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NON-JOINDER AND MISJOINDER OF PARTIES IN COMMON-LAW ACTIONS‡

BY HENRY CRAIG JONES* AND LEO CARLIN**

MISJOINDER OF PARTIES DEFENDANT IN ACTIONS EX CONTRACTU

No person can be sued at common law for a breach of a contract who is not a party to the contract.52 In an action on contract a misjoinder of defendants is, unless amended, fatal.53 If the declaration discloses a misjoinder of defendants, the defendant may demur, move in arrest of judgment after verdict, or proceed by a writ of error after judgment, on the ground that the declaration is not sufficient in law, since it does not state a joint cause of action against all the defendants.54 If the misjoinder is not apparent on the face of the declaration, the defendant, under a plea denying the alleged contract, e. g., the general issue, may move for a non-suit on the ground of a variance, or may have a directed verdict.55

Referring to the common-law rule respecting joinder of parties defendant in actions ex contractu, the Virginia Supreme Court, in Bush v. Campbell,56 says:

"It is purely technical in its nature, in many instances producing great delay and much inconvenience without any corresponding advantages. The defendants very rarely derive any real substantial benefit from it."

Only one decision, Bolyard v. Bolyard,57 is noted in West Virginia wherein objection is raised to misjoinder of contract defendants as apparent on the face of the declaration. The misjoined defendant demurred to the declaration. The demurrer was overruled as too large, because it was interposed to the entire

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52 DICEY, PARTIES, Rule 46.
53 Idem, Rule 116.
54 AMES, CASES ON PLEADING, ed. 1905, 136; CHITTY, PLEADING, 16 Am. ed., 51.
55 26 Grat. 403, 435 (1876).
56 79 W. Va. 554, 91 S. E. 529 (1917).
declaration instead of being limited to the misjoinder; but the court seems to recognize that a demurrer as to the misjoinder would have been proper if it had been properly framed.

In Urton v. Hunter, it was held that both non-joinder and misjoinder of parties defendant in contract actions should be pleaded in abatement. This case was quoted with approval to the same effect in Rutter v. Sullivan. In Harris v. North, a recent case, the question came up flatly in a contract action where there was a misjoinder not apparent on the face of the declaration. The plea was one in abatement. The court points out that in neither of the cases just referred to was there a plea in abatement for a misjoinder, and therefore that the statement made in the earlier case and approved in the second is in each "mere obiter dictum". The court says:

"In neither case, could the court have given the matter mature consideration. An assumption of identity of misjoinder and non-joinder of defendants, in legal effect, seems to have been hastily adopted without inquiry or an attempt at verification. This assumption is clearly erroneous. At common law, non-joinder of defendants was ground of abatement, and, if not pleaded, it was waived. 1 Chitty, Pl., 11 Am. ed., 4647. Misjoinder of defendants did not have to be pleaded in abatement. When it appeared in the proof under the general issue, it was a matter calling for a nonsuit and not ground of abatement. 1 Chitty, Pl., 11 Am. ed., 44, 45; 15 Encyc. Pl. & Pr., 582; 1 C. J. 131; 5 Rob. Pr., 72. As abatement and nonsuit do not differ very substantially in legal effect, this rule is obviously technical. There is really no good practical reason for denying to one improperly joined as a defendant, right to show his lack of interest and thus to avoid the expense and annoyance incident to a defense on the merits. Unable to have his relation to his co-defendants quoad the matter in controversy determined separately and in advance of the trial of the general issue, he is bound to make defense to a claim with which he may not be concerned at all, otherwise than by a false allegation of his relation to it. Nevertheless, to permit him to plead the misjoinder in abatement, would enable him to deny, in a special and restricted form, what is alleged against him. The office of the plea in abatement is to bring to the attention of the court some fact or circumstance not disclosed on the face of the record, which, not absolutely and forever precluding or excluding right of recovery in the plaintiff, defeats the action in which it is set up for lack of jurisdiction, or on account of some privilege.

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68 2 W. Va. 83 (1867).
69 25 W. Va. 427, 430 (1885).
or disability. If the plea is sustained, the plaintiff may proceed against part of the defendants, or in another court, or another form of action; or against the same defendant, at a later date. A matter which forever precludes recovery against the party pleading it, should be pleaded in bar. 1 Chitty, Pl., 446, 447. The plea under consideration, as has been observed, brings to the attention of the court no new independent or undisclosed matter. It deals with the subject matter of the principal allegation of the declaration, and responds only partially to it. In other words, it attempts to divide the allegation and deny only a portion of it. Some matters, such as outlawry, alien enemy and attainer, could be pleaded either in abatement or in bar, 1 Chitty, Pl., 11 Am. ed., 446, but they were not disclosed by the declaration, nor did pleas thereof respond directly to any allegation or effect a division thereof. Hence, the subject matter of this plea does not belong in that class. We are clearly of the opinion that it is not pleadable by way of abatement and that it constitutes mere evidence under the general issue."

