JOINDER OF PARTIES*

CHARLES E. CLARK and HERBERT BROWNELL, JR.

The subject of joinder of parties is peculiarly interesting in that it shows the growing tendency to develop procedural rules towards the end of prompt dispatch of litigation. At common law the rules of party-joinder depended entirely on what was conceived to be the substantive rights of the parties litigant; and the idea of employing the rules of joinder as a procedural device to save many trials by deciding at one time issues affecting several persons came later through the code adoption of the more liberal equity rules of joinder. Even under the code the idea was only imperfectly perceived or carried out and it is only now in a few jurisdictions—notably England, New York and New Jersey—that the possibilities of thus somewhat relieving the press of cases upon the courts are being at all adequately realized. The subject can best be understood by tracing this course of development through the various systems of pleading.

JOINDER OF PLAINTIFFS—BEFORE THE CODES

Compulsory joinder at common law. Plaintiffs were compelled to join or could join, at common law, only in a limited class of cases where their rights were joint. Thus in a contract action, whenever the interests of the promisees were interpreted as joint by the court, the promisees had to sue together in any action on the contract.[1] Partners, for example were required to join in suing on obligations owing the partnership. If one of the promisees died, the survivor or survivors only were allowed to sue on the contract.[2] Likewise in tort actions, joinder of

*The substance of this article, together with additions dealing with the subjects of intervention and the bringing in of new parties will form a chapter in a forthcoming book on Code Pleading, to be published by the West Publishing Company, St. Paul, Minn.

[1] Slingsby's Case, 5 Co. 18 b (1588) (covenant); see Comment (1923) 32 YALE LAW JOURNAL 384. In a note to Eccleston v. Clipsham, 1 Saund. 153 (20 Car. II), the early cases are summarized as follows: "If the covenant be so constructed as to be ambiguous . . . then it will be joint if the interests are joint, and several if the interests are several. On the other hand, if it be in terms *unmistakeably* joint, then, though the interest be several, all the parties must be joined in the action. So, if the covenant be *clearly* several, the action must be several, though the interest be joint. It is a question of construction." See, further, Calvert v. Bradley, 16 How. 580 (U. S. 1853); Baker v. Peterson, 133 N. E. 214 (Ill. 1921), (1922) 22 COL. L. REV. 369. The same rule applied to actions of assumpsit. Moore v. Chesley, 17 N. H. 151 (1845); see Bradley's Ex'rs v. Maull, 4 Harr. 223 (Del. 1843). Also when the action was quasi-contractual, if the plaintiff had to rely on the contract to prove his case. See Buddle v. Willson, 6 Term R. 369 (1795). A

plaintiffs turned upon the distinction between joint and several interests. Hence when the plaintiffs were joint owners of property which was damaged, they had to bring their action for damages jointly. The most typical tort cases within this rule were suits by joint tenants, joint owners, and parceners and certain suits by tenants in common.[3]

Effect of nonjoinder at common law. If the defendant objected in the proper manner that parties were not joined who should have been under the technical rules just stated, severe penalties were attached. In contract actions, while the defendant could raise the point by a plea in abatement[4] he could also rely on

---

promissory note to "*A* or *B*" was interpreted as joint within this rule. Willoughby v. Willoughby, 5 N. H. 244 (1830).

If the defendant had settled with some of the joint contractees, the other or others could sue alone in some jurisdictions. Baker v. Jewell, 6 Mass. 460 (1810); Beach v. Hotchkiss, 2 Conn. 697 (1818). In other jurisdictions they could sue for their share in the name of all, even against the consent of those who had settled. Sweigart v. Berk, 8 Serg. & R. 308 (Pa. 1822); *cf.* Cunningham v. Carpenter, 10 Ala. 109 (1846) (party objecting to joinder was indemnified for costs); Chambers v. Donaldson, 9 East 471 (1808) (fraudulent collusion between plaintiff's husband who refused to join and defendants).

[2] Rolls v. Yate, Yelv. 177 (1611); Anderson v. Martindale, 1 East 497 (1801); Teed v. Elworthy, 14 East 210 (1811); Smith v. Franklin, 1 Mass. 480 (1805). Upon the death of the last contractee, the cause of action descended to his personal representative alone. Bebee v. Miller, Minor 364 (Ala. 1824). Of course, the cause of action had to be one that survived the person. And the excuse for not joining the other contractees had to be stated in the declaration. Holyoke v. Loud, 69 Me. 59 (1879); Percival v. McCoy, 4 McCrary 418 (W. D. Iowa, 1882).

[3] Joint tenants: Pullen v. Palmer, 5 Mod. 72 (6 Wm. & M.) (avowry for rent). Joint owners: Winterstoke Hundred's Case, 3 Dye. 370a (22 Eliz.); Turnpike Co. v. Fry, 88 Tenn. 296 (1889); see Child v. Sands, 1 Salk. 31 (5 Wm. & M.); Whitney v. Stark, 8 Cal. 514 (1857). Parceners: ARCHBOLD, PLEADING (1824) 52. Tenants in common: Joinder was required in the so-called personal actions. State v. True, 25 Mo. App. 451 (1887) (injury to chattel held in common); Louisville Ry. v. Hart, 119 Ind. 273 (1889) (same); Hays v. Farwell & Co., 53 Kan. 78 (1894) (conversion); Gent v. Lynch, 23 Md. 58 (1865) (trespass to land). But not in the so-called mixed actions. Curtis v. Bourn, 2 Mod. 62 (27 Car. II). In the real actions, joinder was not allowed. Moore v. Fursden, 1 Show. 342 (3 Wm. & M.) (ejectment); Heatherly v. Weston, 2 Wils. 232 (1764) (same); Throckmorton v. Burr, 5 Cal. 400 (1855) (same); but see Denne v. Judge, 11 East 288 (1809). Tenants in common could join or sever in debt for rent when they jointly demised reserving an entire rent, but if there were separate demises, they had to sue separately. See Wilkinson v. Hall, 1 Bing. N. C. 713 (1835).

[4] Scott v. Godwin, 1 Bos. & P. 67 (1797) (erroneously cited in Baker v. Jewell, *supra* note 1, as holding that defendant could only enter a general demurrer); Hilliker v. Loop, 5 Vt. 116 (1833). Such a plea would rarely be made, for the defendant could gain a nonsuit by raising the point at trial under the general issue.

the general issue if the defect did not appear in the declaration.[5] If the omission was apparent on the record, he could enter a general demurrer [6] or even move in arrest of judgment [7] or bring a writ of error.[8] But in tort actions, if the defect did not appear, the defendant could object to nonjoinder only by pleading it in abatement.[9] In case he failed to do this, he could not later raise the point. Furthermore, the party omitted could later sue alone.[10] If the defect was apparent, there is some authority to the effect that the defendant tortfeasor could enter a demurrer or move in arrest of judgment.[11]

Permissive joinder at common law. No permissive joinder as such, where plaintiffs whose rights were several, had the option of joining, was permitted at common law. Thus, if the plaintiffs' interests in a contract were several, or so interpreted by the court, no joinder of plaintiffs was allowed no matter how many common questions of law or fact were involved.[12] In tort actions, even though a single act of the defendant caused injury to several people, they could not join unless the property or interest injured was jointly held by them,[13] or unless the damage was considered "entire." [14] Joinder as a procedural device to shorten litigation was not contemplated at common law.

---

[5] Smith v. Crichton, 33 Md. 103 (1870) (non assumpsit); Young v. Hesselmeyer, 34 Mo. 76 (1863) (holding also that the point could not be raised by a motion in arrest of judgment); Hill v. Tucker, 1 Taunt. 7 (1807); see note in 1 Wm. Saund. 153.

[6] Anderson v. Martindale, *supra* note 1.

[7] See Hicks v. Branton, 21 Ark. 186 (1860).

[8] See note in 1 Wm. Saund. 153; Dawson v. George, 193 S. W. 495 (Tex. Civ. App. 1917) (appeal).

[9] Addison v. Overend, 6 Term R. 766 (1796); Bloxam v. Hubbard, 5 East 407 (1804); Fell v. Bennett, 110 Pa. 181 (1895); Thompson v. Hoskins, 11 Mass. 419 (1814).

[10] Sedgeworth v. Overend, 7 Term R. 279 (1797).

[11] See 15 ENCY. OF PL. AND PR. (1899) 569.

[12] Tippet v. Hawkey, 3 Mod. 263 (1 Wm. & M.); Curtis v. Sprague, 51 Cal. 239 (1876); Governor v. Webb, 12 Ga. 189 (1852); Pelly v. Bowyer, 7 Bush 513 (Ky. 1870).

[13] The reason given for not allowing joinder here was, "nor is there any rule, in a case like this, to apportion damages—one may have suffered false imprisonment, another the loss of his property and a third, only vexation of mind." Ainsworth v. Allen, Kirby 145 (Conn. 1786). See also Rhoades v. Booth, 14 Iowa 575 (1863) (malicious prosecution); Smith v. Cooker, Cro. Car. 512 (14 Car. I) (slander). Husband and wife could not join, even though both were injured by a single act of the defendant. A note in (1923) 25 A. L. R. 739 to Ryder v. Jefferson Hotel Co., 121 S. C. 72, 113 S. E. 474 (1922) collects the cases on this point. But partners could join for a slander in respect of their joint business. Cook v. Batchelor, 3 Bos. & P. 150 (1802); Patten v. Gurney, 17 Mass. 182 (1821). But no damages to personal feelings, etc., could be recovered in such an action. Haythorn v. Lawson, 3 Car. & P. 196 (1827).

[14] Coryton v. Litheby, 2 Saund. 115 (22 Car. II) (owners of two separate

Effect of misjoinder at common law. If too many plaintiffs were joined, it was fatal to the plaintiff's case. In contract actions, if the misjoinder was apparent from the declaration, the defendant could enter a general demurrer [15] or move in arrest of judgment.[16] If the misjoinder did not appear in the pleadings, it was ground for a nonsuit whenever it appeared at trial.[17] These same harsh rules applied to tort actions.[18]

Compulsory joinder in equity. The aim of the equity courts was to settle an entire transaction in a single suit whenever such course was convenient and could be followed without prejudice to the defendant.[19] Joinder was compulsory for all persons without whom a complete settlement of the transaction could not be effected.[20] (1) Everyone whose interests would be directly affected by the decree was thus an indispensable or at least *necessary* party as distinguished from merely a *proper* party.[21] For instance, in a suit to partition land, equity required that all who

---

mills, which together had a concession to grind the corn of all the tenants of the manor, joined in suing a tenant who had ground his corn elsewhere); Weller v. Baker, 2 Wils. 414 (1769).

[15] White v. Portland, 67 Conn. 272, 34 Atl. 1022 (1896); Governor v. Webb, *supra* note 12.

[16] McNulty v. O'Donnell, 27 Pa. Super. Ct. 93 (1904); see Lockhart v. Power, 2 Watts 371 (Pa. 1834). The point was raised on writ of error in Cofran v. Shepard, 148 Mass. 582 (1889).

[17] Ulmer v. Cunningham, 2 Me. 117 (1822).

[18] "And the objection may be taken on the trial in arrest, or by appeal, or writ of error, and especially when such misjoinder of parties does not appear from the plaintiff's petition . . . if upon the trial, or in any stage of the case, the misjoinder appears, defendant may avail himself of the defect." Rhoades v. Booth, 14 Iowa 575, 577 (1863); see also Leavet v. Sherman, 1 Root 159 (Conn. 1790).

[19] See City Bank v. Bartlett, 71 Ga. 797 (1883); Wilson v. Castro, 31 Cal. 420 (1866); STORY, EQUITY PLEADING (8 ed. 1870) § 76c; Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL 817, 818.

[20] Browne v. Blount, 2 Russ. & M. 83 (1830); McPike v. Wells, 54 Miss. 136 (1876). See, more specifically, Shields v. Barrow, 17 How. 130 (U. S. 1854) (rescission); Reformed Church v. Nelson, 35 Ohio St. 638 (1880) (will); Dameron v. Jamison, 71 Mo. 97 (1879) (partition); Pillow v. Sentelle, 39 Ark. 61 (1882) (mortgage foreclosure); Cullum v. Lub-Tex Motor Co., 267 S. W. 322 (Tex. Civ. App. 1924) (quiet title); Long v. Pritt, 92 W. Va. 73, 114 S. E. 512 (1922) (partition); Wilson v. Reeves County Water Imp. Dist., 256 S. W. 346 (Tex. Civ. App. 1923) (enjoining diversion of water); Mfgrs. Light Co. v. Lemasters, 91 W. Va. 1, 112 S. E. 201 (1922) (to determine ownership of cash fund).

