affected both defendants. See discussion in text at pages 154-155 supra.

\textsuperscript{307} \textit{Ibid.}

\textsuperscript{308} Case discussed in the text at pages 154-155 supra.
hold that the code provision did not permit persons making separate promises in a single instrument to be joined as defendants.\textsuperscript{309} This is the same problem which has faced the West Virginia court, namely, are these transactions to be treated as creating two causes of action, neither of which affects both defendants.\textsuperscript{310}

(2) \textit{The Federal Rule.} The departures from the equity rules which exist under the earlier code provisions have been eliminated by the new Federal Rules of Civil Procedure and the code provisions of states which have patterned their procedure on those rules. The rules of compulsory joinder of parties is retained, subject to the exceptions allowed by an equity court;\textsuperscript{311} but the restriction that all parties plaintiff must be interested in the whole relief demanded before they may be joined has been discarded;\textsuperscript{312} and express language removes the possibility of those restrictive interpretations which prevented a freer joinder of parties defendant under the earlier codes.\textsuperscript{313} The great liberality permitted in joining causes of action under the new rules, to be discussed presently,\textsuperscript{314} removes any danger of a limitation being found in those rules of joinder which would restrict a joinder of parties.

Federal Rule 20 (a) provides:

"All persons \textit{may} join in one action as \textit{plaintiffs} if they assert \textit{any} right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences \textit{and} if any question of law or fact common to all of them will arise in the action. All persons \textit{may} be joined in one action as \textit{defendants} if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences \textit{and} if any question of law or fact common to all of them will arise in the action."\textsuperscript{315}

To remove any doubt that the restriction of each party's being interested in \textit{all} of the relief demanded has been eliminated, the rule further provides, "A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded."

\textsuperscript{309} \textit{Id.} at 388.
\textsuperscript{310} See discussion in the text at pages 154-155 \textit{supra}.
\textsuperscript{311} See note 291 \textit{supra}; Federal Rule 19; CLARK, CODE PLEADING 360; 3 MOORE, FEDERAL PRACTICE §§19.05 [1], 19.19, 19.20.
\textsuperscript{312} This restriction was discussed in the text at pages 166, 197 \textit{supra}.
\textsuperscript{313} These interpretations were discussed in the text at page 198 \textit{supra}.
\textsuperscript{314} See text at page 204 \textit{infra}.
And if it becomes necessary, the court may "order separate trials or make other orders to prevent delay or prejudice."

The advantages in that part of the rule which deals with joinder of parties in the alternative will be discussed in a forthcoming issue of this Review. The remainder of the rule makes it certain that no limitation will be placed in the way of joining plaintiffs because of some limitation on the joinder of defendants, or vice versa, for the same liberality is extended in the joinder of either. Whether the numerous parties involved be plaintiffs or defendants, the disputes arising out of any transaction or series of transactions may be completely settled in one action if the claims involve common questions of law or fact. This device may be used to save time and expense involved in trying the same main issues in many actions because of the restrictive rules of party joinder which prevail under the earlier codes, at common law, and in West Virginia. For example, where a number of persons are injured by an allegedly negligent act of the defendant, these persons may, but are not required to, join in one action to determine the defendant's liability to them; or a parent and an infant may join as plaintiffs to enforce their separate claims arising from the allegedly negligent act of the defendant which injured the child. If it appears inexpedient to have all of the issues decided in one trial, the court possesses the power to order separate trials of the issues to the extent that it is necessary to prevent delay or prejudice.

Other examples might be here enumerated, both as to permitted joinder of plaintiffs or defendants, but this could involve merely a repetition of the cases already criticized. To avoid that, reference is merely made to the preceding discussion of the West Virginia cases on party joinder. The adoption of a rule like the federal rule would go far in permitting joinder in the cases criticized. The additional change needed to assure this result is discussed in the following section.