Again in Bolyard v. Bolyard, the court held that objection to a misjoinder of contract defendants should be asserted under the general issue and not under a plea in abatement, saying:

"Misjoinder of defendants in an action is not pleadable as matter of abatement. It is matter of defense, admissable under the general issue. For that reason, it is not proper matter of a plea in bar."

The last sentence quoted, however, to the effect that a misjoinder "is not proper matter of a plea in bar", of course is incorrect. The general issue itself is a plea in bar. The court likely intended to say that, not only is it improper to plead the misjoinder in abatement, but it is likewise improper to plead it even by a special plea in bar, because such a plea would amount to the general issue and for this reason would be bad.

Both the Virginia Code and the West Virginia Code contain a statute the terms of which purport to alleviate the effect of a misjoinder of contract defendants. This statute is section 19 of chapter 131 of the West Virginia Code and reads as follows:

"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."

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\[\text{Note 87, supra.}\]
It was adopted into the West Virginia Code from the Virginia Code of 1860, where it is section 19 of chapter 177. It first appears in its present form in the Virginia Code of 1849, where it is section 19 of chapter 177. It is based on Virginia Acts, 1838, chapters 95, 96, and 9 George IV., chapter 14, §1. It is now section 6263 of the Virginia Code of 1919. It will thus be seen that it has survived the thoroughgoing changes respecting remedies for misjoinder of parties made in the last Virginia revision. Owing to the fact that the remedial effect of this statute has received a widely different interpretation in the two states, it will be interesting to note at length the trend of the decisions.

The first West Virginia case mentioning this statute is Urton v. Hunter, where the court says that the circuit courts are in disagreement as to its interpretation and the Supreme Court will not express an opinion, since on the facts proved it was clear that if the defendant who was served with process had been sued alone he could not have been held liable.

The statute next came up for consideration in Snyder v. Snyder, where again the facts did not call for its application. The court says:

"It is a general rule, sanctioned in Virginia for a long time by many decisions, that in a joint action, founded upon a joint obligation, or on a joint and several obligation, there must be a joint judgment against all the parties, or no judgment at all. But it is not a universal rule. Where a defendant pleads matter, which goes to his personal discharge, such as bankruptcy, infancy, or any matter that does not go to the nature of the writ, or pleads, or gives in evidence, a matter which is a bar to the action against him only, and of which the others could not take advantage, judgment may be given for such defendant, and against the rest. Moffet v. Bickle, 21 Gratt. 280; 1 Rob. Prac. (old), pp. 400, 402, and the cases there cited."

The court plainly states these principles as based upon the common law. The court goes on to say that "this exception has now even been enlarged and provided for by statute," referring to chapter 131, section 19, supra, and indicating that the statute has added something to the common-law exception. Speaking further of the statute, the court says: "This is a qualification to the gen-

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2 W. Va. 83, 86 (1867).
9 W. Va. 415, 419 (1876). The language of this case is quoted and approved in Carlon's Admr. v. Ruffner, 12 W. Va. 297, 306 (1877).
eral rule; one that was required to promote justice, and avoid litigation.'"

In Roanoke Grocery and Milling Co. v. Watkins, the court held that under the statute judgment would be entered against the two makers of a promissory note, where they and one other were sued jointly, if the third was able to show that he was liable as a guarantor and not as a joint maker. The court says:

"If defendant Jones had, by the matter given in evidence under the general issue, which went to his personal discharge, succeeded in making it a bar as to himself, then the plaintiff's judgment against defendants Watkins and Surface would be valid under section 19 of chapter 131 of the Code."

It should be noted that these statements respecting the statute are chiefly *dicta*. The real effect of the statute was first taken up seriously in Scott v. Newell, which was an action in assumpsit against six persons as "Trustees, of the First Presbyterian Church of Chester, W. Va." The declaration contained only the common counts; the pleas were *non assumpsit* and set-off. At the trial, the jury rendered a verdict for $200 in favor of the plaintiff. The court below set the verdict aside and entered judgment for the defendants. The evidence was not preserved but, in an opinion rendered by the trial judge in entering judgment for the defendants and incorporated in the defendants' brief, it appears that some of the defendants were not trustees when the plaintiff was employed. Thus the court got before it a question of misjoinder of parties, where the misjoinder alleged was based directly on non-liability of part of the defendants on the contract, and not on a "personal" defense, so that the court had an opportunity to adjudicate whether the statute did anything more than merely affirm the common-law exception. The court says that the statute in question was

"Intended to relax the common-law rule [that] where a joint action on contract was brought against several defendants, a judgment could be rendered only for, or against all, unless one of the defendants was discharged by matter personal to himself, such for instance as infancy, the marriage of a female contractor, or a discharge in bankruptcy. 1 Chit. Pl. 52; Jenkins v. Hurt's Comm., 2 Rand. 446; Taylor v. Beck, 3 Rand. 316; Baker v. Cook, 11 Leigh 606.""

