Parties to Actions and Suits under the Revised Code

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It is not the purpose of this discussion to deal with all the provisions in the Revised Code relating to parties to actions and suits, but only with those which have been newly adopted in the revision. Most of the technicality which has heretofore hampered procedure involving the law of parties has prevailed in the common law actions, rather than in suits in equity; particularly, in the rules controlling joinder of parties and defining the consequences of misjoinder and nonjoinder of parties. The nature and effect of these rules at the common law and of the statutory modifications prior to the Revised Code, many of which modifications have been carried into the revision without change, have been comprehensively discussed in prior numbers of this publication.\(^1\) Efforts of the revisers were largely directed toward elimination of the evils there criticised, and hence were chiefly concerned with problems relating to joinder of parties in common law actions and the consequences of misjoinder and nonjoinder thereof. Consequently, a reading of the former discussion will serve the double purpose of furnishing a prior common law and statutory background for explanation of the effects of the new provisions and of directing attention to the nature of the evils intended to be corrected. It is perhaps unnecessary to state that no attempt will be made to cover all the provisions in the Revised Code which in some particular may affect parties to actions or suits, but only those which have a more prominent general application.

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ASSIGNEES

It is familiar law that a right to sue—a cause of action—is not assignable at the common law. At first an assignment of a chose in action was recognized and enforced only in equity. Later, the common law became so far indulgent toward the rights of the assignee as to permit him to sue in the name of the assignor, the action being styled in the name of the assignor for the use of the assignee. Yet how essentially the action was still considered to be an action by the assignor is indicated by the fact that it is not necessary to mention the name of the assignee in the declaration, although of course it is the better practice to do so. Therefore, on the record, the assignor is the real party to the action. However, he is the real party in name only—the nominal plaintiff. The real party in control of the litigation is the assignee—the use plaintiff. He has an absolute right to sue in the name of the assignor. It is not necessary to obtain the consent of the assignor. In fact, he is supposed to give his consent impliedly when he makes the assignment. The only condition which he can interpose to the use of his name, and the only extent to which he can interfere with the litigation, is to require the assignee to indemnify him for any costs that may be adjudicated against him in the action. In West Virginia, not even this obstacle can be interposed to the assignee’s right to proceed, since a statute provides that any costs adjudicated against the plaintiff in the action shall be adjudicated against the assignee. It necessarily follows that there is no necessity whatever for making the assignor a party to the action in any form or capacity, and that the use of his name is only a formality to satisfy what is now a mere whim of the common law. Yet until enactment of the Revised Code it was necessary in many cases to conform to this useless formality.

Under the provisions of the former Code, an assignee was permitted to sue in his own name only when he was the assignee

4 Welch v. Mandeville, 1 Wheat. 233 (U. S. 1816); Sunderland, Cases on Common Law Pleading (2d ed. 1932) 605, note. The fact that the nominal plaintiff was liable for costs indicates how essentially he was the real party on the record. Hayward v. Gifford, 4 M. & W. 194 (1838), Sunderland, Cases on Common Law Pleading 606.
of a "bond, note, account, or writing, not negotiable". Of course bonds, notes, accounts and writings do not include all the causes of action which are assignable. Consequently, under the former Code, it was necessary to differentiate between assigned causes upon which the assignee could sue in his own name and those upon which he could sue only in the name of the assignor. It might seem that the differentiation could easily have been made by giving proper attention to the terms of the statute, and that no confusion should have resulted; but such was not the case. Moreover, there are indications that the bare necessity for making the differentiation led to confusion, perhaps largely due to the fact that it was not based on any logical expediency. Assignees seemed prone to assume that the statute covered all assignments, and so attempt to sue in their own names on assigned causes still controlled by the common law.

A further element of confusion involved joinder of causes of action. In those instances in which the assignee was permitted to sue in his own name, he was permitted to join with assigned causes other causes which had accrued to him in his own capacity. Parties who attempted to avail themselves of this privilege sometimes failed to realize that the statute did not warrant the joinder except in a case involving an assignment of a bond, note, account or writing.

Confusion could result even after judgment in the action. Where the action was brought in the name of the assignor, the judgment, if for the plaintiff, was in the name of the assignor for the use of the assignee. Attempts were made to pursue the same formula in suits in equity to enforce the judgment lien and failed because equity requires the suit to be brought by the real party in interest, the use plaintiff-assignee, regardless of the form of the common law judgment.

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7 The words "not negotiable" in this section were used to indicate that it applied to instruments which are not negotiable, and not, by implication, to place any restriction upon the manner of suing on negotiable instruments, actions on which were controlled by Code 1923, c. 99, § 11.
8 See Miller v. Starcher, 86 W. Va. 90, 102 S. E. 809 (1920); Young v. Garred, 90 W. Va. 767, 112 S. E. 181 (1922).
9 See Young v. Garred, supra, holding that the term "writing" did not include stock certificates.
10 See cases cited in note 8 supra.
11 See Logan Central Coal Co. v. County Court of Logan County, 106 W. Va. 578, 146 S. E. 371 (1929).
The Revised Code\textsuperscript{13} eliminates all this confusion by permitting the assignee in all cases to sue in his own name, although he still has the privilege in any case of suing in the name of the assignor, as at the common law, if he so desires. He had this option under the former statute\textsuperscript{14} and there is nothing in the revision by which it is eliminated. Furthermore, the present statute permits in all instances a joinder of assigned causes with those accruing to the assignee in his own capacity, provided the joinder is not prohibited by other rules of the law; and provided, of course, the assignee sues in his own name.

