The Joinder of Plaintiffs Act

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of their qualifications. For this reason there is much agitation for an amendment of our Act to provide for such period of probation. Whether or not such amendment can be made, in the light of the "vested rights" which have or have not already accrued, depending upon what attitude our courts should adopt, is a matter of great concern. It was the opinion of J. McLean in Gere v. School Directors, (supra) that the act may be amended or repealed by subsequent legislatures.

The form of contract prescribed in Sec. 2, of our Act embraces an undertaking to teach, although there are some persons whom the act includes who are not employed for teaching, such as school secretaries or dental hygienists. The Act states that the contract of all "professional employes" should only be drawn in this prescribed form, but such would be impossible as to all these employees. However, the Act should be interpreted most reasonably and such changes as are necessary in the prescribed form should be made by the school board when contracting with employees who do not teach.

It should be noted that although it is provided in the Act that a substantial decrease in the number of students due to natural causes is a sufficient cause for suspension of a contract, no new appointment can be made while there are suspended employees available. There is nothing in the Act which prevents a school board from appointing a large number of unnecessary employees and later suspending them with the object in view of reserving control of appointing teachers many years after the term of office of the school directors has expired. More particularly, their successors in office would be bound by the Act to reappoint the suspended members before they could choose their own teachers. However, it would seem that our courts should not consider one a "professional employee" whose services were unnecessary at the time of his employment. If an appointment is not made in good faith by a school board, their act should be considered as void.

Vincent Quinn.

THE JOINDER OF PLAINTIFFS ACT.

In the October, 1937 issue of the Dickinson Law Review a note, appearing in reference to the passage of an act in Pennsylvania providing for the joinder of plaintiffs, made the following comment:

"It is impossible to foresee all the problems of interpretation involved, but in providing for the joinder of plaintiffs in circum-


stances presenting 'any common question of law or fact' a wide latitude appears to have been granted.'"1

The purpose of this note is to venture to predict the interpretations that the courts of Pennsylvania will put upon their new act. These comments will be based upon the successive adoption of this remedial legislation from the English Practice Act2 by New Jersey, New York and Illinois and the interpretations of the courts in these jurisdictions. Particular emphasis will be given to the experience of New Jersey for that state enacted this means of avoiding a multiplicity of suits more than a quarter of a century ago,3 and secondly, the phraseology corresponds favorably with the Pennsylvania statute.

Our problem has been simplified by this striking similarity in the enactments of the above-mentioned states as a result of their initial source, the following English Practice Act provision:

"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 be found not entitled to relief unless the Court or a judge in disposing of the costs should otherwise direct."4

Pennsylvania act of the General Assembly, No. 404, provides:

Sec. 1: "That all parties who have a right of action, whether jointly, severally, or in the alternative, in respect of, or arising from, the same transaction or series of transactions, and whose actions would give rise to any common question of law or fact, may join, as plaintiffs, in one civil action."

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142 Dickinson Law Review, 50.
2English Practice Act, Order 16, r. 1.
4English Practice Act, Order 16, r. 1.
Sec. 2: "If, in any such action, it shall appear that the joinder of the plaintiffs will complicate, prejudice or delay the trial of such action, the court, on petition or on its own motion, may order separate trials, or make such other order as it deems expedient and proper."

Sec. 3: "In every such action, separate verdicts shall be rendered and judgments entered as to each plaintiff."\(^5\)

The New Jersey Practice Act of 1912 phrased the New Jersey enactment very concisely thus:

Sec. 4: "Subject to the 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."\(^6\)

Of the enactments of the four states under consideration, the New York Civil Practice Act of 1915 is the least useful in scope for our purpose:

Sec. 20: "The joinder of all parties plaintiff and defendant claiming an interest in the subject of the action, whether jointly, severally or in the alternative, shall be permitted subject to an order for a separate trial as to any party and to suitable penalties for misjoinder."\(^7\)

The Illinois Civil Practice Act of 1933 dealt with joinder of plaintiffs thus:

Sec. 23: "(Joinder of Plaintiffs) Subject to rules, all persons may join 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 had brought separate actions any common question of law or fact would arise: 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 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 for which he or they may be entitled.

\(^7\)N. Y. Civil Practice Act of 1915, sec. 20.
"If anyone who is a necessary plaintiff declines to join, he may be made a defendant, the reason therefore being stated in the complaint."  

The comparatively short lapse of time since this enactment makes it futile to consider its judicial construction in Illinois.

