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Recent Pleading Reforms in California

EXPERIENCE in England and in this country points to the fact that the procedure under which the courts operate is an important matter. That too little attention was given this question in a long period of our history is common knowledge. Likewise it is common knowledge that perfection has not yet been attained. Much yet remains to be done in this important field of law. Whether it shall be done by rules of court or by legislative enactments is perhaps an open question. The duty, however, of seeing that the best possible procedure is employed rests upon the legal profession. This is a duty the profession owes to society and no matter how it is to be done, the lawyer must bear the burden. Rules of pleading, practice, and evidence, are practical matters. They are good if they work. Whether they will work can only be known from experience. They are so closely related to substantive law, which is ever changing, and ever being applied to new and complicated factual situations, that changes in the law of procedure must be made from time to time. It is unthinkable that rules of procedure can be framed for all time. The task of making and re-making them is not an easy one. On the contrary it is a difficult task requiring the best thought and the most painstaking efforts of the profession. These rules should be simple, readily understandable, and so framed that they will work fairly for the litigants, inform the courts of the problems to be solved, and reduce the expense of the administration of justice to the minimum consistent with an adequate investigation and settlement of the controversy. In fact only the legal profession seems qualified to perform this service because qualification seems largely to depend upon legal learning and experience with the administration of justice. The recently established Judicial Council and the State Bar of California have great opportunities, and the people of this state can well expect progress in the legal system, both in substantive and procedural law.

Some very significant changes in pleading were made in California by the Legislature in 1927. These changes are the subject of this article.

THE ANSWER

An important change in pleading was made by an amendment to section 437 of the Code of Civil Procedure. In this section there is defined the manner in which the complaint may be answered.

Before the adoption of the amendment of 1927 a defendant was not permitted to file a general denial to a verified complaint, nor a qualified general denial, i. e. an answer that admits some allegations of the complaint and generally denies all others not admitted.

The amendment evidently was passed to enable a defendant to deny without being limited to the specific denial.

When the complaint is verified a general denial to the entire complaint is not authorized by the amendment. On the contrary, by implication, it seems to be prohibited, as that part of the section was retained which provides: "If the complaint be not verified a general denial is sufficient," etc.

The amendment, however, provides that a defendant may deny all the allegations in a specific paragraph, or paragraphs, or a part, or parts of the complaint. It is provided: "The denial of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint."

A defendant, therefore, seems to be relieved of the duty to deny specifically every allegation in a complaint that he desires to put in issue, yet, it seems, he may, by designation of every paragraph, or every part of the complaint, deny every allegation in the complaint and thereby accomplish the same end that could be accomplished were he permitted to file a general denial. By force of this amendment he will be able to avoid the pitfalls involved in framing specific denials, for example the negative pregnant.

In many instances it will be neither desirable nor prudent to deny every allegation in the complaint and it will be quite convenient, and in furtherance of simplicity in pleading, for the defendant to be able to deny only those portions of the complaint that contain allegations that involve the questions of fact as to which the litigants do not agree. Any change that will accomplish this, or tend to accomplish it, seems desirable. The main purpose of pleading is to arrive at the issues, and that system would seem best which leaves for trial only those matters of importance that are actually in dispute. Much time and labor may be saved by members of the bar, in many cases, if care is exercised in restricting the denials to those paragraphs or

parts of the complaint that contain the allegations of fact that are decisive and are truly disputed.

The amendment in effect states that the defendant may employ a qualified general denial. It provides that he may controvert the complaint in the manner above pointed out, or may do so "by express admission of certain allegations of the complaint with a general denial of all the allegations not so admitted."

Additional latitude is given defendant in that he is now permitted to deny part of the allegations of the complaint upon information and belief, or for lack of information or belief, followed by a general denial of all allegations not so denied or admitted. It is highly probable that this method of answering is still available to defendant where the complaint is not verified.¹ This method should be held available, though the section as it stands may not escape attempts to have it construed to mean that since the amendments of 1927 qualified general denials are permitted only where the complaint is verified.

The amendment seems to further simplicity in pleading without sacrifice of the objects sought to be accomplished by written pleadings of the kind required by the code, viz. the production of issues of law and fact, so that the judge and the litigants, in advance of the trial, may know the essentials of the controversy.

COUNTERCLAIMS

Section 438 relating to counterclaims was very materially changed by amendment in 1927. The clearest language to accomplish the change may not have been chosen, yet the intent of the legislature seems sufficiently clear to warrant the conclusion that a defendant is now permitted to file counterclaims that were not permitted under the section as it previously stood. The amended section, in part, provides that "The counterclaim mentioned in section 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor

¹ *Levinson v. Schwartz* (1863) 22 Cal. 229; *Hensley v. Tartar* (1860) 14 Cal. 508; *Stewart v. Street and Co.* (1858) 10 Cal. 373. These cases hold that qualified general denial is permitted where the complaint is not verified.

There is some conflict in the decisions as to whether a qualified general denial is permitted under a code which does not specifically authorize it but states defendant may answer by either general or specific denial. *Burley v. German-American Bank* (1884) 111 U. S. 216, 28 L. Ed. 406, 4 Sup. Ct. Rep. 341; *Kingsley v. Gilman* (1867) 12 Minn. 515; *Dezell v. Fidelity & Casualty Co. of N. Y.* (1903) 176 Mo. 253, 75 S. W. 1102; *Long v. Long* (1883) 79 Mo. 644; *Seffert v. Northern Pacific R. Co.* (1907) 49 Or. 95, 88 Pac. 962, 13 Ann. Cas. 883 and note.

of a defendant and against a plaintiff between whom a several judgment might be had in the action," etc.²

Previous to the amendment section 438 contained other specific limitations upon the counterclaim. A defendant before the amendment might only file, as is usual in the codes of most states, a counterclaim which arose out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or one connected with the subject of the action;³ and, when plaintiff sued upon a contract, defendant might file a counterclaim also upon a contract, if his cause of action existed at the commencement of plaintiff's action. The kind of counterclaim that defendant might file was obviously limited.

The only limitation of the counterclaim now remaining is that the counterclaim must tend to diminish or defeat plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment may be had. It therefore seems possible for defendant under this section, as amended, where plaintiff sues for personal injury, due to negligence, to file a counterclaim upon a debt, for example, or for a personal injury that defendant received at some other time, though there exists no connection whatsoever between the counterclaim and the cause of action set forth in the complaint.

Weighty objections may be made to a system of pleading that enables a defendant to file any kind of counter action against a plaintiff, subject only to the limitation that the relief he seeks must be such that it will tend to diminish or defeat plaintiff's recovery, and such that there can be rendered a judgment in his favor and against a plaintiff in the suit, if the action set forth in the complaint and the counterclaim in all cases, must be submitted to the same jury. To

² For cases involving the limitations see the following: *Stockton, etc. Society v. Giddings* (1892) 96 Cal. 84, 90, 30 Pac. 1016; *Wood v. Brush* (1887) 72 Cal. 224, 13 Pac. 627; *Roberts v. Donovan* (1886) 70 Cal. 108, 11 Pac. 599; *Chase v. Evoy* (1881) 58 Cal. 348; *Belleau v. Thompson* (1867) 33 Cal. 495; *Bartlett Estate Co. v. Fraser* (1909) 11 Cal. App. 373, 105 Pac. 130.

