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Joinder of Independent Tort Feasors as Defendants. [Seattle Taxicab Co. v. De Jarlais, Wash., 236 PAC 785]

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that the lessee should drill for oil on the premises or tear down valuable buildings. Could not the lessor bring an action at law for waste? Clearly he could not if the lessee has a fee; yet it is believed that in a lease of this kind he could do so.[20]

The opinion of Mr. Justice Holmes in the case of *Stark v. Mansfield*,[21] while not directly in point, would seem to throw some light on the effect of a statute which gives a lease an important attribute of a fee. In that case a lease for one hundred years, renewable forever, was involved and the question was whether the lessor had a reversion. The court held he had, although a statute provided that leases for a term one hundred years or more, so long as fifty years remain unexpired, should be regarded as an estate in fee simple as to everything concerning its descent. While that statute differs widely from the Ohio statute, it seems clear that Mr. Justice Holmes did not consider that making a lease descend as a fee, necessarily transformed it into such an estate.

What makes the interpretation of these statutes by the Ohio court more remarkable is that three years before, in the case of *Rawson* v. *Brown*,[22] the court had considered at length this same group of statutes and had concluded that they fell short of making the lessee's interest in ninety-nine year leases, renewable forever, a freehold estate.[23]

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EQUITY PRACTICE—JOINDER OF INDEPENDENT TORTFEASORS AS DEFENDANTS.—[Washington] A recent case[1] presents an inter-

20. Clearly, so long as this is a mere term of years, the lessee should be liable at law for waste. In the Maryland case of *Crowe* v. *Wilson* (1886) 65 Md. 479, 5 Atl. 427, however, the court, while recognizing the chattel character of ninety-nine year leases renewable forever, seemed to feel that the liability of the lessee should not be exactly the same as in the case of an ordinary term; an injunction restraining waste was allowed in that case.

21. (1901) 178 Mass. 76, 59 N. E. 643. The court said: "The earlier part of the section provides that when land is demised for a term of one hundred years or more, the term, so long as fifty years of it remain unexpired, shall be regarded as an estate in fee simple as to everything concerning its descent and various other incidents not affecting this case. The section then ends with the words, 'and whoever holds as lessee or assignee under such a lease shall, so long as fifty years of the term are unexpired, be regarded as a freeholder, for all purposes.' But this does not give the lessee a fee, it simply gives to his interest a dignity and quality equal to a life estate. It is not intended to destroy or impair the reversion of the lessor or to make it in any degree less an estate than it was before." In another part of the opinion the court seemed to base its conclusion in part on absence of words of inheritance in the lease, but that circumstance, it would seem, should not affect the situation so far as the point in question is concerned.

22. (1922) 104 Ohio St. 537, 136 N. E. 209.

23. That case involved the power of a court to partition the lessor's interest. The court held that it could be done because the lessor was seized of a present estate of freehold. In *Ralston Steel Car Co.* v. *Ralston*, supra, the opinion in *Rawson* v. *Brown* is not referred to. It is submitted that the two cases are reconcilable only on the theory that *Rawson* v. *Brown* holds that a rent charge reserved out of a lease in fee is partitionable.

1. *Seattle Taxicab Co.* v. *De Jarlais* (1925) 236 Pac. 785 (Wash.).

esting problem in the joinder of independent tortfeasors as defendants in a suit for an injunction to prevent unfair competition. According to the allegations of the complainant, the plaintiff had for some years used a distinctive 'yellow cab' in its taxi services, and had acquired a large and valuable patronage as the result of reliable and efficient service and reasonable, uniform rates. The three defendants, who were separate and independent competitors of the plaintiff in the taxi business, had recently painted their respective cabs yellow so as to resemble the plaintiff's cabs, whereby the public was deceived and patronage unfairly diverted from the plaintiff. No combination or conspiracy was alleged. The prayer was for an injunctioning and damages. Pending a demurrer for misjoinder of defendants, the complaint was amended by striking out the prayer for damages, and thereupon the demurrer was overruled. On appeal this ruling was affirmed. The decision was not based on any provision of the Washington code, but was made in spite of a section to the effect that where several causes of action are united in the same complaint they must affect all of the parties to the action.

