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Joinder of Parties and Causes

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JOINER OF PARTIES AND CAUSES.—What is the basis for the rules as to joinder? There seems to be a notion current among members of the bar that these rules are necessary safeguards against a tendency to unduly complicate legal proceedings. Any attempt now made to modify existing rules is opposed immediately by those who seem to feel this danger. It might be well to consider the problem in the light of the experience of the courts and attempt to ascertain whether there is any evidence of this suggested peril.

In the early procedure when an action could only be commenced with a certain kind of a writ which had rather distinct characteristics, there did not seem to exist any chance of abuse. The malevolent person who seems to be lurking at the threshold of the bar ready to institute his nefarious proceeding could be ignored.

With the abolition of the writ system of commencing suit in some jurisdictions or with the liberalization of that system in other jurisdictions, there seemed to be some necessity for safeguarding the proceedings. This protection was afforded by the rather complex system of joinder provided in the early codes. Who was being protected by this system? Surely not the courts. There should be no desire to provide an orderly and systematic system of justice for its own sake. The courts have no reason to exist except for the control they afforded over the affairs of those coming within the scope of their judgments or decrees. It must be that there was a desire to protect the parties involved in the controversy,—either the one bringing the action or the one or ones against whom it was instituted.

Why was it necessary to give protection to these parties? There seemed to be a general notion that if some restrictions were not imposed upon the parties, that the issues presented would be so involved as to restrict the efficient and satisfactory settlement of the issues. This idea was somewhat related to the jury trial, as the efficiency of the jury is directly proportionate to the simplicity of the issues involved. The plaintiff would have his claims lost in such a maze of entangling threads that the tribunal could not be able to trace the course of any particular claim. On the other hand the defendant would have such a diversity of claims to meet that he could not intelligently make an issue and a judgment might be rendered against him in the confusion.

This attitude toward the problem entirely eliminated two important factors which can control the scope of the trial more

than any specific or detailed rules of practice. The plaintiff is curbed by his desire to get affirmative action from the court and not to unduly involve or complicate the trial. And on the other hand the defendant can be protected by power of the court to restrict the scope of the hearing so that he will not be unduly prejudiced.¹

This vague and flexible notion of joinder is a far cry from the early common law conception of a lawsuit which emphasized singleness of issue. Procedural rules are generally the expression of the habits of those administering the law and as these habits can only be gradually changed, it was a matter of slow growth from the rules of practice in the 14th Century to those in the 20th. The common law reluctantly gave up its idea of singleness of issue. But many inroads had been made upon it by the time the Codes of Civil Procedure were first adopted in this country.

When the time came to abolish the writ system of commencing legal action which as a natural consequence limited the scope of the trial, the codifiers sought some rules which would arbitrarily and automatically limit the scope of the hearing. It is quite natural that the Code Commissioners would attempt to liberalize joinder along the line of the legal nature of the matter in controversy. If the claims were similar and if all the plaintiffs were affected by each claim, there would seem to be sufficient similarity of issue to be conveniently tried together. But nowhere was there a clear attempt to make the convenience of handling the claims the test. The legal nature of the claims was the basis for determining joinder which may or may not make for conveyance. Some attempt to change this method was the introduction of the "same transaction" class but this was often too strictly interpreted and was largely limited to cases of only one plaintiff.

The increase in the amount of litigation and interrelation of some of the problems involved has continually exerted a pressure for more liberal provisions as to joinder. It might be that the bar is not ready to accept a complete abolition of restriction rules and rely solely upon the interests of the plaintiff or plaintiffs to avoid abuse of this new power on the one hand and on the other the power of the courts to restrict the scope of the hearing by a separation of claims should it appear desirable.

We do not need to consider this problem from mere specula-

¹ A liberal attitude toward the joinder problem is set forth by Professor Sunderland, "Joinder of Actions," 18 MICH. L. REV. 571 (1920); Wm. Wirt Blume, "A Rational Theory for Joinder of Causes and Defenses," 26 MICH. L. REV. 1 (1927) and CLARK, CODE PLEADING (1928) pp. 241 *et seq.*

tion as we have an opportunity to observe the effect of some of the liberal provisions as to joinder of parties which have been made in some states.