³ Statutes containing these qualifications generally prevail in the code states. Surely more apt language could have been employed to define the nature of the counterclaim. A casual study of the cases will reveal that the phrases "transaction set forth in the complaint," "foundation of plaintiff's claim," "connected with the subject of the action," have proven to be the source of much confusion. There is considerable conflict in the decisions of various state courts and also lack of harmonious interpretation and application in the decisions of courts of the same state as to the meaning of these phrases. *Meyer v. Quiggle* (1903) 140 Cal. 495, 74 Pac. 40; *Gregory v. Clabrough's Exr.* (1900) 129 Cal. 475, 62 Pac. 72; *The Story & Isham Com. Co. v. Story* (1893) 100 Cal. 30, 34 Pac. 671; *Macdougall v. Maguire* (1868) 35 Cal. 274; *Kinsman v. Stanhope* (1914) 50 Mont. 41, 144 Pac. 1083, L. R. A. 1916C, 443 and note at p. 445; *Scott v. Waggoner* (1914) 48 Mont. 536, 139 Pac. 454, L. R. A. 1916C, 491 and note at p. 497; *Wrege v. Jones* (1904) 13 N. D. 267, 100 N. W. 705, 3 Ann. Cas. 482 and note.

say nothing of the difficulties that might be the judge's, where two or three unrelated suits are tried together, such as rulings upon evidence, instructions, etc; the difficulties for the jury, who must keep the evidence and the instructions separated, seem much greater than can be sustained by twelve laymen called from various walks of life to settle disputed questions of fact and apply rules of law with which they are probably quite unfamiliar. One may well question the point of view that involves placing heavier duties upon the jury. The amendment, however, contains a proviso that is highly desirable and should have careful consideration by the trial courts. At the end of the amended section it is stated that "the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff." This is a wise proviso to so broad a counterclaim statute. Many situations will readily occur to the reader where the utmost confusion may result if several complicated and hotly contested cases are tried together before the same jury. On the other hand two or more—not many more—simple cases may be tried together before the same jury. In cases where there is no jury there is much less objection to trying together several complicated actions. Whether the amended section will further the administration of justice will largely depend upon the wisdom of the trial judges in administering the new rule.

The amended section also provides that the right to counterclaim shall not be affected by the fact that "plaintiff's or defendant's claim is secured by mortgage or otherwise," or by the fact that the action or counterclaim is brought "for the foreclosure of such security."

This provision was made, no doubt, to change the law as declared by the courts in decisions construing the counterclaim section as it stood before the amendment.⁴

PARTIES PLAINTIFF

Far reaching changes also were made by the 1927 amendments to the Code of Civil Procedure relating to parties to civil actions. Unquestionably the new rules as to parties, plaintiff and defendant, are much more liberal by reason of the recent amendments.

The precise limits of the new and larger field are not easy to define. A prediction, however, may safely be made that several years will elapse, and many cases will come up for decision, before the scope of the new provision will be determined.

⁴ Moore v. Gould et al. (1907) 151 Cal. 723, 91 Pac. 616; McKean v. German American Savings Bank (1897) 118 Cal. 334, 340, 50 Pac. 656.

Section 378, as amended in 1927, states the new rule as to permissive joinder of parties plaintiff. It reads as follows:

"All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action; *provided*, that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled."^{4a}

An obvious and important change is made by the language which states that all persons may be joined as plaintiffs who are alleged to have any right to relief "in respect to or arising out of the same transaction or series of transactions . . . whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action." This is much broader language than was contained in the section before amendment, which in substance, provided that all persons might be joined as parties plaintiff who were interested in the subject of the action and in the relief demanded.

The new section is very similar to provisions contained in the statutes of New York and New Jersey and the rule of the English Supreme Court.⁵

^{4a} Amendment approved May 9, 1927; Cal. Stats. 1927, p. 631.

⁵ New York Civil Practice Act, 1920, § 209; New Jersey Laws, 1912, c. 231, § 4, p. 378; Rules of the Supreme Court (England) Order 16, rule 1, 1896, The Annual Practice, 1927, p. 201.

The New York act permits the joinder of plaintiffs "in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise." N. Y. Civil Practice Act, 1920, § 209.

The New Jersey act provides: "Subject to rules, all persons claiming an interest in the subject of the action and in obtaining the judgment demanded, either jointly, severally, or in the alternative, may join as plaintiffs, except as otherwise herein provided. And persons interested in separate causes of action may join if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions."

The English rule provides as to joinder of plaintiffs that all may join "in whom any right to relief in respect of or arising out of the same transaction, or series of transactions, is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise" etc.

Also the New York act and the English rule provide that if the joinder may "embarrass or delay the trial of the action" the court may order separate trials or make other expedient orders.

See n. 22, *infra*, for the full text of the English rule.

In New York, by virtue of this "new and rather revolutionary provision," as it was characterized by Chief Justice Hiscock, 193 plaintiffs, each claiming to have a separate cause of action, were permitted to sue several defendants, whom they alleged had made common false representations to induce each plaintiff to purchase shares of stock in a corporation that defendants had organized.⁶ It was said that though all the questions involved were not the same as between defendants and all the plaintiffs yet the "common issues are basic, and would seem to be the ones around which must revolve the greatest struggle, and to which must be directed the greatest amount of evidence," viz. representations made, so it was alleged, "with the deliberate intent to cheat and defraud the public into buying the stock at an unconscionable value."

In New Jersey it has been held, by reason of the broad provisions of the practice act, that twelve plaintiffs might join in an action for injury to the separate property of each caused by a fire and explosion due to defendant's negligence.⁷

⁶ *Akely et al. v. Kinnicutt et al.* (1924) 238 N. Y. 466, 144 N. E. 682. Defendants' attack upon the act as unconstitutional on the ground that it deprived them of the right to separate jury trials as to each distinct cause of action of each plaintiff was held not well founded. The court said: "The statute is a remedial one in promotion of the purpose in these times so insistent and widespread that the delays and expenses of litigation shall be lessened where possible, and as such it is to be liberally construed." The result was reached without specific reference to the section of the New York act relating to joinder of causes of action. This question will be noticed later in connection with the discussion of the joinder of parties defendant.

In *Delnorth et al. v. Yellow Taxi Corp.* (1926) 127 Misc. Rep. 543, 216 N. Y. Supp. 513, it was held five plaintiffs might join in an action for damages for personal injuries alleged to have been sustained by reason of the negligence of defendant. See also *Fleitmann & Co., Inc. v. Colonial Finance Corp.* (1922) 203 App. Div. 827, 197 N. Y. Supp. 125.

⁷ *Metropolitan Casualty Co. v. Lehigh Valley R. Co.* (1920) 94 N. J. L. 236, 109 Atl. 743. Twelve separate actions for damages were brought. They were ordered consolidated by the trial judge and tried before the same jury. The plaintiffs recovered. The injury to each plaintiff was caused by a fire and explosion for which defendant was held liable. The consolidation was sustained because it was concluded that the twelve plaintiffs might have joined in a single action. The following extract from the opinion (at p. 238) shows the broad meaning given "transaction": "This language perhaps is not apt to accurately describe the fire and explosion which occurred in this case 'as a transaction or series of transactions.' But the Legislature has expressly enjoined a liberal construction of the statute to the end that legal controversies may be speedily and finally determined according to the substantive rights of the parties. The order was one of procedure. Under a liberal construction of the statute, we think the order of consolidation made by the trial judge was not error. But it is argued, not without some force, that the words 'transaction or series of transactions' do not include torts, but refer to contracts, business, and the like. While this may be the primary signification of the word, yet it is broader and more comprehensive. It is synonymous with 'act,' 'action,' 'affair,' 'business,' and the like. Standard Dict. It is a term broader than 'contract.' Contract is a transaction, but a transaction is not necessarily a contract."