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316 See note 300 supra.
317 In addition to the provision in Rule 20 (a) which permits such severance of issues for trial, see Rule 42 (b) quoted in note 335 infra.
318 Many additional illustrations may be readily found in the cases cited in the footnotes to CLARK, CODE PLEADING §§58, 369, and 5 MOORE, FEDERAL PRACTICE §§20.03, 20.05, 20.06. See also the court rule permitting joinder of claims against insurance companies in West Virginia, discussed in the text at page 206 infra. In addition, see Professor Moore's summary quoted in the text at page 203 infra.

Correlative with a liberalization in the rules of party joinder, to prevent this freedom from being denied by restrictive rules on joinder of causes of action, it is necessary either that a broader than customary view of a cause of action be adopted or that great freedom in joining causes of action be permitted. To avoid any possibility that a narrow view of a cause of action may be applied to prevent the objective of settling in one action common questions of law or fact arising from the same transaction involving numerous parties, the safer course is to adopt the second alternative. This alternative will, in addition, permit numerous questions between one party plaintiff and one party defendant to be settled in one action, which joinder is now denied solely on the basis of improper joinder of causes.

The West Virginia rules on joinder of causes of action do not offer any assurance that widely different issues will not be intro-

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319 This danger is evident from those West Virginia cases discussed herein in which it was held that the demurrer to the declaration should be sustained because of a misjoinder of both parties and causes of action. In other jurisdictions where the party joinder rules have been liberalized, it has been demonstrated that a retained restrictive view of a cause of action will defeat intended permitted party joinder in the absence of liberalized rules as to joinder of causes. The case most often cited and criticized as illustrating this point is Ader v. Blau, 241 N. Y. 7, 148 N. E. 771, 41 A. L. R. 1216 (1925). A New York statute permitted joinder of defendants in the alternative, an advantage to be discussed in a forthcoming issue of this Review. An administrator suing for the death of a child alleged that one defendant had negligently maintained a fence upon which the child had been fatally injured and that the other defendant, a doctor, had negligently treated the child for the injuries received and thus caused the death. Held, that there was a misjoinder of parties and causes. The rules as to the latter nullified in part the liberalized rules as to the former. In addition to the extensive law review comments on this case cited in CLARK, CODE PLEADING 439 n. 16, see 3 Moore, FEDERAL PRACTICE 2719.

320 The West Virginia court's concept of a "cause of action" will be developed in a forthcoming issue of this Review in relation to the problem of amendments which do or do not change the cause of action. It may be noted here that a cause of action at law has not been viewed by this court as embracing all matters "connected with a transaction that can be handled together conveniently," Id. at 1803. This latter view would prevent in most cases a problem of joinder of causes from arising as to the liberalized rules on party joinder herein recommended since those rules limit joinder of parties to instances where the disputes between them arose out of the same transaction and involve at least some question of law or fact common to all of the parties joined. See text at page 199 supra; CLARK, CODE PLEADING §19; 2 Moore, FEDERAL PRACTICE §2.06[4]. In the absence of the adoption of this concept by the court, which appears unlikely, the liberalized rules as to joinder of parties might be nullified in part by the existing rules as to joinder of causes which have been discussed herein. See text at pages 183-190 supra.
duced into a case, but they may prevent joinder of all the claims that arose out of one transaction and involve common questions of law or fact.

(1) Code Pleading. The earlier rules in code pleading as to joinder of causes were usually a combination of the equity and common law rules. Joinder of causes was permitted if the claims were all within certain specified classes. Judge Clark summarizes those classes as follows:

"... The number of classes differs in the various states, ranging from six in Kentucky to ten in Nevada and Ohio. The usual classes include the following in some combination: (1) contracts, express or implied; (2) injuries to the person; (3) injuries to the character; (4) injuries to property; (5) actions to recover real property with or without damages; (6) actions to recover chattels with or without damages; (7) claims against a trustee by virtue of a contract or operation of law; (8) actions arising out of the same transaction or transactions connected with the same subject of action. Often certain of the tort classes are found combined, and in some codes the last class is omitted." Legal claims within these classes do not correspond with those which may be joined at common law or in West Virginia, some classes being less restrictive but others being more restrictive. They are all broader than the West Virginia classes to the extent that claims whether formerly legal or equitable may be joined within classes, but this results from a merger of legal and equitable remedies which will be discussed in a forthcoming issue of this Review.