Continuing its discussion of the act, however, the court, saying

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41 W. Va. 787, 796, 24 S. E. 612 (1896).
69 W. Va. 118, 70 S. E. 1092 (1911).
that it cannot agree with the "more liberal construction" given to the statute by the Virginia court, holds that the statute does not change the common-law rule in the case of "a joint action against several defendants on an alleged joint promise, where the plea is joint, and the proof shows that all did not promise", because

"Proof that one did not make the promise [would] establish a different cause of action, and constitute a fatal variance, not curable by amendment. It would, of course, be no variance to prove an alleged joint promise to be both joint and several, because there would be no inconsistency between the two. But if the promise is not proven at all, does it not defeat the action as to all? How can it be said, in such a case, that the plaintiff could have sued some of the defendants, and that he "would have been entitled to recover" against them; and if not, how can the statute be made to apply? The language does not embrace such a case. The defense in the present case does not appear by the pleas to have been personal to any one of the defendants; the pleas are joint. Still it was proper to prove under the joint plea of non assumpsit that some of the defendants had not promised; and would not the effect of such proof be the same as at the common law, and would it not be a discharge as to all the defendants? It would seem that such a variance is fatal to the cause of action, and cannot be cured by amendment. 1 Chit. Pl. 52; Gibson v. Beveridge, 90 Va. 696."

Continuing, the court says further:

"In the present case all the defendants were sued jointly, and all were before the court and made joint defense. The evidence is not before us; if it were it might show a fatal variance between the declaration and the proof, for which the court would have been justified in rendering judgment for the defendants. Plaintiff cannot allege a joint promise and recover on proof of a promise as to some of the defendants only."

The judgment of the lower court for the defendants was affirmed. It will be noted that the court seems to emphasize the fact that the defendants all joined in the same plea, but on the fundamental basis of the court's reasoning—a variance between the promise alleged and the promise proved—it should have made no difference if the defendants had pleaded severally. This decision of the West Virginia Supreme Court of Appeals seemingly holds that the statute has accomplished nothing and that the law on the question stands precisely as it was before, notwithstanding
previous statements of the court that the statute was a "qualification of the general rule," and was enacted "to promote justice and avoid litigation."

The Supreme Court of Virginia, construing this statute in *Bush v. Campbell*, reaches a conclusion directly opposed to that of the West Virginia court. This was an action *ex contractu* against several defendants, some of whom were discharged by the verdict of the jury, upon grounds which showed that they were not parties to the contract, which was substantially the defense set up in *Scott v. Newell*. The court held that the statute had changed the common-law rule, which would require a judgment against all or none, so as to permit judgment against only those defendants who were proved liable on the contract. In so deciding, the court held that the design of the enactment was not simply to affirm the common law which permitted judgment against part of the defendants when the others had set up a "personal" defense, but *was intended to reach cases where some of the defendants are acquitted upon grounds which go to the denial of the joint contract stated in the declaration*. The court further points out that if the defense is one that goes to the foundation of the entire contract, *e. g.*, illegality or release of one of the joint obligors, the statute does not apply, because the plaintiff would not have been entitled to recover against the remaining defendants if he had sued them alone. If the statute is to accomplish anything, the test laid down by the Virginia court would seem to be *correct, viz.* whether "the plaintiff might at common law commence a new action and recover against him who is liable."* In other words, it would seem clear that the statute applies wherever the defense of one of the several defendants is of such a character that the plaintiff might recover against the other, if the action were against that other defendant only. The statute, as construed by the Virginia court, simply permits the plaintiff to recover judgment against those defendants liable in the pending action, instead of compelling him to sue the same defendants in a new action.

The Virginia case under discussion presents an apt illustration of the difficulties confronting plaintiffs under the common-law rule, and offers the strongest kind of argument for a liberal construction of any statute which would alleviate the common-law rule. The plaintiff was in possession of a bond brought to him by

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66 26 Grat. 403, 424 (1875).
67 Idem, p. 428.
the principal obligor, and which the plaintiff accepted fully believing that all five of the signatures to the bond were genuine. When sued, three of the persons whose names had been placed to the bond as obligors pleaded *non est factum*, and the plaintiff, having reasonable doubts as to the truth of this plea, the two remaining signers insisting that the signatures of the other three were genuine, found himself in a perplexing predicament, if the common-law rule was to prevail. If he dismissed his action and began a new action against the two, they would defend on the ground of non-joinder of the other three. If he went ahead against all five and one or more of the three established his plea, he must lose and must begin all over again as to the others who were confessedly liable. Under the statute as construed by the Virginia court, these difficulties are avoided. The plaintiff could safely pursue his action against all five defendants, taking judgment in the end against as many as are proved liable. The rule thus established by the interpretation placed on the statute by the Virginia court is the same that has always prevailed as to tort actions.

