

April 1920

Joinder of Parties and the Doctrine of Survivorship

L. C.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Civil Procedure Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

L. C., *Joinder of Parties and the Doctrine of Survivorship*, 26 W. Va. L. Rev. (1920).

Available at: <https://researchrepository.wvu.edu/wvlr/vol26/iss3/5>

This Editorial Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

West Virginia Law Quarterly

And THE BAR

Published by the Faculty of the College of Law of West Virginia University, and issued in November, January, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, \$1.50 per year. To those who are members of the Association the price is \$1.00 per year and is included in their annual dues. Single copies, 50 cents.

Board of Editors

HENRY CRAIG JONES JAMES RUSSELL TROTTER JAMES W. SIMONTON
THOMAS P. HARDMAN LEO CARLIN

Associate Editors

JOSEPH R. CURL DAVID C. HOWARD CLIFFORD R. SNIDER

JOINDER OF PARTIES AND THE DOCTRINE OF SURVIVORSHIP.— Although many statutory provisions have been enacted in West Virginia with the purpose and the result of liberalizing technical rules and requirements pertaining to pleading and procedure in general, it would seem that the law relating to parties, and particularly the law relating to joint contractors, involving both the adjective and the substantive law, has not received sufficient attention in this respect. *Pollack v. House & Herman*,¹ recently decided by the West Virginia Supreme Court of Appeals, is interesting in this connection, not because it announces any new doctrine, but because it calls attention to a condition of our law which strikes one as being rather inconsistent with the modern concept of contractual liability. In this case, certain real estate was vested in J. P., one moiety in his own right and the other moiety as trustee. J. P., in his personal capacity and as trustee, joined by his wife, demised the property to the defendant, reserving a rent. J. P. died, leaving a will constituting J. P., Jr., and T. H. P. trustees of his estate and executors of his will. M. was appointed by decree of court to act as trustee in execution of the trust as to which J. P. was trustee in his lifetime. *Held*, in a suit against the defendant on a covenant to pay rent, that only the

¹100 S. E. 275 (W. Va. 1919).

widow of J. P., she being the surviving obligee in the lease, and M., substituted trustee, were proper parties plaintiff; that, although J. P., Jr., and T. H. P., as trustees under the will of J. P., would be entitled (in equity) to a portion of the recovery, nevertheless they could not join in the action.

At common law, all joint obligees and joint promisees must sue jointly.² This rule has not been changed by statute in West Virginia.³ If a joint obligee or promisee refuses to join, the other or others may nevertheless, on giving indemnity for costs, use his name as a nominal plaintiff for the purpose of maintaining the suit.⁴ Only the use of this formality prevents the mere caprice of one joint obligee or promisee from depriving the other or others of all legal remedy. Upon the death of one or more of the joint obligees or promisees, the exclusive legal right to sue passes to those surviving; and upon the death of the last survivor, to his personal representative.⁵

Various reasons are apparent why this method of procedure, particularly as applying the doctrine of survivorship, is unsatisfactory.

In the first place, the survivor, survivors or the personal representative of the last survivor may refuse to bring suit. In such event, unless the representative of the deceased obligee or promisee should be allowed to bring an action solely in the name of the survivor, survivors or personal representative of the last survivor as nominal plaintiff or plaintiffs, in the same manner in which an assignee at common law sues in the name of his assignor, his sole remedy would seem to be in a court of equity. If the rule forbidding the representative of the deceased joint obligee or promisee to sue were merely one of procedure, there would be no legal obstacle to, and there would be the plainest analogical precedent for, permitting an action to be brought in the name of a survivor who refuses to sue. But the rule that the right of a joint obligee or promisee survives to his coobligee or copromisee and does not descend to his personal representative, however originating, seem-

²2 PAGE, CONTRACTS, §1143.

³The Phoenix Insurance Co v. Fristoe, 53 W. Va. 1, 44 S. E. 253 (1903); Sandusky v. Oil Company, 63 W. Va. 260, 59 S. E. 1082 (1907); Hatfield v. Cabell County Court, 75 W. Va. 595, 34 S. E. 335 (1915).

⁴ANDREWS' STEPHEN'S PLEADING, 2 ed., § 31; 2 PAGE, CONTRACTS, § 1143; 30 Cyc. 107 and note.

