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Notes and Comments

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NOTES AND COMMENTS

Amendment of Pleadings After Trial

Wide latitude in the making of amendments to pleadings, before and after trial, and even after judgment, appears to be the aim of Section 46 of the Illinois Civil Practice Act.[1] It purports to carry out the policy expressed in another section to the effect that controversies should be speedily and finally determined according to the substantive rights of the parties.[2] To such a policy most litigants and lawyers would heartily subscribe, but efforts to liberalize procedure so as to permit a prompt decision on the merits seem to have received a limitation in *Bollaert v. Kankakee Tile & Brick Company*.[3] It was there decided that the right to amend after judgment was contrary to other recognized principles affecting the jurisdiction of our courts, and, to the extent that conflict existed, the right to amend was forced to yield.

In that case an employee sued for money allegedly due, basing his claim on the theory of an account stated. The proof adduced at the trial, without a jury, did not support that theory though it did justify a recovery on another basis. Judgment for the plaintiff was, therefore, granted. The defendant employer filed a notice of appeal and duly followed such notice with an appeal bond which received judicial approval. In the interim between notice of appeal and the approval of the bond, plaintiff filed a notice of cross-appeal and a motion for leave to amend his complaint. His motion was allowed by the trial judge on the ground that the purpose of the amendment was to conform the pleadings to the proof, hence within the scope of Section 46 of the Civil Practice Act. The Appellate Court, Second District, however held that such amendment had been improperly granted because, by reason of the steps taken toward the appeal, the trial court had lost jurisdiction of the cause. It therefore reversed and remanded.[4]

It is fundamental that one suit can be pending only in one court at one moment of time, hence jurisdiction to decide cannot exist at the same time in a trial court and also in a reviewing court. Necessarily, the rule must be that once an appeal is perfected and the reviewing court has obtained jurisdiction of a case, such jurisdiction can no longer reside in the lower court. Such, indeed, was the rule at common law,

1 Ill. Rev. Stat. 1941, Ch. 110, § 170.

2 Ibid., § 128.

3 317 Ill. App. 120, 45 N.E. (2d) 506 (1942). The decision might seem to be in conflict with Grossman v. Grossman, 312 Ill. App. 655, 38 N.E. (2d) 778 (1942), abstract opinion, wherein the reviewing court sanctioned the allowance, by the lower court, of an amendment to the complaint to conform to proof while an appeal was pending. An examination of the opinion disclosed that the appeal was only from an interlocutory order concerning injunction and receivership.

4 Dove, J., dissented on the ground that Section 46(3) of the statute in question expressly covered amendment after judgment.

though a distinction was made between an appeal and a writ of error. The former was merely a continuation of the same proceeding, while the latter was considered as an independent legal proceeding originating from the upper court. The latter did not, therefore, of itself divest the lower court of its jurisdiction.[5] When an appeal was taken, the lower court had to make up the record and, that work not being a part of the judicial determination of the merits of the case, the lower court still had power, or jurisdiction, to do so. Such jurisdiction over the record, as distinguished from over the controversy, has not been modified by practice statutes and seems inherent to the functioning of a court. During the process of making out the record, corrections might be made therein, by the trial court, of any clerical mistakes,[6] especially upon proper notice to the parties, so that the record might speak the truth and represent what had actually occurred.[7] Other amendment, however, particularly one affecting the merits of the controversy, was improper.

Prior to the enactment of the Civil Practice Act, Illinois consistently followed these common-law rules. All proceedings were stayed in the lower court upon perfection of the appeal.[8] Matters purely of form could still be corrected below, and the reviewing court would accept the filing of a supplemental record.[9] Such supplemental records, however, were only acceptable to the extent that they showed what had actually taken place before the time of perfecting the appeal,[10] and, if the appeal was from a specific order, such as the appoint-

5 This distinction was carefully observed in Illinois until changed by the Practice Act; it is well set out and concisely expressed in Thompson v. Davis, 297 Ill. 11 at p. 15, 130 N.E. 455 at p. 457 (1921).