\textbf{Husband and Wife}

Equity has largely solved its own problems with reference to husband and wife as parties to litigation. Consequently, the revisers were chiefly confronted with common law problems in dealing with the marital relation. The result accomplished has been almost, but not quite, to give the husband and the wife the legal status of single persons. Perhaps the subject may be discussed more intelligibly by considering first the provisions relating to joinder of husband and wife with each other as parties.

At the common law, as a general rule, a married woman could not sue or be sued without joining her husband.\textsuperscript{15} The former Code contained two sections which modified the common law—sections 13 and 15 of the chapter\textsuperscript{16} dealing with the rights and liabilities of married women. These sections seem to have been inconsistent. Section 13, the first one enacted,\textsuperscript{17} originally applied to married women both as plaintiffs and as defendants. By Acts of 1893,\textsuperscript{18} it was reënacted with an amendment which made it apply to married women as defendants only (with other changes which need not be noted here), in which form it appears in the former Code.

"A married woman may be sued without joining her husband in the following cases: 1. Where the action concerns her separate property. 2. Where the action is between herself and her husband. 3. Where she is living separate and apart

\textsuperscript{13}C. 55, art. 8, § 9.
\textsuperscript{14}Miller v. Starcher, 86 W. Va. 90, 102 S. E. 809 (1920), and cases cited.
\textsuperscript{15} Dicey, Parties, rules 29, 66, in Stephen, Common Law Pleading (Andrews' ed. 1901) 71, 77.
\textsuperscript{16}Code 1923, c. 66.
\textsuperscript{17} See W. Va. Acts 1891, c. 109, § 15.
\textsuperscript{18}C. 3, § 13.
from her husband. And in no case need she prosecute or defend by guardian or next friend."

At the same time, section 15 was enacted as a new section.19

"A married woman may sue or be sued in any court of law or chancery in this state, which may have jurisdiction of the subject matter, the same in all cases as if she were a feme sole..."

If a married woman may be sued in all cases as if she were a feme sole, it would seem that she could be sued in all cases without joining her husband, and not merely in the three instances enumerated in section 13. If these sections had been enacted at different times, it would seem that one must have been construed as amendatory of the other. However, since both, as they appear in the former Code, were enacted at the same time, it would seem necessary to construe them together and make an attempt to give effect to both as far as practicable. There would seem to be no way to give effect to section 13 at all except to interpret it as implying, by way of exception to section 15, that the husband and the wife must be joined in all instances other than those stated. Although an exhaustive search has not been attempted, no case has been found calling attention to the inconsistency. Nor has any case decided since Acts of 1893 been found holding that section 13 requires a joinder of the husband with the wife in any instance. On the other hand, it seems to have been the uniform view that, by virtue of section 15, a wife, where the cause of action concerned her alone, might, at her option, have sued either alone or jointly with her husband.20 Both sections have been superseded by a single section in the Revised Code which embodies the substance of section 15 and eliminates section 13, except the provision relating to a guardian or next friend.

"A married woman may sue or be sued alone in any court of law or chancery in this State that may have jurisdiction of the subject matter, the same in all cases as if she were a single woman, and her husband shall not be joined with her in any case unless, for reasons other than the marital relation, it is proper or necessary, because of his interest or liability, to make him a party. In no case need a married

19 W. Va. Acts 1893, c. 3, § 15. The citations to this section in Code 1923 indicate that it appeared in Acts 1891, c. 109. However, it does not appear there except to the extent that part of its effect is included in § 13.

20 See annotations to this section in Code 1923.
woman, because of being such, prosecute or defend by guardian or next friend."

Since enactment of this section, joinder of the husband with the wife merely because of the marital relation is prohibited and is no longer optional, as under the former Code. Whether it is now proper to join a husband and a wife in a given action, as plaintiffs or as defendants, will depend solely upon their relation to the cause of action, as in the case of other persons.

The last sentence in former section 13, "And in no case need she prosecute or defend by guardian or next friend'", has been amended in the new section by addition of the phrase "because of being such". Obviously, this phrase is added in order to insure that the provision shall not be so construed as to dispense with a next friend or a guardian *ad litem*, as the case may be, when the wife is an infant or insane.

The former Code permitted joinder of the husband with the wife in actions to recover antenuptial *debts* from the wife, but a judgment recovered in the action was enforceable only against the wife and her separate property. The Revised Code, in accord with the general policy of dispensing with a joinder based merely on the marital relation, no longer permits a joinder in such a case. The wife is specifically made liable on her antenuptial *contracts*, as well as for her *debts*, and it is provided that "the same may be enforced against her and her property as if she were a single woman."

The former Code made the husband liable for antenuptial debts of the wife to the extent that he should acquire any of the separate property of the wife, "by any antenuptial contract or otherwise". As the section appears in the Revised Code, it applies to a husband or a wife who shall have received, one from the other, any real or personal property by conveyance or transfer "by reason of any antenuptial contract or otherwise". Instead of applying merely to debts, as formerly, it now applies to "obligations, whether based on tort or contract". Moreover, while the former section imposed a liability for debts "contracted before marriage", the present section imposes a liability for obligations created at

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21 Rev. Code, c. 48, art. 3, § 19.
22 Code 1923, c. 66, § 10.
23 C. 48, art. 3, § 14.
24 Code 1923, c. 66, § 11.
25 C. 48, art. 3, § 15.
any time before the conveyance or transfer, and it is made specific that the conveyance or transfer may be one made either before or after marriage. The statute is silent as to whether the husband and the wife may be joined in an action under this section. Under the rules governing joinder of causes of action independently of the marital relation, it would seem that such a joinder would not be proper; and these are the rules which, by virtue of the provisions heretofore discussed, must be applied in the present situation.

