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Joinder of Actions

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I

ONE of the unfortunate consequences of the close historical connection between rights and remedies, is the inveterate tendency of lawyers and judges to accord to the rules relating to each the same protection and the same measure of professional homage. All laws are equally entitled to respect, and all departures from accepted rules are equally subject to censure. As a trustee for society, the legal profession views with conscientious alarm all critical attacks upon the subject matter of its trust. The rules of law, whether substantive or remedial, are the corpus of its trust estate, which must be preserved with scrupulous care.

This is the more remarkable in view of the skill in logical analysis which legal study produces. Its consistent aim and tendency is to brush aside superficial resemblances and distinctions in its search for underlying relations. The lawyer, by education and experience, is trained to distrust obvious analogies. He might well be expected instinctively to question the application of identical canons of conformity in the substantive and procedural branches of the law. The rules respecting rights and obligations define the goal of professional endeavor, while the rules relating to remedial processes are only means toward that end. Conservatism in steadfastly safeguarding the established principles of legal liability may well go hand in hand with the utmost novelty and opportunism in the methods employed in doing it.

But the history of procedure has been a long and discouraging demonstration that nothing is harder for the legal mind to understand than this very difference. Means and end are always being confused, and the same rules of construction and interpretation used in determining rights are too likely to be used also in passing upon

remedies. Indeed, conservatism in remedial law is a much more marked professional trait than conservatism in other legal fields, for the reason that the public does not understand it and cannot step in so readily and demand relief. The bar occupies a strategic position of commanding strength. In its helplessness the public looks to the bar for technical advice as to the way out, and so far the American bar has failed to rise to its great opportunity.

There is a further striking failure which must be charged to the legal profession in America, which grows out of the one just noted, and that is its ignorance of and indifference to improvements in procedural practice developed in other jurisdictions. It is safe to say that if a new method of treating cancer were discovered and successfully employed in England, every intelligent doctor in the world would almost immediately know about it and attempt to take advantage of it. But it is equally safe to say that if a new and successful method of treating some procedural problem were discovered in England, American lawyers as a class would remain in substantial ignorance of it for at least two generations, and would probably treat it with scornful indifference for a generation or two more. There are no state lines for progressive doctors, dentists, engineers, architects, manufacturers or business men. But not one lawyer in a hundred knows or cares what reforms are being employed by his profession on the other side of the political boundary. The American lawyer is satisfied with things as they are. As long as clients continue to come and the machinery of the law continues to move, he is as free from concern over the methods used elsewhere as the southern negro with his mule and his little plow, who never worries about tractors or other new-fangled devices.

No better illustration of this can be found than the problem of joinder of causes of action. The old rules and the very foundations upon which they rested, if there really were any, have been demolished by modern reformatory legislation. Most of the restrictions which the law placed upon such joinder can be shown by experience to be useless. One jurisdiction has progressed here, another there. But no jurisdiction, excepting perhaps Great Britain and its dominions, has consolidated and assembled the various improvements which have been developed into an enlightened and comprehensive system, nor has there even been any interest shown by the rank and file of American lawyers in studying the operations of new rules in this field.

II

Two aspects of the subject of misjoinder present themselves, namely, what constitutes a misjoinder and what are the consequences of it. The two are somewhat inter-related, because the consequences may well depend upon the scope of the defect and the variety of forms in which it shows itself, while at the same time the extension or restriction of the scope of the objection may depend upon the consequences attached to its occurrence.

In regard to the effect of misjoinder of causes, we have a well-known statement from Chitty, the greatest expounder of the common law system of pleading, reverently followed by generations of judges as the "word" behind which it was vanity to attempt to look. He says:

> "The consequences of a misjoinder are more important than the circumstance of a particular count being defective, for in the case of misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on a general demurrer, or in arrest of judgment, or upon error."[1]

In quoting and following this rule the Supreme Court of Vermont observes that its authority "is quite too elementary in one's early professional readings to justify any remarks on the subject,"[2] which probably is typical of the professional respect for that learned writer.

The rule makes it clear that misjoinder of causes was a most serious and fatal error, an error going to the very heart of the plaintiff's case, an error so fundamental and far-reaching that it vitiated the very judgment which might perchance be inadvertently rendered for the plaintiff.[3]

Now, the severity of the penalties for these mistakes naturally suggested the question, whether they were not too heavy, and this led immediately to the further inquiry, what was the real objection to the joinders which the common law condemned. The two were correlative. If the misjoinder produced but slightly harmful consequences, then the penalty for using it should be slight; whereas, if it was seriously detrimental to the proper conduct of the case or

[1] CHITTY ON PLEADING, *206.