6 Collins vs. Nelson, 41 Cal. App. (2d) 107, 106 P. (2d) 39 (1940); O'Hare v. Peacock Dairies, Inc., 39 Cal. App. (2d) 506, 103 P. (2d) 594 (1940); In re Schultz, 99 Cal. App. 134, 277 P. 1049 (1929); Haynes v. Los Angeles Ry. Corporation, 80 Cal. App. 776, 252 P. 1072 (1927); Miracle v. Marshall, 271 Ky. 18, 111 S.W. (2d) 399 (1937); Higdon v. Commonwealth, 257 Ky. 69, 77 S.W. (2d) 400 (1934); Smart v. Valencia, 49 Nev. 411, 248 P. 46 (1926).

7 Hilliker v. Board of Trustees, 91 Cal. App. 521, 267 P. 367 (1928); Cranston v. Stanfield, 123 Ore. 314, 261 P. 52 (1927); Panhandle Const. Co. v. Lindsey, 123 Tex. 613, 72 S.W. (2d) 1068 (1934); Milwaukee Electric Crane & Mfg. Corp. v. Feil Mfg. Co., 201 Wis. 494, 230 N.W. 607 (1930). This power extends to amandment of a sheriff's return: Palatine Ins. Co. v. Hill, 219 Ala. 123, 121 So. 412 (1929); to amendment of the minutes: Phoenix Title & Trust Co. v. Horwath, 41 Ariz. 417, 19 P. (2d) 82 (1933); to amendments in the pleadings: Centennial Mill Co. v. Martinov, 83 Utah 391, 28 P. (2d) 602 (1934), Dwight v. Hazlett, 107 W. Va. 192, 147 S.E. 877 (1929); or even in the judgment: Vaughn v. Kansas City Gas Co., (Kan. App.) 159 S.W. (2d) 690 (1942), Michael McNamara Varnish Works v. McNamara Paint Prod. Co., 286 Mich. 68, 281 N.W. 540 (1938), Crawford v. Chicago, R. I. & P. Ry. Co., 171 Mo. 68, 66 S.W. 350 (1902), Mills v. Moore, (Tex. Civ. App.) 5 S.W. (2d) 263 (1928), and Hovey v. McDonald, 109 U.S. 150, 3 S. Ct. 136, 27 L. Ed. 888 (1883). A list of acts still permitted in the lower court pending appeal is set out in State ex rel. Riefling v. Sale, 153 Mo. App. 273, 133 S.W. 119 at p. 121 (1910).

8 People ex rel. Beadles v. Pam, 276 Ill. 181, 114 N.E. 504 (1916).

9 Cook County Brick Co. v. Wm. Bach & Sons Co., 93 Ill. App. 88 (1901).

10 Ogden v. Town of Lake View, 121 Ill. 422, 13 N.E. 159 (1887).

ment of a receiver or the issuance of a temporary injunction, the reviewing court would disregard anything which had happened in any other aspect of the case subsequently to the entry thereof.[11] At the same time it also became the practice, confirmed early by statute, to allow amendment of pleadings in the trial court so as to conform to the proofs. Thus, in chancery cases, amendment was possible at any time until the close of the term following the decree if the decree was rendered in vacation.[12] Similarly, in law cases, amendment even after verdict was permitted, provided such action was taken prior to judgment.[13] Allowance of an amendment to the pleadings was, however, subject to the discretion of the court and might be denied in a proper case.[14] Amendments were never allowed after the appeal had been perfected,[15] and an appeal, for the purpose of jurisdiction, matured at once the finality of the judgment appealed from.[16]

