Kentucky Law Journal

Volume 40 | Issue 1 Article 9

1951

Joinder of Actions

William M. Deep
University of Kentucky

JOINDER OF ACTIONS

The Kentucky Civil Code Committee's action in revising our present code procedure is an earnest and laborious effort to streamline our law by the elimination of outdated and useless code provisions plus the consolidation and clarification of others. The committee has chosen the brief, but very effective, Federal Rules of Civil Procedure as its guide. The purpose of this note is to point out some of the problems which will be confronted by the Committee in its effort to formulate a workable joinder of claims provision.

Prior to entering into a detailed discussion of the specific provision it is appropriate to review briefly the history of the joinder of claims rule. Under the common law system of pleading, unity of the subject matter in a suit was secured by the writ system and by the forms of action.[1] The plaintiff could combine in the same declaration any number of counts in the form of action selected, each stating a different cause of action against the defendant. However, claims which did not fall within the scope of the one form of action could not be joined, even though the facts upon which they were based were identical.[2] There were two notable exceptions to the general common law rule that two or more forms of action could not be joined in one declaration; debt and detinue, originally one action, could be joined; and trover which developed from case, might be joined with it.[3] It is difficult to rationalize the common law rules on joinder, for the commonly accepted belief is that the rules were arbitrary because they imposed limitations upon joinder without any reference to trial conveniences.[4] For example, because of the restrictive concept of cause of action a count in trespass could not be joined with a count in case,[5] although the two counts may have been only variations in presenting underlying operative facts, and should have been regarded as different statements of the same cause of action. On the other hand, wholly unrelated trespasses could be pleaded in different counts in the same action because they came under the same form of action.[6] Situations such as this gave rise to the popular belief that there was no reason for the above mentioned exceptions to be allowed and at the same time refused to allow the joinder of trespass and case when it was often only a matter of a different story of the same claim. The com-

---

[1] CLARK, CODE PLEADING, 435 (2 ed. 1947).
Ibid. at 436.
1 CHITTY, PLEADING 206 (16th Am. Ed. 1879).
SHIPMAN, COMMON LAW PLEADING, 201, 203 (3rd. ed. Ballantine 1923).
[5] Supra, note 1, at 436 fn. 4.
[6] 2 MOORE'S FEDERAL PRACTICE, 2113 (1938).
SHIPMAN, COMMON LAW PLEADING, 203 (1923).
Supra, note 6, at 202.

mon law penalty for misjoinder was extremely harsh in comparison with our present day procedure and the defect could have been reached by general demurrer, motion in arrest of judgment, and writ of error.[7]

In equity the procedure resembled that which exists in those jurisdictions which have adopted the code system. The purpose of the common law rules regarding joinder was to avoid a multiplicity of issues, whereas, equity "abhors a multiplicity of suits" Equity, desiring to settle the entire controversy between the parties at one time allowed the contestants to introduce all closely related matters. What could or could not be joined was within the discretion of the court, and the criteria upon which it was determined was trial convenience. The joinder rule, in equity was a broad one often referred to as the "rule against multifariousness" [8] The equity objection of multifariousness was recognized as being one which a court of equity could make at any time on its own initative. Equity proceeded upon the theory that joinder was a trial problem and determination of the question as to what should be joined could better be decided at the trial. In all classes of cases, where the causes joined present common questions of law or fact, the courts of equity are inclined to enforce the doctrine of condemning the unnecessary use of separate suits, and the defendant must make a very clear showing of prejudice before a demurrer for multifariousness will be sustained.

The procedural reform movement of America, which began with the New York Code of 1848, swept away the common law forms of action, and adopted in their place a single form of proceeding. When the forms were discarded, the common law rules of joinder should have been discarded with them, "But the framers of the code were still unable to free themselves from the common law tradition that the formal test of some kind must be adopted for restricting joinder of causes of action."[9] Section 83 of the present code of Kentucky which was adopted by the legislature in 1876 provides in effect that:

Several causes of action may be united in the same complaint by the plaintiff if all of them can be brought

(1) Upon express or implied contracts; or,
(2) For the recovery of real property and the rents, profits and damages for withholding it; or,
(3) For the recovery of specific personal property, and damages for the taking or withholding it; or,

---

[7] 1 CHITTY, PLEADING 228 (16th Am. ed. 1879).
[8] Supra, note 1, at 437.
[9] Sunderland, *Joinder of Actions*, 18 Mich. L. Rev. 571 at 579.