In the later Virginia case of *Muse v. Farmer's Bank*, the court says:

"This statute changed essentially the rule of the common law requiring in actions on joint or joint and several contracts one final judgment for or against all the defendants. The effect of that change is to relieve a plaintiff, who proves a good cause of action against part of the defendants, but not against the others from being put to the expense and delay of a new action against those who are bound. If, therefore, the plea of one of the defendants is of such a character that the plaintiff might have recovered against the others, had he sued them only, he is entitled to a judgment in the pending action against those who are liable. This is the construction given by the New York courts to a statute from which ours was probably taken, and is very similar in its provisions. *Blodgett v. Morris*, 14 N. Y. 482, 487."

The New York court, in the case just cited, says:

"The object of the provision obviously is, to prevent a plaintiff who proves a good cause of action against part of the defendants, but not against the others, from being put to the delay and expense of a new action. It was not intended to change the law in any other respect, but simply applies to actions upon contract the same rules which at common law were applied to actions for torts."

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27 Gratt. 252, 254 (1876).
Although the West Virginia Supreme Court placed an emphatic and definite interpretation upon the statute in *Scott v. Newell*, previously discussed, in direct opposition to the Virginia decisions, the reasoning of the court in at least one subsequent case is opposed to *Scott v. Newell*, although the court erroneously bases its conclusions upon common-law principles and ignores the existence of the statute. In *Bolyard v. Bolyard*, the plaintiff sued her husband and her husband's father upon a bond in which they were obligors and the plaintiff was obligee. Under a plea of the general issue, judgment was entered against both defendants in the lower court. The Supreme Court, holding that the husband was not liable on the ground that the marital relationship between him and the obligee rendered the bond void as to him, reversed the judgment and dismissed the action as to him, but judgment was entered against the father alone. This procedure in the Supreme Court likely may be sustained on common-law principles, as the husband did not deny that he executed the bond but set up a purely personal reason why he was not liable. However, the court does not sustain its action on this ground, but discusses the husband's defense as if it were equivalent to a denial of execution of the contract. The court says:

"As to John M. Bolyard, the husband, the judgment will be reversed, the verdict set aside and the action dismissed, but as to J. H. Bolyard, the judgment will be affirmed, agreeably to the rule of practice announced in *Pence v. Bryant*, 73 W. Va. 126."

The case of *Pence v. Bryant*, is an action in tort against three defendants. Two were proved liable and one not liable. The court, deciding that judgment might be taken against the two who were liable, says:

"Where, in a joint action for tort against three persons, who unite in the same pleas, the jury finds against all of them, the court may, in passing on their motion for a new trial, and plaintiff's motion for a judgment on the verdict against two (naming them), whose guilt the evidence establishes, and to dismiss as to the other, render such judgment as to the two defendants, and set aside the verdict as to the third, of whose guilt there is no proof."

The reason for pursuing such a course, says the court, quoting from an Illinois case, is that

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69 79 W. Va. 554, 91 S. E. 529 (1917).
"A plaintiff in an action of tort may take judgment against as many defendants as he pleases. The liability of tort feasors is joint and several, and the person injured can select which of them he chooses to have judgment against."

The court might have based its decision in Bolyard v. Bolyard upon the common-law exception relating to personal defenses. However, if the court thought that the defense was not a personal one, as it seemingly did, it might have based its decision upon the statute, in which event it would have overruled Scott v. Newell. But plainly it was not warranted in basing its action upon the common-law principles announced in Pence v. Bryant, as these principles apply only in tort actions.

The Virginia and the West Virginia Codes contain another statutory provision which operates as a qualification of the common-law rule that judgment in an action ex contractu must be entered jointly against all the defendants, except those who have personal defenses. This statute is section 52 of chapter 125 of the West Virginia Code, and reads as follows:

"Where, in an action or suit against two or more defendants, the process is served upon part of them, the plaintiff may proceed to judgment as to any so served, and either continue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment, as to them, until judgment be obtained against all."

In Snyder v. Snyder, the court says that

"This statute was found to be necessary to qualify the general rule above cited. Great delay and inconvenience and costs resulted from an adherence to the rule without such a qualification.

"Under the statute, there may be had as many several judgments on a joint obligation, as there are parties to the obligation dependant wholly upon the service of the process."

The provisions of the Virginia Acts of 1895-1896 (Virginia Code, 1904, section 3258a) apply, but there are no Virginia cases applying the statute to misjoinder of defendants in an action ex contractu. It has been succeeded by section 6102 of the Virginia Code of 1919.

