1926

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Edward W. Hinton

ILLINOIS
LAW REVIEW

Volume XX FEBRUARY, 1926 Number 6

AN AMERICAN EXPERIMENT WITH THE ENGLISH RULES OF COURT

By Edward W. Hinton

After seventy years' experience with the famous Code of Civil Procedure, which served as a model for the codes of the various western states, the New York legislature in 1920 adopted a new code known as the Civil Practice Act.

On many subjects, this act embodied in substance the provisions of the former code, but attempted a more or less radical departure in dealing with the joinder of parties.

The provisions of the former code, that all persons having an interest in the subject of the action and in obtaining the judgment demanded might be joined as plaintiffs, and that any person might be made a defendant who had or claimed an interest in the controversy adverse to the plaintiffs, or who was necessary to the complete determination of the question involved therein, were obviously taken from the equity practice, and were subsequently embodied in equity rule 37, by the Supreme Court of the United States.

The provisions of the Civil Practice Act on the joinder of parties were copied almost verbatim from order 16 of the English rules of court adopted under the authority of the Judicature Act. For convenience the more important rules of order 16, and the corresponding sections of the Civil Practice Act, are here set out in parallel columns.

Order 16:	*New York Civil Practice Act:*
R. 1. All persons may be joined in one action as plaintiffs, in whom any right to relief [in respect of or arising out of the same transaction or series of transactions][1] is alleged to exist,	Sec. 209. All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist,

1. The words in brackets were added by amendment in 1896.

whether jointly, severally, or in the alternative, [where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such other order as may be expedient], and judgment may be given for such one or more of the plaintiffs as may be found entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief unless the court or a judge in disposing of the costs shall otherwise direct.

R. 4. All persons may be 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, without any amendment.

R. 5. It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

R. 6. The plaintiff may, at his option, join as parties to the same whether jointly, severally or in the alternative, where if such persons brought separate actions any common questions of law or fact would arise; 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 to be entitled to relief, for the relief to which he or they may be entitled.

Sec. 211. All persons may be 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.

Sec. 212. It shall not be necessary that each defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

Sec. 216. Two or more persons severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to

action all or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes.

R. 7. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties.

recover against other parties liable over to him, may all or any of them be included as defendants in the same action at the option of the plaintiff.[2]

Sec. 213. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties.

The common law rules as to joinder of parties were extremely simple, but inflexible. In order to join as plaintiffs the declaration must show a joint right.

If two would sue on a contract they must allege a promise to them jointly. If they would sue in tort, they must allege an invasion of a joint right. If a plaintiff would join two as defendants in an action on a contract he must allege a joint promise on their part. If he would join two as defendants in a tort action he must allege a wrong committeed by them jointly. The application of the rules might involve difficult problems as to when a promise should be construed to be made jointly or to run to two jointly, or what property rights were joint, or when two persons were jointly liable, as for example, whether master and servant were jointly liable for the torts of the servant.

But with such problems solved, the application of the rules followed as a matter of course. The rules themselves were the product of the jury trial, and were based on what appears to be a well founded belief that the capacity of the jury was limited, and that confusion was likely to result from a multiplicity of distinct issues, which would be inevitable if plaintiffs were allowed to join to enforce separate claims against a defendant, or if a plaintiff were permitted to enforce separate claims against different defendants in one action.[3] The inflexibility of the rules sometimes made

2. This section is a re-enactment of sec. 454 of the Code of Civil Procedure, and therefore is older than rule 6, order 16.

3. "The difference in the rules as to parties between courts of law and of equity was not accidental, but had an obvious foundation in reason. Where

two suits necessary where without much danger of confusing one might have served the purpose. For example, a joint action could not be maintained against a principal and guarantor, because they did not promise jointly, though the default of the principal might be the only substantial issue.

The separate owners of several dogs which chased and killed the plaintiff's sheep could not be sued jointly, because each was separately liable for the damage done by his own dogs, though it might in that case be more convenient to settle the separate liabilities in one action rather than two.[4]

In the chancery practice the courts followed the general analogy of the law rules as to parties, unless there was some practical reason for a more liberal joinder.[5]

The practical reasons for relaxing the rule fall into two general classes:

Where it was sought to dispose of property or funds or otherwise completely settle an entire controversy, and to that end separate and conflicting rights had to be taken into account.