Under the common law and the prior Code, a husband was liable for his wife's torts. A new section in the Revised Code specifically makes the wife liable for her torts, "whether committed before or after marriage, and whether under the coercion or instigation of her husband or not", and provides that the husband shall not be liable therefor except on the basis of agency, coercion or instigation.

While the general effect of the revision is to sever the unity of husband and wife and define their respective rights and liabilities as they would be fixed by general rules of the substantive law independently of the marital relation, there is one instance where a new section in the Revised Code imposes a joint liability which did not exist at the common law. This section may be roughly summarized as imposing a joint liability on the husband and the wife for various obligations involving professional services, rent, labor and purchases for the benefit of the family or a member of the family. Under the prior law, the husband alone was ordinarily liable for such obligations, and he is still made primarily liable by a provision to the effect that "his property when found shall be first applied to satisfy any such joint liability", and that the wife shall be subrogated to the rights of the creditor against the husband to the extent that any of her property shall be taken or she shall be compelled to pay money to satisfy the obligation. On the other hand, there is a provision that

"All purchases hereafter made, or services contracted for, by either husband or wife in his or her own name, shall be presumed, in the absence of notice to the contrary, to be on his or her private account and liability. . . ."

The statutes prior to the Revised Code had not modified the common law to the extent that a husband and a wife might sue

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26 See cases cited in the revisers' note to Rev. Code, c. 48, art. 3, § 20.
27 C. 48, art. 3, § 20.
28 C. 48, art. 3, § 22.
each other on contracts to which they were parties. The common law disability might have been based directly on the fiction that the husband and the wife were one person, in which event they could not have sued each other on any contract; or merely on lack of contractual capacity to enter into a contract with each other, in which event the action might have been maintained when it did not involve privity of contract as between the husband and the wife. Although allusion is made to the fiction in some of the local cases, the decisions seem primarily to have been based on lack of contractual capacity. That lack of contractual capacity was the only obstacle seems to have been settled in what is perhaps the latest case dealing with the subject, where a wife was permitted to sue her husband on a promissory note made by the husband to a third person as payee and bequeathed by the latter to the wife.

Although under the former Code husband and wife did not have power to contract with each other, a wife had power to contract with persons other than her husband and could sue and be sued on such contracts. The Revised Code extends the capacity to contracts between husband and wife. It is provided, however, that a contract between husband and wife can not be enforced in a common law action ‘unless such contract, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby’. Thus, it will be noted, a new class of contracts has been added to the Statute of Frauds.

The present status of the law may be summarized as follows. There is nothing to prevent a husband and a wife from suing each other in a contract action except lack of contractual capacity as between each other. This lack of capacity as an obstacle has been wholly removed when the contract, or some memorandum or note thereof, is in writing and signed by the party to be charged thereby. In all other instances where the action may be maintained, the situation must be such that direct contractual privity between

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31 See cases cited in note 29 supra. Apparently it has been assumed that the fiction of unity of husband and wife, so far as it applies to contracts, has been abolished except as to contractual capacity as between husband and wife.
33 See cases cited in note 29 supra.
34 Rev. Code, c. 48, art. 3, § 8.
husband and wife is not involved. While the necessity for making this distinction may appear to be somewhat artificial, it may not be without logic. The condition in the nature of a statute of frauds may have been imposed as a precaution to compel a degree of deliberation and avoid the creation of obligations on a hasty or quixotic impulse, which might be facilitated by the marital relation. Such considerations are not involved when a contract is entered into by a husband or a wife with a third party and the husband or the wife sues as an assignee. In such cases, the plaintiff's title as assignee involves only a transaction with a third person.

**Persons Under Disability**

The former Code provided that "any minor entitled to sue, may do so by his next friend". It will be noted that the statute says that a minor *may* sue by his next friend, but does not say that he *must* do so. Wherefore, it has been said that he had an option to sue under the statute by his next friend or to sue by his guardian independently of the statute. The Revised Code provides that an infant may sue by either his next friend or his guardian, and that his guardian, or some other person as a next friend, may be substituted by the court for a prior next friend. Since logically an infant's guardian, as the person most interested in his affairs, is the person who should (and it is presumed normally does) serve as his next friend; and since the court already had a power of substitution when the next friend was incompetent, it might be surmised that nothing has been accomplished by the new provisions except a substitution of nomenclature. It should be remembered, however, that no appointment of a next friend by the court is necessary, nor does he need any authorization in order to institute the suit. Wherefore it may happen that a suit is instituted for an infant by a next friend who is not his guardian when the court is of the opinion that, although the next friend is competent and legally unobjectionable, the infant's interests would for various reasons be better served if he were represented by his guardian. On the other hand, there may be cases where it would

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36 Code 1923, c. 82, § 14.
38 C. 56, art. 4, § 9.
40 Ibid.
be improper for the guardian to act on behalf of the infant, or where he would refuse to act, as where he is a party defendant to the litigation or his interests are opposed to those of the infant.