[2] *Joy* v. *Hill* (1863), 36 Vt. 333.

[3] "The general common law rule is, that where a declaration is so defective that it will not sustain the judgment, the objection may be availed of on motion in arrest in the trial court, or on error in the appellate court."—*Chicago & Eastern Ill. R. R. Co.* v. *Hines* (1890), 132 Ill. 161. Quoted with approval in *Kelly* v. *Chicago City R. R. Co.* (1918), 283 Ill. 640.

fundamentally inconsistent with proper judicial action, much more drastic remedies would be appropriate. It was possible, too, that there might be substantial difference in the evils resulting from different varieties of misjoinder.

One aspect of the case brings out in strong relief the inherent hollowness and unreality of the doctrine of misjoinder as a substantial fault in pleading. The judges could not agree on the true rules respecting joinder of forms of action. The plaintiff's case suffered capital punishment, so to speak, for an error in this regard, but the courts could not tell him with any certainty how to avoid it. A paragraph from Tidd quaintly expounds this remarkable situation. He says:

> "In one case, it was said by LEE, Ch. J., that the true way to judge of this matter is, that whenever the process and judgment are the same on two counts, they may be joined; otherwise they cannot. But it being found that the similarity of the process afforded but a very fallible criterion, there being the same process of summons, attachment and distress in actions of account, covenant, debt, annuity, and detinue, and the same process of attachment and distress in actions of assumpsit, case and trespass, none of which can be joined, it was said in a subsequent case by WILMOT, Ch. J., that the true test to try whether two counts can be joined in the same declaration, is to consider and see whether there can be the same judgment on both; and if there be, he thought they might be well joined. But in a later case the Court of Common Pleas were of opinion, that the rule or test to try whether two counts can be joined, as laid down in the former one, was rather too large, and not universally true: and the reason for this opinion probably was, that there is the same judgment, for damages and costs, in actions of assumpsit, covenant, case and trespass, and the same entry of a *misericordia* in the first three of these actions, and yet no two of them can be joined. Therefore, in a still later case, a new criterion was established; and it was said by BULLER, J., to be universally true that wherever the same plea may be pleaded, and the same judgment given, on two counts, they may be joined in the same declaration. But even this rule is not altogether unexceptionable; for it is clear that case and trespass cannot in general be joined, although the same plea of not guilty of the premises will serve for both, and

there is the same judgment in each, for damages and costs. * * *"[4]

This amazing incongruity did not seem to call for any apologetic explanation from the profession. None of the classical writers on common law pleading and none of the judges of that era appeared to have been disturbed by the anomaly. The doctrine of misjoinder was a professional tradition, which had always been recognized in some form or other, and was fully justified by the antiquity of its ancestry. The perils of misjoinder were inherent risks which had to be patiently endured by the people, like the perils of war and contagious disease. If the problem of defining and identifying misjoinders was too difficult for the courts to solve, why blame the courts? They were only human and could not be expected to do impossible things.

This attitude marked the culmination of what may be considered the complacent period of procedural despotism. From this position the courts have receded under the pressure of hostile criticism or under legislative orders, until it can hardly be said that a single rule or a single principle which looked so impressive and was taken so seriously a hundred years ago, has come unscathed through the hardships of the great retreat. There are still outposts in the old procedural front line trenches, held by devoted courts who worship Chitty and the old regime, but they are isolated and all but surrounded, and their fall is inevitable.

III

The classes of cases in which the common law discovered and penalized misjoinder were as follows:

Class 1. Misjoinder resulting from the form, nature, or subject-matter of the actions joined.

Class 2. Misjoinder resulting from diversity of parties, or from diversity of capacities or rights in which the same parties sue or are sued, in the several causes joined.

Class 1

Misjoinder resulting from the form, nature or subject-matter of the actions joined.

(a) Process as a test.

