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SOME ASPECTS OF JOINDER OF CAUSES

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CONTEMPORARY reforms in practice and procedure include the removal of many of the restrictions covering the joinder of causes of action in the complaint. The policy of modern statutes is to encourage joinder of causes. Typical of this trend is the statutory system of joinder of parties and causes which is now in effect in New York State.[1] The system bears the strong imprint of equitable principles. A favorite ground of equity jurisdiction has been the prevention of a multiplicity of suit. Purely as a matter of pleading, equity permitted the joinder of parties plaintiff or defendant where they had a common interest in the subject matter of the bill. But further than this, equity recognized the prevention of multiplicity of suit as an independent and substantive ground of equity jurisdiction and invented the remedy known as the bill of peace.[2] A bill of peace combined the two-fold functions of a restraining order and an order of consolidation. Numerous parties plaintiff who were threatening to sue or were actually suing the same defendant in different actions at law, were in a proper case enjoined by a bill of peace from prosecuting their actions, and the issues involved in the numerous law actions were tried and disposed of in a single equity suit, the equity plaintiff being the prospective or actual defendant at law, and the law plaintiffs becoming defendants in equity. The bill of peace also functioned where a single plaintiff had threatened to sue or was actually suing different defendants in numerous actions at law.[3] Equity enjoined the bringing or the further prosecution of the numerous law actions, the position of the parties again being reversed, the law defendants becoming plaintiffs in equity, and the law plaintiff becoming the defendant in the equity suit.[4] The early rule with respect to a

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1. N. Y. CIV. PRAC. ACT (1921) § 209, 211, 212, 213; (1935) § 258.

2. In some of its earlier opinions the New York Court of Appeals held that the prevention of a multiplicity of suits was in itself sufficient to confer jurisdiction on a court of equity even though no other element of equity jurisdiction was present. New York & N. H. R. R. v. Schuyler, 17 N. Y. 592 (1858); Supervisors of Saratoga County v. Deyoe, 77 N. Y. 219 (1879). In a recent case, however, the court intimates that prevention of multiplicity of suits alone is not sufficient, but there must be some other ground of equitable interference present. Boston & Maine R. R. v. Delaware & Hudson Co., 268 N. Y. 382, 197 N. E. 321 (1935); (1936) 5 FORDHAM L. REV. 171.

3. In addition to the cases mentioned, a bill of peace was sometimes granted to restrain repeated actions by the same plaintiff against the same defendant. 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 245.

4. While ordinarily the bill of peace has been used to enjoin the prosecution of numerous actions at law, the bill may also be maintained to prevent multiplicity, by restraining numerous actions in equity. Erie Ry. v. Ramsey, 45 N. Y. 637 (1871); Alleghany & K. R. R. v. Weidenfeld, 5 Misc. 43, 25 N. Y. Supp. 71 (Sup. Ct. 1893).

bill of peace was technical and narrow. It was necessary, in order for equity to exercise its jurisdiction, that there exist among the numerous individuals or between each of them and their common adversary a common right, a community of interest in the subject matter of the controversy, or a common title from which all of the separate claims arose.[5] Gradually a more liberal view was adopted by Courts of Chancery and a bill of peace issued even though no common right, title or community of interest in the subject matter of the action existed among the numerous parties, provided there was *a common question of law or fact involved in the general controversy.*[6]

The New York statutes governing the joinder of parties and causes are remedial in character and have as their object the prevention of a multiplicity of suit. The so-called liberal rule governing bills of peace in equity has been woven into the statute governing the joinder of plaintiffs so that it covers both actions at law and actions in equity. *A community of interest in a common question of law or fact arising out of the same transaction or series of transactions, is the test of joinder of plaintiffs.*[7] While the statutes governing the joinder of parties defendant do not in so many words state the requirement that there be a community of interest among the defendants in a common question of law or fact, this requirement is to be read into these statutes.[8]

During the year 1935 the legislature of the State of New York made an important change in the statute governing the joinder of causes of action. Former Civil Practice Act Section 258, was repealed and a new Section 258 added, which reads as follows:

"Section 258. Joinder of Causes of Action. The plaintiff may unite in the same complaint two or more causes of action whether they are such as were formerly denominated legal or equitable, provided that upon the application of any party the court may in its discretion direct a severance of the action or separate trials whenever required in the interests of justice".[9]

The new statute is patterned after similar statutes and rules of practice in England[10] and New Jersey.[11] The scope and effect of the statute will necessarily have to await the construction placed upon it by the courts, but an insight into the motives behind its passage can

5. 1 POMEROY, *op. cit. supra* note 3, § 268.