[21] These are the terms used by the United States Supreme Court and perhaps most usual in equity pleading to distinguish the kinds of parties. Shields v. Barrow, *supra* note 20; CLEPHANE, EQUITY PLEADING (1926) 25-48. It has been objected that the terms "necessary" and "indispensable" convey the same idea. Mathieson v. Craven, 164 Fed. 471 (D. Del. 1908). But a distinction has been drawn. While necessary parties are so interested in the controversy that they should normally be made parties in order to enable the court to do complete justice, yet if their interests are separ-

had interests in that land should be joined.[22] (2) A person might also be a necessary party for the complete protection of some other person who would at all events be directly affected by the decree. Every one jointly interested in the subject of the action within the common law rules of joinder (joint promisees, joint tenants, etc.) came within this second class because their joinder protected the defendant against a multiplicity of suits.[23]

Necessary parties in equity were not always parties plaintiff. When anyone, who by reason of his interest would ordinarily be a plaintiff, could not be joined [24] or refused to join [25] in the bill, he could be made a defendant, if the reason for his not being joined was stated in the bill.[26] The most important exception to the rule that all these necessary parties had to appear on record was the class suit, or doctrine of representation discussed below.[27]

Effect of nonjoinder in equity. In equity the plaintiff could always amend to remedy a defect of parties.[28] Nonjoinder of necessary parties was properly raised, if it was apparent from the face of the record, by a special demurrer in which the omitted parties were designated.[29] If the lack of parties went only to a

able from the rest and particularly where their presence in the suit cannot be obtained, they are not indispensable parties. The latter are those without whom the court cannot proceed. Minnesota v. Northern Securities Co., 184 U. S. 199, 22 Sup. Ct. 308 (1902); Atwood v. R. I. Hospital Trust Co., 275 Fed. 513, 24 A. L. R. 156 (C. C. A. 1st, 1921), *rev'g* 264 Fed. 360, 255 Fed. 162, certiorari denied 42 Sup. Ct. 270 (1922); Commonwealth Trust Co. v. Smith, 266 U. S. 152, 45 Sup. Ct. 26 (1925). See also Franz v. Buder, 11 F. (2d) 854 (C. C. A. 8th, 1926); Interstate Refineries v. Barry, 7 F. (2d) 548 (C. C. A. 8th, 1925); Fineman v. Cutler, 273 Pa. 189, 116 Atl. 819 (1922); Walrath v. Roberts, 12 F. (2d) 443 (N. D. Cal. 1925); Independent Wireless Tel. Co. v. Radio Corp., 45 Sup. Ct. 166 (1926); Cobb v. Interstate Mortgage Corp., 20 F. (2d) 786 (C. C. A. 4th, 1927); (1926) 35 YALE LAW JOURNAL 1018; (1926) 20 ILL. L. REV. 726.

[22] Long v. Pritt, *supra* note 20.

[23] Joint contractees had to sue together in equity. Himes v. Schmehl, 257 Fed. 69 (C. C. A. 3d, 1919). And joint contractors had to be sued together. Hull v. Eidt-Summerfield Co., 204 S. W. 480 (Tex. Civ. App. 1918). And, as at law, joint tortfeasors could be sued jointly or severally. Grow v. Seligman, 47 Mich. 607 (1882); Armstrong v. Savannah Soap Works, 53 Fed. 124 (S. D. Ga. 1892); Courthope v. Mapplesden, 10 Ves. Jr. 290 (1804).

[24] Parkman's Adm'rs v. Aicardi, 34 Ala. 393 (1859) (absence from state); Whitney v. Mayo, 15 Ill. 251 (1853); see Ins. Co. of North America v. Svendsen, 74 Fed. 346 (D. S. C. 1896).

[25] Billings v. Mann, 156 Mass. 203 (1892); see Osgood v. Franklin, 2 Johns. Ch. 1 (N. Y. 1816).

[26] Bengley v. Wheeler, 45 Mich. 493 (1881). If it was not stated, a special demurrer lay. Morse v. Hovey, 9 Paige 197 (N. Y. 1841).

[27] See *infra* page 57.

[28] Postlewait v. Howes, 3 Iowa 365 (1856); Whitney v. Cotten, 53 Miss. 689 (1876); Perham v. Haverhill Fibre Co., 64 N. H. 2 (1885); see Holland v. Trotter, 22 Gratt. 136 (Va. 1872).

[29] Oliva v. Bunaforza, 31 N. J. Eq. 396 (1879) (general demurrer over-

part of the relief sought, the demurrer had to be directed to that part of the bill only.[30] If the nonjoinder was not evident from the record, the defendant put in a plea or answer in bar.[31] But the lack of necessary parties could be raised later in the proceedings. Indeed, the court, of its own motion, could at any time refuse to go on until necesary parties were brought in.[32] Of course, if the omitted parties were merely "proper parties" the defect was not as serious. The defendant generally could raise the question of their nonjoinder only preliminarily.[33]

Permissive joinder in equity. The usual statement was that plaintiffs were allowed to join in equity if they were interested in the subject of the action and in obtaining the relief demanded. In view of the adoption of this phraseology in the codes, its meaning in equity is important. It was to be understood not as a strict requirement for every case, but as a justification for joinder in a particular case. The statement was affirmative, not negative. The rule, thus stated, was obviously and purposely so general that new situations might be brought within it as occasion demanded. The chancellors constantly emphasized that the application of the rule was largely within the discretion of the court, and that the purpose guiding this discretion was to prevent a multiplicity of suits by allowing joinder whenever the issues could be conveniently settled together. As no jury trial was involved, there was no need to simplify the issues to as great an extent as in the law courts. Accordingly, every plaintiff did not need to be interested in all the relief sought.[34]

Among the common situations where joinder was allowed in equity were when owners of separate lands united to enjoin a common injury or nuisance[35] or the levy of an illegal tax or rate;[36] when persons injured by the same or identical fraudulent

---

ruled with costs and with leave to amend); see Greenleaf v. Queen, 1 Pet. 138 (U. S. 1828).

[30] Weston v. Blake, 61 Me. 452 (1873).

[31] Robinson v. Smith, 3 Paige 222 (N. Y. 1832); Plunkett v. Penson, 2 Atk. 51 (1740); Moore v. Moore, 74 N. J. Eq. 733, 70 Atl. 684 (1908).

[32] Shields v. Barrow, *supra* note 20.

[33] Chambers v. Robbins, 28 Conn. 552 (1859).

[34] Brinkerhoff v. Brown, 6 Johns. Ch. 139 (N. Y. 1822); Brown v. Guarantee Trust Co., 128 U. S. 403, 9 Sup. Ct. 125 (1888); Ballou v. Inhabitants of Hopkinton, 4 Gray 324 (Mass. 1855); Addison v. Walker, 4 Younge & C. 442 (1841); Parr v. Att'y Gen., 8 Clarke & F. 409 (1842); Worthy v. Johnson, 8 Ga. 236 (1850); Gates v. Boomer, 17 Wis. 455 (1863).

[35] Cloyes v. Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039, 11 L. R. A. (N. S.) 693 (1907) annotation; Murray v. Hay, 1 Barb. Ch. 59 (N. Y. 1845); Gillespie v. Forrest, 18 Hun 110 (N. Y. 1879); Foreman v. Boyle, 88 Cal. 290 (1891); Marsh v. Fairbury, 163 Ill. 401 (1896); see Heagy v. Black, 90 Ind. 543, 536 (1883); Rowbotham v. Robbins, 47 N. J. Eq. 337 (1890).

[36] Simons Sons Co. v. Md. Tel. Co., 99 Md. 141, 57 Atl. 193 (1904); Gage

misrepresentations sued to be put in statu quo;[37] and when creditors who had recovered separate judgments against a common debtor brought a creditor's bill.[38] The cases indicate that the result of the equity practice before the codes might be more accurately stated: that joinder was allowed whenever the plaintiffs were interested in the subject of the action *or* (not *and*) in the relief demanded.[39]

If, within the rules just described, the equity court thought that the subject matter of the suit involved such distinct and separate matters that the defendant would be prejudiced by having them settled at the same time, the bill was declared multifarious.[40]

Effect of misjoinder in equity. A misjoinder of parties was raised by demurrer when it appeared in the bill;[41] otherwise, by plea or answer.[42] In the case of a misjoinder of defendants, however, only the party misjoined could complain.[43] Amendment was always allowed, unless the bill was made multifarious by the misjoinder,[44] and even if the bill was dismissed for misjoinder it was without prejudice to a new suit.[45] Usually the misjoinder was deemed waived if not objected to early in the pleadings,[46] but the court, of its own motion, could refuse to go on until the misjoinder was cured by amendment.[47]

---

v. Chapman, 56 Ill. 311 (1870); Mt. Carbon Coal Co. v. Blanchard, 54 Ill. 240 (1870).

[37] Reardon v. Dickinson, 100 So. 715 (La. 1924); Rader v. Bristol Land Co., 94 Va. 766, 27 S. E. 590 (1897); Bosher v. Richmond and H. L. Co., 89 Va. 455, 16 S. E. 360 (1892).

[38] Gates v. Boomer, *supra* note 34.

[39] In addition to the cases already cited, the following tend to bear out this statement. Buie v. Mechanics Bldg. Ass'n, 74 N. C. 117 (1876); Western Land Co. v. Guinault, 37 Fed. 523 (E. D. La. 1889); Almond v. Wilson, 75 Va. 613 (1881). As to the history of these phrases under the code, see the next section.

[40] Bertelmanm v. Lucas, 7 F. (2d) 325 (C. C. A. 9th, 1925); Rountrie v Satterfield, 100 So. 751 (Ala. 1924); CLEPHANE, *op. cit. supra* note 21, at 212-214.

[41] Stookey v. Carter, 92 Ill. 129 (1879); Hendrickson v. Wallace, 31 N. J. Eq. 604 (1879) (waived by failure to demur).

[42] McElroy v. McElroy, 142 Ga. 37, 82 S. E. 422 (1914); In re Young's Estate, 63 Or. 120, 126 Pac. 992 (1912).

[43] Northern Pac. Ry. v. Lee, 188 Fed. 621 (W. D. Wash. 1912); Emerson v. Gaither, 103 Md. 564, 64 Atl. 26 (1906).

[44] Hanks v. North, 58 Iowa 396 (1882) (the plaintiff who was misjoined was allowed to withdraw; no amendment needed); Hubbard v. Manhattan Trust Co., 87 Fed. 51 (C. C. A. 2d, 1898).

[45] House v. Mullen, 22 Wall. 42 (U. S. 1874).

[46] Southern L. Ins. Co. v. Lanier, 5 Fla. 110 (1853); Hill v. Houk, 155 Ala. 448, 46 So. 562 (1908).

[47] Wells v. Sewell's Point Guano Co., 89 Va. 708, 17 S. E. 2 (1893); see Oliver v. Piatt, 3 How. 333 (U. S. 1845).

JOINDER OF PLAINTIFFS—UNDER THE CODES

Compulsory joinder. The first part of the provision found in practically all the codes, dealing with compulsory joinder of plaintiffs reads: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants." [48] It is evident that the codes thus adopt the equity rule that all whose interests would be directly affected by the decree are necessary parties, and such is the result of the decisions.[49] And if any person is a necessary party only in the sense that his presence is needed for the complete protection of the defendant's interests, he must still be joined under the code,[50] subject to the exceptions formerly allowed by the equity courts.[51] One of these exceptions is expressly written into the codes. Thus,

[48] Alaska Code (1913) § 871; Ala. Code (1923) § 5701; Ariz. Rev. Stat. (1913) § 416; Ark. Dig. Stat. (1921) § 1097; Cal. C. C. P. (1923) § 382; Idaho Comp. Stat. (1919) § 6649; Ind. Ann. Stat. (Burns, 1926) § 277; Iowa Code (1924) § 10973; Kan. Rev. Stat. (1923) § 60-412; Ky. Ann. Civ. Code (Seymour, 1924) § 24; Mo. Rev. Stat. (1919) § 1159; Mont. Rev. Code (1921) § 9083; Neb. Comp. Stat. (1922) § 8542; Nev. R. L. (1912) § 5001; N. M. Ann. Stat. (1915) § 4073; N. Y. Civ. Prac. Act. (1920) § 194; N. C. Cons. Stat. (1919) § 457; N. D. Comp. Laws (1913) § 7406; § 5001; N. M. Ann. Stat. (1915) § 4073; N. Y. Civ. Prac. Act (1920) § 220; Or. C. C. P. (1920) § 68; Porto Rico R. S. & Codes (1911) § 5050; S. C. C. C. P. (1922) § 362; S. D. Rev. Code (1919) § 2315; Utah Comp. Laws (1917) §6510; Wis. Stat. (1921) § 2604; Wyo. Comp. Stat. (1920) § 5594. Fed. Eq. Rules (1912) § 37 is practically the same. The Washington provision reads: "All persons interested in the cause of action, or necessary to the complete determination of the questions involved, shall, unless otherwise provided by law, be joined as plaintiffs when their interest is in common with the party making the complaint, and as defendants when their interest is adverse to the plaintiff." Wash. Comp. Stat. (Rem. 1922) § 189.

[49] See, for example, Henry v. Bank, 302 Mo. 684, 259 S.W. 462 (1924) (grantor necessary party to suit affecting title to land that he conveyed with covenants of warranty); South Penn Oil Co. v. Miller, 175 Fed. 729 (C. C. A. 4th, 1909) (lessor necessary party to suit affecting title to the leased land); Matagorda Canal Co. v. Markham Irr. Co., 154 S. W. 1176 (Tex. Civ. App. 1913).

[50] Phillips v. Poole, 96 Ga. 515, 23 S. E. 504 (1895) (joint obligees must join); Meredith v. Punxsutawney Nat'l Bank, 119 Atl. 586 (Pa. 1923) (joint contractees); Lee v. Ricca, 241 Pac. 508 (Ariz. 1925); Pitts v. Crane, 236 Pac. 475 (Or. 1925); Natter v. Blanchard Co., 153 App. Div. 814, 138 N. Y. Supp. 969 (1st Dept. 1912); Davis & Holmes Land Co. v. First Nat'l Bank, 152 N. E. 723 (Ind. 1926); Eno v. Knox, 44 S. D. 343, 184 N. W. 206 (1921); Fineman v. Cutler, 116 Atl. 819 (Pa. 1922).

Tenants in common are, of course, allowed to join as plaintiffs under the codes in personal actions as at common law. Sawers Grain Co. v. Goodwin, 83 Ind. App. 556, 146 N. E. 837 (1926) (conversion). They are now also allowed to join in the so-called "real actions." Hunt v. Mounts, 101 W. Va. 205, 133 S. E. 323 (1926) (ejectment); see Shelby v. Shelby, 194 Ky. 141, 238 S. W. 371 (1922) (defendant may object if only one co-tenant sues in ejectment).

