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Recent Legislation

PERMISSIVE JOINDER — OHIO'S STEP TOWARD LIBERAL PLEADING

OHIO REVISED CODE SECTION 2307.191

On August 26, 1963, rule 20 of the Federal Rules of Civil Procedure became effective in Ohio.¹ This rule provides for permissive joinder of parties. However, the existing joinder statutes providing for joinder of plaintiffs² and defendants³ were not expressly repealed. The new Ohio statute incorporates *verbatim* the wording of the federal rule⁴ and is substantially identical to the joinder provisions of a number of states.⁵

In construing a statute adopted from another jurisdiction, the construction placed thereon by the courts of the jurisdiction of origin is at least persuasive and often determinative.⁶ Decisions of such federal and state courts,⁷ therefore, should be useful in defining the scope of the recent Ohio enactment.

An understanding of the conflicting purposes of rule 20 and the old Ohio statutes is necessary for an intelligent reconciliation of the new with the old. Federal rule 20 is not intended to affect the substantive rights of parties.⁸ The permissibility of joinder is to be predicated upon the convenience of adjudicating all issues of a single transaction or occurrence in a common suit.⁹ The common-law provisions for joinder, from which the old Ohio statutes have evolved, favored the submission of a single issue for trial and have tended to restrict rather than favor joinder.¹⁰

Under rule 20, persons who assert a claim jointly, severally, or in the alternative may join as plaintiffs, and in like manner, persons against whom claims are asserted jointly, severally, or in the alternative may be joined as defendants.¹¹ In Ohio, allowable joinder has rested pri-

1. OHIO REV. CODE § 2307.191 (Supp. 1963).

2. OHIO REV. CODE § 2307.18.

3. OHIO REV. CODE § 2307.19.

4. Compare OHIO REV. CODE § 2307.191 (Supp. 1963), with FED. R. CIV. P. 20.

5. See, e.g., CAL. CIV. PROC. CODE §§ 378-79(c); ILL. ANN. STAT. ch. 110, § 23 (Smith-Hurd 1955); N.Y. CIV. PRAC. ACT § 1002.

6. Chapel State Theatre Co. v. Hooper, 123 Ohio St. 322, 175 N.E. 450 (1931); May Coal Co. v. Robinette, 120 Ohio St. 110, 165 N.E. 576 (1929).

7. See note 5 *supra*.

8. Siebrand & Siebrand v. Gosnell, 234 F.2d 81 (9th Cir. 1956); United States v. Carolina Warehouse Co., 4 F.R.D. 291 (W.D.S.C. 1945).

9. 3 MOORE, FEDERAL PRACTICE, § 20.02 (2d ed. 1963).

10. CLARK, CODE PLEADING 13 (2d ed. 1947).

11. OHIO REV. CODE § 2307.191(A) (Supp. 1963).

marily upon the assertion of a joint right or allegation of joint liability.¹² Under the 20, however, two or more persons sustaining distinct damages as a result of the same occurrence may prosecute their claims in a single suit.¹³ A cause of action, however, must be stated on behalf of each plaintiff and against each defendant even though it be stated in the alternative.¹⁴

As an illustration of the federal rule: *A* and *B*, passengers in *C*'s car, are injured in a collision between *C*'s car and a truck owned by *O* and being used for *D*'s purposes. *A* and *B* may join as plaintiffs even though they have no interest in each other's cause of action.¹⁵ The truck driver may be liable for his own negligence and his master may be joined, even though the master's liability rests on the doctrine of *respondeat superior*.¹⁶ *O* and *D* may be joined on the theory that one or the other was the master.¹⁷

The provision of rule 20 regarding joinder of rights asserted jointly, severally, or in the alternative, therefore, would seem primarily designed to counteract the tendency of courts to allow only the joining of parties jointly liable or those asserting a joint right. It would seem to be permissive entirely. A few courts, however, have found some limitation on joinder in these provisions, holding that the relief sought was cumulative rather than alternative¹⁸ and that plaintiffs may not join in the alternative when their claims are mutually destructive.¹⁹ Basically, the only restrictions placed by rule 20 on joinder are: (1) the claims must arise "out of the same transaction, occurrence or series of transactions or

12. The Field Code, as adopted in Ohio in 1853, required that a plaintiff be interested in the subject of the action and that the defendants all claim an interest in the action adverse to the plaintiff. OHIO REV. CODE § 2307.18-19. These statutes were rigidly construed with the effect that only plaintiffs alleging a cause of action based on a joint right or defendants against whom a joint or a joint and several liability was alleged were properly joinable. *Larson v. Cleveland Ry.*, 142 Ohio St. 20, 50 N.E.2d 163 (1945); *Village of Mineral City v. Gilbow*, 81 Ohio St. 263, 90 N.E. 800 (1909); *Ulmer v. Squire*, 71 Ohio App. 369, 50 N.E.2d 178 (1942); *Toledo Terminal R.R. v. Mauk*, 9 Ohio App. 438 (1918).