The joinder of legal claims within these code classes is subject to the same criticism which has been directed to the West Virginia

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321 See this criticism illustrated in the text at pages 169-180 supra.
322 See the cases discussed in the text at pages 183-190 supra.
323 The use of the past tense in discussing this topic is subject to the explanation set forth in note 289 supra.
324 CLARK, CODE PLEADING 437.
325 Id. at 441.
326 The common law and West Virginia rules have been discussed in the text at pages 167-175 supra, and nothing of great value would be learned from a detailed enumeration of the instances in which the code rules were more or less restrictive than the existing rules in West Virginia since, as Professor Moore states, the code rules amounted to nothing more than "a reshuffling of the common law rules." MOORE, FEDERAL PRACTICE 1805. See notes 328-330 infra. It may be noted generally that a greater similarity of claims may be found within the groups joinable under the codes than may be found within the groups joinable under West Virginia practice.
327 The usual provision is that such claims may be joined if they fall within one of the specified classes. CLARK, CODE PLEADING 444.
rules. They permit some unrelated claims to be joined in one action\textsuperscript{328} but require other unrelated claims to be asserted in separate actions,\textsuperscript{329} while not permitting joinder of claims which are related unless they happen to fall within one of the arbitrary classes specified.\textsuperscript{330} As Judge Clark states, some of these harsher results might have been avoided by a liberal interpretation of the terms used in the eighth class above.\textsuperscript{331} However, many courts restricted joinder thereunder to cases where the claims asserted were not "legally distinct", and ignored the equity idea of joinder which was the basis embodied in that class.\textsuperscript{332} To remedy such undesirable restrictions many states, including non-code jurisdictions, have been removing restrictions on joinder of causes.\textsuperscript{333} The liberalization has taken various forms. Some states have removed all restrictions except that legal and equitable causes may not be united, while others have retained some additional restrictions, such as not permitting joinder of causes in replevin and ejectment actions. The more recently modified rules have followed substantially the liberal treatment in the Federal Rules.

\textsuperscript{328} For example, claims for damages based on a number of contracts may be joined even though there is no relationship between the contracts.

\textsuperscript{329} For example, unrelated tort claims may fall into different classes. Greater liberality in joining such claims is permitted in West Virginia, both because of the variety of claims assertable in one form of action at common law and because of the statute which now permits in effect joinder of claims assertable at common law in trespass, trespass on the case, and trover. See discussion in text pages 173-174 supra. In addition, as in West Virginia, different theories of the same wrong are not joible if the claim is stated in such a way that it falls by allegation into different specified classes. The West Virginia restriction as to this problem is discussed in the text at pages 175-177 supra.

\textsuperscript{330} For example, in one transaction the defendant violates a contractual agreement with the plaintiff and damages or detains unlawfully property owned by the plaintiff. Allegations of this nature might be assertable merely as different theories of the case. In either event, the claims may not be joined since they would fall into different classes under the codes or would be assertable in forms of action not joible in West Virginia. Compare note 329 supra.

\textsuperscript{331} \textit{Clark, Code Pleading} 442, 452-456.

\textsuperscript{332} \textit{Id.} at \textsection 669, Professor Moore tersely states that the real vice in the statement of class eight was that a narrow concept of a cause of action was adopted and as a consequence many courts applied the narrow common law concept of a cause of action. 3 Moore, \textit{Federal Practice} 1805. See note 320 supra. Judge Clark and Professor Moore both use as illustrations of this interpretation the New York cases which held that there could be no joinder of claims by \textit{A} if he were assaulted by \textit{B} and at the same time \textit{B} slandered \textit{A}. At common law an action of trespass and an action of trespass on the case would be required and they were not joible; therefore, the court took the position that there were different causes of action not arising out of the same transaction. Even the West Virginia rule is more liberal. See the text at pages 173-174, 177-180 supra.