⁵WILL'S GOULD, PLEADING, 3 ed., 385; 2 PAGE, CONTRACTS, §1144, and cases cited.

ingly always has been recognized as one of the substantive law.⁶ Hence there is no legal right to enforce. The estate of the decedent is denied relief because it has no substantive right, not merely because there are procedural difficulties in the way.

In the second place, although the survivor does bring an action and prosecute it to a conclusion, it by no means follows that the estate of the deceased obligee or promisee has an equal advantage in the procedure and its results. The survivor may use poor discretion or insufficient diligence in prosecuting a recovery. The result may be an inadequate recovery, or no recovery at all, although the right of action may be entirely sufficient. But even if the survivor should obtain an adequate recovery, final relief to the decedent's estate does not necessarily follow. The survivor may refuse to pay over the decedent's equitable share to the estate, in which event an independent suit in equity for an accounting is the only remedy.⁷ It is submitted that the representative of a deceased joint obligee or promisee ought at the least, with reference to both the substantive and the adjective law, to have a status equivalent to that of a living joint obligee or promisee.⁸ The decision in the principal case, in allowing a substitution in the contract as to the decedent's fiduciary capacity but not as to his personal capacity, is a striking illustration of the technical distinctions growing out of the present rule. Yet the Court beyond a doubt is correct in recognizing the original trust as a *continuing interest* which survived the death of the trustee, while his personal rights under the contract ceased with his death, or rather survived to the other obligees—a plain exemplification of the substantive nature of the legal rule of survivorship.⁹

Practically the same procedural complications and difficulties, under the common law, adhere to the process of getting relief

⁶WILL'S GOULD, PLEADING, 6 ed., 385; 2 PAGE, CONTRACTS, §1144; 1 POMEROY'S EQUITY JURISPRUDENCE, 4 ed., § 409; 3 *Id.*, § 1301.

⁷2 PAGE, CONTRACTS, §1144.

⁸Statutes have already been passed in some states permitting the personal representative of a deceased joint obligee or promisee to joint with the survivors in an action at law. 2 PAGE, CONTRACTS, §1144.

⁹The decision in the principal case is plainly correct, assuming that the common law has not been changed by statute. W. VA. CODE, c. 85, s. 19, reads as follows: "A personal representative may sue or be sued upon any judgment for or against, or any contract of, or with his decedent." There would seem to be much force in the argument of counsel to the effect that this statute abolishes the doctrine of survivorship as to joint contracts. If it does not do so, then it is merely declaratory of the common law applying to several contracts (which the Court states), and hence is superfluous. Arguing from the plain language of the statute, "any contract" certainly must include a joint contract.

against the estate of a deceased joint obligor or promisor. The death of a joint obligor or promisor discharges his estate from all legal liability. The liability survives to the surviving obligors or promisors.¹⁰ Where the survivors are insolvent, the obligee or promisee is permitted to seek relief in equity, but not at law, against the representative of the deceased obligor or promisor.¹¹ Otherwise, an action at law is prosecuted to satisfaction against the survivor and he is forced to seek in equity contribution from the estate of the decedent.¹²

A statute has been enacted in West Virginia¹³ placing primary legal liability upon the estate of the deceased joint obligor or promisor; but, since this statute has been construed as not permitting joinder of the representative with the survivor or survivors in the same action,¹⁴ it has only partially eliminated the inconveniences of the common-law situation. The principal effect of the statute seems to be to substitute two actions at law for one action at law and a suit in equity. Since substantive legal liability has been placed upon the estate of the decedent, there is no apparent reason why this liability and that of the survivors should not be made joint. As the law now is, we have the anomaly of a contract exclusively joint at common law made exclusively several by death of a party and operation of the statute.¹⁵

It is said that there can not be a judgment in a joint action against a surviving joint contractor and the representative of one deceased, *e. g.*, an executor, because the judgment would be against the one as *de bonis propriis* and against the other as *de bonis testatoris*.¹⁶ While this distinction, although primarily based on procedural difficulties, is technically correct, it certainly presents no obstacles that may not be overcome by statutory enactment. Undoubtedly, pursuing the reasoning of the principal case, the

¹⁰2 PAGE, CONTRACTS, §1137, and cases cited; WILL'S GOULD, PLEADING, 6 ed. 388; 1 BEACH, THE MODERN LAW OF CONTRACTS, §677.