The first rule of misjoinder is stated by Comyns to rest upon

[4] 1 TIDD'S PRACTICE [2nd Am. from the 8th. London Ed.] 10.

difference in process, "for," he says, "in debt the old process was summons, attachment, and distress, and on taking out the original a fine was paid to the king, in proportion to the sum demanded; but in trespass the process was a *capias,* and a fine was set in proportion to the degree of the offense, and levied by a *capiatur.* * * * So a man cannot join actions founded upon tort, and upon contract, in the same declaration; for they require different process and different pleas."[5]

But this criterion was shown by LEE, Ch. J., in the passage quoted above from Tidd, to be quite worthless. And none of the later cases or writers make any point of it.

In modern times the process in all civil actions has become substantially identical, so that it is quite certain nothing is to be gained by paying any attention to this discredited test of the common law.

(b) Form of action as a test.

Chitty says that the joinder of actions depends on the form of the action rather than on the subject matter.[6]

But this test is formally worthless and has become intrinsically meaningless.

It was admitted everywhere that some actions of different forms, as debt and detinue, case and trover, could be joined.[7] Common law practice, therefore, refuted the test of form.

Furthermore, by a mere rearrangement and selection of facts, or by the use of fictions, a cause of action could be set up indifferently as one in case or assumpsit, debt or assumpsit, trover or replevin, assumpsit or trover, trespass or case, debt or covenant, which effectually prevented any bona fide contention that there was anything inherent in the controversy in such cases which had the slightest bearing on the subject of joinder.

Again, the common law forms of action themselves were useless categories which, even as Chitty and Tidd were writing, had largely lost their value, and have now almost disappeared from the habitable globe.[8]

In many of those states which purport to retain forms of action, the common law forms have been ousted by statutory forms having little resemblance to the old forms whose names they often bear.[9]

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[5] COMYNS DIGEST, Actions G. 2.

[6] 1 CHITTY ON PLEADING, *196.

[7] *Id.*

[8] They are expressly abolished by all the American Codes which follow the New York reform.

[9] In Michigan contract actions are all called assumpsit, and tort actions for damages are all called trespass on the case. MICH. JUD. ACT, Ch. XI; 14 MICH. L. REV. 382. In

It is also to be noted that, like other tests suggested by the common law, this test has been ignored in modern statutory rules of joinder, thus adding the condemnation of modern practice to that of reason.[10]

It is quite clear, therefore, that form, as a rational basis for joinder, has lost what little value it ever had.

(c) Plea as a test.

There was a good deal of discussion in the common law courts over the identity of available pleas as a test for joinder, as BULLER, J., indicates in the quotation above taken from Tidd. But no one asserted that this alone was sufficient to determine the matter. For example, debt on judgment, on specialty and on simple contract could all be joined, yet the general issue in the first was *nul tiel record,* in the second *non est factum,* and in the third *nil debet.*[11] It was only when used in conjunction with other tests that this was deemed significant. But this was a confession that the test was fortuitous rather than one based on any principle, no reason for requiring even a qualified identity of plea ever being offered.

Furthermore, there was nothing in any of the general issues which had any bearing upon the action in which it was used, other than a mere verbal relation to the form of the allegations. As operative elements in pleading the general issues were mere formulae embodying interesting historical suggestions and embracing arbitrary privileges of proof.

And again, as in case of forms of action, the general issues have all but disappeared and will soon be entirely extinct, because they served no useful purpose. So that it is apparent that the pleas which can be pleaded offer no workable or reasonable test for the joinder of causes of action.

(d) Judgment as a test.

The common law judges emphasized as the chief test for the joinder of causes of action, that the judgments rendered upon them should all be the same. This is clearly shown by the passage from Tidd quoted above.

Massachusetts these actions are classified as tort or contract. REV. L. 1902, Ch. 173, Sec. 1. In many states the distinction between trespass and case has been abolished by statute. *Barker* v. *Koozier* (1875), 80 Ill. 205; *Moulton* v. *Smith* (1851), 32 Me. 406; *Bellant* v. *Brown* (1889), 78 Mich. 294; *Parsons* v. *Harper* (1860), 16 Gratt. (Va.) 64; *Hood* v. *Maxwell* (1866), 1 W. Va. 219.

[10] *Smith* v. *Merwin* (1836), 15 Wend. N.Y.) 184; *Smith* v. *Miller* (1887), 49 N. J. L. 521; *McWheeney* v. *City of Waterbury* (1878), 46 Conn. 295; *Hagar* v. *Brainerd* (1872), 44 Vt. 294.