We stated above that the joinder of plaintiffs enactment was in the nature of remedial legislation and would avoid a multiplicity of suits. What are actions or causes of action which have a common question of law or fact? In the determination of this question Doran v. City of Asbury Park\(^9\) reached New Jersey's highest court, the Court of Errors and Appeals. The plaintiffs in that case joined in one action to recover damages resulting from water being backed up on their premises and into their cellars through the erection of a detritus tank, flume and straightway when the defendants were laying out a new road. The jury returned a verdict for the plaintiffs and damages were separately assessed. On the appeal the court stated:

"The plaintiffs were entitled to join in the action under section 4 of the new practice act (P. L. 1912, p. 577), there being a common question of law and fact arising out of the same transaction."

The word "transaction" is not confined to actions ex contractu but covers actions ex delicto as well. Twelve separate suits involving twelve different plaintiffs were brought against the Lehigh Valley Railroad Co. growing out of the same fire and explosion, "The Black Tom Explosion." Thus the trial judge in Metropolitan Casualty Insurance Co. of New York v. Lehigh Valley R. Co., ordered these twelve cases to be consolidated for the purpose of trial and tried before the same jury, against the objection of the defendant. Ten of the suits involved broken windows, the eleventh was for the destruction of a schooner at anchor near the site of the explosion, and the twelfth by the schooner's steward to recover for injuries received and personal property destroyed by the fire and explosion. The defendant cited a long list of cases at common law but the plaintiffs advanced the statutory provision. The defendant argued in connection with the interpretation of the statute that the words "transaction or series of transactions" do not include torts, but refer to contracts, business and the like. The court carefully marshalled authority in support of the holding that "transaction" must be defined to cover actions ex delicto as well as ex contractu:

"It is synonymous with 'act', 'action', 'affair', 'business', and the like. Standard Dictionary. It is a term broader than contract. Contract is a transaction but transaction is not necessarily a contract.

\(^8\)Illinois Laws of 1933, p. 784, sec. 23.
\(^9\)91 N. J. Law 651, 104 Atl. 130.

"In a general sense, a transaction is where both causes of action proceed from the same wrong. Lamming v. Galushka, 135 N. Y. 239-244, 31 N. E. 1024. See Scarborough v. Smith, 18 Kan. 399, 406."10

In Messiana v. Terhune11 Parker, J., treats the joinder of plaintiffs as a frequent occurrence. There the plaintiff Di Carolis was an employee of the Plaintiff Messiana, who was a tenant of the premises adjoinging the land of the appellant, Terhune, and both plaintiffs sustained injury because of the caving of the land, on their side of the property line, due to excavation for a new building on land of Terhune. Thus the two parties joined as plaintiffs in their respective individual rights as provided in the New Jersey Practice Act of 1912.12

In Burgess v. Noteboon, Slawska v. Noteboon,13 Burgess and Slawska who had separate claims in trespass de bonis asportatis against the same defendant joined in one action under section 4 of the Practice Act of 1912. Each had a verdict and judgment which the Court of Errors and Appeals later affirmed.

No difficulty was experienced in interpreting what the legislature desired to convey by parties who have a right of action "in the alternative." For example in Reinfeld v. Laden,14 an action was instituted by Joseph Reinfeld, or in the alternative, S. L. Distributing Company, a corporation, against the defendant. The court recognized the basis for such a procedure from the following facts:

"The action is to recover $5,000 paid as deposit by the plaintiff, or one of them, on account of the purchase price of 1,000 cases of Blue Grass whisky. The cause is laid in the alternative under the Practice Act (P. L. 1912, p. 378) par. 4."

A cursory inspection of these provisions might give rise to the assumption that these apply to mandamus proceedings but there is a strong dictum to the contrary in Stretch v. State Board of Medical Examiners. Stretch and three others had applied for a writ of mandamus against the New Jersey State Board of Medical Examiners to compel the Board to grant the relators licenses to practice osteopathy. Justice Parker stated:

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11106 N. J. Law 119; 148 Atl. 758.
1498 N. J. Law 709; 121 Atl. 445.
"It is proper to say that we doubt the propriety of embracing these four relators in one rule or one writ. Their rights are separate and distinct, and depend upon different states of facts similar only in their nature. The Practice Act of 1912 does not apply to mandamus proceedings, and if it did apply, section 4, the only pertinent provision, does not cover the case."  

