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# PERMISSIVE JOINDER OF PARTIES AND CAUSES IN NORTH CAROLINA

HENRY BRANDIS, JR.\*

## I. JOINDER OF PARTIES

The basic North Carolina statutory provisions on joinder of parties are G. S. 1-68 through 1-73.<sup>1</sup>

Under G. S. 1-68 "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative, except as otherwise provided." Under G. S. 1-69 "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the question involved."

It is provided in G. S. 1-70 that those united in interest "must" be joined as plaintiffs or defendants; though if one who should be a plaintiff will not join as such, he may be made a defendant, the reason therefor being stated in the complaint. The "must" in this section is modified materially as to parties defendant by G. S. 1-72, which provides: "In all cases of joint contracts of partners in trade or others, suit may be brought and prosecuted against all or any number of the persons making such contracts." And G. S. 1-71 expressly gives the plaintiff an option to join defendants severally liable "upon the same obligation."<sup>2</sup> The power to bring in new parties is provided by G. S. 1-73.<sup>3</sup>

These provisions, standing alone, have given no undue trouble. Since there is no provision regarding plaintiffs united in interest comparable to that regarding defendants in G. S. 1-72, when the Court regards the right to be enforced as indivisible, all those sharing it must be joined as plaintiffs.<sup>4</sup> However, this article is concerned with permissive, rather than mandatory joinder.

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<sup>1</sup> See also N. C. GEN. STAT. (1943) §1-113 through §1-115, dealing with the prosecution of actions against joint and several debtors.

<sup>2</sup> In *Castleberry v. Sasser*, 210 N. C. 576, 187 S. E. 761 (1936), this enabled one of the original defendants, who was appointed administrator and substituted for deceased plaintiff, to take a nonsuit against himself individually and proceed against the other defendants.

<sup>3</sup> See also N. C. GEN. STAT. (1943) §1-163. Discussion of the subject of bringing in new parties is beyond the scope of this article.

<sup>4</sup> *Fishell v. Evans*, 193 N. C. 660, 137 S. E. 865 (1927) (joint payees of note must join in suit on note); *Allen v. McMillan*, 191 N. C. 517, 132 S. E. 276 (1926) (joint owners or cotenants of personal property must join in action for possession); *Winders v. Hill*, 141 N. C. 694, 54 S. E. 440 (1906) (members of syndicate making land contract must all be parties plaintiff); *Proctor v. Georgia Home Insurance Co.*, 124 N. C. 265, 32 S. E. 716 (1899) (when an insurance policy is pay-

## PARTIES PLAINTIFF

It is clear that even though the rights of plaintiffs are several, at least for some purposes, they may join when they seek the same type of relief with respect to property in which each has an interest. Thus, for instance, it is proper for the owner of an easement and the owner of the fee to join in an action against a trespasser for damages and an injunction.<sup>5</sup> The same type of approach is reflected in the personal property field in a case where a truck was sold under a conditional sale contract and the Court permitted conditional vendor and vendee to join in an action against one whose negligence damaged the truck.<sup>6</sup> This was allowed though the vendee was claiming damages not only for direct injury to the truck but also for lost profits.

On the other hand the unifying factor of the shared property is missing where several plaintiffs join to recover for their respective personal injuries; and this (more fully discussed subsequently) is branded not only a misjoinder of parties, but misjoinder of causes as well.<sup>7</sup>

## PARTIES DEFENDANT

The provisions of G. S. 1-71 and 1-72, set forth above, obviously give a plaintiff much leeway in joining multiple defendants in actions founded on contract, whether their liability is joint, joint and several, or several. Thus, for example, it is proper to join a principal and his sureties in suing on a claim for which both are liable,<sup>8</sup> even though recovery against the surety may, by his contract, be limited to a smaller sum than the recovery sought against the principal.<sup>9</sup> If the same is not

able to two persons "as their interest may appear," both must be plaintiffs). *See also* *Neal v. Wachovia Bank and Trust Co.*, 224 N. C. 103, 29 S. E. (2d) 206 (1944); *Redmon v. Netherlands Fire Ins. Co.*, 184 N. C. 481, 114 S. E. 758 (1922).

<sup>5</sup> *Morganton v. Hudson*, 207 N. C. 360, 177 S. E. 169 (1934). Judge Brogden said, at page 362: "An easement is an interest in land, and it has been held by this Court that a tenant and an owner may be properly joined in an action for trespass or remainderman and life tenant."

<sup>6</sup> *Wilson v. Horton Motor Lines, Inc.*, 207 N. C. 263, 176 S. E. 750 (1934). The opinion indicates the Court thought two causes of action were involved, not a mere joinder of parties. This aspect of the case is subsequently discussed.

Where a statute provides a penalty for the benefit of anyone suing for it, two plaintiffs can apparently give themselves a joint interest in the recovery, and thus justify their joinder, by the act of joining. *See Carter v. Wilmington & Weldon R. R.*, 125 N. C. 437, 36 S. E. 14 (1900).

<sup>7</sup> *Thigpen v. Kinston Cotton Mills*, 151 N. C. 97, 65 S. E. 750 (1909). *See also Campbell v. Washington Light and Power Co.*, 166 N. C. 488, 82 S. E. 842 (1914).

<sup>8</sup> *Watson v. King*, 200 N. C. 8, 156 S. E. 93 (1930); *Harrison v. Southern Transit Corp.*, 192 N. C. 545, 135 S. E. 460 (1926); *Pritchard v. Mitchell*, 139 N. C. 54, 51 S. E. 783 (1905). *See, however, cases cited infra notes 176 and 177.*

<sup>9</sup> *Virginia Trust Co. v. Pharr Estates, Inc.*, 206 N. C. 894, 175 S. E. 186 (1934) (some defendants had guaranteed payment when due of both principal and interest, but one had guaranteed interest and taxes only); *Shuford v. Yarbrough*, 197 N. C. 150, 147 S. E. 824 (1929); *McCall v. Zachary*, 131 N. C. 466, 42 S. E. 903 (1902).

true of indemnitors or some guarantors, it is because they have no liability to plaintiff, at least at the time the principal is being sued.<sup>10</sup>

Other examples of proper joinder are suits against the maker, payee and indorsers of a note,<sup>11</sup> and suits against several warrantors in a chain of title.<sup>12</sup>

The provisions of G. S. 1-71 and 1-72 are not broad enough, in terms, to cover an action brought against several defendants in tort.<sup>13</sup> However, the Court has clearly recognized the right to join defendants in tort if the allegations show them to be joint tortfeasors.<sup>14</sup> The rule covers not only cases of tortfeasors entitled to contribution as between themselves,<sup>15</sup> but also cases where one defendant, being only secondarily liable, is entitled to judgment against his codefendant for the entire amount of plaintiff's recovery against him.<sup>16</sup> This means that master and servant may be joined, though the master's liability is predicated solely upon the doctrine of *respondeat superior*.<sup>17</sup>

<sup>10</sup> State *ex rel.* Green County v. National Bank of Snow Hill, 193 N. C. 524, 137 S. E. 593 (1927); Harrison v. Southern Transit Corp., cited *supra* note 8; Clark v. Bonsal & Co., 157 N. C. 270, 72 S. E. 954 (1911); Sullivan, Drew & Co. v. Field, 118 N. C. 358, 24 S. E. 735 (1896); Wooten v. Maulsby, 69 N. C. 462 (1873). See also Killian v. Hanna, 193 N. C. 17, 136 S. E. 246 (1927); State *ex rel.* Cool v. Smith, 119 N. C. 350, 25 S. E. 958 (1896); Blackmore v. Winders, 144 N. C. 212, 56 S. E. 874 (1927). The result of the *Harrison* case, allowing the owner of a passenger bus and its liability insurer to be joined as defendants, was changed by statute. N. C. PUB. LAWS 1927, c. 136, §6, now part of N. C. GEN. STAT. (1943) §62-108. See Williamson v. Frederickson Motor Express Lines, 195 N. C. 682, 143 S. E. 256 (1928).

<sup>11</sup> Berger v. Stevens, 197 N. C. 234, 148 S. E. 244 (1929).

<sup>12</sup> Winders v. Southerland, 174 N. C. 235, 93 S. E. 726 (1917). See also Baber v. Hanie, 163 N. C. 588, 80 S. E. 57, 12 A. L. R. 1518 (1913), where, on a subrogation, rather than a contract doctrine, plaintiff sued several successive grantees of land who had assumed a debt to plaintiff. The joinder question was not raised.

<sup>13</sup> G. S. 1-72 is clearly confined to contracts. G. S. 1-71 refers to "persons severally liable upon the same obligation," and it is doubtful if the last two words would include tort cases.

<sup>14</sup> Lineberger v. Gastonia, 196 N. C. 445, 146 S. E. 79 (1929); Hipp v. Farrell, 169 N. C. 551, 86 S. E. 570 (1915); Tyler v. Hilton Lumber Co., 165 N. C. 163, 81 S. E. 139 (1914).

<sup>15</sup> N. C. GEN. STAT. (1943) §1-240.

<sup>16</sup> Gregg v. City of Wilmington, 155 N. C. 18, 70 S. E. 1070 (1911). The defendant secondarily liable, when sued alone, may have the person primarily liable brought in to respond to the original defendant's cross-action. Bowman v. City of Greensboro, 190 N. C. 611, 130 S. E. 502 (1925); Guthrie v. City of Durham, 168 N. C. 573, 84 S. E. 859 (1915). All three of these cases involved a city and an individual whose active negligence was allegedly the real cause of plaintiff's injury. Strictly speaking, the two may not be joint tortfeasors. Brown v. Town of Louisburg, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677 (1900). But for the purposes of joinder by the plaintiff they are treated as if they were.

<sup>17</sup> Hough v. Southern Ry., 144 N. C. 692, 57 S. E. 469 (1907); Cotten v. The Fisheries Products Co., 177 N. C. 56, 97 S. E. 712 (1919). However, where plaintiff is a fellow employee of defendant servant, the case against defendant master may be dismissed because the Workmen's Compensation remedy against him is exclusive. McCune v. Rhodes-Rhyne Manufacturing Co., 217 N. C. 351, 8 S. E. (2d) 219 (1940); Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938). See also Britt v. Howell, 208 N. C. 519, 181 S. E. 619 (1935); Patton v. Champion Fibre Co., 192 N. C. 48, 133 S. E. 174 (1926); cf. Pinnix v. Griffin, 221 N. C. 348, 20 S. E. (2d) 366 (1942); Gadsden v. George H. Crofts & Co., 175 N. C. 358, 95 S. E. 610, L. R. A. 1918E 226 (1918).

While the Court's viewpoint on the matter is not always clear, it is certain that in some of these situations the Court regards the action against multiple defendants as presenting but one cause of action. This has been plainly said in cases involving principal and surety,<sup>18</sup> and in the joint tortfeasor cases.<sup>19</sup> In cases founded on contract, G. S. 1-71 and 1-72 make it clear enough that the plaintiff may, if he wishes, sue the defendants separately, and the same rule is clearly reached by decision in the joint tort cases.<sup>20</sup> Thus there is not merely a single cause of action for purposes of enforcing the rule against splitting a single cause; but there is no compelling necessity, in the interest of a purely technical consistency, to disregard the purpose for which the decision is being made in determining whether a given set of facts embraces one or more causes of action.

Treating the case as presenting only one cause has the advantage of requiring only that the joinder of parties provisions be satisfied. The statutes governing joinder of causes may be disregarded, particularly the requirement that all causes must affect all parties.<sup>21</sup> That the latter might give trouble may be illustrated by the joint tortfeasor cases. If the action against each were a separate cause, in view of the fact that plaintiff might recover from one or more without recovering from others, would each be affected by all causes?<sup>22</sup>

#### ALTERNATIVE JOINDER

Apparently following a suggestion made in this REVIEW,<sup>23</sup> the General Assembly of 1931 amended the statutes which are now G. S. 1-68 and 1-69 to permit alternative joinder of either plaintiffs or defendants.<sup>24</sup> At the same time it inserted into the section respecting plaintiffs: "If, upon the application of any party, it shall appear that such joinder may embarrass or delay the trial, the court may order separate trials or make

<sup>18</sup> *McCall v. Zachary*, *supra* note 9.

<sup>19</sup> *Tyler v. Hilton Lumber Co.*, cited *supra* note 14; *Hough v. Southern Ry.*, cited *supra* note 17. In the first of these the complaint contained three statements, variously referred to as counts and as causes of action: (1) against the two defendants; (2) and (3) against each defendant separately. The basic facts in each were the same. The Court said there was actually the same cause of action stated in different forms. In the *Hough* case, Judge Walker, at page 695, said: "This is the substance of the cause of action which, being for a tort, may be made joint by uniting all the tortfeasors as defendants in one action; or several by suing each in a separate action. The plaintiff, or party aggrieved by the wrong, may make it joint or several, at his election, and it is not open to the wrongdoer to complain of the election so made or to dictate how he shall make his choice. . . . His election finally determines what shall be the character of the tort, whether joint or several."

<sup>20</sup> See quotation from *Hough v. Southern Ry.*, cited *supra* note 19. See also *Mode v. Penland*, 93 N. C. 292 (1885).

<sup>21</sup> N. C. GEN. STAT. (1943) §1-123(7).

<sup>22</sup> Currently the right of contribution might be argued to satisfy this requirement, but the privilege of joinder antedates this statutory right.

<sup>23</sup> *Proposals for Legislation in North Carolina* (1930) 9 N. C. LAW REV. 13, 24.

<sup>24</sup> N. C. PUB. LAWS 1931, c. 344.

such other order as may be expedient." No such provision was written into the section governing joinder of defendants, but G. S. 1-179 provides: "A separate trial between a plaintiff and any of several defendants may be allowed by the court when, in its opinion, justice will thereby be promoted."<sup>25</sup>

The 1931 amendment also added to G. S. 1-69: "If the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to determine which is liable." No similar provision was inserted in G. S. 1-68 as to plaintiffs in doubt as to which of them is entitled to recover, but the mere authorization of alternative joinder seems adequately to cover the situation.

These provisions make it clear that whenever the Court will say that only one cause of action is involved, alternative joinder is permitted on either side. However, no change was made in G. S. 1-123, governing joinder of causes, and its requirement that all causes affect all parties remains as a potential trouble maker in the alternative joinder field. Accordingly, discussion of the relatively few cases is deferred until the subject of joinder of parties and causes is reached.

#### CONSEQUENCES OF MISJOINDER OF PARTIES

Misjoinder of parties is not listed as a ground for demurrer by G. S. 1-127. Consequently, with some exceptions,<sup>26</sup> the Court has held that such misjoinder—defined as joinder of an unnecessary party—cannot be objected to by demurrer.<sup>27</sup> Even when this is not expressly

<sup>25</sup> Granting of a separate trial under this provision is discretionary. *Bryan v. Spivey*, 106 N. C. 95, 11 S. E. 510 (1890).

<sup>26</sup> *Clark v. Bonsal & Co.*, cited *supra* note 10 (demurrer sustained and action dismissed as to one defendant. However, while nominally the demurrer was for misjoinder of parties, the decision hinged on whether a cause of action was stated as to that defendant); *McMillan v. Edwards*, 75 N. C. 81 (1876) (court passed on question when raised by demurrer, without indicating any impropriety in the procedure); *Wall v. Fairley*, 74 N. C. 464 (1875) (some defendants dismissed on demurrer, this being a reversal of the decision below. It is not clear whether these defendants demurred for misjoinder or failure to state a cause of action against them. The court also passed on a demurrer for improper joinder of certain plaintiffs); *Burns v. Ashworth*, 72 N. C. 496 (1875) (record showed motion to dismiss for misjoinder of parties, though on argument counsel said the motion was based on misjoinder of causes; the Court said, whichever it was, it was waived by failure to raise it by demurrer or answer, but later said joinder of unnecessary parties is surplusage). A very recent apparent exception is *Western N. C. Conference v. Talley*, 226 N. C. 654, 39 S. E. (2d) 816 (1946). There defendants, after answering, moved to dismiss as to one plaintiff on the ground that it was not a proper party plaintiff. The Court, in a *per curiam* opinion, said this was in effect a demurrer for misjoinder of parties and came too late. The cases cited do not support the proposition that misjoinder of parties only is to be raised by demurrer. See note 30 *infra*.

<sup>27</sup> *Star Furniture Company, Inc. v. Carolina and Northwestern Ry.*, 195 N. C. 636, 143 S. E. 242 (1928); *Ingram v. Corbit*, 177 N. C. 318, 99 S. E. 18 (1919); *Winders v. Southerland*, 174 N. C. 235, 93 S. E. 726 (1917); *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268 (1898); *State ex rel. Hoover v. Berryhill*, 84 N. C. 133 (1881); *McIntosh*, *NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES* (1929 ed.) §§227, 441. This should be distinguished from a defect of parties, which is expressly listed as a ground of demurrer by G. S. 1-127. The latter is

stated, the Court has said that joinder of an unnecessary party is harmless surplusage.<sup>28</sup> The error can be cured by disclaimer and judgment for costs,<sup>29</sup> by permitting withdrawal in the case of a plaintiff,<sup>30</sup> or, in case of a defendant, by allowing a motion to strike his name<sup>31</sup> or by granting a motion to dismiss as to him.<sup>32</sup>

Of course, there is no such thing as misjoinder of a proper party, even though, strictly speaking, such party may not be a necessary party.<sup>33</sup> Therefore, when the Court refers to misjoinder of an unnecessary party, it must mean the joinder of an improper party. The consequences of this, as the rules outlined in the preceding paragraph show, are not very serious. The case continues between all proper and necessary parties, with the improper party, if he remains in the case at all, having nominal status only and being interested only in the assessment of costs—against him if a plaintiff and in his favor if a defendant. However, these rules

interpreted as a failure to join a necessary party, sometimes referred to as "misjoinder" of a necessary party. *Shuford v. Yarborough*, cited *supra* note 9; *Sullivan, Drew & Co. v. Field*, cited *supra* note 10. It is a fatal defect unless the necessary party is brought in under G. S. 1-73; and the statute of limitations may continue to run as to him until he is brought in. *Fishell v. Evans*, cited *supra* note 4. Joining as a plaintiff one who is a necessary party defendant has also been called a misjoinder of parties. *Paxton v. Wood*, 77 N. C. 11 (1877). For a case completely confusing the usual distinction between misjoinder of parties and defect of parties, see *Lanier v. The Pullman Co.*, 180 N. C. 406, 105 S. E. 21 (1920).

<sup>28</sup> *Moore County v. Burns*, 224 N. C. 700, 32 S. E. (2d) 225 (1944); *Balfour Quarry Co. v. West Construction Co.*, 151 N. C. 345, 66 S. E. 217 (1909); *Emry v. Parker*, 111 N. C. 261, 16 S. E. 236 (1892); *Young v. Young*, 81 N. C. 92 (1879).

<sup>29</sup> *Sullivan, Drew & Co. v. Field*, cited *supra* note 10; *Green v. Green*, 69 N. C. 294 (1873) (rule applies whether unnecessary parties are plaintiffs or defendants).

<sup>30</sup> *McLaughlin v. Raleigh C. & S. Ry.*, 174 N. C. 182, 93 S. E. 748 (1917); *Pritchard v. Mitchell*, 139 N. C. 54, 51 S. E. 783 (1905); *Jarrett v. Gibbs*, 107 N. C. 303, 12 S. E. 272 (1890) (lower court reversed for holding it had no power to permit withdrawal over defendant's objection). In *McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845, 18 L. R. A. 850 (1893), the Court found no error where the trial judge refused to strike the name of a plaintiff on motion of the defendants. Among other things, it said that misjoinder of parties is to be taken advantage of by demurrer, thus apparently being in accord with the cases cited in note 26 and in conflict with those cited in note 27. But it recognized the rule that joinder of unnecessary parties is mere surplusage. See also *Western N. C. Conference v. Talley*, cited *supra* note 26. These two last-mentioned cases, though apparently mistaken as to the office of the demurrer, possibly indicate that a motion to strike or dismiss should be made before answer.

<sup>31</sup> *Winders v. Southerland*, cited *supra* note 27; *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590 (1910).

<sup>32</sup> *Williams v. Hooks*, 200 N. C. 419, 157 S. E. 65 (1931). This case indicates that if the Supreme Court is really convinced a defendant is an improper party and may be prejudiced by being held in the case to await final judgment, it will not hesitate to reverse the lower court's refusal to dismiss. The Court has also reversed the over-ruling of a demurrer and dismissed as to improper defendants in a case where it is not clear whether the demurrer was for misjoinder or failure to state a cause of action. *Wall v. Fairley*, cited *supra* note 26. Cf. *Clark v. Bonsal & Co.*, cited *supra* notes 10 and 26; *Emry v. Parker*, cited *supra* note 28.

<sup>33</sup> In *Choate Rental Co. v. Justice*, 212 N. C. 523, 193 S. E. 817 (1937), after holding that the rental agent could not maintain the action because the owner was the real party in interest, the Court still thought the agent was a proper party who could be left in the case, in the discretion of the lower court, after the owner had been joined.

are largely confined to situations where a plaintiff, joined with others, patently has no right to relief or does not ask for any,<sup>34</sup> or where a defendant, joined with others, patently is not liable or no relief is sought against him.<sup>35</sup>

The great difficulty is in the cases where several plaintiffs are each clearly seeking relief or where relief is clearly sought against each of several defendants. In such cases, if misjoinder of parties is found, misjoinder of causes of action is usually also found, and, as subsequently indicated, the consequences of the so-called "dual misjoinder" are more serious.