In England it has been held, by virtue of Order 16, rule 1, that several plaintiffs might join in an action against directors of a corporation for loss alleged to have been sustained by each plaintiff, individually, by reason of untrue statements in a prospectus on the faith of which each plaintiff subscribed and paid for certain debentures.⁸

So also the plaintiffs, the Universities of Cambridge and Oxford, were permitted to join in an application for an injunction to restrain defendants from publishing and selling books bearing the titles "The Oxford and Cambridge Publications," where it was claimed the public was being misled to believe the publications in question came from the presses of the plaintiffs. Some publications were issued jointly by the presses of Oxford and Cambridge while in many instances each university press issued its own publications. It was held the action might be maintained by the two universities in respect to their joint interest and also in respect to their separate interests.⁹

Having decided that "transaction" includes the doing of wrongful acts that give rise to tort actions, the courts may well hold that "transaction," or "series of transactions," includes contractual relations. The situation easily may be supposed, and soon will arise, where a defendant has entered into a great number of contracts of the same kind with many plaintiffs where a common question of law, or fact, exists. No reason is seen why joinder of plaintiffs, who have made separate contracts, should not be permitted. "Transaction," given the broad meaning of doing or performing any act that

See *Fidelity & Deposit Co. of Maryland et al. v. Lehigh Valley Co.* (1921) 275 Fed. 922, an action by thirteen plaintiffs growing out of the explosion at the Black Tom Terminal. The verdict was for defendant.

⁸ *Drincqbier v. Wood* [1899] 1 Ch. 393. Byrne, J., (at p. 397):

"I do not consider that the word 'transaction' in the rule necessarily implies something taking place between two persons as, e. g., where a collision between two ships causes damage, or houses are shaken down by a traction-engine passing along a highway; it is perfectly true that to establish their respective rights to relief the plaintiffs must prove their title on distinct evidence. But when each plaintiff has proved his title there is a common ground of action, namely, the loss to the plaintiffs caused by the defendants issuing the prospectus."

See also *Bedford v. Ellis* [1901] App. Cases 1; *Walters v. Green* [1899] 2 Ch. 696; *Stroud v. Lawson* [1898] 2 Q. B. 44.

And see *Thomas et al. v. Moore et al.* [1918] 1 K. B. 555, where the court sanctioned the joinder of eight plaintiffs in an action against six defendants for defamation. Plaintiffs were members of the National Union of Railwaymen and defendants the Associated Society of Locomotive Engineers and Firemen. Plaintiffs were defamed by defendants in speeches and a magazine article in a controversy as to a war bonus to railwaymen. The case was heard before Darling, J. and a jury. Upon the verdict of the jury judgment was given in favor of each plaintiff and against each defendant in a specific sum.

⁹ *Universities of Oxford and Cambridge v. George Gill & Sons* [1899] 1 Ch. Div. 55.

gives rise to a cause of action, will include legal wrongs of all kinds.

The meaning of the provision that plaintiffs may join if entitled to relief, in respect to or arising out of the same transaction, or series of transactions, whether jointly, severally, or in the *alternative* is not so obvious. It seems to mean that where it is uncertain which of two or more plaintiffs is entitled to recover they may join, if the other requirements of the statute exist. An appellate decision of the Supreme Court of New York, however, declined to give it this meaning without suggesting what was meant¹⁰ by the term "in the alternative."

This provision is found in the New York and New Jersey statutes, and in the English rule.¹¹

PARTIES DEFENDANT

Three new sections were added in 1927 to the Code of Civil Procedure relating to joinder of parties defendant, viz. sections 379a,¹² 379b,¹³ 379c.¹⁴ Statutes corresponding to these were adopted in New York in 1920.¹⁵ The New York statutes were again based upon the English practice act.¹⁶ In New Jersey there may be found a statute somewhat similar to section 379a of the California Code.

¹⁰ Olsen et al. v. Bankers' Trust Co. (1923) 199 N. Y. Supp. 700. This was a suit by the payee and the maker of a certified check against defendant bank that certified it. A forgery had been committed after the check left the maker's hands and as a result thereof the bank paid some unauthorized person. The majority of the court held the claims of plaintiffs were not alternative but that they were "mutually destructive. If one plaintiff proves his right to recover, the other's claim must perforce be entirely extinguished." Two judges dissented saying the facts alleged showed "a liability in the alternative." The English cases cited in the dissenting opinions seem not in point. See note upon Olsen et al. v. Bankers' Trust Co. in 33 Yale L. J. 328 (1924).

¹¹ See n. 5, supra.

¹² Section 379a. "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative; and judgments may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities." (New section added April 27, 1927; Cal. Stats. 1927, p. 477.)

¹³ Section 379b. "It shall not be necessary that each defendant shall be interested as to all relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest." (New section added April 27, 1927; Cal. Stats. 1927, p. 478.)

¹⁴ Section 379c. "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties." (New section added May 9, 1927; Cal. Stats. 1927, p. 631.)

¹⁵ New York Civil Practice Act, §§ 211, 212, and 213. See Civil Practice Manual, New York, prepared by Edward H. Wilson; Parsons' Practice Manual, New York, Annotated, 1921, p. 86.

¹⁶ Order 16, rules 4, 5, and 7. See The Annual Practice, 1927, pp. 227, 231.

The New Jersey act does not contain sections corresponding to sections 379b, and 379c, *supra*, but in addition to language very similar to the language of section 379a, *supra*, it provides for the joinder of separate causes of action against several defendants if the causes contain a common question of law or fact and arose out of the same transaction or series of transactions.¹⁷

Problems of interpretation immediately are suggested by the English, New York and California provisions. The thought that comes first to mind is, do these provisions authorize the joinder by a plaintiff or plaintiffs of separate causes of action that previously was not permitted? Two English cases decided by the House of Lords held that their rules, as originally written, related only to the joinder of parties.¹⁸

In *Smurthwaite v. Hannay*,¹⁹ sixteen separate holders of bills of lading, in one action, sued ship owners for non-delivery of bales of cotton. It was held the rules relating to joinder of parties defendant, and rule 1, Order 16, relating to joinder of parties plaintiff, referred to in connection with the discussion of joinder of parties plaintiff,²⁰ did not authorize the joinder of the sixteen separate causes of action. In *Sadler v. Great Western Railway Co.*²¹ a similar holding was made where a single plaintiff sued two defendants for damages and for an injunction, for separately, and jointly obstructing the access to plaintiff's premises. The plaintiff prayed for judgment for £5,000 damages against each defendant. These decisions led to the amendment in 1896 of rule 1 of Order 16.

Doubtless the language employed in amending rule 1 of Order 16 gave weight to the argument that separate actions might be united in one complaint by several plaintiffs, though the rule purports to deal primarily with the question of parties. As amended the rule provides that all may join as plaintiffs in whom any right to relief is alleged to exist, whether jointly, severally or in the alternative, "in respect of or arising out of the same transaction or series of transactions . . . where if such persons brought separate actions any

¹⁷ N. J. Laws, 1912, c. 231, § 6, p. 378. "Subject to rules, any person may be made a defendant, who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, adverse to the plaintiff, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein.

"The plaintiff may join separate causes of action against several defendants if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions."

¹⁸ *Sadler v. Great Western Ry. Co.* [1896] A. C. 450; *Smurthwaite v. Hannay* [1894] A. C. 494.

¹⁹ *Supra*, n. 18.

²⁰ See n. 22, *infra*.