70 9 W. Va. 415, 420 (1876).
71 Nothing is added by the approval given to these statements in the cases of Roanoke Grocery, etc. Co. v. Watkins, 41 W. Va. 787, 24 S. E. 612 (1896); Armontrout v. Smith, 52 W. Va. 96, 98, 43 S. E. 98 (1902); s. c. 56 W. Va. 356, 357, 49 S. E. 377 (1904).
72 Note 20, supra.
NON-JOINDER OF PARTIES PLAINTIFF IN ACTIONS EX DELICTO.

In tort actions, all persons having joint interests must sue jointly. Persons having separate interests and suffering separate damages must sue separately. Persons having separate interests but sustaining joint damage may sue either jointly or separately.73

At common law, the objection of non-joinder of plaintiffs in a tort action can be taken only by a plea in abatement, whether the defect be apparent on the face of the declaration or not.74 If the defendant does not object to the non-joinder, he will be liable for such portion of the damages as was incurred by the plaintiff alone, though not for more.75

There would seem to be no Virginia or West Virginia decisions on this phase of joinder, but it would appear that the remedy of the defendants is a plea in abatement, as under the accepted common-law rule.76 In Tucker's Commentaries,77 it is said that

"When two or more persons are jointly entitled, or have a joint legal interest in the property affected, they must in general join in the action or the defendants may plead in abatement; and though the interest be several, yet if the wrong complained of be an entire joint damage, the parties may join in the action; but as the courts will not in one suit take cognizance of distinct and separate claims of different persons, therefore where the cause of action as well as the interest is several, each party injured must sue separately."

As to the mode of raising the objection of non-joinder of plaintiffs in tort actions, Tucker says:78

"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 defend-

72 DICEY, PARTIES, Rule 80.
73 AMES, CASES ON PLEADING, ed. 1905, 140; SUNDERLAND, CASES ON COMMON LAW PLEADING, 518; 15 ENCYC. PL. & PRAC. 544.
74 Sedgworth v. Overend, 7 T. R. 279, SCOTT, CASES, 139.
75 BURGESS, PLEADING AND PRACTICE, 75.
76 TUCKER, COMMENTARIES, ed. 1837, 221-222.
77 Idem, 222.
ant 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."

It would seem that cases of non-joinder of parties plaintiff in tort actions present proper situations for the application of the West Virginia statute heretofore discussed, providing that

"Whenever in any case a complete determination of the controversy can not be had without the presence of other parties, the court may cause them to be made parties to the action or suit by amendment."

However, in view of the attitude already noted which the court has taken toward this statute, it is not likely that it would be permitted to aid non-joinder of plaintiffs in tort actions.

MISJOINDER OF PARTIES PLAINTIFF IN ACTIONS EX DELICTO.

At common law, if the declaration disclosed a misjoinder of plaintiffs in a tort action, the defendant might demur, move in arrest of judgment after verdict, or proceed by writ of error after judgment, on the ground that the declaration was not sufficient in law, since it did not state a joint cause of action in favor of all the plaintiffs. It will be noted that the rule is the same as for misjoinder of parties in actions ex contractu.

If the defect is not apparent on the face of the declaration, the defendant can usually raise the objection by a plea traversing the declaration, ordinarily the general issue. Here again the rule is the same as in actions ex contractu. The consequences will usually be a non-suit at the trial or a directed verdict, on account of failure to prove a joint right of all the plaintiffs to recover.

In Tucker's Commentaries, it is said:

"If too many persons be made co-plaintiffs, the objection, if it appear 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."

The general rule as stated above is followed in Yeager v. Town of Fairmont, where a joint action of trespass on the case for dam-

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80 Ames, Cases on Pleading, ed. 1905, 134.
81 Vol. 2, ed. 1837, p. 222. Accord, Burks, Pleading and Practice, 76.
82 43 W. Va. 259, 27 S. E. 234 (1897).
ages to real estate, caused by a change in the grade of a street, was brought by the owner of the life estate and the remainder in fee. The court says:

"The contention of the defendant is that this was a misjoinder of plaintiffs, and the first question for consideration is whether this question can be raised by demurrer, or whether it should have been properly raised by a plea in abatement. The character of the interests owned by the respective parties is averred on the face of the declaration. When such is the case, we find the law, as to the manner in which the question may be raised, stated in 1 Chit. Pl. p. 75, as follows: 'If, however, too many persons be made co-plaintiffs, the objection, if it appear on the record, may be taken advantage of either by demurrer, in arrest of judgment, or by writ of error.' The same author on page 73 of the same volume, says: 'When two or more persons are jointly entitled to have a joint-legal right in the property affected, they must in general join in the action, or the defendant may plead in abatement, and, though the interest be several, yet if the wrong complained of cause an entire joint damage, the parties may join or sever in the action; but as the courts will not in one suit take cognizance of distinct and separate claims of different persons, where the damage as well as the interest is several, each party injured must in that case sue separately.'"