[51] See *supra* notes 24-28.

whereas at law all persons whose interests were interpreted as joint had to sue together as plaintiffs in contract or tort, the codes provide that, as in equity formerly, "if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason thereof being stated in the complaint." [52] Some of the many situations in which this provision is used are indicated in the footnote.[53]

Nonjoinder. Many of the codes specifically provide that a special demurrer should be used to raise the objection of a nonjoinder of plaintiffs, when such defect is apparent on the record.[54] No distinction is taken between tort and contract actions as at common law. The code decisions indicate a uniform holding that the objection will be waived if the special demurrer is not used in this situation.[55] If the nonjoinder is not apparent

---

[52] See statutes cited *supra* note 48; Conn. Gen. Stat. (1918) § 5640.

[53] Hall v. So. Pac. Ry., 180 Pac. 20 (Cal. 1919) (employer, after paying workmen's compensation award, refuses to join employee to sue third party wrongdoers); Grain Dealers Ins. Co. v. Missouri, K. & T. Ry., 98 Kan. 344, 157 Pac. 1187 (1916) (insured, after receiving insurance, refuses to join with insurer in suing third party wrongdoer); Lashley v. Lashley, 212 Ala. 225, 102 So. 229 (1924) (one beneficiary refuses to join others in suit to enforce trust); Snodgrass v. Snodgrass, 231 Pac. 237 (Okla. 1924) (some of legatees refuse to join others in suit to cancel deeds); Payne v. Meisser, 176 Wis. 432, 187 N. W. 194 (1922) (reversioner refuses to join in suit to prevent life tenant from committing waste).

[54] In the following codes, a provision is found that the defendant may demur when it apears from the record that there is a defect of parties plaintiff or defendant. Cal. C. C. P. (1923) § 430-1; Ga. Code (1926) § 5631; Ind. Ann. Stat. (Burns, 1926) § 362; Iowa Code (1924) § 11130; Ky. Civ. Ann. Code (Seymour, 1924) § 92; Mont. Rev. Code (1921) § 9131; Neb. Comp. Stat. (1922) § 8610; Nev. R. L. (1912) § 5040; N. M. Ann. Stat. (1915) § 4110; N. D. Comp. Laws (1913) § 7442; Ohio Gen. Ann. Code (Page, 1926) § 11309; Okla. Comp. Stat. (1921) §268; Or. Laws (1920) § 68; S. D. Rev. Code (1919) § 2348; S. C. C. C. P. (1922) § 401; Utah Comp. Laws (1917) § 6568; Wash. Comp. Stat. (1922) § 259; Wis. Stat. (1921) § 2649; Wyo. Comp. Stat. (1920) § 5651. And see, for statutes going even further in specifically adopting the old equity practice, *infra* note 57.

In the statutes here cited, "defect" is interpreted by a majority of the courts to mean nonjoinder only. Rich v. Fry, 196 Ind. 303, 146 N. E. 393 (1925); Dolan v. Hubinger, 109 Iowa 408, 80 N. W. 514 (1899). *Contra:* State v. Trimble, 262 S. W. 357 (Mo. 1924) (includes misjoinder).

[55] Pulkrabek v. Bankers M't'ge Corp., 238 Pac. 347 (Or. 1925); State v. Trimble, *supra* note 54. See Fla. Rev. Gen. Stat. (1920) §§ 2566-7; Va. Gen. Laws (1923) § 6118. The demurrer must designate the parties to be joined. Rich v. Fry, *supra* note 54. Dilatory pleas such as this one are very strictly construed against the person using them. Anderson v. East Oregon Lumber Co., 106 Or. 459, 211 Pac. 937 (1923) (demurrer for "defective parties plaintiff" held not sufficient as a demurrer for "defect of parties plaintiff"). The New York practice requires that nonjoinder be set up by motion. N. Y. Civ. Prac. Act, § 278, rules 102, 105.

on the face of the record, it must be set up specially in the answer, the omitted parties being designated.[56]

Some codes expressly provide that, as in equity formerly, a plaintiff may amend if nonjoinder is proved.[57] And the courts still have the power to refuse to proceed unless the complaint is amended to bring in parties whose interests will be directly affected by any decree that may be rendered.[58] It is seldom, therefore, that the plaintiff's action is dismissed because of a defect of parties.[59]

Permissive joinder. A distinct departure from the common law rules of joinder, based as they were on the distinction between joint and several interests, is seemingly found in the code provision: "All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs." [60] This statement, it will be noticed, copies the phraseology in which the former equity practice was usually described. Furthemore, the framers of the original New York Code, as is well known, stated that in general they meant to apply equity procedure to all actions under the code.[61] Unfortunately, however, they used "and" instead of "or," thus making

[56] McCormack v. Bertschinger, 237 Pac. 363 (Or. 1925); Pye v. Eagle Lake Lumber Co., 66 Cal. App. 584, 227 Pac. 193 (1924). In cases when the defendant cannot know the names of all parties who are omitted, he probably would not be required to name them. See Travis v. First Nat'l Bank, 210 Ala. 620, 98 So. 890 (1924) (not under code). In New York, nonjoinder will be waived if not raised by a preliminary motion. Porter v. Lane Const. Corp., 212 App. Div. 528, 209 N. Y. Supp. 54 (4th Dept. 1925).

[57] The provision reads that no action shall be defeated for nonjoinder or misjoinder of plaintiffs or defendants. See, for example, Conn. Gen. Stat. (1918) § 5646; R. I. Gen. Laws (1923) § 4871; N. J. Comp. Stat. (Supp. 1924) § 163-285; N. Y. Civ. Prac. Act (1920) § 192; Va. Gen. Laws (1923) § 6102. See Aven v. Singleton, 132 Miss. 256, 96 So. 165 (1923).

[58] Fineman v. Cutler, *supra* note 50; Gooch v. Elliott, 113 S. E. 72 (S. C. 1922).

[59] But see Wolfenbarger v. Britt, 105 Neb. 773, 181 N. W. 932 (1921) (amendment not allowed).

[60] Alaska Comp. Laws (1913) § 870; Ark. Dig. Stat. (1921) § 1095; Cal. C. C. P. (1923) § 378; Conn. Gen. Stat. (1918) § 5640; Idaho Comp. Stat. (1919) § 6645; Ind. Ann. Stat. (Burns, 1926) § 270 ("shall be joined"); Iowa Code (1924) § 10969; Kan. Rev. Stat. (1923) § 60-410; Ky. Civ. Ann. Code (Seymour, 1924) § 22; Mo. Rev. Stat. (1919) § 1157; Mont. Rev. Code (1921) § 9077; Neb. Comp. Stat. (1922) § 8535; Nev. R. L. (1912) § 4990; N. M. Ann. Stat. (1915) § 4071; N. C. Cons. Stat. (1919) § 455; N. D. Comp. Laws (1913) § 7403; Ohio Gen. Ann. Code (Page, 1926) § 11254; Okla. Comp. Stat. (1920) § 218; Or. C. C. P. (1920) § 393; Porto Rico R. S. & Codes (1911) § 5046; S.C. C. C. P. (1922) § 360; S. D. Rev. Code (1919) § 2313; Utah Comp. Laws (1917) § 6506; Wis. Stat. (1921) § 2602; Wyo. Comp. Stat. (1920) § 5592; U. S. Eq. Rules (1912) rule 37, U. S. Comp. Stat. (1916) § 1536. For the more liberal statutes, see *infra* note 75.

[61] FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS (1848) 124.

the requirement a double-barrelled one. In accordance with familiar rules of interpretation, however, we would expect to find that the code rule for permissive joinder had been interpreted in the light of the equity decisions which had given it content. We would expect joinder to be allowed whenever the subject matter of the actions could, in the opinion of the court, be settled in one action conveniently and without prejudice to the defendant. But, at least in actions formerly triable at law, some code courts have required that all the plaintiffs have an interest in the whole subject of the action and in all the relief demanded, disregarding the meaning which the code provisions had assumed through interpretation.

The provision that all parties must be interested in the relief demanded has proved the more severe restriction. Thus, when obligees with separate interests in the same instrument attempt to join in suing the obligor for a money judgment, there is a misjoinder.[62] Some code courts, however, realizing that a multiplicity of suits may be avoided without inconvenience at trial or prejudice to the defendant, have allowed joinder in this situation,[63] stressing that a lump sum recovery is sought. When contractees, under contracts which were separate but involved common questions of law or fact, have attempted to join in suing the obligor, a misjoinder has been declared.[64] As at common law, if the interests of the plaintiffs in a contract are interpreted as joint or several, joinder is allowed.[65]

When owners of separate interests in the same land have been injured by a single tortious act of the defendant and join to recover damages,[66] or possession,[67] many code courts allow recovery. Clearly, no one plaintiff is interested in the relief demanded any more than in the contract cases just noted. Though the case would not often arise, it would seem that the same result should be reached when owners of separate interests in

---

[62] Keary v. Mutual Reserve Ass'n, 30 Fed. 359 (E. D. Mo. 1887); Goodnight v. Goar, 30 Ind. 418 (1868).

[63] Loomis v. Brown, 16 Barb. 325 (N. Y. 1853); Rizer v. Callen, 27 Kan. 339 (1882). Sureties on the same instrument are allowed to sue together for reimbursement. Hudson v. Aman, 158 N. C. 429, 74 S. E. 97 (1912); see Lord & Taylor v. Yale Mfg. Co. 230 N. Y. 132, 141, 129 N. E. 346, 348 (1920).

[64] Ballew Lumber Co. v. Mo. Pac. Ry., 288 Mo. 473, 232 S. W. 1015 (1921).

[65] See Chrage v. Hutt, 252 S. W. 658 (Mo. 1923).

[66] Schiffer v. Eau Claire, 51 Wis. 385 (1881); Clark v. McClain Fire Brick Co., 100 Ohio St. 110, 125 N. E. 877 (1919) (damages and injunction); Shepard v. Manhattan Ry., 117 N. Y. 442, 23 N. E. 30 (1889) (same).

[67] See Hunt v. Mounts, *supra* note 50. If the defendant files a special demurrer, he can *require* the plaintiff to bring in other co-tenants. Shelby v. Shelby, *supra* note 50.

a chattel [68] sue together for injury to it caused by the defendant's act.

Joinder is not allowed, in a suit for damages, when the defendant's single act injures lands of which the plaintiffs each own separate parcels [69] or chattels owned separately by those who are attempting to join.[70] If an injunction is sought in such a case, however, the courts will allow joinder.[71] Likewise it is permitted when a number of persons who have bought stock [72] or land [73] sue together to be put in statu quo. A few courts will allow the plaintiffs to recover damages in these misrepresentation cases,[74] obviously in acordance with the meaning of the code joinder provision as interpreted by courts of equity at the time the early codes were adopted.

Misjoinder. It is expressly stated in some of the codes that the proper way to object to a misjoinder of plaintiffs that appears on the record is by a special demurrer.[75] If it is not used the objection is waived.[76] If no express provision is made in the code, it is usual to follow the equity rule which also required a special demurrer.[77] If the misjoinder does not appear of record, the code courts universally follow the equity practice of requiring a plea in abatement.[78] When a misjoinder is declared, a number of the codes specify that the plaintiff shall be allowed to amend.[79] Presumably, in the absence of such a provision the

---

[68] *Contra:* St. Louis & S. F. Ry. v. Dickerson, 29 Okla. 386, 118 Pac. 140 (1911).

[69] Hellams v. Switzer, 24 S. C. 39 (1885); Tate v. Ohio & M. Ry., 10 Ind. 174 (1858); Burghen v. Erie Ry., 123 App. Div. 201, 108 N. Y. Supp. 311 (4th Dept. 1908).

[70] Bort v. Yaw, 46 Iowa 323 (1877); Taylor v. Brown, 92 Ohio St. 287 (1915).

[71] Krocker v. Westmoreland Mill Co., 274 Pa. 143, 117 Atl. 669 (1922); Younkin v. Milwaukee L. H. & T. Co., 112 Wis. 15, 87 N. W. 861 (1901).

[72] Spencer v. McGuffin, 190 Ind. 308, 130 N. E. 407 (1921); Ellsworth v. Trinkle, 96 Kan. 666, 153 Pac. 543 (1915).

[73] Grover v. Marott, 192 Ind. 551, 136 N. E. 81 (1922) (damages allowed).

[74] *Supra* note 73.

[75] The statutes (cited *supra* note 54) also provide that a special demurrer shall raise the question of misjoinder of parties in the following states: California, Georgia, Montana, New Jersey, Utah. See also Fla. Rev. Gen. Stat. (1920) §§ 2566–7; Miss. Ann. Code (Hem. 1917) § 359.

[76] Frost v. Long & Co., 213 Pac. 1107 (Mont. 1923); Linder v. Wimberly, 158 Ga. 285, 123 S. E. 129 (1924).

[77] Parker v. McGinty, 77 Colo. 458, 239 Pac. 10 (1925); Billy v. McGill, 240 Pac. 119 (Okla. 1925). Under New York practice (Civ. Prac. Act. § 278, rules 102, 105) motions are substituted for demurrers, and the motion must be made before trial. Russian Reinsurance Co. v. Stoddard, 211 App. Div. 132, 207 N. Y. Supp. 574 (3d Dept. 1925).

[78] Forbes v. Jamestown, 212 App. Div. 332, 209 N. Y. Supp. 99 (4th Dept. 1925) (too late after verdict); Hunt v. Mounts, *supra* note 50, (1926) 33 W. Va. L. Q. 101 (waived by failure to plead in abatement).

[79] *Supra* note 57.

code courts would reach the same result, following the equity practice.

JOINDER OF PLAINTIFFS—LATER CODE PROVISIONS

In the previous section it was pointed out that because of the restricted meaning given them by the court the original code provisions as to joinder largely failed of their purpose in making the liberal equity rules applicable to all actions. The provisions were especially defective in two regards. As in the case of the code generally, they are couched in terms of absolute declaration and restriction rather than as general directions to guide but not to bind the court in the exercise of its discretion. And they contained the troublesome requirement of an "interest in obtaining the relief demanded" in all the plaintiffs. Following the English precedents, a few jurisdictions have recently adopted provisions which should largely, perhaps entirely, do away with those difficulties. The New York provision reads as follows: "All persons may be joined as plaintiffs in one action 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." [80] Discretion is given to the trial judge to order separate trials whenever he believes that joinder would embarrass or delay the trial. [81]

[80] N. Y. Civ. Prac. Act (1920) § 209. The provision regarding alternative joinder is discussed below. The English rule, Order 16, Rule 1, is practically identical. See *infra* note 84.