If the infant is represented by his guardian in lieu of a next friend, it may be necessary to give attention to a matter of pleading not involved when he is represented by a next friend. As has already been noted, no appointment or authorization is required when suit is brought through the medium of a next friend. The next friend acts wholly on his own initiative. Hence of course the declaration does not need to allege any appointment or qualification of the next friend. On the other hand, if the suit is brought through the medium of a guardian, it may be necessary to allege appointment and qualification of the guardian, as is required when an action is instituted by a personal representative.41

The Revised Code,42 as did the former Code,43 requires appointment of a guardian ad litem to represent an infant or insane party defendant; which appointment may now be made by the court, the judge in vacation, or the clerk at rules. Formerly, the appointment could be made only by the court, or by the clerk at rules.

As perhaps has been observed by practitioners in most, if not all, jurisdictions, the practice of requiring a person under disability to be represented by a guardian ad litem has in the main resulted in compliance with a mere formality. Although the infant or insane person can not technically appear by attorney, nevertheless his interests are generally represented by counsel and are protected by the court. It is primarily from these sources, and not from activities by the guardian ad litem, that he is assured of his dues. It is perhaps safe to assert that the chief beneficiary in the representation in most cases has been the guardian ad litem as the recipient of a fee. The principal object evinced by the re-

41 Austin v. Calloway, 73 W. Va. 231, 80 S. E. 361 (1913). However, a distinction can be made between the situation where an infant is suing by his guardian and the situation where suit is brought by a personal representative. In the first instance, the suit is by the infant and is styled in his name by his guardian. The guardian, so to speak, is merely a prop by which the infant is supported. The suit is not the guardian's suit. In the other instance, the personal representative is the plaintiff and the suit is his suit. See Owen v. Appalachian Power Co., 78 W. Va. 596, 89 S. E. 262 (1916), making such a distinction between a personal representative and a next friend. Still the fact remains that a guardian has no right to act as such in lieu of a next friend unless he has been appointed and has qualified.
42 C. 56, art. 4, § 10.
43 Code 1923, c. 125, § 13.
vision is an attempt to correct this situation. The former statute prescribed no qualifications for the guardian ad litem; but he is now required to be "some discreet and competent attorney at law"; who may be compelled to act. However, if such an appointee declines to act, the court may in his stead appoint "some other discreet and proper person", who is not required to be an attorney at law. The guardian ad litem is required faithfully to represent the interest or estate of the infant or insane person and the court is required to see that he does so. The court is given power of removal and substitution. While the intention implicit in these amendments is wholly meritorious, it remains to be seen to what extent it will be accomplished in practice.

JOINDER OF PARTIES

No attempt will be made here to enter into a discussion of the details of this topic further than is necessary to elucidate effects of the revision. The new provisions are chiefly concerned with joinder of parties in common law actions. The former state of the law in this respect may be reviewed in prior numbers of this publication heretofore cited.44

At the common law, as a general rule, in an action on a joint contract, it is necessary to join as defendants all the joint promissors who are living.45 If the contract is joint and several, all the promissors may be sued jointly or each may be sued severally in a separate action, but an intermediate number of them can not be sued jointly. In other words, the contract must be treated as wholly joint or as wholly several.46 Such, with minor qualifications, were the general rules prior to the Revised Code governing common law actions in this state, except in the case of negotiable instruments.47 However, there were circumstances under which, by virtue of statute, nonjoinder of a joint promissor might be excused.

In order to raise objection to the nonjoinder, except when it appeared on the face of the declaration, it was necessary to plead it in abatement.48 But no plea in abatement for nonjoinder of a

44 Note 1 supra.
45 Dicey, Parties, rules 49, 52, in Stephen, op. cit. supra n. 15, at 74. See Jones and Carlin, supra n. 1, at 203 et seq.
46 Winslow v. Herrick, 9 Mich. 380 (1861); Sunderland, op. cit. supra n. 4, at 640; 1 Williston, Contracts (1931) § 337.
47 See Code 1923, c. 99, § 11, for actions on negotiable instruments.
48 See Jones and Carlin, supra n. 1, at 203.
defendant was good unless it alleged that the nonjoined person was a resident of the state and stated the place of his residence.\textsuperscript{49} Such an allegation, of course, was traversable. Hence the result was that a nonresident joint promissor might be omitted; at the risk, however, of the nonjoinder being pleaded in abatement and the evidence on a trial of the issue in abatement showing that he was a resident.

If the action as against a joint promissor was barred by the Statute of Frauds or the Statute of Limitations, he might be omitted as a defendant; since it was provided that, if such were found to be the fact on trial of an issue in abatement for the nonjoinder, the issue should be found against the defendant.\textsuperscript{50} Here again the plaintiff assumed the risk that his excuse for the nonjoinder might not be established by the evidence.

While inability to serve a joint promissor with process did not excuse his nonjoinder, it did permit the plaintiff to take judgment against those who were served without waiting for service on the others. In such a case, the plaintiff was given the option to discontinue his action as to those not served or to continue it and take successive judgments against them as process was served.\textsuperscript{51} Under the original statute, if the action were discontinued as to any defendant not served, he could not be sued again in a future action.\textsuperscript{52} Hence originally the effect was not, essentially, to change a joint into a several contract on the contingency of nonservice, but rather to eliminate one or more of the joint promissors from liability to the plaintiff. Later, it was provided that a discontinuance as to those not served should not be a bar to a future action against them.\textsuperscript{53} Thereafter, on the contingency of nonservice of one or more of the defendants, it was within the plaintiff's power, so far as his remedial rights were concerned, to change a joint contract into one wholly several, or into one partly joint and partly several in various proportions, depending on the circumstances.