²¹ *Supra*, n. 18.

common question of law or fact would arise."²² It seems certain, however, that more appropriate provisions might have been enacted to make it clear that the causes of action involved might be united. The words "severally," "series of transactions," "separate actions," most strongly indicate that the rule, if it is to mean much—is to include many new situations—must be construed to include cases where there are several distinct and separate *causes of action*. No doubt much difficulty might have been avoided had the rule relating to joinder of causes of action been written so as definitely to provide for the joinder of any number of separate causes of action arising out of the same transaction, or series of transactions, against persons jointly, severally, or alternatively liable, where a common question of law or fact would arise. This was not done by the English Court. Order 18, rules 1 to 9, inclusive, relating to joinder of causes of action were not amended,²³ and, as had been held by Lord Herschell, L. C., in *Smurthwaite et al. v. Hannay et al.*, Order 18 did not authorize the joinder of separate and distinct causes of action arising out of different transactions though a common question of law or fact be involved.

The English cases decided since the amendment to rule 1 of Order 16 are not altogether clear and harmonious, though it seems to be the prevailing opinion that this rule, as amended, deals with and provides for the joinder of causes of action, though Order 16 in the main, as stated, relates to the subject of joinder of parties. The cases referred to above, under the heading "Parties Plaintiff," seem also to support this view.²⁴

The following English cases are of interest. In 1899 it was held, by the Court of Appeal, that a plaintiff could not maintain a single

²² Order 16, rule 1, as amended in 1896, reads as follows: "All persons may be joined in one action as plaintiffs, in whom any right to relief [in respect of or arising out of the same transaction or series of transactions] is alleged to exist, whether jointly, severally, or in the alternative [where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such other order as may be expedient], and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief unless the court or a judge in disposing of the costs shall otherwise direct."

The words in brackets are those that were added in 1896. This is the same language that was employed in 1927 in amending section 378 of the California Code of Civil Procedure.

²³ *The Annual Practice*, 1927, p. 314.

²⁴ *Bedford v. Ellis* [1901] A. C. 1; *Walters v. Green* [1899] 2 Ch. 696; particularly *Drincqbier v. Wood* [1899] 1 Ch. 393; *Universities of Oxford and Cambridge v. Gill* [1899] 1 Ch. 55.

action against the London County Council for negligently excavating near plaintiff's house, thereby damaging it, and The New River Company, a water company, for leaving a water main insufficiently stopped, from which water escaped and caused the damage.²⁵ It seems very doubtful whether there was a common question of law or fact as to the two defendants in this case.

The opinion of the Court of Appeal stresses the point that rule 1 of Order 16, according to the interpretation of the House of Lords, does not provide for the joinder of separate tort actions. A. L. Smith, L. J., said:

"The London County Council is sued on the ground that they have by their excavations let the plaintiffs' house down, and, if the water company is to be sued, it is for allowing water to get out of their main by which the plaintiffs' house was let down. There is no joint tortfeasance between the two. The question is, Who let down the plaintiffs' house? Now, I take the law to be settled by the House of Lords that Order XVI has relation to the joinder of parties, and not to the joinder of causes of action."

Perhaps a different attitude upon this question is found expressed by the Court of Appeal in 1910 in *Compania Sansinena etc. v. Houlder Bros. Ltd. et al.*²⁶ That was an action against two defendants for failure to properly transport frozen meat from Buenos Aires to Europe. The contract with plaintiff was made by one defendant to carry the meat on its steamers or other suitable steamers. The other defendant was engaged by the first described defendant to transport part of the meat. It was held the action could be maintained against both defendants.

Vaughan Williams, L. J., refers to rule 1 of Order 16, but seems to base his opinion upon the ground that the steamship companies

²⁵ *Thompson et al. v. The London County Council* [1899] 1 Q. B. 840. See E. W. Hinton, "An American Experiment with the English Rules of Court," 20 *Illinois L. Rev.* 533, 541 (1926), wherein, commenting on *Thompson et al. v. The London County Council*, *supra*, he says: "In a very loose sense there might be said to be a common question of fact, namely, what caused the collapse of the building. But in an accurate sense the question in the two cases would be quite different. In the claim against the county the sole question would be whether the excavation caused the damage. Proof of any other cause would be proper to rebut the claim, and to that extent the effect of the leaking water pipe would be involved. In the case against the water company the effect of the leaking water would be directly involved, and in an incidental way, the effect of the excavation. Under a liberal construction the joinder might have been allowed."

See also *Pope v. Hawtrey et al.* (1901) 85 L. T. (Court of Appeal), wherein it was held plaintiff could not maintain an action for an alleged slander spoken by H on one occasion and by D on another occasion.

²⁶ [1910] 2 K. B. 354.

were in the relation of principal and agent and that a joint responsibility existed. This view made it unnecessary to determine whether rule 1 of Order 16 permits the joinder of distinct causes of action that involve a common question of law or fact. The opinion of Fletcher Moulton, L. J., contains a discussion of the meaning of rule 1. He points to the amendments made in 1896 and concludes: "The terms of this rule to my mind make it clear that Order XVI does not now deal solely with joinder of parties, but also deals with joinder of causes of action." He refers to rule 4,²⁷ relating to joinder of defendants and concludes that as rule 1 provides for joinder of causes of action, as well as joinder of parties plaintiff, there is no difficulty in reaching the conclusion that the defendants could be joined in the action before the court.²⁸ Buckley, L. J., also wrote an opinion in which he seems to take about the same position taken by Fletcher Moulton, L. J., as to the effect of the amendment in 1896 of rule 1. One finds difficulty in determining whether he is of the opinion that plaintiff stated two distinct causes of action or one cause of action against both defendants. The following remark found in the opinion of Vaughan Williams, L. J., was rather appropriate (at p. 362): "I regret it, and am not by any means the only judge who has commented on the lamentable want of precision which is prevalent under the system of pleading now in force."

It has no doubt occurred to the reader that much trouble and expense might have been saved had the Supreme Court, if such was its desire, made clear amendments to Order 18, dealing with joinder of causes of action.

In 1914 the Court of Appeal in *Oesterreichische Export A. G. v. British Indemnity Insurance Company*²⁹ held plaintiff could join two

²⁷ The rule is the same as Cal. Code Civ. Proc. § 379a set forth in n. 12, *supra*.

²⁸ He used this language (at p. 365): "Turning to r. 1 in its new form, I find that the words inserted are of the nature of words of restriction or qualification, which, while they shew that it is intended by the rule to deal with joinder of causes of action, at the same time put some limitation on the joinder of causes of action which may be made under it. Looking at r. 4 by the light of that rule, it appears that the Rule Committee deemed it to be unnecessary to insert similar words in r. 4, and that they thought it desirable to keep the terms of that rule of their original width, after having made it clear that the Order was not limited to joinder of parties, but was intended to deal also with joinder of causes of action. The result appears to me to be that we are not now bound to limit the plain meaning of the words of r. 4 by reference to a decision of the House of Lords given under a different state of circumstances, when Order XVI stood as it was originally framed."

²⁹ [1914] 2 K. B. 747. It seems clear that there were two separate causes of action. As to the nature of the causes of action Kennedy, L. J., said (at p. 754): "The right to relief claimed arises out of the same transaction, namely, the shipment of goods in a named ship and a loss in respect of those

defendants, in an action, upon an insurance policy, which contained two contracts, whereby each company insured plaintiff for one-half the value of the property.

Reference to the English cases will be closed by again referring to *Thomas et al. v. Moore et al.* decided in 1918,³⁰ wherein the Court of Appeal held that several plaintiffs could maintain an action against several defendants for separate slanders by each defendant, and for conspiracy of the several defendants to injure plaintiffs.

