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Joinder of Original and Assigned Choses in Action

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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 Choses 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).

a tenant for years was in possession of land on which it had constructed a coal tipple when, it is alleged, the defendant, without purchase or condemnation, entered upon and took and damaged a part of the property for road purposes, thus causing injury to both the leasehld and the freehold interests—in other words, damages to both the tenant and the reversioners. It may be surmised that the tenant and the reversioners, aware that they could not join as plaintiffs for purposes of a joint recovery,[2] undertook to obviate the difficulty by an assignment. Whatever the motive, the reversioners assigned to the tenant their right of action accruing from injury to the freehold and an attempt was made to join the two causes of action, the one pertaining to the leasehold and the other to the freehold, in a single action. The propriety of the joinder was challenged in a question as to the sufficiency of the amended declaration, where the tenant was designated as a plaintiff in its own right and, in pursuance of the nominal plaintiff and use plaintiff formula, the assignors (reversioners) were designated as plaintiffs suing for the use of the assignee (tenant). It was held by both the trial court and the appellate court that the joinder was improper.

It will be recognized, of course, as fundamental that the common law, for procedural purposes, does not recognize an assignment of a chose in action. Yet the law so far indulges the equitable rights of the assignee as to permit him to bring an action in the name of the assignor for the use and benefit of the assignee. Such action is wholly subject to the control of the assignee (use plaintiff),[3] the only condition being that he indemnify the assignor (nominal plaintiff) for costs.[4] Under the local law, even indemnification for costs would not seem to be necessary, since a statute provides that the costs shall be taxed against the use plaintiff.

> "When a suit is in the name of one person for the benefit of any other, if there be judgment for the defendant's cost, it shall be against such other."[5]

Various statutes, going to different lengths in the different states, have been enacted permitting an assignee to sue in his own name, without the formality of styling the action in the name of the

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2 Yeager *v.* Town of Fairmont, 43 W. Va. 259, 27 S. E. 234 (1897).

3 Welch *v.* Mandeville, 1 Wheat. (U. S.) 4 L. Ed. 79, SUNDERLAND, CASES ON COMMON LAW PLEADING, 730 (1816).

4 Howard *v.* Giffard, 4 Mees. and W. 194, SUNDERLAND, CASES ON COMMON LAW PLEADING, 732 (1838); SUNDERLAND, CASES ON COMMON LAW PLEADING, 931, note.

5 W. VA. CODE, Ch. 138, §9.

assignor for the use of the assignee. Our own statute reads as follows:

> "The assignee of any bond, note, account, or writing, not negotiable, may maintain thereupon any action in his own name, without the addition of 'assignee', which the original obligee or payee might have brought; but shall allow all just discounts, not only against himself, but against the assignor, before the defendant had notice of the assignment. In every such action the plaintiff may unite claims payable to him, individually, with those payable to him as such assignee."[6]

If the chose in action which was the subject of the assignment in the principal case had come within the terms of the above quoted statute, there would have been no procedural difficulties in the proposed joinder, because the assignee could have sued wholly in his own name and the two different causes of action, the one assigned and the other original, appropriately alleged, could have been set forth in separate counts. However, the assigned cause was not based upon a "bond, note, account, or writing", but upon an injury to realty. Hence, not only does the statute fail to warrant such a joinder as coming under its express terms relating to joinder, but it does not even authorize the assignee, suing solely on the assigned cause, to sue in his own name without joinder of the assignor as nominal plaintiff.[7]

There is nothing inherent in the nature of the subject matter of these two different injuries—the one to the leasehold and the other to the freehold—which would tend to prohibit their joinder. Of course innumerable actions have been brought by parties who were owners of land and also in possession at the time of a trespass, and presumably nobody ever undertook to argue that such parties are not entitled to recover entire and combined damages for injuries to both the freehold and the possession. Obviously, the difficulty—and the only difficulty—arises when the two different injuries accrue to different persons, *e. g.*, a tenant in possession and a reversioner, and the objection to the joinder is not based on incompatibility of subject matter nor difficulties of proof, but on the fact that causes of action accruing separately to different parties can not be joined.[8] If incompatibility of the

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[6] W. VA. CODE, Ch. 99, §14.
[7] Barkers Creek Coal Co. *v.* Alpha-Pocahontas Coal Co., 96 W. Va. 700, 123 S. E. 803 (1924).
[8] See Yeager *v.* Town of Fairmont, *supra*, n. 2.

subject matter were the prime objection, the same objection might be raised in some of those instances where the statute last quoted expressly provides that there may be a joinder. Of course it may be urged that, at the common law, the two different causes of action are not remediable in the same form of action; that trespass is the sole remedy for injury to the possession, and case for the injury to the reversion; and that trespass and case are forms of action which can not be joined. However, this objection, formal even at the common law, is wholly obviated by our statute, which makes both causes of action remediable in case.

It is submitted that the court is correct in deciding that the attempted joinder in the principal case is improper. If the causes were properly joinable, they would be amenable to a single verdict and a single judgment. Procedurally, this could not be accomplished under our present statute. The tenant could only have a verdict and take judgment in his own name as to the damages to the leasehold. As to the assigned cause, he could not take judgment in his own name, but in the name of the assignors (nominal, but theoretically and procedurally the actual, plaintiffs) for his use and benefit. We have here, due to the misjoinder, the same procedural difficulty that arises in hte case familiarly cited where a plaintiff attempts to join counts in one of which he alleges a cause of action accruing to him in his personal right and in another of which, as executor, he alleges a cause of action accruing to the testator in his lifetime. In the one instance, it is said, he is entitled to judgment *de bonis propriis* and in the other instance to judgment *de bonis testatoris,* and since a single judgment can not dispose of the combined recoveries, the joinder is improper.