However, if the plaintiff were proceeding for judgment on notice of motion, in those instances where he was permitted to

\textsuperscript{49} CODE 1923, c. 125, § 17.
\textsuperscript{50} CODE 1923, c. 125, § 18.
\textsuperscript{51} CODE 1923, c. 125, § 52.
\textsuperscript{52} Armentrout v. Smith, 52 W. Va. 96, 43 S. E. 98 (1902); Armentrout v. Smith, 56 W. Va. 356, 49 S. E. 377 (1904).
\textsuperscript{53} Acts 1919, c. 84, § 52, adding the last sentence to the section as it appears in Code 1923.
adopt such a procedure in lieu of a common law action, the situation was entirely different.

"A person entitled to obtain judgment for money on motion may, as to any person liable for such money, move severally against each or jointly against all, or jointly against any intermediate number, and may also move severally against the personal representative of any decedent who in his lifetime was liable alone, jointly, or with others; and when notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with the notice. Such motion may be made from time to time until there is judgment against every person liable, or his personal representative..."

A plaintiff proceeding under this section could, at his option, without any excuse for a nonjoinder of defendants, proceed successively, at different times and in separate proceedings, against one or any intermediate number of joint promissors. The effect of this section, so far as a plaintiff's right to sue is concerned, was not only to change all joint contracts coming within the scope of the remedy into joint and several contracts, but to change them into contracts intermediately joint and several in optional proportions, in a manner wholly foreign to the common law relating to joint and several contracts.

To recapitulate, the law with reference to joinder of joint promissors under the former Code may be summarized as follows. When the plaintiff sued in a common law action, a nonjoinder was excused only when the nonjoined promissor was a nonresident of the state or the right to sue him was barred by the Statute of Frauds or the Statute of Limitations. Inability to obtain service of process did not excuse a nonjoinder, although it did permit separate judgments in the original action and, later, a second action for recovery against those not served in the original action. On the other hand, if the plaintiff proceeded for judgment on notice of motion in lieu of suing in a common law action, he had an absolute option, without any excuse for a nonjoinder, to proceed against any number of joint promissors without surrendering his rights against the others. It will thus be seen that the contractual rights and liabilities of parties to a certain class of contracts were differentiated by the nature of the remedy adopted, regardless of

54 Code 1923, c. 121, § 7.
the nature of the rights and liabilities as defined by the contract. The inconsistency of permitting the remedies, without any reason, to vary the substantive terms of a contract is mentioned by the revisers as a reason why a more liberal practice is prescribed for common law actions in the Revised Code.\textsuperscript{55}

In the Revised Code, the provisions of section 7, chapter 121, of the former Code, hereinbefore last quoted, relating to joinder of parties in a proceeding for judgment on notice of motion, have been eliminated from the article of the Revised Code dealing with motions.\textsuperscript{56} The substance of these provisions and certain provisions in the former Code dealing, respectively, with joinder of parties in actions on negotiable instruments\textsuperscript{57} and joinder of assignors in actions by assignees on non-negotiable instruments,\textsuperscript{58} with additional provisions, have been incorporated in a single section of the Revised Code, which has been made to apply equally to common law actions and to proceedings for judgment on notice of motion.

"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. If notice or other process be not served upon all persons proceeded against, judgment may nevertheless be given against those liable who have been served as provided by law with such notice or other process. Such actions or proceedings by notice may be had from time to time in the same or any other court until judgment is obtained against every person liable or his personal representative. However, plaintiff shall have satisfaction of but one of two or more judgments rendered on the same demand."\textsuperscript{59}

It will be noted that this radical section is much more comprehensive in its terms than the former section\textsuperscript{60} prescribing the

\textsuperscript{55} Revisers' note to REV. CODE, c. 55, art. 8, § 7.
\textsuperscript{56} REV. CODE, c. 56, art. 2.
\textsuperscript{57} CODE 1923, c. 99, § 11.
\textsuperscript{58} CODE 1923, c. 99, § 15.
\textsuperscript{59} REV. CODE, c. 55, art. 8, § 7.
\textsuperscript{60} CODE 1923, c. 121, § 7, note 54 supra.
procedure in a proceeding for judgment on notice of motion. The specific effect of the present section, with reference to the plaintiff's remedial rights on obligations included within its terms, is not only to change joint contracts into several contracts, or into contracts intermediately joint and several in various proportions, at the option of the plaintiff, but also to change several contracts into joint contracts in reverse optional proportions. So far as the plaintiff's remedial rights are concerned, all distinction between negotiable and non-negotiable instruments has been abolished. Also, as to instruments and contracts coming within the terms of the section, it would seem that the former rules\textsuperscript{61} requiring separate actions against a principal and a guarantor, and action against the principal as a condition precedent to suing the guarantor, have been abrogated.

A further modification of the former law has been accomplished with reference to actions by assignees. A section in the former Code provided that

"Any such assignee may recover from any assignor of such writing; but only joint assignors shall be joined as defendants in one action, and a remote assignor shall have the benefit of the same defense as if the suit had been instituted by his immediate assignee."\textsuperscript{62}

The effect of this section was that an assignee might sue his immediate assignor or any remote assignor, but he could not join assignors in the same action unless they were joint assignors. In other words, only assignors who had participated in the same assignment could have been joined. The present statutes permit a joinder of all the assignors in the whole chain of assignments and the maker in the same action, at the option of the plaintiff.\textsuperscript{63}

The obvious attempt to frame the new section so as to insure that it shall apply to certain specific situations deemed of primary importance, and yet to give it a more comprehensive general application, has led to the use of terms which may cause difficulty in its interpretation and application. Its terms apply 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..."


