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Henry Brandis Jr.

William E. Graham Jr.

RECENT DEVELOPMENTS IN THE FIELD OF PERMISSIVE JOINDER OF PARTIES AND CAUSES IN NORTH CAROLINA

HENRY BRANDIS, JR.* AND WILLIAM E. GRAHAM, JR.†

INTRODUCTION

This article is intended as a supplement to a more comprehensive article which appeared in the *Review* in 1946.[1] Its objective is to bring down to date the rules and lines of authority then discussed. No effort will be made to present a complete or rounded picture of joinder problems. No phase of the subject will be treated unless it is affected by cases decided since the 1946 article was written.

The number of joinder questions brought to the North Carolina Supreme Court is sufficient to indicate practicing attorneys must consider such questions rather frequently. It is hoped that this supplemental article will be of some assistance to attorneys in their search for authorities.

PARTIES PLAINTIFF

Consistent interest in the subject of the action and in obtaining the relief demanded permits joinder of parties plaintiff,[2] though their rights are several, at least for some purposes. For example, it was held that a bailor and bailee have a sufficiently common interest in the subject of action and relief sought to permit them to join in an action for the wrongful conversion of the bailed property.[3] But where the trial court allowed the joinder of certain plaintiffs in a taxpayer's action to have the city enjoined from tearing down a housing project, the Supreme Court reversed on the ground that the complaint of the additional parties

* Professor of Law and Dean of the School of Law, University of North Carolina.

† Associate Editor, NORTH CAROLINA LAW REVIEW.

[1] Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N. C. L. REV. 1 (1946). In general, the same topical headings are used herein as in the 1946 article. Omission of a topic indicates that there have been no further cases. With rare exceptions, no specific reference to the 1946 article will be made, as the topical headings will readily enable the reader to proceed from either article to the other. Reference should also be made to Brandis, *A Plea for Adoption by North Carolina of the Federal Joinder Rules*, 25 N. C. L. REV. 245 (1947).

[2] Burton v. Reidsville, 240 N. C. 577, 581, 83 S. E. 2d 651, 653 (1954). "True the unity or identity of interest required at common law is not necessary under the code (G. S. 1-68, 1-70; Wilson v. Motor Lines 207 N. C. 263, 176 S. E. 750) but two or more plaintiffs representing opposing interests with reference to the main purpose of the action may not be joined."

[3] Peed v. Burleson's Inc., 242 N. C. 628, 89 S. E. 2d 256 (1955).

alleged facts in opposition to those of the original complaint. The Court did not decide whether they could have been joined as defendants.[4]

When an insurer has been subrogated to a part of an insured's claim, he may join as plaintiff; and, while it is proper for the insured alone to sue for the entire claim, it is also proper for the trial judge, in his discretion, to order the insurer to come in, as an additional plaintiff or defendant, upon motion of an original party.[5]

PARTIES DEFENDANT

In the area of contract litigation, joinder of a guarantor of payment with the principal debtor has been sustained, even though his obligation, as distinguished from that of a surety, may be separate and independent.[6]

Joinder of several defendants in a tort action is permitted as a matter of course if the Court finds them to be joint tort-feastors.[7] This is true not only in cases where joint tort-feasors are entitled to contribution as between themselves,[8] but also in cases where one defendant is only secondarily liable and therefore entitled to full recovery from his co-defendant.[9] Thus, in the ordinary case, joinder of master and servant is permitted, though the master's liability is predicated solely upon the *respondeat superior* doctrine.

However, because of the exclusive character of the remedy provided by the Workmen's Compensation Act, the plaintiff's employer, if covered by the act, may not be made a defendant either originally or upon motion of a party, and this is true whether the attempt is merely to join the employer with plaintiff's negligent fellow-employee or to join him (whether as an independent actor or because of *respondeat superior*) as a joint tort-feasor, or on a primary liability theory with a defendant not in the business family.[10]

[4] Burton v. Reidsville, 240 N. C. 577, 83 S. E. 2d 651 (1954). See, *Case Survey*, 34 N. C. L. REV. 1, 15-16 (1955).

[5] Taylor v. Green, 242 N. C. 156, 87 S. E. 2d 11 (1955); Lyon and Sons v. Bd. of Education, 238 N. C. 24, 76 S. E. 2d 553 (1953); Jackson v. Baggett, 237 N. C. 554, 75 S. E. 2d 532 (1953); Burgess v. Trevathan, 236 N. C. 157, 72 S. E. 2d 231 (1952). See also Note, 31 N. C. L. REV. 224 (1953).

[6] Aready Farms Milling Co. v. Wallace, 242 N. C. 686, 89 S. E. 2d 413 (1955).

[7] Midkiff v. Auto Racing, Inc., 240 N. C. 470, 82 S. E. 2d 417 (1954); Snowden v. Wooten, 234 N. C. 111, 66 S. E. 2d 693 (1951); McHorney v. Wooten, 234 N. C. 110, 66 S. E. 2d 692 (1951); Barber v. Wooten, 234 N. C. 107, 66 S. E. 2d 690 (1951); Stowe v. Gastonia, 231 N. C. 157, 56 S. E. 2d 413 (1949); McKinney v. Deneen Co., 231 N. C. 540, 58 S. E. 2d 107, (1950); Garrett v. Garrett, 228 N. C. 530, 46 S. E. 2d 302 (1948); Moses v. Morganton, 195 N. C. 92, 141 S. E. 484 (1928); Moses v. Morganton, 192 N. C. 102, 133 S. E. 421 (1926).

[8] N. C. GEN. STAT. § 1-240 (1953).

[9] The Court continues to hold that a third party alleged to be primarily liable, may be brought in upon the original defendant's motion and demand for judgment over. This is upon equitable principles, completely apart from statutory provisions. Davis v. Radford, 233 N. C. 283, 63 S. E. 2d 822 (1951); Wright's Clothing Store v. Ellis Stone and Co., 233 N. C. 126, 63 S. E. 118 (1951).

[10] N. C. GEN. STAT. 97-10 (1953). Hunsucker v. Chair Co., 237 N. C. 559, 75 S. E. 2d 768 (1953); Lovette v. Lloyd, 236 N. C. 663, 73 S. E. 2d 886 (1953).

Alternative Joinder

In dealing with alternative joinder of defendants, G. S. § 1-69 states: "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." This was held to justify joinder of a deputy sheriff, the sheriff, the bondsman of both, and the alleged private employers of the deputy in an action for false arrest by the deputy.[11] The theory was that the plaintiff was uncertain whether the deputy was acting as public officer or private employee at the time of the arrest.

No comparable reference to uncertainty appears in G. S. § 1-68, dealing with alternative joinder of plaintiffs, but authorization of alternative joinder seems necessarily to include the possibility of uncertainty. Nevertheless, when two plaintiffs, apparently uncertain as to which was the real party in interest, alleged ostensibly exclusive rights to recover on the same claim, the Court did not treat this situation as presenting alternative joinder of parties, but rather held it to present a misjoinder of parties and causes requiring dismissal.[12]

This case will be more fully considered under "Alternative Joinder" in that section of this article dealing with "Joinder of Parties and Causes."

II Joinder of Causes of Action

Decision on a potential joinder of causes problem can be rendered unnecessary by a finding that, though the complaint contains allegations constituting grounds for separate causes, plaintiff only contends for one cause,[13] apparently inserting the other allegations to elaborate his claim and as bearing on the issue of injury and damages.[14]

Possibly the Court's most liberal use of this technique is found in

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G. S. § 97-9 has been construed to bring an employee's superiors within the same immunity as that afforded employers, thereby precluding their joinder. Bass v. Ingold, 232 N. C. 295, 60 S. E. 2d 114 (1950); Essick v. Lexington, 232 N. C. 200 (1950).

[11] State *ex rel* Cain v. Corbett, 235 N. C. 33, 69 S. E. 2d 20 (1952).

[12] Foote v. Davis, 230 N. C. 422, 53 S. E. 2d 311 (1949).

[13] E.g., where the action was to recover excess taxes paid during different years. Rand v. Wilson, 243 N. C. 43, 89 S. E. 2d 779 (1955). Conversely, the Court sometimes treats an action as involving several causes when it could easily be said to involve a single cause. While an example of this will occasionally be pointed out, this article will not attempt to discuss what constitutes a single cause of action.