[11] GOULD ON PLEADING, Chap. IV. Sec. 84.

The argument was this: There can be but *one* judgment *quod recuperet* in one action; if causes of action requiring different judgments were to be joined, there would result the necessity of two different kinds of judgments *quod recuperet* in the same action, which is impossible.[12]

It is not clear what differences were here referred to. Tidd says that the judgments in debt and detinue were different, hence their joinder was outside the rule;[13] while Gould says these judgments were the same, hence the joinder was an illustration of the rule.[14] The only distinctions in judgments which any of the writers on common law pleading refer to in connection with misjoinder are between judgments *"quod sit in misericordia,"* or, more briefly, *"misericordia,"* and judgments *"quod capiatur,"* or merely *"capiatur."*[15] If this distinction is taken as the only one to which the rule applies, it means almost nothing, for most forms of action result in a *"misericordia,"* and yet many of them may not be joined. As a test for joinder, independent of other tests, this was never of much value, and in modern times these distinctions between judgments have largely ceased to exist.[16]

But the entire argument on which the rule rests is intrinsically but a mere begging of the question. Why, it may be asked, can only one judgment be rendered for the plaintiff in one action? If there are two counts, and the plaintiff succeeds upon one and fails upon the other, there are two judgments rendered, one for the plaintiff and one for the defendant. There is no greater diversity than this in case of two different judgments for the plaintiff on the two counts of his declaration. A joinder of counts is in effect nothing but a consolidation of actions, and a consolidation has no restrictive effect upon the jurisdiction of the court to render a proper judgment in each of the actions consolidated.

(e) Nature of the subject-matter as a test.

When the great American procedural reform, which resulted in what is called Code Pleading, was put into effect in New York in 1848, the subject of joinder of causes of action was one of the titles

[12] *Peabody* v. *Kinsley* (1860), 40 N. H. 418; GOULD ON PLEADING, Ch. 4, Sec. 86.

[13] TIDD'S PRACTICE [2nd Am. Ed.] 11.

[14] GOULD ON PLEADING, Ch. IV., Sec. 85.

[15] TIDD'S PRAC. [2nd Am. Ed.] 11; GOULD ON PLEADING, Ch. IV, Secs. 79-87; 1 CHITTY ON PLEADING *199.

[16] In *Williams* v. *Bramble* (1852), 2 Md. 313, it appeared that while Maryland was still a close adherent of most of the common law rules of pleading, it had completely abandoned this distinction, and the court refused to condemn a joinder of trover and trespass because the reason given in support of the rule—difference in judgments—no longer had any support in Maryland law.

of the new code. The code abolished forms of action, and it provided no special distinctions in pleas or process or judgments which could serve as a means for perpetuating the common law tests of joinder. But the framers of the code were still unable to free themselves from the common law tradition that formal tests of some kind must be adopted for restricting joinder of causes of action. All they had left to base such rules upon were the differences in subject-matter in different causes of action. With these distinctions before them they provided a new criterion as a substitute for the obsolete common law tests. This was similarity in subject-matter, to be determined in accordance with a fixed classification set out in the code. These classes are quite similar in most of the twenty-five or thirty American codes which were patterned on that of New York. The usual classes are as follows. 1. Contracts, express or implied; 2, Injuries to the person; 3. Injuries to the character; 4. Injuries to property; 5. Actions to recover real property with or without damages; 6. Actions to recover chattels with or without damages. And to these specific classes was added a very general class: 7. Actions arising out of the same transaction or transactions connected with the same subject of action.[17]

A comparison of this system with the common law system reveals some very interesting features. In some ways it is far less restricted, in that it allows legal and equitable actions to be joined,—actions calling for wholly different modes of trial and wholly different kinds of relief. And in the seventh class tort and contract actions are quite likely to find themselves together. In other respects it is more restricted than the common law, since actions embraced in classes 2, 3 and 4, non-joinable under the code, could all have been joined at common law as actions on the case.

But it introduced an entirely new difficulty, in the use of three new terms,—"transaction," "subject of action," and "connected with,"—none of which had acquired any precise meaning. And the volume of litigation that has resulted from the effort to define and administer this vague rule is distressingly large.[18]

The theory of the classification is somewhat hard to justify. Why should all contract actions be thrown into one class while torts are separated into three? Why should wholly unrelated contract

[17] These statutes are collected in SUNDERLAND'S CASES ON CODE PLEADING, 192.