How has this problem been solved in New York? The important New York case is *Ader v. Blau*, decided by the New York Court of Appeals in 1925.³¹ The action was for the wrongful death of an infant. One defendant was charged with maintaining an iron picket fence which was attractive to children, whereby the child was injured, causing infection and death. As to the other defendant it was charged that he was a physician, who was called after the injury to treat the child, and that as a result solely of negligent treatment the child died. Two causes of action for separate and distinct torts were thus stated. It was held they could not be joined. The opinion was written by Hiscock, C. J.; Cardozo, J., dissenting.

Chief Justice Hiscock's first observation is that the contention that the liberal provision for the joinder of plaintiffs should be considered in determining the scope of the rule as to joinder of defendants, is inapplicable to the case, because, he concludes, there is not a question of fact common to both causes of action, as contemplated by section 209 of the Civil Practice Act of New York. This observation is evidently based upon the proposition that the facts to be investigated in determining whether there was malpractice are not the same as those pertinent to a determination of whether the property owner maintained an attractive nuisance.

The court was also of the opinion that the case did not fall within the provisions of section 211 of the act authorizing the joinder of several defendants alleged to be liable in the "alternative."

The main ground of the opinion of the learned Chief Justice is that the sections of the New York Practice Act relating to parties

goods on board the ship from causes against which the defendants have insured the plaintiffs, and the liability of each of the defendants will have to be proved in exactly the same way. It is therefore said that the Scottish company are proper parties to be joined in the one action, and that the case comes within Order XVI, r. 4, and within the language of Lindley, L. J., in *Massey v. Heynes* (1), where he says: 'When the liability of several persons depends upon one investigation, I think they are all 'proper parties' to the same action, and, if one of them is a foreigner residing out of the jurisdiction r. 1 (g) of Order XI applies.'

³⁰ [1918] 1 K. B. 555. See n. 8, *supra*, for a more particular statement.

³¹ (1925) 241 N. Y. 7, 148 N. E. 771, 41 A. L. R. 1216 and note.

"are clearly limited by" the section of the act relating to the joinder of causes of action, viz. section 258.³² His first conclusion is that the two causes of action are not consistent, as plaintiff alleged in the statement of the first cause of action that the infant's death was caused by the property owner and in the second cause of action by the physician. He then points to the language of section 258, providing that it must appear upon the face of the complaint that the causes of action united "are consistent with each other" and concludes, as stated by the pleader, that it was impossible that each defendant was the sole cause of the death of the infant. He says:

"Two persons cannot be sued as joint tort-feasors, where it is alleged that one defendant caused death by a picket fence, alleged as an independent and exclusive act of negligence, and that another defendant caused death by negligent surgical treatment, alleged as an independent and disconnected act."

He then concludes that the causes of action, as stated, could not be joined as they did not arise out of "the same transaction or transactions connected with the subject of the action," another limitation upon joinder of causes of action found in section 258. As to this obstacle to joinder he says:

"In one case the subject of action is the wrongful act of one defendant in maintaining the fence, and in the other cause of action it is the wrongful act of defendant in negligently treating the intestate. The two causes of action, each against a different defendant, do not arise out of transactions connected with the same subject of action."

Judge Cardozo, dissenting, was of the opinion, first, that the causes of action were not inconsistent, because the property owner would not be relieved of liability because the injury was "aggravated by the malpractice of a surgeon." He also was of the opinion that the subject of the action was "the death of the child," and, that the subject of the action in one count was connected with the subject of the action in the other count; and further that by the terms of section 258 there is no requirement, as previously there was, that

³² See Parsons Practice Manual, New York, 1921, 109. This section enumerates twelve classes of actions that the plaintiff may unite in a complaint. The ninth class is: "Upon claims arising out of the same transaction, or transactions connected with the same subject of action, whether or not included within one or more of the other subdivisions of this section."

This general limitation is contained in section 258 (Parsons Practice Manual, p. 109): "It must appear upon the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and it must appear upon the face of the complaint that they do not require different places of trial."

the causes of action joined affect all the parties to the action. This opinion has been the subject of comment by learned writers.³³

These cases raise two important questions that it is believed have not been finally settled. Are we in reality simplifying the administration of justice by providing for such a wide field in which several actions at law may be joined? If we are, then a second question arises: Have the rules or practice acts been changed so as clearly and certainly to accomplish the purpose?

Experience only can furnish an answer to the first question. Surely the present day trial by the judge and jury, where the judge can only instruct the jury in writing as to the law, and cannot orally charge them and comment on the evidence, makes grave problems for the average jury, in less complicated situations. Yes, the task is often too great, even for the best juries composed, one must remember, of laymen unaccustomed to determining facts from the testimony of many conflicting witnesses and to applying rules of law which often are none too well understood by them.

As to the second question: the experience of the English and New York courts³⁴ clearly indicates that the changes were not made in the best manner possible, and that trouble lurks in forming pleading rules and statutes that make joinder of *parties* permissible, where there is a common question of law or fact, without making the

³³ See 35 Yale L. J. 85 (1925), for an adverse comment by Professor Charles E. Clark on the majority opinion. See also 25 Columbia L. Rev. 975 (1925); 11 Cornell L. Q. 113 (1925); and Jay Leo Rothschild, "New York Civil Practice Simplified," 26 Columbia L. Rev. 30 (1926); E. W. Hinton, "An American Experiment with the English Rules of Court," 20 Illinois L. Rev. 533 (1926); all discussing this perplexing problem.

Professor E. W. Hinton, in 20 Illinois L. Rev. 533, 545, observes: "Some limitation on the joinder of parties and causes of action is necessary to prevent hopeless confusion and complication in cases triable by jury.

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

See Charles E. Clark and Herbert Brownell, Jr., "Joinder of Parties," 37 Yale L. J. 28, 53 (1927), in which the authors state: "Unfortunately in New York, the rules governing joinder of causes of action were not changed when this new provision as to parties was introduced. This was in spite of the fact that the English experience had demonstrated the difficulty of carrying out provisions for extensive joinder of parties unless the rules as to joinder of causes were also broadly interpreted. Lower court decisions in New York had, however, quite properly given effect to the new party joinder provisions, and with a view of the term *cause of action* as is stated herein, little difficulty might have followed. The New York Court of Appeals has, however, now reverted once more to the narrow construction of the term and has decidedly limited the rules of party joinder in the case of *Ader v. Blau*."

³⁴ See J. L. Rothschild, "New York Court Practice Simplified," 26 Columbia L. Rev. 30, 38 (1926); The Annual Practice, 1927, Order 16, Parties, p. 201 et seq.

rule, or statute, relating to joinder of *causes of action* broad enough to include the joinder of all causes of action involving a common question of law or fact. The provisions for joinder of causes of action should be as broad as the provisions for the joinder of parties in order to avoid difficult questions of interpretation.

The causes of action that may be united in one complaint in California are provided for in section 427 of the Code of Civil Procedure.³⁵ This provision of the California Codes is not unlike section 258 of the New York Civil Practice Act,³⁶ portions of which have been quoted. In each statute there is the limitation, as to actions not specifically enumerated, that they shall arise out of the same transaction or transactions connected with the subject of the action. The California act contains the limitation that the causes of action united "must affect all the parties to the action."³⁷ This limitation was not in the New York statute which applied to *Ader v. Blau*. It previously had been in the statute relating to joinder of causes of action³⁸ but was omitted in 1920 when the sweeping changes as to joinder of parties were made. Judge Cardozo, dissenting in *Ader v. Blau*, expressed the opinion that had this limitation been retained in the Civil Practice Act of 1920, the joinder of the two causes of action could not have been made.³⁹

³⁵ Section 427 provides: "The plaintiff may unite several causes of action in the same complaint where they all arise out of:

"(1) Contracts, express or implied; . . ." (Then there follow six kinds of actions that may be united.)