New York took some steps toward a more intelligent system of joinder in the Civil Practice Act of 1920. They only partly handled the problem by changing the rule as to joinder of parties, but refused to change the provision as to joinder of causes of action. The liberality in New York only extends to cases where the interests of the parties to the controversy are several with respect to claims which are joinable under the "nature of the action" classification. But this is a considerable change and permits joining in one suit a large number of claims which would formerly have to be sued on separately.

The only unifying factors are the requirements that the claims must arise out of the same transaction or series of transactions and have common questions of law and fact. This presents the inquiry whether or not this liberality opens the door to a large number of suits where complex and intricate claims are presented which prevents an intelligent determination of the issues at the hands of the jury. There has been considerable a priori speculation. The only satisfactory answer can be secured from a picture of the cases that are being filed and tried under this system. Other jurisdictions can very profitably observe the effect of this change upon the New York procedure.

The first attempt to make that survey was instituted by the Yale Law School. The reports from this survey give information about all the cases that reached final determination in the Suppliants' attorney will prefer separate trials with the hope that consisted of about 2300 cases, exclusive of divorce actions, foreclosures and default cases. The surprising fact was that in only one was there a motion to sever the causes of action and in that case there was no question as to the complexity of the action. Of course one would not be justified in drawing a too general conclusion from these reports, as cases can readily exist which do not appear in these statistics. But one is justified in concluding that there has not been a wholesale abuse of this privilege of joinder. It would seem that the interest of the plaintiff in simplicity of issue was a factor in deterring him from too freely using this privilege of liberal joinder.

If this privilege is not likely to be abused there is no reason for withholding it from use in cases where the parties desire its use and would be benefited thereby. But the litigating parties are not the only ones benefited by a liberal provision of joinder. The courts are likewise aided by having the congested trial

calendars somewhat relieved. If one action will take the place of several the entire system of judicial administration will be benefited.

A survey of the every day run of cases shows the advantage of this liberality in joinder. A typical situation arises in personal injury cases especially in automobile accidents where so many occur to women and children. If there is a husband living in one case or parent in the other, there will be two causes of action arising out of the accident which in most states must be sued on separately. These situations are illustrated by *Dobrikin v. Union Railway Co.*,² and *Weis v. Richartz*.³ Or the situation may be more involved as in *Spetler v. Jogel Realty Company*.⁴

In these classes of cases which frequently arise, there is no valid reason for requiring separate trials. It may be that the plaintiffs attorney will prefer separate trials with the hope that the juries in separate trials would award more damages than if tried at one time. This might sometimes be the case where injuries were serious. However, this advantage is not one that the state should be unduly concerned to protect, and especially at the expense of a congested docket and an increasing cost of jury trials.

This possible advantage to the plaintiff does not appear to be very great over against the convenience of having all these matters disposed of at one time. One of the great problems of litigation in a city is to get one's witnesses in court at the time of a trial and to this extent one trial is preferred over two or three.

It is a matter of especial interest that the experience of lawyers has been such that they do not find the situation too complicated to be handled by one jury even where there may be as many as five separate verdicts. In the Supreme Court of New York County there are many cases tried each year where several actions have been consolidated and submitted to one jury.⁵ These cases

² 130 Misc. Rep. 796 (1927). A husband joined his action for loss of services with that of his wife for personal injuries.

³ 130 Misc. Rep. 583, 224 N. Y. S. 416 (1927). A parent joined his claim for loss of services with that of his child for personal injuries.

⁴ 224 App. Div. 612, 231 N. Y. S. 517 (1928). The wife and son joined in suing for injuries to each and the father joined his claims for loss of services of each.

⁵ There were 203 of such cases in 1927, 109 in 1928 and 86 for the first half of 1929 as shown by the report of Edwin M. Coe, Trial Term Calendar Clerk, Supreme Court, New York County.