[14] Heath v. Kirkman, 240 N. C. 303, 82 S. E. 2d 104 (1954); State *ex rel* Cain v. Corbett, 235 N. C. 33, 69 S. E. 2d 20 (1952); Lillian Knitting Mills Co. v. Earle, 233 N. C. 74, 62 S. E. 2d 492 (1950). In one case where the Court decided that allegations were sufficient to state several causes of action, it held that the pleader could not successfully contend that only one cause of action was stated, with the other allegations being material only insofar as they related to the question of damages. Snotherly v. Jenrette, 232 N. C. 605, 61 S. E. 2d 708 (1950). This, however, should be contrasted with the acceptance of such a contention in State *ex rel* Cain v. Corbett, *Supra*, the Court stating that it constituted an election of remedies. In this respect, the two cases are irreconcilable.

the recent case of *Casey v. Grantham*,[15] where an action was brought (1) against a partner for an accounting and settling of partnership affairs; and (2) to enjoin the trustee and the beneficiary from foreclosing a deed of trust on the partnership property.[16]

Where the Court finds that there are several causes of action, the propriety of their joinder is governed by G. S. § 1-123, which permits joinder of causes, whether legal or equitable in nature, provided the causes joined all fall within one of the seven classes specified and do not require separate places of trial. If these requirements are met, no joinder problem will be encountered as between a single plaintiff and a single defendant, regardless of how complicated the facts may be. For example, the contract action class has permitted a plaintiff to allege in a single complaint that defendant breached two separate contracts to lend money; that he charged usurious interest on each contract; and that the breach of each contract resulted in farm losses for which plaintiff was entitled to actual and punitive damages.[17]

Improper Joinder of Causes

The most difficult question arises in the interpretation of the clause in G. S. § 1-123 permitting joinder of causes arising out of the same transaction or transactions connected with the same subject of action. Such question arises with relative frequency because this is the only clause in the section which permits joinder of tort and contract causes.

"Transaction" and "subject of action," while now familiar and somewhat hallowed, are nevertheless vague and nebulous criteria. They may be, and from time to time are, construed either very broadly or narrowly and technically. Fact situations are so diverse that those somewhat diverse approaches can be pursued without such obvious inconsistency as to bring about different decisions on identical facts.

[15] 239 N. C. 121, 79 S. E. 2d 735 (1954).

[16] The complaint alleged that the deed of trust in question covered property belonging to the plaintiff as well as partnership property, and that the partnership property was sufficient to pay the debt. A majority of the Court believed that since, under the doctrine of marshalling of assets, plaintiff was entitled to have the partnership property first applied to the payment of the debt, he was entitled to have foreclosure enjoined until the accounting. In a long dissent by Justice Johnson, in which Justice Winborne concurred, it was insisted *inter alia* that (1) two causes of action were involved; and (2) such joinder would delay an innocent creditor from collecting a loan while two partners engaged in an action that did not affect the creditor's right to collect. Actually, the complaint contined allegations of collusion between the defendant partner and the creditor (his father) which should have permitted joinder even if two causes of action were present. It is doubtful, however, that the allegations—conclusions of law for the most part—were sufficient to state a cause of action against the creditor. At any rate, it is possible that in a subsequent case of this nature, where there is no possible inference of collusion, the Court will find two causes of action, thus raising a serious dual misjoinder problem.

[17] Perry v. Doub, 238 N. C. 233, 77 S. E. 2d 711 (1953).

In the recent cases, misjoinder has usually been found.[18] While some of the results were necessitated by the arbitrary restrictions, there has certainly been no marked tendency to discover any elastic in the transaction clause.

For example, in Smith v. Gibbons,[19] plaintiff sought to recover (1) money due under a contract for personal services; and (2) damages for assault and false imprisonment committed upon him by defendant when he visited defendant's office to discuss the matter. Technically, it is rather clear that the breach of the contract and the alleged torts are distinct transactions, but it may be rather forcefully argued that they are transactions connected with the same subject of action—i.e., that the breach of contract is the subject of the action and that the assault and false imprisonment are connected therewith, in that they arose out of a negotiation prompted by the alleged breach.[20]

Joinder problems have arisen in several cases where one cause was required to conform to a special statutory procedure which the Court did not believe could be integrated into the procedure of an ordinary civil action.[21] There are no recent cases where such procedure has restricted joinder. In fact, one statutory procedure—under the N. C.

[18] Mills v. Park Corp., 242 N. C. 20, 86 S. E. 2d 893 (1954). A cause of action against a cemetery for breach of promissory representation and a cause of action to restrain the enforcement of unlawful and unreasonable rules and regulations in the management of the property were held improperly joined. (Plaintiff actually attempted to join five causes of action; however, three were dismissed on appeal as statements of defective causes of action). Large v. Gardner, 238 N. C. 288, 77 S. E. 2d 617 (1953). It was alleged that defendant cashed plaintiff's check and plaintiff put the money in his pocket without counting it; that several days later defendant caused plaintiff to lose his job by falsely accusing him of accepting a large sum of money in excess of the check, and had him arrested for false pretense. Plaintiff demanded damages for causing the breach of his employment contract and for malicious prosecution. The Court, without referring to the transaction clause, held that defendant's demurrer for (*inter alia*) misjoinder of causes had been properly sustained. Three Justices dissented on the ground that the complaint could be construed to state a cause of action for malicious prosecution. (Actually, the decision of the majority may have turned on the general faultiness of the complaint rather than a misjoinder problem.) Belch v. Perry, 240 N. C. 764, 84 S. E. 2d 186 (1954). The Court intimated that a cause of action against defendant for breach of an agreement not to engage in business in competition with plaintiff after selling his interest in a partnership to plaintiff, and a cause of action for defendant's fraud in inducing plaintiff to purchase his interest therein, could not be properly joined. Hancammon v. Carr, 229 N. C. 52, 47 S. E. 2d 614 (1948). (In an action to recover on a check, defendant maker was not permitted to assert a counterclaim for abuse of process in which he alleged that plaintiff had procured a warrant charging him with issuing the allegedly worthless check.) In this case the Court pointed out the similarity of the transaction clause in the joinder and counterclaim statutes and clearly intended that its discussion should apply to both. The opinion is a painstaking effort to explain why the Court regards "connected story" alone as insufficient. See also, Thompson v. Pilot Life Insurance Co., 234 N. C. 434, 67 S. E. 2d 444 (1951).

[19] 230 N. C. 600, 54 S. E. 2d 924 (1949). See also Vestal v. White, 229 N. C. 414, 49 S. E. 2d 927 (1948).

[20] See the similar discussion in Brandis, *supra* note 1, p. 12, of Pressly v. Great Atlantic and Pacific Tea Co., 226 N. C. 518, 29 S. E. 2d 382 (1946).

[21] See cases collected in Brandis, *supra* note 1, pp. 12, 13.

Betterment Statute—has recently been held to permit a joinder perhaps not otherwise permissible.[22]

Inconsistency may be the source of a joinder problem when the Court believes that two causes are actually incompatible. A recent illustration is *Perkins v. Langdon*,[23] where plaintiffs originally alleged that defendants entered into a parol contract to lease tobacco warehouses to them for three years and afterwards sold the warehouses before the lease expired. Defendants' demurrer was sustained because the complaint contained no allegations that defendants had covenanted not to sell the warehouses during the term of the lease. Plaintiffs amended, asserting, *inter alia* that the original contract provided for a joint adventure arrangement whereby plaintiffs were to manage and operate the warehouses for the joint account of plaintiffs and defendants. In striking the amendment, the Court found that it set up a wholly different cause of action, and furthermore, that the causes could not be joined in the same complaint because inconsistent.[24]

On the other hand, no such incompatibility was found in *Jenkins v. Duckworth*.[25] There plaintiffs alleged employment by defendant, successful performance, rendition of an account for services in a stated amount, a partial payment by defendant prior to rendition of the account, another partial payment thereafter, and failure and refusal to pay the balance. By amendment plaintiffs added allegations of performance of the same employment and allegations that the services rendered were reasonably worth a specified amount (being the same amount stated in the account). Since an express contract for the performance of the services (though not for the amount of compensation) was admitted, the Court pointed out that they were not alternative causes in express and implied contract. Nevertheless, the opinion refers to the two sets of allegations as "counts" and also as "causes of action."

It is not possible to be certain whether the Court thought this represented alternative causes—one for breach of the original contract and one on an account stated—or merely a single cause of action with alterna-

[22] Comm'rs of Roxboro v. Bumpass, 237 N. C. 143, 74 S. E. 2d 436 (1953). The Court held that even though neither of two interpleaders had any interest in the other's claim, a demurrer for misjoinder of parties and causes could not be sustained. "This for the simple reason the statute under which interpleaders must proceed, General Statutes Ch. 1, art. 30, requires that a claim for betterments be filed in the action in which judgment for land has been rendered." Barnhill, J., at 145.

[23] 233 N. C. 240, 63 S. E. 2d 565 (1951).

[24] The following language indicates that the Court obviously regarded the complaint and the amendment as completely incompatible: "The allegations of the complaint seek to establish the relation of landlord and tenant as the basis of recovery. By these amendments, the plaintiffs are endeavoring to set up the alternate relation of joint adventures. If the one is true, the other cannot be." Johnson, J., *id.* at 246.

[25] 242 N. C. 758, 89 S. E. 2d 47 (1955).

tive theories supporting the same measure of recovery. It is clear that the Court saw and approved alternatives of some kind which were inconsistent in the sense that plaintiffs could not conceivably recover on both.

Perkins v. Langdon and *Jenkins v. Duckworth* present radically different factual settings. They can obviously be reconciled. Yet they serve to point up the fact that the distinctive treatise on the limits of permissible inconsistency in North Carolina has yet to be written—by the Court or anyone else. It can be said, however, that it is most unfortunate that our Court has not taken notice of the modern trend toward acceptance of inconsistency, provided, at least, that the alternatives (whether called counts or causes of action) rest upon obvious uncertainties of legal theory or proof and do not require that plaintiff, on the witness stand, swear to personal knowledge of the simultaneous coexistence of mutually destructive facts.