Where the rights or liabilities were separate, but the claims involved the same question which might well be settled once and for all. Such situations may be illustrated by suits by separate property owners to restrain a nuisance, the pollution or diversion of water, or the obstruction of a street, and by suits against a number of defendants separately polluting or diverting a stream.[6] The provisions of the former code, embodying a part of the equity rule, and doubtless intended to apply to legal actions as well as equitable actions, produced much confusion, but little actual change.

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all persons having an interest in the controversy are made parties, cases are frequently rendered exceedingly complex. Judges can command the time and patience, and may be safely endowed with the discretion required to disentangle their intricacies and dispose of their varied equities. But it is extremely inconvenient, if not impossible, to try such cases by a jury. They are qualified to deal with simple issues only; and the rules of the common law as to parties, as well as those which prevail in the formation of issues, were adapted to the nature of the tribunal before which the cases were to be tried. The attempt to apply the equitable rules as to parties, to all legal actions, would lead to infinite embarrassment in the trial of jury cases": Selden, J., in *Voorhis* v. *Childs* (1858) 17 N. Y. 354.

4. *Adams* v. *Hall* (1829) 2 Vt. 9.

5. "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 on 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": *Story* "Eq. Pl." (9th ed.) sec. 272.

6. For a discussion of such cases, see "Joinder of Independent Tortfeasors as Defendants": ILL. LAW REVIEW 20:294.

Joinder was allowed or refused in the equity cases in accordance with the general equity practice, without much attention to the wording of the statute, which otherwise might have embarrassed the joinder in some instances.

In legal actions the language was found largely inapplicable. And a further limitation was imposed by the section on joinder of causes of action, which required that each cause of action united in the same complaint must affect all of the parties to the action. Accordingly under the code separate property owners continued to join in suits for an injunction to protect their respective holdings from injury by nuisance.[7] But such property owners could not join in an action for damages.[8]

In a suit for an injunction the plaintiff might join as defendants those who were separately and independently polluting a stream, but could not maintain a joint action against them for damages.[9]

Under the codes the courts in the main continued to apply the common law tests to legal actions, namely, whether the complaint stated a joint right in the plaintiffs, or a joint liability on the part of the defendants, otherwise there was a misjoinder of parties or of causes of action.

Turning to the English rules under order 16, it is obvious that they were to be applied to both actions at law and suits in equity, and it is not surprising that both the profession and the courts were perplexed.

Prior to the amendment in 1896, rule 1, declared that all persons might join as plaintiff in whom any right to relief was alleged to exist, whether jointly, severally or in the alternative. And rule 4 declared the same thing as regards defendants. Joint rights and joint liabilities were well enough understood and caused no difficulties. If two or more had a joint right to relief a joinder to enforce it was necessary under the former system. But the meaning of several rights and several liabilities was largely uncertain. In the field of contracts joint and several promises were well enough known, creating a joint and several liability. So in the tort field, those co-operating in the commission of a tort incurred a joint and several liability. But the doubt was whether the term 'several' was used in this restricted sense, or whether it was used in the sense of separate rights and separate liabilities.

7. *Strobel* v. *Kerr Salt Co.* (1900) 164 N. Y. 303.
8. *Younkin* v. *Milwaukee Traction Co.* (1901) 112 Wis. 15.
9. *State* v. *Nearing* (1912) 244 Mo. 25.

Two decisions by the House of Lords removed some of the uncertainty. In the first of these,[10] several persons had shipped cotton on the same vessel for which bills of lading were issued to each shipper. A number of these shippers, claiming that there was a shortage in the deliveries under their respective bills of lading, joined as plaintiffs in an action for the loss, on the theory that this presented a case of a several right to relief according to the terms of the rule.

The House of Lords held the joinder unauthorized, and pointed out that if the term 'several' should be construed to mean 'separate,' it would lead to the absurdity that any number of plaintiffs might join together to sue any number of defendants in respect to causes of action not common to either plaintiffs or defendants.

From a functional standpoint the court thought that this could not have been intended.

The court did not accept the view of the Master of the Rolls that separate causes of action in favor of different plaintiffs might be joined where they arose out of the same transaction, though that would not have helped the joinder in question because these claims for shortage did not arise out of the same transaction, but out of separate and independent, though similar, transactions.

It was suggested that since under the former chancery practice there were cases where plaintiffs severally entitled to the same relief might propertly join, the rule was probably framed to cover such situations. While the result seems sound, one of the reasons assigned is not very convincing, namely, that order 16 dealt with parties, while the case involved rather a joinder of causes of action, which was regulated by order 18.