6. *Id.* § 269.

7. N. Y. CIV. PRAC. ACT (1921) § 209.

8. Bossak v. National Surety Co., 205 App. Div. 707, 200 N. Y. Supp. 148 (1st Dep't 1923); Sherlock v. Manwaren, 208 App. Div. 538, 203 N. Y. Supp. 709 (4th Dep't 1924).

9. N. Y. Laws 1935, c. 339, in effect Sept. 1, 1935.

10. English Practice Act, Order 18, Rule 1.

11. N. J. PRAC. ACT, §§ 6 (2), 11; N. J. RULES OF PRAC. 21.

be gathered by comparing it with its predecessor, the former Civil Practice Act Section 258. As previously constituted, the Section provided that the plaintiff might unite in the same complaint two or more causes of action, whether they be legal or equitable, provided they fell within one and the same subdivision of the Section and provided further that they were not inconsistent and did not require different places of trial.[12] The scheme of the statute classifying the different types of actions and segregating them into the different subdivisions seems to have rested on purely arbitrary grounds. *X* could not unite in the same complaint against *Y*, a cause of action on contract and a cause of action in replevin because they did not belong to one and the same subdivision of the Section. The requirement, that the causes joined must belong to one and the same subdivision of the Section was not imposed where the claims arose "out of the same transaction, or transactions connected with the same subject of action" as set forth in subdivision 9 of the statute. Therefore *X* could unite in the same complaint against *Y* a cause of action on contract and a cause of action in replevin, provided they both arose "out of the same transaction, or transactions connected with the same subject of action . . . ."

As compared to the arbitrary confinements of the other subdivisions of the Section, subdivision 9 of the former Civil Practice Act Section 258

12. Former N. Y. CIV. PRAC. ACT (1921) § 258 read as follows:

"JOINDER OF CAUSES OF ACTION.

The plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries, except libel, slander, criminal conversation or seduction.
3. For libel or slander.
4. For injuries to real property.
5. Real property in ejectment, with or without damages for the withholding thereof.
6. For injuries to personal property.
7. Chattels, with or without damages for the taking or detention thereof.
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, whether or not included within one or more of the other subdivisions of this section.
10. For penalties incurred under the conservation law.
11. For penalties incurred under the agricultural law.
12. For penalties incurred under the public health law.

It must appear upon the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and it must appear upon the face of the complaint, that they do not require different places of trial.

A provision of statute authorizing a particular action, or regulating the practice or procedure therein, shall not be construed to prevent the plaintiff from uniting in the same complaint two or more causes of action pursuant to this section".

was undoubtedly intended by the legislature to be a concession towards liberality of joinder of causes of action, in the interest of prevention of multiplicity of suit. But the use of the words "Upon claims arising out of the same transaction, or transactions connected with the same subject of action . . ." rendered the subdivision ill adapted to clear construction at the hands of the courts. Referring to these identical words as used in Section 484 of the Code of Civil Procedure from which former Civil Practice Act Section 258 was derived, the Court of Appeals with a touch of cynical humor said:

"Neither, in our judgment, can it be said that the causes of action are brought to recover 'upon claims arising out of . . . transactions connected with the same subject of action' . . . which phrase has been said by a distinguished judge to be 'well chosen . . . because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice'. (*New York & N. H. R.R. Co. v. Schuyler*, 17 N. Y. 592, 604)."[13]

The bulk of the decisions in the past, having to do with the joinder of causes of action, have related to the construction to be placed on the words "arising out of the same transaction or transactions connected with the same subject of action" found in former Subdivision 9. Some of these decisions served only to increase confusion and doubt in the mind of the practitioner. Typical of the narrow refinements and distinctions which arose in connection with Subdivision 9 are the following: If *A* assaulted *B* and while making the assault spoke defamatory words of *B*, causes of action for assault and for slander could not be joined in the same complaint,[14] yet if *A* trespassed upon *B*'s land and while committing the trespass assaulted *B*, *B* could join causes of action for trespass and assault in the same complaint, [15] for while in the former case it was held the claims did not arise "out of the same transaction, or transactions connected with the same subject of action", in the latter it was said they did.[16]

A case where there was a chance to avoid a possible multiplicity of suit by joinder of causes in the same complaint but where the opportunity had to be passed by, because of the narrow construction placed on Subdivision 9 of Section 258, involved the sale of a gun by *A* to *B*.