Apparently with these ideas in mind, Section 46 of the Civil Practice Act was drafted to permit amendments to the pleadings, for the sole purpose of making the same conform to the proofs, either before or after judgment, upon such terms as might be deemed just and without any apparent qualification that such amendment was necessary before appeal had been taken. In fact another section was inserted permitting the reviewing court to exercise any and all of the powers of amendment which might have been exercised by the trial court.[17] The same statute, however, contains a provision, not found in the earlier statutes, which recites that: "An appeal shall be deemed perfected when the notice of appeal shall be filed in the lower court . . . no step other than that by which the appeal is perfected shall be deemed jurisdictional."[18] Jurisdiction is thereby vested in the reviewing court sooner than was formerly the case, with a corresponding limitation on the powers of the trial court. That section, operating through the principles laid down in earlier cases, was regarded as sufficient in the Bollaert case to limit the right to amend the pleadings, at least in the trial court, up until the time when notice of appeal was filed. Though amendment, even after judgment, is permitted by the statute and has been approved by the courts,[19] such permission must now be exercised in the light of this additional requirement.

The broad language of Section 46 may, then, develop into a trap

11 Martin v. Sexton, 72 Ill. App. 395 (1897).

12 Cooper v. Gum, 152 Ill. 471, 39 N.E. 267 (1894).

13 Kennedy v. Swift & Co., 234 Ill. 606, 85 N.E. 287 (1908).

14 Wolverton v. George H. Taylor & Co., 157 Ill. 485, 42 N.E. 49 (1895).

15 Lake Shore & Mich. So. Ry. Co. v. Chicago & Western Indiana R.R. Co., 100 Ill. 21 (1881); Parker v. Shannon, 121 Ill. 452, 13 N.E. 155 (1887).

16 Elgin Lumber Co. v. Langman and Utman, 23 Ill. App. 250 (1887).

17 Ill. Rev. Stat. 1941, Ch. 110, § 216(1a).

18 Ibid., § 200(2). See also Francke v. Eadie, 373 Ill. 500, 26 N.E. (2d) 853 (1940), noted in 18 CHICAGO-KENT LAW REVIEW 416.

19 Wiedow v. Carpenter, 310 Ill. App. 342, 34 N.E. (2d) 83 (1941); Jackson v. Jackson, 294 Ill. App. 552, 14 N.E. (2d) 271 (1938).

for the unwary if the lesson of the Bollaert case is overlooked. Too much reliance on the provision permitting amendment in the reviewing court after appeal has been taken would likewise seem unwise. Decisions exist which have declared other portions of that section unconstitutional as an attempt to confer upon reviewing courts powers not properly belonging to appellate tribunals.[20] Such decisions, while not strictly in point, cast grave doubts upon the validity of the provision in question for the reasoning therein involved would seem equally applicable to the instant situation.

With the opportunity to amend lost in the trial court by the prompt filing of a notice of appeal, and with no apparently sound relief available in the reviewing court, a stalemate appears likely. The only avenue of escape, followed in the Bollaert case, seems to be for the reviewing court to reverse and remand the cause upon the existing record. This, however, forces the parties to the expense and delay of a new trial, a consequence which appears to be a definite restriction upon the policy motivating our reformed procedure.

G. MASCHINOT

CIVIL PRACTICE ACT CASES

APPEAL AND ERROR—RECORD AND PROCEEDINGS NOT IN RECORD—WHETHER TRIAL COURT HAS JURISDICTION, AFTER EXPIRATION OF TIME ALLOWED BY RULES OF COURT IN WHICH TO PREPARE AND FILE RECORD, TO GRANT EXTENSION OF TIME TO APPELLANT FOR SUCH PURPOSE—In the divorce case of *Lukas* v. *Lukas*,[1] the defendant filed notice of appeal from an adverse decree. Within the fifty-day period allowed by Rule 36(1), subsection (c), of the Illinois Supreme Court,[2] the appellant prepared and submitted a report of the proceedings to the trial judge, but, for some unexplained reason, the same was not then filed. One week after the fifty-day period had expired, appellant secured an order extending the time in which to file such report of proceedings which order was entered nunc pro tunc as of the day on which the report had been presented. The report was thereafter duly filed and the record submitted to the reviewing court. Upon its own motion, that court refused to consider the report of the proceedings on the ground that the trial court lacked jurisdiction to enter the order in question, and, finding no error in the remainder of the record, it affirmed the decree.

