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Misjoinder of Tort Feasors

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and dismissal from further consideration without discovering the forgery amounts to lack of due diligence and bars the drawee's right to recover.[16] What might be the rule where both parties are negligent cannot be stated since the point seems never to have been raised.

Comparing the Pennsylvania and foreign rules the conclusion seems inevitable that in the vast majority of cases the same result would be reached in a given state of facts. Where we would allow a drawee to recover under the Act of 1849, other states might allow a recovery under an "equitable exception"; and where in Pennsylvania the drawee would be "estopped" (and this estoppel is very easy to acquire) other states would deny recovery under Section 62 of the N. I. L., which codifies *Price v. Neal.* In all jurisdictions the courts are merely trying to temper harsh cases, where one of two innocent parties must suffer from the wrong of a third party. It is only in the very narrow line of cases, in which all things may be equal, that the courts, following different policies, will differ in result. These exact situations will occur so infrequently, that neither rule can be said to hinder the free use of credit instruments. Either rule would seem to suffice its purpose of furnishing a ready guide as to where the loss will fall in the comparatively infinitesimal number of instances where such instruments are found in circulation.

J. Boyd Landis.

MISJOINDER OF TORT FEASORS

Having ascertained that a cause of action based on tort has accrued, the plaintiff's next consideration is whom to make parties defendant.

Under the common law of Pennsylvania if the tort is one that is deemed joint, the plaintiff may in one action, at his election, sue all the wrongdoers,[1] sue any number of them, or sue each one separately.[2] Where the tort is separate and distinct, the wrongdoers had to be sued separately.[3]

Accordingly, where the plaintiff contemplated suit against two or more tort feasors jointly, he had to be sure that the facts showed a joint tort. If it later appeared that there in fact was no joint liability, plaintiff was confronted with a nonsuit or a verdict against him,[4] unless he amended his pleadings at the trial by striking out the defendant who was not a joint tort feasor upon request properly made to the court. If the amendment were allowed, the

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[16]See all cases cited supra note 14.

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[1]Klauder v. McGrath, 35 Pa. 128 (1860).

[2]Rowland v. Phila., 202 Pa. 50 (1902); Gates v. P. R. R., 150 Pa. 50 (1892).

[3]Dutton v. Lansdowne Borough, 198 Pa. 563 (1901); Wiest v. Traction Co., 200 Pa. 148 (1901).

[4]Leidig v. Bucher, 74 Pa. 67 (1873); Polis v. Heinzmann, 276 Pa. 315 (1923).

opposite party could plead surprise and secure a continuance.[5] The joinder of several parties as defendants without regard to the question of the tort being joint was a "practice which is not to be commended."[6]

To avoid this "uncommendable" practice, the plaintiff had to be sure that the "joint" tort he alleged was in fact joint—a matter of no little difficulty at times. It has been held that to hold defendants jointly there must be some concert or concurrence of action in trespass or negligence charged, or some neglect of a joint duty resting upon them, and that there can be no joint recovery for separate trespasses or separate acts tending to produce an injury.[7] In toto, it seems that for a joint tort there must be some concurrent action, common purpose or common design.[8]

Let us suppose that the plaintiff slips and falls upon a sidewalk in front of K's garage, receiving injuries. It is alleged by the plaintiff that the condition of this sidewalk was defective in that the garage driveway over it was built at a dangerous slope and was not level with the sidewalk of which it was a continuation and that it had become worn and slippery. This negligence is attributed to the property owner K. Plaintiff also alleges that the city was negligent in granting a permit to construct the driveway at an uneven level with the sidewalk and allowing such dangerous and unsafe condition to continue when it knew or should have known that such irregularities existed and that it was negligent in permitting a defectively built sidewalk to pass inspection.

Under the principles above discussed if the plaintiff in his statement alleged joint negligence on the part of K and the city and made them defendants, there would result a misjoinder of parties defendant and the plaintiff would have to amend his pleadings by striking off the city as a defendant.[9] Of course, if the plaintiff did not allege joint negligence, there would result a mis-

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[5]Sturzebecker v. Traction Co., 211 Pa. 156 (1905); Dutton v. Lansdowne Borough, 198 Pa. 563 (1901).

[6]Wiest v. Traction Co., 200 Pa. 148 at p. 151 and p. 152 (1901) where the court said, "Joining of several parties as defendants without regard to the question of the tort being joint, does, no doubt, relieve the plaintiff of the responsibility of finding out, before beginning his action, who is justly chargeable with the wrong causing the injury, as it leaves that question to be developed at the trial. The plaintiff may profit by the contention which naturally arises among the defendants, in which each one seeks to charge the other. But such a course does not tend to an orderly trial, nor the attainment of justice. . . The mischief in unwarrantably joining as defendants parties who are not, in fact, joint wrongdoers, is, in the confusion and disorder resulting at the trial, and the increased difficulty in arriving at a just verdict."

[7]Hill v. Amer. Stores Co. Inc., 80 Pa. Super. Ct. 338 (1923).