"(8) Claims arising out of the same transaction, or transactions, connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

"The causes of action so united must all belong to one only of those classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; . . ."

³⁶ Parsons' Practice Manual, New York, 1921, p. 109.

³⁷ See n. 35, *supra*.

³⁸ This limitation was in the New York statute prior to the adoption of the Civil Practice Act in 1920. See New York Code of Civil Procedure, § 484, Parsons' Code of Civil Procedure, New York (1919) p. 141: "that they affect all the parties to the action."

³⁹ Cardozo, J., dissenting in *Ader v. Blau* said (148 N. E. 771, 776): "that until the adoption of the Civil Practice Act, the objection would have been a good one that each of the causes of action does not affect all the parties to the action (Code Civ. Proc. § 484), but that by Civil Practice Act, § 258, this requirement is omitted, with the result that joinder is allowed."

Judge Cardozo expressed no opinion as to whether there was any question of law or fact in the two actions common to all the parties to the actions. Judge Hiscock was of the opinion that there was no such common question and to support the statement cited *Akeley v. Kinnicutt* (1924) 238 N. Y. 466, 144 N. E. 682, *supra*, wherein 193 plaintiffs were permitted to unite in an action for damages, sustained because of alleged false misrepresentation in a prospectus of the condition of a corporation upon the faith of which each purchased stock. It is difficult to see that there was a common question in *Ader v. Blau*, *supra*, of the type intended in section 209, New York Civil

The question is quite naturally suggested whether the difficulties of the problem may not be even greater under the California Code of Civil Procedure than they were in New York. Judge Cardozo, who thought the joinder proper in *Ader v. Blau*, did not take the position that the statute relating to joinder of causes of action had no bearing upon the question, but, on the contrary, agreed that it had, and concluded that nothing in the statute prevented the joinder, since the limitation that the actions joined must affect all the parties had been eliminated.

It seems quite obvious that many situations may be presented where several causes of action arise out of the same transaction or series of transactions, involving a common question of law or fact, which do not affect all the parties to the action. There are quite a few significant decisions in California that give effect to the limitation, contained in section 427, requiring that the causes of action united must affect all the parties to the action.⁴⁰ It is difficult to see why

Practice Act, which seems, as does the English act, to define a common question to be one that would arise "if such persons had brought separate actions." A separate action against the physician for malpractice would not involve either the acts of the property owner or the law relating to attractive nuisances.

⁴⁰ In *Johnson v. Kirby* (1884) 65 Cal. 482, 4 Pac. 458, plaintiff alleged that he was successor in interest to one S. J. who owned 29,000 shares in defendant mining company. The action was against the company and three individuals. It was alleged that S. J. made an agreement with defendant K. by which K. was to receive 16,000 shares of the stock provided he thereafter entered into and performed a contract with the mining company to sink a shaft on the property of the mining company, the stock, however, to be re-transferred to S. J. if he failed to perform the contract. It was alleged S. J. transferred the stock to K., that K. did not perform the contract with the mining company and that he refused to transfer the 16,000 shares; that K. being in control of the corporation and its officers, caused the corporation to acknowledge the contract was performed. One cause of action was to compel the transfer to him of 16,000 of the shares, which he alleged were procured by the fraud of defendant K. and were transferred to defendants M. G. L. and R. H. L., with knowledge of the fraud. The other cause of action was to compel the transfer of 13,000 of the shares. As to this stock it was alleged that after K. got control of the company an illegal assessment was levied and this stock was sold to M. G. L. and R. H. L. upon S. J.'s refusal to pay the same.

The court concluded that K. had no connection with the L.'s as to the 13,000 shares. Thornton, J., for the court said: "As Kirby is improperly joined as a defendant in regard to the thirteen thousand shares, two causes of action are improperly united, viz., one relating to the sixteen thousand shares of stock, and another relating to the thirteen thousand shares. As the causes of action do not affect the same parties, they cannot be properly united. (Code Civ. Proc. § 427.)"

In *Buel v. Dodge et al.* (1889) 79 Cal. 208, 21 Pac. 735, it was held improper to unite a cause of action against one for wrongful attachment with a cause of action against another for wrongful foreclosure.

See *People v. Central Pac. R. Co.* (1890) 83 Cal. 393, 23 Pac. 303, wherein it was held under Cal. Code Civ. Proc. § 427, that the state could not in a single complaint maintain an action for taxes alleged to be due the state and

this general limitation as to joinder of causes of action does not apply, though subsequently, by legislative authority, the rules relating to joinder of parties were greatly broadened. If this general limitation, as to uniting causes of action, is applicable then the most liberal application of the new rule as to joinder of parties can be made only in those cases where there is a single cause of action. Such a limitation no doubt greatly lessens the scope of the new section relating to joinder of parties.

A similar limitation upon the scope of the new sections relating to joinder of parties, if held applicable, is the provision that unless the causes of action united are of the specified classes, they must be "claims arising out of the same transaction, or transactions connected with the same subject of action."⁴¹ This provision, made a part of the section relating to joinder of causes of action in 1907, seems to have been quite liberally construed by the California courts.⁴²

seventeen counties thereof. It was held the suit affected "eighteen different persons, to wit, the state and seventeen separate counties."

And see *Ramsey v. Powers et al.* (1925) 74 Cal. App. 621, 241 Pac. 567, wherein it was held that plaintiff could not maintain a tort action against several defendants when the facts showed that if torts were committed, they were committed by each defendant acting independently of the others. The decision is based upon the authority of *Miller v. Highland Ditch Co.* (1891) 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254, a suit against several defendants for injuring plaintiff's land. It was alleged defendants jointly injured the land but the proof showed separate and distinct acts, without concert, unity or design. It was held plaintiff could not recover damages against defendants.

See also upon this question, *Tropical Land, etc. Co. v. Lambourn* (1915) 170 Cal. 33, 148 Pac. 206; *Hobbs v. Davis* (1914) 168 Cal. 556, 143 Pac. 733; *Robinson v. Godfrey* (1926) 50 Cal. App. Dec. 356, 248 Pac. 268. See the following cases holding that each cause of action united must affect all the parties to the complaint: *Ryder et ux. v. Jefferson Hotel Co. et al.* (1922) 121 S. C. 72, 113 S. E. 474; *Clark v. Great Northern Railway Co.* (1903) 31 Wash. 658; *Midland Terra Cotta Co. v. Illinois Surety Co.* (1916) 163 Wis. 190, 157 N. W. 785.

For many cases from other jurisdictions see 1 C. J. (Actions) §§ 256 et seq.

⁴¹ Cal. Code Civ. Proc. § 427, quoted *supra*, n. 35.

⁴² Cal. Stats. 1907, p. 705.

In *Boulden v. Thompson* (1913) 21 Cal. App. 279, 131 Pac. 765, plaintiff was permitted to unite: (1) a cause of action for breach of covenant in a lease of real and personal property, it being alleged defendant forcibly ejected plaintiff; (2) an action for conversion of personal property, at the time defendant took possession; (3) an action for swearing at plaintiff and calling him and his wife vile names, etc. at that time.