## II. JOINDER OF CAUSES OF ACTION

As already pointed out, a handy way to avoid trouble over the propriety of joinder of causes, is to decide that the complaint states only one cause.<sup>36</sup> In addition to the examples already mentioned, the following illustrate this technique: an action for defamation, alleging several slanderous statements in the same conversation,<sup>37</sup> an action by a

<sup>34</sup> Occasionally a case arises where two plaintiffs are apparently seeking relief but, very probably, only one of them is entitled to it, and the joinder may reflect counsel's uncertainty as to which has the right of action or is the real party in interest. The effect, in these cases, of invoking the rule that joinder of an unnecessary party is surplusage, may be to permit alternative joinder of plaintiffs; and this was apparently done in several cases antedating the alternative joinder provisions of G. S. 1-68. *Virginia Trust Co. v. Webb*, 206 N. C. 247, 173 S. E. 598 (1934) (assignee and assignor as plaintiffs, where the assignment was for security only); *Star Furniture Company, Inc. v. Carolina and Northwestern Ry.*, cited *supra* note 27 (consignor and consignee); *Abbott v. Hancock*, cited *supra* note 27 (wife individually and as next friend of insane husband suing for loss of services resulting from seduction of minor daughter). In this type of case the Court may settle the matter by saying that, if the defendant is liable, it makes no difference to him who gets the money so long as either is the rightful claimant, since both will be bound by the judgment. See *Bank of Blowing Rock v. McIver*, 217 N. C. 623, 9 S. E. (2d) 25 (1940). See also *Balfour Quarry Co. v. West Construction Co.*, cited *infra* note 182; *Black Mountain R. R. v. Ocean Accident and Guarantee Corp.*, 172 N. C. 636, 90 S. E. 763 (1916), same case 175 N. C. 566, 96 S. E. 25 (1918).

<sup>35</sup> The rules have also been applied where garnishees are named as defendants in the action. *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590 (1910). In this situation, while some relief is clearly sought against them, they are not liable to plaintiff on his basic cause of action.

<sup>36</sup> Actually, a number of cases discuss joinder of causes when the action could easily be said to involve but one cause. See *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES* (1929 ed.) §417. However, while such a case will occasionally be pointed out, it is not the purpose of this article to discuss what constitutes a single cause of action; and, in the main, if the Court indicates there are several causes, it is accepted as a true joinder case for purposes of the article. It may be mentioned, however, that the provision of G. S. 1-123 permitting joinder of causes arising out of the same transaction is, in itself, an invitation to a narrow view of what constitutes a single cause of action.

<sup>37</sup> *Elmore v. Atlantic Coast Line R. R.*, 189 N. C. 658, 127 S. E. 710 (1925). The complaint alleged different slanderous words in the same conversation as two causes of action. The Court quotes two texts to the effect there is but one cause. In the trial below the plaintiff recovered \$10,000 on each of his "causes," and the Supreme Court reversed one recovery as the words were privileged, and sustained the other. So it was well for the plaintiff that it had not been treated as one cause of action, with one recovery assessed, at the trial.



decedent's daughter against her mother and brother to have a trust declared for her benefit as to land, to have a cash equalization, and to secure a share of the personal property, all under an alleged paper writing of the deceased,<sup>38</sup> and an action to correct a deed and recover possession.<sup>39</sup>

Where the Court finds several causes of action, the propriety of their joinder is governed by G. S. 1-123. This statute sets forth seven classes of causes which may be joined. The first, most notorious, and most troublesome is that covering causes arising out of "the same transaction, or transaction connected with the same subject of action."<sup>40</sup> The other six classes, in summary, are: (2) contract, express or implied; (3) injuries to person or property; (4) injuries to character; (5) claims to recover realty; (6) claims to recover personalty; and (7) claims against a trustee.<sup>41</sup> Express permission is given to join legal and equitable causes. In fact, as long as only one plaintiff and one defendant are involved, there are only two substantial limitations: (a) the causes joined must all belong to the same class; and (b) they must not require separate places of trial.

The classes, particularly the first three, are broad enough to permit considerable freedom of joinder. But they are not broad enough to permit joinder of tort and contract causes unless the transaction clause is satisfied.<sup>42</sup> Joinder is permissible, without reference to that clause, if the tort can be waived and that cause grounded on a contract theory.<sup>43</sup>

While in the early days of the Code the Court apparently denied the

<sup>38</sup> *Ricks v. Wilson*, 151 N. C. 46, 65 S. E. 614 (1909). The Court, while twice saying there was but one cause, discussed and relied on cases permitting joinder of causes and parties. Cf. *England v. Garner*, 86 N. C. 366 (1882).

<sup>39</sup> *Ely v. Early*, 94 N. C. 1 (1886). Action originally was for possession of two tracts. Plaintiff was permitted to amend to request correction of a deed he had inadvertently given for one of the tracts. The Court said there was still but one cause of action and the amendment related back for purposes of the statute of limitations. The propriety of including several tracts in the action was apparently not questioned.

<sup>40</sup> "And Mr. Pomeroy, in his treatise on Remedies and Remedial Rights, criticizes the opinion and says the Judge is 'afloat as to the legal import of the subject of action.' And we think he might truly have added that not a few other Judges and commentators are 'afloat' upon the legal import of 'the same transaction,' 'transactions connected with the same subject of action,' 'the object of the action,' and 'causes of action,' and the nice and refined distinctions between them. . . . And so complex, uncertain and defiant of logic has the subject proved, that the Courts have failed to derive any aid from even 'the reason of the thing,' that *dernier resort* of some Judges when all other resources have failed." Ashe, J., in *Young v. Young*, 81 N. C. 92, 97 (1879). For discussion of the meaning of the transaction clause, see *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES* (1929 ed.) §418.

<sup>41</sup> This section contains several exceptional provisions for mortgage foreclosure actions, but these will not be dealt with in this article.

<sup>42</sup> *Pressley v. The Great Atlantic & Pacific Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382 (1946); *Hodges v. Wilmington and Weldon R. R.*, 105 N. C. 170, 10 S. E. 917 (1890). Cf. *Simons v. Southern Home Ins. Co.*, 203 N. C. 146, 164 S. E. 730 (1932).

<sup>43</sup> *Logan v. Wallis*, 76 N. C. 416 (1877).

right to joint tort and contract even when arising from the same transaction,<sup>44</sup> it has now long been clear that this is permissible.<sup>45</sup> Of course, the alleged breach of contract and the alleged tort are often simply alternative theories grounded on the same basic facts, as may be true when negligence and breach of warranty or fraud and breach of warranty are joined; and the plaintiff is not then entitled to double recovery. This has led recently to difficulties over the question of whether, at the trial, plaintiff may be compelled to elect upon which theory to proceed,<sup>46</sup> though there seems to be no compelling reason against submitting both theories to the jury under appropriate instructions.<sup>47</sup> There has also been a recent suggestion that an election may be compelled between express and implied contract theories;<sup>48</sup> but, while this finds support in the language of one earlier case,<sup>49</sup> our Court has approved submission of an implied contract issue to be passed upon by the jury

<sup>44</sup> *N. C. Land Co. v. Beatty*, 69 N. C. 329 (1873); *Doughty v. A. & N. C. R. R.*, 78 N. C. 22 (1878). In the first of these the matter was complicated by the presence of several defendants, but Rodman, J., apparently rejected the argument that causes could be joined under the transaction clause though not within any one of the other six subdivisions. He thought (page 332) that that construction "would produce all the inconveniences and confusion which it was the object of all the rules regulating the joinder of actions to prevent." However, it would be possible to interpret the language as confined to situations involving different causes affecting different defendants. In the *Doughty* case there was but a single defendant and a single plaintiff.

<sup>45</sup> *Hatcher v. Williams*, 225 N. C. 112, 33 S. E. (2d) 617 (1945); *Peitzman v. Town of Zebulon*, 219 N. C. 473, 14 S. E. (2d) 416 (1941); *Hawk v. Pine Lumber Co.*, 145 N. C. 47, 58 S. E. 603 (1907); *Smith v. Newberry*, 140 N. C. 385, 53 S. E. 234 (1906); *Reynolds v. Railroad*, 136 N. C. 345, 48 S. E. 765 (1904).

<sup>46</sup> *Walker v. Hickory Packing Co.*, 220 N. C. 158, 16 S. E. (2d) 668 (1941) (plaintiff claimed he suffered damage from eating rancid lard sold to him by defendant. Both negligence and breach of warranty submitted to jury, defendant's motion to compel election being denied. The Supreme Court held the negligence cause should have been nonsuited as plaintiff's evidence showed contributory negligence; and this eliminated the necessity of passing on the election question); *Simpson v. The American Oil Co.*, 219 N. C. 595, 14 S. E. (2d) 638 (1941), same case, 217 N. C. 542, 8 S. E. (2d) 813 (1940). At first trial complaint alleged negligence and breach of warranty in sale of insecticide spray. Supreme Court raised question, without deciding it, as to whether defendant could have compelled election. Plaintiff's judgment was reversed because the Court thought the charge could be interpreted as permitting the jury to assess damages on each theory and add them together. At the second trial the judge denied the defendant's motion to compel election, but submitted the case only on the theory of express warranty. Plaintiff's judgment, for \$7,000 as compared with \$5,000 at the first trial, was sustained, with Stacy, C. J., and Winborne, J., dissenting without opinion and Barnhill, J., not sitting. See also *Harding v. Southern Loan and Ins. Co.*, 218 N. C. 129, 10 S. E. (2d) 599 (1940); *Horton v. Carolina Coach Co.*, 216 N. C. 567, 5 S. E. (2d) 828 (1939); *McIntosh*, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES (1929 ed.) §§412, 414. Cf. *Womack v. Carter*, 160 N. C. 286, 75 S. E. 1102 (1912), holding that counts for conversion and for money had and received, based on the same transaction, stated but a single cause of action.

<sup>47</sup> In *Craven County v. The Investment Co.*, 201 N. C. 523, 160 S. E. 753 (1931), the lower court was sustained in denying a motion to compel an election between tort and contract theories, though the facts were much different from those in the cases cited in note 46. See also *Fields vs. Brown*, 160 N. C. 295, 76 S. E. 8 (1912); *Long v. Fields*, 104 N. C. 221, 10 S. E. 253 (1889).

<sup>48</sup> *Graham v. Hoke*, 219 N. C. 755, 14 S. E. (2d) 490 (1941).

<sup>49</sup> *Hayman v. Davis*, 182 N. C. 563, 109 S. E. 554 (1921).

if it fails to find that an express contract exists.<sup>50</sup> However, these cases do not undertake to deny the right of joinder at the pleading stage, and full discussion of the question of election at trial is beyond the scope of this article.<sup>51</sup>

The propriety of joinder of causes has been sustained in a great variety of situations, in most of which the application of the statute is plain.<sup>52</sup> Two are worth special mention. In *McGovern v. Insurance*

<sup>50</sup> *Lipe v. Citizens Bank and Trust Co.*, 206 N. C. 24, 173 S. E. 316 (1924); *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566 (1889). See also *Coley v. Dalrymple*, 225 N. C. 67, 33 S. E. (2d) 477 (1945); *Grady v. Faison*, 224 N. C. 567, 31 S. E. (2d) 760 (1944); *Simpson v. The American Oil Co.*, cited *supra* note 46 (question raised, but not decided, whether an election could be compelled between express and implied warranty); *Jones v. Mial*, 79 N. C. 165 (1878); *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES* (1929 ed.) §410.

<sup>51</sup> Also beyond the scope of this article is full discussion of the harsh and questionable doctrine of election of remedies, which has found its most frequent application in the cases holding that a plaintiff may not proceed on theories involving both affirmance and disaffirmance of a contract or sale. Under this doctrine plaintiff may find that by bringing suit on one theory, or even by some extra-judicial action, he has made a final and binding election. See, for example: *Stewart v. Salisbury Realty and Ins. Co.*, 159 N. C. 230, 74 S. E. 736 (1912); *Davis v. Butters Lumber Co.*, 132 N. C. 233, 43 S. E. 650 (1903). Compare, particularly with the *Stewart* case, *Wiggins v. Landis*, 188 N. C. 316, 124 S. E. 621 (1924). It seems to follow that if plaintiff includes both theories in his complaint he can be compelled to elect. *F. E. Lykes & Co., Inc. v. Grove*, 201 N. C. 254, 159 S. E. 360 (1931), though in at least one case both theories were allowed to go to the jury. *Troxler v. Building Co.*, 137 N. C. 51, 49 S. E. 58 (1904). Cf. *Hatcher v. Williams*, 225 N. C. 112, 33 S. E. (2d) 617 (1945); *Fields v. Brown*, cited *supra* note 47; *Batchelor v. Macon*, 67 N. C. 181 (1872). The same approach has been used to hold that an unsuccessful suit on a contract is a bar to a subsequent suit for its reformation, *Leaksville Light and Power Co. v. Georgia Power Co.*, 193 N. C. 618, 137 S. E. 817 (1927); that two theories of disaffirmance may be inconsistent (with an implication that there must be an election), *Smith v. Greensboro Joint Stock Land Bank*, 213 N. C. 343, 196 S. E. 481 (1938); and that filing of a lien on the theory that the furnisher of material was a subcontractor was an election of remedies which precluded a subsequent attempt to recover on the theory that the material was furnished directly to the owner, *Economy Pumps, Inc. v. F. W. Woolworth Co.*, 220 N. C. 499, 17 S. E. (2d) 639 (1941); *Doggett Lumber Co. v. Perry*, 212 N. C. 713, 194 S. E. 475 (1938). See also *Lyon v. Atlantic Coast Line R. R.*, 165 N. C. 143, 81 S. E. 1 (1914); *Spruill v. Bank of Plymouth*, 163 N. C. 43, 79 S. E. 262 (1913); *Clark v. East Lake Lumber Co.*, 158 N. C. 139, 73 S. E. 793 (1912); *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES* (1929 ed.) §§408, 413, 414. Subsequently mentioned briefly in the text is the question of whether the alternative joinder provisions may operate to modify the doctrine.

<sup>52</sup> The following are examples: (1) to set aside deeds for mental incompetence of grantor and undue influence of grantee, *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623 (1945); (2) to renew a judgment and to correct it to make it speak the truth, *Curlee v. Scales*, 223 N. C. 788, 28 S. E. (2d) 576 (1944) (dictum); (3) to recover for negligent injury and to set aside a release allegedly obtained by fraud, *Killian v. Hanna*, 193 N. C. 17, 136 S. E. 246 (1927); cf. *Joyner v. P. L. Woodard & Co.*, 201 N. C. 315, 160 S. E. 288 (1931); (4) against a carrier for delay in delivering goods and for damages to same goods during return shipment, *Lyon v. Atlantic Coast Line R. R.*, cited *supra* note 51; (5) for breach of contract and for a statutory penalty (joinder may be justified either by transaction clause or contract clause), or for several statutory penalties, *Robertson v. Atlantic Coast Line R. R.*, 148 N. C. 323, 62 S. E. 413 (1908); *State ex rel. McCullen v. Seaboard Air Line Ry.*, 146 N. C. 568, 60 S. E. 506 (1908); *State ex rel. Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890 (1891); (6) for specific performance and damages (which could easily be called one cause of action),

*Company*,<sup>53</sup> plaintiff had, at different times, taken out fifteen policies of insurance on her own life and the lives of her children and grandchildren. She discovered they were not the type of policy she claimed defendant's agents represented they were. She sued for damages for the misrepresentations as to all fifteen policies. Three judges believed that if separate causes were involved, their joinder was justified by the transaction clause. The other two judges felt that if the transaction clause covered this, there was no need for the other six classes in the statute, but they found the joinder justified under class three (injuries, with or without force, to person or property).

In *Hamlin v. Tucker*,<sup>54</sup> plaintiff sued a single defendant for: (1) harboring and maintaining plaintiff's wife; (2) converting personal property which plaintiff claimed *jure mariti*; (3) inducing the wife to execute to defendant a deed to her land, under which defendant received rents; and (4) conversion of personal property covered by a marriage settlement between plaintiff and his wife. Chief Justice Pearson, writing for a unanimous Court, held that the causes all arose out of the same subject of action.<sup>55</sup>

*Winders v. Hill*, 141 N. C. 694, 54 S. E. 440 (1906); (7) to have plaintiff's title declared and for damages or possession or rents, *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108 (1899); *Jennings v. Reeves*, 101 N. C. 447, 7 S. E. 897 (1888); *Gregory v. Hobbs*, 93 N. C. 1 (1885); (8) for possession and for judgment on the debt secured by the property or for foreclosure of the lien thereon, *Kiger v. Harmon*, 113 N. C. 406, 18 S. E. 515 (1893); *Martin v. McNeely*, 101 N. C. 634, 8 S. E. 231 (1888); (9) for money judgment and to subject land to a charge for its payment, *Outland v. Outland*, 113 N. C. 74, 18 S. E. 72 (1893); (10) two claims of one plaintiff against an estate, *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232, 32 Am. St. Rep. 799 (1892); (11) against executors for accounting covering the activities of their testator in his successive capacities as guardian and administrator of plaintiff's intestate, *Alexander v. Wolfe*, 83 N. C. 272 (1880); (12) on a note and on an open account, *Sutton v. McMillan*, 72 N. C. 102 (1875); (13) against an official and his surety on bonds covering different terms, the surety being liable on both bonds, *Syme v. Bunting*, 86 N. C. 175 (1882); (14) for a money judgment and mandamus to compel provision for its payment (not clear whether regarded as one cause or two), *McLendon v. The Commissioners of Anson County*, 71 N. C. 38 (1874). Since enactment of N. C. PUB. LAWS, 1933, c. 349, amending what is now N. C. GEN. STAT. (1943) §1-512, the rule of this last case has been changed and the claim must be reduced to judgment before mandamus is sought. *Maryland Casualty Co. v. Leland*, 214 N. C. 235, 199 S. E. 7 (1938). Cf. *Bundy v. Commercial Credit Co.*, 198 N. C. 339, 151 S. E. 626 (1930), where a misjoinder objection was overruled by treating an amendment to the complaint as a permissible counterclaim or set-off to the answer.

<sup>53</sup> 141 N. C. 367, 54 S. E. 287 (1906).

<sup>54</sup> 72 N. C. 502 (1875).

<sup>55</sup> "Here . . . the subject-matter of controversy cannot be settled without deciding, not merely whether the defendant enticed the plaintiff's wife to leave him, and harbored and maintained her in violation of his original rights, but whether he did not also, as a part of his interference with the marital right of the plaintiff, induce her to allow him to carry off and convert her paraphernalia, wardrobe, bookcase, cottage furniture, etc., and whether he did not by reason of her dependent position, induce her to execute a deed for her land, and thereby frustrate the purpose of the marriage settlement or to put such a cloud upon his rights under it as to entitle the plaintiff to the aid of the Court as connected with or germane to the charge of having enticed his wife to abandon him, and harbored and maintained her in her resistance to his lawful authority." 72 N. C. 502, 503. The Chief Jus-

## IMPROPER JOINDER OF CAUSES

As already indicated, even when only one plaintiff and one defendant are involved, G. S. 1-123 is so worded as ordinarily to prevent joinder of tort and contract actions unless they fall under the transaction clause. In enforcing the rule, the Court merely carries out the mandate of the statute. Determination of whether the causes do fall under the transaction clause is a very troublesome problem, and occasionally the Court has not given quite as broad an interpretation to it as might be possible. The recent case of *Pressley v. The Great Atlantic & Pacific Tea Company*<sup>56</sup> furnishes an illustration. Plaintiff alleged: (1) that he was injured by the negligence of defendant, his employer; and (2) that when he reported back to work defendant demanded a release exonerating defendant from liability for his injuries and, when he refused to give it, defendant wrongfully discharged him. This is certainly a situation in which common sense indicates that joinder ought to be permitted. There is an argument to be made that the basic subject of action is the negligent injury, and that the transaction involving the discharge is a transaction "connected with" that subject. The Court, however, rejected this and found that, while the two causes might tell a connected story, they were not connected with the same subject of action. Since the first cause was in tort and the second in contract, it followed that the two could not be joined.<sup>57</sup> However, while somewhat technical, the decision is not a legally unreasonable construction of a statute which, at best, is of very uncertain meaning.<sup>58</sup>

There are a few cases in which the joinder is held improper because one cause must conform to a special statutory procedure which the Court does not believe can be integrated into the procedure of an ordinary civil action. For instance, this has been held with reference to

tice also stated that should the action become so complicated and confused as to embarrass the court, the remedy would be for the court *ex mero motu* to refuse to pass on matters not germane to the principal subject of action. This latter was afterwards characterized as dictum and as pointing to a procedure which would have been a solution had the draftsmen of the Code anticipated the problem and adopted it. *Young v. Young*, 81 N. C. 92 (1879). But see *Craven County v. The Investment Co.*, 201 N. C. 523, 160 S. E. 753 (1931), where the Court calls attention to it without intimating that it could not be followed.

<sup>56</sup> 226 N. C. 518, 39 S. E. (2d) 382 (1946).

<sup>57</sup> Cf. *Edgerton v. Powell*, 72 N. C. 64 (1875). Plaintiff sued to foreclose a mortgage on one moiety in land and to recover possession of the other moiety under a different chain of title. The Court, describing the causes as affecting different tracts, held that they did not arise out of the same transaction or transactions connected with the same subject of action.