The New Jersey provisions reads: "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. And 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." N. J. P. L. (1912) p. 378, § 4. *Cf.* definition of "transaction" in the rules. N. J. P. L. (1912) p. 386, r. 13.

The Washington statute reads: "All persons interested in the cause of action or necessary to the complete determination of the questions involved, shall unless otherwise provided by law, be joined as plaintiffs when their interest is in common with the party making the complaint, and as defendants when their interest is adverse to the plaintiff." Wash. Comp. Stat. (Rem. 1922) § 189. In Arkansas the statute authorizing consolidation of suits has been used to secure more extensive joinder of parties. Ark. Dig. Stat. (1921) § 1081; Little Rock Gas & Fuel Co. v. Coppedge, 116 Ark. 334, 172 S. W. 885 (1915).

[81] The New York and English statutes, *supra* note 80, conclude: " . . . provided that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found entitled to relief, for the relief to which he or they may be entitled."

Under these provisions, a large number of persons who were defrauded into buying worthless stock by acts of the defendant were allowed to join and each recover damages, the court stating that the common questions of law or fact in such a case were of the requisite "substantial importance as compared with all the issues." [82] Pure tort claims for damages to each of several plaintiffs whose property was injured in an explosion for which the defendant was responsible were allowed in a single action.[83] Other decisions of this general nature indicate that the new rules, at least so far as these particular ones applying to parties plaintiff are concerned, are being liberally and reasonably interpreted. In each case the question is made to turn on the very practical question whether any common question of law or fact will arise in it.[84] It is to be expected that other jurisdictions will adopt similar rules.

JOINDER OF DEFENDANTS—BEFORE THE CODES

Compulsory joinder at common law. In contract. Joint obligors had to be sued together in the law courts.[85] To alleviate

[82] Akely v. Kinnicutt, 238 N. Y. 466, 144 N. E. 682 (1924), (1925) 34 YALE LAW JOURNAL 192; *cf.* also Drincqbier v. Wood [1899] 1 Ch. 393.

[83] Metropolitan Ins. Co. v. Lehigh Valley Ry., 94 N. J. L. 236, 109 Atl. 743 (1920).

[84] *Cf.* Akeley v. Kinnicutt, *supra* note 82: "The common issues are basic, and would seem to be the ones around which must revolve the greatest struggle, and to which must be directed the greatest amount of evidence." See also Peacock v. Tata Sons, 206 App. Div. 145, 200 N. Y. Supp. 656 (1st Dept. 1923); Fleitmann & Co., Inc., v. Colonial Finance Corp., 203 App. Div. 827, 197 N. Y. Supp. 125 (1st Dept. 1922) (joinder allowed in a suit for the conversion of gloves by *A* and *B*, each severally owning a part, and *C* having a lien on the remainder); (1923) 32 YALE LAW JOURNAL, 384; (1924) 33 *ibid.* 817; (1925) 35 *ibid.* 84; (1921) 21 COL. L. REV. 113; Sunderland, *Joinder of Actions* (1919) 18 MICH. L. REV. 571. The provision should be considered with reference to the joinder of defendants provision discussed below. Joinder of parties in the alternative is also discussed below. In England the rule originally did not contain the "same transaction" phrase and the clause as to any common question of law or fact. It was finally held by the House of Lords, after much conflict below, that the rule did not relate to joinder of causes. Smurthwaite v. Hannay [1894] A. C. 494. This so greatly restricted the operation of the rule that it was expanded to its present form in 1896, and the courts have held that thereby the rules were extended. Payne v. British Time Recorder Co. [1921] 2 K. B. 1; Thames v. Moore [1913] 1 K. B. 555; Universities of Oxford and Cambridge v. Gill [1899] 1 Ch. 55; Bedford v. Ellis [1901] A. C. 1. It is unfortunate that in New York this experience was not appreciated, and that the joinder of causes restrictions have been continued with already unfortunate results.

[85] Keller v. Blasdell, 1 Nev. 491 (1865); People v. Sloper, 1 Idaho 158 (1867); Needham v. Heath, 17 Vt. 223 (1845); see Scott v. Godwin, 1 Bos. & P. 67, 73 (1797). In the case of executors, the plaintiff had to sue all

some of the hardships that resulted from this technical rule, some exceptions were allowed however. When one of the joint obligors was out of the jurisdiction, the plaintiff could "outlaw" him and proceed against the others jointly.[86] Also, when one joint obligor was discharged by operation of law after the contract had been made, the plaintiff could sue all the obligors but discontinue the suit as to the defendant discharged.[87] If one of the defendants could not be sued for some reason such as infancy existing at the time the contract was made, the usual procedure was to sue only the remaining obligors.[88] And, finally, if the plaintiff reasonably did not know before suit that the joint obligors had a dormant partner, the defendants sued could not plead nonjoinder even in abatement.[89] When one of several joint contractors died, the plaintiff was obliged to sue only the survivor or survivors.[90]

In the so-called quasi-contractual actions, the rules as to contract actions applied whenever the plaintiff had to rely on a contract to prove his case, and, accordingly, all joint contractors in these cases had to be joined as defendants.[91]

In tort. While, as will be noticed later,[92] the plaintiff had his option of suing joint tortfeasors jointly or severally, there was one case in which defendants in tort actions had to be joined; where joint tenants or tenants in common were sued for omitting to do an act which, as such tenants and not otherwise, they

---

who proved the will. Hensloe's Case, 9 Co. 36b (42 Eliz.). See also Burdick, *Joint and Several Liability of Partners* (1911) 11 COL. L. REV. 101.

[86] Sheppard v. Baillie, 6 Term R. 327 (1795). The same result was reached in almost all the states in this country, although outlawry did not exist here. The usual substitute was a return of *non est inventus*. Dennett v. Chick, 2 Me. 191 (1823). *Contra:* McCall v. Price, 1 McC. L. 82 (S. C. 1821).

[87] Boville v. Wood, 2 M. & S. 23 (1813) (bankruptcy); Noke v. Ingham, 1 Wils. 89 (1745) (same); Ivey v. Gamble, 7 Port. 545 (Ala. 1838) (statute of limitations). But see Belden v. Curtis, 48 Conn. 32 (1880).

[88] Burgess v. Merrill, 4 Taunt. 468 (1812); Gibbs v. Merrill, 3 Taunt. 307 (1810). If the plaintiff sued all the original obligors including the infant, the practice varied. In England, he could not discontinue the action as to the infant and proceed against the others. Boyle v. Webster, 17 Q. B 950 (1852). The opposite result was generally reached in this country See, for example, Hartness v. Thomson, 5 Johns. 160 (N. Y. 1809).

[89] Tomlinson v. Spencer, 5 Cal. 291 (1855); N. Y. Dry Dock Co. v. Treadwell, 19 Wend. 525 (N. Y. 1838) (could not plead in abatement if plaintiff did not know about the dormant partner at the time the contract was made) See generally, Burdick, *op. cit. supra* note 85.

[90] Murphy v. Branch Bank, 5 Ala. 421 (1843); Weaver v. Shryock, 6 Serg. & R. 262 (Pa. 1820); Executor's Action, 4 Leon. 193 (31 Eliz.). By the weight of authority, the death of the obligor who was not joined had to be averred in the declaration. Blackwell v. Ashton, Sty. 50 (23 Car.).

[91] Buddle v. Willson, *supra* note 1; Walcott v. Canfield, 3 Conn. 194 (1819).

[92] See *infra* note 106.

should have performed. As the common title had to be proved, it was thought necessary to have all the tenants before the court.[93]

When one joint tortfeasor died, the plaintiff could sue the survivors jointly, but he could not join with them the personal representative of the deceased wrongdoer even if the tort were one for which an action would have survived as against that representative alone.[94]

Nonjoinder. From early times at law, in a suit on a bond where the defect was not apparent on the face of the record, the plaintiff had to raise the question of nonjoinder of defendants in abatement or else he waived the point.[95] The rule was later extended to all contract actions in which the defect of defendants was not apparent.[96] The plea in abatement had to show that the co-contractor was alive and could be sued.[97] If the defect appeared in the pleadings, the majority rule was to allow it to be raised by a general demurrer, or in error or arrest of judgment.[98] In tort cases, since the plaintiff had his option of suing joint tortfeasors jointly or separately, the question of nonjoinder was not important.[99] In the limited class of actions in which the suit was against joint tenants or tenants in common for a joint tort, however, a plea in abatement effectively raised the question of nonjoinder.[100]

Permissive joinder at common law. In contract. Should the contract on which the plaintiff sued be interpreted by the court as joint and several, the plaintiff had his option of suing the obligors alone or together.[101] He could not sue more than one,

[93] Low v. Mumford, 14 Johns. 426 (N. Y. 1817). The same evidently was true of co-parceners. ARCHBOLD, PLEADING (1824) 72.

[94] Johnson v. Cunningham, 56 Ill. App. 593 (1894); see Union Bank v. Mott, 27 N. Y. 633 (1863).

[95] Cabell v. Vaughn, 1 Saund. 291 (21 Car. II) (with extensive note).

[96] Rice v. Shute, 5 Burr, 2611 (10 Geo. III); Allen v. Lucket, 3 J. J. Marsh. 164 (Ky. 1830); First Nat'l Bank v. Hamor, 49 Fed. 45 (C. C. A. 9th, 1892); Mountstephen v. Brooke, 1 Barn. & Ald. 224 (1818). The rule was the same in joint and several contracts. See 1 Saund. 291, n. 2; Minor v. Mechanics Bank, 1 Pet. 46 (U. S. 1828). And in the quasi-contract cases where the plaintiff had to rely on the contract to prove his case. See Buddle v. Willson, *supra* note 1.

[97] Ascue v. Hollingsworth, Cro. Eliz. 544 (39 Eliz.). But in the case of matters of record such as recognizances and judgments, it need only appear that there was another obligor. Needham v. Heath, *supra* note 85; Gilmas v. Rives, 10 Pet. 298 (U. S. 1836).

[98] Harwood v. Roberts, 5 Greenl. 441 (Me. 1828); King v. Young, 2 Anst. 448 (34 Geo. III); Wisner v. Catherwood, 225 Ill. App. 471 (1922).

[99] Nonjoinder could not be pleaded. Fisher v. Cook, 23 Ill. App. 621 (1887); Livingston v. Bishop, 1 Johns. 290 (N. Y. 1806); Mitchell v. Tarbutt, 5 Term R. 649 (1794) (quasi-contract).

[100] Low v. Mumford, 14 Johns. 426 (N. Y. 1817).

[101] Poullain v. Brown, 80 Ga. 27 (1887) (sued one only); Lilly v. Hodges,

though, unless he did join them all.[102] And if one of such obligors died, the plaintiff could treat the contract as several and sue the personal representative of the deceased contractor, or as joint and sue the surviving obligor or obligors.[103]

As might be expected, the plaintiff could not joint obligors on several contracts,[104] nor could he join obligors whose promises appeared on the same instrument if the court interpreted the promises as several.[105]

In tort. The law courts broke away from the distinction between joint and several interests in their rules as to joinder of defendants in tort actions. As a result, a plaintiff could sue joint tortfeasors jointly or severally as he saw fit.[106] Included within the category of joint tortfeasors, under the American cases, for the purpose of joinder at least, were persons whose independent but concurrent acts caused a single injury to the plaintiff. A typical case of such concurrent action was the situation where two defendants, each driving negligently, collided and injured the plaintiff.[107]

---

8 Mod. 166 (9 Geo. I) (same); Greer v. Miller, 2 Overt. 187 (Tenn. 1812) (sued them jointly); see Maiden v. Webster, 30 Ind. 317 (1868).

[102] Claremont Bank v. Wood, 12 Vt. 252 (1840). And, of course, if the plaintiff started out on the theory that the contract was several, and sued one obligor, he could not later join all the other obligors in a single suit. Bangor Bank v. Treat, 6 Me. 207 (1829). Or, if the plaintiff sued all the obligors on the theory that the contract was joint, he could not take a judgment against one of them alone. Gibbons v. Surber, 4 Blackf. 155 (Ind. 1836). If the contract was treated as joint, the exceptions noted above with regard to joint contracts applied.

[103] May v. Hanson, 6 Cal. 642 (1856) (could not sue them to together); Eggleston v. Buck, 31 Ill. 254 (1863) (same). In Enys v. Donnithorne, 2 Burr. 1190 (1761), the plaintiff sued only the personal representative. In Lanier v. Irvine, 24 Minn. 116 (1877), the plaintiff sued only the surviving obligors.

[104] Mann v. Sutton, 4 Rand. 253 (Va. 1826); Register v. Casperson, 3 Harr. 289 (Del. 1844); Addicken v. Schrubbe, 45 Iowa 315 (1876); see Northern Texas Traction Co. v. Clark, 272 S. W. 564 (Tex. Civ. App. 1925).

[105] Gibson v. Lupton, 9 Bing. 297 (1832). As the contract of each surety with the other sureties was considered several, a surety who was seeking contribution at law had to sue each co-surety separately and recovered only that surety's proportionate amount. Browne v. Lee, 6 Barn. & C. 689 (1827); Easterly v. Barber, 66 N. Y. 433 (1876).

[106] Sutton v. Clarke, 6 Taunt. 29 (1815); Vary v. Burlington Ry., 42 Iowa 246 (1875). If he obtained a judgment against one tortfeasor alone and satisfied it, he could not later sue another one of the wrongdoers although he later found he could have proved more damages in the first suit. Westbrook v. Mize, 35 Kan. 299 (1886).