[18] See the case of *McArthur* v. *Moffat* (1910), 143 Wis. 199, where Judge WINSLOW makes an exhaustive study of the decisions and the views of text writers as to the meaning of these terms, concluding that a number of earlier Wisconsin cases were wrong and that a new definition of "subject of action" was necessary.

actions be joinable, when tort actions no more unrelated, and often much more closely related, are not?

It is quite reasonable to suppose that the basis of the classification was convenience, and the legislature has merely attempted to formulate rules of convenience. But the task is quite an impossible one. Cases are so diverse and may be interrelated in so many ways that one cannot tell *a priori* what combinations will produce convenience in trial and what will not. Sometimes the classification of the codes produces the most absurd and inconvenient results. In *Campbell* v. *Hallihan*,[19] a cause of action for taking away and converting a pair of horses was held not joinable with a count for assault by defendant while the plaintiff was trying to regain possession of the property, but the conversion might have been waived and the action then joined with any contract action, even breach of promise of marriage. In *Stark* v. *Wellman*,[20] a cause of action for loss of money which defendant promised to take care of, was held not joinable with a count alleging a conversion of the same money by the defendant, notwithstanding the two were only different theories of the same wrong. In *Clark* v. *Great Northern Ry. Co.*,[21] a cause of action founded on a breach of a contract for carrying the plaintiff as a passenger was held not joinable with a count for ejecting the plaintiff from the train with unnecessary violence. In *Doughty* v. *Atlantic & North Carolina R. R. Co.*,[22] it was held that plaintiff could not join a count for a penalty for obstructing a stream with a count for damages caused by the same obstruction.

Variations in the scheme of classification will not cure the trouble. It is more radical. The basis for the objection of misjoinder is nothing inherent in the differences between actions. The seventh class, among those noted above, is probably capable of upsetting every other attempted distinction in the joinder statutes under easily conceivable circumstances. There is no reason whatever why any two or more causes of action, irrespective of their nature, should not *always* stand together in the same pleading if they are *ever* allowed to do so. No difficulty in the administration of justice can possibly result from the joinder. It is only when it is sought to try all of them together that inconvenience results.

One other feature of joined actions has frequently been objected to, and that is inconsistency. Some statutes or court rules expressly

[19] (1904) 45 Misc. (N.Y.) 325.
[20] (1892) 96 Cal. 400.
[21] (1903) 31 Wash. 658.
[22] (1878) 78 N. C. 22.

prohibit such joinder,[23] while others expressly authorize it.[24] Most statutes are silent on the subject, and the courts are free to follow their own views, which are quite irreconcilable. The subject naturally embraces defenses as well as counts, and the relation of allegations within the count as well as the relation of the counts themselves, and an extended consideration of it would not be germane to the present discussion.

(f) All restrictions removed.

Accordingly, in default of any rational bases for a system of rules on joinder relating to the form, nature or subject-matter of actions, we reach the final stage of development, where it is frankly admitted that the common law created imaginary difficulties in joining actions, that the code continued them with substantial but illogical variations, that all *a priori* restrictions fail to meet the needs of practical litigation, and that only by allowing an unlimited freedom of joinder can the maximum of convenience in the trial of actions be attained. If a plaintiff joins too many actions it is easy to separate them for trial, while if he severs them it may be very hard to effect a consolidation, owing to differences in the time of reaching issue, lack of initiative in bringing about a consolidation, and the possibility that they may be pending in different courts.

This stage had been almost or entirely reached in a number of jurisdictions.

In Kansas, "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable or both," without any restrictions based upon their character or subject-matter.[25]

In Iowa, "Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings," that is, where all are either legal or equitable, may be freely joined without restrictions other than those relating to parties and venue.[26]

In Wisconsin, by an amendment of the code in 1915, the classification was abolished and the provision was made to read like the Kansas statute.[27]

In Michigan, "The plaintiff may join in one action, at law or in

[23] MINNESOTA, REV. L. 1905, Sec. 4154; NEW YORK, CHASE'S CODE CIV. PRO. 1910, Sec. 484.

[24] MICHIGAN, CIR. CT. RULES, No. 21, Sec. 7; NEW JERSEY, LAWS 1912, Ch. 231, Schedule A, Rule 24.

[25] GEN. STAT., 1909, Sec. 5681.