<sup>58</sup> The opinion refers to "the plain and unambiguous language of the statute which defines and limits the causes that may be united in one action." 226 N. C. 518, 519, 39 S. E. (2d) 382, 383. Since the case turned on construction of the transaction clause, this is in sharp contrast with the language of *Ashe, J.*, quoted *supra* note 40.

suits against railroads in which one of the causes was a demand for compensation for the taking of an easement.<sup>59</sup>

Misjoinder may also be found when the Court believes two causes are so inconsistent as to be incompatible. Our Court has several times said that even if two causes are to some extent inconsistent, the complaint is not always on that account demurrable.<sup>60</sup> But there are numerous indications that inconsistency may spell trouble. While the classification is hardly helpful in predicting results in new situations, it can be pointed out that the North Carolina cases seem to show three general stages of inconsistency: (1) The causes are inconsistent in the sense that allowing recovery on both would be double recovery, but joinder is still permitted at the pleading stage and election is forced, if at all, only at the trial stage. Such are the cases, to which reference has been made, involving joinder of express and implied contract, or joinder of fraud or negligence with breach of warranty.<sup>61</sup> (2) The causes are inconsistent and an election can be forced, probably at the pleading stage, but plaintiff may still maintain independent actions. (3) The causes are so inconsistent that election can be forced at the pleading stage and (while there may be some exceptions) an election once made, whether in this manner or by bringing suit on one cause only or even by extra-judicial action, is binding and plaintiff must win on the first theory chosen or not at all. At this latter stage the doctrine of election of remedies is operating in full force and the matter has become in reality a question of substantive law and not a true problem of joinder in pleadings.<sup>62</sup>

An illustration of the intermediate stage is *Huggins v. Waters*,<sup>63</sup> where plaintiff alleged that he leased a hotel from defendant *W* and

<sup>59</sup> *Abernathy v. South and Western Ry.*, 150 N. C. 97, 63 S. E. 180 (1908); *Allen v. The Wilmington and Weldon R. R.*, 102 N. C. 381, 9 S. E. 4 (1889). See also *Dalton v. State Highway and Public Works Commission*, 223 N. C. 406, 27 S. E. (2d) 1 (1943), holding that a claim for breach of contract could not be included in a special proceeding to recover damages for the taking of land by the Highway Commission.

<sup>60</sup> *Shuford v. Yarborough*, 198 N. C. 5, 150 S. E. 618 (1929) (facts given throw little light on what was meant by the statement); *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590 (1910) (but Court found the two causes were both grounded on theories of disaffirmance and were, therefore, consistent. Two judges dissented on the ground there should be a repleader to state plainly the single cause they believed to be involved). However, in *Paxton v. Wood*, 77 N. C. 11, 14 (1877), the Court said, "we can hardly suppose even the liberality of C. C. P. will warrant the joinder of inconsistent causes of action."

<sup>61</sup> See the prior text discussion and the cases cited notes 46 through 50. The Court has said that decision of the fraud action would not be *res judicata* as to a subsequent suit for breach of contract. *Harding v. Southern Loan and Insurance Co.*, cited *supra* note 46.

<sup>62</sup> Cases cited *supra* note 51.

<sup>63</sup> 154 N. C. 443, 70 S. E. 842 (1911). The case actually reached trial in the lower court, but the Supreme Court, by stating that one cause alleged in the complaint was destructive of the other, seems to imply that an election could have been forced before the trial was reached.

defendant *B* obstructed the drain through which the hotel sewage was carried away. The Court held that *W* could be liable for breach of implied covenant of quiet enjoyment only if *B*'s act was rightful; and, of course, *B* could be liable only if his act was wrongful. Consequently, the two causes were inconsistent and the Court said plaintiff would have to elect; but in a later version of the litigation,<sup>64</sup> the Court said it was proper for plaintiff, instead of electing, to institute independent actions against *W* and *B*. Since the case obviously involves joinder of parties as well as causes, further discussion of it will be postponed; but it may be pointed out here that the rule of the first version of the case may have been changed by the alternative joinder provisions.

#### THE VENUE CASES

As already stated, G. S. 1-123 limits joinder of causes by providing that the causes must not require different places of trial. This limitation has probably not been a very serious one. At least, the cases are few in number and they involve not an attack on the joinder, but an attempt to remove the entire action. Of course, removal of the entire case is a sensible solution when one cause requires trial elsewhere and the other causes can be tried at either place. In such a case, in fact, G. S. 1-123 is not applicable, because the causes do not *require* trial at different places.

In passing upon motions to remove, the Court tends to select a principal cause of action and decide the motion by reference to its proper venue, regarding the other causes as incidental. Thus, in an action to establish claims against *H* and to set aside *H*'s deed to *W*, the latter was thought to be the controlling purpose of the suit, and the entire case was ordered removed to the county in which the land was situated.<sup>65</sup> Similarly, where the Court thought the action was basically one to settle rights to real estate, the entire case was removed though it included demands for a partnership accounting and other relief.<sup>66</sup> And in cases involving recovery of personal property, proper venue for the case seems to turn on whether that relief is the principal relief sought or is merely incidental.<sup>67</sup>

<sup>64</sup> *Huggins v. Waters*, 167 N. C. 197, 83 S. E. 334 (1914).

<sup>65</sup> *Wofford-Fain & Co. v. Hampton*, 173 N. C. 686, 192 S. E. 612 (1917). Cf. *N. C. Joint Stock Land Bank v. Kerr*, 206 N. C. 610, 175 S. E. 102 (1934), where, venue not being involved, plaintiff's basic claim against the principal defendant was held to be the principal relief sought, and a demand to set aside an assignment of a judgment from the principal defendant to others was thought to be incidental.

<sup>66</sup> *Falls of Neuse Manufacturing Co. v. Browder*, 105 N. C. 440, 11 S. E. 313 (1890).

<sup>67</sup> *Woodard v. Sauls*, 134 N. C. 274, 46 S. E. 507 (1904) (removal to county where property situated denied); *Edgerton v. Games*, 142 N. C. 223, 55 S. E. 145 (1906). Lower court, finding recovery of property to be chief cause of action, ordered removal. Supreme Court affirmed, not holding squarely that it was the

One case clearly recognized and discussed the provision of G. S. 1-123, but there, as usual, the motion was for removal of the entire case, and it was also clear that, if there were two causes, one of which had to be removed, the second could properly be tried at the new venue, also.<sup>68</sup> In a dictum in another case, the Court stressed the desirability of permitting causes arising out of the same transaction to be tried at the same time and place,<sup>69</sup> though this would hardly be decisive if the causes really *require* different places of trial.

#### CONSEQUENCES OF MISJOINDER OF CAUSES

By the express terms of G. S. 1-127, misjoinder of causes is a ground for demurrer. It follows, under G. S. 1-134, that when the misjoinder appears on the face of the complaint, as it almost invariably will, failure to demur is a waiver of the objection; and the cases so hold.<sup>70</sup> And even when the objection is properly presented and sustained, G. S. 1-132 provides that "the judge shall, upon such terms as are just, order the action to be divided into as many actions as are necessary for the proper determination of the causes of action therein mentioned." This mandate has, of course, been followed by the Court.<sup>71</sup> The consequences of simple misjoinder of causes are not, therefore, very serious, and there

chief cause, but saying that since it was a cause, action below was correct. However, it distinguished the Woodard case on the ground that the recovery of the property there was requested only to apply it on the principal judgment sought.

<sup>68</sup> *Richmond Cedar Works v. J. L. Roper Lumber Co.*, 161 N. C. 604, 77 S. E. 770 (1913). The Court was unable definitely to determine whether plaintiff was suing in conversion (transitory) or for damages to the freehold, with conversion merely alleged in aggravation of damages (local), or both. It remanded the case for repleader.

<sup>69</sup> *State ex rel., McCullen v. Seaboard Air Line Ry.*, 146 N. C. 568, 570, 60 S. E. 506, 507 (1908). Judge Connor, referring to causes based on breach of contract and statutory penalty, said: "It would seem that, as the action in respect of the first cause was properly brought in Craven County, and the two causes of action arose out of the same transaction, both the letter and spirit of the law would be met by permitting them to be tried in that county. . . . It is manifest that practically the same evidence will be relevant in the trial of both causes of action." Actually the question was not before the Court, because the defendant demurred on the ground that the venue was wrong for the penalty action, and the Court held that the question could not be raised by demurrer. *Cf. Kellis v. Welch*, 201 N. C. 39, 158 S. E. 742 (1931), where motion to remove was by one of three defendants, but the Court, stressing the desirability of a single trial, treated the case as presenting a single cause, rather than several and denied removal.

<sup>70</sup> *Teague v. Collins*, 134 N. C. 62, 45 S. E. 1035 (1903); *Kiger v. Harmon*, 113 N. C. 406, 18 S. E. 515 (1893) (objection waived if not taken "by demurrer or answer"); *McMillen v. Baxley*, 112 N. C. 578, 16 S. E. 845 (1893); *Finley v. Hayes*, 81 N. C. 368 (1879) (waived by failure to demur, because it appeared on the face of the complaint, even though answer attempted to raise the objection). *See also Lanier v. The John L. Roper Lumber Co.*, 177 N. C. 200, 98 S. E. 593 (1919).

<sup>71</sup> *See, e.g., Pressley v. The Great Atlantic & Pacific Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382 (1946); *Hodges v. Wilmington and Wedon R. R.*, 105 N. C. 170, 10 S. E. 917 (1890). In *Doughty v. A. & N. C. R. R.*, 78 N. C. 22 (1878), the trial court dismissed instead of dividing. This was affirmed because, while plaintiff appealed from the sustaining of the demurrer, he had made no express demand below that the action be divided instead of dismissed.



must be many cases in which the defendant's counsel thinks making the objection is hardly worthwhile. However, as pointed out below, more serious consequences ensue if the misjoinder is one of both causes and parties.

The actions in which the Court finds that a particular statutory cause of action cannot be joined with other causes, have not been divided. The Court has stricken out the non-statutory cause as "irrelevant matter,"<sup>72</sup> and has also disregarded the statutory cause as surplusage.<sup>73</sup>

The venue cases may also be subject to special rules. If two causes are joined which really *require* different places of trial, the Court has indicated that the objection should be taken by motion to change venue, prior to any demurrer for misjoinder; and that upon the objection being so raised, the action could be divided and each part assigned to its proper venue.<sup>74</sup>

### III. JOINDER OF PARTIES AND CAUSES

The question of whether there is a misjoinder of both parties and causes has been before the North Carolina Supreme Court at least 130 times since adoption of the Code, and in slightly less than two-thirds of these cases the joinder has been held proper.

It was decided soon after the Code was adopted that the Code did not intend to restrict the joinder privileges previously accorded in the equity practice; and that, therefore, misjoinder would not be found unless the complaint would have been multifarious under the pre-Code equity practice.<sup>75</sup> It was also recognized that the Code intended to liberalize the rules of joinder at law and not to prescribe more narrow rules; and that, therefore, if the joinder was permitted at common law

<sup>72</sup> *Abernathy v. South and Western Ry.*, cited *supra* note 59.

<sup>73</sup> *Allen v. The Wilmington and Weldon R. R.*, cited *supra* note 59.

<sup>74</sup> *Richmond Cedar Works v. J. L. Roper Lumber Co.*, cited *supra* note 68. See also *State ex rel. McCullen v. Seaboard Air Line Ry.*, cited *supra* note 69.

<sup>75</sup> *Young v. Young*, 81 N. C. 92 (1879). In *State ex rel. Hoover v. Berryhill*, 84 N. C. 133, 135 (1881), Ruffin, J., said: "When the Constitution of 1868 was adopted, whereby all the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, were abolished, it became to be a matter of imperative necessity that there should be new rules provided for our courts in regard to the parties to the actions to be thereafter instituted. It was open to the lawmaking power of the State to have retained either the technical common-law rules or those that had been adopted by the chancery courts, and which were regarded as being more liberal; but, as the two were inconsistent and in many particulars contradictory, they could not coexist in the same court and be administered at the same time. Accordingly the provisions of the Code were adopted, which, with a few modifications, are the same with the rules that had prevailed with the courts of equity; so that these old equity rules are our best guides in determining the proper parties to actions brought under the Code, and this Court very early manifested a purpose to adopt them as such." Cf. *Glenn v. Farmers Bank of N. C.*, 72 N. C. 626 (1875); *N. C. Land Co. v. Beatty*, 69 N. C. 329 (1873). In the latter (at page 334), the Court referred to the transaction clause of what is now G. S. 1-123 as perhaps "an imperfect attempt to condense the rule of equity."

it would certainly be permitted under the Code.<sup>76</sup> Thus it became the rule that if either pre-Code equity or pre-Code law authorized joinder the Code would also permit it;<sup>77</sup> and, of course, joinder under the Code would additionally be permitted when authorized by the statutory language, though it was not permitted in pre-Code practice—as joinder of tort and contract, on the law side, under the transaction clause.<sup>78</sup>

Acceptance of the equity rules has been of great and lasting importance under the Code. It is quite true that those rules are frequently hard to apply, and the Court has conceded more than once that no general rule has been or can be adopted with regard to multifariousness.<sup>79</sup> But the very vagueness of the rules has enabled the Court to permit joinder which might have been prevented by literal interpretation of the language of the Code provisions—particularly the requirement of G. S. 1-123 that all causes affect all parties.<sup>80</sup>

The leading pre-Code equity case, upon which the early Code cases relied for their authority as to the equity rules, is *Bedsole v. Monroe*.<sup>81</sup> There plaintiff alleged that he and defendant were the executors and chief legatees of an estate; that defendant agreed to undertake active management of the estate's affairs; that, by fraud, he induced plaintiff to convey plaintiff's interest in the estate lands. Relief demanded included an accounting, payment of the legacies, division of the residue of the estate, and cancellation of the deed. A demurrer for multifariousness was overruled. Chief Justice Ruffin defined multifariousness as the joining of two or more distinct grounds of suit against the same or different persons, which existed when there was misjoinder of persons

<sup>76</sup> "We presume that it will hardly be maintained that the effect of the Code, with its freer and more elastic provisions, has been to *prevent* the union of parties plaintiff, when the same was permitted by the common law." Ruffin, J., in *State ex rel. Hoover v. Berryhill*, 84 N. C. 133, 137 (1881). The case involved the right of two (out of five) next of kin to join in suing the sureties on the administrator's bond, alleging that an accounting had been had in which the share of each plaintiff had been fixed. The Court found a precedent for this in *State to the use of Murphy v. McKay*, 28 N. C. 397 (1846).

<sup>77</sup> The language in the early Code cases, quoted in notes 75 and 76, seems to deal primarily with joinder of parties, but the facts show that the propriety of joinder of causes was also at stake. And, indeed, the quotation from the *Hoover* case, cited *supra* note 75, was directed to a demurrer which the Court said it would treat as a demurrer for misjoinder of causes.

<sup>78</sup> Cases cited *supra* notes 44 and 45.

<sup>79</sup> *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751 (1944); *Craven County v. The Investment Co.*, 201 N. C. 523, 160 S. E. 753 (1931); *Balfour Quarry Co. v. West Construction Co.*, 151 N. C. 345, 66 S. E. 217 (1909); *King v. Farmer*, 88 N. C. 22 (1883).

<sup>80</sup> Of course, the mere fact that equitable relief is sought is not alone a reason for permitting joinder of causes, involving different parties, apparently unrelated otherwise. See, e.g., *Mills v. N. C. Joint Stock Land Bank*, 208 N. C. 674, 182 S. E. 336 (1935), where an unsuccessful attempt was made to join a demand for the reform of an insurance policy against one defendant with a demand for an injunction to restrain foreclosure against another. Cf. *Simons v. Southern Home Ins. Co.*, 203 N. C. 146, 164 S. E. 730 (1932).

<sup>81</sup> 40 N. C. 313 (1848).

or subjects of litigation. He pointed out that the objection was usually based on misjoinder of persons, because one defendant should not have to submit to delays that might arise between the plaintiff and another defendant. However, he conceded that, though there were few cases illustrating it, a single defendant might raise the objection based on misjoinder of subjects of litigation.

The Chief Justice then employed the phrases which, with or without minor variations, have ever since rung through the North Carolina cases. Multifariousness, he said, "can only apply when two things concur: first, when the different grounds of suit are wholly distinct; and second, when each ground would, as stated, sustain a bill. If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction or series of transactions, forming one course of dealing and all tending to one end; if one connected story can be told of the whole, then the objection cannot apply."<sup>82</sup>

Further, he supposed a case in which a former ward sues his guardian, involving several conveyances of the ward's property. He said, "In such case a bill may be filed in affirmance of the original right of the plaintiff, and in order that the relief in respect to it—which is the main relief—may be effectual, the plaintiff may state in his bill any number of conveyances improperly obtained from him, either at one or more times or respecting different kinds of property, and ask to have them all put out of his way or to have reconveyances; for the several conveyances do not so much constitute different subjects of litigation, but are rather so many barricades erected by the defendant to impede the plaintiff's progress toward his rights."<sup>83</sup> Accordingly, the joinder was sustained.

The case involved a single plaintiff and a single defendant, but the language used, particularly in the first quotation, can be employed to fit situations involving multiple parties; and it has frequently been so employed. Most of the Code cases sustaining joinder in situations which were at all complicated have justified on the ground that the complaint related a "connected story."<sup>84</sup> Subsequent cases have added a statement that "if the objects of the suit are single, and it happens that different persons have separate interests in distinct questions which arise out of the single object, it necessarily follows that such different

<sup>82</sup> 40 N. C. 313, 317.

<sup>83</sup> 40 N. C. 313, 317.

<sup>84</sup> However, "That a connected story of the several transactions may be told is not alone sufficient. They must be *connected with the same subject of action.*" Barnhill, J., in *Pressley v. The Great Atlantic and Pacific Tea Co.*, 226 N. C. 518, 519, 39 S. E. (2d) 382, 383 (1946) (a case which also involved only one plaintiff and one defendant). This distinction is obviously based on the wording of the transaction clause of G. S. 1-123; but it has not been such a stumbling block to joinder as the requirement of the same section that all causes affect all parties.

persons must be brought before the Court in order that the suit may conclude the whole subject."<sup>85</sup>

It remains to examine some types of cases which have been rather frequently before the Court.

#### CREDITORS' BILLS

It is firmly established that a creditor may sue his debtor for a judgment on the debt and, in the same action, ask to have the debtor's fraudulent conveyances set aside, joining the grantees as parties defendant. This was tentatively permitted as early as 1875,<sup>86</sup> and its propriety was clearly affirmed in 1881 in *The Dawson Bank v. Harris*.<sup>87</sup> The Court there recognized that prior to the Code plaintiff would first have had to secure his judgment and then apply to equity to set aside the conveyance; but in view of the union of law and equity under the Code, the Court believed the entire relief could conveniently be granted in one action and that this conformed to the Code intent to avoid useless multiplicity of litigation.<sup>88</sup> The effect is to allow a judgment creditor's bill without a judgment.<sup>89</sup> The case involved several conveyances to different grantees; and, though the grantees had in turn conveyed to the principal defendant's wife, who was also a party, the opinion makes it clear that the joinder would have been proper had each grantee retained such title as he acquired.<sup>90</sup>

When there is but one plaintiff, there is a plausible argument that the requirement that all causes affect all parties is satisfied, whether there be one conveyance or several. The grantee-defendants are not technically liable for the demand against the principal defendant for a money

<sup>85</sup> *Young v. Young*, 81 N. C. 92, 97 (1879).

<sup>86</sup> *Glenn v. Farmers Bank of N. C.*, 72 N. C. 626 (1875). The Court inclined to the opinion that the Code permitted the joinder and sustained the overruling of the demurrer, but said that the decision was not final, as defendant could have the benefit of his objections at the trial.

<sup>87</sup> 84 N. C. 206 (1881).

<sup>88</sup> The Court relied in part on *McLendon v. The Commissioners of Anson County*, cited *supra* note 52, holding that the Code permitted demands for money judgment and for *mandamus* to be joined in one action.

<sup>89</sup> *Hancock Bros. & Co. v. Wooten*, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466 (1890). The rule permitting the demands for money judgment and to set aside the conveyance to be joined has been expressly written into Rule 18(b) of the Federal Rules of Civil Procedure.

<sup>90</sup> It was argued that the several defendants were connected with different transactions, were without community of interest, and that there was no combination among them. In answering this, Chief Justice Smith said, "The essential unity of the proceeding consists in the fact that the debtor's own property is alone sought to be appropriated to his debt. If the conveyances are fraudulent, as for this purpose the demurrer admits, the title remains in Harris, and never was divested out of him. The aid of the Court is asked to remove a cloud upon the title by declaring the deeds void, so that the property may be sold under the direction of the Court and bidders be induced to give the [*sic*] value for it. The defendants, other than Harris, are made parties because they by their deeds profess to have had an interest in the subject-matter, and section 61 of the Code requires they should, in order that they may be concluded by the result, and the adjudication be final." 84 N. C. 206, 212. (Section 61 of the Code is present G. S. 1-69.)

judgment; but, since the fate of their conveyances will depend upon its outcome, they are certainly "affected" by it. But what if several plaintiffs, each with a separate claim, unite in an action for separate money judgments and to set aside conveyances? All the plaintiffs are interested in the demand to set aside the conveyances, but is plaintiff *A* "affected" by plaintiff *B*'s demand for his money judgment?

If two plaintiffs with independent claims in either contract or tort attempt to join, without the conveyance feature being present, it is held to be misjoinder of causes and parties.<sup>91</sup> Addition of the conveyance feature does not confer on plaintiff *A* an interest in plaintiff *B*'s basic claim; nor is plaintiff *A*'s right to have the conveyance set aside affected in the slightest by plaintiff *B*'s success or failure. Nevertheless, it is clear enough that the addition of this complication will turn a case of misjoinder into a case of proper joinder. The right to do so was recognized as early as 1882.<sup>92</sup> The rationale is apparently: (1) that judgment creditors could, before the Code, join in demanding that the debtor's conveyance be set aside;<sup>93</sup> and (2) that the Code resulted in permitting all the relief to be granted in one action, relying on the *Dawson Bank* case. The rule is a wholly practical one, as its unbroken continuation affirms; and it fully justifies whatever technical violence has been done to the literal language of the joinder of causes statute.