\textsuperscript{62} Code 1923, c. 99, § 15.

\textsuperscript{63} Rev. Code, c. 55, art. 8, §§ 7, 10.
Any doubts that may arise will be concerned with the phrases "other instrument of any character" and "judgment for money on contract".

The first phrase has the same meaning as if it read "holder of any other instrument of any character". Since the term "holder" is usually applied to promissory notes, checks, and instruments of a similar kind, and not to contracts in general, it might be surmised that the phrase was intended to apply only to instruments fundamentally similar in some respect to those specifically enumerated, such as a warehouse receipt. A like conclusion might be reached through application of the doctrine of *ejusdem generis*. However, a revisers' note warns that

"The words 'of any character' following the word 'instrument' are intended to obviate a construction limiting the application of the section to instruments of a class similar to those named."

Then what is the meaning of the term "instrument"? Is it intended to include all written contracts in the possession of the plaintiff on which he has a right of action, whether for the payment of money or for the performance of some other act, as its broadest and most liberal interpretation might permit? Or is it intended to cover only instruments providing for the payment of money, leaving the second phrase to cover instances where a party is entitled to recover "judgment for money on contract" but is not the "holder" of an instrument?

The second phrase, "judgment for money on contract", involves a possible ambiguity. The words "on contract" may be taken as modifying "money" or as modifying "judgment". Thus, the phrase may be understood as if it read "money on contract" or as if it read "judgment on contract". A somewhat similar phrase in the statute dealing with proceedings for judgment on notice of motion, "any person entitled to recover money by action on any contract", has been construed as applying only to contracts which provide for the payment of money. On the other hand, another somewhat similar phrase in the section prescribing an affidavit of merits in contract actions, "action . . . for the recovery of money arising out of contract", seems to have been subject to different interpretations. According to one interpreta-

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64 REV. CODE, c. 56, art. 2, § 5.
66 REV. CODE, c. 56, art. 4, § 51.
tion, it is intended to apply to any contract action, regardless of
the nature of the contract;\textsuperscript{67} while according to another interpr-
etation, it applies only where the action is on a contract for the pay-
ment of money.\textsuperscript{68}

The section in the former Code\textsuperscript{69} permitting a discontinuance
and a future action as to defendants not served with process has
been carried into the Revised Code without change.\textsuperscript{70} A question
now arises whether, due to the comprehensive provisions of the
section last discussed permitting the joint contract parties therein
included to be sued severally at the option of the plaintiff, there
is a conflict between the two sections. The one section purports to
permit a discontinuance as to parties once sued only on the con-
tingency of nonservice; while the other section gives the plaintiff
an absolute right to omit parties at the inception of the action
without any contingency. If the plaintiff has such an option at
the inception of his action, there would seem to be no reason why
he should not be allowed to exercise a similar option after the
action has been started, by way of discontinuance; and perhaps
such will be the result of a construction placed upon the two sec-
tions construed together. Any doubt as to such a right could be
removed by adding a proviso to the section in which the present
conditional right to a discontinuance is authorized.

It is a familiar rule of the common law that a joint liability,
on the death of one or more of those jointly liable, survives only
against the survivors, and, finally, on the death of all, against the
personal representative of the last survivor.\textsuperscript{71} The remedy for
survivors who at law are compelled to discharge the entire liability
is to seek contribution in equity against the estates of the decedents.
The former Code had already provided that the personal represen-
tative of a deceased joint promissor might be sued.

\textsuperscript{67} Marstiller v. Ward, 52 W. Va. 74, 43 S. E. 178 (1902); KITTLE, RULE
DAYS (1914) § 36.

\textsuperscript{68} Rosenerance v. Kelley, 74 W. Va. 100, 81 S. E. 705 (1914).

\textsuperscript{69} CODE 1923, c. 125, § 52, notes 51, 52, 53, supra.

\textsuperscript{70} REV. CODE, c. 56, art. 4, § 53.

\textsuperscript{71} Dicey, Parties, rule 52, in Stephen, op. cit. supra n. 15, at 74.
partners, had been bound severally as well as jointly, otherwise than as partners.\textsuperscript{72}

It will be noted, however, that the personal representative had to be sued singly and could not be joined with the survivors,\textsuperscript{71} since the authority to sue him at all arises from the fact that the statute attaches a several liability — and only a several liability — upon the contingency of death to a liability that otherwise remains wholly joint. This section has been carried into the Revised Code\textsuperscript{74} without change and a new section has been added.

"In every action or motion in which a decedent, if living, could be joined as defendant with another or others under section seven of this article, his personal representative may be joined with him or them, or with the personal representative of any one or more of them. In every such case in which a judgment is rendered against a personal representative, alone or jointly with another or others, such judgment, as to such representative, shall affect only the estate of his decedent, and shall, as to such estate, have the same force and effect as if rendered in an action in which such representative is sued alone. But nothing in this section shall prevent a plaintiff, at his election, from proceeding separately against the representative of any decedent."\textsuperscript{75}

It will be noted that the effect of this section, so far as the mere question of joinder is concerned, is, at the option of the plaintiff, to abolish the common law rule as to survival of liability and give the personal representative the same status as that of the decedent in his lifetime. However, a judgment obtained against the personal representative operates only against the estate of the decedent and has only the status of a several judgment. Such a qualification is designed to prevent interference with the administration of estates and the settlement of partnership affairs.