An analysis of the traffic negligence cases for 1928 shows that in that type of case there were about forty cases so tried. In a few a formal order of consolidation was entered, but ordinarily the cases were submitted together by agreement of the parties.

ordinarily were ones where an action for loss of services was joined with one for personal injury. There were a few actions where the plaintiffs had sustained separate injuries in the same accident and the several claims were tried together. One accident where three persons were injured gave rise to four actions and another, where four were injured gave rise to eight actions. It thus seems to be the experience that attorneys find that one jury can handle at least two claims and in some instances where the several injuries were more or less clearly defined and undisputed, the juries were allowed to handle several distinct claims.

Any system of procedure which permits this liberality in joinder is to be commended as it aids the courts in its ever pressing problem of disposing of the cases on its docket as rapidly as possible. There may be no objection to go a step further and require joinder or consolidation in some of the simpler cases. It was interesting to note that when a motion was made by a defendant for the consolidation of personal injury action with one for loss of services that the motion was granted in each case and that in one case the motion was made on a mimeograph form accompanied by a mimeograph affidavit showing that such defendant was accustomed to make such motion as a matter of course.⁶ There is no reason why the actions should not be consolidated especially if handled by the same attorney and thus saving the parties some additional court costs which in the average case in New York County seem to run between \$125.00 and \$150.00..

This same tendency to unite in the trial several actions which were not united in the pleadings is shown in the survey of the actions in the courts of Connecticut and Massachusetts. In neither of these states does the statute permit the joinder of a personal injury with loss of service action or personal injury claims of two or more persons.⁷ Yet in the cases tried in Springfield, Massachusetts for the year 1926 of the forty-two trials involving traffic accidents, there were seven trials where more than one action was tried together and in one of these there were five suits and in another six suits so united. It again appears that attorneys find no difficulty in submitting these several claims to one jury. But the legislature has not as yet seen fit to permit

⁶ *Mamie Wendling et al., v. Union Ry. Co., of N. Y.*, case number 1926-41093.

⁷ In Massachusetts the common law rule of joint interest prevails except in small labor claims. Mass. Gen. Laws 1921, Ch. 231, §2. In Conn. the usual code provision exists "all persons having an interest in the subject of the action and in obtaining the judgment demanded may be joined as plaintiffs—". §5640, Gen. Stats. Conn. (1918).

the joinder of these claims in the first instance which would save the parties certain costs and somewhat simplify the preliminary stages of the trial.

The same record appears in Connecticut in the Courts of Fairfield, Hartford and New Haven counties. That of New Haven County is typical, in sixty-seven trials involving traffic accidents there were seven trials where two or more actions were consolidated.⁸ Again this is evidence that a more practical test of joinder could be adopted than now exists and a great saving in time and expense would result were the joinder made to depend upon exigencies of each particular case. The matter could well be left to the judgment of the plaintiff with the possible limitation of the common question of law and fact requirement as in the English and New York provisions. But it cannot be maintained that the parties are finding a very practical test in the present rules of joinder based upon the legal theory of the claims involved.

Another very interesting fact disclosed by this recent procedural survey is that the trial courts and the parties take a more practical view of questions of joinder than that laid down by judicial decision. The case of *Ader v. Blaw*⁹ has had its share of critical examination¹⁰ and justly too as is seen by the application of its principles to the problems of the trial judge. In that case the plaintiff sued two defendants for the death of his intestate, alleging that one was the owner of a picket fence which was negligently maintained and "that by reason of said facts of defendant's negligence said Bernard Ader suffered such injuries and infection that he died." Plaintiff further alleged that defendant Herman Emil was a doctor and negligently treated the injuries of the deceased "so that by reason of such negligence the said Bernard Ader died." A motion was made by defendant Emil to sever the cause and to strike out the claims made against such defendant. This was granted by the lower court and reversed by the Appellate Division.¹¹ The decision of the Court of Appeals required a severance¹² and later the plaintiff on December 2, 1926 commenced a separate suit against the doctor. An order was entered therein staying such action pending

⁸ Of the seven trials, four involved a joining of actions for loss of services with personal injuries, three the owner of an automobile joined his action with that of the person who was riding in the car and received personal injuries.

⁹ 241 N. Y. 7, 148 N. E. 771, 41 A. L. R. 1216 (1925).

¹⁰ 35 YALE L. J. 85, 11 CORNELL L. QUAR. 113.

¹¹ 211 App. Div. 532, 209 N. Y. S. 784 (1925).