Later cases have not questioned the rule. Not only have one or more plaintiffs been allowed to sue one principal defendant and his fraudulent grantees, whether there be one conveyance,<sup>94</sup> or several;<sup>95</sup> but there may be several principal defendants against whom money judgment is sought (assuming their joinder on this phase of the case is proper), and the conveyance to be set aside may be from one such defendant to another,<sup>96</sup> or to a third party from all of them acting together,<sup>97</sup> or to a third party from one or more acting independently as to his own property.<sup>98</sup> The principle extends to a case where the prin-

<sup>91</sup> *Weaver v. Kirby*, 186 N. C. 387, 119 S. E. 564 (1923) (implied contract); *Roberts v. Utility Manufacturing Co.*, 181 N. C. 204, 106 S. E. 664 (1921) (express contract); *Sasser v. Bullard*, 199 N. C. 562, 155 S. E. 248 (1930) (tort).

<sup>92</sup> *Mebane v. Layton*, 86 N. C. 572 (1882).

<sup>93</sup> For this the Court relied on *STORY'S EQUITY PLEADING*, on cases decided by other courts, and on *Wall v. Fairley*, 73 N. C. 464 (1875).

<sup>94</sup> *Wofford-Fain & Co. v. Hampton*, 173 N. C. 686, 92 S. E. 612 (1917); *Benton v. Collins*, 118 N. C. 196, 24 S. E. 122 (1896).

<sup>95</sup> *LeDuc v. Brandt*, 110 N. C. 289, 14 S. E. 778 (1892).

<sup>96</sup> *Robinson v. Williams*, 189 N. C. 256, 126 S. E. 621 (1925). Cf. *Walker v. Asheville Building Securities Co.*, 205 N. C. 165, 170 N. C. 631 (1933).

<sup>97</sup> *Federal Reserve Bank v. Moseley*, 202 N. C. 836, 162 S. E. 923 (1932); *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 997 (1891).

<sup>98</sup> *Virginia Trust Co. v. Pharr Estates, Inc.*, 206 N. C. 894, 175 S. E. 186 (1934) (deeds of trust to be set aside were void for failure to comply with G. S. 23-2 rather than on ordinary fraud principles); *Carswell v. Talley*, 192 N. C. 37, 133 N. C. 181 (1926) (the deed involved here was made under court order); *Virginia-Carolina Chemical Co. v. Floyd*, 158 N. C. 455, 74 S. E. 465 (1912). See also *Barkley v. McClung Realty Co.*, 211 N. C. 540, 191 S. E. 3 (1937).

principal defendant's wife joined him in executing the deed, which included some property of the wife;<sup>99</sup> to a case in which plaintiff seeks (a) to set aside the corporate debtor's deed to defendant *A* and the latter's deed of trust to defendant *B*, and (b) a money judgment against defendant *C*, who had assumed the debts of the corporate debtor;<sup>100</sup> and to a case in which plaintiff seeks (a) a money judgment against the principal defendant, and (b) to set aside the assignment of a judgment previously obtained by that defendant against present plaintiff in another action.<sup>101</sup>

The joinder is proper though the demand for relief encompasses still other things, such as: an injunction restraining sale under the deed of trust sought to be set aside;<sup>102</sup> to establish the existence of a partnership between defendants;<sup>103</sup> to require foreclosure of a mortgage, the validity of which was not questioned, so that plaintiff could reach the surplus remaining;<sup>104</sup> to require sums realized by an assignee of the principal defendants to be applied to plaintiff's claim;<sup>105</sup> and to ask for judgment against the debtor bank's stockholders on their double liability contract.<sup>106</sup>

The fact that a single plaintiff grounds his action on an unliquidated tort claim for assault and battery does not affect the propriety of the joinder.<sup>107</sup> No case seems to have involved two or more plaintiffs with independent, unliquidated tort claims, but it is doubtful that a sound line could be drawn between tort and contract for this purpose. However, perhaps this would increase the chance that separate trials would be ordered under the provisions of G. S. 1-68.

A case having some resemblance to the creditors' bill cases, in that

<sup>99</sup> *Hancock Bros. & Co. v. Wooten*, cited *supra* note 89. In *Allred v. Robbins*, 205 N. C. 823, 172 S. E. 404 (1934), the wife joined in executing the deed, but the property belonged to the husband alone.

<sup>100</sup> *Daniels v. Duck Island, Inc.*, 212 N. C. 90, 193 S. E. 7 (1937).

<sup>101</sup> *N. C. Joint Stock Land Bank v. Kerr*, 206 N. C. 610, 175 S. E. 102 (1934). The purpose of this was to insure that the prior judgment would be used only as a credit against any judgment obtained by plaintiff in the current action.

<sup>102</sup> *Daniels v. Duck Island, Inc.*, cited *supra* note 100. Comparable is a request for an injunction restraining a sale under execution on a judgment against plaintiff joined with a request to set aside an assignment of the judgment. *N. C. Joint Stock Land Bank v. Kerr*, cited *supra* note 101.

<sup>103</sup> *Robinson v. Williams*, cited *supra* note 96.

<sup>104</sup> *LeDuc v. Brandt*, cited *supra* note 95 (the complaint demanded that other conveyances be set aside). See also *Virginia Trust Co. v. Pharr Estates, Inc.*, cited *supra* note 98, where plaintiffs requested foreclosure of a deed of trust and, in the same action, requested that deeds for other property given by guarantors be set aside, alleging that the property covered by plaintiff's deed of trust would not sell for enough to satisfy the debt secured.

<sup>105</sup> *Smith v. Summerfield*, cited *supra* note 97.

<sup>106</sup> *Glenn v. Farmers Bank of N. C.*, cited *supra* note 86. However, here the decision was not final, as defendant was permitted to raise the objection again at the trial.

<sup>107</sup> *Benton v. Collins*, cited *supra* note 94. Cf. *Moorefield v. Roseman*, 198 N. C. 805, 153 S. E. 399 (1930). See also *Virginia-Carolina Chemical Co. v. Floyd*, cited *supra* note 98.

plaintiff joins with his request for money judgment a request that equity aid him in removing a stumbling block to his recovery, is *Killian v. Hanna*.<sup>108</sup> There plaintiff coupled an action for wrongful death with a demand that a release, given with respect to the wrongful death claim, be set aside as fraudulent. The tortfeasor's insurer and two of its agents, allegedly active in securing the release, were joined with the tortfeasor as defendants. The joinder was sustained. The case essentially represents only an illustration of anticipatory pleading. If omitted from the complaint, the release allegations could have been introduced by reply.<sup>109</sup>

#### ESTATE LITIGATION

In litigation involving the assets of an estate, even though complicated as to parties and involving multiple demands for relief, objection for misjoinder of causes and parties has an excellent chance of being overruled. In these cases, much reliance is placed on the "connected story" and "single object" phrases.<sup>110</sup>

Where the litigation is instituted by the creditors of the decedent, there is obviously much similarity to the creditors' bill cases, though the demand to set aside conveyances is usually replaced by some other demand designed to reach the estate assets. Thus, an estate receiver, appointed in a creditors' suit, joined as defendants the widow-executrix, her son and two corporations dominated by the son, alleging mismanagement and dissipation of estate assets and that one of the corporations was holding such assets which the executrix should recover and administer for the benefit of creditors. An accounting was demanded of all the defendants, and perhaps other relief, also.<sup>111</sup> In another case a creditor sued the administrators and their surety, the widow, and the heirs, demanding that the purported final account be set aside and that plaintiff recover judgment jointly against defendants and individually against the administrators and their surety.<sup>112</sup> In a third case in which joinder was sustained, the type of relief demanded does not appear.<sup>113</sup>

<sup>108</sup> 193 N. C. 17, 136 S. E. 246 (1927).

<sup>109</sup> *Joyner v. P. L. Woodard & Co.*, 201 N. C. 315, 160 S. E. 288 (1931), where the lower court was sustained in striking out the release allegations, as no harm was done by such action. See also *Scott v. Bryan*, 210 N. C. 478, 187 S. E. 756 (1936).

<sup>110</sup> Even when the Court found only a single cause of action was involved, it still fell back on these phrases. *Ricks v. Wilson*, 151 N. C. 46, 65 S. E. 614 (1909).

<sup>111</sup> *Bundy v. Marsh*, 205 N. C. 768, 172 S. E. 353 (1934).

<sup>112</sup> *State ex rel. Salisbury Morris Plan Co. v. McCanless*, 193 N. C. 200, 136 S. E. 371 (1927). Technically this is not a decision on misjoinder of causes and parties. The demurrer below did not mention misjoinder of either. In the brief on appeal, misjoinder of causes was raised, and the Court considered it briefly, though it probably had been waived.

<sup>113</sup> *State ex rel. McCleod v. Maurer*, 215 N. C. 795, 2 S. E. (2d) 868 (1939). The brief *per curiam* opinion indicates only that the suit was by a creditor against an administrator, his sureties, and the heirs for the determination of questions

In the one case in which the creditor clearly sought to set aside a conveyance a misjoinder of causes and parties was found.<sup>114</sup> The attempt was: (1) to surcharge the administrator's final account and recover from him and his sureties for maladministration; and (2) to set aside, as fraudulent, a conveyance made by decedent two years before his death (the administrator and sureties, as individuals, as well as others, being involved in this and subsequent conveyances allegedly made with knowledge of the fraud). The Court, in a *per curiam* opinion, said the causes involved different defendants, were unrelated, and did not set forth a connected story. The case differs from the ordinary creditors' bill cases in that plaintiff could win on the fraudulent conveyance cause without winning on the other.<sup>115</sup>

Where the plaintiffs are heirs or next of kin or legatees, and the litigation is grounded primarily on events transpiring after the decedent's death,<sup>116</sup> the joinder has usually been sustained. As already pointed out, two next of kin may join in suing the sureties on the administrator's bond, alleging that the distributive share of each plaintiff had already been fixed by an accounting.<sup>117</sup> The Court sustained this though three other next of kin were not joined.

Most of the other cases of this type are considerably more complicated, though the basic idea is always to secure the plaintiffs' share of the estate assets. As long as all the relief sought is directly connected with that objective, and as long as there is a central, unifying thread—such as the provisions of a trust or agreement or will, or misapplication of funds by the principal defendants (with which the other defendants are somewhat connected)—the joinder will probably be sustained.<sup>118</sup>

involved in the settlement of the estate. The demurrer for misjoinder of causes and parties was overruled on the authority of two cases involving estate litigation instituted by heirs or distributees.

<sup>114</sup> *H. L. Vollers Co. v. Todd*, 212 N. C. 677, 194 S. E. 84 (1937).

<sup>115</sup> *Cf. Daniels v. Duck Island, Inc.*, cited *supra* note 100.

<sup>116</sup> Cases grounded on fraud practiced on the decedent prior to his death are dealt with below under "Other Fraud Cases."

<sup>117</sup> *State ex rel. Hoover v. Berryhill*, cited *supra* note 76.

<sup>118</sup> *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751 (1944) (heirs of *B* sue *M*, alleging one plaintiff borrowed money from *B*'s estate, giving note and mortgage on her share of realty, payable to *G*, a deceased executor of *B*, individually; that this plaintiff then conveyed to *M*, who promised to pay the debt to *B*'s heirs; that plaintiffs possess the mortgage and note and will surrender them upon payment. The administrator d. b. n. c. t. a. of *B* was made a plaintiff and the administrator of *G* a defendant. The lower court then sustained a demurrer for misjoinder of causes and parties, but the Supreme Court reversed, saying, *inter alia*, that there was but a single cause of action against *M*); *Bellman v. Bissette*, 222 N. C. 72, 21 S. E. (2d) 896 (1942) (*P*, prior to death, conveyed land to one daughter and her husband, they agreeing in writing to care for *P* and his wife, take certain compensation and, upon the death of *P* and wife, convey to all *P*'s children share and share alike. After death of *P* and wife, they conveyed one tract to husband of another daughter, and he in turn conveyed to a trustee to secure a loan. The other children of *P*, having received nothing, sue both daughters and their husbands, the trustee and the lender. They demand enforcement of the trust, conveyance of the land, and an accounting. *Held*, proper joinder,



The "connected story" and similar phrases are likely to be invoked to permit it. If, however, anything regarded by the Court as a completely independent transaction is introduced, or if the relief sought is in part not necessarily connected with the estate assets, misjoinder may be found.

An illustration is found in the case of *Robertson v. Robertson*.<sup>110</sup> *R* left a will stating that if any of his children owed debts to other children, the debts should be a charge on the debtor's share of the land (except in the case of debtor-daughters), and the debtor's share of personalty should be applied on the debts. Plaintiff was a creditor child and also executor. He sued in both capacities, joining as defendants the other living children of *R*, the children of a deceased son, and the husbands of two of *R*'s daughters. He requested determination of the amount of the debts and, presumably, invocation of the will provision in collecting them. The Court, in general, approved the joinder, saying: "The allegations in the complaint as to the indebtedness of the several defendants relate to the same subject matter and involve the rights of the parties under the quoted provisions of the will of a common ancestor."<sup>120</sup> However, it found the attempted joinder of the two husbands improper. Conceding that their joinder would be only surplusage if the debts involved were debts of their wives alone, the Court nevertheless construed an allegation that each daughter and her husband were indebted, with prayer for judgment against both, as indicating that debts for which the husbands were personally liable were involved. Apparently this made it a misjoinder, since the debts of the husbands were not covered by the will provisions and the situation, as between them and the rest of the defendants, became simply an attempt to sue different defendants on independent debts.<sup>121</sup>

though there were separate allegations of waste against the different defendants); *Leach v. Page*, 211 N. C. 622, 191 S. E. 349 (1937) (Plaintiffs, distributees of *L*, sued *P*, as administrator of *L* and individually, alleging he had estate funds, for which he had not accounted, which he invested through a partnership of which he was a member and for which the partnership gave notes. This partnership and an interlocking one were alleged to be subsidiaries of a defunct bank and the latter, or its liquidating agent, was alleged to hold assets of the partnership which plaintiffs were entitled to have applied on the debt. Defendants, in addition to *P*, were *P*'s surety, the members of the two partnerships, the bank, its liquidating agent, and the Commissioner of Banks. Supreme Court reversed the order sustaining demurrer for misjoinder of causes and parties). See also *Shaffer v. Bank*, 201 N. C. 415, 160 S. E. 481 (1931); *Taylor v. Postal Life Ins. Co.*, 182 N. C. 120, 108 S. E. 502 (1921); *Bedsole v. Monroe*, 40 N. C. 313 (1848).

<sup>110</sup> 215 N. C. 562, 2 S. E. (2d) 552 (1939).

<sup>120</sup> 215 N. C. 562, 564, 2 S. E. (2d) 552, 553 (1939).

<sup>121</sup> Though the situation was one which, if it involved misjoinder at all, would ordinarily be branded misjoinder of both causes and parties, and the demurrer was for both, the Court in its opinion refers expressly only to misjoinder of causes. It did not dismiss the entire proceeding. Normally the consequence of misjoinder of causes is division of the action. However, the Court did not order this, but simply sustained the demurrer as to the husbands only, making it probable that the action was dismissed against the husbands only.

Assuming, as the Court found, that the credit of the husbands was involved, it still seems probable that their liability was joint and several with their wives, or at least several "upon the same obligation" within the meaning of G. S. 1-71. Application of the wives' shares of the personality to the debts would operate to reduce or discharge the amount otherwise payable from the husbands' property. It is thus arguable that the husbands were "affected" by the will provisions as well as the other defendants. The case thus possibly represents the most technical approach the Court has made in the estate cases; but, on the whole, it has adopted a broad viewpoint on joinder in this field and the results have been satisfactory.

#### CORPORATE MISMANAGEMENT CASES

Though the facts in such cases are usually quite complicated, when the receiver or liquidating agent of a corporation sues its officers, directors or stockholders for mismanagement of the corporate business, the action is likely to withstand any objection raised on the ground of misjoinder of causes and parties. While some stress has been laid on facts which virtually show a conspiracy or common design between the defendants,<sup>122</sup> it is probable that any showing that all defendants actually participated in the wrongdoing is sufficient.<sup>123</sup> The defendants in these cases are essentially liable as joint tortfeasors, and in connection with other types of torts it is sufficient, to make the defendants joint tortfeasors, to show that their actions united to produce a single injury, even though they were clearly not acting in concert or pursuant to a

<sup>122</sup> *Branch Banking & Trust Co. v. Peirce*, 195 N. C. 717, 718, 143 S. E. 524 (1928). The Court distinguished cases, relied on by the defendant, because of the complaint's allegation "of a general course of dealing and systematic policy of wrongdoing, concealment and mismanagement, virtually amounting to a conspiracy, in which the defendants are all charged with having participated at different times and in varying degrees." Cf. *Hood ex rel. Commercial Bank and Trust Co. v. Love*, 203 N. C. 583, 584, 166 S. E. 743, 744 (1932): "Where, in an action brought by the Commissioner of Banks against directors of a bank for damages on account of negligent mismanagement, the complaint enumerates in detail negligent acts and omissions of the defendants and alleges that such acts and omissions constitute a general course of dealing and systematic policy of neglect, wrongdoing, and mismanagement, in which all defendants participated, and that such negligence proximately caused great losses to the bank, is the complaint demurrable? We think not."

<sup>123</sup> *Solomon v. Bates*, 118 N. C. 311, 316, 24 S. E. 478, 480, 54 Am. St. Rep. 725, 729 (1896). The Court said: "The complaint does not allege several acts committed by different defendants, but that the defendants, acting together, committed the acts complained of. This would make them jointly and severally liable, and the averment of a common design or conspiracy is unnecessary." The action was brought by a bank depositor rather than a receiver, but the principle should be the same. A more serious point is that the quotation is susceptible of the interpretation that the Court thought the facts alleged showed a conspiracy or common design, and was saying only that the pleader did not have to append the express characterization. However, though the joinder question was not at issue, the proposition that directors may be liable as joint tortfeasors, even in the absence of conspiracy or common design seems to be sustained by *Minnis v. Sharpe*, 198 N. C. 364, 151 S. E. 735 (1930), same case 202 N. C. 300, 162 S. E. 606 (1932), and 203 N. C. 110, 164 S. E. 625 (1932).

common design.<sup>124</sup> Of course, conspiracy or common design becomes a legitimate necessity when, without it, the activities of different defendants are so diverse as to time and place as apparently to give rise to entirely separate injuries.

When the only relief sought is a money judgment for the mismanagement, the joint tortfeasor approach could result in labeling the whole proceeding as a single cause of action,<sup>125</sup> but the decisions have apparently not rested on this ground.

The addition of a demand to set aside a conveyance by one of the defendants (a typical creditors' bill feature) does not result in a misjoinder;<sup>126</sup> and the joinder has been sustained even where the Court possibly regarded the causes as to some extent inconsistent.<sup>127</sup>

However, in two cases the plaintiff receiver has been guilty of error. In one it was not very serious. There the complaint included allegations that the defendants received bank deposits knowing the bank to be insolvent. Holding that only injured depositors could sue on that ground, the Court said it could be stricken on motion, but the remainder of the action was not affected.<sup>128</sup>

In another bank case the receiver attempted to sue: (1) the directors, for negligence prior to merger, resulting in insolvency; and (2) the successor bank, alleging breach of its contract with the directors regarding liquidation of assets. This was held to be dual misjoinder, the Court stressing the fact that there was no allegation of conspiracy or its equivalent—"a general and continued course or dealing, or of a systematic policy of wrongdoing, participated in by all the defendants."<sup>129</sup> In the light of the requirement that each cause affect all parties, the insistence here on conspiracy or its equivalent is legitimate. Even if it be assumed that the breach of contract was also a tort (thus eliminating the necessity of satisfying the transaction clause of G. S. 1-123), the allegations as stated do not show independent acts producing a single injury, but such acts producing separate injuries.

The same general principles apply where a creditor is permitted by

<sup>124</sup> *Lineberger v. City of Gastonia*, 196 N. C. 445, 146 S. E. 79 (1929).

<sup>125</sup> This might run into logical difficulties in a case like *Branch Banking and Trust Co. v. Peirce*, cited *supra* note 122, where the allegations covered a period of seven years and not all the defendants had been officers or directors for the entire period. Here the "systematic policy . . . virtually amounting to a conspiracy" may appeal to the Court as a convenient thread on which to hang the joinder, but the respective defendants were hardly in on the policy except while serving as officers or directors. The Court, by calling attention to what was done in *Long v. Swindell*, 77 N. C. 176 (1877), possibly implies that differing amounts of damages could be assessed against the several defendants.

<sup>126</sup> *Carswell v. Talley*, 192 N. C. 37, 133 S. E. 181 (1926).

<sup>127</sup> *Shuford v. Yarbrough*, 198 N. C. 5, 141 S. E. 343 (1929). The facts given are not sufficient to permit determination of what the causes were or how they might have been inconsistent.

<sup>128</sup> *Branch Banking and Trust Co. v. Peirce*, cited *supra* note 122.

<sup>129</sup> *Grady v. Warren*, 201 N. C. 693, 694, 161 S. E. 319 (1931).

the substantive law to sue officers, directors or stockholders. Thus, no misjoinder was found when a depositor sued bank directors and, on the same basic allegations of mismanagement, joined causes of action for negligence in conducting the bank's affairs and for wrongfully inducing the plaintiff to deposit his money by misrepresenting the bank's solvency.<sup>130</sup> On the other hand, the Court has several times found that suits by creditors involve entirely independent causes of action, with different parties affected, without any showing of common design or concurrence of wrongdoing resulting in a single injury. Thus it is misjoinder of causes and parties when numerous creditors sue, the complaint embracing "a suit by creditors against the original stockholders for unpaid balances due on their original subscriptions; second, a suit by such creditors against three other defendants alleged to be in control of the property and goods of the corporation, claiming same as owners for fraudulent dissipation of these assets; third, suits by certain individual creditors against still other defendants on a separate demand or claim against the latter. . . ."<sup>131</sup> Similarly, when a defendant claimed he had made payment of a note (on which plaintiff sues) to a bank president, who falsely represented that the note had been lost or misplaced, the Court dismissed his cross-claim because of joinder of: (1) demand for recovery against the bank's receiver for the president's fraud; (2) demand for judgment against the president personally; and (3) demand for judgment against the officers and directors for permitting an insolvent bank to remain open.<sup>132</sup> The Court regarded the demands against the receiver, on the one hand, and against the officers and directors, on the other, as distinct causes of action, one in contract and the other in tort, against different defendants.