[8]Bard & Wenrick v. Yohn, 26 Pa. 482 (1856); Leidig v. Bucher, 74 Pa. 67 (1873); Little Schuylkill Nav. R. R. & Co. v. Richards, 57 Pa. 142 (1868); Hill v. Amer. Stores Co. Inc., 80 Pa. Super. Ct. 338 (1923); but see Gray v. Mill Creek Coal Co. et al, 11 Pa. D. & C. 42 (1928) where the court said, ". . . it is not necessary that the defendants should act in concert to become joint tortfeasors. They became joint tortfeasors by the result that their individual acts taken together produced . . ."

[9]Dutton v. Lansdowne Borough, 198 Pa. 563 (1901).

joinder of parties as one could not sue in the same action two or more defendants who are liable severally.

Today, since the enactment of the Joint Suit Act[10] and the Scire Facias Acts[11] the query arises as to the extent that these common law principles exist.

In a recent case, *Williams v. Kozlowski*,[12] from which the above "suppositious" case is taken, the plaintiff on substantially those facts recovered a verdict against both defendants and on appeal taken by the city, it was affirmed. The city took the position, among others, that there was a misjoinder of parties defendant since there was no joint liability between the property owner and the city and since there was no allegation of joint liability in the plaintiff's statement of claim. In an opinion rendered by Mr. Justice Maxey, the Court answered the contention as follows:

> " If the joint negligence *is* sufficiently pleaded, the procedure followed in this case, was in conformity with the Act of June 29, 1923, P. L. 981. If it was *not* sufficiently pleaded, the suit against the two defendants is permissible under the Scire Facias Acts of 1929 and 1931. Those acts give statutory support to the policy of bringing onto the record as defendants in any action all persons alleged to be liable for the cause of action declared on, *whether liable jointly or severally*. It is true that these acts provide for the bringing onto the record of an added defendant or defendants only by the *original defendant* suing out a writ of scire facias to bring such additional defendant or defendants upon the record; but to bring the practice into complete harmony with these acts, we hold that there is now no legal policy which forbids the *plaintiff's* bringing all defendants upon the record whether they are liable jointly or severally. These acts expressly purport to be a departure in procedure from the common law rule which forbade the joining in one suit of persons committing torts which were not joint. The Scire Facias Act of June 22, 1931, P. L. 663, section 2, provides, inter alia, 'Upon the joinder of additional defendants under the terms of this act, such suit shall continue, both before and after judgment, according to equitable principles, although at common law, or under existing statutes, the plaintiff could not properly have joined all such parties as defendants'."

The lower court had found that there was a sufficient plea of joint negligence and it must be admitted that in such case, the procedure was in conformity with the Joint Suit Act, as that act was evidently drawn to remedy a procedural difficulty which existed in our law when two or more defendants

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[10]Act of June 29, 1923, P. L. 981.

[11]Act of April 10, 1929, P. L. 479, amended by Act of June 22, 1931, P. L. 663, further amended by Act of May 18, 1933, P. L. 807.

[12]313 Pa. 219 (1933).

were charged with joint liability and it was not proved as alleged.[13] It is to be noted that the Joint Suit Act applies where it is *pleaded* in any suit that two or more defendants are *jointly liable* for the cause of action specified,[14] and it has been held under that act that where a plaintiff alleged joint liability but proved only several liability, recovery was permitted only against one and the entry of separate verdicts and separate judgments was deemed to be error.[15]

The proposition that even if the joint negligence was not sufficiently pleaded, the joinder of the defendants in the instant case was proper, is a matter to be accepted with more difficulty. It permits a plaintiff to bring upon the record two or more defendants without regard to whether the tort was joint. It sanctions the practice that was declared "uncommendable" in *Wiest v. Traction Co.*[16] Is such practice in accordance with the policy of the law today?

To ascertain whether such practice is in harmony with the Scire Facias Acts, reference must be made to the history of those acts. A detailed reference to such history is beyond the scope of this note and undesirable in view of the fact that there are two well written articles, namely one by Warwick Potter Scott[17] and the other by Paul S. Lehman,[18] which fully discuss the acts and their history.

Skimming over the surface of these acts, it appears that they provide for the addition of defendants only by original defendants but it has been held that an added defendant can by scire facias bring onto the record another additional defendant.[19] The Act of 1929 was construed to grant no additional rights to the plaintiff but merely to enable the defendant to bring upon the record persons whom he alleges are liable over to him, or are jointly liable with him, or severally liable with him. The plaintiff could not recover a judgment against the additional defendant.[20] This purported "liberal" construction of the Act of 1929 has been the subject of adverse criticism by Warwick Potter Scott who states that,

> " . . . there seems to be no fundamental reason why the mere fact that the plaintiff did not originally sue the additional defendant should prevent the plaintiff from obtaining a judgment directly against the additional defendant. It is a common occurrence that a complaintant who brings his bill on the equity side of the court ultimately obtains a decree giving him direct rights against various defendants or respondents who

