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NECCESSITY OF PLEADING NONJOINDER OR MISJOINDER OF PARTIES IN ABATEMENT.—In a recent West Virginia case,[1] involving the question of misjoinder of plaintiffs in an action of ejectment, the first paragraph of the syllabus contains the following statement:

> "Such a defect as nonjoinder or misjoinder of parties must be made the subject of a plea in abatement. If a party goes to trial without filing such plea, he thereby waives the defect."

So far as this statement is based on common-law principles, it would seem difficult to reconcile it with the authorities. Independently of statutes, only two instances are recalled where either a nonjoinder or a misjoinder of parties must be pleaded in abatement in order to save to any party or parties to the litigation rights that they would

[1] Hunt *v.* Mounts, 133 S. E. 323 (W. Va. 1926).

otherwise lose.[2] These two instances are nonjoinder of contract defendants[3] and nonjoinder of tort plaintiffs.[4]

If a nonjoinder of contract defendants is not pleaded in abatement, judgment is simply taken against those who are sued as if they were the sole promissors; while if there is a nonjoinder of contract plaintiffs, the contract is excluded from the evidence on the ground of variance between the allegations and the proof. Originally, there was a like exclusion in the case of a nonjoinder of contract defendants, but, beginning with the leading case of *Rice* v. *Shute*,[5] it has been held that objection to the nonjoinder is waived unless pleaded in abatement. It is said that proof that the defendant promised with another is not inconsistent with the allegation in the declaration that he himself promised, and hence there is no variance.[6] If this conclusion is logical, it is rather difficult, as indicated in some of the cases,[7] to conceive why proof that the promise was made to the plaintiff and another is inconsistent with the allegation in the declaration that it was made to the plaintiff. However, another reason is urged why a distinction should be made between plaintiffs and defendants. It is said that the defendant ought to know who are his co-contractors and, if one is nonjoined, should be allowed to object only by plea in abatement, so as to set the plaintiff right at the beginning of the action; but that he may be ignorant as to who are proper parties plantiff, and hence should be permitted to raise the objection of nonjoinder of plaintiffs at the trial, where he may for the first time be informed by the evidence that the nonjoinder exists.[8] Whatever the logic or justification of the distinction, it seems to have been almost if not universally recognized since the decision of *Rice* v. *Shute*.

When there is a nonjoinder of tort plantiffs, if the nonjoinder is not pleaded in abatement, the defendant can raise no objection on account of it, but those who have sued will recover only damages proportionate to the interest which they have in the subject matter of the litigation (ordinarily, an undivided interest in property), and the non-

[2] 28 W. VA. L. QUAR. 197-212, 266-286, and authorities cited.
[3] *Idem*, 203-212, and authorities cited.
[4] *Idem*, 277-279, and authorities cited.
[5] 5 Burr. 2611 (1870).
[6] See Inhabitants of Richmond *v.* Toothaker, 69 Me. 451 (1879).
[7] See Snellgrove *v.* Hunt, 1 Chitty's Reports 71 (1819).
[8] *Idem*.

joined party may bring his separate action to recover for the damage done to his interest.[9] By failure to plead the nonjoinder in abatement, the defendant is assumed to have consented to separate actions and an apportionment of the damages.

It will be noted that the question in the principal case does not involve a nonjoinder of tort plaintiffs, but a misjoinder of tort plaintiffs; and hence its solution cannot be aided by the exception discussed in the preceding paragraph.

In the principal case, the court refers to the Virginia statute,[10] enacted in 1919, largely conforming to the provisions of the English and New Jersey practice acts, which provides that "no action or suit shall abate or be defeated by the nonjoinder or misjoinder of parties, plaintiff or defendant," and so deprives the defendant even of his plea in abatement which the common law permits in such cases. The results intended to be accomplished by this radical statute, of course, are entirely in derrogation of the common law, and would seem to be irrelevant in the absence of a West Virginia statute of similar import. Referring to the subject matter of the Virginia statute, the court says, "In our state there is no express statute on the subject." By using the word "express," the court seems to imply that there may be a statute in this state which by implication or approximation tends to accomplish the results intended by the Virginia statute. It is seemingly for some such purpose that the court then proceeds to quote from the following section of the West Virginia Code:[11]

> "No plea in abatement, for the nonjoinder of any person as a codefendant, shall be allowed in any action, unless it be stated in the plea that such person is a resident of the state, and unless the place of residence of such person be stated with convenient certainty in an affidavit verifying the plea."