In the remaining corporate mismanagement cases, the plaintiffs were stockholders. In one of these a receiver had been appointed for the corporation. The preferred stockholders intervened, had the directors made defendants, and sued: (1) to earmark assets in the receiver's hands as a sinking fund for the benefit of the preferred; (2) on behalf

<sup>130</sup> *Caldwell v. Bates*, 118 N. C. 323, 24 S. E. 481 (1896); *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478 (1896); *Tate v. Bates*, 118 N. C. 287, 24 S. E. 482 (1896) (connected cases). See also *Craven County v. The Investment Co.*, 201 N. C. 523, 160 S. E. 753 (1931), a case with very complicated facts involving a loan by a county to help effect reorganization of a bank which became insolvent. Joinder was sustained.

<sup>131</sup> *Beckley Clothing Co. v. Green*, 187 N. C. 772, 122 S. E. 847 (1924). See also *Lucas and Lewis v. N. C. Bank and Trust Co.*, 206 N. C. 909, 174 S. E. 230 (1934). There it does not positively appear whether plaintiffs were stockholders or creditors, though they were probably the latter. It was held misjoinder of causes and parties to join: "(1) alleged contract breaches and (2) torts committed on the part of the corporate defendant, and (3) alleged neglect of official duties and (4) torts committed by the Commissioner of Banks." No other facts are given in the brief *per curiam* opinion.

<sup>132</sup> *The Citizens National Bank of Baltimore v. Angelo Brothers*, 193 N. C. 576, 137 S. E. 705 (1927).

of the receiver against the directors for negligence and misapplication of funds in failing to add to the sinking fund in named years; and (3) directly against the directors, based on the same allegations as in (2), for any amount not realized by (1) and (2).<sup>133</sup> The Court said the joinder was proper, though the principal battle was over the propriety of a reference, and it is not clear that any proper objection to joinder was made. If it can be regarded as good authority on the joinder question, it seems, on the surface, in conflict with the bank case summarized in the preceding paragraph. However, in that case the Court was undoubtedly strongly influenced by the feeling that the defendant, with his new parties and cross-claim, should not be allowed unduly to complicate the controversy between himself and plaintiff.<sup>134</sup> In this case, while the controversy was also technically a new one introduced into the framework of a pending action, it was for practical purposes an entirely independent proceeding.

There are several other stockholder cases in which the joinder was held to be proper.<sup>135</sup> However, the Court drew the line in *Summit Mills, Inc. v. Summit Yarn Co.*<sup>136</sup> The basic allegations were that *B* agreed to form a new corporation which would buy plaintiff's property for \$85,000 and one-fourth of its stock; that, after this was done, *B* (also a corporation), through identical officers and control of the stock, mismanaged the new corporation and made it insolvent; that *B* failed to pay what it promised to pay for its stock in the new corporation; that *B* misrepresented the facts as to this; and that plaintiff had been deprived of information regarding the new corporation. Suing *B* and the new corporation, plaintiff demanded a money judgment against both, a statutory audit of the new corporation, a receivership, and preference for

<sup>133</sup> *Fry v. Pomona Mills, Inc.*, 206 N. C. 768, 175 S. E. 156 (1934).

<sup>134</sup> Defendant's answer also alleged that plaintiff held the note as collateral, that plaintiff also held other collateral, and demanded that the other collateral be first exhausted. Chief Justice Stacy said: "This case presents a striking illustration of the wisdom of the rule established by these decisions. If the plaintiff hold the note in suit only as collateral, and the remaining collateral held by it be amply sufficient, as alleged, to discharge its obligation, then the bringing into this suit of the other defendants would seem to be wholly unnecessary." 193 N. C. 576, 578, 137 S. E. 705, 706 (1927).

<sup>135</sup> *Ayers v. Bailey*, 162 N. C. 209, 78 S. E. 66 (1913). Eight plaintiffs, stockholders of a bank, sued three defendants, who were stockholders and officers, alleging defendants wrongfully took worthless paper and then induced plaintiffs to guarantee it when it was transferred as part of a merger deal, the defendants promising to join in the guarantee, which they failed to do. While the Court found two causes of action—one on the alleged contract to guarantee and one for mismanagement—the joinder was held proper as involving transactions connected with the same subject of action; *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590 (1910) (two judges dissented on the ground there should be a repleader to state clearly the one cause of action they believed to be involved); *Oyster v. Mining Co.*, 140 N. C. 135, 52 S. E. 198 (1905) (special concurring opinion by two judges). For a case, sustaining joinder, involving some elements of mismanagement, but where control of the corporation was the real issue, see *Corbett v. Hilton Lumber Co.*, 223 N. C. 704, 28 S. E. (2d) 250 (1943).

<sup>136</sup> 223 N. C. 479, 27 S. E. (2d) 289 (1943).

its claims over any claims of *B* against the new corporation. The Court said there were at least two causes which were legally unrelated and did not each affect all parties: (1) against *B*, for breach of its contract to pay for the stock—on which the new corporation could not be liable; and (2) the audit, which could not be asserted against *B*. It further said that the misrepresentation allegations affected only *B*.

This seems an unnecessarily technical decision. In view of the control allegations, virtually making the new corporation the *alter ego* of *B*, the case seems to present a "connected story" and a common design within the meaning of the cases previously discussed. And it is very difficult to see why, in any practical sense, both defendants are not affected by each cause. In fact, the whole proceeding could easily be treated as one cause of action, with the request for the audit regarded as one for purely incidental relief. It seems reasonably clear that the philosophy underlying many of the earlier cases would have justified the joinder here.

#### OTHER FRAUD CASES

It is already apparent that fraud is valuable, though not infallible, cement for joining causes and parties. It is a usual feature in the creditors' bill cases, though there it is not directly related to plaintiffs' basic claims. It is frequently found in the estate and corporate management cases. And when the Court speaks of conspiracy or common design as justifying the joinder of multiple defendants, fraud or something very close to it is almost inevitably involved.

It is not surprising, therefore, that in situations other than those already discussed, when fraud is the gravamen of the complaint, the plaintiff may ordinarily join as defendants all those who participated in the fraud or knowingly profited by it, and may ask for such relief as necessary to overcome the fraud and enforce his rights. The fact that the fraud may involve a number of transactions or different properties does not prevent the joinder if the allegations connect them as parts of a continuing scheme. Thus, it has been held that the heirs of a decedent may sue the persons who, over a long period of years, and in various types of business deals, fraudulently bilked the decedent of his property, joining as defendants other persons who, with knowledge, took some of the property.<sup>137</sup> The joinder has also been sustained where the alleged fraud was practiced in part on the decedent and in part by the

<sup>137</sup> *Fisher v. Trust Co.*, 138 N. C. 224, 50 S. E. 659 (1905). The facts of the case were exceptionally complicated, and the decision was by a three to two vote. The opinions contain lengthy reviews of earlier cases. Judge Walker, one of the dissenters in the case, subsequently recognized that "the principle of that case has since been thoroughly settled." *Lee v. Thornton*, 171 N. C. 209, 214, 88 S. E. 232, 234 (1916) (also a case involving fraud practiced on the ancestor). See also *Young v. Young*, 81 N. C. 92 (1879).

administrator after decedent's death, where the allegations made it appear that each phase was a part of one original plan.<sup>138</sup>

In one case the Court found misjoinder of causes and parties where, according to the Court, the complaint alleged: (1) breach of contract against two defendants, on which the other defendants were not liable; (2) tort against two defendants, in which the other defendants were not interested; and (3) conspiracy against all the defendants.<sup>139</sup> It does not appear from the meagre facts stated whether the first two causes involved facts which could have been considered as part of the conspiracy alleged in the third.<sup>140</sup>

Some of the land title cases also involve fraud, but it is more convenient to deal with them in connection with the other land title cases.

#### CASES INVOLVING SEVERAL TRACTS OF LAND

Where the object of the suit is to recover possession of several tracts of land,<sup>141</sup> there is a misjoinder of causes and parties if one or more plaintiffs,<sup>142</sup> or defendants,<sup>143</sup> or both,<sup>144</sup> are not interested in all tracts. (This should be distinguished from a situation where a plaintiff or defendant with no apparent interest in any of the land is joined, as there

<sup>138</sup> *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635 (1897). For other fraudulent scheme cases, see *Griggs v. Griggs*, 218 N. C. 574, 11 S. E. (2d) 878 (1940); *Cotten v. Laurel Park Estates, Inc.*, 195 N. C. 848, 141 S. E. 339 (1928) (facts not given, but *per curiam* opinion, sustaining joinder, indicates there were three causes of action connected by "a common scheme, or plot, practically a conspiracy"). See also *Taylor v. Taylor*, 197 N. C. 197, 148 S. E. 171 (1927) (Wife sued for alimony without divorce, joined husband's father as a defendant, and demanded the setting aside of: (1) a deed of separation allegedly secured by fraud and coercion; and (2) an allegedly fraudulent deed from husband to his father. Conspiracy between the two defendants was alleged. After answer, defendants demurred *ore tenus* for misjoinder of causes. Joinder sustained. Decision rested on "general scheme" and "connected story" rather than on waiver by failure to demur at the proper time.).

<sup>139</sup> *Williams v. Gooch*, 206 N. C. 330, 173 S. E. 342 (1934).

<sup>140</sup> *Cf. N. C. Land Co. v. Beatty*, 69 N. C. 329 (1873), where the Court denied the right to join what it interpreted as a cause of action for breach of contract against B with a cause for fraud against B and C, even though it was clear that the contract allegations, which were not stated as a separate cause in the complaint, were simply one part of the fraud allegations. However, the case is rather doubtful authority, as the Court seemed also of the view, since clearly rejected, that contract and tort could not be joined even when they arose from the same transaction.

<sup>141</sup> What constitutes a "tract" of land, while usually not a troublesome question, is not always free from difficulty. See *Edgerton v. Powell*, 72 N. C. 64 (1875). The case involved misjoinder of causes only, but the Court dealt with the two moieties in the same land as different tracts, apparently because there were different chains of title.

<sup>142</sup> *Rogers v. Rogers*, 192 N. C. 50, 133 S. E. 184 (1926).

<sup>143</sup> *Burleson v. Burleson*, 217 N. C. 336, 7 S. E. (2d) 706 (1940).

<sup>144</sup> *Holland v. Whittington*, 215 N. C. 330, 1 S. E. (2d) 813 (1939). Technically, because of the way the misjoinder question was presented in this case, there is no decision that one suit could not include the two tracts involved. However, the Court stressed the different relation of the parties to the two tracts; and it is apparent, anyway, that if lack of community of interest of plaintiffs or defendants will constitute misjoinder, there is bound to be misjoinder when it is lacking as to both.

his joinder can be treated simply as surplusage.<sup>145</sup>) This principle has been applied to tax foreclosure actions when all defendants were not claimants to all the tracts,<sup>146</sup> and to a suit for the recovery of the value of separate tracts, when plaintiffs could not all share in the recovery on all the tracts.<sup>147</sup>

However, such a joinder may be permissible if the Court finds some over-all right of the plaintiffs, recognition or rejection of which will determine the outcome of the whole case. Thus, where tracts originally owned independently by *H* and *W* were included in a deed of trust executed by them jointly, and the suit was grounded on their alleged rights under a parol agreement made by *H*, on behalf of himself and *W*, with the trustee, the joinder was proper.<sup>148</sup> Similarly, the joinder was sustained where twenty-one plaintiffs, claiming as remaindermen under the will of *T*, sued nineteen defendants who claimed under various deeds from one who, plaintiffs alleged, was only a life tenant.<sup>149</sup> The case involved sixteen adjoining tracts lying in two counties. In this latter case the objection raised went only to joinder of causes; and the Court seemed to regard the entire proceeding as involving but one cause.<sup>150</sup> It is arguable that the same is true in the first case; but the Court, in a very brief opinion, by citing the joinder of causes section, at least intimates to the contrary.

In some cases, where several tracts, legal title to which is currently in different persons, are all affected by the same fraudulent scheme, joinder is proper. The fraud, as usual, is a cementing factor. Thus, it was held proper joinder where the complaint alleged that defendants *L* and *T*, by fraud and undue influence, procured separate conveyances from plaintiff's ancestor to defendant *T* and defendant *M*, who took

<sup>145</sup> See the discussion under "Joinder of Parties"; and see *Moore County v. Burns*, 224 N. C. 700, 32 S. E. (2d) 225 (1944).

<sup>146</sup> *Moore County v. Burns*, cited *supra* note 145.

<sup>147</sup> *Green v. Jones*, 208 N. C. 221, 179 S. E. 662 (1935). The principle also has been applied to partition proceedings. *Simpson v. Wallace*, 83 N. C. 477 (1880).

<sup>148</sup> *Cole v. Shelton*, 194 N. C. 741, 140 S. E. 734 (1927). Stacy, C. J., said (at page 742): "It is sufficient to say that the rights of all the parties are dependent upon the establishment or nonestablishment of the alleged parol trust, which grows out of a single agreement, if made at all, affecting all three tracts of land." The opinion also "observed" that the action was one cognizable only in equity.

<sup>149</sup> *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692 (1887). After the case had been pending for seven years and parties on each side had died, the Superior Court ordered the remaining plaintiffs and defendants to prosecute and defend for all those having similar interests. This action was held proper because the situation was appropriate for a class suit and because, as to plaintiffs, one or more tenants in common may sue for possession of real estate without joining the others.

<sup>150</sup> "It is true that the plaintiffs allege title under the will of Joseph Thames, and the defendants claim conveyance from John T. Gilmore, but these are unnecessary statements of the chain of title relied on by the plaintiffs and defendants respectively, and are not alleged as causes of action." 97 N. C. 121, 126, 1 S. E. 692, 694.



with knowledge.<sup>151</sup> However, in *Green v. Jones*,<sup>152</sup> a different result was reached. There it was alleged that defendants "wrongfully procured" title, from *G* and his wife, to a tract which *G* owned individually and a tract which *G* and wife owned by the entirety. *G* having died, the wife, individually and as administratrix, and *G*'s heirs sued to recover the value of the land. In a *per curiam* opinion, misjoinder of causes and parties was found because the heirs had no interest in the tract held by the entirety and there was, therefore, no community of interest between the plaintiffs.<sup>153</sup> The case does not describe the wrongful conduct of the defendants, individually or collectively, but the decision was not made to turn on any non-participation by the defendants in a common scheme.<sup>154</sup> It was the joinder of the plaintiffs which was fatal.

Perhaps a distinction must be taken here between tort and contract. As pointed out subsequently, two plaintiffs claiming injury by virtue of breach of a single contract are, at times at least, allowed to join though their interests are not truly joint; whereas two plaintiffs claiming injury by virtue of a single tortious act ordinarily cannot join. Thus, in the parol agreement case, *H* and *W* could join because, though the agreement was made by *H* alone, it was for the benefit of both as he was acting for himself and *W*. But fraud, while it may give sufficient community of interest among the defendants, may not alone supply it for the plaintiffs. Where there are multiple plaintiffs, they apparently need some shared interest in the property, as where they would be tenants in common of all the tracts involved.

For purposes of the land tract cases, "It is a well established rule that a number of trespassers, who have settled upon different parts of one tract of land, or upon several, that are contiguous and have been consolidated by the owner of them into one body, may be sued in a single suit brought by the latter to recover possession and have the title adjudicated."<sup>155</sup>

<sup>151</sup> *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232 (1916) (there was also a conveyance to plaintiff, allegedly made to embarrass him). See also *Fisher v. Trust Co.*, cited *supra* note 137.

<sup>152</sup> 208 N. C. 221, 179 S. E. 662 (1935).

<sup>153</sup> The opinion also points out, and possibly relies on the fact that the wife, as administratrix, would have no interest in the realty of her husband in the absence of an allegation that personal property was insufficient to pay debts, and also had no interest in the tract held by the entirety. However, this would seem at most to make the administratrix an unnecessary party, joinder of whom would be harmless surplusage. Her presence should not affect the propriety of joinder of causes and parties unless she *did* allege insufficient personalty, in which case she would show an interest in one of the tracts, but not the other.

<sup>154</sup> Fraud on the part of some defendants, not participated in by the others, affecting only one of two tracts, clearly will not justify joinder. *Holland v. Whittington*, cited *supra* note 144.

<sup>155</sup> *Bryan v. Spivey*, 106 N. C. 95, 99, 11 S. E. 510 (1890). See also *Weeks v. McPhail*, 128 N. C. 134, 38 S. E. 292 (1901). Cf. *Love v. Willbourn*, 27 N. C. 344 (1845); *Needham v. Branson*, 27 N. C. 426 (1845). It seems probable that, in some of the cases where misjoinder has been found, an argument for plaintiff, that

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FOR OTHER RELIEF

When the main object of the suit is recovery of the possession of property, and plaintiff has equitable title only, he may join a demand for a conveyance of the legal title, or for a declaration that he holds legal title, with the demand for possession. And this is true though, for purposes of the first demand, he joins a defendant who is not directly affected by the demand for possession. Thus it was proper joinder where plaintiff alleged that he purchased land at execution sale, but the sheriff's deed was lost before registration, and joined the sheriff and occupant as defendants.<sup>156</sup> Similarly, when plaintiff purchased land through an agent of *M*, who received the money, but the deed was signed by the agent instead of *M*, it was proper to join *M* and the occupant as defendants, litigate the first question with *M* and then try the ejectment issue with the occupant.<sup>157</sup>

In another case it was alleged that *J* deeded land to plaintiff's ancestor, who died without registering the deed; and that, after his death, *J* procured the deed and destroyed it and conveyed the land to others. It was held proper for plaintiff, in his ejectment action, to join as defendants *J*, the then legal title holder, and intermediate owners.<sup>158</sup> These cases clearly bring out the fact that, since the adoption of the Code, the owner of equitable title may, in many cases, bring ejectment without going into equity first to secure legal title.<sup>159</sup>

Two other cases of this general type,<sup>160</sup> which involve further complications, are discussed below under "Alternative Joinder."

the tracts are contiguous and have been consolidated by the common owner, has been overlooked.

<sup>156</sup> *McMillan v. Edwards*, 75 N. C. 81 (1876). Objection to misjoinder was waived, but Court said the joinder was proper under the transaction clause. The sheriff had professed his willingness to execute another deed. It was probably unnecessary to make him a defendant at all; and even with him present, the whole case should probably be regarded as one cause of action.

<sup>157</sup> *Phoebe v. Black*, 76 N. C. 379 (1877). Actually, plaintiff attempted to join *M* as party plaintiff, but the Court said this was improper and suggested that the proper procedure would be as stated in the text.

<sup>158</sup> *Jennings v. Reeves*, 101 N. C. 447, 7 S. E. 897 (1888). The joinder question was not expressly raised, but the Court approved joinder in overruling the defendant's objection that the original deed could not be proved by parol evidence in an ejectment action.

<sup>159</sup> See *McINTOSH*, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES (1929 ed.) §211(2).

<sup>160</sup> *Heggie v. Hill*, 95 N. C. 303 (1886), and *Young v. Young*, 81 N. C. 92 (1879). See also *Ingram v. Corbit*, 177 N. C. 319, 99 S. E. 18 (1919) (tenant joined administratrix, widow, and heir of landlord in action grounded on breach of lease, asking for possession against widow and heir, that allotment of widow's dower be declared void, and for damages); *Fields v. Brown*, 160 N. C. 295, 76 S. E. 8 (1912) (plaintiff joined a cause against *A* and *B* for possession of a horse with a cause for fraud or false warranty against *A* alone); *England v. Garner*, 86 N. C. 366 (1882) (plaintiffs sued to set aside partition sale of which they alleged they had no notice, to set aside deed given by one of the purchasers at the sale, for possession, for rents, profits and damages, and for an injunction against waste).

## DEMANDS FOR ENFORCEMENT OF A LIEN AND OTHER RELIEF

It is quite clear that a demand for foreclosure of a mortgage can be joined with a demand for judgment on the debt secured by the mortgage.<sup>161</sup> The fact that the persons liable on the debt and those in possession of the property are not the same persons does not render the joinder improper.<sup>162</sup> And even where the factual situation was very complicated, when the Court described the action as one on a note and for foreclosure of a deed of trust, the joinder was sustained.<sup>163</sup>

The same rules probably apply to any action to enforce a lien, at least where all the defendants having an interest in the property took with actual or constructive notice of the lien. In fact, even if they had no such notice, that would seem to be more in the nature of a defense to the action than an objection to joinder. The creditors' bill cases obviously lend some support to this thesis. And in *Outland v. Outland*,<sup>164</sup> plaintiff alleged that O's will devised lands to two of his sons, subject to a charge for support of his third son; and that plaintiff maintained the third son upon agreement of the other two to pay for the maintenance. The complaint asked for judgment against the two sons

<sup>161</sup> *Credle v. Ayers*, 126 N. C. 11, 35 S. E. 128 (1900).

<sup>162</sup> N. C. GEN. STAT. (1943) §1-123, last paragraph; *McINTOSH*, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES (1929 ed.) §431.