Consequences of Misjoinder of Causes

Although G. S. § 1-127 expressly sets forth misjoinder of causes as a ground for demurrer, the ensuing consequences are not too serious. 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 misjoined."[26] So with severance as the ultimate possible result of an objection to the misjoinder of causes, there are probably many cases where defendant's counsel intentionally waives the objection.[27]

III Joinder of Parties and Causes

The Court continues to hold that joinder will be sustained, even in complicated situations, if the Court finds that the complaint relates a "connected story";[28] or "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 persons must be brought before the Court in order that the suit may conclude the whole subject."[29]

[26] The Court has naturally followed this mandate, e.g.: McKinley v. Hinnant, 242 N. C. 245, 87 S. E. 2d 568 (1955); Mills v. Park Corp., 242 N. C. 20, 86 S. E. 2d 893 (1955); Smotherly v. Jenrette, 232 N. C. 605, 61 S. E. 2d 708 (1950); Smith v. Gibbons, 230 N. C. 600, 54 S. E. 2d 924 (1949). See also Brandis, *supra* note 1, n. 71.

[27] N. C. Gen. Stat. § 1-134 (1953) provides that when misjoinder of causes appears on the face of the complaint, failure to demur is a waiver of the objection.

[28] Roberson v. Swain, 235 N. C. 50, 69 S. E. 2d 15 (1952); Owens v. Hines, 227 N. C. 236, 41 S. E. 2d 739 (1947). The several transactions must nevertheless comply with the wording of G. S. § 1-123 to the effect that all causes must be connected with the same subject of action. Pressley v. Great Atlantic and Pacific Tea Co., 226 N. C. 518, 519, 39 S. E. 2d 382, 383 (1946).

[29] Erickson v. Starling, 233 N. C. 539, 64 S. E. 2d 832 (1951); Owens v. Hines, *supra* note 28.

Creditor's Bills

It is well established in North Carolina that creditors with wholly independent claims may join as plaintiffs to establish their claims against their common debtor, provided they share in seeking some common object designed to protect their recovery—such as a demand that the debtor's fraudulent conveyance be set aside; and other parties to the alleged fraud may be made defendants. However, since it is the fraudulent conveyance feature which permits joinder in the above instances, plaintiffs must be careful to state facts and circumstances sufficient to sustain the allegation of fraud. Otherwise, they run the risk of having their entire action dismissed because of dual misjoinder.[30]

Estate Litigation

The phrases "connected story" and "single object" are usually used to justify joinder in litigation involving the assets of an estate. This is particularly the case where all the relief sought is directly connected with securing or protecting plaintiff's share of the estate assets, and 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 other defendants are somehow connected).[31]

Owens v. Hines,[32] a case very similar to the creditor's bill type of situation, illustrates this technique. It was alleged that the defendant guardian sold lands belonging to plaintiffs, his children, for $4,000 and loaned and invested the proceeds, in his own name, upon securities not approved by law. Later he received a deed to other land, with himself as grantee. When the plaintiffs became of age and demanded title to this land as part of their estate, defendant allegedly disaffirmed the trust relationship and executed a deed for the land to his wife. Plaintiffs joined defendant guardian and his wife and demanded judgment: (1) for $4,000 with interest from defendant guardian, (2) that defendants hold title to the land as trustees for plaintiffs, (3) that the indebtedness be a specific charge and lien upon the land and (4) that defendant wife was not the owner of any of the land and was entitled to no right, title, or interest thereto.

The above facts presented a clear case for the application of the "connected story" and "single object" principles and the Court had no trouble finding a proper joinder of parties and causes. Its reasoning was that the main object was an accounting by defendant guardian for

[30] Davis v. Whitehurst, 229 N. C. 226, 49 S. E. 2d 394 (1948). An action by several creditors on independent claims against a common debtor, and to enjoin an action between defendant and a third party on a contract allegedly "tainted with fraud . . . on creditors. . . ."

[31] See Brandis, *supra* note 1, pp. 22-25.

[32] 227 N. C. 236, 41 S. E. 2d 739 (1947).

specific property of plaintiffs, and that the conveyance was directly connected therewith.

In *Erickson v. Starling,*[33] beneficiaries of a trust consisting of the controlling stock in a corporation instituted a suit to remove trustees and to require an accounting. It was alleged, *inter alia,* that stock in a subsidiary corporation had been transferred to one of the trustees personally for an inadequate consideration. In affirming the trial court's order overruling defendants' demurrer, the Court held that plaintiffs were entitled to maintain a single suit against the trustees and their confederates, corporate and individual.[34]

These cases illustrate relatively simple situations where plaintiffs have been allowed to join causes against several parties in order to protect their interest in estate assets from allegedly fraudulent administration. Somewhat more complicated situations may arise where heirs or next of kin allege numerous causes grounded upon transactions affecting the distribution of the estate assets.

An unusual illustration of the latter type of case is *Johnson v. Scarborough,*[35] where no less than seven causes against numerous individuals were crowded into defendants' answer as cross-claims. The action, brought by certain heirs, with the remaining heirs named as defendants, was in the form of a special proceeding to partition the real property of N.V.J., deceased. It appeared that the property in question consisted of (a) that of which N.V.J. had been sole owner, (b) an interest in real property devised to him by E.M.J. and (c) an undivided interest in real property of B.D.J., deceased, inherited by him as heir at law. Two defendants attempted to assert cross-actions as follows: (1) to have declared void certain deeds and instruments conveying defendants' interest in the E.M.J. estate, (2) for accountings (a) of rents and profits derived from the operation of farms by the estate of E.M.J., and (b) of proceeds from the sale of timber from the estate, (3) to have declared void deeds conveying defendants' interest in the estate of B.D.J. (4) to have a prior proceeding, in which lands of E.M.J. were partitioned, declared void; (5) for an accounting against administrators of the estate of B.D.J. (6) for an accounting against J.R.C., an alleged partner of E.M.J., for rents and profits accruing after E.M.J.'s death; and (7) for an accounting against J.T.T. on the ground that he purchased, subsequent to the death of E.M.J., partnership property owned by E.M.J. and J.R.C. All in all, defendants indicated that they were dissatisfied.

[33] 233 N. C. 539, 64 S. E. 2d 832 (1951).

[34] "The arm of equity is neither short nor palsied when it comes to dealing with fraud; nor is judicial process or privilege intended to be used as a shield against ferreting it out or to stay the day of reckoning and judgment, but rather to be employed, as contemplated, in a single action for investigation of the whole scheme and the unravelling of its ramifications." Stacy, C. J., *id.* at 541.

[35] 242 N. C. 681, 89 S. E. 2d 420 (1955).

The Court dismissed the cross-action in a rather summary fashion because all causes did not affect all parties. An analysis of the case indicates that even the most liberal principles would not justify joinder of all the causes asserted by the defendants. In the first place, the causes lack a unifying thread like provisions of a trust or will or misapplication of funds by principal defendants.[36] Secondly, it is obvious that one connected story cannot be told of the various transactions. For instance, the causes asserted for the various accountings and the requests to have certain conveyances of defendants set aside are completely unrelated, with the interest of the other parties to the petition being in no wise affected by the latter causes.

Clearly here the defendants asserted ownership of more dirty linen than could be sent to the laundry in one bundle.

Other Fraud Cases

Where fraud is the gravamen of the action, the plaintiff may ordinarily join all those who participated in the fraud or knowingly profited by it and may ask for such relief as is necessary to overcome the fraud and enforce his rights. Thus, where *S* was allegedly guilty of fraud in the procurement of a written agreement for the sale of property and caused a corporation to be formed and title to the property placed in the corporation, plaintiff could properly enjoin *S* and the corporation from conveying the property.[37]

The recent case of *McKinley v. Hinnant*[38] illustrates a situation where fraud, though alleged, was not broad enough to cover all of the transactions pleaded. The facts indicate that plaintiff sold certain realty to *H* and *W*, taking a deed of trust on other property to secure a note for the purchase price. It was alleged that *H* and *W* agreed to execute a mortgage on the conveyed property at a later date as additional security; that plaintiff thereafter borrowed a smaller amount from F, and, at the suggestion of *H* and *W*, transferred their note and deed of trust as security and took an option to repurchase from *F;* and that the note and deed of trust were wrongfully cancelled. In an action against *H*, *W* and *F*, plaintiff sought (1) to have the transfer of the note and the option to repurchase declared a mortgage; (2) to have the cancellation of the note and deed of trust declared void; and (3) to have a purchase money deed of trust declared on the conveyed property as redress for breach by *H* and *W* of their agreement to execute a mortgage thereon.

[36] Even if misapplication by principal defendants were present, it could not be said that the other defendants were connected therewith.

[37] Roberson v. Swain, 235 N. C. 50, 69 S. E. 2d 15 (1952). As previously pointed out (see note 16, *supra*) sufficient allegations of fraud would probably have justified joinder even in the eyes of the minority in the case of Casey v. Grantham, 239 N. C. 121, 79 S. E. 2d 735 (1954). (The majority found only one cause of action involved).

[38] 242 N. C. 245, 87 S. E. 2d 568 (1955).