Under the pre-existing law a single controversy on this question, Commonwealth ex rel. Henry Menges & Camilla Menges v. Huttel reached the Pennsylvania higher court. It arose in the form of a suit by a tenant joined by another claiming part of the goods distrained, to compel a constable, charged with the execution of a landlord's warrant, to have an appraisement made of goods elected to be retained by the tenant under the three hundred dollar exemption law. Rice, J., said, inter alia:

"But aside from this, the general rule is, that two or more persons having separate interests seeking redress by mandamus cannot join in one and the same writ, but should have separate writs according to their several interests: 14 Am. & Eng. Ency. of Law 219. Where the distinct rights of two or more persons are improperly joined, the writ is liable to be either superseded or quashed: Tapping on Mandamus, 324 . . . . . Even if she had a standing to demand an appraisement and setting apart to her of the goods claimed by her, she asserts a separate and distinct right. It may be that she has no such right, but it is enough for us to know that she asserts it, and according to the rule above stated should have prosecuted it in a separate suit. As the objection was made promptly the court committed no error in sustaining it."

Stretch v. the State Board of Medical Examiners was followed and approved by the court in D'Aloia v. Civil Service Commission of New Jersey. Six individual holders of six positions under the city government of Newark joined in a mandamus proceeding to require the civil service commission to certify their respective salaries at certain respective amounts. The court, citing the earlier case declared that while, if they were suing at law for their respective salaries, the circumstances might permit a joinder of these suits under section 4 of this act, there is no warrant of law for a joinder in a mandamus proceeding. Parker, J., said, "It follows that there should be a separate writ and separate record for each prosecutor."

1588 N. J. Law 92; 95 Atl. 623.
17101 N. J. Law 427; 128 Atl. 877.
18Also see 26 Cyc. 408, 409, 409 note 54.
Joinder of plaintiffs no doubt will play an important role in warranties of fitness of goods where a number of persons have causes of action arising out of the same transaction. A typical situation of this nature arose in New Jersey in *Griffin v. James Butler Grocery Co.* A family group of five ate dinner together. Four of the five partook of canned peaches and became violently ill. Of these, two died within a short period. The two survivors joined as plaintiffs to bring one action against the grocery chain.

Mrs. Berni, who joined as plaintiff in her own right (Practice Act of 1912, Sec. 4—Comp. St. Supp. Secs. 163-280) was nonsuited for no cause of action rather than misjoinder as Justice Parker, again giving the opinion for the court, indicates:

"There was a nonsuit as to Mrs. Berni, the other several plaintiff, on the ground that she was not a party to the sale, and hence not entitled to the benefit of any implied warranty. She does not appeal, and therefore we are not concerned with this share of the litigation."

The Court of Errors and Appeals unanimously affirmed for the remaining plaintiff.

Joinder of plaintiffs is a distinct advantage in actions for damages for personal injuries resulting from motor vehicle and railroad accidents. Five non-resident plaintiffs joined in bringing suit against the Public Service and Gas Co. and another for injuries sustained in an automobile accident caused by wires negligently left by either one or the other of the defendants. As in the other cases above mentioned it was held:

"Since the causes of action have a common question of law or fact and arose out of the same transaction, plaintiffs joined in the present suit against both defendants, as permitted by sections 4 and 6 of the Practice Act of 1912 (P.L. 1912, c. 231, p. 378, Comp St. Supp. Secs. 163-280), Met. Cas. Ins. Co. v. L.V.R.R. Co., 94 N. J. Law 236, 109 A. 743."

The trial judge at Somerville in the Supreme Court of New Jersey, Somerset County, in considering a motion of the defendants to non-pros. the plaintiffs for failure to post security for costs, defendants demanding security of $100 from each plaintiff for each defendant or a total of $1,000, held:

"The conclusion is, consequently, that if plaintiffs collectively post a bond for $100 to each of the defendants, in the usual statutory form with sufficient sureties resident in this state, or deposit a like sum for the benefit of each defendant, in other words the sum of $200, the requirement of the statute will be deemed to have been met."

19108 N. J. Law 92; 156 Atl. 636.


21See note 10, supra.
In arriving at its decision the court considered a recent decision under New York's Joinder of Plaintiffs Act,22 *M. Salinoff & Co. v. Standard Oil Co. of N.Y.*, 259 N. Y. 219,23 the court there saying, inter alia:

"Section 209 (New York Civil Practice Act) was adopted for the very purpose of avoiding such unnecessary litigation and expense. To facilitate litigants and the courts, all persons whose claims involve any common questions of law and fact may be joined as plaintiffs in one action. Thus there will be but one trial, and the main issue of fact and liability, settled in the one lawsuit. . . . The very purpose sought to be accomplished by section 209 would be somewhat frustrated if, by consolidation into one action, costs were allowed on the basis of separate actions."