The court based its decision on the following passage from 30 "Cyc" p 129:

"The distinction is marked in the difference between an action for an injunction and an action for pecuniary damages where both actions turn upon an injury arising out of the acts of different defendants between whom there has been no common design or concert of action, but whose independent acts have in fact united as their common result, in an invasion of the plaintiff's rights. When plaintiff seeks an injunction against the continuance of this common result, he may join all the defendants in one action. But when he sues to recover his damages because of his injury from these separate and independent wrongdoers, he cannot join them as defendants in one action."

On this basis the case is difficult to sustain. The general equity rule is the same as at law, namely, that normally separate and independent rights of action against different persons must be enforced by separate suits.

Judge Story gives the following illustration of the rule:[2]

"If an estate should be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for specific performance; for each party's case would be distinct, and would depend upon its own peculiar circumstance. . . . On the other hand, the vendor in the like case, would not be allowed to file one bill for specific performance against all the purchasers of the estate, for the same reason."

The same general rule is equally applicable to suits to enjoin the commission of torts.

Thus it has been held that separate property owners cannot join in a bill to restrain separate trespasses to their respective lands by the same defendant.[3]

2. *Story* "Eq. Pl." (9th ed.) sec. 272.
3. *Marselis* v. *Morris Canal Co.* (N. J. 1830) 1 Sax. 30.

Nor can separate property owners join in a bill to set aside their separate conveyances alleged to have been obtained by similar fraudulent representations.[4] There is, of course, a well-recognized exception to this rule, which permits separate property owners to join in a bill to abate, or prevent the continuance of a nuisance which similarly affects their respective lands.[5]

The courts usually refer to these cases as involving a 'common' injury to all, as if that afforded a sufficient explanation. The real reason for permitting the joinder would seem to be the practical convenience of settling the question of nuisance once and for all in one suit, instead of separately in separate suits by each property owner. So separate judgment creditors may unite in a bill to reach property which has been fraudulently conveyed.[6]

The usual statement that the creditors have a *common* interest is neither enlightening nor satisfactory. Their interests are obviously separate and distinct, and not infrequently antagonistic, especially in those jurisdictions where the diligent creditor may obtain an advantage by prompt action.

But the practical advantage of settling the important question as to the validity of the conveyance once and for all outweighs the possible complications.

The same considerations explain the permitted joinder of property owners in bills to prevent illegal assessments.[7] In the case of defendants, it has never been supposed that a plaintiff could maintain a bill against independent wrongdoers merely because they were committing more or less similar wrongs. Thus it has been held that a bill against separate infringers of a patent or copyright was multifarious.[8] For the same reason a plaintiff was unable to maintain a joint bill against separate mine owners who were depositing refuse from their separate mines in separate places so that such refuse was washed down and deposited on his land.[9]

The same court held a bill multifarious which sought to restrain several defendants from maintaining separate structures, each of which obstructed navigation.[10]

For the same reason it was held a misjoinder for a debtor to attempt by a single bill to restrain his separate creditors from enforcing separate assignments given to secure their respective claims,

4. *Jeffers* v. *Forbes* (1882) 28 Kan. 174; *Levering* v. *Schell* (1883) 78 Mo. 167; *Norian* v. *Bennett* (1919) 179 Cal. 806.

5. *Murray* v. *Hay* (1845) 1 Barb. Ch. 159; *Rowbotham* v. *Robbins* (1890) 47 N. J. Eq. 337; *Strobel* v. *Kerr Salt Co.* (1900) 164 N. Y. 303; *Younkin* v. *Milwaukee Trac. Co.* (1901) 112 Wis. 15.

6. *Brinkerhoff* v. *Brown* (1822) 6 John. Ch. 139; *Gates* v. *Boomer* (1863) 17 Wis. 470.

7. *Gage* v. *Chapman* (1870) 56 Ill. 311.

8. *Dilly* v. *Doig* (1794) 2 Vesey Jr. 486.

9. *Keyes* v. *Little York Gold Co.* (1879) 53 Cal. 724. It has sometimes been thought that this case is in conflict with the stream pollution cases, but there is a substantial difference because the pollution cases involve the condition of the stream, and closely resemble the nuisance cases.

10. *People* v. *Oakland* (1897) 118 Cal. 234.

on the ground that such claims were usurious.[11] The reason and the good sense of the general rule are obvious. Where there is neither concert nor co-operation between A and B, neither is responsible for the acts of the other, nor concerned with the liability of the other.

Where every question is separate and distinct, nothing is gained from an attempt to force a pooling of issues when there are no common issues or questions to pool.