[107] Foley v. Lord, 232 Mass. 368, 122 N. E. 393 (1919); Colegrove v. New York & N. H. Ry., 20 N. Y. 492 (1859); Klauder v. McGrath, 35 Pa. 128 (1860) (joint owners of wall negligently allowed it to deteriorate and fall); Consolidated Ice Machine Co. v. Kiefer, 26 Ill. App. 466 (1887) (successive negligence of two defendants co-operating to build a structure); Sharon v. Anahma Realty Corp., 123 Atl. 192 (Vt. 1924). For the English

If a servant, in the course of his employment, committed a tort for which the master would have been responsible (if sued alone) only under the doctrine of respondeat superior, there was a doubt whether the master and servant could be joined in the action for damages. Most cases seemed to refuse joinder.[108] A similar question arose in the analogous principal-agent cases, where the agent injured the third person.[109] Of course, if the master or principal directed the commission of the tort, the plaintiff could at his option, always join him with the servant or agent.[110]

Whenever the court interpreted the acts of the wrongdoers as "separate," no joinder was allowed.[111] Within this rule, a plaintiff who was slandered at the same time by two people could not join them.[112] And when two people each converted the plaintiff's goods by unconnected acts, it seems that joinder was not allowed.[113]

Misjoinder. The law courts nonsuited the plaintiff in a contract action if the misjoinder did not appear in the pleadings, unless he proved the contract as he pleaded it.[114] If the misjoinder appeared in a contract action, the rule was also stringent and the defendant could raise the point by a general demurrer.[115] A tort action, however, was not defeated by misjoinder except as to those against whom no cause of action was proved. Thus, if a plaintiff alleged a joint tort by several defendants who were joined, and he proved that the act was committed by only some

---

view, see The Koursk [1924] P. 140, 40 T. L. R. 399; (1925) 34 YALE LAW JOURNAL 335; (1924) 24 COL. L. REV. 891; 2 CAMBRIDGE L. J. 243; and for the decision below, see [1923] P. 206; (1924) 37 HARV. L. REV. 619; (1924) 36 JURID. REV. 178; (1924) 40 L. Q. REV. 334. See also Little Schuylkill Co. v. Richard's Adm'r, 57 Pa. 142 (1868); (1920) 9 A. L. R. 940 annotation; 12 L. R. A. (N. S.) 669 (1908) annotation; (1927) 27 COL. L. REV. 754. *Cf.* Ader v. Blau, a recent New York case discussed *infra* note 163.

[108] Parsons v. Winchell, 5 Cush. 592 (Mass. 1850); Davis v. Groner, 121 Atl. 446 (N. J. 1923); The Koursk, *supra* note 107; McNamara v. Chapman, 123 Atl. 229 (N. H. 1923); Bartlett v. Sullivan, 249 Ill. App. 410 (1927), 21 ILL. L. REV. 522; *cf.* (1917) 30 HARV. L. REV. 525. See Michael v. Alestree, 2 Lev. 172 (28 Car. II); Wright v. Compton, 53 Ind. 337 (1876). For cases under the code, see *infra* notes 144, 145.

[109] The Jungshoved, 290 Fed. 773 (C. C. A. 2d, 1923); (1924) 22 MICH. L. REV. 255. *Cf.* Moreton v. Hardern, 4 Barn. & C. 223 (1825). For cases under the code, see *infra* note 144.

[110] Hawkesworth v. Thompson, 98 Mass. 77 (1867); Moore v. Fitchburg Ry., 4 Gray 465 (Mass. 1855) (master gave standing instructions).

[111] See Dickey v. Willis, 215 Mass. 292, 102 N. E. 336 (1913).

[112] Chamberlain v. White, Cro. Jac. 647 (20 Jac. I).

[113] See Nicoll v. Glennie, 1 M. & S. 588 (1813).

[114] Livingston's Ex'rs v. Tremper, 11 Johns. 101 (N. Y. 1814); Shirreff v. Wilks, 1 East 48 (1800); Kimmel v. Schultz, 1 Ill. 169 (1826).

[115] State Treasurer v. Friott, 24 Vt. 134 (1852); Wooster v. Northrup, 5 Wis. 245 (1856). It is usually stated also that the objection might be raised in error or in arrest. Cunningham v. Orange, 52 Atl. 269 (Vt. 1902).

of them, the action was merely dismissed as to those not implicated.[116]

Joinder in equity. None of the artificiality of the common law joinder rules appeared in chancery practice. The equity rule that all parties had to be joined if the transaction could not be settled without directly affecting their interest has already been discussed.[117] It was also noted above, that any abrupt division between plaintiffs and defendants in equity would be unreal because the plaintiff could joint as defendants those who would not or could not join as plaintiffs and should ordinarily have been so classed.[118] That discussion indicates that the statement "all parties should be interested in the subject of the action and in the relief demanded," did not lay down a rigid requirement for every case but was merely the phraseology used to describe a system built around an ideal of convenient trial practice, with considerable flexibility to meet new situations. This view is further strengthened by the cases involving permissive joinder of defendants. For example, a plaintiff who was justifiably in doubt as to the facts could joint two sets of sureties as defendants, the one of whom was responsible for the acts of a common principal up to a certain date and the other after that date. This was true although proof at the trial would very likely show that only one of the defendant owed the plaintiff.[119] A plaintiff could join as defendants, in a suit to recover a trust fund, all in whose hands portions of the fund had come.[120] In a suit to quiet title, he could sue all who made adverse claims to the property.[121] If the plaintiff sued to set aside fraudulent conveyances of land, he could join all who claimed portions or interests in it, although their interests had been received at different times through conveyances entirely separate.[122]

JOINDER OF DEFENDANTS—UNDER THE CODES

Compulsory joinder. The code provision requiring joinder of all parties united in interest has already been noted in connec-

[116] Swigert v. Graham, 7 B. Mon. 661 (Ky. 1847); Keer v. Oliver, 61 N. J. L. 154 (1897); Subley v. Mott, 1 Wils. 210 (1747). In the exceptional case of slander or conversion where the tort was regarded as "several," the objection to misjoinder had to be raised before verdict if the verdict was against one defendant only. Burcher v. Orchard, Sty. 349 (1652). But not when a judgment against all of the defendants was given. Nicoll v. Glennie, *supra* note 113.

[117] See *supra* notes 19–28.

[118] See *supra* notes 24–27.

[119] State v. Brown, 58 Miss. 835 (1881). See also cases *infra* note 169.

[120] Blake v. Van Tilborg, 21 Wis. 672 (1867).

[121] Carlson v. Curren, 48 Wash. 249, 93 Pac. 315 (1908).

[122] Hultberg v. Anderson, 170 Fed. 657 (D. Kan. 1909); Bauknight v. Sloan, 17 Fla. 284 (1879).

tion with joinder of plaintiffs.[123] In its application to joinder of defendants, it has resulted in no substantial change from the previous systems. Thus, except as changed by special statutes, all joint contractors must be joined in a suit to recover damages for breach of the contract.[124] Special statutes modifying to a considerable extent the common law rule or providing that joint contractors may be sued as are several contractors are, however, quite general.[125] The former "indispensable" parties of equity must still be joined,[126] while the "necessary" parties must be joinded except in certain cases where they cannot be practicably brought before the court.[127] Under most codes the defendant may enter a special demurrer for a defect of defendants, when that defect appears in the pleadings.[128] If he does not do so, the nonjoinder is waived.[129] If the defect does not appear in the pleadings, the defendant must answer in abatement.[130] In general, the plaintiff may amend to supply the defect of parties.[131]

Permissive joinder. The general code provision is that "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary

---

See, as to joinder of defendants generally, Creager v. Beamer Synd., 274 S. W. 323 (Tex. Civ. App. 1925); Ferguson v. Mansfield, 114 Tex. 112, 263 S. W. 894 (1924); Stewart v. Miller, 271 S. W. 311 (Tex. Civ. App. 1925).

[123] See *supra* note 48.

[124] Wolfenbarger v. Britt, *supra* note 59; Camp v. Gress, 250 U. S. 308, 39 Sup. Ct. 478 (1918); Delaware Co. Nat'l. Bank v. King, 109 App. Div. 553, 95 N. Y. Supp. 956 (1st Dept. 1905); Slutts v. Chafee, 48 Wis. 617 (1880).

[125] See statutes discussed in Burdick, *op. cit. supra* note 85; *cf.* also, (1926) 26 COL. L. REV. 771; (1922) 32 YALE LAW JOURNAL 296.

[126] Egyptian Novaculite Co. v. Stevenson, 8 F. (2d) 576 (C. C. A. 8th, 1925), quoting Shields v. Barrow, *supra* note 20; see *supra* note 21; Castle v. City of Madison, 113 Wis. 346, 89 N. W. 156 (1902); Mahr v. Norwich Union Fire Ins. Soc., 127 N. Y. 452, 25 N. E. 391 (1891) (a somewhat harsh decision).

[127] Pacific Southwest Trust Co. v. Mayer, 244 Pac. 248 (Wash. 1926); O'Connell v. Ryan, 127 Misc. 350, 216 N. Y. Supp. 590 (Mun. Ct. 1926); Grazioso v. Hirschfield, 128 Atl. 541 (N. J. 1925); Stephen v. Howells Sales Co., 16 F. (2d) 805 (S. D. N. Y. 1926); Davis & Holmes Land Co. v. First Nat'l Bank, *supra* note 50; Am. Smelting & Ref'g Co. v. Hicks, 65 Colo. 146, 172 Pac. 1055 (1918).

[128] See statutes cited *supra* note 54.

[129] Crowley v. Calhoun, 161 Ga. 354, 130 S. E. 563 (1925); Wilson & Co. v. Hartford Fire Ins. Co., 300 Mo. 1, 254 S. W. 266 (1923).

[130] Berringer v. Krueger, 69 Cal. App. 711, 232 Pac. 467 (1924); Gandia v. Porto Rico Fertilizer Co., 291 Fed. 18 (C. C. A. 1st, 1923), certiorari denied, 44 Sup. Ct. 37; Lapayowker v. Levitzky, 130 Atl. 627 (N. J. 1925) (without code provision). Dickenson v. Hawes, 32 Ga. App. 173, 122 S. E. 811 (1924), again illustrates the disfavor with which the courts look on these dilatory pleas.

[131] See statutes *supra* note 57; Chicago, R. I. & P. Ry. v. Hyde, 204 Pac. 125 (Okla. 1922).

party to the complete determination or settlement of the question involved herein." [132] This would seem sufficiently broad to enable the courts to carry out the purpose of the code makers to adopt for *all* actions the equity rules which had for their object the complete settlement of a question or transaction in a single suit.[133] But many of the decisions indicate comparatively little advance over the common law rules. Among reasons in addition to the natural conservatism of courts, two may be particularly noted. One is the effect of the restricted rules of joinder of plaintiffs which were discussed above. The English experience shows that a liberalization of the rules of plaintiff joinder leads to a corresponding extension of the rules of defendant joinder.[134] It seems that the possible scope of a single case seems more or less delimited by the extent of the rules within which plaintiffs may be joined; and courts naturally fall into the practice of setting a limit to the joinder of defendants corresponding roughly to that set for plaintiffs. And the other is the effect of the restrictions on joining *causes of action.* These on their face seem to conflict with the joinder of parties rule, for they typically provide that each cause of action must affect all parties to the action.[135] It is true that if the term "cause of action" is not construed in a restrictive sense, the difficulty may be largely avoided, but many courts unfortunately have considered "cause of action" as identical with "right of action." [136] Thus in the cases of principal and guarantor noted below, there has been thought to be two causes of action. Such an interpretation of the codes results in continuing in large measure the

---

[132] Alaska Comp. Laws (1913) § 870; Ark. Dig. Stat. (1921) § 1096; Cal. C. C. P. (1923) § 379; Conn. Gen. Stat. (1918) § 5641; Idaho Comp. Stat. (1919) § 6646; Ind. Ann. Stat. (Burns, 1926) § 276; Iowa Code (1924) § 10972; Kan. Rev. Stat. (1923) § 60-411; Ky. Civ. Ann. Code (Seymour, 1924) § 23; Mo. Rev. Stat. (1919) § 1158; Mont. Rev. Code (1921) § 9078; Neb. Comp. Stat. (1922) § 8541; Nev. R. L. (1912) § 4999; N. M. Ann. Stat. (1915) § 4072; N. C. Cons. Stat. (1919) § 456; N. D. Comp. Laws (1913) § 7404; Ohio Gen. Ann. Code (Page, 1926) § 11255; Okla. Comp. Stat. (1921) § 219; Or. C. C. P. (1920) §393; Porto Rico R. S. & Codes (1911) § 5047; S. C. C. C. P. (1922) § 361; S. D. Rev. Code (1919) § 2314; Utah Comp. Laws (1917) § 6507; Wis. Stat. (1921) § 2603; Wyo. Comp. Stat. (1920) § 5593. Federal Equity Rules (1912) § 37, U. S. Comp. Stat. (1916) § 1536, has practically the same provisions. And see the Washington statute *supra* note 80. The more liberal statutes on the subject are collected *infra* note 158.

[133] FIRST REP. N. Y. COM'RS PL. & PR. (1848) 124; Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL 817.

[134] Referred to *supra* note 84.

[135] Clark, *Joinder and Splitting of Causes of Action* (1927) 25 MICH. L. REV. 395, 401.

common law distinction between joint and several interests as the arbitrary test of permissive joinder of defendants.[137]

In tort cases, also, some code courts still tend to follow the common law rules. Universally the plaintiff has his option of suing tortfeasors, who are joint tortfeasors in the strict sense that they acted in concert, together or separately.[138] But further, in this country at least, where the wrongful acts of two or more persons, though independent, were concurrent and resulted in a single injury to the plaintiff, such persons are considered joint tortfeasors for the purpose of suit.[139] Beyond this the courts have differed as to where to draw the line. Various cases may be noted.