(4) For the partition of real or personal property, or, both; or,
(5) For injuries to character; or,
(6) For injuries to person and property

But the causes of action, so united, must belong to one only of these classes and must equally affect all the parties to the action and not require different places of trial.[10]

Taking into account this code provision, it is difficult to see any improvement over the common law system. The rigid and exact formal test of the common law procedure was replaced by an equally exacting formal test. As can be seen no discretion was given to the court to control the number of actions of any class which could be joined, and no provision was made for consolidation.

The Kentucky Code provision is similar to the original New York Code of 1848,[11] which stated classes of suits – seven in number – of similar forms of claims, and provided that joinder might be had within these classes. There has been much discussion over the original purpose of this method of categorizing by the original framers of the code. The method followed is somewhat similar to that of the common law since similarity of legal claim seems particularly to have been looked for. It is to be noted however, that the code definitely has abolished the old common law forms. Therefore, the classes are in some respects less restricted than at common law, and in others more so. The common law action on the case, for example, allows joinder of claims which now fall within several classes of the code.

The majority of the code states have adopted the famous "same transaction" provision which was accepted in New York as a supplement to its original code in 1852.[12] This noted provision was added directly from the equity practice, so that causes of action "arising out of the same transaction or transactions connected with the same subject of action,"[13] might be joined. The original Kentucky Code of Civil Practice which was adopted by the Legislature in 1851 did not contain this provision, and the framers of the present code failed to include it, nor has it been included by any subsequent amendments. The inclusion of this provision within the joinder of claims rule appears to have introduced an illogical combination of joinder classes. The net result of such a provision is to have some of the classes based upon similarity of legal claims, as it exists in Kentucky and some upon unity of occurrence as it has existed to the present time in most of the codes.[14]

---

[10] KY. CODE, CIV. PRAC. ANN. sec. 83 (Carroll's 1948).
[11] N.Y. Laws 1848, c. 379, sec. 143.
[12] N.Y. Laws, 1852, c. 392, sec. 167.
[13] *Ibid.*
[14] Supra, note 1 at 441.

The "same transaction" class may upset every other distinction in the classification, since it cuts across all other classes.[15]

The primary limitations which have been imposed by Kentucky's joinder of actions provision where there is only one plaintiff and one defendant are: (a) the causes joined must belong to the same class (b) they must not require separate places of trial and (c) forbids the joining of equitable and legal causes.

The logical basis of the code classification is that the mixing of unlike actions may be prejudicial either on procedural or substantive problems. The possibility of prejudice arising from free joinder of causes is a complaint which is often cited but seldom encountered. Can adequate protection against prejudice be assured merely by looking at the theories on which the respective causes are based? It is the opinion of the writer that the pre-determination of classes is not the solution to the danger apprehended, but adequate protection against possible prejudice and hardship can be provided by giving the court power to order separate trials of the causes originally joined.

The arbitrary system of joinder as provided for by our present code has proved very difficult to apply and it is difficult to determine, even at the present time what can be joined.[16] However, Federal Rule 18 provides that:

> (a) The plaintiff in his complaint or in a reply setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. There may be a like joinder of cross-claims or third party claims if the requirements of Rules 13 and 14 respectively are satisfied.

This rule eliminates this lack of decisiveness, for where the parties are the same there is no restriction whatever. Where the parties are different, full freedom of joinder is permitted, subject to the rules as to joinder of parties.[17] That means where the parties are different any joinder is permitted in cases which arise out of the same transaction of occurrence and involve a common question of law or fact. Therefore, Federal Rule 18 (a) permits the joinder of practically anything, but Federal Rule 42 (b) which provides that "the court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claims, third party claims or

---

[15] Supra, note 11. Professor Sunderland notes some of the absurd and inconvenient results which the code classification may produce.