In Virginia, from 1896 to 1919, the procedure for misjoinder was governed by the act passed in 1895-6,\textsuperscript{84} hereinbefore quoted,\textsuperscript{85} providing that in all cases of misjoinder the court might order the action to abate as to any party improperly joined. Under this statute, it was held in \textit{West v. Adams},\textsuperscript{86} an action for unlawful detainer of land which was the separate estate of a married woman plaintiff, that a motion to quash the summons for misjoinder of the husband was properly overruled, because the statute required the court in such cases to direct the action to abate as to the husband and then to proceed in the name of the wife. A similar construction was placed upon the statute in \textit{Cole's Heir v. Jamerson},\textsuperscript{87} an action in ejectment, where an administrator who had no title to the land was erroneously made a party plaintiff, and the court said that the proper procedure under the statute was to order the action to abate as to the administrator and to proceed in the names of the other plaintiffs.

The provisions of this statute are now covered by section 6102

\textsuperscript{84} VA. CODE, 1904, § 3258a.
\textsuperscript{85} See note 26, supra.
\textsuperscript{86} 2 Va. Dec. 517, 27 S. E. 496 (1897).
\textsuperscript{87} 112 Va. 311, 71 S. E. 618 (1911).
of the new Virginia Code of 1919, hereinbefore quoted. It has already been noted that West Virginia has no equivalent statute.

NON-JOINDER OF PARTIES DEFENDANT IN ACTIONS EX DELICTO.

At common law, "one, or any, or all of several joint wrong-doers may be sued." Therefore, no objection may be raised for the non-joinder of parties defendant in tort actions, whether apparent on the face of the declaration or not.

There seem to be no cases in West Virginia where a tort defendant has directly raised the objection that others ought to have been joined with him in the action, likely because the common-law rule has been so universally recognized that such an objection has been considered futile. However, the several liability of joint tortfeasors, as well as the right to sue an intermediate number, has frequently been recognized in the West Virginia decisions. Should a proper case arise, without a doubt the West Virginia court, in agreement with the Virginia court, would follow the common-law rule as stated in Tucker's Commentaries:

"If several persons jointly commit a tort, the plaintiff has his election to sue all or any of the parties, because a tort is in its nature a separate act of each individual; and therefore in actions in form ex delicto, as trespass, trover, or case for malfeasance, against one only for a tort committed by several, he cannot plead the nonjoinder of the others in abatement or in bar, or give it in evidence under the general issue."

A statutory exception to the common-law rule will be noted in chapter 90, section 5, of the West Virginia Code, relating to ejectment, which provides that the occupant of the land shall be joined with the adverse claimant as a defendant. Under a similar statute in Virginia, it was held that the failure to join the occupant as defendant with the landlord was a matter in abatement only, and could not be raised under a plea in bar. The court says:

"Pleas in abatement for nonjoinder of defendants are not common in actions ex delicto, but the reason for this is that in the great majority of tort actions the plaintiff may, at his own option, sue one or any or all of those who have partici-
pated in the wrong; and in such cases the failure to join any or all participants as defendants is not a valid objection . . . But when the reason ceases the law ceases, and where the plaintiff in actions ex delicto improperly omits parties who ought to be joined as defendants, there can be no question that the proper remedy is exactly the same as in actions ex contractu. There is no reason for any distinction in this respect between the two classes of actions, and none is made by the authorities. The regular and well-established method of objecting to any action 'for too few defendants,' where the ground for the objection does not appear on the face of the declaration, is by a plea in abatement. The decisive question is whether the objection is good, not whether the action is in contract or in tort. Ordinarily, the objection is not good in actions of tort, but whenever it is good, regardless of the form of the action, the only remedy known to our law is a plea in abatement."

An apparent common-law exception to the general common-law rule that joint tortfeasors may be sued severally will be found in National Fire Insurance Co. v. Catlin, where it is held that, when an action of detinue is brought for property jointly detained by several, all should be made parties defendant; and if one is sued alone, he may plead the non-joinder in abatement. In this case, there was merely an unlawful detention, but no tortious taking. Many authorities classify an action of detinue under such circumstances as one ex contractu, as detinue was truly and exclusively in its genesis. The fact that all the joint detainers must be joined in the action is cited by Mr. Street as an indication of the contractual nature of the remedy. Hence it is very questionable whether the Virginia case was dealing with a non-joinder of tort defendants.

In any instance in West Virginia where the non-joinder may be pleaded in abatement, of course the statutory provisions contained in the West Virginia Code, chapter 125, sections 17, 18 and 19, would apply.

MISJOINDER OF DEFENDANTS IN ACTIONS EX DELICTO.