When the plaintiff's land is injured because of the separate acts of the defendants in polluting a stream, or wrongfully building dams, joinder is usually allowed in a suit for injunctions against each of them.[140] A few courts, realizing that common questions of law and fact are involved so that time will be saved by joinder, allow the plaintiff to recover damages also in this situation.[141] When a plaintiff is injured by a defective sidewalk, allowed to become dangerous due to the separate negligence of a municipality and a private individual, he is permitted to join both in a suit for damages.[142] And when the concurrent negligence of two people causes a collision in which the plaintiff is injured, he is allowed to join the wrongdoers.[143]

---

[136] See Clark, *op. cit. supra* note 133, at 828, 829, advocating a more flexible definition of cause of action.

[137] *Cf.* Phillips v. Flynn, 71 Mo. 424 (1880); Voorhis v. Childs' Ex'r, 17 N. Y. 354 (1858).

[138] Griswold v. Morrison, 53 Cal. App. 93, 200 Pac. 62 (1921) (sued separately); Smith v. Mosbarger, 156 Pac. 79 (Ariz. 1916). See Myers v. Linebarger, 134 Ark. 231, 203 S. W. 580 (1918) (can be sued separately).

[139] See *supra* note 107. As to contribution between joint tortfeasors see Comment (1925) 34 YALE LAW JOURNAL 427. As to a case of joinder where it was impossible to tell which defendant was responsible, see Celwer v. Miles, 100 So. 666 (Miss. 1927), noted in (1927) 36 YALE LAW JOURNAL 886.

[140] Moses v. Morganton, 192 N. C. 102, 133 S. E. 421 (1926) (joinder allowed, i. e., no removal to federal court where plaintiff does not desire it and where one of defendants is in same state with plaintiff); (1926) 39 A. L. R. 939, collecting cases; Bunker Hill Mining Co. v. Polak, 7 F. (2d) 583 (C. C. A. 9th, 1925), noted in (1925) 74 U. OF PA. L. REV. 109. In Seattle Taxi Motor Co. v. De Jarlais, 236 Pac. 785 (Wash. 1925), under the Washington statute quoted *supra* note 80, an injunction was allowed in a suit to enjoin unfair competition by various taxicab companies. See Note (1926) 20 ILL. L. REV. 294.

[141] Mitchell Realty Co. v. West Allis, 184 Wis. 352, 199 N. W. 390 (1924), (1925) 3 WIS. L. REV. 245; Bunker Hill Mining Co. v. Polak, *supra* note 140; Cloyes v. Middlebury Elec. Co., 80 Vt. 109, 66 Atl. 1039 (1907). *Contra*: Tackaberry Co. v. Sioux City Service Co., 154 Iowa 358, 132 N. W. 945 (1911); (1920) 9 A. L. R. 939.

[142] Fortmeyer v. Nat'l Biscuit Co., 116 Minn. 158, 133 N. W. 461 (1911).

A conflict exists as to whether, when a servant injures a plaintiff so that his master is responsible under the doctrine of respondeat superior only, the master and servant can be joined in a single action for damages. The later cases seem to permit such joinder,[144] although there are quite a number of jurisdictions holding to the contrary.[145]

When a plaintiff's property has been taken from him fraudulently, he is usually allowed to sue the original wrongdoers and transferees in a single suit to get back his property.[146] And a trustee in bankruptcy can sue creditors who have received preferences even though not all of the creditors are involved in each preferential transfer.[147] These cases all indicate that in spite of the broad wording of the code, the result of obtaining the complete settlement of a question or controversy or related questions in a single action has not been secured in many jurisdictions.

Same; Persons liable upon the same obligation or instrument. The codes generally contain a further provision that persons

---

[143] See authorities *supra* note 107. For a slightly different fact situation where joinder was allowed, see Daggy v. Miller, 180 Iowa 1146, 162 N. W. 854 (1917). *Contra:* White v. Arizona Eastern Ry., 229 Pac. 101 (Ariz. 1924).

[144] Illinois Central Ry. v. Hawkins, 115 N. E. 613 (Ind. 1917); Greenberg v. Whitcomb Lumber Co., 90 Wis. 225 (1895); Mayberry v. No. Pac. Ry. Co., 100 Minn. 79, 110 N. W. 356 (1907); Burrichter v. Chicago, M. & St. P. Ry., 10 F. (2d) 165 (D. Minn. 1925) (plaintiff can prevent removal to federal court if one of defendants lives in same state with him); Hay v. May Dep't Stores Co., 271 U. S. 318, 46 Sup. Ct. 498 (1926); Aetna Life Ins. Co. v. Brewer, 12 F. (2d) 818 (C. A. D. C. 1926); Kraus v. C. B. & Q. Ry., 16 F. (2d) 79 (1926); Allen v. Frester, 112 Neb. 515, 199 N. W. 841 (1924); Davis v. Groner, 121 Atl. 446 (N. J. 1923); see Maumee Valley Rys. v. Montgomery, 81 Ohio St. 426, 91 N. E. 181 (1910). A few jurisdictions allow a verdict to stand against the master without a verdict against the servant in this situation. See (1927) 36 YALE LAW JOURNAL 1026.

The same conflict arises in the analogous principal-agent cases. See, for example, the cases collected in (1927) 46 A. L. R. 1506; Huffman v. Bankers Ins. Co., 112 Neb. 277, 200 N. W. 994 (1924); (1925) 25 COL. L. REV. 504.

[145] Hobbs v. Hurley, 104 Atl. 815 (Me. 1918); Scherrer v. Foster, 5 F. (2d) 236 (E. D. Ill. 1925); Bartlett v. Sullivan, 241 Ill. App. 410 (1926); French v. Cent. Construction Co., 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N. S.) 669 (1907) annotation; B. & O. Ry. v. Baillie, 148 N. E. 233 (Ohio, 1925).

[146] Fairfield v. Southport Nat'l Bank, 77 Conn. 423, 59 Atl. 513 (1904) (joined transferees of promissory notes); Nichols v. Michael, 23 N. Y. 264 (1861) (chattels recovered from fraudulent vendee and his transferees); Winslow v. Dousman, 18 Wis. 456 (1864) (joined transferees of land). *Contra:* Warnock Uniform Co. v. Garifalos, 224 N. Y. 522, 121 N. E. 353 (1918) (attempted to joint fraudulent vendee of promissory notes and eight transferees each holding separate notes).

[147] Sherwood v. Holbrook, 98 Misc. 668, 163 N. Y. Supp. 326 (Sup. Ct. 1917).

severally liable upon the same obligation or instrument may all or any of them be included in the same action at the option of the plaintiff.[148] In spite of this it is held that where two people make separate contracts with the plaintiff covering the same transaction or question, as principal and guarantor, there are two causes of action and neither affects both defendants.[149] On the other hand the contract of a technical surety is regarded as joint and several with that of his principal.[150] The result is to call for fine distinctions as to when there are separate contracts and when only one. Whether these are two documents is not controlling but seems practically to be quite important.[151]

---

[148] "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange, promissory notes, may all or any of them be included in the same action at the option of the plaintiff." This is the usual phrasing of the code provision and will be found, though with varied wording, in the following: Alaska Comp. Laws (1913) § 866; Ariz. Rev. Stat. (1913) § 407; Ark. Dig. Stat. (1921) § 1099; Cal. C. C. P. (1923) § 383; D. C. Ann. Code (1925) § 1211; Idaho Comp. Stat. (1919) § 6650; Ind. Ann. Stat. (Burns, 1926) § 278; Iowa Code (1924) § 10975; Kan. Rev. Stat. (1923) § 60–414; Ky. Ann. Civ. Code (Seymour, 1924) § 26; Mass. Gen. Laws (1921) c. 231, § 4; Minn. Gen. Stat. (1923) § 9174; Mo. Rev. Stat. (1919) § 1160; Mont. Rev. Code (1921) § 9084; Neb. Comp. Stat. (1922) § 8544; Nev. R. L. (1912) § 5002; N. J. Comp. Stat. (1911) p. 4060, § 29; N. M. Stat. Ann. (1915) § 4074; N. Y. Civ. Prac. Act (1920) § 216 (1); N. C. Cons. Stat. (1919) § 458; N. D. Comp. Laws (1913) § 7407; Ohio Gen. Ann. Code (Page, 1926) § 11258; Okla. Comp. Stat. (1921) § 222; Or. Laws (1920) § 37; Porto Rico R. S. & Codes (1911) § 5051; R. I. Gen. Laws (1923) § 4869; S.C.C.C.P. (1922) § 363; S. D. Rev. Code (1919) § 2316; Tenn. Code (Thompson's Shannon, 1918) § 4484; Utah Comp. Laws (1917) § 6511; Wash. Comp. Stat. (Rem. 1922) § 192; Wis. Stat. (1921) § 2609; Wyo. Comp. Stat. (1920) § 5596; English Prac. Rules, o. 16, r. 6.

[149] Mowery v. Mast, 9 Neb. 445 (1880) (guarantor); Berdan v. Gilbert, 13 Wis. 670 (1861) (guarantor of collection); Graham v. Wingo, 67 Mo. 324 (1878); Wolf v. Eppenstein, 71 Or. 1, 140 Pac. 751 (1914); Bondward v. Bladen, 19 Ind. 160 (1862); Allen v. Fosgate, 11 How. Pr. 218 (N. Y. 1855).

[150] Carman v. Plass, 23 N. Y. 286 (1861) (joinder allowed); Loustalot v. Calkens, 120 Cal. 688, 52 Pac. 583 (1898). By the majority rule, an undisclosed principal whose identity has been discovered cannot be joined in a suit on the contract as a defendant along with the agent. The Jungshoved, *supra* note 109, (1924) 22 MICH. L. REV. 255. Even in the case of technical sureties on the same contract, the rules governing joinder of causes of action may prevent joinder of the sureties. See Baker v. Hanson, 231 Pac. 902 (Mont. 1924) (plaintiff could not join surety *A*, who was responsible for the whole default, and surety *B*, who was responsible for part only, as each cause of action must affect all parties to the suit).

The surety was sued alone against his objection in Posch v. Lion Bonding Co., 137 Minn. 169, 163 N. W. 131 (1917); Royal Indemnity Co. v. Wood Canal Co., 10 F. (2d) 501 (C. C. A. 6th, 1926).

[151] *Cf.* Carman v. Plass, *supra* note 150 with the cases cited *supra* note 149.

The difficulty has been avoided in the Connecticut and New Jersey rules which by express provision include all such cases.[152]

Misjoinder. As noted above,[153] a few courts have interpreted the demurrer provision as to "defect of parties" as covering misjoinder, so that any objection thereto has to be raised by a special demurrer if the misjoinder appears on the record. The other code courts reach the same result, following the former equity rule,[154] and, of course, make no distinction between contract and tort actions in this regard. If the misjoinder is not apparent, an answer in abatement is required.[155] But, as in equity, these rules are qualified to the extent that a defendant cannot object to the joinder of other defendants if in the opinion of the court he is not prejudiced by their presence.[156] Here also, either by specific provision requiring it, or by decision, the code courts will usually allow the plaintiff to remedy a misjoinder of defendants by amendment in accordance with the prior equity practice.[157]

JOINDER OF DEFENDANTS—LATER CODE PROVISIONS

In those jurisdictions which have recently adopted the more extensive English provisions as to joinder of plaintiffs, there is also a substantial extension of the rules of permissive joinder of defendants. The New York provision reads: "All persons may he joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities." [158] Discretion, of course, is given the trial court to order a severance.[159]

---

[152] These include "indorsers, guarantors, and sureties, whether on the same or by a separate instrument" in the provision quoted *supra* note 148. Conn. Prac. Book (1922) p. 277, § 154; N. J. P. L. (1912) 385, n. 7.

[153] *Supra* note 54.

[154] Tice & Co. v. Evans, 32 Ga. App. 385, 123 S. E. 742 (1924); Schauer v. Morgan, 216 Pac. 347 (Mont. 1923).

[155] Genack v. Gorman, 224 Mich. 79, 194 N. W. 575 (1923) (motion to dismiss replaces plea in abatement); see Ryan Gulch Reservoir Co. v. Swartz, 234 Pac. 1059 (Colo. 1925).

[156] O'Connell v. Rogers, 237 Pac. 775 (Cal. 1925); Lowery Lock Co. v. Wright, 154 Ga. 867, 115 S. E. 801 (1923). Even if a misjoinder of other parties defendant is declared, the action would not be dismissed as to all defendants. See Tuppela v. Mathison, 291 Fed. 728 (C. C. A. 9th, 1923).

[157] Statutes *supra* note 57; Stone v. Edwards, 32 Ga. App. 479, 124 S. E. 54 (1924). *Contra:* Hallen v. Smith, 264 S. W. 665 (Mo. 1924).

[158] N. Y. Civ. Prac. Act (1920) § 211. See also N. J. P. L. (1912) p. 378, § 6; Eng. o. 16, r. 4. The clause regarding joinder in the alternative is discussed later.

[159] See N. Y. Civ. Prac. Act (1920) § 212.

Under this provision there would seem to be no question but that many of the cases noted in the previous section, where joinder was refused, should be decided differently. In general it may be stated that the tendency is towards such liberal decisions.[160] Unfortunately in New York, the rules governing joinder of causes of action were not changed when this new provision as to parties was introduced. This was in spite of the fact that the English experience had demonstrated the difficulty of carrying out provisions for extensive joinder of parties unless the rules as to joinder of causes were also broadly interpreted.[161] Lower court decisions in New York had, however, quite properly given effect to the new party joinder provisions,[162] and with a view of the term *cause of action* as is stated herein, little difficulty might have followed. The New York Court of Appeals has, however, now reverted once more to the narrow construction of the term and has decidedly limited the rules of party joinder in the case of *Ader v. Blau*.[163] Here the plaintiff sued for the death of his intestate, claiming that the first defendant had negligently maintained a picket fence upon which the in-

[160] See Oesterreichische Export vorm. Janowitzer v. British Indemnity Co. [1914] 2 K. B. 747 (plaintiff sued two insurance companies, each of whom had insured a portion of the same cargo); Bullock v. L. G. O. Co. [1907] 1 K. B. 264; Thomas v. Moore [1918] 1 K. B. 555; also cases cited *infra* notes 162, 174-178.