<sup>163</sup> *Marshville Cotton Mills, Inc. v. Maslin*, 195 N. C. 12, 141 S. E. 348 (1928). Original transaction was agreement for a land trade between N and C. When C was unable to clear debts on its land, N, at C's request, transferred his land to M. M and wife executed a note to B and deed of trust to E, and conveyed the land to C. B endorsed the note to N, who endorsed it, without recourse, to plaintiff. C (through its receiver), B, N, M and wife, E, and several persons whose interests did not appear were made defendants. The Court relied upon the "connected story" doctrine and the transaction clause of G. S. 1-123. No mention was made of the last paragraph of that section, dealing especially with mortgage foreclosures, nor of the provision of the section excepting mortgage foreclosures from the requirement that all causes affect all parties.

See also *King v. Farmer*, 88 N. C. 22 (1883). Plaintiffs were trustees, for themselves and others, as members of a joint stock company, holding title to land. F contracted to buy the land, plaintiffs retaining title as security. They sued the other *cestuis* and F, alleging that F had paid to plaintiffs only the first installment, but claimed to have made other payments to other *cestuis* in amounts unknown to plaintiffs. They demanded an accounting of the payments and of rents and profits, judgment against F for the balance of the purchase price, sale of the land if F was unable to pay it, and that the trust be closed out and distribution ordered. Joinder was sustained.

In *Virginia Trust Co. v. Pharr Estates, Inc.*, cited *supra* note 98, the foreclosure was combined with a creditors' bill. There bondholders and the trustee in a deed of trust given to secure the bonds joined as plaintiffs against: (1) the principal debtor; (2) guarantors of principal and interest; (3) a guarantor of interest and taxes; and (4) the trustees and *cestuis* under deeds of trust given by several of the guarantors. Plaintiffs demanded foreclosure, but alleged the land would not bring enough to satisfy the debt and so demanded, also, that the deeds of trust given by the guarantors be set aside so that plaintiffs would be in better position to collect their deficiency judgment. Joinder was sustained. Cf. *Walker v. Asheville Building Securities Co.*, 205 N. C. 165, 170 S. E. 631 (1933), where the complaint demanded foreclosure of a deed of trust and the setting aside of a tax foreclosure sale.

<sup>164</sup> 113 N. C. 74, 18 S. E. 72 (1893).

and that the judgment be declared a charge on the land; and purchasers of part of the land from the two sons were made defendants. The trial judge sustained a demurrer for misjoinder of causes, but the Supreme Court reversed. Misjoinder of parties was not expressly raised, but the Court relied on the "connected story" cases.

It has also been held that a conditional seller of personal property may unite a demand for the purchase price with a demand for recovery of the property (for the purpose of foreclosure), joining as defendants the debtor and another who is in possession.<sup>165</sup>

*The Federal Land Bank of Columbia v. Jones*<sup>166</sup> involved joinder of an entirely different kind of demand with a demand to foreclose a mortgage. After giving the mortgage to plaintiff, the mortgagor conveyed an easement to *T* permitting it to pond water on the land, and *T* transferred the easement to *P*. Plaintiff alleged that the resultant ponding greatly lessened his security and demanded damages on that score, as well as foreclosure. The defendants (mortgagor, *T* and *P*) did not raise the question of joinder as such, but contended that the damage action would not accrue until foreclosure was had and a deficiency resulted. The Court rejected this and also said the joinder of causes was proper.

#### GENERAL CONTRACT AND TORT PRINCIPLES

So far as multiple defendants are concerned, it is clear enough that plaintiff may (possibly excepting completely unrelated breaches) ordinarily sue *A* and *B* for breach of the same contract;<sup>167</sup> or may join them in action for breaches of two different contracts where both are liable on both contracts.<sup>168</sup> On the other hand, plaintiff may not join causes for breaches of separate contracts if one or more defendants are not liable on each contract.<sup>169</sup> Thus it was a misjoinder of causes and parties when a county, in one action, undertook to collect on several official bonds of a sheriff, covering different terms of office, when the

<sup>165</sup> *Andrews Music Store, Inc. v. Boone*, 197 N. C. 174, 148 S. E. 39 (1929), relying on *Kiger v. Harmon*, 113 N. C. 406, 18 S. E. 515 (1893) (a chattel mortgage case involving a single defendant), the transaction clause of G. S. 1-123, and the provisions of G. S. 1-69. Cf. *Fields v. Brown*, cited *supra* note 160.

<sup>166</sup> 211 N. C. 317, 190 S. E. 479 (1937). Cf. *McKesson v. Mendenhall*, 64 N. C. 502 (1870).

<sup>167</sup> N. C. GEN. STAT. (1943) §1-71. See *Hanover National Bank v. Cocke*, 127 N. C. 467, 37 S. E. 507 (1900), involving several *pro rata* liability on a single contract. Held, one cause of action. Cf. cases cited, *infra* note 173. See also *McLean v. State Bank of McBee*, 194 N. C. 797, 139 S. E. 691 (1927), where plaintiff, alleging he had a contract to buy land, sued to restrain its sale until claims of mortgagees, judgment creditors and plaintiff were adjudicated. No other facts given, but joinder was sustained.

<sup>168</sup> *Syme v. Bunting*, 86 N. C. 175 (1882). See also *Burrell v. Hughes*, 116 N. C. 430, 21 S. E. 971 (1895), where principal and sureties were sued on an official bond for penalties based on several breaches of duty by principal.

<sup>169</sup> *Warden v. Andrews*, 200 N. C. 330, 156 S. E. 508 (1931) (misjoinder found where complaint combined causes for breach of contract with *A*, with *B*, and with a partnership composed of *B* and *C*); *Logan v. Wallis*, 76 N. C. 416 (1887).

sureties were not the same.<sup>170</sup> Similarly, it has been held improper to join a cause against an administrator and his sureties with one against a Clerk of Superior Court and his sureties, even though the complaint alleged facts which, it was contended, showed official misconduct participated in by both principals.<sup>171</sup>

In another case a building contractor sued the owner for the balance due on the contract. Defendant had the architect brought in and filed a counterclaim and cross-claim, alleging improper construction by the plaintiff or defective plans by the architect, or both. This was held to be an improper attempt to join two causes against different parties.<sup>172</sup>

However, even when there are separate contracts, joinder may be proper if there is some feature common to all which makes recovery on each dependent, to some extent, upon recovery on the others. For example, where plaintiff sued five insurance companies on separate fire policies, the joinder was proper because each policy contained a clause rendering the insurer liable for a *pro rata* part of the loss only.<sup>173</sup>

<sup>170</sup> *Pender County v. King*, 197 N. C. 50, 147 S. E. 695 (1929). Cf. *Syme v. Bunting*, cited *supra* note 168, holding that principal and same surety may be sued on bonds covering different terms, and *State ex rel. Smith v. The Fidelity and Deposit Co. of Baltimore*, 191 N. C. 643, 132 S. E. 792 (1926), holding that a single plaintiff may sue a single surety defendant on three separate bonds, the principals on which (not made parties) were different. See also *State v. Gant*, 201 N. C. 211, 159 S. E. 427 (1931).

<sup>171</sup> *Street v. Tuck*, 84 N. C. 605 (1881). There is a good argument that the "connected story" and "common scheme" cases should make the joinder in this situation permissible. Cf. *Mitchell v. Mitchell*, 96 N. C. 14, 1 S. E. 648 (1887), where plaintiff sued: (1) an administrator and his sureties for defalcation; and (2) the clerk of Superior Court for requiring an insufficient bond of the administrator. Held, misjoinder of causes and parties. See note 177 *infra*.

<sup>172</sup> *Rose v. Fremont Warehouse and Improvement Co.*, 182 N. C. 107, 108 S. E. 389 (1921).

<sup>173</sup> *Pretzfelder v. Merchants Ins. Co.*, 116 N. C. 491, 21 S. E. 302 (1895) (the demurrer was for misjoinder of causes only, but the Court said there was misjoinder of neither causes nor parties). See also *Planters Savings Bank v. Earley*, 204 N. C. 297, 168 S. E. 225 (1933) (in action to assess bank stockholders all stockholders can be joined as defendants, because an accounting is necessary and no judgment can be rendered against any stockholder until the amount for which each is liable is determined). Cf. *Virginia Trust Co. v. Pharr Estates, Inc.*, cited *supra* notes 98 and 163 (where separate contracts of guaranty may have been involved); *Ivy River Land & Timber Co. v. The American Ins. Co.*, 190 N. C. 801, 130 S. E. 864 (1925); *Ayers v. Bailey*, 162 N. C. 209, 78 S. E. 66 (1913). Another situation where joinder has been sustained though technically there may be separate contracts is a suit against successive warrantors in plaintiff's chain of title, for breach of the same warranty. *Winders v. Southerland*, cited *supra* note 12. The Court said that, though plaintiff could sue them separately, it was the same cause of action. Cf. *Baber v. Hanie*, cited *supra* note 12. Either this principle or that of *Hanover National Bank v. Cocke*, *supra* note 167, would seem to provide an analogy which would permit joinder where a plaintiff claims contribution from several defendants who were joint obligors with plaintiff on a debt plaintiff has been compelled to pay, whether the parties win all co-principals or all co-sureties, and whether the complaint proceeds on a legal or an equitable theory. See, however, *Petree v. Savage*, 171 N. C. 437, 88 S. E. 725 (1916); *Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47 (1897). Cf. N. C. GEN. STAT. (1943) §1-240. The correct principle was clearly recognized in *Hughes v. Boone*, 81 N. C. 204 (1879), where two plaintiffs sued a single defendant for contribution and joinder was held proper.

In tort, plaintiff may sue several defendants whose acts combine to produce a single injury, thus making them joint tortfeasors;<sup>174</sup> and he may also join with the principal defendant one whose liability is predicated solely upon *respondet superior*.<sup>175</sup> In these cases there is usually said to be but one cause of action. In one case, the addition of a surety of one of the defendants did not render the joinder improper,<sup>176</sup> but possibly no general rule to that effect can be stated.<sup>177</sup>

This was true even though, while there had been a single judgment, different surety bonds were involved. The Court held that the former equity rules governing joinder in contribution cases applied, whether the Code action was legal or equitable. *Cf. Bunker v. Llewellyn*, 221 N. C. 1, 18 S. E. (2d) 717 (1942).

<sup>174</sup> *Lineberger v. Gastonia*, 196 N. C. 445, 146 S. E. 79 (1929).

<sup>175</sup> *Hough v. Southern Railway*, 144 N. C. 692, 57 S. E. 469 (1907).

<sup>176</sup> *State ex rel. Cook v. Smith*, 119 N. C. 350, 25 S. E. 958 (1895). The complaint alleged that defendant sheriff, at the instance of defendant *A*, who promised to indemnify the sheriff, wrongfully levied on defendant's property. The surety on the sheriff's bond was also a defendant. Damages were demanded for the value of the property sold, for seizure of an excessive amount of property, and for deterioration caused by delay in making the sale. The opinion is consistent with the theory that the action was basically in tort as against both the sheriff and *A* (because he procured the wrongful acts), with the surety being joined as in any other action based on misfeasance of the sheriff. At one point the opinion indicates there is but one cause of action, but elsewhere deals with joinder of causes in tort and contract arising from the same transaction. (As for *A*'s joinder, while the Court seems to give some weight to his indemnity agreement, it is doubtful that this, standing alone, would justify making him a defendant with the sheriff. *See cases cited supra* note 10.) *Cf. Strange v. Manning*, 99 N. C. 165, 5 S. E. 900 (1888).

<sup>177</sup> Even where there is but one principal defendant, the Court may not permit him and the surety to be joined as defendants if it believes the principal is liable for some act or some type of damage for which the surety is not liable. In *Martin v. Rexford*, 170 N. C. 540, 87 S. E. 352 (1915), it was held that the principal and surety on his replevy bond could be joined if plaintiff asked only for actual damages, but that joinder was improper if plaintiff expected to proceed against the principal on a malicious prosecution theory under which punitive damages might be allowed, as the surety would not be liable for the latter. *Cf. Strange v. Manning*, cited *supra* note 176. *See also Railroad Co. v. Hardware Co.*, 135 N. C. 73, 47 S. E. 234 (1904), where plaintiff sued *A* for wrongful and malicious attachment, joining *B*, the surety on *A*'s attachment bond. The Court held this to be misjoinder of causes and parties because *B*'s liability on the bond did not include liability for the injury for which *A* was sued and, therefore, *B* was not affected by the cause against *A*.

Where two officials are sued for breaches of duty, and their sureties are joined, the Court is inclined to find a misjoinder. Thus, in *State ex rel. Ellis v. Brown*, 217 N. C. 787, 9 S. E. (2d) 467 (1940), the sureties of a clerk of Superior Court, who had paid his defalcation, sued the county accountant, his bondsman, and the county commissioners, alleging improper auditing of the clerk's office by the accountant and that the commissioners required insufficient bond and employed incompetent auditors. The Court sustained the demurrer for misjoinder (as well as for failure to state a cause of action). The same result was reached in *Mitchell v. Mitchell* (suit against an administrator, his sureties, and a clerk of Superior Court) and *Street v. Tuck* (suit against administrator, clerk of Superior Court, and sureties of both), both cited *supra* note 171. The opinions in the first and third of these cases indicate that, when the sureties are joined, the Court regards the case as basically one in contract. In the *Ellis* case the Court said the cause against the accountant and his sureties sounded in contract, and that against the commissioners in tort. In the *Street* case the Court stressed the separate contracts of the sureties and said that rights against them would remain essentially separate even though the two officials might become individually responsible for the same wrongful act committed by both. Despite this strong statement, there would seem

Where causes based on separate torts are involved, several defendants may still be joined if each is liable for each tort,<sup>178</sup> but again the requirement that all causes affect all parties operates to shut off joinder at that point.<sup>179</sup> Thus, it was held improper to join a cause against one defendant for slander with a cause against him and three others for subsequent publication of the same defamatory matter.<sup>180</sup> This was so even though plaintiff's attorney did not ask for any separate judgment on the original slander and contended that he had not alleged a cause of action on it at all, but had only pleaded it by way of inducement in connection with the publication by all the defendants. However, assuming that two causes were clearly alleged, the case is as good an illustration as can be found of the unwisdom of the statutory requirement that all causes affect all parties.

Where the actions of several defendants, though clearly related in point of time, are regarded as producing separate injuries instead of a single injury, the joinder is improper.<sup>181</sup>

When we switch from multiple defendants to multiple plaintiffs, we find cases allowing several plaintiffs to join in suing for breach of a single contract,<sup>182</sup> though this tends to disregard the requirement that

to be no reason why two officials could not be considered joint tortfeasors in a proper case; and if they could be joined as such, *State ex rel. Cook v. Smith*, cited *supra* note 176, should be adequate authority for joining their sureties also, unless the tort for which a principal is liable is not a breach of the bond. Of course, if the Court finds that the officials are not joint tortfeasors, they could not be joined and, *a fortiori*, their sureties could not be. Probably both the *Ellis* and *Mitchell* cases go no further than this—i.e., in them, attempted joinder of the principals would have been misjoinder even if the sureties had not been sued. Though the joinder question was not raised, sureties were actually joined with joint tortfeasors in *State v. DeHerradora*, 192 N. C. 749, 136 S. E. 6 (1928).

It may be noted that it may be difficult to distinguish between a case like *Martin v. Rexford*, *supra*, holding that the punitive damage element may cause a misjoinder, and the cases, cited *supra* note 9, holding that it is permissible to join principal and surety in a suit on an obligation on which both are liable, even though the surety's liability may, by his contract, be limited to an amount smaller than the possible recovery against the principal.

<sup>178</sup> *Howell v. Fuller*, 151 N. C. 315, 66 S. E. 131 (1909) (a master and servant case).

<sup>179</sup> *Long v. Swindell*, 77 N. C. 176 (1877), is a possible exception to this. However, this feature of the case, while it has been cited once, with possible approval, *Branch Banking and Trust Co. v. Peirce*, cited *supra* note 122, has not been followed and is probably very questionable authority.

<sup>180</sup> *Gattis v. Kilgo*, 125 N. C. 133 (1899). See also *Burns v. Williams*, 88 N. C. 159 (1883), where the complaint was grounded on accusations of hog stealing, one accusation having been made by one defendant in the presence of the others, and another accusation made by another defendant in the absence of the others. No objection was made to the joinder, but the Court pointed out it was improper. *Rice v. McAdams*, 149 N. C. 29, 62 S. E. 774 (1908) held that defendants cannot be joined for slanderous words spoken unless they are connected by an allegation of common design on purpose.

<sup>181</sup> *Atkins v. Steed*, 208 N. C. 245, 179 S. E. 889 (1935). See also *Bost v. Metcalf*, 219 N. C. 607, 14 S. E. (2d) 648 (1941).

<sup>182</sup> *Balfour Quarry Co. v. West Construction Co.*, 151 N. C. 345, 66 S. E. 217 (1909). The facts were rather unusual. Defendant and plaintiff A made a contract for delivery of stone by the latter. Plaintiff A "sublet" part of the contract to

all causes affect all parties when the interests of plaintiffs are several. Occasionally a case may arise in which the Court would regard the rights of the plaintiffs, even though arising from a single contract, as so completely independent as to prevent joinder.<sup>183</sup> Of course, if plaintiffs' interests are strictly joint, they cannot sue separately.<sup>184</sup>

When separate contracts are involved, plaintiffs ordinarily may not join, whether the contracts be express,<sup>185</sup> or implied.<sup>186</sup> However, in at least one case, the Court found justification for joinder of suits on separate contracts, though it is probably *dictum*.<sup>187</sup>

plaintiff *B*. Defendant never formally recognized plaintiff *B* as a party to the contract, but told it to ship stone and agreed to the price. Plaintiffs requested separate recoveries. The Court said if defendant's action made the contract joint, then each plaintiff was interested in both causes, while if plaintiff *A* would alone be responsible on the contract, the joinder of *B* was harmless. (Actually if plaintiffs' interests were joint, it would seem to show, not that both were interested in both causes, but that there was a single cause.) The opinion contains a lengthy discussion of joinder, stressing the "connected story" doctrine and trial convenience. See also *Cole v. Shelton*, cited *supra* note 148; *Hudson v. Aman*, 158 N. C. 429, 74 S. E. 97 (1912) (sureties could join in suing principal, though case, which discusses former law and equity rules, is short of a holding that this could be done in all cases); *State ex rel. Hoover v. Berryhill*, 84 N. C. 133 (1881) (several next of kin may join in suing administrator's sureties for their respective shares, which had already been fixed by an accounting). Cf. *Brock & Scott Produce Co. v. Brock*, 186 N. C. 54, 118 S. E. 798 (1923). For a somewhat analogous situation, see *Hughes v. Boone*, *supra* note 173, where two plaintiff sureties sued a defendant surety when plaintiffs had paid a disproportionate share of a single judgment based on two surety bonds, each plaintiff having been party to only one bond. It is recognized, however, that the right of contribution rests on general equitable principles rather than on contract.

<sup>183</sup> Cf. cases cited *infra* note 191.

<sup>184</sup> Cases cited *supra* note 4.

<sup>185</sup> *Roberts v. Utility Manufacturing Co.*, 181 N. C. 204, 106 S. E. 664 (1921); *Logan v. Wallis*, cited *supra* note 169.

<sup>186</sup> *Weaver v. Kirby*, 186 N. C. 387, 119 S. E. 564 (1923); *Shore v. Holt*, 185 N. C. 312, 117 S. E. 165 (1923). A peculiar situation is presented where, if a contract is valid, the rights of plaintiffs are joint and they would have to join; but if the contract is invalid, they must rely individually upon *quantum meruit* to recover. In *Neal v. Wachovia Bank & Trust Co.*, 224 N. C. 103, 29 S. E. (2d) 206 (1944), plaintiff's counsel correctly decided that the contract was invalid under the Statute of Frauds. His course in bringing a separate action for each plaintiff was sustained. Query, would literal interpretation of the joinder provisions prevent joinder of: (1) joint action to enforce the contract; and (2) *quantum meruit* for each plaintiff, to be relied on only if the Court finds the express contract to be invalid? It is obvious that common sense dictates that such joinder be permitted. See cases cited *supra* notes 48 through 50.

<sup>187</sup> *Redmon v. Netherlands Fire Ins. Co.*, 184 N. C. 481, 114 S. E. 758 (1922). There *A*, to secure a loan from *B*, deeded lumber to *C* as trustee. *C* was to sell lumber, pay off *B*, and reconvey any lumber then remaining to *A*. *B* took out two fire insurance policies, covering the lumber, with the same company, one payable to *C* and one to *A* and *C* as their interests might appear. *A* assigned his interest to *D* as security for another debt. There was a fire and *A*, *B*, *C* and *D* joined as plaintiffs in a suit on both policies. Upon the misjoinder question being raised, plaintiffs were permitted to allege that *B* had acquired the interest of *A* and *D*. The Court held this eliminated any misjoinder question; but is also said there was no misjoinder, anyway. It regarded the plaintiffs as united in interest and the causes as satisfying the transaction clause; it stressed the identity of the underlying facts; and even said flatly that *D* was interested in the result of both causes because it was entitled to hold the interest of *A* in one policy. The result is eminently practical but, on the point of whether all causes affect all parties, probably cannot be squared with the results of some of the other cases where equally practical results have been rejected.



In the tort field, the fact that a single tortious act of one defendant results in injury to several persons does not, standing alone, justify their joining as plaintiffs.<sup>188</sup> This has been carried to the extent of holding that, when an infant has been injured, it is misjoinder of causes and parties to unite an action by the infant for personal injuries with one by the parent for loss of services,<sup>189</sup> and the result would apparently not be changed where the infant's cause is brought in the name of the parent as next friend.<sup>190</sup> These cases, also, are excellent examples of the need for the elimination of the requirement that all causes affect all parties.

There are also several cases indicating that several plaintiffs may not join in seeking damages for mental anguish caused by the same wrongful act of one defendant,<sup>191</sup> though in several such cases the joinder question was inconsequential, as the plaintiffs stated no cause of action.