It is necessary to note carefully, however, that the section last quoted does not authorize joinder of a personal representative with a survivor in all instances in which the prior section permits a personal representative to be sued alone. The joinder is authorized only in those cases in which "a decedent, if living, could be joined as defendant with another or others under section seven of

\footnotesize{\textsuperscript{72} Code 1923, c. 99, § 13. Italics supplied.  
\textsuperscript{73} See Pollock v. House & Hermann, 84 W. Va. 421, 100 S. E. 275 (1919), recognizing the general common law rule as to joinder of survivors with personal representatives of decedents, in this case applied to plaintiffs.  
\textsuperscript{74} C. 55, art. 8, § 6.  
\textsuperscript{75} Rev. Code, c. 55, art. 8, § 8. Italics supplied.}
By the measure of this qualification, there can be a joinder only in an action on a "note, check, draft, bill of exchange, or other instrument of any character" of which the plaintiff is the "holder", or when the plaintiff is suing as a person "entitled to judgment for money on contract"; while under the section permitting the personal representative to be sued alone, an action may be maintained against him when the decedent was liable "by judgment, bond, note or otherwise, for the payment of a debt, or the performance or forbearance of an act, or for any other thing". Whatever the logic of these distinctions, if they are not carefully borne in mind, error is likely to result from an attempt to exercise the privileges newly granted.

It remains to notice two instances where the Revised Code no longer authorizes a nonjoinder of persons which was permitted by the former Code. Attention has been called to the fact that the former Code permitted a nonjoinder of persons against whom an action was barred by the Statute of Frauds or the Statute of Limitations. The provisions permitting such a nonjoinder have been eliminated from the revision. The elimination, which seems wholly logical, is justified by reference to the fact that such defenses are personal in nature and might never be asserted by the parties to whom they apply if such parties were sued. Hence the plaintiff has no right to assume in advance that the defenses will be asserted; or, if asserted, will be sustained. As applied to actions coming within the provisions of the section permitting a plaintiff at his option to omit joint promisors, elimination of the former privilege of nonjoinder will have no effect, since no excuse for the nonjoinder is now necessary. However, the eliminated provisions applied to all defendants, and not to particular classes of contract defendants. Hence the elimination will still affect situations where a plaintiff is not given an option as to a nonjoinder.

CONSEQUENCES OF NONJOINDER AND MISJOINDER

A detailed discussion of the consequences of nonjoinder and misjoinder of parties to common law actions under the common law and under the statutes prevailing in this state prior to the

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70 The section referred to is REV. CODE, c. 55, art. 8, § 7, note 50 supra.
71 REV. CODE, c. 55, art. 8, § 6. See note 72 supra.
72 CODE 1923, c. 125, § 18, note 50 supra.
73 See revisers' note to REV. CODE, c. 56, art. 4, § 34.
Revised Code will be found in prior numbers of this publication heretofore cited. For purposes of the present discussion, the former rules may be summarized here briefly, without entering into a discussion of exceptions and qualifications.

If a nonjoinder or a misjoinder appeared on the face of the declaration, it was generally subject to demurrer. If it did not appear on the face of the declaration, advantage of it could generally be taken under a plea in bar by way of objecting to the introduction of evidence at the trial, because of a variance between the declaration and the proof. In other instances, it was subject to a plea in abatement. In those instances where it was required to be pleaded in abatement, of course objection to it was waived in the absence of the plea. Generally, it could not be cured by addition or elimination of parties, because such an addition or elimination would result in an amendment introducing a new cause of action, which was prohibited by the law of amendments. Statutes in the former Code designed to ameliorate the situation had been so construed as to have had little effect. Hence generally, if a plaintiff was found guilty of a nonjoinder or a misjoinder, his only remedy was to start a new action.

The provisions in the Revised Code have been designed particularly to obviate the necessity for starting a new action merely because too many or too few parties have sued or been sued. This object has been accomplished partly by providing the utmost liberality as to elimination and addition of parties, on either side of the case; and partly, where circumstances permit, by permitting judgment without an elimination or addition.

"No action or suit shall abate or be defeated by the misjoinder or nonjoinder of parties, plaintiff or defendant. Whenever such misjoinder shall be made to appear by affidavit or otherwise, the parties misjoined shall be dropped by order of the court, entered of its own accord or upon motion, at any stage of the cause. Whenever in any case full justice can not be done and a complete and final determination of the controversy can not be had without the presence of other parties, and such nonjoinder shall be made to appear by affidavit or otherwise at any time before final judgment or decree, the court of its own accord, or upon motion, may cause such omitted persons to be made parties to the action or suit, as plaintiffs or defendants, by proper amendment and process, at any stage of the cause, as the ends of justice may require,

80 Note 1 supra.
and upon such terms as may appear to the court to be just; but no new party shall be added upon motion unless the place of his residence, if known, be stated with convenient certainty in the affidavit of the party questioning his nonjoinder, and, if his place of residence be not known, unless such fact be stated.\(^\text{81}\)

The first sentence of this section would seem to eliminate all the common law methods of objecting to a misjoinder or a nonjoinder of parties. A plea in abatement is not proper, because the function of a plea in abatement is to abate the action, while the statute provides that an action or suit shall not abate because of a misjoinder or a nonjoinder. A demurrer is not proper, because the function of a demurrer is to defeat the action, and the statute provides that an action shall not be defeated because of a misjoinder or a nonjoinder. For a like reason, objection could not be raised at the trial under a plea in bar.