[20] Schmidt v. Equitable Life Assur. Soc., 376 Ill. 183, 33 N.E. (2d) 485 (1941), as applied to the Illinois Supreme Court; Ockenga v. Alken, 314 Ill. App. 389, 41 N.E. (2d) 548 (1942), as applied to the Appellate Courts. See also Sprague v. Goodrich, 376 Ill. 80, 32 N.E. (2d) 897 (1941), noted in 19 CHICAGO-KENT LAW REVIEW 275, and Scott v. Freeport Motor Casualty Co., 379 Ill. 155, 39 N.E. (2d) 999 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 35, which cases deal with a similar problem under Ill. Rev. Stat. 1941, Ch. 110, § 192(3c).

[1] 381 Ill. 429, 45 N.E. (2d) 869 (1943), Wilson, J., dissented without opinion. Appeal to the Supreme Court was allowed because a freehold was involved.

[2] Ill. Rev. Stat. 1941, Ch. 110, § 259.36.

The filing of the notice of appeal in any case is important, not only from its jurisdictional aspects,[3] but also from the fact that it is the controlling date fixing the time for subsequent steps to be taken in perfecting the appeal.[4] In recognition of the fact that it is not always possible to complete the required steps in the allotted time, provision has been made for the entry of an order extending the time, but where such provision exists it is accompanied by the qualification that any such order be entered before the allotted period has expired.[5] The trial court in the instant case, despite this qualification, attempted to give its order retroactive effect by providing that the same was entered nunc pro tunc as of a date within the period in which, had application then been made, it might have granted an extension of time. Such conduct has received the condemnation of the Illinois Supreme Court in criminal cases[6] and also in civil cases decided prior to the adoption of the Illinois Civil Practice Act.[7] By regarding such order as a nullity in the instant case, the court again affirms this earlier position. To be valid, therefore, any order granting an extension of time must be entered in fact and within the allotted period.

It should also be noted that the mere presentation or submission of the report of proceedings to the trial judge, though done within apt time, is not a sufficient compliance with the rule in question. That rule, having the force of statute,[8] specifically states that: "The report of the proceedings at the trial . . . shall be procured by the appellant and submitted to the trial judge . . . *and filed in the trial court* within 50 days after the appeal has been perfected."[9] Nothing short of filing is regarded as compliance therewith,[10] and, if the filing does not occur within the limited

3 Ibid., § 200(2).

4 Thus, it is made the basis for measuring time, under Ill. Rev. Stat. 1941, Ch. 110, § 259.34, in which to serve notice of appeal and to file return thereof; under § 259.35, in which to join in the appeal or prosecute a cross-appeal; under § 259.36, in which to file a praecipe for the record, and for a supplemental praecipe; under § 259.36(1)(c), in which to file report of proceedings and to enlarge the time for so doing; under § 259.36(l)(d), in which to stipulate as to the material facts in lieu of a report of proceedings; and under § 259.36(2)(a), in which to transmit the record to the reviewing court.

5 See, for example, Ill. Rev. Stat. 1941, Ch. 110, § 259.36(l)(c) and § 259.36(2)(b).

6 People v. Keller, 353 Ill. 411, 187 N.E. 460 (1933); People v. Miller, 365 Ill. 56, 5 N.E. (2d) 458 (1936).

7 Hake v. Strubel, 121 Ill. 321, 12 N.E. 676 (1887); Pieser v. Minkota Milling Co., 222 Ill. 139, 78 N.E. 20 (1906); Richter v. C. & E. R. R. Co., 273 Ill. 625, 113 N.E. 153 (1916).

8 Ill. Rev. Stat. 1941, Ch. 110, § 203, authorizes the Supreme Court to regulate the practice and procedure by which cases shall be reviewed by general rules. It has exercised such power insofar as the instant problem is concerned by Rule 36, Ill. Rev. Stat. 1941, Ch. 110, § 259.36.