Naturally, in the light of the above cases, it is misjoinder for two plaintiffs to join against one defendant for torts to each separately, not arising from the same wrongful act.<sup>192</sup>

When the injury is to property, instead of to the person, the several plaintiffs may join if each has an interest in the property. For example, the conditional vendor and vendee of a truck were permitted to join in suing defendant for negligent damage to the truck, even though

<sup>188</sup> See *Walker v. Standard Oil Co. of N. J.*, 222 N. C. 607, 24 S. E. (2d) 254 (1943); *Montgomery v. Blades*, 217 N. C. 654, 9 S. E. (2d) 397 (1940).

<sup>189</sup> *Thigpen v. Kinston Cotton Mills*, 151 N. C. 97, 65 S. E. 750 (1914).

<sup>190</sup> *Campbell v. Washington Light and Power Co.*, 166 N. C. 488, 82 S. E. 842 (1914). The cause of the parent individually was withdrawn and the joinder problem thus eliminated, but the Court said the action, as originally brought, seemed to be on all fours with *Thigpen v. Kinston Cotton Mills*, cited *supra* note 189.

<sup>191</sup> *Cooper v. Southern Express Co.*, 165 N. C. 538, 81 S. E. 743 (1914) (husband and wife against Express Co. for delay in delivering a coffin, resulting in burial of child at place not originally intended. Misjoinder waved by failure to demur, but Court pointed out that it existed); *Eller v. Railroad*, 140 N. C. 140, 52 S. E. 305 (1905) (husband and wife for delay of wedding caused by delay of railroad in delivering bride's baggage. Misjoinder waived here, also, but Court pointed it out "so that attention may be called to this important provision of the law"); *Martin v. Western Union Telegraph Co.*, 130 N. C. 299, 41 S. E. 484 (1902) (*P*'s administratrix, *P*'s daughter and daughter's husband sue for delay in delivery of telegram requesting special doctor for *P*. Demurrer for misjoinder of causes. Court said if plaintiffs were suing for *P*'s mental anguish, no cause of action for that survived *P*; and if they sued separately for their own mental anguish, there was misjoinder of causes and parties). If these three cases are regarded as brought primarily on contract theories, they might be considered as in conflict with the cases cited, *supra* note 182, allowing two plaintiffs to join in suing on the same contract. However, there is obviously no ordinary express contract to which all parties in the case are parties. Further, there is obviously a tort element in the cases. As to tort and contract theories generally in the public carrier cases, see *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES* (1929 ed.) §412.

<sup>192</sup> *Sasser v. Bullard*, 199 N. C. 562, 155 S. E. 248 (1930). Husband and wife attempted to join causes for: (1) assault on both; (2) false arrest, abuse of process, and false imprisonment of husband. Case dismissed.

the conditional vendee was asking damages for lost profits, as well.<sup>193</sup> And plaintiffs having an interest in the same real property may likewise join in a trespass action.<sup>194</sup> This would clearly not apply where interests in different property are involved. That is, if there is a three-car collision, owners *A* and *B* may not join in suing owner *C* for property damage to their respective cars any more than they could join in suing him for their respective personal injuries.

Since neither tort causes nor contract causes may be joined unless they each affect all parties, the same rule of course applies to attempted joinder of tort and contract causes.<sup>195</sup> (Even if they affect all parties, contract and tort causes would also have to satisfy the transaction clause of G. S. 1-123.)

#### JOINT VERSUS SEVERAL TORTS

It has already been pointed out that the plaintiff may join several defendants if they are joint tortfeasors (i.e., if their concurring acts produce a single injury), but may not join them if their acts are regarded as producing separate injuries.

A troublesome situation in this area is the surprisingly common one when plaintiff is injured by the non-simultaneous actions of the drivers of two vehicles. In *Atkins v. Steed*,<sup>196</sup> plaintiff alleged that he was knocked from the running board of vehicle *A* by the negligence of the driver of vehicle *B*, and that while he was unconscious on the highway, as the result of the blow "just previously received," the driver of vehicle *C* negligently ran into him. The drivers of vehicles *B* and *C* were made defendants. The trial judge overruled a demurrer for misjoinder of causes and parties. The Supreme Court, with Chief Justice Stacy writing the opinion, reversed and dismissed the case on the theory that plaintiff was suing for two injuries, not one, and had thus attempted to join different causes of action against different parties.

There are at least four other cases in which the facts are somewhat similar. In one the allegation was that plaintiff's intestate was thrown into the highway by the negligence of defendant *A*, in whose car she was riding, and while on the highway was run over by a truck driven by defendant *B* and owned by defendant *C*.<sup>197</sup> In the second, plaintiff's intestate was allegedly struck and dragged seventy feet by defendant

<sup>193</sup> *Wilson v. Horton Motor Lines, Inc.*, 207 N. C. 263, 176 S. E. 750 (1934).

<sup>194</sup> *Morganton v. Hudson*, 207 N. C. 360, 177 S. E. 169 (1934).

<sup>195</sup> See, e.g., *Town of Wilkesboro v. Jordan*, 212 N. C. 197, 193 S. E. 155 (1937) (suit by individual plaintiffs against principals and sureties on bond given in *quo warranto* proceeding, coupled with action by town against principals to recover town funds wrongfully collected and expended); *Williams v. Gooch*, 206 N. C. 330, 173 S. E. 342 (1934); *Martin v. Rexford*, and *Railroad Co. v. Hardware Co.*, both cited *supra* note 177.

<sup>196</sup> 208 N. C. 245, 179 S. E. 889 (1935).

<sup>197</sup> *Hester v. Horton Motor Lines*, 219 N. C. 743, 14 S. E. (2d) 794 (1941).

A's car, and, having then rolled off into the street, was struck by defendant B's car.<sup>198</sup> In the third, it was alleged that plaintiff's intestate was knocked down by defendant A's car and, while attempting to rise, was struck by defendant B's car.<sup>199</sup> In the remaining case, the complaint alleged that defendant A's street car and defendant B's truck undertook to pass plaintiff while he was walking between the car track and the highway; that the street car hit him and knocked him in front of the truck, which also hit him.<sup>200</sup>

In none of these four cases was the joinder question raised. The last-mentioned of the four is the only one which antedates the *Atkins* case, and the Court in the latter distinguished it because of the failure to raise the objection. But it is clear that in each of the four cases the Court regarded the defendants as joint tortfeasors, liable in damages for the total injuries suffered; and in one of them,<sup>201</sup> it was so held despite the fact that it was argued there was no evidence of a joint tort. Conceding that failure to object to the joinder waives that question, it is difficult to see how it could determine the question of whether the defendants are joint tortfeasors. If their torts are really several, then, though sued together because misjoinder has been waived, each should be liable only for the damages attributable to his actions alone.<sup>202</sup>

The actions of the several defendants in the street car case were possibly simultaneous enough to distinguish it, on its facts, from the running board case; but it is very doubtful if that is true of the other cases cited. Therefore, the following appraisal of the existing practical situation seems justified: (1) Defendants would be well advised to raise the joint versus several tortfeasor question by demurrer for misjoinder of causes and parties;<sup>203</sup> and (2) when this is not done, there is ample authority for the Court to go the whole way and hold them to be joint tortfeasors.

#### RULES APPLY TO DEFENDANT'S PLEADINGS

The North Carolina Supreme Court has consistently applied to counterclaims and cross-claims which, taken together, plead several causes, the requirement that all causes affect all parties. For example, in *Wingler v. Miller*,<sup>204</sup> M and W, as administrators, and their sureties, were being sued by the heirs and distributees, the primary claim being

<sup>198</sup> *Lewis v. Hunter*, 212 N. C. 504, 193 S. E. 814 (1937).

<sup>199</sup> *West v. Collins Baking Co.*, 208 N. C. 526, 181 S. E. 551 (1935).

<sup>200</sup> *Hodgin v. N. C. Public Service Corp.*, 179 N. C. 449, 102 S. E. 748 (1920).

<sup>201</sup> *Lewis v. Hunter*, cited *supra* note 198.

<sup>202</sup> Cf. *Long v. Swindell*, cited *supra* note 179.

<sup>203</sup> This question has been raised in this way in other types of tort situations. See *Lineberger v. Gastonia*, 196 N. C. 445, 146 S. E. 79 (1929) (defendants owned separate sewer systems allegedly contributing to plaintiff's injury); *Anthony v. Knight*, 211 N. C. 637, 191 S. E. 323 (1937) (motor vehicle collision case). Joinder was held proper in both.

<sup>204</sup> 221 N. C. 137, 19 S. E. (2d) 247 (1942).

that *M* had taken as his own some money which belonged to the decedent. *M* counterclaimed and cross-claimed, alleging: (1) that *W* had been put in charge of a business owned in partnership by *M* and the decedent, that *W* was neglecting the business and refused to account; and (2) that *W* and the plaintiffs had conspired to defame *M* by saying that he had taken money of the estate. On the first cause he asked for an injunction, a receiver, and removal of *W* as administrator; on the second he demanded \$25,000 damages. This was held to be misjoinder, the Court pointing out that the defendant sureties had no interest in the cross-claim and that different causes were alleged against different parties.<sup>205</sup>

#### ALTERNATIVE JOINDER

As pointed out in connection with the discussion of joinder of parties, G. S. 1-68 and 1-69 now permit joinder of plaintiffs or defendants in the alternative. The permission is clear and express enough wherever the Court will say there is but one cause of action. For instance, if *A* and *B* are uncertain as to which is the real party in interest, they presumably could join in the alternative.<sup>206</sup> Or, if *A* wished to sue the driver of a truck for negligence, but at the outset he was uncertain whether *B* or *C* was the driver, he could join them as defendants in the alternative.

But what if several causes of action are thought to be involved? Will the requirement of G. S. 1-123, that all causes affect all parties,

<sup>205</sup> See, also, as illustrating application of the rules to counterclaims and cross-claims, *Schnepf v. Richardson*, 222 N. C. 228, 22 S. E. (2d) 555 (1942); *Beam v. Wright*, 222 N. C. 174, 22 S. E. (2d) 270 (1942); *Bost v. Metcalf*, 219 N. C. 607, 14 S. E. (2d) 648 (1941); *Shemwell v. Lethco*, 198 N. C. 346, 151 S. E. 729 (1930); *Rose v. Fremont Warehouse and Improvement Co.*, 182 N. C. 107, 108 S. E. 389 (1921). Even if a cross-claim involves but a single cause of action, it will not be permitted unless it is "germane" to the plaintiff's cause. *Schnepf v. Richardson*, *supra*; *Montgomery v. Blades*, 217 N. C. 654, 9 S. E. (2d) 397 (1940) (where plaintiff sues *A* and *B* for negligence, *A* cannot cross-claim against *B* for *A*'s injuries received in the same accident); *Coulter v. Wilson*, 171 N. C. 537, 88 S. E. 857 (1912); *Gibson v. Barbour*, 100 N. C. 192, 6 S. E. 766 (1888); *Hulbert v. Douglas*, 94 N. C. 128 (1886). In some of the cases this latter rule and the rule that all causes must affect all parties are apparently regarded as amounting to the same thing.

Prior to the *Montgomery* case, in *Powell v. Smith*, 216 N. C. 242, 4 S. E. (2d) 524 (1939), the Court had held that when plaintiff sued *A* for negligence and *A* had *B* brought in on allegations that he was a joint tortfeasor, *B* could cross-claim against *A* for his injuries received in the same accident. The *Montgomery* case distinguished this case because there the defendant against whom the cross-claim was filed was responsible for bringing in the cross-claimant. Since this factor neither affects trial convenience nor affects the relation of the cross-claim to plaintiff's cause, the distinction seems of very doubtful validity. Perhaps, under the circumstances of the *Powell* case, the Court would hold differently if the objection came from the plaintiff instead of from the defendant against whom the cross-claim was filed. (In the *Montgomery* case, also, the objection came from the defendant and not the plaintiff.)

<sup>206</sup> This has apparently been successfully accomplished a few times by simple joinder of plaintiffs, without making the joinder one expressly in the alternative. See cases cited *supra* note 34.

step in to prevent the alternative joinder? There has been so little attempted use of the alternative joinder provisions in the fifteen years since their enactment, that the answer is somewhat problematical.

In *Grady v. Warren*,<sup>207</sup> the receiver of an insolvent bank sued: (1) the directors for negligence, prior to the bank's merger with another bank, resulting in insolvency; and (2) the other bank, for breach of its contract with the directors of the insolvent bank regarding the liquidation of the assets of the latter. Demurrer for misjoinder of causes and parties was sustained. There is nothing in the statement of facts to indicate that the allegations were in the alternative; and it seems probable that the plaintiff could proceed independently on each cause and recover on both. However, in attempting to sustain joinder, plaintiff's attorney may have cited the new provision for joinder in the alternative. At any rate, the Court mentioned it and said it "applies only when the plaintiff is in doubt as to the persons from whom he is entitled to redress on his cause of action; in that case he may join two or more persons as defendants to determine which is liable. The statute manifestly does not authorize a misjoinder of causes and of parties. Such was not its purpose. A complaint is demurrable, now as before the amendment . . . for a misjoinder of parties, and of causes of action."<sup>208</sup>

The new statute pretty clearly didn't apply in the case, but the quoted language is susceptible of the interpretation that it could never apply unless there is but a single cause of action.

In *Smith v. Greensboro Joint Stock Land Bank*,<sup>209</sup> the complaint alleged that defendant Land Bank foreclosed a mortgage under an insufficient power of sale and also purchased indirectly at its own sale; and that the land had since been conveyed to others. The bank and the new holders of legal title were made defendants and plaintiff asked: (1) to set aside the foreclosure sale and subsequent deeds; or (2), if it was decided the new owners were innocent purchasers for value, damages against the Land Bank. Though the Land Bank was involved in both causes, this is pretty clearly alternative joinder as far as the other defendants were concerned. The Court found a misjoinder of causes and parties without mentioning the alternative joinder provisions of G. S. 1-69. The reasons given were that the causes proceeded on inconsistent theories and that all causes did not affect all parties.

However, in *Pietzman v. Town of Zebulon*,<sup>210</sup> the Court permitted use of the alternative joinder statute. Plaintiff sued the town for breach of contract. The town answered, alleging that the Mayor and Clerk, who made the contract on behalf of the town, did not have authority

<sup>207</sup> 201 N. C. 693, 161 S. E. 319 (1931).

<sup>208</sup> 201 N. C. 693, 694, 161 S. E. 319, 320 (1931).

<sup>209</sup> 213 N. C. 343, 196 S. E. 481 (1938).

<sup>210</sup> 219 N. C. 473, 14 S. E. (2d) 416 (1941).

to do so. Plaintiff then had the Mayor and Clerk made parties defendant and amended to allege: (1) the town was liable on the contract; or (2) the other defendants were liable for wrongfully making the contract and inducing the plaintiff to enter into an unauthorized contract. In sustaining joinder the Court reasoned: (a) the complaint told a "connected story"; (b) tort and contract causes could be joined under the transaction clause of G. S. 1-123; (c) no alternative facts were alleged, the only alternative being which defendants were liable; and (d) since plaintiff was in doubt as to who was liable, the statute applied. While it appears that defendant's attorney argued that the joinder was improper because the two causes did not each affect all parties, the Court did not expressly deal with the statutory provision to that effect.

Since the opinion dealt with the case as presenting two causes of action, it seems definitely to negative the implication in the *Grady* case that the alternative joinder statute can apply only where there is one cause of action. It leaves, however, some doubt as to whether the Court will permit joinder of two causes, involving different defendants, if alternative factual allegations are involved, as well as doubt as to its effect on the doctrine of the *Smith* case.

A brief examination of the cases antedating the 1931 change in the statute does not throw much additional light on the future of that provision.

In one case the Court refused to allow the owner of a building to claim damages against the contractor and architect on allegations that the building was not properly constructed by the contractor or the architect's plans and specifications were defective, or both.<sup>211</sup> (There was no privity of contract between contractor and architect.) Would the *Peitzman* case change the result of this case? It seems doubtful because: (1) to the extent that an alternative is presented the Court might regard it as dependent upon alternative facts; and (2) the allegations seem to contemplate the possibility of recovery against both defendants, thus not presenting a case in which plaintiff anticipates recovery against only one but is uncertain as to which it will be. The latter feature eliminates an argument that can be made in a situation like that of the *Peitzman* case—i.e., that both causes affect all parties, in a practical sense, because if plaintiff is held entitled to recover on one it automatically eliminates the possibility of recovery on the other. The two are mutually exclusive.

There has been a time, however, when such mutual exclusiveness was a stumbling block rather than an aid to joinder. In *Huggins v. Waters*,<sup>212</sup> plaintiff alleged that he leased a hotel from *W* and that *B*

<sup>211</sup> *Rose v. Fremont Warehouse and Improvement Co.*, cited *supra* note 205.

<sup>212</sup> 154 N. C. 443, 70 S. E. 842 (1911).

obstructed the private drain through which the hotel's sewage was discharged. He sued *W* for breach of the implied covenant of quiet enjoyment and *B* for damages for the wrongful obstruction. The Court said the two causes were destructive of one another, because if *B*'s act was wrongful there was no breach of the covenant by *W*, while if it was rightful *W* would be liable and *B* would not be. Should this situation be again presented, the *Peitzman* case ought to be authority for suing *W* and *B* in the alternative. It seems to involve no more of a factual alternative than the *Peitzman* case; there is doubt as to which defendant may be liable, but no possibility of recovery against both; and because of the mutual exclusiveness, both defendants are affected by both causes to the same extent as in the *Peitzman* case. Further, while the Court in the *Huggins* case said that the plaintiff should elect against which defendant to proceed, it afterward held that he could bring independent actions against each of them,<sup>213</sup> and so there did not have to be a final and binding election in the true election of remedies sense. There seems to be no sound reason why the whole matter could not now be disposed of in one action.

There are several relatively early Code cases in which the Court believed that the pre-Code equity practice justified what amounted to alternative joinder. Thus, in *Heggie v. Hill*,<sup>214</sup> it permitted plaintiff in one action, to sue: (1) the owners of record title to land, derived through foreclosure of a mortgage, for possession of the land; and (2) the mortgagee who foreclosed, for the excess of the purchase price over the amount of the debt secured. Obviously, plaintiff would not be entitled to both. Success on his first theory depended on his contention that the foreclosure was wrongful, based on his allegations that nothing was due on the debt at the time of foreclosure. His second theory rested on alternative allegations that only \$177 was due on the debt at the time of foreclosure, whereas the sale realized \$1,066. Under this theory, since some of the debt would have remained unpaid at foreclosure, the latter would be rightful. The Court held the joinder proper since the rights of all the parties depended upon whether the mortgage had been satisfied. Two things are worth noting: (a) alternative factual allegations were involved; and (b) one theory proceeded on disaffirmance of the sale and the other on its affirmance.

<sup>213</sup> *Huggins v. Waters*, 167 N. C. 197, 83 S. E. 334 (1914).

<sup>214</sup> 95 N. C. 306 (1886). The Court said, among other things, that all prior authority authorized the joinder. Whether this was so is somewhat problematical in the light of *Brown v. Coble*, 76 N. C. 391 (1877). There plaintiff sued to recover possession from the occupant, asking cancellation of a deed given by a clerk and master, through which the occupant claimed title. In the alternative, plaintiff asked for judgment for the purchase money against the administrator of the clerk and master. At the trial the issue of possession was decided for the occupant. On appeal this was affirmed and the action against the administrator dismissed, the Court saying that as to the possession issue he had no interest, and as to the purchase money issue, the occupant had no interest.

As to the first of these, the language of the *Peitzman* case leaves the authority of the case open to doubt. As to the second, numerous North Carolina cases have held that a plaintiff may not proceed on two such conflicting theories.<sup>215</sup> The case was, therefore, very doubtful authority on this point until its rule was possibly revived by the decision in the *Peitzman* case, which also involved theories of affirmance and disaffirmance.

In *Young v. Young*,<sup>216</sup> the plaintiff's basic allegations were that his ancestor had paid for land but died before getting his conveyance, and that defendants had conspired to cheat and defraud by withholding the title. He demanded: (1) judgment that *Z*, the record owner, be ordered to convey to plaintiff, and for damages against him; and (2) judgment against *Z* and three others, one of whom received the purchase money, for the amount of the purchase price. The Court upheld the joinder, though it found the action barred, *pro tanto*, by the statute of frauds. This seems, on the surface, to present an alternative joinder situation, but it is possible that all defendants could be regarded as joined for purposes of both causes. However, assuming the former, the authority of the case is probably less doubtful than that of the *Heggie* case, as it can be construed as standing for the proposition that when plaintiff cannot recover on an alleged express contract, he may still be entitled to some recovery on an implied contract theory. The joinder of the two is still clearly permitted, at least at the pleading stage,<sup>217</sup> and the only unusual feature of the case then becomes the possible alternative party feature. The present alternative joinder provisions may well be broad enough to permit that feature of the case to be now followed.

The result of the *Peitzman* case is thoroughly commendable; but can it be relied upon, standing alone, to support the conclusion that neither notions about inconsistent causes nor the doctrine of election of remedies will be applied where the parties are sued in the alternative? Where the so-called inconsistency arises simply from joining tort and contract theories (i.e., fraud or negligence and breach of warranty)<sup>218</sup> or from joining express and implied contract theories,<sup>219</sup> where no alternative party question is presented, it is clear that joinder at the pleading stage is proper and the only real question is whether an election can be forced at the trial. It will probably be only very rarely that this sort of case will involve alternative joinder of parties. Even if the *Young* case be regarded as such a case, its facts will not often be duplicated. But, assuming such a case will arise, it would seem to be squarely within the

<sup>215</sup> See cases cited *supra* note 51.

<sup>216</sup> 81 N. C. 92 (1879).