\textsuperscript{333} The jurisdictions are named and the statutes cited in \textit{Clark, Code Pleading} 443, 468.
(2) The Federal Rule. Federal Rule 18 permits joinder of any claims which a party desires to assert against an opposing party. All restrictions based on the origin or nature of the claims have been removed. The court may decide that separate trials are necessary, but no narrow view of "a cause of action" nor the application of any restriction on joinder of causes can be used to prevent joinder of any claims or any parties. The rule on joinder of parties now contains the only limitations on joinder of claims in the federal courts. Other advantages in having this liberal rule have been discussed herein.

This freedom in joining claims is permissive. If a party fails to join claims hereunder, he may assert them in other independent actions if they were not parts of a single "cause of action" involved in the former litigation. Any doubt may and should be resolved by joinder.

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334 That rule reads: "The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied." Rule 18(a), Federal Rules of Civil Procedure, following 28 U. S. C. A. §723c (1941).

Rules 19 and 20 determine what parties must or may be joined, and have been discussed in the text at pages 199-200 supra. Rule 22 applies to interpleader and is not to be discussed in this paper. The joinder of alternate claims, counterclaims, and legal with equitable claims will be discussed in forthcoming issues of this Review.

335 Rule 42(b), Federal Rules of Civil Procedure, following 28 U. S. C. A. §723c (1941), reads: "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim . . . or of any separate issue or of any number of claims . . . or issues."

Professor Moore aptly states that joinder of actions is a trial, and not a pleading problem. 3 Moore, FEDERAL PRACTICE §18.05. Rule 42(b) prevents "embarrassment, delay or expense" which might otherwise result from the liberal rules on joinder of claims. Id. at §42.02. Even in the absence of liberalization of the rules on joinder of causes in West Virginia, a rule of this nature might serve the same purpose in view of the existing possibilities as to joinder of causes. See discussion in the text at pages 169-180 supra.

336 See note 334 supra.

337 Briefly, where a party may be in doubt as to the facts which he may be able to prove or as to the legal theory which may be held applicable to the facts proved, he may allege liability on a variety of facts or theories without limitations based upon the forms of action which at present limit his choice. See discussion in text at pages 169-177 supra.

338 See note 334 supra.

339 For a very practical approach to the problem of res adjudicata, see 2 Moore, FEDERAL PRACTICE §2.06[6].

J. The Contrast

The differences between the West Virginia procedure and that under the new Federal Rules as to joinder of causes and parties might be more evident if some cases were examined in which the Federal Rules have been applied. Professor Moore has summarized the possibilities under the Federal Rules. For the sake of brevity, his summary, omitting the supporting authority, is quoted for comparison with the West Virginia cases previously discussed.

"[2]—One Plaintiff and One Defendant.
"Assume the case of one plaintiff, A, and one defendant, X. A may join in one complaint as many claims, or causes of action, as he has in his individual capacity against X, in his individual capacity. Thus A may join such diverse causes of action as action for breach of contract, . . . action on a note, suit for negligent injury, . . . etc., . . .

"[3]—Multiple Parties.
"A claim by A, as an individual, for conversion, and a claim by A, as administrator, on an account due the estate, would not fall within the above provisions. A is suing in different capacities, and hence, there are essentially two different plaintiffs. The same would be true if A sought to sue X, as an individual, on one claim, and X, as administrator, on another claim. Unlimited joinder is not authorized here. The joinder is subject to the rules on parties, and would be warranted if the claims arose out of the same transaction, occurrence or series of transactions or occurrences and if there was a question of law or fact common to the two claims.

"Subject to these rules on parties, A, B and C may join in one action to press individual claims against X; or A may sue X, Y, and Z on separate claims; or A, B and C may join separate claims against X, Y and Z. Thus the joinder of the different claims would be proper if the claims arose out of the same transaction, occurrence, or series of transactions or occurrences, and if there was a question of law or fact which knit them together.