9 Ill. Rev. Stat. 1941, Ch. 110, § 259.36(1)(c). Italics added.

10 Under the former practice even signing and sealing of the bill of exceptions by the trial judge was regarded as insufficient, filing was the important factor: Holmes v. Parker, 2 Ill. (1 Scam.) 567 (1839); Hall v. Royal Neighbors of America, 231 Ill. 185, 83 N.E. 145 (1907); Illinois Improvement Co. v. Heinsen, 271 Ill. 23, 111 N.E. 117 (1915); Williams v. DeRoo, 316 Ill. 23, 146 N.E. 470 (1925).

period or within a proper extension thereof, the report of the proceedings does not become a part of the record. Its contents, therefore, are not open for consideration by the reviewing court.

W. F. ZACHARIAS

JUDGMENT—RENDITION, FORM AND REQUISITES IN GENERAL—WHETHER MORE THAN ONE JUDGMENT MAY BE RENDERED IN THE SAME CASE AGAINST SEVERAL DEFENDANTS SUED AS JOINT TORT-FEASORS—In *Shaw* v. *Courtney*[1] the plaintiff filed a two-count complaint in which he charged the several defendants with assault and battery and also with false imprisonment. At the ensuing trial, the issues were submitted to the jury with separate forms of verdict as to each defendant, and the jury returned separate verdicts as to each in varying amounts.[2] On appeal from the resulting judgments in favor of plaintiff upon such verdicts, the defendants contended the same were erroneous for lack of authority to apportion damages against joint tort-feasors, but the court found no error on this point by reason of Section 50 of the Illinois Civil Practice Act.[3] The cause was, however, reversed and remanded on the ground that the several verdicts were against the manifest weight of the evidence.

Under common law practice, the victim of a tort who believed that several persons were responsible for the wrong, had the choice of suing any one of the wrongdoers, or joining all as joint tort-feasors, even though they might not have acted in concert.[4] At the trial, any defendant who was not proven to be at fault could secure his discharge by motion for a directed verdict. If the case went to the jury, that body might return a verdict of not guilty as to any one or more of the defendants, but if it found them, or some of them, guilty it would render one verdict against all such persons for the total amount of plaintiff's damage without apportionment.[5] Execution of the single judgment on such single verdict could be enforced against any one defendant, who, upon satisfaction thereof, was denied any right of contribution.[6] If any defendant appealed and succeeded in demonstrating error, the entire judgment was reversed as to all even though the same was compatible with right and justice as to the others, since the same was regarded as an indivisible unit.[7] It was, of course, impossible under such practice to join several

1 317 Ill. App. 422, 46 N.E. (2d) 170 (1943).

2 The verdicts were for $5000, $1500, $1500, and $2000 respectively and separate judgments were entered thereon, for a total of $10,000.

3 Ill. Rev. Stat. 1941, Ch. 110, § 174.

4 Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481, 25 N.E. 799 (1890); Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N.E. 553 (1898); City of Roodhouse v. Christian, 55 Ill. App. 107 (1894). See also Cooley, Torts, 4th Ed., I, § 81.

5 Pecararo v. Halberg, 246 Ill. 95, 92 N.E. 600 (1910); Humason v. Michigan Central R. Co., 259 Ill. 462, 102 N.E. 793 (1913); though plaintiff, after verdict, might still dismiss as to any defendant and take judgment as to the remainder: Postal Telegraph Cable Co. v. Likes, 225 Ill. 249, 80 N.E. 136 (1907).

6 Nelson v. Cook, 17 Ill. 443 (1856).

7 McDonald v. Wilkie, 13 Ill. 22 (1851); Seymour v. Richardson Fueling Co.,

tort-feasors except on the theory of joint liability, inasmuch as a misjoinder would have occurred had the plaintiff sought to advance several independent claims in one action against several separate defendants.