The defendants demurred for misjoinder of causes only and the Court ordered the first two causes to be severed from the latter. No objection was made to the joinder of parties and causes. It is obvious from the Court's opinion, however, that it believed dual misjoinder to be present, on the ground that *F* was not connected with the alleged breach by *H* and *W* of their agreement to execute a mortgage on the conveyed property. This view would seem correct, if that breach was a separate cause of action, in the light of the restrictive "all causes must affect all Parties" provision of G. S. § 1-123. It is significant, however, that the alleged fraudulent circumstances did furnish the cement necessary to join all of the defendants on the first two causes. And a broad view might well result in a decision that only a single cause of action is presented—*i.e.*, plaintiff seeks, essentially, to protect his rights under his contract of sale with *H* and *W*, and *F* is a necessary party to one phase of such protection.

General Contract and Tort Principles

In the tort field, plaintiff may sue several defendants whose acts combine to produce a single injury, thus making them joint tort-feasors.[39] Actually, in these cases there is usually said to be but a single cause of action.[40]

Where the complaint sufficiently alleges conspiracy, there is no joinder problem because as a matter of substantive law the liability of conspirators is joint and several.[41] Thus, in an action charging several defendants with conspiring to run plaintiff out of business as a plumber, the plaintiff was allowed to join the Executive Secretary of the State Board of Examiners of Plumbing and Heating Contractors, the town clerk, and members of the Town's Board of Aldermen, alleging various activities on their part, including the procurement of passage of license ordinance and the criminal prosecution of plaintiff.[42]

[39] The stream polution cases furnish a good example of this: Stowe v. Gastonia, 231 N. C. 157, 56 S. E. 2d 413 (1949); McKinney v. Deneen, 231 N. C. 540, 58 S. E. 2d 107 (1950); Lineberger v. Gastonia, 196 N. C. 445, 146 S. E. 79 (1929).

[40] Where the action is grounded on an intentional tort, the Court usually speaks of a common purpose, intent and concert of action. Garrett v. Garrett, 228 N. C. 530, 46 S. E. 2d 302 (1948). (Plaintiff alleged that one defendant, acting pursuant to a joint purpose, went to plaintiff's residence, dragged her out of the house to a point where the other defendant was lying in wait, and both then assaulted her.) Where the action is for negligence the theory is concurrent negligence. The Court has stated clearly that neither concert of action nor unity of purpose is necessary. It is sufficient if the acts of the several defendants, however independent, concur to produce a single injury. Shaw v. Barnard, 229 N. C. 713, 51 S. E. 2d 295 (1949). *Cf.* Midkiff v. Auto Racing, Inc., 240 N. C. 470, 82 S. E. 2d 417 (1954), where "concert of action" was alleged.

[41] Muse v. Morrison, 234 N. C. 195, 66 S. E. 2d 783 (1951).

[42] *Ibid.* (Plaintiff lost on merits in Muse v. Morrison, 240 N. C. 664, 83 S. E. 2d 705 (1954)). Compare Manley v. Greensboro News Co., 241 N. C. 455, 85 S. E. 2d 672 (1955), where plaintiff attempted to circumvent a joinder problem by alleging that an opposing political candidate and the news company conspired in the

Turning to multiple plaintiffs, it was held, where several property owners alleged that they had been individually damaged by defendant's breach of covenants (separate though forming a part of a uniform plan of development), that joinder was improper.[43] From the practical standpoint this result seems unfortunate; but it seems dictated by the requirement that all causes must affect all parties.

In the tort field, the fact that a single tortious act of defendant injured several persons does not, standing alone, permit their joining as plaintiffs; and the same rule applies even though the only physical injury is to an infant and his father attempts to join his own cause for loss of services and expenses incurred with the infant's cause, brought by the father as next friend.[44]

Joint Versus Several Torts

As has already been indicated, plaintiff may join several defendants in joint tort-feasor situations—where the acts of defendants concur to produce a single injury. No joinder is allowed, however, if the defendants' acts produce separate injuries.[45]

A difficulty in this area arises when plaintiff is injured by the non-simultaneous actions of the drivers of two or more vehicles. A leading case illustrating this problem is *Atkins v. Steed*,[46] where it was alleged that plaintiff was knocked from the running board of vehicle *A* by the negligence of the driver of vehicle *B*, and that while unconscious on the highway, as the result of the blow "just previously received," the driver of vehicle *C* negligently ran into him. In an action against the drivers

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publication of libel. It was held that non-suit was properly entered by the trial court on the grounds that there was no evidence of conspiracy, and that libel is an individual tort incapable of joint commission.

[43] Chambers v. Dalton, 238 N. C. 142, 76 S. E. 2d 162 (1953). The Court, in a per curiam opinion, regarded the several causes of action as completely separate and distinct with their only relation being that they were of the same nature and asserted the same general type of grievance. A taxpayer's equity action was met with a similar type of reasoning in Branch v. Bd. of Education, 233 N. C. 623, 65 S. E. 2d 124 (1951). There taxpayers sought to enjoin allegedly unlawful expenditures or diversions of funds belonging to four separate school administrative units and to compel an allocation of such funds to the respective units. Actually, the complaint was demurrable for other reasons; however, the Court reasoned that four independent causes of action belonging to four governmental agencies could not properly be joined, unless there was controversy as to the respective shares of the several units in the fund in question.

[44] See Ellington v. Bradford, 242 N. C. 159, 86 S. E. 2d 925 (1955). Compare Shields v. McKay, 241 N. C. 37, 84 S. E. 2d 286 (1954). Here the only cause was that on behalf of the infant, brought by the father as next friend. The complaint alleged elements of damage properly recoverable by the father in his capacity as parent, as distinguished from next friend. Defendant failed to demur or to move to strike. The Court held that in such a situation the father is considered to have waived his right to recover therefor. For this reason, it was held to be error for the Court *ex mero motu* to limit the recovery for loss of earning capacity and medical expenses to the period after the infant reached majority.

[45] See Note, 31 N. C. L. Rev. 237 (1953).

[46] 208 N. C. 245, 179 S. E. 889 (1935).

of vehicles *B* and *C*, the Supreme Court, with Chief Justice Stacy writing the opinion, dismissed the case for dual misjoinder, regarding it as a suit for two injuries, not one, and an attempt to join different causes of action against different parties.

In a subsequent case, *Barber v. Wooten*,[47] a slightly more complicated fact situation seems analagous, but joinder was allowed. There it was alleged that, immediately after a collision caused by the negligence of the intestate of one defendant, and while plaintiff was injured and unable to extricate herself from the car in which she was a passenger, another defendant negligently ran his truck into the car causing further injury, and that shortly thereafter the third defendant ran into the side of the car causing still further injuries. The opinion of Chief Justice Stacy appears to distinguish the two cases on the grounds that in the "running board" case, although plaintiff asked for a "joint" recovery, this complaint indicated that the negligence of one defendant had come to an end before the negligence of the other defendant occurred and contained no allegation of joint and concurrent torts as did the complaint in the *Barber* case.[48] An inference can certainly be drawn that the addition of the words "joint and concurrent" would have saved the plaintiff's complaint in the "running board" case.

Regardless of the wording of the complaint with respect to "joint and concurrent," it is obvious that the time element is an important factor in multiple battery situations.[49]

The time element was also emphasized in another type of situation, where plaintiff's intestate, in a drunken condition, was allegedly wrongfully ejected from one bus and shortly thereafter struck by a bus of another carrier. Joinder of the two carriers was held improper. The Court stated: "While the plaintiff does not make any allegations as to the length of time which expired between the two events, it does appear on the face of the complaint that the deceased, after being discharged from the Transit Line bus, went at least one block before he was struck

[47] 234 N. C. 107, 66 S. E. 2d 690 (1951).

[48] In this general type of situation, unless the tort-feasors are all joint tort-feasors, determining the damages they respectively cause is extremely difficult. In a wrongful death case it is impossible. This latter seems to have been recognized in two companion cases to the *Barber* case. In the first, McHorney v. Wooten, 234 N. C. 110, 66 S. E. 2d 692 (1951), Stacy, C. J. stated at 111: "This case affords perhaps a clearer, if not a more pronounced distinction from the *Atkins case* . . . , than does the *Barber* case. Here the action is for the wrongful death of plaintiff's intestate—the result of the sum total of all the torts, neglects or defaults of the defendants which culminated in the right given by the 'Lord Campbell Act.'" The second case, Snowden v. Wooten, 234 N. C. 111, 66 S. E. 2d 693 (1951), was another wrongful death arising from the same collision.

[49] In Barber v. Wooten, 234 N. C. 107, 110, 66 S. E. 2d 690, 692 (1951), Barnhill J., concurring, said: "It does not appear on the face of the complaint that there was any appreciable interval of time between the three collisions. Hence the question defendants seek to raise is not presented by demurrer."

by the bus of defendant Greyhound Corporation. The two events alleged were entirely distinct in point of time and circumstance."[50]

Here there is no succession of physical impacts with a consequent question as to whether all defendants are jointly liable for plaintiff's total damage or each is independently liable for a part. As the Court pointed out, the liability of the first carrier, if any, was grounded primarily upon breach of its carrier's contract; and the essential question was whether the passenger's subsequent death could be attributed to that breach. If it could be, then joinder would seem to be perfectly proper, despite lapse of time. However, the elapsed time in the case was sufficient to make that an important (but only one) factor in determining that the death could not be attributed to the first carrier's breach. Hence, no cause of action for wrongful death was stated against the first carrier; and the Court so held, dismissing the action as to it while allowing the case to continue against the second carrier. Thus, while joinder was said to be improper, the decision is in fact a resolution of questions concerning substantive rights.