"May a claim in favor of A and B against X be joined with an unrelated claim solely in favor of A against X; or a claim of A against X and Y be joined with unrelated claim of A against only X? . . . . . it was properly ruled that a claim on a promissory note against three defendants could not be joined with a claim on another note against two of the defendants, where the claims did not arise out of the same transaction, occurrence, or series of transactions or occurrences and no common question of law or fact was present. If this basic qualification of Rule 20 (a) is met, it is, of course, no objection to the joinder that all of the claims do not affect all of the parties.
"There can, of course, be no question of misjoinder where the claims are against the same parties, and hence it is proper for A to join one claim against X and Y with an entirely unrelated claim against X and Y. Assuming that the parties are properly joined on each claim, it is immaterial that there is no common question of fact as between the two claims: the situation is the same where A joins two claims against a single defendant."

The great freedom in joinder permitted by these rules may create problems in the trial of the claims; so may the rules of joinder now existing in West Virginia. However, to deal with such problems Federal Rule 42 offers a device not available to a West Virginia court. This rule provides that, for convenience or to avoid prejudice, the court may order a separate trial of any claim or of any separate issue or of any number of claims or issues. This the court may do even though there is no question as to the propriety of joinder of the claims. In addition, other devices available under the Federal Rules may eliminate many of the issues before the case reaches the trial stage. These are matters for discussion in forthcoming issues of this Review.

In concluding this part of the paper, attention naturally reverts to the West Virginia rule pertaining to actions on insurance policies. This rule was promulgated by the Supreme Court of Appeals in 1940 and provides:

"When any person has causes of action, arising from a single occurrence or casualty, against two or more defendants, under policies of insurance, containing similar or substantially similar terms and conditions, having the same legal effect on the question of liability, such person may, if he so elects, join such causes in one action against such defendants. . . When such joinder takes place all issues of law and fact shall be tried together. . . . Before or at trial, a defendant on motion, may be granted a separate trial if it appear that the cause of action against such defendant is substantially different from that of other defendants."

The liberality of the Federal Rules as to joinder of parties and causes resounds in this rule. True, it is somewhat more restrictive

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341 3 Moore, Federal Practice §§18.04[2], 18.04[3]. The omissions in this quotation deal with the additional claims which may or must be joined as counterclaims or as legal with equitable claims in the same action. These matters will be discussed in forthcoming issues of this Review.
342 See note 335 supra.
343 3 Moore, Federal Practice §18.05.
344 121 W. Va. xxi, at xxii; 125 W. Va. on the first page (not numbered) in the report.
in that it appears to contemplate as a condition precedent to joinder a question of law common to all the defendants, whereas the federal rule would be satisfied if there were any question of law or fact common to all of the defendants. True too, the term "a single occurrence or casualty" may be construed to be more restrictive than "the same transaction, occurrence, or series of transactions or occurrences." In addition, separate trials may be held necessary if the narrow common law concept of a cause of action is adopted in applying this rule, even though no inconvenience or prejudice would result from a trial of all of the issues at one time. Basically, however, the approach is toward the freer joinder of parties and claims, at the pleading stage, as permitted by the Federal Rules. One may hope that the liberality shown in this rule will be extended to both plaintiffs and defendants and that the restriction as to claims under policies of insurance will be eliminated. With experience based on such liberalization, including observation as to the time and expense saved, one may confidently expect that the freedom as to joinder of claims permitted by the Federal Rules will soon be allowed in West Virginia.

(Continued in a forthcoming issue of this Review.)

345 In addition to the requirement that the claims arise from a single occurrence or casualty, the insurance policies must contain "similar or substantially similar terms and conditions, having the same legal effect on the question of liability."

346 See Federal Rule 20 (a) quoted in the text at page 199 supra.

347 Ibid.

348 The rule provides that a separate trial may be granted if it appears that "the cause of action" is substantially different from that of the other defendants. This test may be applied in such a way that even within the cases in which joinder is permitted, each defendant may obtain a separate trial as to the claims asserted against him. Note how joinder of claims was defeated by a narrow concept of a cause of action even though the rule permitting joinder was more liberally worded than this part of the West Virginia rule. See notes 320, 332 supra. It may be hoped, even though a narrow concept of a cause of action is applied, that the court will hold that the limiting words "substantially different" embody the same idea expressed in the federal rule, that is, so different that inconvenience or prejudice would result if a separate trial is not granted. See note 335 supra.