With the adoption of the Illinois Civil Practice Act, an innovation occurred in the procedural law of this state for that statute permitted a variety of joinder unknown to the common law.[8] By reason thereof, actions have since been upheld in which one plaintiff has been allowed to assert several independent claims against one defendant,[9] and several plaintiffs have been permitted to join their independent but related claims against the same individual.[10] In such cases, the act provides that the court may, in its discretion, order separate trials,[11] and further provides that more than one judgment may be rendered in the same case.[12] Cases exist in which separate judgments have been rendered in favor of independent, but joined, plaintiffs[13] and, for purpose of jurisdiction on review, these several judgments have been regarded just as independent as if they had arisen in separate and distinct proceedings.[14] The practice, so far as it affects the rights of several plaintiffs, is now, therefore, fairly well settled.

The instant case, however, presents the opposite side of the picture. There is no doubt that, had plaintiff chosen to do so, he might have maintained a series of independent suits, one against each defendant, holding each liable for his own conduct.[15] When the several claims were combined in one suit against all defendants, though, a problem would

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205 Ill. 77, 68 N.E. 716 (1903); Livak v. Chicago & Erie R. R. Co., 299 Ill. 218, 132 N.E. 524 (1921). It is true that Smith-Hurd Ill. Rev. Stat. 1933, Ch. 110, § 111, repealed Jan. 1, 1934, permitted partial affirmance and partial reversal, but its application was confined to claims clearly divisible. See Domestic Building Ass'n v. Nelson, 172 Ill. 386, 50 N.E. 194 (1898); Village of Lee v. Harris, 206 Ill. 428, 69 N.E. 230 (1903); City of Kewanee v. Puskar, 308 Ill. 167, 139 N.E. 60 (1923).

8 The joinder sections are found in Ill. Rev. Stat. 1941, Ch. 110. Section 168 thereof deals with the right of one plaintiff to advance several independent causes against the one defendant; Section 148 covers the right of one plaintiff to name several defendants in the alternative; and Section 147 fixes the right of several plaintiffs to combine and assert independent but related claims against one or more defendants. Any of the foregoing would have been impossible under common-law rules.

9 Randall Dairy Co. v. Pevely Dairy Co., 278 Ill. App. 350 (1935), though such case requires that the several claims be stated in separate counts in the complaint.

10 Crane v. Railway Express Agency, Inc., 293 Ill. App. 328, 12 N.E. (2d) 672 (1938); Baker v. S. A. Healy Co., 302 Ill. App. 634, 24 N.E. (2d) 228 (1939); Weigend v. Hulsh, 315 Ill. App. 116, 42 N.E. (2d) 146 (1942).

11 Ill. Rev. Stat. 1941, Ch. 110, § 168.

12 Ibid., § 174.

13 See, for example, Crane v. Railway Express Agency, Inc., 293 Ill. App. 328, 12 N.E. (2d) 672 (1938).

14 Antosz v. Goss Motors, Inc., 378 Ill. 608, 39 N.E. (2d) 322 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 174.

15 Severin v. Eddy, 52 Ill. 189 (1869); W., St. L. & P. Ry. Co. v. Shacklet, 105 Ill. 364 (1883); City of Roodhouse v. Christian, 55 Ill. App. 107 (1894).

arise as to the theory upon which plaintiff was pursuing his claim. If he regarded the defendants as joint tort-feasors,[16] he should be treated as presenting but one claim and thus be entitled to but one verdict and one judgment against all for the whole amount of the damage sustained.[17] Such, at least, would have been the rule in this state prior to the adoption of the Civil Practice Act, and such has been the holding in New Jersey, from which state a portion of the pertinent statutory section appears to have been drawn,[18] as well as in England under the reformed procedure adopted there.[19] Decisions exist in other jurisdictions with apparently contrary holdings,[20] but such cases appear to be predicated on the fact that, in them, certain of the joined defendants were found to be subject to liability for punitive damages, hence it was regarded as proper to take separate verdicts against them for the purpose of ascertaining the amount of such additional penalty.[21]

If, on the other hand, the theory of the plaintiff's case, as disclosed by the pleadings, is that he is pursuing his independent claims against the several defendants but has joined them in one action for convenience of proof, then the statute specifically sanctions the use of separate verdicts[22] and separate judgments,[23] just as it authorizes that such actions may be severed or consolidated as an aid to convenience.[24] In such a

[16] This theory is more apt to be indicated by a single-count complaint in which the allegations are not in the alternative.