Actions for wrongful death will not be and were not intended to be affected by the Joinder of Plaintiffs Act in Pennsylvania. In Pennsylvania the legislature has enacted that whenever death shall be occasioned by the unlawful negligence or violence, and no suit be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow the personal representatives, may maintain an action for and recover damages for the death thus occasioned.24 Amram in Pennsylvania Common Pleas Practice, page 21, annotates the following section:

"Persons entitled to recover damages for any injuries causing death shall be the husband, widow, children or parents of the deceased and no other relative, and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy; and without liability to creditors. The declaration shall state who are the parties entitled in such action, the action shall be brought within one year after death."25

The Death Act in New Jersey provides that the personal representative may sue in his own name for the benefit of the surviving husband or wife and next of kin to recover damages resulting from the wrongful death of the testator or intestate.26 Harris in Practice and Pleadings annotates similar statements:

"The personal representative and not the beneficiaries have control over the foregoing cause of action. If the testator appointed an executor in his will, he is the one who can sue under the Death Act. In

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22See 209 Civil Practice Act of New York.
23181 N. E. 457.
251855, P. L. 309 (Pa.)
the absence of such an executor, an ordinary administrator cannot act, the court will appoint a special administrator ad prosequendum to prosecute this action."

The Joinder of Plaintiffs Act was mentioned in a New Jersey case, Stagg v. McCann. There in a bill of complaint in chancery a mother of one deceased sought to enjoin the wife of the deceased as administratrix from prosecuting an action under the Death Act without joining the plaintiff or complainant as party plaintiff. The Court of Errors and Appeals held the bill in chancery "should have been dismissed upon the ground of lack of jurisdiction in that the complainant had a complete remedy at law." The court then cites the Joinder of Plaintiffs Act. As a matter of fact the law court in which she had first sought relief a justice of the Supreme Court had already denied her claim.

Misjoinder may go very far up the judicial ladder before it is detected that one or more of the plaintiffs are improperly joined. In Rizzie v. Pohan, husband and wife signed a preliminary agreement of sale of real estate belonging to the wife and acknowledged the receipt of $500 down money. This money the husband deposited to his own account. The contract was rescinded because of a dispute arising over the existence of an easement. The brokers, promised a stated commission and never compensated, and the vendee, determined to join as plaintiffs, vendee seeking to recover $500 down money. Justice Parker declared: "The brokers, not having received their commission, and apparently conceiving that their claim might properly be pressed in the same suit by virtue of section 4 of the Practice Act of 1912 (P. L., p. 378) joined as plaintiffs, though on the face of things their claim was against the husband alone. Both claims went to judgment. When executions issued it was discovered by the plaintiffs for the first time (although plainly appearing on the real estate records all the time) that the title was vested in the wife, both then and when the brokerage and contract of sale were made.

"From this point the claim of the brokers drops out of the case, as the Vice Chancellor held that they have no standing, on a contract by the husband, to attack the property of the wife."

In the remainder of the opinion the court reverses the lower court decree subjecting the wife's property to a judgment against the husband.

In conclusion, how broadly will the courts use their discretionary power to interpret the joinder acts as one state follows the precedents established by an-

27140 Atl. 393; see also 134 Atl. 846.
2896 N. J. Equity 327; 125 Atl. 240; 102 N. J. Equity 239.
other? If *Broderick v. Abrams* is any indication we may say the courts will construe the enactments very broadly. This case is one of many which arose out of the numerous bank failures in the early years of the economic depression. The Bank of the United States, a banking institution organized under the laws of New York, was found to be in such dire straits by Broderick, New York State Superintendent of Banks, that he determined that it should be liquidated. This officer having determined that the reasonable value of the bank's assets was not sufficient to liquidate its aggregate indebtedness in full levied an assessment upon its stockholders under the banking laws of the State of New York which impose an individual responsibility upon the stockholders of an institution of the character of this one to the extent of the value of their stock at par value. The object of this suit was to recover unpaid assessments from 558 New Jersey stockholders and thus this action was brought by Broderick joining Abrams and 557 others. In determining whether this would be allowed the court noted it had been invested with power to "order a separate trial among the plaintiffs, or one or more of several plaintiffs, and the defendant, or one or more of several defendants, or between co-defendants," and the power to "strike out causes of action which cannot be conveniently tried with other causes of action joined in the same suit." The court then gave its broad approval of joinder as follows:

"These are discretionary powers, but their exercise is guided and controlled by the manifest policy of the statute to avoid a multiplicity of suits and to expedite the determination of legal controversies in accordance with the dictates of substantive rights. As indicated, the case in hand offers nothing to justify that these joined causes of action cannot be conveniently tried together without injustice to the applying defendants; and there is therefore no basis for a departure from the normal statutory course of procedure."

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29116 N. J. Law 40, 181 AP. 716.
30New Jersey Supreme Court Rule 108.
31New Jersey Supreme Court Rule 21.
32116 N. J. Law 40, 181 Atl. 716.