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[9] "In actions in form *ex delicto*, and which are not for the breach of contract, if a party who ought to be joined be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages on the trial; and the defendant cannot, as in actions in form *ex contractu* give in evidence the non-joinder, as the ground of nonsuit on the plea of the general issue or demur or move in arrest of judgment, or support a writ of error, though it appear upon the face of the declaration, or other pleading of the plaintiff, that there is another party that ought to have been joined: and if one of several part-owners of a chattel sue alone for a tort, and the defendant do not plead in abatement, the other part-owners may afterwards sue alone for the injury to their undivided shares, and the defendant cannot plead in abatement of such action." TUCKER, COMMENTARIES (1837 ed.) 222.

[10] VA. CODE, 1919, §6102.

[11] W. VA. CODE, c. 125, §17.

It is believed that this section is to no extent a substitute for the Virginia statute, so far as the manner of raising objection to a nonjoinder or misjoinder of parties is concerned. Nor, it is believed, does this section in any manner change the common-law rules determining when a plea in abatement is or is not necessary for the purpose of objecting to a nonjoinder or misjoinder. First of all, it will be noted that the operation of the statute is confined to nonjoinder of defendants, while the principal case is concerned with misjoinder of plaintiffs. A careful reading of this section will disclose that, even in the case of nonjoinder of defendants, it was not the intention of the statute to prescribe a plea in abatement as the exclusive method of objecting to the nonjoinder. In fact, the draftsmen of the statute evidently recognized and assumed the common-law rule prescribing a plea in abatement as the normal and only method of objecting to a nonjoinder of defendants, when the nonjoinder does not appear on the face of the declaration, and the object of the statute is simply to enumerate certain matters which such a plea shall contain, if it is used. Where a nonjoinder of defendants appears on the face of the declaration, in spite of the statute, and in spite of any dicta to the contrary, the defendant may still object by demurrer, motion in arrest of judgment, or on writ of error.[12]

Referring to the section above quoted, the court in the principal case says:

> "This was the statute in the Code of 1860, and in *Urton* v. *Hunter*, 2 W. Va. 83, construing this statute, it was held that it applied to where other parties were improperly included (as in the case here) as well as where there was a nonjoinder of parties."

This statement would seem to be erroneous. The statute referred to in the principal case (section 17 of chapter 125, quoted above), is not mentioned in *Urton* v. *Hunter*, the case cited by the court as construing it, and seems to have had no influence in the decision of the case. The statute discussed in *Urton* v. *Hunter* is section 19 of chapter 131 which reads as follows:

> "In an action founded on contract, against two or more defendants, although the plaintiff may be barred as to

[12] 28 W. VA. L. QUAR. 203-212, and authorities cited.

> 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."

In *Urton* v. *Hunter*, the plaintiff, Urton sued Hunter, Harris and McCullough as partners engaged in business under the firm name of Hunter, Harris & Company. Harris, who was the only defendant served with process, pleaded *nil debet* and filed an affidavit denying the partnership. At the trial, the evidence showed that Hunter, Harris and Thompson, instead of Hunter, Harris and McCullough, constituted the members of the partnership. Consequently, the case involved a nonjoinder and a misjoinder of a party defendant. Thompson was nonjoined and McCullough misjoinded. Objection to the nonjoinder, of course, was waived because it was not pleaded in abatement. This result came from the common law and not from the statutes. There remained, however, the question of the misjoinder and the court was called upon to decide whether judgment could be taken against Harris in pursuance of section 19 of chapter 131, quoted above, regardless of the misjoinder. Although the opinion of the court is not entirely clear in all its details, it seemingly was in effect decided that the latter statute did not aid the situation because Urton would not have been entitled to recover against Hunter and Harris if he had sued them alone, they being entitled in that event to plead the nonjoinder of Thompson in abatement. The court furthermore, evidently reverting to purely common-law principles, says:

> "But in addition it is very clear that the contract declared on and the contract proved are different and distinct contracts, and the variance, therefore, is fatal, with or without the statute."