[161] See *supra* note 84, and discussion in (1923) 32 YALE LAW JOURNAL 584. The Rhode Island cases illustrate strikingly how a narrow definition of "cause of action" in the provisions regarding joinder of causes of action may nullify the effect of the new rule for defendants. Besharian v. Rhode Island Co., 41 R. I. 94, 102 Atl. 807 (1918), (1918) 31 HARV. L. REV. 1034; McGinn v. Comstock & Son Co., 106 Atl. 222 (R. I. 1919); Lally v. Ventrone, 120 Atl. 161 (R. I. 1923). *Cf.* N. J. P. L. (1912) p. 378, § 6. "The plaintiff may join separate causes of action against several defendants if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions." This is similar to the provision as to joining plaintiffs quoted *supra* note 80.

[162] Sherlock v. Manwaren, 208 App. Div. 538, 203 N. Y. Supp. 709 (4th Dept. 1924); First Const. Co. v. Rapid Transit Co., 211 App. Div. 184, 206 N. Y. Supp. 822 (1st Dept. 1924); S. L. T. Co. v. Bock, 118 Misc. 756, 194 N. Y. Supp. 773 (2nd Dept. 1922), (1923) 32 YALE LAW JOURNAL 384; Cowles v. Eidlitz, 121 Misc. 340, 201 N. Y. Supp. 254 (Sup. Ct. 1923), (1924) 24 COL. L. REV. 208; Mende v. Mende, 218 App. Div. 791, 218 N. Y. Supp. 283 (3d Dept. 1926). But see Klein v. Betzold, 119 Misc. 505, 197 N. Y. Supp. 501 (Sup. Ct. 1922), adversely criticized in Rothschild, *Simplification of Civil Practice in New York* (1923) 23 COL. L. REV. 618, 634.

[163] 241 N. Y. 7, 148 N. E. 771, 41 A. L. R. 1216 (1925). The case is criticized by the writer in (1925) 35 YALE LAW JOURNAL 85; also in (1925) 25 COL. L. REV. 975, and (1925) 11 CORN. L. Q. 113. In (1926) 26 COL. L. REV. 30, Professor Rothschild, who was the successful counsel, argues that the decision was a correct interpretation of the present statutes although these should be changed. In (1926) 20 ILL. L. REV. 533, Professor Hinton discusses the case as showing the breakdown of modern joinder rules, a conclusion which seems not wholly fair in view of the English experience.

testate had been fatally injured, and that the second defendant, a surgeon, had negligently treated the intestate, who was so injured, that he died. It was held that the joinder was improper, both from the standpoint of parties and of causes of action. The decision so far as it concerns causes of action is considered critically elsewhere.[164] So far as the question of parties is concerned it means that the rules as to joinder of causes must override all others, and since such rules are here most narrowly construed, there is grave danger that the new party rules may be nullified. In a very practical sense the question in the case was, who was responsible for the intestate's death, and it would seem to be a question to be properly determined in a single action.[165]

In this case also the court, while denying that there was "any common question of law or fact," also holds that joinder of defendants, unlike joinder of plaintiffs, does not depend on the existence of such common question. It is true that the statute does not in terms state this test, but this holding, it is submitted, presents a dilemma to the court, for the statute as to joining defendants, quoted above, is *less* restricted in its provisions than the plaintiff joinder statute. But the English experience seems to indicate that substantially the same rules will in practice apply to joinder of both plaintiffs and defendants. The test of a common question of law or fact affords a practical and understandable test, and should not, it is submitted, be discarded.[166]

Whether these rules will modify the former rule that principal and guarantor cannot be sued together is not clear. Unfortunately, in New York the former statute providing for joining persons severally and immediately liable on the same obligation or instrument was retained. It may, therefore, be held that the former restrictive construction of this statute still obtains.[167]

---

[164] The provision requiring joined causes to affect all parties to the action has been removed from the New York act, but the court held that these were separate causes, that they were inconsistent and that they did not arise out of the same transaction.

[165] It is not clear how far this case overturns such a case as Sherlock v. Manwaren, *supra* note 162, where joinder was allowed in a suit against four physicians for negligence in successively resetting the plaintiff's shoulder bone. Possibly in the Ader case, had the action been expressly stated to be in the alternative against the defendants, the court might have upheld the joinder under the rules as to alternative joinder discussed in the next section.

[166] *Cf.* (1925) 35 YALE LAW JOURNAL 88, n. 11, and Sherlock v. Manwaren, *supra* note 162. The extension of the rules of joinder of plaintiffs in England in 1896 led in practice to an extension of the rules of joinder of defendants. This development is traced in KING & BALL, THE ANNUAL PRACTICE (1927) 201–2, 227–229; see also *supra* notes 84, 134; (1923) 32 YALE LAW JOURNAL 384; Rothschild, *Simplification of Civil Practice* (1924) 24 COL. L. REV. 730, 750–752. But see (1924) 24 COL. L. REV. 681.

[167] See Medina, *Some Phases of the New York Civil Practice Act and Rules* (1921) 21 COL. L. REV. 113, 124.

JOINDER IN THE ALTERNATIVE

Common law and code rules. At common law, it was settled, in accordance with the rule discussed above that parties could only be joined where their interests were joint, that parties could not be joined in the alternative.[168] Thus, where a public officer engaged *A* as his sole surety for one year, and *B* as his sole surety for the next year, and defaulted sometime during the two-year period, even if it was impossible to tell during which year he defaulted, the state could not sue *A* and *B* together. In this particular situation, at least, equity would allow joinder of of defendants in the alternative.[169] But, under the codes, it has been generally held that in the absence of express statutes parties could not be joined in the alternative, even though the plaintiff was put to more expense to settle the transaction, and might even lose out altogether by the way the proof developed at the separate trials. Thus in tort actions, while the common law and code courts would allow a plaintiff to sue independent tortfeasors together if their acts were concurrent and resulted in a single injury to the plaintiff, it would not allow the plaintiff to plead, more truthfully no doubt in many cases, that one or the other of the defendants had caused the injury, and ask for relief accordingly.[170]

Statutory alternative joinder—Plaintiffs. In New York and New Jersey, joinder of plaintiffs in the alternative is permitted.[171] No cases have been decided by the highest court in these jurisdictions which directly involved the point. A decision by an intermediate New York court, with two judges dissenting with opinion, seems directly to render the "alternative" provision ineffective.[172]

Same—Defendants. Several states by statute allow joinder of defendants in the alternative.[173] Under these provisions, it

[168] See Cohn-Baer-Myers v. Realty Transfer Co., 117 App. Div. 215, 102 N. Y. Supp. 122 (1st Dept. 1907), *aff'd* 191 N. Y. 533, 84 N. E. 1110 (1908).

[169] Love v. Keowne, 58 Tex. 191 (1882); Adams v. Conner, 73 Miss. 425, 19 So. 198 (1895); Alexander v. Mercer, 7 Ga. 549 (1849); State v. Brown, 58 Miss. 835 (1881). *Contra:* Oglesby's Sureties v. State, 73 Tex. 658, 11 S. W. 873 (1889) (not citing the Keowne case); Clark v. Lord Rivers, L. R. 5 Eq. Cas. 91 (1867).

[170] See Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450 (1913); 51 L. R. A. (N. S.) 640 (1914) annotation; (1926) 41 A. L. R. 1216; (1918) 31 HARV. L. REV. 1034; (1922) 35 *ibid.* 466; (1924) 33 YALE LAW JOURNAL 328, 369–372.

[171] See New York, New Jersey and English statutes, quoted *supra* note 80.

[172] Olsen v. Bankers Trust Co., 205 App. Div. 669, 199 N. Y. Supp. 700 (1st Dept. 1923), crit'd (1924) 33 YALE LAW JOURNAL 328.

[173] N. Y. Civ. Prac. Act (1920) § 211. By *ibid.* § 212, it is provided that each defendant need not be interested in all the relief prayed for, or as to

has been held that if *A* contracts with *B* who purports to be the agent of *C*, and *C* later denies the agency, *A* can join *B* and *C* in the alternative in an action on the contract.[174] Also, if *X* delivers goods to *Y* for *Z*, and *Y* claims to have so delivered them but *Z* denies having received them, *X* can join *Y* and *Z* in the alternative in a suit on the contract.[175] Or, again, if *O* is injured in a collision between *P* and *Q* and cannot tell which of them was negligent, he is allowed to join *P* and *Q* in the alternative in a suit for damages.[176] In a leading English case, where the plaintiff contracted to sell goods to *A* and then ordered them from *B*, but upon delivery to *A* he claimed they were not as ordered, the plaintiff was allowed to sue *A* and *B* together, claiming the contract price from the former or, in the alternative, damages for breach of contract from the latter.[177] Some other situations in which the plaintiff must rely on the evidence as it develops at the trial to fix responsibility, and where joinder is, therefore, allowed, are set out in the note.[178]

It has been decided that the new provision does not make the defendants, even though they are sued together, jointly responsible for the purpose of removal to the federal courts.[179] Accordingly, even if one of the defendants is a resident of the same state as the plaintiff, the latter cannot demand that the trial be

---

every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent his embarassment; and that a plaintiff in doubt as to the person from whom he is entitled to redress may join two or more defendants. This follows the English rules, o. 16, r. 4, 5, 7. See also Conn. Prac. Book (1922) § 155; R. I. Gen. Laws (1923) c. 333, § 20; N. J. P. L. (1912) p. 378, § 6; *ibid.* p. 385, rule 7; Wis. Stat. (1921) § 2603.

[174] Stein, Hall & Co. v. Alison & Co., 123 Misc. 382, 205 N. Y. Supp. 422 (1st Dept. 1924); Schechtman v. Salaway, 204 App. Div. 549, 198 N. Y. Supp. 851 (2nd Dept. 1923); Eames v. Mayo, 93 Conn. 479, 106 Atl. 825 (1919); see Elliott v. McNeil & Sons Co., 206 App. Div. 441, 201 N. Y. Supp. 500 (1st Dept. 1923).

[175] S. & C. Clothing Co. v. U. S. Trucking Corp., 216 App. Div. 482, 215 N. Y. Supp. 349 (1st Dept. 1926); (1926) 26 COL. L. REV. 901; Hummerstone v. Leary [1921] 2 K. B. 664; Thermoid Rubber Co. v. Baird Rubber Co., 124 Misc. 774, 209 N. Y. Supp. 277 (Sup. Ct. 1925); *cf.* Stern v. Ide Co., 212 App. Div. 714, 209 N. Y. Supp. 473 (1st Dept. 1925), crit'd in (1925) 35 YALE LAW JOURNAL 113; (1926) 26 COL. L. REV. 46.

[176] Jacobs v. Barron, 215 App. Div. 560, 214 N. Y. Supp. 261 (1st Dept. 1926); Besterman v. British Motor Cab Co. [1914] 3 K. B. 181.

[177] Payne v. British Time Recorder Co. [1921] 2 K. B. 1. The English cases are included in a review of the subject in (1926) 41 A. L. R. 1216, 1244. *Cf.*, however, Stern v. Ide, *supra* note 175.

[178] Lonnberg v. Knox, 123 Misc. 148, 204 N. Y. Supp. 852 (1st Dept. 1924) (seaman sues for wages—in doubt which of defendants operated the ship); Zenith Bathing Pavilion v. Fair Oaks S. S. Corp., 211 App. Div. 492, 207 N. Y. Supp. 306 (1st Dept. 1925), reversed on other grounds, 240 N. Y. 307, 148 N. E. 532 (1925).

[179] Lynch v. Springfield Ins. Co., 15 F. (2d) 725 (E. D. N. Y. 1926).

in the state court. It has also been held that merely because the plaintiff is allowed to sue defendants in the alternative does not of itself justify an attachment prior to trial against the property of each defendant. It seems that an attachment will not be sustained against a particular defendant unless there is a prima facie case against him, without regard to the other defendant or defendants.[180]

REPRESENTATIVE OR CLASS SUITS

The most important exception to the equity rules of compulsory joinder was the representative or class suit.[181] In practice it was found that if everyone whose interest would be directly affected by a decree had to be before the court, oftentimes a controversy would be left unsettled. Thus where some heirs of a deceased landowner were missing, the remainder might be prevented from suing to quiet title to the land or to set aside a fraudulent conveyance. Or, where a defendant, along with several hundred others, made a subscription to a building fund, it was practically impossible to compel all of the subscribers to sue as plaintiffs to collect the sum due. So, often, it would be impossible or impracticable to bring before the court all the defendants whose interests would be affected, as in cases involving the construction of wills, where contingent interests were outstanding in children not yet born. To meet these and similar situations, the doctrine of the class suit was early developed in equity and finds expression in the code provision [182] that, "when the question is one of a common or general interest of many persons or when the parties are numerous and it might be impracticable to bring

[180] Zenith Bathing Pavilion v. Fair Oaks S. S. Corp., *supra* note 178, crit'd in (1925) 35 YALE LAW JOURNAL 228; *cf.* (1926) 26 COL. L. REV. 48. See also Whitman v. Dayton Rubber Mfg. Co., 210 N. Y. Supp. 937 (2d Dept. 1925).

[181] Two of the early equity decisions on this subject were Bromley v. Williams, 32 Beav. 177 (1863), and Cockburn v. Thompson, 16 Ves. Jr. 321 (1809).