[16] Hendricks Admr. v. American Exp. Co., 138 Ky. 704, 128 S.W 1089 (1910); Rural Credit Subscribers Association v. Jett, 205 Ky. 604, 266 S.W 240 (1924).

[17] FEDERAL RULES 19, 20 and 22 must be satisfied.

issues", acts as a buffer to any possible misuse or abuse of the privilege of unlimited joinder which may result in genuine hardship or prejudice.

By approaching the joinder of causes problem as one to be entertained at the trial stage, the necessity of encountering the question of whether there has been a misjoinder is eliminated for a large percentage of cases never get beyond the pleading stage. If a case is settled before trial, what difference does it make how many causes it embraced or on what theories they were grounded? Hence, the writer suggests that the joinder of actions problem be approached as a trial and not a pleading problem and a provision similar to 42 (b) be provided, whereby the court is given ample power to order a separate trial of any claim, or of any separate issue, or of any number of claims or issues.

The venue problem under the present code is raised in the provision which states that the joined causes shall not require different places of trial. This limitation has not presented a situation which would be described as serious, but nevertheless there exists the possibility that a conflict could arise, hence in revising the section some disposition must be made of this clause. The court must be able to tell if the venue or place of trial is properly chosen. Certain actions, particularly those dealing with realty, are local, and must be tried at the place where the subject matter of the suit is located. Others are transitory, and may be tried wherever it is possible to obtain jurisdiction over the person of the defendant. Therefore, this requirement in the code will remain so long as this distinction between the type of action is maintained. As a result the venue rule has not been affected by this provision in the code. One case[18] clearly recognized and discussed the provision in section 83 which permits a joinder of action only when they may be brought in the same county The problem arose in relation with civil code Section 73 which provides that –

> "Actions against a common carrier upon a contract to carry property must be brought in the county where the defendent resides, or where the contract is made, or where the property is to be delivered, and actions for injuries to a passenger or other person must be brought in county where defendant resides, or where plaintiff is injured or resides, if he resides in a county through which the road passes."

An action was brought against a common carrier for damages growing out of the negligent shipment of household goods from a point in Indiana to a point in Kentucky The plaintiff in the same action asked for damages for personal injuries sustained by him in the same collision in which his goods were damaged while the car was on

[18] Wilson v. Louisville & Nashville Ry. Co., 112 S.W 585 (1908).

the side track in St. Louis, Missouri. The action was brought in the Madison County Circuit Court against the Louisville and Nashville Railroad Company The Court of Appeals of Kentucky held that the Madison County Circuit Court had jurisdiction as to the cause of action for damages for injury to the household goods because the action was instituted in the county where the carrier defendant agreed to deliver the property as provided in the first part of section 73. But the court further asserted that it did not have jurisdiction as to the cause of action for personal injuries sustained by the plaintiff for by the latter part of Section 73, no authority is given to bring an action for an injury to a passenger in the county where the carrier agrees to deliver the property On this account Section 83 does not remedy the matter, for under that section one of the conditions precedent to uniting several causes of action is that each may be brought in the same county It is common knowledge that one of the primary objectives of the law is to avoid a multiplicity of actions,[19] and the court stressed the desirability of permitting causes arising out of the same transaction to be tried at the same time and place.[20] The provisions of Federal Rule 18 for the joinder of claims are subject to Rule 82, that is, jurisdiction and venue are not affected in any manner and the rules must be construed in accordance with that principle. The writer suggests that where the party is before the court for any portion of the controversy he should be required to answer all joinable issues.