"Courts of equity, in cases of this sort, are anxious to preserve some analogy to the comparative simplicity of proceedings at the common law, and thus to prevent confusion in their own pleadings, as well as in their own decrees."[12]

To the general rule prohibiting the joinder of independent wrongdoers as defendants, there are two or three fairly well defined exceptions. First, there is a class of cases where there is no combination or concert in intent and the acts are separate and distinct. But there is a combination in result because the result of the acts of one is affected by the acts of the other. This may be illustrated by a case[13] where a plaintiff was permitted to maintain a bill against two defendants who were obstructing access to his property by parking their respective vehicles in front of it. The most serious part of the obstruction resulted because both sets of vehicles were there at the same time. There was co-operation in fact, though not in intent. A similar situation was involved in the famous merry-go-round case,[14] where intolerable conditions were produced by a hand organ, a merry-go-round, and some other noisy attractions, all operated independently at the same time. Any one by itself might not have been serious, but the combination was unbearable. That doctrine was carried to the extreme limit in a fairly recent case[15] in Illinois, where a bill was sustained against the proprietors of three independent disorderly resorts operated in the same part of a town, and where a substantial part of the disturbance arose from the circulation of drunken patrons from one to the other.

Such cases bear a strong analogy to a class of cases where a joint liability arises at law from independent but concurrent acts of negligence. For example, where a third person is injured as the result of a collision between two vehicles, each of which was negligently operated. The main reason, however, for permitting a joinder in equity in such cases is the practical advantage of being able to consider the result as an entirety with all persons responsible for it before the court at once.

The principal case does not seem to fall into this group. The loss of patronage from the imitation of plaintiff's cabs by A was not in the least affected by similar misconduct by B.

11. *Atlanta Finance Co.* v. *Fulweiler* (Ga. 1924) 124 S. E. 689.
12. *Story* "Eq. Pl." (9th ed.) sec. 271.
13. *Thorpe v. Brumfitt* (1873) L. R. 8 Ch. App. 650.
14. *Lambton* v. *Mellish* (1894) 3 Ch. 163.
15. *Bucks* v. *Strawn* (1913) 182 Ill. App. 644.

Another very well known group which stand on much the same basis are the stream pollution cases. It is well settled that a riparian owner may maintain a bill against any number of persons whose independent acts have contributed to the condition of the stream.[16] The actual condition of the stream, and what caused it, are questions that would be involved in suits against each of the defendants, and may as well be settled once and for all. The last group consists of the water diversion cases. Joinder here has frequently been sustained.[17]

Such cases involve questions of relative rights, because the plaintiff is not entitled to all the water in the stream. Upper riparian proprietors are entitled to some of the water.

Where relative rights must be taken into account, it is desirable to have all the parties before the court, notwithstanding the added complication. These cases furnish no analogy for the joinder of the defendants in the principal case, under any doctrine of contributing to the result.

A joinder might possibly have been sustained, however, on a different ground. Whether the plaintiff had acquired a right to the exclusive use of a combination of yellow and black to distinguish its cabs was a contested question involving both law and fact. That question would be involved in separate suits against the several defendants. The balance of convenience in settling that question might well support the joinder. In an early English case a bill was sustained against independent trespassers all of whom were disputing the plaintiff's alleged prescriptive right of exclusive fishery.[18] On the first argument, the chancellor was of the opinion that the bill was multifarious because the defendants were not alleged to be acting in concert.

On reargument he overruled the demurrer and sustained the bill because the question involved was whether the plaintiff had a general right to the sole fishery.

A curious combination was presented in a Wisconsin case.[19] Plaintiffs, riparian owners on a lake, claimed a prescriptive right to have the water remain at its accustomed level. One defendant was maintaining a dam at the inlet to the lake which prevented the inflow of water, and the other defendant was withdrawing a large amount of water at the outlet for power purposes. The joinder of the defendants was sustained, partly on the ground that they contributed to the result complained of, and partly on the ground that they were both interested in the question of plaintiff's alleged right to a certain water level. On the latter ground, the case seems sound and would support the joinder in the principal case.

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16. *Lockwood* v. *Lawrence* (1885) 77 Me. 297; *Warren* v. *Parkhurst* (1906) 186 N. Y. 45; *State* v. *Dearing* (1912) 244 Mo. 25.

17. *Hillman* v. *Newington* (1880) 57 Cal. 56.

18. *Mayor of York* v. *Pilkington* (1737) 1 Ak. 282.

19. *Draper* v. *Brown* (1902) 115 Wis. 361.