Obviously, the proper method of procedure, when the court does not act of its own accord, is to make a motion to eliminate or to 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, the affidavit performing the functions of a plea in abatement by way of giving the plaintiff a better writ. Perhaps a plea in abatement may still be used as a substitute for the motion and the affidavit, since a proper plea in abatement should embody all the facts required to go into the affidavit and must be under oath. A plea in abatement, however, in serving such a function, should not be considered a true plea in abatement, since there is no possibility of abating the action; but only as a substitute for the motion and affidavit — a means by which the misjoinder or the nonjoinder and facts of residence are "otherwise" made to "appear" to the court.

It will be noted that the provisions of this section apply to both actions at law and suits in equity. Since courts of equity, without the aid of statutes, have always exercised great liberality in the way of permitting — and requiring — the addition or elimination of parties in order to do complete justice, the statute would seem to be merely declaratory of the chancery practice, so far as the provisions relating to elimination and addition of parties are concerned. However, there may be some difficulty in applying in an equity suit the provision defining the effect of a nonjoinder. It is

\(^{81}\) Rev. Code, c. 56, art. 4, § 34.
well known that there are some instances where a court of equity can not render a decree unless all the persons jointly interested are before the court, as in a suit for the cancellation of a contract. Such a person, in the equity classification, is called an indispensable party. His nonjoinder can not be excused. No decree can be rendered until he is brought in. If he is not ultimately brought in, the suit must necessarily be defeated, or abated. Yet the statute provides that no suit shall abate or be defeated by the nonjoinder of parties defendant. It seemingly could not be the intention of the statute to permit a decree granting relief in the absence of such a party. On the other hand, if a decree granting relief can not be entered and the suit can not abate or be defeated, it must abide forever on the docket awaiting joinder of the omitted party. That the latter result is not contemplated is indicated by the fact that a plaintiff is required to use due diligence in maturing his suit as to an indispensable party already joined, or else suffer a dismissal of his suit.\textsuperscript{82}

It is familiar law that misjoinder of tort defendants does not prevent judgment against those who are properly sued.\textsuperscript{83} Such is not true, as a general rule,\textsuperscript{84} at the common law or under the former Code with reference to contract defendants. Judgment had to be taken against all or none of the contract defendants. The former Code contains a section which was intended to change this rule, which would seem to have no justification except the demands of bare technicality.

"In an action founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover, if he had sued them only, on the contract alleged in the declaration."\textsuperscript{85}

This section was so construed as to defeat the whole object of its enactment,\textsuperscript{86} in spite of the fact that its terms would seem to be so clear as to avoid any misapprehension as to its effect. It has been practically rewritten in the Revised Code, with the object

\textsuperscript{82}REV. CODE, c. 56, art. 4, \$ 69. While this section provides for "a hearing or dismissal", it would seem that a hearing could only result in dismissal or a decree for the defendant on the hearing when the suit is not matured as to an indispensable party, the suit thus being either abated or defeated.

\textsuperscript{83}Pence v. Bryant, 73 W. Va. 126, 80 S. E. 137 (1913).

\textsuperscript{84}There are some exceptions, as in the case of personal defenses. See Jones and Carlin, supra n. 3, at 268 et seq.

\textsuperscript{85}CODE 1933, c. 131, \$ 19.
of accomplishing only what was intended in the original draft, but in language still more emphatically indicating its purpose.

"In an action or motion, founded on contract, against two or more defendants, the fact that one or more of the defendants, at any stage of the cause or for any reason, is found not liable on the contract shall not prevent the plaintiff from having, as if the motion or action were an action founded on tort, verdict and judgment, or judgment alone, as the case may be, against any other defendant or defendants who are liable; nor shall the fact that a verdict is set aside as to one or more of the defendants in such action or motion as contrary to the evidence prevent the plaintiff from having judgment on such verdict as to any other defendant or defendants found liable thereby."

Fear has been expressed that this section might be construed so as to permit a plaintiff, at his option, to take judgment against one or more contract defendants in any case without condition or qualification. Such would seem to be an extraordinary interpretation to put upon its provisions. Moreover, even if such should be the case, apprehension over the result would seem to be somewhat needless, with a realization of the radical effects of the sections already considered, which permit nonjoinder of joint contract parties at the inception of an action and elimination of unnecessary parties at any stage of the procedure.

There was one instance in the equity practice in this state where, prior to enactment of the Revised Code, a misjoinder of parties could not be cured by amendment. It was the rule in this state that a multifarious bill in equity could not be amended so as to cure the misjoinder of causes. Multifariousness frequently involves a misjoinder of plaintiffs or defendants. In such a case, the misjoinder of parties could not be cured by amendment, because such, in effect, would be permitting an amendment to cure a multifarious bill. This rule, which is technical, has never been recognized in many of the states, and is contrary to the common law rule prevailing in this state, has been abolished by a provision in the Revised Code which permits a multifarious bill to be amended so as to cure a misjoinder of causes.

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86 See Jones and Carlin, supra n. 1, at 268 et seq.
87 REV. CODE, c. 56, art. 6, § 32.
89 See (1920) 21 C. J. 426 and cases cited.
91 REV. CODE, c. 56, art. 4, § 24.