¹¹PAGE, CONTRACTS, §1137; 1 POMEROY, EQUITY JURIS., §409, citing numerous cases. In some states the personal representative may be sued in equity regardless of solvency of the surveyors. 1 POMEROY, EQUITY JURIS., §409.

¹²2 PAGE, CONTRACTS, §1137, citing *Erwin v. Dundas*, 4 How. 58 (U. S. 1846).

¹³W. VA. CODE, c. 99, §13.

¹⁴HOGG, PLEADINGS AND FORMS, 10-11, citing *Richardson's Executrix v. Jones*, 12 Grat. 53, 58 (Va. 1855). See *Henning v. Farnsworth*, 41 W. Va. 548, 23 S. E. 663 (1895); *Thompson v. Curry*, 79 W. Va. 771, 781, 91 S. E. 301 (1917).

¹⁵See reference to statutes and decisions of different states in 1 POMEROY'S EQUITY JURISPRUDENCE, §409, pp. 769-770, note 4, where statutes permit such a joinder.

¹⁶HOGG, PLEADINGS AND FORMS, 10-11; *Henning v. Farnsworth*, *supra*.

West Virginia Supreme Court would hold that a joint judgment could be taken against a survivor in his own right and a substituted trustee, where the substitution is made necessary by death of the jointly contracting original trustee. Such a judgment would be against parties in different capacities. Practically, the procedural difficulties ought not to be any greater in the case of a personal representative than in the case of a substituted trustee.

—L. C.

DATE FROM WHICH INTEREST ACCRUES ON JUDGMENT IN TORT.—The Supreme Court of Appeals in a recent case¹ has removed some confusion that has confronted the bench and bar on the subject of the date from which interest is computed in entering up judgment in a tort action. At least we have the last unmistakable utterance of a majority of the court. There is a dissenting opinion on this question by one judge.² This decision follows one rendered about a year previously,³ in which the court divided exactly as in the

¹Wehrle v. Wheeling Traction Company, 102 S. E. 289 (1920), decided January 27, 1920 (rehearing denied March 24, 1920), in which it is said: "In the recent case of Long v. Pocahontas Consolidated Collieries Co., 83 W. Va. 380, 98 S. E. 289, Judge Williams dissenting, we ignored the ruling in the Easter Case on this question of interest, and in reversing the judgment below in a tort action rendered judgment for the plaintiff with interest from the date of the verdict. In the Easter Case we seem to have been misled by Talbott v. W. Va. C. & P. Ry. Co., 42 W. Va. 560, opinion by Judge Holt, decided subsequently to the amendments of sections 14, 16 and 18 of chapter 131 of the Code, by chapter 120 Acts of the Legislature, 1882, and to have overlooked our decision in Campbell v. City of Elkins, 58 W. Va. 308. As Judge Holt in Talbott v. W. Va. C. & P. Ry. Co. refers only to Hawker v. B. & O. R. R. Co., *supra*, and Murdock v. Insurance Co., 33 W. Va. 407, the latter case involving a judgment rendered after, but a verdict rendered before said amendments, he seems to have overlooked the effect of the amendments of 1882. In Campbell v. City of Elkins, due regard seems to have been had to the amendments of 1882, and the conclusion there reached that in tort actions like the present the judgment should bear interest from the date of the verdict, as provided in section 16 of chapter 131, the only provision of the law applicable in such cases. After a full review of these decisions, we are fully satisfied that in actions of tort the judgment should bear interest from the date of the verdict."

²Wehrle v. Wheeling Traction Company, 102 S. E. 289 (1920), where, in the dissenting opinion of Judge Williams it is said: "I dissent from so much only of the foregoing opinion as holds that interest on the judgment should run from the date of the verdict, for the same reason expressed in my dissenting opinion in the Long v. Pocahontas Consolidated Collieries Case 83 W. Va. 380, 98 S. E. 289. Properly construed, I do not think the statute cited in the opinion applies to judgments recovered in tort actions."

³Long v. Pocahontas Consol. Collieries Co., 83 W. Va. 280, 98 S. E. 289 (1919).