Since the term "cause of action" does not appear in the Federal Rules because it denotes a concept which is difficult to define, Federal Rule 18 is titled "Joinder of Claims" It is doubtful that this title will be adopted by our Legislature since the term "cause of action" has deep roots in our law and has been extensively used in publications.[21]

An excellent illustration of the thoroughness with which the Federal Rules has handled the joinder problem is shown by noting Rule 54, which provides that:

> "when more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and separate judgment is so entered, the court by order, may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

---

[19] Gilliam v. Cassady, 290 Ky. 477, 161 S.W 2d 915 (1942).
[20] McCullen v. Seaboard Air Line Ry. Co., 146 N.C. 568, 60 S.E. 506 (1908).
[21] McCaskill, *The Elusive Cause of Action*, 4 U. Chi. L. Rev. 281 (1937).

Therefore, where there is a suit based upon several causes of action and the court or the parties find it convenient to dispose of one of the issues and postpone the remainder, the practice is allowed and the procedure to be followed is clearly presented. Any subsequent doubt as to whether the judgment is final or interlocutory is disposed of, for the rule specifically gives the court discretion to so determine.

The Kentucky code provides that legal and equitable causes of action may not be joined in one suit,[22] but for the purposes of joinder under the Federal Rules of Civil Procedure the distinction between legal and equitable claims has been abolished[23] and in the interest of securing a just, speedy and inexpensive determination of every action a plaintiff is permitted to join all legal and equitable claims which can be conveniently disposed of in one trial.[24]

This provision seems to solve many of the difficulties which have permanently established themselves within our procedure of conducting causes of action based on legal and equitable principles, and it is recommended that such action be taken by our legislature.

In cases involving a single plaintiff and single defendant under the present joinder of causes code section when A sues B he may join any number of causes for injury to person or property however unrelated they may be;[25] or he may join any number of causes for breach of contract.[26] The classes are broad enough to permit considerable freedom of joinder, but they are not broad enough to permit tort and contract causes to be joined.[27] Joinder has been permitted, however, where the tort is waived and that cause grounded on a contract theory.[28] A recent decision handed down by our Court of Appeals reiterated the principle that causes of action in tort and contract were improperly joined.[29] The facts of the case were as follows: As a result of a collision between their respective automobiles, the parties to the suit made a settlement. The plaintiff, gave to the defendant his promissory note for $109, the amount of damage to defendant's car, which was later paid. The plaintiff brings this action and in his petition joined an action for damages to his car — an action in tort — with an action in contract based upon an alleged promise by defendant to pay him $233, the amount of damage to his car. The plain-

[22] Rural Credit Subscriber s Ass n. v. Jett 205 Ky. 604, 266 S.W 240 (1924).
[23] 28 U.S.C. 1946 "there shall be but one form of action to be known as civil action"
[24] Supra, note 8.
[25] Justice v. Justice, 295 Ky. 610, 175 S.W 2d 21, (1943).
[26] Ocean Accident & Guarantee Corp. v. Milford Bank, 236 Ky. 457, 33 S.W 2d 312 (1930).
[27] Willis v. Tomes 141 Ky. 431, 132 S.W 1043 (1911).
[28] Roberts v. Moss, 127 Ky. 657, 106 S.W 297 (1907).
[29] Folden v. Shelton, 312 Ky. 74, 226 S.W 2d 531 (1950).

tiff was required to elect which cause of action he would pursue, and upon the election, he thereby, in effect, eliminated all of his petition except that referring to the alleged tort. By requiring this election the controversy which was based upon similar facts was required to be split thereby requiring separate suits. A similar situation arose in a case[30] before the Federal Court, where the complaint alleged that the plaintiff purchased a ticket entitling her to passage on defendant's vessel, and while she was a passenger on the vessel the defendant's servants, without provocation, and in breach of the defendant's contract to safely convey the plaintiff to her destination negligently, wilfully and illegally imprisoned her in the hospital ward. As a result the plaintiff became mentally unbalanced and brings this action for damages. The defendant's ground for a motion to dismiss the complaint is directed to the fact that the plaintiff has attempted to state a cause of action in both tort and contract. The court denied the motion holding that a complaint is not defective merely because it joins causes of action in tort and in contract. Therefore, under the Federal Rules of Civil Procedure a party may state as many separate claims as he has, and is not bound to select any particular theory upon which to seek judgment.