As a matter of fact some of the rules under order 16 clearly dealt with a joinder of causes of action as well as a joinder of parties. For example, rule 5 provided that it should not be necessary that a defendant be interested in all the relief prayed, or in every cause of action included in the proceeding.

In the next case,[11] the plaintiff joined two defendants, alleging that one occupied the premises adjoining the plaintiff's property on the north, and that the other adjoined plaintiff on the south, and that in receiving and dispatching goods at their respective places of business defendants obstructed the sidewalk and street so as to prevent access to plaintiff's place of business. On much the same reasoning as in the previous case it was held that the provision of

10. *Smurthwaite* v. *Haunay* (1894) A. C. 494.
11. *Sadler* v. *Great Western Ry.* (1896) A. C. 450.

rule 4, that persons might be joined against whom the right to any relief was alleged to exist whether jointly or severally, did not authorize a joint action, against two defendants to enforce separate claims against each for independent, though similar torts.

These cases seem to imply that a joinder of parties prohibited by the former practice as involving a misjoinder of causes of action was still prohibited unless clearly authorized by the new rules.

As a result of these decisions which greatly limited the joinder of parties, rule 1 was amended by adding the words in brackets thereby expressly authorizing a joinder of plaintiffs to enforce several (separate) claims where they arose out of the same transaction,[12] or series of transactions, and where, if they had sued separately, a common question of law or of fact would arise. In its amended form, rule 1 suggests a familiar doctrine of the former chancery practice, and the cases in which a joinder has been allowed to enforce separate claims have been chancery cases or cases where the joinder would have been permissible if the suit had been in chancery. For example, where several persons claimed to have been induced to purchase certain corporate securities by reason of false and fraudulent statements in a prospectus, they were permitted to join in an action for damages.[13] Apparently the issuance of the prospectus was treated as the transaction out of which the claims arose.

"It is perfectly true that if these plaintiffs had not entered into contracts they could not have a title to relief. The entering into the contract was a separate transaction. All the plaintiffs allege the right to relief to arise out of the issue of the prospectus containing false statements and therefore out of the same transaction. . . . But when each plaintiff has proved his title, there is a common ground of action,

12. Section 484 of the former New York Code, authorized a joinder of causes of action of different classes in the same complaint where they all arose out of "the same transaction or transactions connected with the same subject of action," and this was readopted in section 258 of the Civil Practice Act. It is somewhat curious to find the English Rules Committee, in 1896, adopting almost the same phraseology which Judge Comstock had characterized in *N. Y. & N. H. Ry.* v. *Schuyler* (1858), 17 N. Y. 592, as "Well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretation which shall be found most convenient and best calculated to promote the ends of justice."

It may be doubted whether that ideal construction has yet been found, though a vast array of cases in the code states embody laborious efforts to give some meaning to 'transaction' and 'subject of the action.'

13. *Drincqbier* v. *Wood* (1899) Ch. D. 393. Under the former chancery practice a number of subscribers have been permitted to join in a bill in equity on a similar state of facts: *Bosher* v. *R. & H. Land Co.* (1892) 89 Va. 455.

namely the loss to the plaintiffs caused by the defendants issuing the prospectus."

In a later case,[14] a number of persons, claiming separate similar rights in a market were held entitled to join as plaintiffs in suit to establish such rights, and for compensation for past exclusion.

"The language of order 16, rule 1 is very wide. It must cover the case of several creditors, joining as co-plaintiffs in a creditor's action. Their debts are separate, and just as much, or just as little 'a series of transactions' as the separate grievances of which the growers in this action complain. Assuming that the defendant has rejected the claims of the several plaintiffs on the ground that according to the true construction of the Act, growers have no preferential claims to which he is bound to give effect, it appears to me that you have a series of transactions, where if the plaintiffs sued separately, a common question of law would arise."

No change was made in the language of rule 4, allowing the joinder of defendants whether jointly or severally liable, but the later English cases assume that the amendment of rule 1, must be applied to rule 4, to prevent the absurdity of totally different rules governing the joinder of plaintiffs and defendants.

The construction of rule 4 is far from settled, and the annotator of the English rules adds this significant caution that, "Practioners would be well advised to walk warily in the matter of joining several defendants where their respective liabilities are separate, in cases not covered by authority." This would indicate that neither certainty nor simplicity has yet been attained in the joinder of parties under the English rules. Some of the later cases, however, throw light on the problem.

In one of these,[15] the plaintiff sued the county for negligent excavation causing his building to fall. When the defendant set up as a defense that the accident was caused by the negligence of a water company in permitting a leak which undermined the premises, the plaintiff sought to make the water company a defendant, but this was refused as involving a misjoinder, because the liabilities were separate and distinct.