At common-law, joinder of persons in a tort action who should not have been made defendants is not ground for objection on the part of those who are properly sued. One improperly joined may

95 3 STREET, FOUNDATIONS OF LEGAL LIABILITY, 154, citing Y.B. Hen. IV. 6, pl. 37.
96 Notes 46, 48, 49, supra.
97 AMES, CASES ON PLEADING, ed. 1905, 136.
demur if the fact of his misjoinder is apparent on the face of the declaration, and he may file a negative plea, ordinarily the general issue, if it is not so apparent. The same rule applies if the tort be one which it is held may not be joint, as verbal defamation.

In West Virginia, if it appears on the face of the declaration that the parties sued are not joint tortfeasors, the objection may be raised by demurrer. Of course, if the misjoinder of the defendants involves—as it usually does—a misjoinder of actions, either of the defendants may demur, as it would be impossible to determine which of the actions the plaintiff intends to rely upon, and the misjoinder of actions, without more makes the declaration bad. However, the plaintiff may always cure the misjoinder, either by dismissing the misjoined defendants or by amending his declaration so as to show a joint liability. In Farley v. Crystal Coal & Coke Co., the court says:

"But, inasmuch as the defendants may be severally liable in all such cases, the plaintiff should have his election to proceed against one of them in this action and dismiss it as to the others, if he cannot truthfully charge joint action in the perpetration of the wrongs complained of. There is no good reason for requiring him to dismiss as to all of them and bring an entirely new action."

In Barger v. Hood, the court says:

"Leave will be given to the plaintiff to amend his declaration so as to show community of action upon the part of the defendants, or by striking out all of the defendants except the one against whom he may elect to proceed."

If the misjoinder is not apparent on the face of the declaration, but appears in the evidence, e. g., in the form of non-liability of one of the defendants, the plaintiff may dismiss the action as to the defendant not proved liable and have a verdict and judgment as to the other defendants.

In Virginia, in McMullin v. Church, it was held that two persons might be sued jointly for malicious prosecution. On the ques-
tion of misjoinder, the opinion of the court is of interest for its discussion of cases where the tort can not be joint (such as oral slander), and where, for that reason, there will be a misjoinder if more than one is sued. The court says:

“If several persons be made jointly liable, where the tort could not, in point of law be joint, they may demur; and if a verdict be taken against all, the judgment may be arrested or reversed on a writ of error, but the objection may be aided by the plaintiff’s taking a verdict against one only; or if several damages be assessed against each, by entering a *nolle prosequi* as to one after the verdict, and before judgment. So in other cases, when in point of fact and of law, several persons might have been jointly guilty of the same offence, the joinder of more persons than were liable in a personal or mixed action in form *ex delicto*, constitutes no objection to a partial recovery, and one of them may be acquitted, and verdict taken against the others. On the other hand, if several persons jointly commit a tort, the plaintiff in general has his election to sue all or some of the parties jointly, or one of them separately, because a tort is in its nature a separate act of each individual. See 1 Chitty on Pl. (16th Am. ed.) 96, 97, 98. Such seems to be the recognized doctrine with respect to the joinder of persons.”

In Langhorne v. Richmond R. Co., it was held that a demurrer would lie for misjoinder of defendants in a tort action. In Riverside Cotton Mills v. Lanier, there was a demurrer for misjoinder of defendants in an action of trespass on the case. The court says:

“In respect to the first ground of demurrer, the general rule is that any number of tort feasors may be joined in the same action, where all are alleged to have participated in the wrong. They may be sued jointly or severally, at the election of the plaintiff; and that is true, notwithstanding there may exist a difference in the degree of liability, or the quantum of evidence necessary to establish such liability. But, if there had been a misjoinder, the remedy by statute now is to move the court to abate the suit or action as to the party improperly joined, and to proceed against the others as if such misjoinder had not been made. Acts 1895-96, p. 453.”

The last announcement on the subject in Virginia is found in Carlton v. Boudar, where the court says:

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102 Va. 128, 159, 45 S. E. 375 (1903).
103 91 Va. 368, 22 S. E. 159 (1895).
104 118 Va. 521, 88 S. E. 174 (1916).
"A misjoinder of parties cannot be taken advantage of by demurrer. The remedy by statute (Acts 1895-6, sec. 3258a, Pollard's Code) is to move the court to abate the suit or action as to the party improperly joined."

The subject is now covered in Virginia by section 6102 of the Virginia Code of 1919, which, as to misjoinder, is in accord with the earlier statute discussed above. There is no equivalent statute in West Virginia.

CONCLUSION.

It will be observed that the chief procedural difficulty in the way of giving final and proper relief where a non-joinder or a misjoinder of parties has occurred is the fact that to admit evidence showing the actual liability would produce a variance between the declaration and proof. This difficulty primarily grew out of historical reasons which have ceased to exist, but is also to a certain extent based upon practical considerations of justice.