In other words, in the multiple battery cases the time element seems to influence the Court's decision as to whether the injury is single or multiple. When, as in the bus case, it is clear that the injury is single, the time element is directly related to the issue of proximate cause. How much weight it will be given on that issue depends upon the particular factual context; but it is clear that, in some factual contexts, independent acts of several defendants may concur to produce a single injury in such a way as to make them joint tort-feasors, though the acts are widely separated in time.[51]

Rules Apply to Defendant's Pleadings

The requirement that all causes must affect all parties continues to apply to cross-claims, cross-actions and counterclaims;[52] and the Court continues to hold that a defendant in a motor vehicle accident case may not cross-claim against codefendants for his own personal injuries or property damage incurred in the same accident.[53]

Thus, in *Wrenn v. Graham*,[54] plaintiff sued the driver of another car and two contractors, alleging them to be joint tort feasors. De-

[50] Shaw v. Barnard, 229 N. C. 713, 51 S. E. 2d 295 (1949).

[51] See, for example, Yandell v. Fireproofing Corp., 239 N. C. 1, 79 S. E. 2d 223 (1953).

[52] Though usage is not standard in North Carolina, in this article, for clarity "counterclaim" will be used to signify a claim by a defendant against a plaintiff and "cross-claim" or "cross-action" will signify a claim by one defendant against another defendant.

[53] An exception to this is that, when the original defendant has another joined, the latter may cross-claim against the original defendant. Grant v. McGraw, 228 N. C. 745, 46 S. E. 2d 849 (1948).

[54] 236 N. C. 719, 74 S. E. 2d 232 (1953).

fendant driver counterclaimed against plaintiff and cross-claimed against his codefendants, alleging all of them to be joint tort-feasors. Upon demurrer and motion to strike filed by the codefendants, the Court dismissed the cross-claim, leaving the counterclaim to continue.

The most cursory analysis of the situation clearly demonstrates that dismissal cannot validly be predicated on the requirement that all causes must affect all parties. There is plainly no violation of that requirement. Defendant driver's allegation that plaintiff and the codefendants were joint tort-feasors is only a single cause of action,[55] affecting all parties in exactly the same manner in which plaintiff's similar cause affects them. This might not be true if defendant interposed a cross-claim only; but that is not the case here. Indeed, dismissal of the cross-action, leaving the counterclaim pending, creates a situation in which, technically, the counterclaim cause does not affect all parties.[56]

The other objection accepted by the Court as justifying dismissal was that: "A plaintiff may not be required to cool his heels in the anteroom while defendants fight out, by cross-action, a claim, one against the other, which is independent of and irrelevant to the cause he asserts."[57] With all due respect to the Court, it is most doubtful that the cross-claim is "independent of and irrelevant to" plaintiff's cause.

In the collision cases the Court has made it plain that if a defendant wishes to claim against the plaintiff, based upon the same collision, he *must* do so by counterclaim and may not maintain an independent action.[58] Here his claim against the plaintiff and his codefendant as joint tort-feasors is a single cause of action.[59] It is most difficult to see, therefore, why any facet of this single cause, one facet of which is a

[55] Cases cited, *supra*, notes 38 and 39.

[56] Upon certain assumptions, the counterclaim cause has a practical effect upon plaintiff's cause against the codefendants. That is, if defendant driver wins on his counterclaim, it necessarily will mean a finding of such negligence on plaintiff's part as to bar his claim against everybody. However, if defendant driver loses on the counterclaim, that does not necessarily affect the codefendants.

Of course, the purpose of pointing out that the counterclaim does not affect all parties is not to support a conclusion that the counterclaim should not be allowed. The purpose is to point up the peculiar reasoning involved in finding a misjoinder is present for a reason which did not exist before the finding, but does exist thereafter.

[57] 236 N. C. 719, 721, 74 S. E. 2d 232 (1953).

[58] Johnson v. Smith, 215 N. C. 322, 1 S. E. 2d 834 (1939); Morrison v. Lewis, 197 N. C. 79, 147 S. E. 729 (1929); Allen v. Salley, 179 N. C. 147, 101 S. E. 545 (1919).

[59] Actually, the rule is that a plaintiff may sue joint tort-feasors jointly or separately. Thus, while plaintiff's claim is a single cause for purposes of joinder, it is not such for purposes of enforcing the rule against splitting a single cause. It is clear therefore that defendant driver may pursue his remedy against the codefendants in an independent action (though, depending upon developments in the present case, relitigation of certain issues may be foreclosed). However, that requires him to split what he could properly treat as a single cause if he had beaten plaintiff to the draw. This enforced splitting does not demonstrate that his claim is irrelevant to the plaintiff's claim.

compulsory counterclaim, should be labeled "independent of and irrelevant" to plaintiff's cause of action.[60]

The result is that the Court, having deprived defendant driver of the right to sue plaintiff in an independent action,[61] now deprives him also of the privilege of pursuing, at one time, his claim against plaintiff and other alleged joint tort-feasors already in the case at plaintiff's instance and alleged by plaintiff to have been negligent. In other words, in this litigation, plaintiff may sue any number of tort-feasors, but a defendant may sue only one—plaintiff. If any practical advantage is here involved, what has plaintiff done to merit it? Is it to be the laurel wreath awarded to the winner of an unseemly race from the bloody highway to the courthouse?

Further, it is here most difficult to believe that plaintiff will be forced to "cool his heels in the anteroom" while the defendants have their little private bicker. Plaintiff's cause and defendant driver's counterclaim include all the issues which might be involved in the cross-claim—the negligence of each party and the damages of plaintiff and defendant driver. Therefore, addition of the cross-claim could not involve serious additional complications. A general melee, with fingers pointing hopefully in all directions, is already insured.

Refusing to try the entire controversy at once, leaving it possible that there may be a second litigation between the defendants, seems a potential waste of public and private time and money.[62] And solicitude for the plaintiff so tender as to counterbalance all contrary considerations seems particularly quixotic in view of the fact that the objection to the cross-claim did not come from the plaintiff.[63] His counsel was not even sufficiently concerned to appear in the Supreme Court.

Finally, the Court asserted that it only applies the statute as written and, if such cross-claim is to be permitted the legislature must amend the statutes to authorize it. But no statute prohibits what was attempted here. The Court itself seems to indicate that this is true, referring to the

[60] In the *Wrenn* case, defendant driver's counsel presented the argument, made in the text of this article, based upon the joint tort-feasor status of plaintiff and the codefendants. The Court labeled it "interesting" and "ingenious but not persuasive." This leaves us with more than a slight suspicion that this article will be no more persuasive—but also with the belief that the opinion fails to point out any fallacy in counsel's analysis.

[61] The opinion in *Wrenn v. Graham* refers to the possibility of an independent suit by the defendant driver against the plaintiff and the contractors. But the cases cited in note 58 *supra* held that he cannot sue the plaintiff in an independent action.

[62] The Court recognized that if defendant driver sued his codefendants in an independent action, the two actions might then be consolidated; but it also recognized that this is not the equivalent of joinder in a single action.

[63] This was also true in Horton v. Perry, 229 N. C. 319, 49 S. E. 2d 734 (1948). So far as plaintiff is concerned the usual rule should apply—that is, failure to object is a waiver.

inability of plaintiffs to join for their respective injuries.[64] There is a statutory basis for preventing such joinder, since neither plaintiff's cause affects the other. But, as already pointed out, in the instant case, there is no cause which does not affect all parties. Perhaps the Court meant that the codefendants are placed in much the same position as if plaintiff and defendant driver had joined as coplaintiffs to sue for their respective injuries. Despite their similarity in that respect, this is not that case.

Considering the quarter from which the objection to such cross-actions usually comes, it is apparent that attorneys for the codefendants feel that it is tactically and psychologically advantageous to get rid of the cross-claims.[65] It is doubtful that this would be a good basis for dismissal; nor is it the reason judicially given for dismissal. It is equally true that the attorney for the claiming defendant feels that it is tactically and psychologically advantageous to have the claim litigated with his compulsory counterclaim. Since the equities here are somewhat balanced, and since no statute prohibits it, the joinder should be permitted on the ground of trial convenience alone; and if a party, in a particular case, can demonstrate real prejudice by virtue of his joinder, the court has adequate power to order separate trials.

To the extent that disapproval of joinder, or the ordering of separate trials, or the denial of consolidation, may be grounded upon the desire to eliminate confusion or to make jury cases more simple, it is reasonable to inquire whether such uncomplicated simplicity is achieved if achieved at the expense of reality. In those accidents where participants are numerous and mayhem is multiple, the just assessment of legal liability is necessarily a complex problem. The isolation of a fragment of the problem will cater to the ancient desire, so attractive (and elusive) to the common law pleader, to narrow every controversy to a single issue. It will also hasten the day when some other method will be devised for resolving highway cases—some method undoubtedly more complicated, but also more realistic and more efficient than a method which finds its criteria in the dichotomy of causes of action, the irrelevance of one driver's smashed ribs to the other driver's broken nose, and solici-

[64] "Whether all persons suffering injury or damage arising out of one and the same motor vehicle collision should be permitted to join as coplaintiffs against the allegedly negligent motorist is for the General Assembly to decide. The Court studiously refrains from making law by judicial fiat. It only applies it as it is written." Wrenn v. Graham, 236 N. C. 719, 722-23, 74 S. E. 2d 232, 234 (1952).