[26] CODE, 1897, Sec. 3545.

[27] LAWS 1915, Ch. 219, Sec. 4.

equity, as many causes of action as he may have against the defendant, but legal and equitable causes of action shall not be joined."[28]

In New England the only limitation under the head now being discussed is a prohibition against joining with an action for recovery of lands other actions not relating to the land, unless by leave of court.[29]

In England the plaintiff may now join all the causes of action he may have, subject to the same restriction in actions for the recovery of land as those in the New Jersey statute, which was taken from the English rules of court.[30]

In Ontario even the restriction as to actions for the recovery of land is abolished, and the plaintiff may join all the actions he may have against the defendant.[31]

In New York the Board of Statutory Consolidation, in 1915, recommended the same provisions as those found in the English rules.[32]

It is therefore quite evident that the spell of the common law, which colored every procedural question with the technical interest and the historical veneration of a clever, learned and jealous profession, has been substantially broken. The retention of restrictions for no better reason than to make the practice of the law more subtle and interesting will no longer be tolerated. Joinder of causes of action so far as it concerns the form, nature or subject-matter of actions is destined eventually to disappear as a procedural problem.

Class 2

Misjoinder resulting from diversity of parties, or from diversity of capacities or rights in which the same parties sue or are sued, in the several causes joined.

At common law misjoinder occurred if the parties were not the same in all the actions joined. Thus a count on behalf of two plaintiffs jointly could not be joined with a count on behalf of one of them severally;[33] counts could not be joined each of which set up a several right in a different plaintiff against the same defendant;[34] counts setting up different causes of action in favor of the same

[28] Jud. Act (1915) Ch. VIII, Sec. 1.
[29] Laws 1913, Ch. 231, Sec. 14.
[30] Order 18, Rule 1, 2.
[31] Jud. Act, 1915, Rule 69.
[32] Rep. of Board of Stat. Consol. on Simplification of Civ. Prac. (1915) Vol. 1, Rules 180, 181.
[33] *Safford* v. *Miller* (1871), 59 Ill. 205.
[34] *Harvey* v. *Edington* (1852), 25 Miss. 22.

plaintiff but against different defendants could not be joined;[35] and counts alleging the joint liability of two or more defendants could not be joined with counts alleging the several liability of any or all of them.[36]

And since differences in the rights or capacities in which parties sued or were sued were treated by the common law as legally equivalent to differences in personalities, the rules above stated were deemed to cover such cases. Thus an executor, administrator or guardian could not sue or be sued in the same action upon individual and representative demands.[37]

These restrictions were all retained in the New York Code of Civil Procedure and in the other American codes which followed that reformed system. Substantially all of them provide that all of the actions united in the same complaint or petition "must affect all the parties to the action."

Even in Kansas,[38] Iowa[39] and Wisconsin,[40] while the code classification based on subject-matter has been abolished, as already shown, the distinctions now under consideration remain unchanged, as at common law.

In Michigan it is probable that the very liberal provision as to joinder should be taken as retaining this restriction relative to parties, except in equity cases, where, according to well settled rules, other considerations have always controlled.[41]

It is only in England and in those jurisdictions which have followed the modern English practice, such as New Jersey and some of the British colonies, that there has been any marked effort to do away with objections to this class of joinders.

The basis of the objection is an entirely sound consideration, namely, that the cause should not become too complicated for convenient litigation. But like most rules of limitation, it was carried farther and made more rigid than was necessary. In equity the courts did much better, and the rules respecting multifariousness were reasonable and elastic enough to make possible the maximum effectiveness of the suit. Thus, while a bill may be multifarious "on account of various defendants being improperly joined in a

[35] *Sleeper* v. *World's Fair Banquet Hall Co.* (1879), 166 Ill. 57.
[36] *McMullin* v. *Church* (1886), 82 Va. 501.
[37] *Henshall* v. *Roberts* (1804), 5 East 150; *Brown* v. *Webber* (1850), 6 Cush. (Mass.) 560.
[38] GEN. STAT., 1909, Sec. 5681.
[39] CODE, 1897, Sec. 3545.
[40] LAWS, 1915, Ch. 219, Sec. 4.
[41] JUD. ACT, 1915, Ch. VIII, Sec. 1.