It was held that these were all claims, which might be either tort or contract, arising out of transactions connected with the subject of the action. *Morris v. Judkins* (1918) 36 Cal. App. 413, 172 Pac. 163; *Barberich et al. v. Pooshichian* (1922) 59 Cal. App. 507, 211 Pac. 236 (an action to forfeit a contract to purchase real and personal property and an action for conversion of part of the personal property were held properly united); *Espinosa v. Stuart* (1921) 52 Cal. App. 477, 199 Pac. 66; *Blodgett v. Trumbull* (1927) 53 Cal. App. Dec. 553, 257 Pac. 199 (an action to quiet title against certain restrictions in a deed, where it was alleged the grantor at the time they were put in promised to insert similar restrictions in deeds that he might make to

However the language in the joinder of causes of action section seems somewhat narrower than the language contained in section 378, as amended in 1927, relating to joinder of plaintiffs. It will be recalled, as to joinder of plaintiffs, that it is provided that all may join who have any interest in the subject of the action or in whom exists any right to relief in respect to, or arising out of, the same transaction, or series of transactions, where if such persons brought separate actions any question of law or fact would arise common to all the parties to the action. "*Series of transactions*" seems to include several transactions of the same kind though they be distinct, separate, and unrelated. This broad provision may well include factual situations which are not connected with the subject of the action though "subject of the action" is given a very broad meaning.

Bearing in mind the experience of the English, and New York courts, might it not be well to make the matter clearer by amending the code section relating to the joinder of causes of action? To what extent this section should be amended depends upon one's views as to the number of causes of action that can properly be tried at one time. If it is thought where there is a trial by the judge and a jury the limitations in the joinder of causes of action provision should apply, then the amendment might be made applicable only to cases where there is a trial by the court without a jury. Perhaps there exist sound reasons for making a difference based upon practical considerations. It is no doubt true that complicated situations can be handled better by the court alone than by the court and a jury.

A ninth subdivision might be added to section 427. It might be written somewhat like this: "[Where the trial is before the court without a jury, either because there is no right to a jury, or a jury

other lots, which promises the grantor did not intend to perform but made them merely to deceive, and an action for damages because of the fraudulent promises, were held properly united).

See the following case which included personal injury to the wife and injury to the husband's car: *Farrar et ux. v. Whipple et al.* (1924) 65 Cal. App. 123, 223 Pac. 80. The joinder was permitted under section 427.

In *Ader v. Blau*, supra, n. 31, all the judges of the New York Court of Appeals, excepting Judge Cardozo, were of the opinion that the negligence of the property owner was the subject of the first action and the negligence of the physician the subject of the second action and so the two causes of action did not arise out of "transactions connected with the same subject of action." Judge Cardozo was of the opinion that the subject of the action was the death of the infant and "that a death so occasioned supplies a unifying center, which connects the subject of action in one count with the subject of action in the other."

The New York cases upon the much litigated question of what is the subject of the action (see 1 C. J. 1082 (Actions) § 239 et seq.) seem considerably less liberal than the prevailing views in California, as the cases cited by Judge Hiscock indicate. See *Wiles v. Suydam* (1876) 64 N. Y. 173; *Keep v. Kaufman* (1874) 56 N. Y. 332.

is waived] all claims that give rise to any right to relief in respect to, or arising out of the same transaction, or series of transactions, or connected with the subject of the action, whether the right to relief of the plaintiff, or plaintiffs, is joint, several, or in the alternative, where if such plaintiffs brought or could bring separate actions any question of law or fact would arise common to all the parties to the action, provided, if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled, provided also, as to this class of actions there is no requirement that the causes of action united must affect all the parties to the action, as is herein provided as to other actions that may be united."

If it is thought that the circumstance whether there is a jury should not in all cases determine the question of joinder of causes of action, and perhaps it should not where the causes of action are not many or the parties not numerous, then the words of the suggested amendment placed in brackets might be omitted.⁴³ The court, according to section 378, and the suggested amendment to section 427, would have the discretion to order separate trials and perhaps there would be no need to make the difference between trials by the court and a jury and trials by the court alone.

Section 379c, the third new section added in 1927 to the subject of parties defendant, seems to require separate discussion. It was passed to cover situations where "the plaintiff" is in doubt as to the person liable to him. It reads as follows:⁴⁴ "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any of the defendants is liable, and to what extent, may be determined between the parties."

This section, as has been said, has its counterpart in England and in New York;⁴⁵ and in Connecticut, New Jersey, and Rhode Island

⁴³ It is of course recognized that in those cases where there is a right to a jury it cannot be ascertained whether the joinder of causes of action is proper until it is known whether there has been a waiver of a jury trial. This is somewhat of an objection to the proposal but perhaps not a fatal one. May we not do well, when considering procedural matters, to bear in mind that practical considerations are paramount, and that it is practical to have much more elasticity where the case is tried by the judge alone than it is where there is a judge and a jury. The practice in equity was much more elastic than the practice at law as to joinder of parties and actions.

⁴⁴ Cal. Stats. 1927, p. 631.

⁴⁵ Order 16, rule 7, *The Annual Practice*, 1927, p. 232; *New York Civil Practice Act*, § 213, *Parsons' Practice Manual*, New York, p. 86.

and Wisconsin similar provisions exist.⁴⁶ It seems probable that it frequently will be applied to negligence cases, where plaintiff is in doubt as to the person responsible. There are a number of English cases of this type;⁴⁷ also cases where the defendants are principal and agent and plaintiff is in doubt as to the person liable.⁴⁸ Perhaps the most liberal application of the rule is found in *Payne v. British Time Recorder Co.*⁴⁹ wherein it was held that plaintiff, who agreed to sell certain time cards according to sample to defendant Time Recorder Co., might join as defendants the Time Recorder Co., which refused to pay for the cards, and W. W. Curtiss, Ltd., the manufacturers, who agreed with plaintiff to make, print, and deliver the cards in fulfillment of the contract between plaintiff and the Time Recorder Co. Plaintiff alleged the performance of his contract with the Time Recorder Co. and alternatively that Curtiss, Ltd., did not manufacture the cards according to the sample.

In New York it has been held that when there is one act alleged to have been done negligently, resulting in injury to plaintiff, several persons may be sued, when the plaintiff is in doubt as to which defendant is responsible.⁵⁰ Also in situations similar to those in England, just mentioned, when there is doubt as to whether one is

⁴⁶ Conn. Proc. Book, 1922, § 155; New Jersey Laws, 1912, p. 378; General Laws of Rhode Island, 1923, c. 133, § 20; Wisconsin Statutes, 1915, § 2603.

⁴⁷ *The Svein Jarl* (1923) 129 L. T. 255; *Besterman v. British Motor Cab Co. Ltd.* [1914] 3 K. B. 181 (C. A.); *Compania Sansinena etc. v. Houlder Bros. Ltd.* [1910] 2 K. B. 354 (see p. 374 for the facts); *Bullock v. London General Omnibus Co.* [1907] 1 K. B. 264 (here plaintiff joined as defendants an omnibus company in which she was a passenger and the owner of another vehicle, which, in her opinion, participated in a collision causing her injuries).

⁴⁸ *Sanderson v. Blyth Theatre Co.* [1903] 2 K. B. 533 (C. A.); *Bennetts & Co. v. McIlwraite & Co.* [1896] 2 Q. B. 464 (C. A.). In these cases the plaintiff's claim was against one defendant, the principal for breach of contract, and the other defendant, an agent, for breach of warranty of authority.

See *Morel Bros. Co. Ltd v. Earl of Wetmorland* [1904] A. C. 11 (H. L.), where the judgment was taken against the agent. It wasn't satisfied. Then an attempt was made to get judgment against the principal.