13. Ader v. Blau, 241 N. Y. 7, 16, 148 N. E. 771, 774 (1925). Pomeroy in his work on Code Remedies concluded that the words under discussion did not apply to actions at law but only to those in equity. POMEROY, CODE REMEDIES (3d ed. 1893) § 475.

14. Paul v. Ford, 117 App. Div. 151, 102 N. Y. Supp. 359 (1st Dep't 1907).

15. Doyle v. American Wringer Co., 60 App. Div. 525, 69 N. Y. Supp. 952 (2d Dep't 1901).

16. These two decisions construing N. Y. CODE CIV. PROC. § 484 were authority as to former N. Y. CIV. PRAC. ACT (1921) § 258 which was identical in language with the Code section.

B was injured by the explosion of the gun and in his complaint joined a cause of action for breach of warranty with a cause of action for negligence. The joinder was held bad on the ground that the claim did not arise out of the same transaction or transactions connected with the same subject of action. [17] The bewildering hodge-podge of decisions arising from the judicial construction of Subdivision 9 of Civil Practice Act Section 258 was largely instrumental in the repeal of the section and the adoption of the present Section 258 which appears to permit joinder of causes of action without restriction save for the discretionary power vested in the court to "direct a severance of the action or separate trials whenever required in the interests of justice."

To attempt to formulate rules governing the joinder of causes of action under a statute which in itself contains no words of limitation and which seemingly leaves the question entirely to the discretion of the court might appear both presumptuous and futile. Yet if the statute is to perform satisfactorily it is not enough to say categorically that each case of joinder will be judged on its own merits and upon its own peculiar set of facts. It is essential to recognize that two distinct classes of cases will arise in which the question of joinder of causes will be governed by entirely different considerations.

In the *first class* may be grouped actions brought by a single plaintiff against a single defendant in which a number of different causes of action have been combined in the complaint. It is in this class of cases that the reforms intended to be accomplished by the new statute will be fully felt. Joinder of causes is no longer limited to actions of certain types nor need there any longer be any inquiry as to whether the claims arise out of the same transaction or transactions connected with the same subject of action. The man who is assaulted by his neighbor and at the same time slandered may now sue for assault and slander in the same complaint. The purchaser of merchandise which proves defective may sue the vendor in the same action for breach of warranty and for negligence. It is fair to assume in this first class of cases that the discretionary power of severance vested in the court by statute, will only find room for exercise where the objection is raised that the causes of action joined are inconsistent and therefor mutually exclusive,[18] or where in rare cases because of statutory provisions the

17. Reed v. Livermore, 101 App. Div. 254, 91 N. Y. Supp. 986 (3d Dep't 1905).

18. Inconsistency between causes of action cannot exist unless they arise out of the same transaction or series of transactions. Hill v. McKane, 71 Misc. 581, 128 N. Y. Supp. 819 (Sup. Ct. 1911). Former N. Y. Civ. Prac. Act (1921) § 258 expressly required that the causes of action joined, be consistent and that different places of trial be not required. These limitations on joinder have been eliminated from the present statute, but it is conceivable that an application for a severance might still properly be made to the court on the ground of inconsistency or the necessity of a different venue for trial.

causes joined require a different venue for trial or where finally the broad ground is urged that the joinder will confuse the issues and render a fair trial impossible.[19]

A *second class* of cases is composed of those in which controversies involving a number of plaintiffs or defendants have been assembled together in the same complaint. The problem has now become one both of joinder of parties and causes. Obviously the question presents itself whether the propriety of joinder in the complaint is to be determined by the statute relating to joinder of causes of action standing alone or by this same statute read in the light of the kindred statutory provisions governing joinder of parties. To adopt the first alternative would be in effect to hold that the new statute governing joinder of causes of action had submerged and rendered obsolete the statutes relating to joinder of parties. It would be the equivalent of saying that the joinder of causes of action in all actions, whether by a single plaintiff against a single defendant or involving multiple plaintiffs or multiple defendants, is subject to no further restriction than that of the reserved discretionary power vested in the court to sever causes of action in the interest of justice. On the other hand to adopt the second alternative is to recognize what has been the previously accepted rule, that the statutes relating to joinder of parties and causes are part of a flexible system and intended to be read together as a whole.[20]