suit upon distinct and independent matters,"[42] or where there is "an improper joinder of plaintiffs, who claim no common interest, but assert distinct and several claims against one and the same defendant,"[43] still "the objection of multifariousness, and the circumstances under which it will be allowed to prevail, or not, is in many cases, * * * a matter of discretion, and no general rule can be laid down on the subject."[44] "The court * * * seems to have considered what was convenient in particular circumstances, rather than to lay down any absolute rule."[45] This was the real criterion of equity,—*convenience.*

It seems strange that the influence of equity was not greater upon the rules of law in respect to joinder, and it is particularly hard to understand why the American codes, which deliberately attempted to amalgamate legal and equitable procedure, did not hit upon the idea of combining the rules of joinder for equitable and legal actions into the single principle of convenience. But the dead hand of precedent prevented it.

But in England, English precedents seemed to have a weaker hold on the profession than in America, and the rules drawn under the Judicature Act of 1873 are so simple and reasonable that one almost wonders whether they were really drawn by lawyers.

The rules as to joinder of parties and joinder of causes of action are in part correlative, and so far as the form of misjoinder now being considered are concerned, both classes of rules must be looked to.

Order 16 provides:

> "Rule 1. All persons may be joined in one action as plaintiffs, in whom any right to relief in respect 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; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such other order as may be expedient."
>
> "Rule 4. All persons may be joined as defendants against

[42] STORY'S EQUITY PLEADING, Sec. 279.
[43] *Id.*
[44] *Id.*, Sec. 284.
[45] *Id.* Sec. 530.

whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative."

And Order 18 provides that claims by or against husband and wife may be joined with claims by or against either of them separately; that claims by or against executors or administrators may be joined with claims by or against them personally; and that claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant.

All of these rules are subject to the further rule that when convenience will be served, the court may order separate trials.

These rules clearly base the whole subject of parties, as affecting the joinder of causes of action, on the criterion of convenience. They absolutely abandon the common law theories of identity of parties as a test of joinder. They do not remove all restrictions, which they perhaps ought to do, since any extension beyond the bounds of practical convenience can be at once corrected by an order for separate trials. But they recognize the true doctrine which ought to control. They are perfectly sound as far as they go.

Many of the British colonies have substantially followed the English rules on this subject.[46]

New Jersey, which drew most of its inspiration for reforms in procedure in 1912 from the English rules, has in part followed the foregoing rules, particularly as contained in Order 18, though it has not gone the full length of Order 16.

The reasonableness and practical utility of these liberal rules is quite apparent. Take the case of a railroad or steamship accident where a number of persons are injured in their persons or their property. Why should each one be forced to play a lone hand in his litigation, instead of pooling his efforts and his resources with some of his fellow sufferers. The English rules expressly allow such a joinder. In *Markt & Co.* v. *Knight Steamship Co.*,[47] where a merchant ship was sunk by a Russian war vessel, and some of the owners of goods on board the scuttled ship, on behalf of themselves and all the other cargo owners, sued the owners of the ship, and the court held that while they had no standing as representative plaintiffs, all or any of the cargo owners might have joined as actual plaintiffs in their own behalf.[48] In *Booth* v. *Briscoe*,[49] eight per-

[46] QUEENSLAND, III STAT. (1911) PRACTICE, Orders III and IV. VICTORIA, ORDERS 16 and 18; NEW ZEALAND, III. CON. STAT. (1908) JUDICATURE ACT, Chaps. II and III; ONTARIO, Rules 66, 67, 68, 70, 71, 72.

[47] [1910] 2 K. B. 1021.

[48] See opinion of FLETCHER MOULTON, L. J., p. 1037.

[49] 2 Q. B. D. 496.

sons who had been severally libeled in a letter published by the defendant were allowed to join in a single action for damages. In *Walters* v. *Green*,[50] a number of independent master builders were allowed to combine their several grievances against a number of trades union officials, through a single action to restrain the defendants from picketing the plaintiffs' works. It is quite possible that the English courts are still too conservative in interpreting the rules, but they are doubtless working upon the true principle, which is maximum of convenience and minimum of formality.

IV

As for the penalties attached to misjoinder, the common law, as has been shown, was very severe. The error was deemed a fatal one.