The court suggests, as a substitute for joining the causes in one action, that "the same result may be obtained by having such suits consolidated and tried together." Such a course of procedure is commended by the court because it "would have the merit of allowing separate pleas to be filed and an apportionment of the damages, which might be of value after verdict in determining the correctness of the finding."[9] Since ordinarily one of the controlling tests as to whether actions can be consolidated for trial is whether the causes of action embraced by them could have been joined in the first instance in a single action, one is led to

[9] Is there an implication that separate pleas could not be filed if the causes were joined instead of being merely consolidated? It is familiar law that there may be different defenses and different pleas to different counts, and even to separable parts of the same count.

inquire as to what is meant by the court when it makes use of the term "consolidation".

The term has been used in the cases to describe various methods of procedure which have been adopted for the purpose of disposing of more than one cause of action by a single trial. Failure to assign a definite meaning to the term has led to no little confusion in definitions, but in general it will be found to have been employed in the cases to describe three separate and distinct situations, unfortunately not always sufficiently differentiated in the application. (1) Actions have been said to have been consolidated when, although separately pending, they have involved the same facts and issues and one has been ordered to be tried and the others to be stayed and to abide the result of the trial in the one action. This procedure involves no real consolidation, since only one action is tried. In such a situation, disposition of the other actions is made by what would be more accurately described as a *substituted trial.* (2) Actions are also sometimes said to have been consolidated when several actions are ordered to be tried together, or at the same time, each action remaining separate and distinct for purposes of the trial and terminating in separate verdicts and judgments. This, of course, is a consolidation only in a very limited sense. (3) In a third class of cases, the courts have dealt with what is believed to be a true consolidation involving the procedure which is ordinarily contemplated when the term is used. The true consolidation, it is believed, may be briefly and correctly described as a retroactive, or *ex post facto,* joinder of causes of action, leading not only to a single trial, but also to a single verdict and a single judgment.[10]

In many jurisdictions, the prerequisites for consolidation have been prescribed by statute. In general, either in pursuance of statutes or in the application of common-law principles, the following conditions are prescribed: (1) identity of parties in the different actions; (2) substantial identity of subject matter or questions involved; (3) that the causes involved in the different actions be such as could have been joined in one action in the first instance; (4) that substantially the same defenses be applicable to all the actions; (5) that all the actions may be disposed of by a single verdict and a single judgment.[11]

The generalities involved in the prerequisites stated above would

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[10] See Lumiansky *v.* Tessier, 213 Mass. 182, 99 N. E. 1051, Ann. Cas. 1913, 1049 (1912); 1 R. C. L. 359-362; 1 C. J. 1121.
[11] 1. C. J. 1125-1128.

seem to require some explanation and qualification,[12] but it is believed that they are collectively sufficient, or that those which do not require qualification are sufficient, to indicate that the court, in the principal case, can not be understood as referring to a true consolidation, since it decided that the separate causes involved could not be joined in one action, and it appears that the parties plaintiff are not the same and hence that there could not be a single verdict and a single judgment. Under the circumstances of the principal case, it would seem that the first description of consolidation, or quassi consolidation in the nature of a substituted trial, would not be applicable. If the court had in mind the second description of consolidation, whereby the actions, verdicts and judgments would remain distinct, it is a little difficult to understand the conclusion of the court that "the same result may be obtained by having such suits consolidated and tried together" as if the causes were permitted to be joined in one action. Such result, it would seem, could be obtained only by a true consolidation coming within the third description. Of course, all that has been said is intended to relate solely to consolidation of actions at law. The possibilities of consolidation in equity, owing to the fact that the relief may be split and the decree is not required to be *in solido* wholly for the one party or the other, are much broader and the principles controlling are much more flexible.

The writer is in sympathy with the inclination of the court to have permitted the attempted joinder, if the mechanics of our procedure so permitted. It would seem that there is only one obstacle which interfered with it—the fact that the assignee of this particular kind of a chose in action is not permitted to sue on it in his own name without joinder of the assignor as a nominal plaintiff. It seems to the writer that, as long as the assignee is permitted, on his own initiative and subject to his own exclusive control, to make use of the name of the assignor in an action to recover on any assigned chose, there is no substantial reason why he should not in any instance be permitted by statute to sue in his own name, instead of being limited, as he is now by the statute above quoted, to actions on an assigned "bond, note, account, or writing". This, of course, is a matter for legislative action. A proper result could be accomplished by amendment of

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12 For instance, since different defenses may be asserted in actions which may be joined, if the actions are such as could be joined, the mere fact that there may be different defenses to the different actions should not interfere with a consolidation.

the statute mentioned. In order to prevent any such amendment from being construed as authorizing joinder of causes deemed incongruous, if there would be any more such danger after the amendment than under the present statute, the last sentence of the section—"In every such action the plaintiff may unite claims payable to him, individually, with those payable to him as such assignee"—might be amended so as to read as follows: "In every such action the plaintiff may unite causes of action accruing to him, individually, with those accruing to him as such assignee, provided that such joinder of causes would be permissible under other provisions or rules of the statute or common law if they had all accrued to the assignee individually."

Such a proviso, for example, would prevent a plaintiff from joining a cause accruing to him individually on a promissory note with a cause growing out of an injury to property of another and assigned to him, because, under the rules of the common law, tort and contract can not be joined. But the proviso, in view of our statute expanding the scope of trespass on the case, would not preclude joinder of the two different causes involved in the principal case, because both arise from injury to property and could be included in one action if they both accrued in the first instance to the same person.

—LEO CARLIN.