Courts of equity animated by motives of practical expediency devised the remedy of a bill of peace to do away with a multiplicity of suit. Both parties and causes were joined in the bill under circumstances which would have been impossible in the courts of common law. The granting of the remedy rested in the sound discretion of the Chancellor. This discretionary power was controlled by the knowledge that not all causes of action could be joined in the bill. A bill which prayed for relief against different defendants on independent and unrelated transactions was demurrable on the ground of multifariousness.[21] There had to be at least a basic question of either law or fact common to all parties and causes embraced within the bill. Furthermore, the bill had to result in a consolidation and simplification of the issues else its pur-

19. By analogy it would seem that the objection that the joinder of causes will prevent a proper trial of the issues, might well be left to the good judgment of the trial court. Akely v. Kinnicutt, 238 N. Y. 466, 144 N. E. 682 (1924).

20. Sherlock v. Manwaren, 208 App. Div. 538, 203 N. Y. Supp. 709 (4th Dep't 1924).

21. Herndon v. Chicago, Rock Island and Pac. Ry. Co., 218 U. S. 135 (1910). Misjoinder of causes at Common Law and under the New York Code of Civil Procedure was ground of demurrer. N. Y. CODE CIV. PROC., § 488 (7). With the advent of the Civil Practice Act and Rules of Civil Practice, effective October 1st, 1921, misjoinder ceased to exist as a ground of demurrer to the complaint and a new remedy was given to the defendant of making a corrective motion pursuant to Rule 102 of the Rules of Civil Practice, to compel service of an amended complaint. The motion had to be noticed

pose failed of accomplishment.[22] Modern statutory provisions liberalizing the joinder of parties and causes and permitting the consolidation of actions have it is true, supplanted to a large extent the bill of peace. Yet the principles underlying the bill still serve as a guide, in construing the statutes and in solving ever recurring questions of joinder. The discretion vested in the court by statute to permit joinder of causes of action or to direct a severance is comparable with the discretion exercised by the Chancellor in granting a bill of peace.

In cases involving multiple plaintiffs or defendants it seems proper to draw the conclusion that the sweeping provisions of Civil Practice Act Section 258 governing joinder of causes of action are intended to be supplemented and limited by the statutes governing joinder of parties. It is not to be assumed that *X* as plaintiff may without restriction, join separate and independent causes of action in his complaint against *A, B, C* and *D* or that *X, Y* and *Z* as plaintiffs may unite in the same complaint separate and distinct causes of action against the defendant *A*. To justify joinder in multiple party actions, there must be present a common question of law or fact in the causes of action united. Otherwise hopeless confusion would ensue. The common question should arise out of the same transaction or series of transactions but no longer need it be "connected with the same subject of action". Those vague and mysterious words are no longer found in any statute.

Lest it be said that the placing of restrictions on the joinder of causes of action in the complaint is out of harmony with the spirit of the new statute, let it be remembered that "the purpose of procedure is order, and without order there can be no satisfactory or uniform enforcement of substantive law".[23]

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by the defendant within twenty days from the service of the complaint, Rule 105 of the Rules of Civil Practice. Misjoinder of causes of action has now been eliminated as a ground of motion under Rule 102. The rule as amended and effective September 1st, 1936, reads as follows:

"RULE 102. Motion to correct pleading.

If any matter contained in a pleading be so indefinite, uncertain or obscure that the precise meaning or application thereof is not apparent, or if there be a misjoinder of parties plaintiff, or a defect of parties plaintiff or defendant, the court may order the party to serve such amended pleading as the nature of the case requires".

The words "or if causes of action be improperly united" previously appearing after the word "defendant" have been omitted. The defendant under the broad provisions of N. Y. CIV. PRAC. ACT (1935) § 258 may now move at any time during the pendency of the action for an order of severance.

22. 1 POMEROY, *op. cit. supra*, note 3, § 251½.

23. Todaro v. Somerville Realty Co., 138 App. Div. 1, 6, 122 N. Y. Supp. 509, 513 (2d Dep't 1910).

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