⁴⁹ [1921] 2 K. B. 1 (C. A.). The decision seems to be based upon the proposition that there was a common question of fact involved, viz. whether the cards were like the sample. It was said that the amendment of rule 1 of Order 16 also related to joinder of actions, and that these two actions, involving a common question of fact, were within the terms of the rule, and that authority for joining the actions existing, rule 4 of Order 16 permitted the joinder of the defendants in the alternative. It was held that it was unnecessary to amend rule 4, and that the amendment to rule 1 was sufficient to authorize the joinder.

⁵⁰ *First Const. Co. etc. v. Rapid Transit Subway Const. Co.* (1924) 206 N. Y. Supp. 824 (a blasting case); *Jackson v. Bickelhaupt* (1927) 128 Misc. 583, 219 N. Y. Supp. 601. In *Sherlock v. Manwaren et al.* (1924) 203 N. Y. Supp. 709, the complaint was against several defendants, who were physicians. As to one it was alleged that he negligently set plaintiff's injured shoulder, and as to the others that they successively negligently attempted to reset it. The joinder was permitted. It was conceded that several causes of action were united in one complaint but it was thought that the joinder of causes

liable as principal or another is liable because as agent he has warranted authority which he did not have.⁵¹ And in an action for debt plaintiff was permitted to join two corporations of nearly the same name, one a Connecticut, the other a New York corporation, where the personnel, offices, etc., were the same.⁵² Also in an action for trespass for leaving the hull of an uncompleted vessel upon plaintiff's land after a license had been revoked, plaintiff was permitted to join several defendants as it was doubtful to him who owned the hull.⁵³

In Rhode Island it has been held that a plaintiff, who alleges that he was injured by a defective bridge, might join two municipal corporations, where he was in doubt which corporation was responsible for the maintenance of the bridge;⁵⁴ and that plaintiff might join two defendants for the negligent operation of an automobile where he was in doubt whether the fault was that of the driver or the owner of the car.⁵⁵ Plaintiff who was injured by a falling arc lamp was

of action provision did not prevent the joinder. As to whether there was a common question of law or fact, Crouch, J., said: "The facts stated in the complaint here are so related that in the event of separate trials they would necessarily have to be proved on each trial. What each defendant did or omitted to do is essential to the proof of the liability of each, and of the extent of such liability. That is a common question of fact in all four causes of action. The substantive law applicable to each cause is the same. We think, therefore, that as mere matter of law, the parties and causes of action were properly joined in one action and one complaint."

The views of the Appellate Division of the Supreme Court were not followed in *Ader v. Blau*, supra, n. 31. See C. E. C., "The New York Court of Appeals and Pleadings," 35 Yale L. J. 85, 88 (1925), approving *Sherlock v. Manwaren*, supra. The view seems to be taken in this article that the joinder in *Ader v. Blau* should have been permitted under section 213 of the New York Practice Act permitting the joinder of defendants when the plaintiff is in doubt as to the person responsible. According to Chief Justice Hiscock, it was not claimed that section 213 applied. Also he was of the opinion, and as to this his opinion seems correct, that section 213 is applicable to situations when there is one cause of action only. It is probably true, if the joinder of causes of action provision is not an obstacle, that under the provisions relating to joinder of plaintiffs and defendants, several defendants may be sued in the alternative when there are several causes of action and a common question of law or fact.

And see *S. C. Clothing Co. v. United States Trucking Corp.* (1926) 215 N. Y. Supp. 349, where plaintiff delivered merchandise to defendant trucking company, which was delivered by it to defendant warehouse company. When the boxes were opened, part of the merchandise was missing. The joinder of the two companies was permitted. The decision seems irreconcilable with *Ader v. Blau*, supra. For a discussion of the case see 26 Columbia L. Rev. 901 (1926).

⁵¹ *Jamison v. Lamborn et al.* (1923) 202 N. Y. Supp. 113.

⁵² *Ellicott v. Archibald McNeil and Sons Co.* (1923) 201 N. Y. Supp. 500.

⁵³ *Zenith Bathing Pavilion, Inc. v. Fair Oaks S. S. Corporation et al.* (1925) 240 N. Y. 307, 148 N. E. 532. For some other New York cases see *Charles E. Clark and Herbert Brownell, Jr.*, "Joinder of Parties," 37 Yale L. J. 28 (1927). See also J. L. Rothschild, "New York Civil Practice Simplified," 26 Columbia L. Rev. 30, 48 (1926).

⁵⁴ *Haley v. Calef et al.* (1907) 28 R. I. 332, 67 Atl. 323.

⁵⁵ *McGinn v. J. F. Comstock & Son Co.* (1919) 106 Atl. 222 (R. I.).

also permitted to join his employer, the owner of a factory wherein the arc lamp fell, and another who had recently repaired the lamp.⁵⁶ The Rhode Island Supreme Court however has limited the application of its statute to cases where there is one cause of action and where doubt exists as to which defendant is liable to the plaintiff.⁵⁷ Similar provisions as to joinder of parties exist in the Canadian provinces.⁵⁸

Concluding, the observation seems most pertinent that though reforms in procedure are highly desirable, when they are made, they should be made cautiously and carefully, and, when taken from other jurisdictions, the experience there should be very thoroughly studied. Often too little attention is paid to the drafting and amendment of statutes and codes and as a result uncertainty and confusion occur, producing economic waste and social ill effects. There must be intensive, critical and continuous consideration of our codes and statutes if the whole body of our law is to be kept well suited to an ever changing social and economic order.

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⁵⁶ *Taylor v. Lumb Knitting Co.* (1908) 70 Atl. 1008 (R. I.). In this case the suit was against the employer and plaintiff had a verdict. The Supreme Court reversed the judgment on the ground that the verdict was against the weight of the evidence and directed that the trial court summon as defendant the company which had recently repaired the lamp.

⁵⁷ *Phenix Iron Foundry v. Lockwood et al.* (1900) 21 R. I. 556, 45 Atl. 546 (an action against an alleged debtor and another, alleged to have assumed the debt).

Mason v. Geo. H. Copeland and Co. et al. (1905) 27 R. I. 232, 61 Atl. 650 (an action against a livery stable keeper for letting, to plaintiff, horses that were dangerous and unmanageable, and a railway company for negligently stopping a car suddenly in such a manner as to make terrifying noises that frightened the horses).

In *Besharian v. Rhode Island Co. et al.* (1918) 41 R. I. 94, 102 Atl. 807, the injury to plaintiff's wife was alleged to be due to the negligence of one defendant in operating a street car and the negligence of another defendant in driving a truck. It was alleged that the negligence was "simultaneous" and "concurrent" and a collision occurred. In holding that the defendants could not be joined, Sweetland, J., said: "The section in question is for the relief of a plaintiff who is in doubt as to which one of a number of persons is guilty of a certain act which has caused an injury and which he regards as tortious. The section is not intended for the relief of one who is in doubt as to which of a number of acts, each committed by different persons, and each alleged to be unlawful, has caused the injury for which he wishes to complain."

Lally v. Ventrone et al. (1923) 120 Atl. 161 (R. I.). These decisions seem to be due to the very narrow limitation existing upon joinder of causes of actions in Rhode Island. See *Sawter v. Seekonk Lace Co.* (1912) 83 Atl. 437 (R. I.). *Bisceglia v. Lamb et al.* (1927) 139 Atl. 307 (R. I.).

One may well doubt whether in Rhode Island the experience of the English courts was known or considered before the enactment of the provision relating to joinder of defendants. Certainly not much change was accomplished by adopting the wide "joinder of parties" provision and leaving unchanged the narrow "joinder of causes of action" provision.

⁵⁸ See "Joinder, in one action at law, of persons not jointly liable, one or the other of whom is liable to the plaintiff," 41 A. L. R. 1223, 1247 et seq., where a number of Canadian cases are collected.