[65] Not even the authors of this article are wholly insensitive to such considerations. They have, for example, some appreciation for the predicament of an attorney faced with the decision as to whether to claim conditionally for contribution or indemnification against both plaintiff and the defendant driver. But, if consolidation is granted, he is (by his own apparent appraisal) back behind the psychological eight ball. And if consolidation is not granted, we have the attorney for defendant driver juggling two parts of what is really a single suit, deeply puzzled as to how he should jockey before the calendar committee.

tude for the special rights of the promptly litigous soul who grabs the label of plaintiff.

ALTERNATIVE JOINDER

As previously pointed out in connection with the discussion of joinder of parties, G. S. § 1-68 and G. S. § 1-69 permit joinder of plaintiffs or defendants in the alternative. The operation of the statutes is relatively clear where the Court finds that only one cause of action is involved. However, in cases where several causes are involved, it is still far from clear whether the requirement of G. S. § 1-123 that all causes must affect all parties will prevent alternative joinder.

At the time the original article was written, there was authority which found misjoinder by emphasizing inconsistency, virtually ignoring the alternative joinder provisions; and there was authority permitting joinder by emphasizing the alternative joinder provisions, virtually ignoring inconsistency.[66] The two lines of authority still exist.

The inconsistency approach was followed in *Foote Brothers Co. v. Davis Co.*[67] There, the defendant allegedly breached a contract to purchase prunes, and was sued by Foote Brothers. Defendant answered, alleging it dealt with plaintiff company only as an agent or broker and that Guggenhime Company was the vendor and real party in interest. Guggenhime, upon motion of plaintiff,[68] was thereupon made a party plaintiff and filed a complaint seeking to recover in its own right. The trial court overruled defendant's demurrer for misjoinder of parties and causes. In reversing the ruling, the Supreme Court did not mention alternative joinder, but held that the two causes were contradictory, and that there was no joint or common interest in the claim asserted.

This seems to be a case where a practical approach with a view to trial convenience should have permitted joinder. There was actually only one claim involved, with the only problem being which plaintiff was entitled to recover on the single contract. No alternative facts were involved, and since all parties were apparently in doubt as to which plaintiff was entitled to recover, it would seem to be a case where the alternative joinder statute should have been applicable. Had the Court chosen to follow it, there was ample authority for this joinder even prior to enactment of the alternative joinder sections.[69] If the case means that

[66] Brandis, *supra* note 1, pp. 43-49.

[67] 230 N. C. 422, 53 S. E. 2d 311 (1949).

[68] The Court emphasized that Guggenhime came in on motion of plaintiff and therefore, could not take advantage of the notion that a newly added party has special privileges in making claims against the original party responsible for his presence. See Grant v. McGraw, *supra* note 53. However, defendant's plea that Guggenhime was the real party in interest should be an adequate substitute for a motion by defendant to have Guggenhime joined. In fact, accepting the plea at face value, Guggenhime was a necessary party.

[69] There are several cases indicating that where plaintiffs are uncertain as to which has the right of action or is the real party in interest, they may join without

the joinder was improper because of omission of alternative statements it is unduly literal. If it means that such joinder would not be permitted, even if stated in the alternative, it disregards the alternative joinder statute. On either hypothesis, the decision comes in the wrong century.[70]

A welcome contrast is a case in which the Supreme Court looked to the alternative provisions of G. S. § 1-69 to justify joinder of defendants.[71] Plaintiff brought an action for false arrest on the part of a deputy sheriff, alleging that the deputy was acting within the scope of his private employment by two beach owners, and was at the same time acting under color of his office. The deputy, the sheriff, the surety on their bonds and the beach owners were all joined as defendants. The trial court sustained demurrers for misjoinder of parties and causes. The Supreme Court reversed, indicating that whether the deputy was acting in his capacity as servant or public officer was a question of fact for the jury, and furthermore, that where a plaintiff is in doubt as to persons from whom he is entitled to redress, he may join two or more defendants to determine which is liable.[72]

The result is certainly commendable. However, the pleadings gave no indication that plaintiff intended to join defendants in the alternative. On the contrary, it seems that he was attempting to hold all of them jointly liable. Therefore, reconciliation of this case with the *Foote* case is impossible unless it be on the ground that G. S. § 1-68, dealing with alternative joinder of plaintiffs, does not expressly contain a provision like that in G. S. § 1-69; "If a plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants to

making the joinder one expressly in the alternative. Brandis, *supra* note 1, n. 206. In fact, several cases antedating the alternative joinder provisions in effect permitted alternative joinder by invoking the rule that joinder of an unnecessary party is surplusage. See Brandis, *supra* note 1, n. 34, and cases cited therein. Sometimes the Court settles the matter by merely saying that, if the defendant is liable, it makes no difference to him who gets the money so long as either plaintiff is the rightful claimant, since both will be bound by the judgment. See Brandis, *supra* note 1, n. 34.

[70] With due apologies to Baron Surrebutter, the following dialogue might be an appropriate commentary on this case:
Judge: "We had a most interesting case the other day. Foote sued Davis for a debt and Davis said that, if he owed the money at all, he owed it to Guggenhime."
Layman: "I suppose you sent for Guggenhime?"
Judge: "Oh yes, we did that because Foote requested it."
Layman: "Well it's nice that you could get them all together and settle the matter once and for all."
Judge: "My dear fellow, you overlook the very point which gives this case its interest. We threw them all out of court."

[71] State *ex rel* Cain v. Corbett, 235 N. C. 33, 69 S. E. 2d 20 (1952).

[72] The Court found that the complaint stated only one cause of action, with additional allegations pertaining to malicious prosecution having been inserted relative to punitive damages. Once this was determined, the application of the alternative joinder provisions became (legalistically speaking), simple. Furthermore, had the Court not permitted the joinder, any improperly joined parties would probably have been dismissed or treated as mere surplusage; thus the consequences to plaintiff would not have been serious.

determine which is liable." However, the mere authorization of alternative joinder of plaintiffs so plainly contemplates a comparable uncertainty, that such a ground of distinction seems highly improbable. Further, if this is the distinction, the Court failed to mention it.

Clearly, the Court has yet to give a thorough consideration to the alternative joinder statutes in the light of the modern trend toward procedural reform—the trend which produced them and which furnishes the principle clues to their proper interpretation.

CONSEQUENCES OF MISJOINDER OF PARTIES AND CAUSES

Demurrer is the proper method to raise the objection to improper joinder of parties and causes, and failure to demur waives the objection; however, in some such cases the Court will nevertheless call attention to the improper joinder.[73]

Where a demurrer for "dual misjoinder" is sustained, severance is not allowed as in the case of improper joinder of causes alone, nor may amendment, eliminating misjoinder be allowed, and the action must be dismissed.[74] Needless to say, this practice imposes a great hardship upon plaintiffs, notwithstanding the fact that the dismissal is usually without prejudice and new actions may be begun. Plaintiffs are burdened by the time and expense involved in beginning new actions as well as the paying of costs in the original actions.

Plaintiffs sometimes escape complete dismissal because the Court finds that no cause of action is stated against one of the improperly joined parties.[75] The same is true where a demurrer for failure to state a cause of action is sustained as to the entire complaint.[76] In the latter type of case, plaintiffs may be permitted to amend and thus, if they see fit, revise the joinder before there is a definite ruling. There are also cases where the Court has allowed the misjoinder to be eliminated by

[73] McKinley v. Hinnant, 242 N. C. 245, 87 S. E. 2d 568 (1955); Eller v. R. R., 140 N. C. 140, 52 S. E. 305 (1905). A demurrer for failure to state a cause of action does not present for decision whether the complaint is objectionable for misjoinder of parties and causes. Batchelor v. Mitchel, 238 N. C. 351, 78 S. E. 2d 240 (1953).

[74] Johnson v. Scarborough, 242 N. C. 681, 89 S. E. 2d 420 (1955); Teague v. Siler City Oil Co., 232 N. C. 469, 61 S. E. 2d 2 (1950); Davis v. Whitehurst, 229 N. C. 226, 49 S. E. 2d 394 (1948).

[75] Jordan v. Maynard, 231 N. C. 101, 56 S. E. 2d 26 (1949). Held, in suit against insured and insurer, demurrer for misjoinder of parties and causes is improperly granted when the complaint fails to state a cause of action against insurer. Case remanded with order to dismiss insurer and continue against insured. Shaw v. Barnard, 229 N. C. 713, 57 S. E. 2d 295 (1948). Where multiple plaintiffs are involved and the Court finds that only one states a cause of action, dual misjoinder will not be found. Wetherton v. Whitford Motor Co., Inc., 240 N. C. 90, 81 S. E. 2d 267 (1954). See also Shelby v. Lackey, 236 N. C. 369, 72 S. E. 2d 757 (1952).