The fact is that there was no plea in abatement in the case of *Urton* v. *Hunter* and the court expressly decided in that case that the defendant could take advantage of the misjoinder without having pleaded it in abatement. The unfortunate feature of *Urton* v. *Hunter* is not the results reached on the basis of the facts involved, but the unnecessary and unwarranted general statement of the law contained in the second paragraph of the syllabus, which in part reads as follows:

> "Where a part of the copartners only are sued, or other parties improperly included, it is matter to be pleaded in abatement for nonjoinder or misjoinder * * * * "

This language may be taken to imply that nonjoinder or misjoinder of parties can be taken advantage of only by plea in abatement, and it apparently was so construed in the principal case.

The unfortunate dictum in *Urton* v. *Hunter* was some years later repeated in *Rutter* v. *Sullivan*,[13] but when, as late as 1916, in *Harris* v. *North*,[14] the court was asked to apply the dictum in the actual decision of a case, it was flatly repudiated. In the latter case, referring to the dictum in *Urton* v. *Hunter* and *Rutter* v. *Sullivan* the court says:

> "In neither case, could the court have given the matter mature consideration. An assumption of identity of misjoinder and nonjoinder of defendants, in legal effect, seems to have been hastily adopted without inquiry or attempt at verification. This assumption is clearly erroneous. At common law, nonjoinder of defendants was ground of abatement, and, if not pleaded, it was waived. I Chitty, Pl., II Am. ed., 4647. Misjoinder of defendants did not have to be pleaded in abatement. When it appeared in proof under the general issue, it was matter calling for a nonsuit and not ground of abatement. I Chitty, Pl., II Am. ed., 44, 45; 15 Encyc. Pl. & Pr., 582; I. C. J. 131; 5 Rob. Pr., 72."

The conclusion of the court is generalized in the syllabus of the case as follows:

> "Misjoinder of defendants in an action of assumpsit is not pleadable as matter of abatement of the action, but is matter of defense under the general issue."

A year later, in *Bolyard* v. *Bolyard*,[15] the question came up again for actual decision. A wife had sued her husband and his father on a bond which they had executed to her as obligee. The husband undertook to plead the defense of coverture in abatement. The court, holding the plea in abatement improper, states the law as follows:

> "Misjoinder of defendants in an action is not pleadable as matter of abatement. It is matter of defense, admis-

[13] 25 W. Va. 427 (1885).
[14] 78 W. Va. 76, 88 S. E. 603, 1 A. L. R. 356 (1916).
[15] 79 W. Va. 554, 91 S. E. 529 (1917).

sible under the general issue. For that reason, it is not proper matter of a plea in bar."

Space will not permit a further review of the cases.[16] Cases dealing with misjoinder of defendants have been selected for comment because it has happened that in these cases the court has found an opportunity particularly to state and emphasize the true common-law rule and at the same time to repudiate the contrary dicta of prior decisions. Moreover, what has been said as to misjoinder of defendants must, under the general rules as to joinder of parties, apply with all the more force to misjoinder of plaintiffs.[17] It should be noted, however, that the statements in the principal case, like the statements in the earlier cases of *Urton* v. *Hunter* and *Rutter* v. *Sullivan*, may perhaps be regarded as dicta, since the court decided that there was in fact no misjoinder of parties.

—L. C.

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[16] For other cases and authorities, see 28 W. VA. L. QUAR. 197-212, 266-286.

[17] The rule as to misjoinder of tort plaintiffs is thus stated in TUCKER, COMMENTARIES (1837 ed.) 222:

"If too many persons be made co-plaintiffs, the objection, if it appears on the record, may be taken advantage of either by demurrer, in arrest of judgment, or by writ of error; or if the objection do not appear on the face of the pleadings, it would be a ground of nonsuit on the trial."