[17] Such, at least, was the practice followed in Wiedow v. Ellen Alden Carpenter, 310 Ill. App. 342, 34 N.E. (2d) 83 (1941), where, in a suit under the Dram Shop Act, one verdict and one judgment was taken against the owner of the premises, the proprietor of the dram shop, and the actual assailant.

[18] In Walder v. Manahan, 21 N. J. Misc. 1, 29 A. (2d) 395 (1942), a verdict which found ". . . against the defendants in the sum of $20,000; $10,000 against each defendant," was held improper as an attempt to apportion damages between joint tort-feasors. See also Owens v. Cerullo, 9 N. J. Misc. 776, 155 A. 759 (1931); Tricoli v. Centalanza, 100 N. J. Law 231, 126 A. 214 (1924). In LaBella v. Brown, and LaBella v. Derr, 103 N. J. Law 491, 133 A. 82 (1926), it was regarded as error to consolidate two separate suits for purpose of trial and to accept a single verdict therein followed by a single judgment thereon, when, in fact, the two claims were against truly independent tort-feasors though affecting the same victim.

[19] Greenlands, Ltd. v. Wilmshurst, (1913) 3 K.B. 507, particularly 530, reversed on other grounds in (1916) 2 A. C. 15.

[20] The court in the instant case cited and relied on Latasa v. Aron, 109 N.Y.S. 744 (1908); Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 19 P. (2d) 637 (1933); McCurdy v. Hughes, 63 N.D. 435, 248 N.W. 512 (1933); Johnson v. Atlantic Coast Line R. Co., 142 S. C. 125, 140 S.E. 443 (1927); Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152 (1903); Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S.W. 264 (1908); and Waggoner v. Wyatt, 43 Tex. Civ. App. 75, 94 S.W. 1076 (1906). In all such cases the discrepancy in the verdicts was purely on the question of punitive damages. Some of the jurisdictions in question either require or permit the use of separate verdicts or separate specification as between compensatory and punitive damages, even where only one defendant is involved.

[21] As to the rule in Illinois on this point, see Becker v. Dupree, 75 Ill. 167 (1874).

[22] Ill. Rev. Stat. 1941, Ch. 110, § 192(2).

[23] Ibid., § 174.

[24] Ibid., § 175.

case it should be expected that the rule would be the same whether the case involved the rights of several independent plaintiffs or concerned the liabilities of several independent defendants.[25]

The latter view represents the one taken by the court in the instant case, but the pleadings utilized would seem to indicate that the plaintiff's theory of his case was one for recovery against joint tort-feasors.[26] While it is true that a plaintiff may chose whether to sue on one or the other theory, he should not be permitted to disregard them, for upon such choice should depend the basis for a proper application of the rules of procedure as they relate to the taking of separate verdicts and the rendition of separate judgments.

W. F. ZACHARIAS

[25] Such, at least, was the view of the late Professor Hinton who wrote: "One rather striking change that it [Section 50 of the Illinois Civil Practice Act] makes is in allowing a number of judgments in the same case, the ordinary common-law rule being that one judgment disposed of the entire case." Hinton, Illinois Civil Practice Act Lectures, p. 276. He was, however, careful to preface this statement with the remark that: ". . . I think it must be limited to those cases of plaintiffs having several rights and defendants under several liabilities. I don't think it could be construed to upset our whole law involved in *joint rights and purely joint liabilities.*" Ibid., p. 275. (Italics added.)

[26] In Koltz v. Jahaaske, 312 Ill. App. 623, 38 N.E. (2d) 973 (1942), an action definitely predicated against two defendants on the theory of a joint tort, separate verdicts were taken but the court found no prejudicial error since the irregularity had been cured by a remittitur as to one of the defendants. The practice of taking separate verdicts, was, however, condemned on the authority of St. Louis, Alton, etc., R. R. Co. v. South, 43 Ill. 176 (1867).