[182] Found in the following codes: Ala. Code (1923) § 5701; Alaska Code (1913) § 871; Ariz. Rev. Stat. (1913) § 416; Ark. Dig. Stat. (1921) § 1098; Cal. C. C. P. (1923) § 382; Idaho Comp. Stat. (1919) § 6049; Ind. Ann. Stat. (Burns, 1926) § 277; Iowa Code (1924) § 10974; Kan. Rev. Stat. (1923) § 60-413; Ky. Ann. Civ. Code (Seymour, 1924) § 25; Minn. Gen. Stat. (1923) § 9165; Mont. Rev. Code (1921) § 9083; Neb. Comp. Stat. (1922) § 8543; Nev. Rev. Laws (1912) § 5001; N. M. Ann. Stat. (1915) § 4079; N. Y. Civ. Prac. Act (1920) § 195; N. C. Cons. Stat. (1919) § 457; N. D. Comp. Laws (1913) § 7406; Ohio Gen. Ann. Code (Page, 1926) § 11257; Okla. Comp. Stat. (1921) § 221; Or. C. C. P. (1920) § 394; Porto Rico R. S. & Code (1913) § 5050; S. C. C. C. P. (1922) § 362; S. D. Rev. Code (1919) § 2315; Utah Comp. Laws (1917) § 6510; Wash. Comp. Stat. (Rem. 1922) § 190; Wis. Stat. (1921) § 2604; Wyo. Comp. Stat. (1920) § 5595; U. S. Equity Rules (1912) § 38. The English provision is set out

them all into court (within a reasonable time) [183] one or more may sue or defend for the benefit of the whole."

The main concern of the courts in enforcing this provision is that some party actually before the court will so represent the numbers of the class of which he is the representative, that their interests will be fully protected. When the purpose of the suit is to extinguish a property interest, greater strictness is required in seeing that the party is truly representative.

Plaintiffs. Among the types of cases in which a plaintiff is allowed to represent a class are suits by one of many subscribers to a fund to collect an unpaid subscription; [184] by one of many cestuis to recover trust money; [185] by one of a large number of creditors to enforce stockholders' liability; [186] by members of an unincorporated association for an accounting of association property; [187] by a taxpayer to recover taxes illegally collected, or to set aside an assessment; [188] and by one of several heirs to set aside [189] a fraudulent conveyance. Other situations in which the class suit is used by a plaintiff are set out in the note.[190] It is not necessary that there be *both* a common question *and* a large number in the class.[191] And it will depend largely on the

in WHITE, THE ANNUAL PRACTICE (1924) 235. Express provision is made for the class suit only in case the parties are numerous in Conn. Gen. Stat. (1918) § 5643, and Ga. Code (1926) § 5415.

[183] Found in the Arkansas and Kentucky statutes cited *supra* note 182.

[184] Hodges v. Nalty, 104 Wis. 464, 80 N. W. 726 (1899).

[185] Conroy v. Cover, 252 Pac. 883 (Colo. 1927); Wheelock v. First Pres. Church, 119 Cal. 477, 51 Pac. 841 (1897).

[186] Adams v. Clark, 36 Colo. 65, 85 Pac. 642 (1906).

[187] Bates v. Houston, 66 Ga. 198 (1880). Acc: Hichens v. Congreve, 4 Russ. 562 (1828) (as to shareholders of a corporation).

[188] Com. v. Scott, 112 Ky. 252, 65 S. W. 596 (1901). As to the conclusiveness of the judgments in such suits, see Greenberg v. Chicago, 256 Ill. 213, 49 L. R. A. (N. S.) 108 (1912) annotation (conclusive on other taxpayers); Lee v. Independent School Dist., 149 Iowa 345, 37 L. R. A. (N. S.) 383 (1910) (not conclusive upon the contractor who did the public work for which the assessment was laid). *Cf.* also Puget Sound Lt. & Power Co. v. Seattle, 5 F. (2d) 393 (C. C. A. 9th, 1925), (1925) 25 COL. L. REV. 191.

[189] Hendrix v. Money, 1 Bush. 306 (Ky. 1866); Thames v. Jones, 97 N. C. 121, 1 S. E. 692 (1887).

[190] Jones v. Newlon, 253 Pac. 386 (Colo. 1927) (three negro school children sue by next friends to enjoin execution of order of Board of Education); Supreme Tribe v. Cauble, 255 U. S. 356, 41 Sup. Ct. 338 (1921) (some of policy holders sue to enjoin use of company funds); Clay v. Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141 (1896) (some of bondholders sue to foreclose deed of trust); United Cloak Assn. v. Sigman, 218 App. Div. 367, 218 N. Y. Supp. 483 (1st Dept. 1926) (membership corporation sues to enjoin intimidation of its members); Trade Press Pub. Co. v. Milwaukee Typo. Union, 180 Wis. 449, 193 N. W. 507 (1923) (some employers sue for all in city in their trade to enjoin alleged conspiracy to force a closed shop).

[191] McKenzie v. L'Amoureux, 11 Barb. 516 (N. Y. 1851); Hilton Bridge Const. Co. v. Foster, 26 Misc. 338, 57 N. Y. Supp. 140 (Sup. Ct. 1899), *aff'd* 42 App. Div. 630, 59 N. Y. Supp. 1106 (1899). It has been questioned

type of case and the surrounding circumstances how large a number of persons would be required to constitute a "class." [192]

The procedure involved in a class suit may be illustrated by following through a case of one creditor of the *X* company suing, as he alleges in his petition, on behalf of himself and such other creditors of the *X* company as may wish to join, to enforce payment of unpaid stock subscriptions. If no other creditor join in suing before trial, the plaintiff has control over details of management of the trial. It is often stated by way of dictum [193] that the plaintiff has complete control of the suit and may dismiss it whenever he sees fit. But it seems probable, in accordance with a statement in an early equity case,[194] that if the time limitation which equity courts set in analogy to the statute of limitations had run against an independent suit by the other creditors who had relied on the plaintiff's suit, or if they would be otherwise prejudiced, the plaintiff would not be allowed to dismiss the action against their objections. It has been so held.[195] The other creditors, in order to avoid costs, statutory bonds, etc., in case the suit is unsuccessful, may not want to join as formal parties. If, however, they ask before trial to be let in, the court may admit them and they can share in the control of the suit.[196] At any time up to the interlocutory decree, they may join or may start separate suits.[197] If the plaintiff secures such a decree, it operates in favor not only of himself but all of the other creditors. Thereafter they cannot start separate suits,[198] but can only prove their claims in the representative action. In default of such proof before final judgment, and in the absence of fraud, they are thereafter barred from participating in the proceeds of the judgment.[199]

---

whether the statute may apply to parties *united in interest* (where joinder is otherwise compulsory). 30 Cyc. 134, citing George v. Benjamin, 100 Wis. 622, 76 N. W. 619 (1898). It seems clear, however, from the history and wording of the provision that the contrary is the case. McKenzie v. L'Amoureux, *supra*; Tobin v. Portland Mills Co. 41 Or. 269 (1902).

[192] George v. Benjamin, *supra* note 191 (31 not sufficient in a suit to collect an assessment); Farley v. Alderson, 190 Ky. 632, 227 S. W. 1005 (1921) (5 out of 9 people couldn't represent the class as defendants in suit to quiet title).

[193] See, for example, Brinckerhoff v. Bostwick, 99 N. Y. 185, 1 N. E. 663 (1885).

[194] Sterndale v. Hankinson, 1 Sim. 393 (1827).

[195] Belmont Nail Co. v. Columbia Iron Co., 46 Fed. 336 (W. D. Pa. 1891). *Contra*: Piedmont Ins. Co. v. Maury, 75 Va. 508 (1881).

[196] Manning v. Mercantile Trust Co., 37 Misc. 215, 75 N. Y. Supp. 168 (Sup. Ct. 1902).

[197] See MacArdell v. Olcott, 62 App. Div. 127, 70 N. Y. Supp. 930 (1st Dept. 1901); Woodgate v. Field, 2 Hare 211 (1842).

[198] See Kerr v. Blodgett, 48 N. Y. 62 (1871).

[199] Kerr v. Blodgett, *supra* note 198. The prior judgment, however, in its final form must, in order for the matter to be res adjudicata as to per-

The "statute of limitations" ceases to operate against all members of the class who participate in the plaintiff's judgment at the time when the plaintiff starts suit.[200]

The representative or class suit should not be confused with the typical case of permissive joinder of plaintiffs, such as an action for damages by one of many persons injured through a single act of the defendant. Thus, the English Court of King's Bench has decided [201] that the class suit was not a proper method of suing to collect damages for the act of a defendant ship owner, whereby a ship containing parcels of goods separately belonging to a large number of people, among them the plaintiff, was destroyed. One of the judges stated that no tort action for damages could be framed to come within the doctrine of representative suits; that while the cargo owners would be permitted to join under the "common question of law or fact" rule, they should not be compelled to have their claims settled together.[202] In other words, the circumstances surrounding the claims of the various shippers were sufficiently different so that, in the court's opinion, no "class" existed. The class suit doctrine in equity was developed to allow the settlement of suits which otherwise could not be tried because of the lack of necessary parties or the impracticability of getting them all into court. No such situation existed in the case before the English court. In spite of the undoubted shortening of litigation which would follow an extension of the doctrine to cases of suits for damages by separate contractees, it is doubtful whether courts would allow the extension under present code provisions.

It is impossible to summarize for all situations just when a sufficient identity of interests exists to employ the class suit. To take a specific example, however, suppose a municipality has (a) voted road bonds, and (b) in the subsequent construction of the road has negligently injured the property of *A*, *B* and *C*. If *A* sues as representative of the property owners affected by the

---

sons who were not formal parties, make it clear that the members of the class who did not come in are barred from later suing. Santilli v. Illinois Surety Company, 79 Misc. 600 (N. Y. Sup. Ct., App. T. 1st Dept. 1913).

[200] Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788 (1887); Dunne v. Portland Ry., 40 Or. 295, 65 Pac. 1052 (1901); Brinckerhoff v. Bostwick, *supra* note 193.

[201] Markt & Co. v. Knight S. S. Co., Ltd. [1910] 2 K. B. 1021. See also Vashon Fruit Union v. Godwin & Co., 87 Wash. 384, 151 Pac. 797 (1915); Aberconway v. Whetnall, 87 L. J. Ch. 524 (1918).

[202] These actions for damages, where joinder is permissive but not compulsory, have been called "non-derivative representative actions." See, for example, Atkins v. Trowbridge, 162 App. Div. 629, 148 N. Y. Supp. 181 (1st Dept. 1914); 4 COOK, CORPORATIONS (8th ed. 1923) § 748. This terminology seems confusing because the main features of a representative action are lacking. True, outsiders are allowed to join as plaintiffs, but the case is rather one of intervention or of consolidation of actions.

road, *and claims that the bonds were illegally voted,* we have a typical class suit; but if he attempts to sue as representative of the property owners *and alleges that he and they have been injured by the negligent act of the municipality* during the construction of the road, the action is not a class suit. *B* and *C* are *allowed* to join as plaintiffs, if they so desire, under the more liberal code joinder provisions, but *A* cannot *force* them to join.

Defendants. A typical case in which one person is allowed to defend for a class occurs when property held in common under a will or otherwise is sought to be partitioned.[203] Here, it is evident, the property of the parties whom the defendant will represent is merely changed from a joint interest to a separate interest in a part of the same property, or into cash. Another example is the case of a trustee representing beneficiaries in a suit involving the trust property.[204] But the equity courts, and also the code courts, have gone further and entirely divested a person of a contingent property interest although he was not a party to the suit. For example, a will may be contested and overthrown although it gives a contingent interest in land to people in being who cannot be brought before the court[205] or to unborn children.[206] But the courts are careful in such cases to safeguard the interests of the absent people. There must exist some good reason for trying the issue[207] as that an estate should be settled up at once. Or, as it is sometimes stated, the suit must not be designed fraudulently to cut off the contingent interests. And there must be someone before the court, such as a guardian or other devisee, representing the same class or interest.[208]

If these safeguards are present, the result of the suit will be conclusive against collateral attack.[209] Of course, in a later suit between the same parties, including those absent at the first trial,

---

[203] Coquillard v. Coquillard, 62 Ind. App. 426, 113 N. E. 474 (1916); Springs v. Scott, 132 N. C. 548, 44 S. E. 116 (1903); Jordan v. Jordan, 145 Tenn. 378, 239 S. W. 423 (1922). For a discussion of class suits in regard to defendants, see Note (1922) 36 HARV. L. REV. 89.

[204] Ogden v. Syphrett, 236 S. W. 143 (Tex. Civ. App. 1922); Chicago, R. I. & P. Ry. v. Schendel, 270 U. S. 611, 46 Sup. Ct. 420 (1926).

[205] Longworth v. Duff, 297 Ill. 479, 130 N. E. 690 (1921); Schnepfe v. Schnepfe, 230 Fed. 781 (C. C. A. 4th, 1916).

[206] McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672 (1894); Mathews v. Lightner, 85 Minn. 333, 88 N. W. 992 (1902).

[207] Bears v. Corbett, 152 N. E. 866 (Ind. 1926).

[208] McCampbell v. Mason, *supra* note 206; Schnepfe v. Schnepfe, *supra* note 205; Longworth v. Duff, *supra* note 205. In a suit for an accounting, where the remaindermen have conflicting interests, the trustee will not be allowed to represent all remaindermen including those who are absent. Franz v. Buder, 11 F. (2d) 854 (C. C. A. 8th, 1926).

[209] Cases cited *supra* note 208. See also Greenberg v. Chicago, *supra* note 188.

if no interests of third persons have intervened, and the court believes that the absent persons were not adequately represented, the case may be reopened.[210]

It therefore appears that representative actions have their chief utility in allowing suits to be brought in certain cases where otherwise it would be impossible to get all the parties before the court. But the usefulness of this procedure is limited by the quite natural hesitation of courts to hold parties bound by judgments rendered in their absence. For instance, it seems that ordinary damage actions and severable contract actions cannot be disposed of in this manner. But where a specific res, realty or chattel, is before the court, title to it may be adjusted when the conditions are present for this form of action. And again a question of general public interest rather than particular personal interest to a party may be so settled. Beyond this the opportunities for its use do not seem numerous.

[210] Bears v. Corbett, *supra* note 207.