Admitting that the variance is substantial, and that the plaintiff ought not to be allowed to have a verdict and judgment in the face of it, it immediately occurs to the practical mind that he ought to be permitted to amend his declaration so as to get rid of it. This suggestion leads up to a consideration of the law of amendments, and particularly of the extent to which a plaintiff will be permitted to amend his declaration. The law in this respect has always been very liberal, but this liberality, at common law, has always stopped short of allowing an amendment which would introduce a new cause of action. The historical explanation of this limitation is that, under the common law, no person was authorized to institute an action except under authority of the king's writ. If a plaintiff secured a writ authorizing him to bring a certain cause of action, and then undertook to amend his declaration so as prosecute a different cause of action, he would be guilty of maintaining an action without the king's authority. Thus, the early common-law limitation as to amendments was formed, and still persists, although this particular reason for it has ceased to exist under the American procedure.

However, there is another reason, based on the science and theory of pleading itself, why a plaintiff ought not to be permitted to amend his declaration so as to introduce a new cause of action. To make such an amendment would be to violate the rule which says that there must not be a departure in pleading. The
purpose of the latter rule is to compel a party, at whatever stage of the cause, to stick to what he has already affirmed. Otherwise, it is said, there would be no way of compelling the parties to arrive at an issue, and even if they should voluntarily arrive at an issue, it would be at the expense of endless prolixity and delay. A more practical consideration, which perhaps is a corollary to the general rule as to departure, is that such an amendment, particularly at the trial, would work unjust surprise upon the defendant.

Conceding the justice and expediency of the general rule as to amendments, it may nevertheless be affirmed without hesitation that its uniform application to non-joinder and misjoinder of parties under the modern procedure results in a sacrifice of justice to inexcusable technicality. As in the case of many other general rules of common-law practice, modern conditions demand the enactment of statutory exceptions. In the first place, it will be recognized that a change of the cause of action merely with reference to the parties involved in the litigation is a far less radical change than a change with reference to the subject matter of the litigation. Such a change would rarely, if ever, work any substantial surprise upon the defendant, if he came into the litigation knowing that the law would permit such a change. Moreover, if the defendant should convince the court that he was actually surprised by such an amendment, he could have a continuance of the case at the cost of the plaintiff, just as in those instances where the court permits an amendment to cure a substantial variance which does not involve the introduction of a new cause of action. Would there not be more justice in this than in compelling the plaintiff to start a new cause of action involving the same subject matter?

It is believed that enough has been said to indicate that the courts have not even been consistent in applying the common-law principles involved. As a result of this inconsistency, results have been reached in the local decisions which were never contemplated even by the technicality of the common law. Furthermore, the rather desultory review of the local law in this article is sufficient to show that very little has been done in West Virginia by way of statutory enactment comprehensively to abolish the evils of the common-law rule; and that what little has been done has been largely nullified or rendered inoperative by the strict construction which the court has placed upon the statutes. It is believed that the legal profession are unanimously agreed that the common-law situation should be relieved by a statutory enactment, comprehen-
sive and positive in its terms, and so worded that the court could have no hesitation nor doubt as to its intent or purpose. With the hope that some aid may be offered to this end, it is thought advisable to conclude this discussion by quoting pertinent provisions from some of the more prominent codes and practice acts. The comprehensive provisions of the Virginia Code of 1919 have already been quoted and discussed.

The New York Civil Practice Act of 1920 provides as follows:

"Sec. 277. . . . An objection to a pleading in the point of law, for a ground appearing on the face of the pleading, may be taken by motion or by the answering pleading; except that objections, to be defined by the rules relating only to form and manner of pleading, may be taken by motion only if the rules so provide."

"Sec. 278. An objection on either of the following grounds, appearing on the face of the pleading, is waived unless taken by motion or by the answering pleading, or, if not so appearing, unless taken by such answering pleading:

1. As to the complaint: . . . . ; (d) that there is a misjoinder of parties plaintiff; (e) that there is a defect of parties, plaintiff or defendant."

Rule 1, Order XVI, of the Rules of the Supreme Court (England), provides that

"All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise."

Rule 11 relates to the procedure in cases of misjoinder or non-joinder and provides that

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and
settle all the questions involved in the cause or matter, be added."

Rule 12 provides that

"Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner."

The New Jersey Practice Act\textsuperscript{106} provides that

"4. Subject to rules, all persons claiming an interest in the subject of the action and in obtaining the judgment demanded, either jointly, severally or in the alternative, may join as plaintiffs, except as otherwise herein provided. Any persons interested in separate causes of action may join if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions."

As to the procedure in cases of misjoinder or non-joinder, the New Jersey Act provides that

"9. No action shall be defeated by the non-joinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped, by order of the court, at any stage of the cause, as the ends of justices may require."

\textsuperscript{106} N. J. PUB. LAWS, 1912, p. 378.