¹² *Supra* n. 9.

the Blau case. Plaintiff obtained judgment in the later suit for \$1725 on March 31, 1927.

This rather detailed portrayal is presented to show the complexity that results from that decision and to see whether the impractical rules therein expressed are followed. There appeared to be no action in this survey of 1928 wherein a motion to dismiss or sever an action was filed under the rules laid down in this case. But on the contrary a more practical theory of joinder was applied.

Reginald Lowe commenced actions against each of three defendants. Pierport Holding Company, Nathan Goldberg and Regent Contractors.¹³ In the first suit he alleged that the defendant was owner of a building where repairs were being made and the general contractor doing the work and that solely by reason of the negligence of defendant, the plaintiff was injured." In the second suit he alleged that defendant was contractor doing the work and "solely by reason of said negligence, plaintiff was injured." In the third suit plaintiff alleged that such defendant was a contractor making repairs and that "wholly and solely by reason of the dangerous and defective condition and of the negligence of the defendant, etc." Plaintiff moved to have these actions consolidated which was granted by the court. Under the rule laid down in said New York Courts, this could not be done if the actions were not originally joinable.¹⁴ The court could have involved itself in a tangle of legal analysis. Could these actions have been joined? Are the several claims consistent? The plaintiff had eliminated a theory of joint liability by alleging in each case the negligence therein set out as the sole cause of the injury. In many cases similar to this, liberality of joinder is accomplished by a liberal notion of joint tort feasons. Here no attempt was made to unite these defendants by that designation. But the convenience of trying the entire controversy at one time and seeing which of the three defendants if any was responsible for that injury so appealed to the court that the order of consolidation was granted. When that case was tried the second and third defendants were dismissed at the close of plaintiff's testimony and verdict was directed for the other defendant at the close of all the evidence, and the controversy was thus fully determined.

The other case¹⁵ was where John Dooley commenced two actions,

¹³ Supreme Court Records, New York County, Case number 1927-41849.

¹⁴ *Brady v. Madison Lunch Inc.*, 199 App. Div. 640, 192 N. Y. S. 10 (1922). See CARMODY'S NEW YORK PRACTICE (1923), Par. 184.

¹⁵ Supreme Court records, New York County, Case number 1926-18242.

one against B. & M. Laundry Service alleging that an auto negligently operated by defendant ran over plaintiff at street car safety zone causing injuries, etc. The second action was against Union Railroad Company, alleging a claim in two counts, (1) for negligence in starting its trolley car as plaintiff was getting on the car and (2) for assault upon plaintiff throwing him from the car causing injuries. Plaintiff here moved to consolidate and the court again permitted the entire controversy to be heard together, and the jury were permitted to hear all the evidence and determine what was the cause of plaintiff's injuries and where the responsibility should be placed.

It may be that *Ader v. Blau* is to be circumvented by the plaintiff commencing separate suits and then moving to consolidate. It may be that upon a motion to consolidate the court is more apt to consider the practical convenience of the trial whereas on a motion to sever a cause of action, the court gets a legalistic set which impels the anomaly of *Ader v. Blau*.

The foregoing cases are presented in detail as they are typical of cases frequently arising and they tend to show on the part of attorneys and courts a desire to adopt more liberal provisions of joinder.

This notion on the part of the rule making bodies that it is necessary to require simplicity of legal issue to obtain efficiency of adjudication is a mistaken one. It seems that the plaintiff's interests are a sufficient check on an abuse of this privilege. It is further a mistake to have all the rules of joinder restricted by limitations of jury trials when as at present there is an increasing number of actions at law being tried to the courts.

A survey of the day by day work of the courts supports the movements towards more liberal joinder of actions and parties, permitting as many angles of controversy to be tried out at one time, as convenience will permit. The parties are benefited by the more expeditious settlement of the controversy and the courts are thereby relieved of the additional burden and expense of unnecessary litigation.

—SILAS A. HARRIS.*

JOINDER OF ORIGINAL AND ASSIGNED CHUSES IN ACTION.—In *Logan Central Coal Company v. County Court of Logan County*¹ recently decided by the West Virginia Supreme Court of Appeals,

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¹ 146 S. E. 371 (1929).