The case has been criticized because the court ignored the amendment of rule 1, which made it possible to join claims for separate liabilities where they arose out of the same transaction, etc., and involved a common question of law or fact.

It is possible that the plaintiff might have made a case of joint liability on the theory that the negligence of each defendant con-

14. Duke of *Bedford* v. *Ellis* (1901) A. C. 1.
15. *Thompson* v. *County Council* (1899) 1 Q. B. 840 (C. A.).

tributed to the fall of the building.[16] But on any other theory the two claims did not arise out of the same transaction. The claim against the county arose out of its acts in making an excavation. The claim against the water company arose out of its neglect to stop a leak in its water main. These would seem to be quite separate and distinct transactions. In a very loose sense there might be said to be a common question of fact, namely, what caused the collapse of the building. But in an accurate sense the question in the two cases would be quite different. In the claim against the county the sole question would be whether the excavation caused the damage. Proof of any other cause would be proper to rebut the claim, and to that extent the effect of the leaking water pipe would be involved. In the case against the water company the effect of the leaking water would be directly involved, and in an incidental way, the effect of the excavation. Under a liberal construction the joinder might have been allowed.

In the next case,[17] plaintiff brought an action for slander against two defendants, alleging the publication of a slanderous charge by one defendant on one occasion, and a publication on another occasion by the other defendant of the same charge in different language.

It was again held that the rules did not authorize the joinder of defendants to enforce separate liabilities for independent torts. It was not even urged that the possibility of the same defense made a common question.

Two rather significant cases may be noted where a joinder of defendants was held proper, though the liabilities were distinct.

In one,[18] the plaintiff had made a contract with the X Company for the shipment of a large quantity of meat on certain of its ships; by a supplemental agreement it was provided that a part of the meat was to be carried on an additional ship to be arranged for by the X Company. Accordingly it engaged the Y Company to handle this shipment.

The meat was damaged in transit, and the plaintiff joined both defendants. The joinder was sustained principally on the ground that the claim against each involved the same question.

"It is the same cause of action as against both defendants, if by that is meant that all of the material facts which go to show injury to the plaintiff's goods, by reason of the unseaworthiness of the ship, are common to the case as against both the defendant companies."

16. *Simmonds* v. *Everson* (1891) 124 N. Y. 319.
17. *Pope* v. *Hawtry* (1901) 85 L. T. R. 263.
18. *Compania Sousinena* v. *Houlder* (1910) 2 K. B. 354.

At common law a joint action could not have been maintained on the contract, because the defendants did not jointly promise. Possibly a joint tort action might have been maintained on the theory that the fault of the actual carrier was imputable to the other defendant which employed it.[19] Lord Justice Vaughan Williams commented on the uncertainty of the pleading which rendered it impossible to determine the precise claim relied on by the plaintiff. "I regret it, and I am not by any means the only judge who has commented on the lamentable want of precision which is prevalent under the system of pleading now in force."

In the last case to be noted,[20] plaintiff had made a contract to furnish certain goods according to certain specifications to defendant X, and in order to carry out the contract made a contract with defendant Y to manufacture the goods according to the same specifications. Defendant X having refused to receive the goods manufactured by defendant Y, as not according to specifications, plaintiff brought an action against both defendants, seeking to recover the contract price from X, and alternatively, damages from Y. The joinder was sustained on the basis of the common question whether the goods were according to specification.

It might seem that this furnished an ideal situation for settling the one important question in one action to which all were parties. But it may be doubted whether a jury could be made to understand the nice problem of burden of proof involved. They might naturally think that if X was not liable, Y must be, which is not true, and might be very unfair to Y. In a separate action against X, he would be entitled to the verdict unless the evidence affirmatively satisfied the jury that the goods were up to specifications. In a separate action against Y for damages, he would be entitled to the verdict unless the evidence affirmatively satisfied the jury that the goods were *not* up to specifications.

The same rules apply to the combined action, so that a verdict for X does not necessarily mean a verdict against Y. Other complications could easily arise in dealing with evidence admissible against one party, but not against any other in this three-sided contest.

These rather typical English cases have been reviewed in order to give a general idea of the new scheme of joinder adopted in the New York Civil Practice Act. The cases are just beginning

19. *Greenburg* v. *Whitcomb Lumber Co.* (1895) 90 Wis. 225. But see *Parsons* v. *Winchell* (1850) 5 Cush. 592.