[76] Temple v. Watson, 227 N. C. 242, 31 S. E. 2d 738 (1947). The trial court sustained defendant's demurrer for failure to state a cause of action and overruled a demurrer for misjoinder of parties and causes. The Supreme Court held that, upon the sustaining of the demurrer on the first ground, there was nothing left to which the demurrer on the second ground could be directed.

amendment after a demurrer was interposed, but before a decision was made sustaining it.[77]

Another development in this area occurred with the case of *Teague v. Siler City Oil Co.*[78] There the trial court overruled defendants' demurrer for misjoinder of causes and parties and the Supreme Court reversed.[79] After the opinion was certified down but before final judgment, the trial court refused to hear plaintiffs' motion to amend, ruling that the Supreme Court decision on the demurrer operated to dismiss the action, thereby leaving the trial court without authority to hear a motion to amend. On appeal, the Supreme Court said that the effect of its reversal was not to sustain the demurrer, but to order the lower court to do so.[80] Therefore, the action was still pending, and the lower court could hear a motion to amend at any time before it rendered final judgment.

This is truly a nice distinction. It does no violence to purely technical concepts. The practical situation, however, is incongruous. If the lower court judge *correctly* (in the view of the Supreme Court) sustains the demurrer, no power to permit amendment exists in any court.[81] But if he incorrectly overrules the demurrer, and is corrected by the Supreme Court, there is power to permit amendment if the plaintiff's attorney acts in time. Perhaps plaintiffs' attorneys should be duly thankful for small technical favors; but elucidating the niceties of the distinction to the general public, which stubbornly harbors notions that everybody should be fed from the same spoon, is somewhat difficult.

Third Party Practice[82]

G. S. § 1-240 grants a defendant express authority to have an alleged joint tort-feasor joined for purposes of contribution.[83] No such right

[77] Sparks v. Sparks, 290 N. C. 715, 55 S. E. 2d 477 (1949); Walker v. Standard Oil Co. of New Jersey, 222 N. C. 607, 24 S. E. 2d 254 (1943); Campbell v. Washington Light and Power Co., 166 N. C. 488, 82 S. E. 842 (1914).

[78] 232 N. C. 469, 61 S. E. 2d 345 (1950).

[79] See Note, 29 N. C. L. Rev. 194 (1951).

[80] The Supreme Court may render final judgment, but the general practice is to send the case down with direction to the lower court to enter judgment in accordance with the decision on appeal. McIntosh, North Carolina Practice and Procedure in Civil Cases, § 694(6) (1929).

[81] "Whether decision of this Court affirming a judgment which sustains a demurrer for misjoinder of parties and causes cuts off the right to apply for leave to amend is not here presented. While decisions seem to answer in the affirmative, we leave the question without *obiter* comment." Teague v. Silver City Oil Co., 232 N. C. 469, 472, 61 S.E. 2d 345, 347 (1950).

[82] The discussion under this topic is related more clearly to the second than to the first Brandis article cited in note 1. However, no attempt will be made here to follow the organization of the second article or to deal with every subject it covered.

[83] Where a newspaper was sued alone for alleged libel, it was held that the newspaper was entitled to have joined, as a joint tort-feasor, an individual who allegedly composed the libelous matter and had it published as a paid advertisement. Taylor v. Kinston Free Press Co., 237 N. C. 551, 75 S. E. 2d 528 (1953). In Yandell v. Fireproofing Corp., 239 N. C. 1, 79 S. E. 2d 223 (1953), an employee of consignee

existed prior to the enactment of the statute, though it had long been recognized that a defendant could have a third party brought in on allegations of primary liability, and could demand judgment over against him for the full amount recovered by the plaintiff.[84] Such practice, of course, is still permitted, quite apart from G. S. 1-240.

For example, this principle was used to justify joinder in *Davis v. Radford*,[85] where a retailer who was sued for breach of an implied warranty that an article sold was fit for human consumption had his distributor joined as third party defendant. The cross-complaint alleged that the distributor had impliedly waranted that the article was fit for human consumption and was therefore primarily liable for injuries resulting from its breach. Likewise, where defendant was sued by an owner of adjacent property for damages resulting from excavation for a building on defendant's property, defendant was allowed to join and set up the primary liability of his contractor, predicated on the contractor's active negligence.[86]

On the other hand, where the suit was against a contractor for breach of contract on the ground that a roof had been defectively constructed, the defendant contractor was not permitted to have his subcontractor joined upon allegations that if the roof were defective, the subcontractor had failed to erect it in accord with specifications and was consequently liable to the plaintiff and defendant contractor.[87] The Court regarded G. S. § 1-240 as inapplicable since the contractor and subcontractor were not joint tort-feasors, and, of course, since the suit was for breach of a

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sued the initial and delivering carriers, and the agent charged with inspecting the freight car where injuries were received. Defendants were allowed to join the shipper who had loaded the car in an allegedly dangerous manner. In regarding the complaint as stating facts indicating concurrent negligence, the Court said: "Concurrent negligence consists of two or more persons, concurring not necessarily in point of time, but in point of consequence in producing a single, indivisible injury." *Id.* at 9-10, 79 S. E. 2d, 223, 229. The only initial liability of the added defendant in such case is on the cross-claim for contribution; therefore, unless plaintiff amends to seek judgment against him, it is error for the Court to enter judgment for plaintiff against the added defendant. Pascal v. Burke Transit Co., 229 N. C. 435, 50 S. E. 2d 534 (1948).

[84] See Brandis, *A Plea for Adoption by North Carolina of the Federal Joinder Rules*, 25 N. C. L. REV. 245, 263-68 (1947).

[85] 233 N. C. 283, 63 S. E. 2d 822 (1951). The fact that the cross-complaint alleged both negligence and implied warranty theories received little attention.

[86] Wright's Clothing Store v. Ellis Stone Co., 233 N. C. 126, 63 S. E. 2d 118 (1951).

[87] Gaither Corp. v. Skinner, 238 N. C. 254, 77 S. E. 2d 659 (1953). The Court did not mention either of the cases in notes 84 and 85, but cited Bd. of Education v. Deitrick, 221 N. C. 38, 18 S. E. 2d 704 (1942). There a general contractor, who had been sued for using green and defective lumber in a building, moved to join the lumber dealer from whom he had obtained the material. It was held that his motion was properly denied because there was no privity between plaintiff and the lumber dealer, and the contractor and lumber dealer were not joint tort-feasors. For a discussion of the case see Brandis, *supra* note 84, p. 265.

contract on which only the original defendant was liable, no issue of primary and secondary liability arose.

While there may be technical distinctions between this case and the *Davis* case,[88] there seems to be little practical reason for permitting the joinder in that situation while denying it here. Of course, in the *Davis* case, the plaintiff could have sued the third party defendant directly; but here, the Court also concedes that the plaintiff might have brought action directly against the subcontractor.[89] Moreover, in a subsequent action, the contractor could obviously look to the subcontractor for any damages paid the plaintiff which resulted from the subcontractor's negligence or breach of his contract. It would therefore seem that the ultimate rights as between the two parties should be determined in the one action. The similar factor of the *Davis* case was emphasized as a reason for permitting joinder.[90]

In order to bring in an additional defendant, either under G. S. §1-240 or under allegations of primary liability a defendant must allege facts sufficient to indicate that both defendants, are or may be liable to plaintiff,[91] and that plaintiff, by timely assertions, could claim rights against the party added.[92] Hence, it follows that where the defendant alleges only that the negligence of another defendant was the sole proximate cause of plaintiff's injury, the cross-action will not be sustained.[93] The

[88] In the *Davis* case, the retail dealer alleged that he purchased the article from the distributor in sealed container under a warranty of wholesomeness, and that he sold to the consumer with the same warranty. In the instant case, there were clearly two contracts involved and the subcontractor was not liable on the contract upon which plaintiff sued.

[89] The Court indicated that plaintiff could have sued the subcontractor as a third party beneficiary to the contract between the defendant and subcontractor.

[90] It is possible to interpret the *Skinner* case as involving only affirmance of a *discretionary* refusal by the judge below to add a new party. If this is the correct interpretation, then the judge would also be sustained if he added the new party.

[91] Hayes v. Wilmington, 243 N. C. 525, 81 S. E. 2d 673 (1956); Kimsey v. Reaves, 242 N. C. 721, 89 S. E. 2d 386 (1955); Potter v. Frosty Morn Meats, Inc., 242 N. C. 67, 86 S. E. 2d 780 (1955); Hobbs v. Goodman, 240 N. C. 192, 81 S. E. 2d 413 (1954).

[92] Thus, in an action for the wrongful death of a child, a defendant may not have the mother of the child joined upon allegations of ordinary negligence, because had the child lived he would have had no right of action against the mother. Billings v. Taylor, 243 N. C. 57, 89 S. E. 2d 743 (1955). See also Hayes v. Wilmington, 239 N. C. 238, 79 S. E. 2d 792 (1954); Hobbs v. Goodman, *supra* note 91.