13. *Lansburgh & Bro. v. Clark*, 127 F.2d 331 (D.C. Cir. 1942); *Doyle v. Standard Oil & Gas Co.*, 123 F.2d 900 (5th Cir. 1941).

14. *Hooper v. Lennen & Mitchell, Inc.*, 52 F. Supp. 319 (S.D. Cal. 1943).

15. *Matanuska Valley Lines, Inc. v. Neal, Inc.*, 229 F.2d 136 (9th Cir. 1955); *Lansburgh & Bro. v. Clark*, 127 F.2d 331 (D.C. Cir. 1942). For the restrictive Ohio rule, see *Taylor v. Brown*, 92 Ohio St. 287, 110 N.E. 739 (1915).

16. *Siebrand & Siebrand v. Gossnell*, 234 F.2d 81 (9th Cir. 1956). This case involved primary and secondary liability. A long line of cases held that joinder in such a situation was impossible. See, e.g., *Shaver v. Shirks Motor Express Corp.*, 163 Ohio St. 484, 127 N.E.2d 355 (1955); *Canton Provision Co. v. Gauder*, 130 Ohio St. 43, 196 N.E. 634 (1936); *Clark v. Fry*, 8 Ohio St. 358 (1858). For a recent decision stating that master and servant are joinable under OHIO REV. CODE § 2307.191 (A), see *Darling v. Home Gas & Appliances, Inc.*, 175 Ohio St. 250, 193 N.E.2d 391 (1963).

17. *Lucas v. City of Juneau*, 127 F. Supp. 730 (D. Alaska 1955); *Flood v. Wheeling & Lake Erie Ry.*, 10 F.R.D. 393 (N.D. Ohio 1950).

18. *Carl Gutmann & Co. v. Rohrer Knitting Mills, Inc.*, 86 F. Supp. 506 (E.D. Pa. 1949).

19. *Garller v. First Nat'l Bank*, 88 Cal. App. 411, 263 Pac. 566 (1928).

occurrences;" and (2) a "question of law or fact common to all of them will arise in the action."²⁰

The series of transactions or occurrences may take place in different geographical areas, and they may be separated by an appreciable length of time. In *Poster v. Central Gulf Steamship Corp.*,²¹ a seaman alleged that exposure to unhygienic conditions on one ship resulted in a disease. This disease was aggravated by similar conditions on an entirely different ship three months later. The similarity of the two occurrences combined with possible concurrent liability furnished sufficient grounds for joinder of the two ship owners.²² In a similar case, it was held that the original tort furnished the "same transaction or occurrence" for joinder of the original tort-feasor and the party aggravating the injury eighteen days later.²³

Courts construing rule 20 have had difficulty in passing on joinder of plaintiffs in cases where fraudulent misrepresentations by the defendant are alleged to have taken place at different times and places. Generally, more than similarity in the mode of misrepresentation must be found to unite the plaintiffs.²⁴ Some factors which have served to unite separate "transactions" have been a scheme of fraud,²⁵ operations performed under a single contract,²⁶ inducement created by a single advertisement,²⁷ and contiguous parcels of real estate as the subject of the fraud.²⁸

The common question of law or fact arising at trial must be significant in relation to the other issues to be adjudicated.²⁹ The applicability of a general body of law, *e.g.*, negotiable instruments law, to the several issues will not of itself support joinder.³⁰

The statute provides for a reasonable limitation on joinder: "The court . . . may order separate trials or make other orders to prevent delay or prejudice."³¹ Although the rule favors a single submission of all available issues, the right of the plaintiff to join the defendants for purposes of pleading does not require all of the claims joined in the

20. OHIO REV. CODE § 2307.191(A) (Supp. 1963).

21. 25 F.R.D. 18 (E.D. Pa. 1960).

22. *Ibid.*

23. *Lucas v. City of Juneau*, 127 F. Supp. 730 (D. Alaska 1955).

24. *Gombi v. Taylor Washing Mach. Co.*, 290 Ill. App. 53, 7 N.E.2d 929 (1937).

25. *Johnson v. Mansfield Hardwood Lumber Co.*, 143 F. Supp. 826 (W.D. La. 1956).

26. *Baker v. S. A. Healy Co.*, 302 Ill. App. 635, 24 N.E.2d 228 (1939).