20. *Payne* v. *British Time Recorder Co.* (1921) 2 K. B. 1.

to reach the Court of Appeals, which is now struggling with the same doubts and uncertainties that have perplexed the English Courts for the last fifty years. In one of the first cases,[21] nearly two hundred plaintiffs joined in an action for damages separately sustained by reason of an alleged fraudulent prospectus by which the various parties were respectively induced to purchase stock in a corporation.

The joinder was sustained without much difficulty under the terms of sec. 209, as arising out of the same transactions or series of transactions and involving the common question of fraud. On its facts the case was practically the same as *Drincqbier* v. *Wood,* supra. To the objection that defendant was deprived of separate jury trials, the court pointed out that these plaintiffs might have assigned their claims to one, in which case they could have all been embraced in one suit under the former system.

In the last reported case,[22] an administrator brought an action against two defendants to recover for the death of his intestate. The complaint alleged negligence on the part of defendant A in erecting and maintaining a picket fence by reason of which the intestate was injured and died as a result thereof. It further alleged that defendant B was employed as a surgeon to treat the injuries so received, and that death resulted from his negligent treatment.

Assuming that the adoption of rule 4 by section 211 impliedly adopted the English limitations that a common origin and a common question are necessary to justify a joinder of separate claims against different defendants, the case presents serious difficulties. The claim against the property owner arose out of the original accident; the claim against the surgeon arose out of his treatment of the injuries. So far as the claim against him was concerned, the cause of the original injuries was wholly immaterial. They were two independent transactions. Under the English view that would not prevent a joinder if both claims involved a common question. In the claim against the property owner, the negligence of the surgeon might, or might not, be involved.

If the intestate used proper care in the selection of a surgeon, the negligence of the surgeon would not be material. In that event, if the defendant was responsible for the original injury he would

21. *Akley* v. *Kinnicut* (1924) 238 N. Y. 466.
22. *Adler* v. *Blau* (1925) 241 N. Y. 7, 148 N. E. 771.

be liable for the resulting death, though directly due to the negligence of the surgeon.[23]

On the other hand, if the intestate did not use proper care in the selection of a surgeon, and the negligence or incompetence of the surgeon caused death which would not otherwise have resulted, the defendant would not be liable.

In the claim against the surgeon the original cause of the injuries would be wholly immaterial. There is only a possibility of a common question. There seems to be no English case allowing joinder on a similar state of facts, and the case which most nearly approaches it, *Thompson* v. *County Council,* supra, is against the joinder. The Court of Appeals, ignoring the history of the English rules, took the following position:

(1.) That section 211, on joinder of defendants, is to be construed without regard to section 209, on joinder of plaintiffs.

(2.) That section 211 "contemplates a case where a fundamental common set of facts either entitles the plaintiff to relief against all the defendants, even though said relief may be predicated on different relationships, or in the alternative against one of two or more of the defendants."

(3.) That there was no such fundamental common state of facts presented.

(4.) That the joinder of separate causes of action was further limited by section 258, prohibiting the joinder of claims not embraced within certain groups or classes, unless they all arose out of the "same transaction or transactions connected with the same subject of action," and were consistent.

(5.) That the causes of action in question did not so arise, and were inconsistent.

Nothing is more futile than the various attempts which have been made in some hundreds of cases to define that impossible phrase 'subject of the action.'

In some of the cases involving property the property itself, or plaintiff's right or title has been thought to be the subject. In the present case the negligent act causing injury and death was thought to be the subject of the action, and hence the two causes of action did not arise out of transactions connected with the same subject.

If separate claims are not normally joinable, their connection with the same subject furnishes no rational ground for an exception

23. *Pullman Co.* v. *Bluhm* (1884) 109 Ill. 20.

to the rule unless this gives rise to a material common question. Hence, the language of sec. 258 might well be construed as substantially equivalent to that in sec. 209, on the joinder of plaintiffs.

The soundness of the court's construction of these transplanted rules is not a matter of general interest, and hence it is not the purpose of this paper to attempt a solution of that problem.[24]

Some limitation on the joinder of parties and causes of action is necessary to prevent hopeless confusion and complication in cases triable by jury.

And the attempts thus far to create uniform rules for both law and equity cases have produced exceedingly difficult problems of construction which are likely to persist. After a survey of the increasing list of cases the writer may confess a growing doubt as to whether the advantages gained are not over-balanced by the uncertainties and difficulties.

24. For a criticism of the case, see comment by Prof. Clark in Yale Law Journal 35:85.