A further possibility of controversy arises in determining whether the joinder of the actions is to be permissive or mandatory Under our present code it has been interpreted to mean permissive,[31] hence a failure to join does not close the doors to possible future litigation upon a different cause of action.[32] But if the rule of joinder is mandatory the prior action would act as a bar to any future litigation for a general rule concerning res judicata is that not only the claims actually litigated but also matters which might have been litigated are barred by a judgment between the parties.[33] Although our present code provision as to the joinder is stated in permissive language, if Federal Rule 18 (a) is adopted, it is deemed advisable by the writer to require that a party should join all claims which arose out of the same transaction that he has against the party in his complaint.

There has been a tendency of the States, since the adoption by the Supreme Court of the Federal Rules, to liberally re-examine the entire legal attitude toward the problem of joinder. The restricted joinder of actions at common law was based largely upon historical practice that resulted in an illogical and arbitrary system. This form of pro-

[30] Munzer v. Swedish American Line, 30 Fed. Supp. 789 (1939).
[31] Clark v. Mason, 264 Ky. 683, 95 S.W 2d 292 (1934); Strubble v. Green, 234 Ky. 384, 28 S.W 2d 271 (1930).
[32] *Ibid.*
[33] Turner v. Deaton, 220 Ky. 154, 294 S.W 1063 (1927).

cedure was changed but slightly by the adoption of the Code by the various States. The writer takes the position that the savings of expense to litigants, the elimination in whole or in part of the congested dockets of the courts, as well as the interest of the public, dictate a wider joinder – if not entire freedom thereof.

WILLIAM M. DEEP

JUDGMENT NOTWITHSTANDING THE VERDICT[1]

What is done in a situation where a jury brings in a verdict for one party when a verdict should have been directed in favor of the other party? The most common answer is for the trial judge or the appellate court to grant a new trial. But such a practice is very unsatisfactory The party for whom the verdict should have been directed in the first instance is subjected to a lengthy delay He is burdened with the expenditure of time and effort in addition to the cost of re-litigation of a case which will undoubtedly end in his favor if he still has tab on his witnesses and their memories have not dulled with the passage of time. Also, it is not unthinkable that the other party may well have time enough for some unscrupulous lawyer to manufacture new evidence to conform to the appellate court's opinion.

Under the present practice in Kentucky an error of the trial court in overruling a motion for a directed verdict can only be corrected by the trial court or the appellate court's granting of a new trial.[2] The only exception is that a judgment *non obstante verdicto* can be granted by the appellate court upon the pleadings. Ordinarily, a directed verdict is proper in a case where the proof is insufficient to disclose any controversy as to the controlling facts of the case, or where there is a lack of proof supporting one or more of the material factors of the cause of action propounded so that the case requires only

[1] The Latin term for judgment notwithstanding the verdict, used mostly at the common law, is *non obstante veredicto.* The literal translation of *non obstante* is notwithstanding, and thus the modern name for the same motion is judgment notwithstanding the verdict. It is also very common parlance with lawyers and judges to use the initials n.o.v. for *non obstante veredicto* and the terms will be used interchangeably in this note.

[2] Weikel v. Alt, 234 Ky. 91, 27 S.W 2d 684 (1930); Baskett v. Coombs Admr., 198 Ky. 17, 247 S.W 1118 (1923); Sheffield-King Milling Co. v. Sorg, 180 Ky. 539, 203 S.W 300 (1918); L. & N. Ry. Co. v. Johnson, 168 Ky. 351, 182 S.W 214, L. R. A. 1916D, 514 (1916); Connecticut Fire Ins. Co. v. Moore, 154 Ky. 18, 156 S.W 867 (1913); L. & N. Ry. v. Paynter s Admr., 26 Ky. L. Rep. 761, 82 S.W 412 (1904); Mast. Crowell & Kirkpatrick v. Lehman, 100 Ky. 464, 38 S.W 1056 (1897).