The Workmen's Compensation Act abrogates all common law liability of a covered employer to employee for an injury by accident in employment. Consequently, a defendant who is sued for negligently inflicting a compensable injury upon an employee cannot have the employer joined under G. S. § 1-240 or upon allegations of primary liability. Hunsucker v. High Point Chair Co., 237 N. C. 559, 75 S. E. 2d 768 (1953); Lovette v. Lloyd, 236 N. C. 663, 73 S. E. 2d 886 (1953); Bass v. Ingold, 232 N. C. 295, 60 S. E. 2d 106 (1950).

[93] Kimsey v. Reaves, 242 N. C. 721, 89 S. E. 2d 386 (1955); Potter v. Frosty Morn Meats, Inc., 242 N. C. 67, 86 S. E. 2d 780 (1955); Hayes v. Wilmington, 239 N. C. 238, 79 S. E. 2d 792 (1954). Normally, the defendant asserts claims against codefendant *X* on a contingent basis, alleging: (1) no negligence on defendant's part; (2) that plaintiff's injury was caused solely by the negligence of *X;* (3) that, if defendant is found liable to plaintiff, *X's* negligence concurred with

same is true where the cross-claim alleges facts which indicate the co-defendant is only secondarily liable to the claiming defendant.[94]

In *Hayes v. Wilmington*,[95] both objections appeared applicable to defendant's pleadings. The cause arose when plaintiff's intestate was killed by a gas explosion in the plaintiff's home. Action was brought against the city and certain contractors, upon allegations that excavating machines of one of the contractors had struck gas pipes underneath the surface of the ground, causing the explosion. The contractor sought to have the power company which owned the gas pipes brought into the case on the ground that it was negligent in (1) installing pipes too near the surface of the ground; (2) failing to lower then upon notice of the planned excavations; and (3) failing to install properly a meter and governor at the plaintiff's residence. It was further alleged that the negligence of the power company was the sole proximate cause of the intestate's death. The trial court granted the motion of the power company to strike its name, and the Supreme Court affirmed on the ground that no allegations of concurrent negligence were contained in the cross-claims. The Court further found that the allegations of the contractor, when related to those of the plaintiff, indicated that any negligence of the power company was only passive and consequently secondary to that of the contractor. The power company was subsequently brought back into the case after the contractor's answer was amended to include a cross-claim containing allegations of concurrent negligence. The trial court once again granted the power company's motion to strike its name. However, the Supreme Court reversed, with the majority being of the opinion that the amended complaint stated a cause of action against the power company for contribution.[96] The portion of the prior opinion dealing with the primary negligence of the contractor was regarded as *obiter dictum*.[97]

A rather unusual use of G. S. § 1-240 was attempted in the case of

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his in producing plaintiff's injury and he is entitled to judgment against *X* for contribution. See, approving such pleadings, Hayes v. Wilmington, *infra* note 96; Read v. Roofing Co., 234 N. C. 273, 66 S. E. 2d 821 (1951). A similar form is used in alleging primary liability and seeking indemnification, and no reason appears why contribution and indemnification could not be sought in the alternative.

[94] Hayes v. Wilmington, 239 N. C. 238, 79 S. E. 2d 792 (1954).

[95] *Ibid.*

[96] Hayes v. Wilmington, 243 N. C. 525, 91 S. E. 2d 673 (1956).

[97] In a strong dissenting opinion, Chief Justice Barnhill regarded the judgment in the previous case as having been based on the conclusion that the negligent acts of the original defendants had insulated those of the power company. He further dissented on the ground that the original appeal was from the trial court's action in granting a motion to strike, in which case the judgment of the Supreme Court became final when defendants failed to petition for a rehearing. "On the original appeal all parties treated the motion just as it was—a motion to strike. The majority now seek to make it a demurrer ore tenus so as to justify the novel procedure adopted to reverse the original opinion without saying so." Hayes v. Wilmington, 243 N. C. 525, 544, 91 S. E. 2d 673, 690 (1956).

Fleming v. Carolina Power and Light Company.[98] Action was brought to recover for the loss of a warehouse caused by the defendant's alleged negligence. Defendant answered *inter alia* that plaintiff was a joint tort-feasor; brought in insurers of third parties who had sustained losses as a result of the fire; and set up a cross-action against plaintiff for contribution. The trial court allowed the joinder; however the Supreme Court reversed, holding that G. S. § 1-240 does not authorize such procedure in order to force third parties to prosecute their claims in plaintiff's action.[99]

While this article is not concerned with the problem of *res judicata,* brief mention may be made of some significant principles as they apply to the third party practice field.[100] It is clear that where a plaintiff seeks no affirmative relief from a party who has been joined for the purpose of contribution, a judgment for the original defendant does not preclude the plaintiff from subsequently suing the party so joined.[101] It would also follow that a plaintiff may join two tort-feasors whose negligence as between themselves has been determined in a former action. But where only one defendant is sued and another is brought in solely for contribution, any prior judgment pertaining to the issue of negligence between the two defendants may properly be pleaded as res judicata.[102]

Consolidation

The consolidation device affords at least minimum relief from our strict joinder statutes. In effect, it allows a trial judge to consolidate independent actions involving the same parties and the same subject matter if no prejudicial or harmful complications will result therefrom.[103] Its purpose is to avoid multiplicity of suits and unnecessary costs and delays;[104] however, it cannot be said to be an effective substitute for free joinder.

The Court itself recognizes that consolidation is not the equivalent of joinder, but quite properly takes the position that the existence of the consolidation power does not justify disregard of the joinder statutes.[105]

[98] 230 N. C. 65, 50 S. E. 2d 45 (1949).

[99] The defendant's counterclaim and cross-action alleged a type of "squeeze play" whereby insurers were attempting to foreclose defendant's defenses in a single action or coerce it into making compromise settlements in order to avoid the harassment and expense of having to defend a multiplicity of actions.

[100] For a more thorough discussion of the res judicata doctrine, see Leonard, *Pleading and Proving the Defense of Res Judicata in North Carolina.* 34 N. C. L. Rev. 458 (1956).

[101] Powell v. Ingram, 231 N. C. 427, 57 S. E. 2d 315 (1950).

[102] Tarkington v. Rock Hill Printing Co., 230 N. C. 354, 53 S. E. 2d 269 (1949).

[103] Peoples v. Seaboard Air Line R. R., 228 N. C. 590, 46 S. E. 2d 649 (1948).

[104] *Ibid.*

[105] "Had appellant elected to institute a separate and independent action against plaintiff and the corporate defendant, the trial judge, in his discretion could have consolidated the two actions for trial. This is a roundabout way to the same end appellant seeks to accomplish here. Nevertheless, the statute does not permit the joinder of the two causes as a matter of right." Barnhill, J., in Wrenn v. Graham,

Occasionally, however, its existence is used as a minor make-weight in a decision sustaining joinder.[106]

There is perhaps a suggestion in one case[107] that consolidation should not ordinarily be used when there are issues not common to all the causes. There the actions, against the same defendant, were brought by the driver of a car and his passengers. Because his case alone included an issue of contributory negligence, the Court said it would be better to try his case separately. The lower court judgment was reversed because the judge's charge was found to be conflicting, and this is what motivated the Court's observation. However, such narrow use of consolidation would worsen rather than better our situation. Though one judge, in a particular case, had difficulty in giving the jury clear instructions, it does not follow that judges in general will have difficulty in doing so. While permissible complexity is certainly not infinite and lines must be drawn somewhere,[108] this situation was not particularly complex,[109] and trial convenience and efficient use of the court's time both favor continued consolidation of such cases. And the opinion does not seem to indicate that a judge ordering such consolidation would be reversed for abuse of discretion.

CONCLUSION

The last ten years have produced no changes in the basic joinder statutes and no significant new departures in judicial interpretation of those statutes. A few cases reflect a more technical approach than our Court brought to joinder problems in the past, and a few reflect a less technical approach. Perhaps the cases reflecting a more technical approach slightly outnumber the less technical ones; but there is no clear trend in either direction.

Both the number and the character of joinder cases being steadily presented indicate that more and more attorneys are seeking (and often failing) to accomplish joinder which is clearly permissible in jurisdictions where the procedural system has been overhauled and modernized. Per-

236 N. C. 719, 722, 74 S. E. 2d 232, 234 (1953). (The authors have heretofore taken issue with the interpretation placed on the joinder statutes in this case, but they do not criticize the principle stated as to the relation between statutory joinder and statutory consolidation.)

[106] "Should we order a severance and require Clifford Grant and H. E. Grant to institute independent actions, the court below would have authority to, and probably would, order a consolidation for trial . . . why march up the hill just to march down again?" Barnhill, J., in Grant v. McGraw, 228 N. C. 745, 747, 46 S. E. 2d 849, 851 (1948).

[107] Dixon v. Brockwell, 227 N. C. 567, 42 S. E. 2d 680 (1947).

[108] *Cf.* the comments, *supra* under "Rules Apply to Defendant's Pleadings."

[109] Grant v. McGraw, quoted in note 102, involved the same issues as were involved in Dixon v. Brockwell, *supra*, note 103. There is no suggestion in the Grant opinion that separate trials should be had.

haps there will one day be enough of them to bring to bear effective pressure from the bar, obviously lacking heretofore, to put North Carolina in line with the modern trend. Meanwhile, although handicapped by the restrictive provisions of our statutes, our Court could bring us closer to the modern trend by removing those restrictions not plainly dictated by the statutes.