<sup>217</sup> See cases cited *supra* notes 48 to 50, inclusive.

<sup>218</sup> See discussion under "Joinder of Causes" and cases cited *supra* notes 46 and 47.

<sup>219</sup> See cases cited *supra* notes 48 to 50, inclusive.



language of G. S. 1-69 and within the ruling in the *Peitzman* case. It would be anomalous if an election could be forced when there is but one defendant and not when there are alternative defendants; but the probable answer is that no election should be forced in any case. At the close of the evidence both theories should go to the jury under proper instructions, unless there is insufficient evidence to justify recovery on one theory or the other.

However, the doctrine of election of remedies is a more serious matter, since it can go to the point of barring any recovery on the second theory after an attempt to proceed on the first. It is not possible in this article to engage in any thorough discussion of this doctrine, but it can be said that it has found its main application in the notion that a plaintiff may not proceed on theories which involve both affirmance and disaffirmance of a contract or sale.<sup>220</sup> It operates even where there is only one defendant. As already indicated, the *Peitzman* case involved theories of both affirmance and disaffirmance, but this feature received no attention from the Court. By contrast, in the *Smith* case,<sup>221</sup> decided after the alternative joinder statute was enacted, the presence of inconsistent theories was a major factor in rejecting the joinder. This was true though they were not theories of affirmance and disaffirmance, but only what the Court regarded as inconsistent theories of disaffirmance.

It seems to the writer that the *Smith* and *Peitzman* cases, though their facts are not the same, reach irreconcilable results. Thus we have a situation, not altogether uncommon in North Carolina, where the Court is apparently at liberty to follow either case. The one stresses inconsistency, without mentioning alternative joinder; the other stresses alternative joinder, without mentioning inconsistency. For the time being, the *Peitzman* case, being the later of the two, should be taken as controlling. And it is to be hoped that it will be followed, as otherwise a large part of the field intended to be covered by the alternative joinder provisions will be withdrawn from their coverage. At the same time, if the Court does not modify its basic notions about election of remedies, we will have a situation in which plaintiff may join defendants in the alternative on two theories which he could not plead against the same defendant. But any relief from the election doctrine is welcome; and if realization of this anomaly, coming in the wake of the *Peitzman* case, leads to modification of the election doctrine in the single defendant cases, the *Peitzman* case will have given double cause for rejoicing.

<sup>220</sup> See cases cited *supra* note 51. It may be noted here that joinder of express and implied contract theories may, in one sense, involve theories of affirmance and disaffirmance. However, the election of remedies doctrine does not seem to have been applied by the North Carolina Court to ordinary express versus implied contract cases.

<sup>221</sup> See note 209 *supra*.

Perhaps, also, for purposes of the alternative joinder cases, the spectre of the requirement that all causes affect all parties has not been completely laid. As already indicated, the Court in the *Peitzman* case rejected an argument based on this provision, but did not expressly cite it. Also, as already pointed out, it seems sound to say that in a *Peitzman* case situation, all causes do affect all parties because recovery on either will bar recovery on the other. The controlling issue in each cause is the same. However, this reasoning would apply almost equally well to the facts of the *Smith* case, and there the Court said that all causes did not affect all parties. Again it is to be hoped that, if the question is not settled by eliminating this troublesome provision from G. S. 1-123, the *Peitzman* case will be followed. And finally, it is to be hoped that the Court will not follow the implication in the *Peitzman* case that alternative factual allegations might destroy the propriety of the joinder.

#### CONSEQUENCES OF MISJOINDER OF CAUSES AND PARTIES

Improper joinder of causes and parties is not specifically listed as a ground for demurrer by G. S. 1-127. However, since improper joinder of causes alone is so listed, it is clear that demurrer is the proper method of raising the "dual misjoinder" objection when it appears on the face of the complaint, and failure to demur will waive it.<sup>222</sup>

If several defendants demur *jointly*, instead of individually, for misjoinder of causes and parties, the demurrer should be overruled if any one of the demurring defendants is a necessary or proper party to all the causes.<sup>223</sup>

When the objection is properly presented and is sustained, it results in dismissal of the entire action, without prejudice to the right to begin

<sup>222</sup> *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751 (1944); *Goldsboro v. W. P. Rose Builders Supply Co.*, 200 N. C. 405, 157 S. E. 58 (1931); *Godwin v. Jernigan*, 174 N. C. 76, 93 S. E. 443 (1917); *Cooper v. Southern Express Co.*, 165 N. C. 538, 81 S. E. 743 (1914); *Weeks v. McPhail*, 128 N. C. 134, 38 S. E. 292 (1901); *Hocutt v. Wilmington & Weldon R. R.*, 124 N. C. 214, 32 S. E. 681 (1899). See also *Rogers v. Rogers*, 192 N. C. 50, 133 S. E. 184 (1926). The Court sometimes calls attention to misjoinder, even though it does not dismiss because of the waiver. See, e.g., *Walker, J.*, in *Eller v. Railroad*, 140 N. C. 140, 145, 52 S. E. 305, 307 (1905): "If plaintiffs had any valid cause of action against defendant, they could not join them. . . . There was no formal objection taken to the misjoinder, but we notice it so that attention may be called to this important provision of the law which is mandatory, and intended to protect a substantial right of defendant, and not merely directory."

<sup>223</sup> *Moore County v. Burns*, 224 N. C. 700, 32 S. E. (2d) 225 (1944). The ruling is based on prior rulings that a joint demurrer for failure to state a cause of action is to be overruled if a cause is stated as to any demurring defendant. *State ex rel. Salisbury Morris Plan Co. v. McCanness*, 193 N. C. 200, 136 S. E. 371 (1927); *Winders v. Southerland*, 174 N. C. 235, 93 S. E. 726 (1917). Apparently the effect of this latter rule can be avoided by interposing an individual demurrer *ore tenus* when the question is raised. *Blackman v. Winders*, 144 N. C. 212, 56 S. E. 874 (1907). However, this would not provide an out in the misjoinder cases, as misjoinder is not a proper ground for demurrer *ore tenus*.

separate actions.<sup>224</sup> The same rule applies to cross-actions involving the "dual misjoinder," though where the misjoinder arises by virtue of a combination of cross-action against a co-defendant and counterclaim against the plaintiff, the latter will remain in the case if it, standing alone, is a permissible counterclaim.<sup>225</sup>

The rule has not always been strictly enforced. In one early case the Supreme Court gave plaintiff an opportunity to amend, without mentioning dismissal.<sup>226</sup> In another, while enunciating the dismissal rule, it remanded the case with opportunity to the plaintiff to apply for leave to amend.<sup>227</sup> In a third, the case was remanded for the exercise of the lower court's discretion in severing or otherwise disposing of the action.<sup>228</sup>

One later case seems to be an outright exception, as the Court disapproved a dismissal and remanded the case with instructions that the lower court could permit an amendment, in its discretion, and that, in the absence of an amendment, it would be the duty of the lower court to divide the action.<sup>229</sup> And another, comparatively recent case seems also to be an exception, as the Court seems to have dismissed only as to

<sup>224</sup> *Moore County v. Burns*, cited *supra* note 223; *Summit Mills, Inc. v. Summit Yarn Co.*, 223 N. C. 479, 27 S. E. (2d) 289 (1943); *Burleson v. Burleson*, 217 N. C. 336, 7 S. E. (2d) 706 (1940); *Atkins v. Steed*, 208 N. C. 245, 179 S. E. 889 (1935); *Lucas v. N. C. Bank and Trust Co.*, 206 N. C. 909, 174 S. E. 301 (1934); *Sasser v. Bullard*, 199 N. C. 562, 155 S. E. 248 (1930); *State ex rel. Cromartie v. Parker*, 121 N. C. 198, 28 S. E. 297 (1897). This is not intended to be a complete list of cases announcing the rule. The provisions of N. C. GEN. STAT. (1943) §1-25 apply to the new actions. *Blades v. Southern Railway Co.*, 218 N. C. 702, 12 S. E. (2d) 553 (1940).

It has been held that when the demurrer is sustained for misjoinder of causes and parties, the plaintiff cannot thereafter apply for leave to amend under G. S. 1-131, as, in effect, the action has already been dismissed, is no longer pending, and the Court has no jurisdiction to permit the amendment. *Grady v. Warren*, 202 N. C. 638, 163 S. E. 679 (1932).

<sup>225</sup> *Wingler v. Miller*, 221 N. C. 137, 19 S. E. (2d) 247 (1942); *Rose v. Fremont Warehouse and Improvement Co.*, 182 N. C. 107, 108 S. E. 389 (1921).

<sup>226</sup> *Logan v. Wallis*, 76 N. C. 416 (1877). The opinion clearly indicated what the amendment should do—eliminate one of five causes alleged.

<sup>227</sup> *Mitchell v. Mitchell*, 96 N. C. 14, 1 S. E. 648 (1887). See also *Wooten v. Maulsby*, 69 N. C. 462 (1872), where it appears the Court might have permitted an amendment except for the fact that, after amendment, the service of process could have been set aside as irregular and so the amendment would have served no purpose. Contrast *Grady v. Warren*, cited *supra* note 224.

<sup>228</sup> *Street v. Tuck*, 84 N. C. 605 (1881). The demurrer was for misjoinder of causes, and the "dual misjoinder" question may not have been properly raised; but the Court discussed it in terms of misjoinder of both causes and parties and said nothing about waiver.

<sup>229</sup> *Gattis v. Kilgo*, 125 N. C. 133, 34 S. E. 246 (1899). Here the demurrer was for misjoinder of separate causes affecting different defendants, and was accompanied by a motion to dismiss. Compare *Martin v. Rexford*, 170 N. C. 540, 87 S. E. 352 (1915), where the Court was not sure whether plaintiff intended to sue on two theories, joinder of which would be improper. It overruled the demurrer and said that if plaintiff really intended to do so, the action should be divided. See also *Benton v. Board of Education*, 201 N. C. 653, 161 S. E. 96 (1931).

the defendants whose presence was thought to cause the misjoinder, retaining the other demurring defendants.<sup>230</sup>

However, there is no serious question about the fact that dismissal is the basic rule; though if the defendants direct their demurrer at only one of several causes, dismissal of it alone may be the result,<sup>231</sup> and if but one of several defendants demurs for the misjoinder, the case may be dismissed only as to him.<sup>232</sup>

Possibly the most serious criticism to be directed against the Court in the joinder field is its adoption of this dismissal rule (though it is of sufficient antiquity to prevent its being laid on the doorstep of the present personnel of the Court). There are, as pointed out from time to time in this article, cases denying joinder which seem overly technical; but in most of them the Court has been struggling to interpret statutes which clearly do contain restrictions on joinder. And to counterbalance them the Court has often, as in the creditors' bill cases, made very liberal decisions. But there is no statute which requires the dismissal for "dual misjoinder," and there is a good argument that the rule should never have been adopted.

As already stated, misjoinder of parties alone—as distinguished from a defect of parties (i.e., failure to join a necessary party)—is not a ground for demurrer. Misjoinder of causes is ground for demurrer, but by the express provisions of G. S. 1-132, the penalty is not dismissal, but only division of the action. It is a little difficult to see how a combination of these relatively innocuous errors requires dismissal. Why not follow the statutory procedure prescribed for the only one specifically listed as ground for demurrer and divide the action? There is not a very satisfactory answer to this question in the cases, most of which, particularly the later ones, simply recognize and enforce the rule on the basis of earlier decisions.

In the relatively early case of *Mitchell v. Mitchell*,<sup>233</sup> the Court said that the power to divide given by G. S. 1-132 (then Code Section 272) did not extend to misjoinder of both parties and causes. "In the latter

<sup>230</sup> *Robertson v. Robertson*, 215 N. C. 562, 2 S. E. (2d) 552 (1939). See also *Shore v. Holt*, 185 N. C. 312, 117 S. E. 165 (1923), where husband and wife joined as plaintiffs, each seeking to recover in *quantum meruit* for services rendered. The Court said the husband's allegations should be stricken out, but allowed the wife's action to continue because the husband could then properly remain as a purely formal party. However, the Court has dismissed in husband and wife cases. See *Sasser v. Bullard*, cited *supra* note 224. The Court said this was not at variance with *Shore v. Holt*, but did not say why.

<sup>231</sup> *Hollard v. Whittington*, 215 N. C. 330, 1 S. E. (2d) 813 (1939). Though directed only to the second cause of action, the demurrer specifically relied, *inter alia*, on misjoinder of causes and parties. The lower court dismissed the second cause and the Supreme Court, on plaintiff's appeal, affirmed, expressly finding that there was such misjoinder.

<sup>232</sup> *Carswell v. Whisenant*, 203 N. C. 674, 166 S. E. 793 (1932). The basic facts are not given in the report, but the result is stated as given in the text.

<sup>233</sup> Cited *supra* note 227.

case, it would seldom be practicable to divide the action. The statute has not provided that it may be done."<sup>234</sup>

As to the point that the statute does not authorize division, it may equally be said that the statute does not expressly prevent it. And, even at the time this case was decided, Code Section 407 (now G. S. 1-179) provided: "A separate trial between a plaintiff and any of several defendants may be allowed by the Court when, in its opinion, justice will thereby be promoted." The two sections together would seem to indicate that the legislature had no policy requiring dismissal where the presence of multiple defendants might cause confusion, even though the separate trial provision may be strictly construed as applying only to a case in which there is no misjoinder. The same thing can now be said as to multiple plaintiffs, since G. S. 1-68 now provides: "If, upon the application of any party, it shall appear that such joinder may embarrass or delay the trial, the Court may order separate trials or make such other order as may be expedient."

As to the second ground of the *Mitchell* decision—that division would seldom be practicable—the Court's action in the case itself seems to belie it. The plaintiff there, contrary to the rule followed in most of the subsequent cases, was given opportunity to apply for leave to amend.<sup>235</sup> This, in effect, allows the plaintiff to eliminate the objectionable features and include them, if he so desires, in another action, while retaining the remainder of the original action. If it is practicable for the plaintiff thus to divide the action, is it not equally practicable for the Court to do so by ordinary division? If the Court can decide what creates the misjoinder, can it not also see how the division may be made?

Several cases further illustrate that division would ordinarily be perfectly practicable. It has been held that voluntary elimination of one cause of action, when the misjoinder objection is made, will prevent dismissal of the remainder (assuming, of course, that what remains presents no misjoinder). This is true whether the offer is to eliminate an objectionable cause without any change in parties,<sup>236</sup> or to drop a party.<sup>237</sup> Whether the offer is to take a voluntary nonsuit or takes

<sup>234</sup> 96 N. C. 14, 18, 1 S. E. 648, 650 (1887).

<sup>235</sup> Compare Douglas, J., in *State ex rel. Cromartie v. Parker*, 121 N. C. 198, 204, 28 S. E. 297 (1897): "As this action cannot be maintained as now constituted, and cannot be divided, we do not see how the plaintiff could be benefited by leave to amend, even if granted." Since the *Mitchell* case was cited, the Court seemingly was expressing disapproval of the amendment privilege there granted.

<sup>236</sup> *Walker v. Standard Oil Co. of New Jersey*, 222 N. C. 607, 24 S. E. (2d) 254 (1943). One cause of action, affecting plaintiff husband alone, was eliminated, leaving causes in which both plaintiff husband and plaintiff wife had an interest. It seems, however, that the offer must be made before decision sustaining the demurrer, and cannot be successfully interposed by way of motion to amend after such decision. *Grady v. Warren*, cited *supra* note 224.

<sup>237</sup> *Campbell v. Washington Light and Power Co.*, 166 N. C. 488, 82 S. E. 842

some other form seems to make little difference, so long as the basic intention is clear.<sup>238</sup>

It is quite true, as the Court has pointed out,<sup>239</sup> that these devices are not a division within the meaning of the statute. But they plainly illustrate the fact that it is practicable, and relatively simple, in the overwhelming majority of cases, to decide what must come out of the action to avoid the misjoinder objection. No more knowledge or trouble would be needed to effect a division.

But, be that as it may, the dismissal rule abides as a sort of punishment for making an error which the Court regards as double instead of single.

#### CONSOLIDATION

By use of the consolidation device, two causes of action which must, under the statutes, be brought independently may be tried together. For example, *A* and *B*, riding in the same car and injured in the same accident, may not join as plaintiffs; but their separate actions may be consolidated for trial even over the objection of the defendant.<sup>240</sup> And not infrequently, in recent years, such cases have been consolidated by mutual consent.<sup>241</sup>

(1914) (plaintiff parent, suing individually and as next friend of infant son for loss of services and personal injuries, respectively, permitted to withdraw as individual); *Syme v. Bunting*, 86 N. C. 175 (1882) (plaintiff originally sued clerk of Superior Court and his sureties, *A* and *B*; he was permitted to amend to add another cause on a bond for a different term, dropping *B* as a party because *B*, unlike *A*, was not a surety on the bond involved in the new cause). Cf. *Price v. Charlotte Electric Railway Co.*, 160 N. C. 450, 76 S. E. 502 (1912) (one plaintiff could renounce claim for damages, but joinder was not the issue).

<sup>238</sup> Thus, in *Walker v. Standard Oil Co. of New Jersey*, cited *supra* note 236, it took the form of an offer by plaintiffs to agree that the court might strike out one cause, which the Supreme Court said was tantamount to taking a nonsuit on that cause. The Court permitted this to avert dismissal, though its information about the offer apparently came from plaintiff's brief rather than the record. In *Campbell v. Washington Light and Power Co.*, cited *supra* note 237, one plaintiff was permitted to withdraw, though the Court said this was not, in a strict sense, a nonsuit. In *Weeks v. McPhail*, 128 N. C. 134, 38 S. E. 292 (1901), the Court pointed out that historically, when plaintiff declined to proceed on one or more causes or as to one or more defendants, leaving the case pending as to others, it was technically a *nolle prosequi* rather than a nonsuit. However, the Court said there was no longer any substantial difference between the two in this respect and nonsuit could be used in either situation. On this question, see also *Gatewood v. Leak*, 99 N. C. 363, 6 S. E. 706 (1888); *Wooten v. Maultsby*, cited *supra* note 227.

<sup>239</sup> *Campbell v. Washington Light and Power Co.*, cited *supra* note 237.

<sup>240</sup> *Robinson v. Standard Transportation Co.*, 214 N. C. 489, 199 S. E. 725 (1938). For examples of other types of cases in which consolidation has been employed, see: *Abbitt v. Gregory*, 201 N. C. 577, 160 S. E. 896 (1931) (several stockholders suing for damages because agent effecting sale of their stock withheld information as to price actually paid by vendee); *Lumbermens Mutual Ins. Co. v. Southern Railway Co.*, 179 N. C. 255, 102 S. E. 417 (1920) (several insurance companies suing to recover amounts paid on same fire loss); *Williams v. Carolina and Northwestern Railroad Co.*, 144 N. C. 498, 57 S. E. 216 (1907) (several persons suing for failure of train to stop at station); *Rollins v. Rollins*, 76 N. C. 264 (1877) (several ejectment actions involving same issue of title). See *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES* (1929 ed.) §§506, 507.

<sup>241</sup> See, e.g., *Toler v. Savage*, 226 N. C. 208, 37 S. E. (2d) 485 (1946); *Wal-*

When the joinder and the consolidation cases are put together, they mean, in theory, that *A* and *B* might join as plaintiffs and, upon demurrer, their action would be dismissed; that they then start over independently and, over defendant's objection, the cases can be consolidated for trial.

The consolidation cases show conclusively that in many situations in which our statutes will not permit joinder, the statutory prohibition is not based on any sound principle of trial convenience. At the same time they offer some measure of relief from the statutory restrictions. However, consolidation is not an effective substitute for free joinder privileges, because: (1) It accomplishes nothing toward minimizing costs in cases settled prior to trial. (2) When consolidation is had in cases in which joinder would not have been permitted over objection, some of the cases have required separate appeals.<sup>242</sup> (3) Since trial convenience will point toward one trial instead of several more often than not, the sounder policy is to authorize joinder, with separate trials granted when justice demands, rather than to deny joinder, with consolidation permitted.

#### SUMMARY

Except for the dismissal rule, the record of the North Carolina Supreme Court in interpreting the joinder statutes shows more cases resulting in liberal than in literal construction. But the statutes themselves, which have undergone no major revision since the Code was adopted, are unduly restrictive. It is time to remove some of the stumbling blocks which they interpose to free joinder. Modernization of joinder rules has been going on elsewhere, and has culminated in the provisions of the Federal Rules of Civil Procedure. These furnish an excellent model for revision of the North Carolina statutes. The changes which would be necessary to conform the State practice to Federal, and the reasons why they are advisable, will be the subject of a subsequent article.

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lace v. Longest, 226 N. C. 161, 37 S. E. (2d) 112 (1946); Strickland v. Smith, 226 N. C. 517, 39 S. E. (2d) 381 (1946); Kennedy v. Smith, 226 N. C. 514, 39 S. E. (2d) 380 (1946). These last-mentioned two cases are reported separately, but the opinion in the Strickland case states that they were tried together. They illustrate that trial convenience does not require that the issues be identical, because it affirmatively appears that evidence of contributory negligence caused a reversal of a verdict for plaintiff in one case and not in the other. See, however, Robinson v. Standard Transportation Co., cited *supra* note 240, stating that consolidation may be ordered when the causes grow out of the same transaction and the defense is the same. See also Butner v. Spease, 217 N. C. 82, 6 S. E. (2d) 808 (1940).

<sup>242</sup> Osborn v. Town of Canton, 219 N. C. 139, 13 S. E. (2d) 265 (1941); Williams v. Carolina and Northwestern Railroad Co., cited *supra* note 240. Conley v. Pearce-Young-Angel Co., 224 N. C. 211, 29 S. E. (2d) 740 (1944), is *contra*, but does not cite the prior cases.