27. *Weigend v. Hulsh*, 315 Ill. App. 116, 42 N.E.2d 146 (1942).

28. *Akeley v. Kinnicutt*, 238 N.Y. 466, 144 N.E. 682 (1924). For an Ohio decision involving a similar fact situation, see *Taylor v. Brown*, 92 Ohio St. 287, 110 N.E. 739 (1915).

29. *Nieman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); *Payne v. British Time Recorder Co.*, [1921] 2 K.B. 1.

30. *Federal Housing Administration v. Christianson*, 26 F. Supp. 419 (D. Conn. 1939).

31. OHIO REV. CODE § 2307.191(B) (Supp. 1963).

pleadings to be determined in a single trial.³² In *Sporia v. Pennsylvania Greyhound Lines, Inc.*,³³ the Court of Appeals for the Third Circuit held that although joinder was proper, the trial court abused its discretion in not granting separate trials.³⁴

Most of the cases dealing with rule 20 construe the words of the rule itself as clearly and unambiguously setting forth the requirements for joinder. Because the Ohio legislature failed to repeal the old joinder statutes, the Ohio courts must determine what effect the presence of the prior statute will have on the new enactment. The intention of the legislature must be determined by the express words of the statutes.³⁵ However, both sections 2307.18-19 and section 2307.91 of the Ohio Revised Code would be applicable to any conceivable question of permissive joinder.

It is an established principle of statutory construction that where two statutes exist covering the same subject matter, they should be considered in *pari materia*.³⁶ In the instant case, however, restrictions of the old statutes, if retained, would render nugatory the new statute, and the state of the law would remain unchanged. Thus, an exception to the doctrine of *pari materia* applies: where the statutes are irreconcilably in conflict, the earlier act should yield to the later.³⁷

The legislative intent of the Ohio statute has been expressed quite clearly, and it is incumbent upon the courts to give effect to the purpose of the legislature in passing section 2307.191.³⁸ The problem could be solved by substantial adherence by the Ohio courts to the federal precedents as this should have the effect of nullifying the restrictions of the prior statutes.

The conflict between the inconsistent statutes regulating permissive joinder of parties is but a part of the problem. Prior Ohio law required causes of action, if they were to be joined, to fall within certain categories reminiscent of the common-law forms of action.³⁹ On the other hand the new section provides that "a plaintiff or defendant need not be interested in obtaining or defending against all of the relief de-

32. *Eichinger v. Fireman's Fund Ins. Co.*, 20 F.R.D. 204 (D. Neb. 1957).

33. 143 F.2d 105 (3d Cir. 1944).

34. *Ibid.*

35. *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948); *Baltimore & O.R.R. v. Board of Revision*, 152 Ohio St. 521, 90 N.E.2d 574 (1950).

36. *Flynn v. Bredbeck*, 147 Ohio St. 49, 68 N.E.2d 75 (1946).

37. *Rogers v. State*, 129 Ohio St. 108, 193 N.E. 754 (1934). The operation of this rule effectively repeals the former provision or statute by implication. Such construction is not favored unless the conflict is irreconcilable. *State ex rel. Shaffer v. Defenbacher*, 148 Ohio St. 465, 67 N.E.2d 705 (1947).

38. *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948); *State ex rel. Bohan v. Industrial Comm'n*, 147 Ohio St. 249, 70 N.E.2d 888 (1946); *Cochrel v. Robinson*, 113 Ohio St. 526, 149 N.E. 871 (1925).

manded.”⁴⁰ If a conflict exists rendering these sections incompatible, the clearly worded dictate of section 2309.191 should prevail, being last in time.⁴¹

Ohio Revised Code section 2309.06 provides that “the causes of action . . . except as otherwise provided, must affect all the parties to the action.” Taking the statutes in *pari materia*, the “except as otherwise provided” clause may be construed to refer to the mandate of the new permissive joinder statute.

That broad procedural reforms are necessary in Ohio, seems hardly open to question. Piecemeal legislation, as in this instance, may very well add confusion rather than clarity to the law. It is time for the Ohio legislature to give thought to adopting the Federal Rules of Civil Procedure in their entirety.

In the future it is hoped that the Ohio legislature will consider the effect of a statute before enacting it. Once the effect of the new statute has been considered, the necessity for repealing old statutes in conflict with the apparent legislative intent of the new act should be obvious.

JAMES G. GOWAN

39. OHIO REV. CODE § 2307.05.

40. OHIO REV. CODE § 2307.191 (Supp. 1963).

41. *Rogers v. State*, 129 Ohio St. 108, 193 N.E. 754 (1934).

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