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[13]Cleary v. Quaker City Cab Co., 285 Pa. 241, at page 245 (1926).
[14]Sabarof v. Flor. E. Coast R. R. Co., 92 Pa. Super. Ct. 287 at page 290 (1927).
[15]MacHolme v. Cochenaur, 167 Atl. 647 (1933) (Pa. Super. Ct.).
[16]Wiest v. Traction Co., 200 Pa. 148 (1901).
[17]79 U. of Pa. Law Review 306 (1930).
[18]37 Dick. Law Review 234 (1933).
[19]Armandeo v. City of Phila., 16 Pa. D. & C. 106 (1931).
[20]Vinnacombe et ux. v. Phila. et al, 297 Pa. 564 at page 569 (1929).

were added to the record in one way or another subsequently to the filing of the original bill. Why should such a consummation be obnoxious in a proceeding under the *Sci. Fa.* Act, especially as the Act itself says that after the additional defendant has been added:

" . . . such suit shall continue, both before and after judgment, according to equitable principles. . . ."[21]

The Scire Facias Act was amended in 1931 providing for the joinder as additional defendants persons who are alone liable to the plaintiff and permitting entry of judgment for the plaintiff against additional defendants. Paul S. Lehman insists that the proper construction of the Act of 1931 should permit direct relief to be given to the plaintiff against the added defendant.[22]

The effect, if judgment be rendered in favor of a plaintiff against an added defendant, is as if such added defendant had been named as an original defendant. Clearly this is a fiction. Yet it is not to be denied that the outcome is within the purpose of the act.

The recent decision states that "there is now no legal policy which forbids the *plaintiff's* bringing all defendants upon the record whether they are liable jointly or severally."[23] It is submitted that the Court was justified in such holding in view of the recent legislation. To permit a plaintiff to bring upon the record persons whether liable jointly or severally to him, is to attain the purpose of the Scire Facias Acts not through the utilization of a fiction but as a matter of fact by the plaintiff actually doing what the fiction would do for him. No change in the substantive law is made by the permission of such practice and it would seem to accord with the spirit of the Scire Facias Acts. Even if it be conceded that these acts have been enacted for the benefit of defendants, a situation may be imagined where the original defendant may not know of an additional defendant to bring upon the record. In such situation, cannot it be said that bringing of the parties on the record by the plaintiff is for the benefit of the "would-be" original defendant and in aid of the Act?

Query, could a plaintiff bring upon the record two defendants, one of whom the plaintiff believes is liable solely to him but does not know which one in fact is so liable? Undoubtedly the plaintiff could avail himself of the Joint Suit Act by alleging that they are jontly liable. It is submitted that in view of the opinion in *Williams v. Kozlowski*, the plaintiff could make them defendants without alleging joint liability.

It is to be noted that the situation involved in the case of *Williams v. Kozlowski* is one that is of frequent occurrence, namely injuries caused by de-

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[21]79 U. of Pa. Law Review, at page 309. Mr. Scott was referring to the Sci. Fa. Act of 1929.

[22]37 Dick. Law Review at page 257. Mr. Lehman, however, submits that direct relief should not be given in cases of liability over. Page 259..

[23]Supra, note 12.

fective sidewalks. Another situation that is of frequent occurrence and it is submitted that is comes within the purview of *Williams v. Kozlowski* case is where one is injured through the negligence of a servant. It has been suggested by dictum that such an injury is not the result of a joint tort on the part of the master and servant and that the plaintiff had to elect as to which one he would sue. If he did sue the one and obtain judgment, he could not afterwards sue the other although he had not realized on his judgment.[24] Under the view of the *Williams v. Kozlowski* case the plaintiff should be able to name both master and servant as defendants and recover judgment against each.

In conclusion, it is submitted that today a plaintiff, where he has suffered an injury caused by one or more tortious wrongdoers, is confronted with no difficulty when he considers parties defendants. If the cause of action is based on a several tort, he can, as he always could, sue the wrongdoers separately. If the cause of action is based on a joint tort and the plaintiff is certain that it in fact is a joint tort, he can in one action sue all the wrongdoers or one, or any number of them, or he can bring separate suits against each. If the cause of action is based upon what the plaintiff believes is a joint tort but is not sure that it is, he has two alternatives, (a) bring suit in accordance with the Joint Suit Act or (b) merely without alleging joint liability make the wrongdoers defendants. If the cause of action is based on a tort for which one of two persons is liable solely but the plaintiff does not know which one is liable, he has two alternatives, (a) bring suit alleging joint liability and thus take advantage of the Joint Suit Act, or (b) merely join them as defendants without alleging joint liability. It is submitted that in view of the Joint Suit Act and the Scire Facias Acts in the light of the case of *Williams v. Kozlowski*, that where the injury is caused by one or more wrongdoers "misjoinder" of parties defendant is no longer available as a defense.

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[24]Betcher v. McChesney, 255 Pa. 394 (1917). See Brennan v. Huber, — Pa. Super. Ct. — (1933), in which the dicta in the Betcher case is not followed and which suggests that master and servant can be sued jointly under the rule in the Williams case.