American courts in some of the jurisdictions which retain the common law system of procedure continue to repeat with parrot-like faithfulness the terrible interdict of the common law against misjoinders of causes of action, allowing the objection to be taken on general demurrer, motion in arrest or writ of error.[51]

In other states retaining the common law practice the consequences of misjoinder have by statute or otherwise been made less serious, and while still deemed a defect of substance, which may be taken advantage of on general demurrer, it cannot be raised after verdict.[52]

Still others of these courts require the objection to be raised by a special demurrer.[53]

The Codes, fortunately, took a more liberal view, and provided what was in effect a special demurrer, making it one of the statutory grounds for demurrer "that several causes of action may have been improperly united."[54]

This was supported by a further provision that this objection was to be deemed waived unless taken by demurrer.

But the true corrective, which was an order for separate trials, is found in very few codes, for the obvious reason that the real nature of the objection has not been understood. There is nothing intrinsically impossible or even inappropriate in joinders of actions of all kinds, for there is hardly a conceivable combination of facts

[50] [1899] 2 Ch. 696.

[51] *Bull* v. *Mathews* (1897), 20 R. I. 100; *McNulty* v. *O'Donnell* (1904), 27 Pa. Super. Ct. 93; *Dean* v. *Cass* (1901), 73 Vt. 314; *Peabody* v. *Kinsley* (1860), 40 N. H. 418; *Smith* v. *State* (1886), 66 Md. 215.

[52] *Shafer* v. *Security Trust Co.* (1918), 82 W. Va. 618; *Chicago & Alton R. R. Co.* v. *Murphy* (1902), 198 Ill. 462.

[53] *Hudson* v. *McNear* (1904), 99 Me. 406.

[54] See Statutes collected in SUNDERLAND'S CASES ON CODE PLEADING, p. 543.

or parties which cannot under some circumstances be tried more advantageously together than separated. Therefore, joinders should be permitted and encouraged with the greatest freedom. If the joinder is such as to conveniently result in a single trial, it will be of substantial advantage; if it is such that separate trials would be preferable, it will have done no harm, for the joinder itself produces a mere physical juxtaposition of actions which has no effect on the actions themselves.

As a matter of experience, the probability of joinder of inharmonious actions is exceedingly slight. A plaintiff would never attempt to join different actions unless he thought there was something to be gained by it, and in most cases he would be right. If a substantial part of the evidence, or a substantial number of witnesses, could be made to do double duty by the joinder, or if common questions of law or fact could be disposed of once, for all the actions, the joinder would be justified. These are the considerations which would prompt the joinder in the first place. Mere desire to annoy the defendant or defendants would be a rare occurrence. But the power of the court to separate the causes for trial would remove even the remote chance of harm.

In Kansas the demurrer for misjoinder of causes of action has wholly disappeared, and there is apparently no other method of raising the objection than by application for an order for separate trials, [55] or to compel an election.[56]

Other states which have taken advanced positions on this matter of joinder have not gone so far, but some of them provide expressly for an order for separate trials as at least a co-ordinate remedy,[57] and this is in harmony with the procedure in the new federal equity rules.[58]

Under the English practice the method for objecting to an improper joinder is an application to the court for an order that the actions be tried separately, or that the action be confined to such of the causes of action as may be conveniently disposed of together.[59] This is practicable and simple, and looks directly to the realization of the chief object of the whole proceeding, which is convenience in the administration of justice.

The current American methods of meeting the difficulty, by de-

[55] GEN. STAT. 1909, Secs. 5681, 5686; *Mathes* v. *Shaw* (1911), 85 Kan. 162.

[56] *Day* v. *Kansas City Pipe Line Co.* (1912), 87 Kan. 617.

[57] IOWA, CODE, 1897, Sec. 3545; MICHIGAN, JUD. ACT, 1915, Ch. VIII, Sec. 1; NEW JERSEY, LAWS 1912, Ch. 231, Schedule A, Sec. 12.

[58] No. 26.

[59] Order 16, Rule 1; Order 18, Rule 8.

murrer or its equivalent, have the fundamental fault that they are obstructive, not constructive. They prevent the plaintiff from doing what he proposes, but they do not provide an adequate substitute. They are, in effect, negative remedies. There has always been too much negation in procedure. No objection to procedural methods should be entertained unless it includes an adequate provision for curing the fault complained of. The principle of the plea in abatement, that the defendant must give the plaintiff a better writ, should be universally employed, with the added feature that the court should become a more active participant in the proceeding and should lend its suggestion and direct its power to putting the defective case in the way of an adequate disposition.

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