PLEADING

Joinder of Actions in Wrongful Death Cases

The administrator of one Charles Betts, deceased, joined a cause of action for property damage with one for the wrongful death of the decedent, both claims arising out of the same accident. Ruling upon a demurrer for misjoinder of causes, the common pleas court found that the two causes of action were not prosecuted in the same right and therefore could not be joined. *Betz* v. *Hart*, 4 Ohio Op. 174, 20 Abs. 479 (1935).

In the event of a wrongful death two causes of action may arise, but each is inherently separate and distinct. *R. R.* v. *Van Alstine*, 77 Ohio St. 395, 83 N.E. 601 (1908); *May Coal Co.* v. *Robinette*, 120 Ohio St. 110, 165 N.E. 576 (1929). Ohio Gen. Code: sec. 11235 provides for the survival to the estate of a deceased person of any cause of action arising out of an injury to his person or property which he himself could have maintained but for his death. Ohio Gen. Code: secs. 10509-166 and 10509-167, the Ohio wrongful death statutes, permit an action for the benefit of certain named beneficiaries for the damage resulting to them because of the death. Both actions are maintainable in the name of the personal representative. Ohio Gen. Code: sec. 11306 allows the joinder of several causes of action in the same petition when they are included in certain named categories, among which are (4) injuries to the person or property, and (2) transactions connected with the same subject for action. Gen Code: sec. 11307 limits this provision, however, by requiring that the causes so joined must affect all parties to the action. *Heinrichsdorff* v. *Keppler Bros.*, 3 Ohio L. R. 476, 34 Ohio C. D. 83 (1915). This requirement was so interpreted by the court in the principal case as to restrict the possibility of joinder to those causes which are prosecuted *in the same right*. This would seem to be an unnecessary extension of the general rule that a party cannot sue in more than one distinct capacity, *Dusenbury* v. *Sagamore Co.*, 142 N. Y. S. 595, 157 App. Div. 485 (1913); *Stock Growers' Bank* v. *Newton*, 13 Colo. 245, 22 Pac. 444 (1889); especially where one cause exists in his own favor and one in that of another. *Glidden* v. *Cincinnati*, 11 Ohio D. R. 853, 30 Bull. 213 (1893); *Wragg* v. *Wragg*, 208 Iowa 939, 226 N.W. 99 (1929). The law regards him as a separate party in each of such relations. *May* v. *Smith*, 45 N. C. 196, 59 Am. Dec. 594 (1853); *Pensacola Co.* v. *Soderlind*, 60 Fla. 154, 53 So. 722 (1910). Thus an administrator of two decedents cannot join causes of

action belonging to the two estates in one proceeding even though they involve a common defendant. *Danaher* v. *City of Brooklyn*, 4 N. Y. Civ. Proc. R. 286 (1883).

The Ohio lower courts have given Gen. Code: sec. 11307 a rather loose construction and in several instances they have permitted the joinder of causes not affecting all the parties. 1 Ohio Jur. 372, 374; *Myers* v. *Miller*, 2 Ohio D.R. 319 (1857); *Gravell* v. *Speakman*, 8 Ohio N.P. (N.S.) 246, 20 Ohio D.N.P. 89 (1909); *Sicbern* v. *Meyer*, 11 Ohio D. R. 344, 26 Bull. 147 (1891). These holdings contravene the express terms of the statute, however, and should not be followed so long as the statute stands. 1 Ohio Jur. 375; *McShafer* v. *Henry*, 19 Ohio Abs. 283 (1935). Nevertheless these decisions are important as indications of the attitude of the Ohio courts toward joinder in general, and in the light of them, it is quite likely that considerable latitude will be given to considerations of convenience and expediency in the joinder problem generally.

It is quite true that, in a sense, the two actions are not prosecuted in the same right, as expressed in two decisions of the Supreme Court of Ohio. *R. R.* v. *VanAlstine*, *supra*, and *May Coal Co.* v. *Robinette*, *supra*. Nevertheless the conclusion drawn by the court in the principal case is not the necessary consequence of such holdings inasmuch as they merely decided that two independent causes of action are provided by the two statutes and, consequently, that the bringing of one such action is no bar to the prosecution of the other. The law relating to this question is in a somewhat unsettled state, however, and this is evidenced by the writings of several textwriters. Thus in 13 Ohio Jur. 562, it is stated that such joinder is proper, whereas the contrary proposition is endorsed by Bliss on Code Pleading p. 198 and by Bates "Pleading, Practice, Parties, and Forms," p. 1214. These writers assert that joinder is not allowable because the causes are not prosecuted in the same right. Only the two latter authorities are cited by the principal case. Unfortunately, the case authority resorted to by these writers fails to sustain the rule set forth by them. The cases cited by Bates are only slightly analogous to the issue and, in the light of the illustrations used by him to support his text, it appears that he had reference to the joinder of causes in different capacities rather than in different rights.

Some of the case authority resorted to by Bates does have a bearing on the general problem but none of it is applicable to the Ohio law. Thus the case of *Louisville and Nashville R. R.* v. *Kellem*, 13 Ky. Law Rep. 228 (1891) is not in point because the substantive law of Kentucky requires the plaintiff to elect between the two causes, and a

recovery on the one cause of action is a bar to a recovery on the other, as has been decided in *Hackett* v. *R. R.*, 95 Ky. 236, 24 S.W. 871 (1894), and *Louisville R. R.* v. *Raymond*, 135 Ky. 738, 123 S.W. 281, 27 L.R.A. (N.S.) 176 (1909). *Hurst* v. *Detroit City R. R.*, 84 Mich. 539, 48 N.W. 44 (1891), was decided in a jurisdiction which allows two remedies but only one recovery in death actions. *Sweetland* v. *R. R.*, 117 Mich. 329, 75 N.W. 1066; *Carbary* v. *R. R.*, 157 Mich. 683, 122 N.W. 367 (1909). *Frink* v. *Taylor*, 4 G. Gr. (Iowa) 196 (1854); and *Lucas* v. *N. Y. C. R. R.*, 21 Barb. (N.Y.) 245 (1855) are not authority for the proposition stated by Bates because in each of these cases the party brought suit in his individual capacity on one cause and as the administrator of the estate on the other. *McVey* v. *Illinois Central R. R.*, 73 Miss. 487, 19 So. 209 (1895) provided no opportunity for joinder because of a holding that survival actions are not maintainable when death is instantaneous. This left the plaintiff with only one cause of action. The cases of *Daley* v. *Boston R. R.*, 147 Mass. 101, 16 N.E. 690 (1888) and *Cincinnati H. and D. R. R.* v. *Chester*, 57 (N.D.) 297 (1877) are of no relevancy to the question under discussion. The principal case also directs the reader to 1 R.C.L. at p. 366, but the two cases there cited are from Kentucky and consequently are not in point, see *supra*. Moreover the contrary proposition is also set forth on the same page of that volume.

In support of the holding in the principal case it might be said that these causes of action are inherently independent; *St. Louis, etc. R. R.* v. *Craft*, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 760 (1915), that they are not prosecuted in the same identical right *R. R.* v. *Van Alstine*, *supra*; *May Coal Co.* v. *Robinette*, *supra*, and that there are differences in the beneficiaries and in the measure of damages. One cause of action grounds a recovery for all damage suffered up to the death, the other for that ensuing thereafter. The administrator is, in effect, made the trustee of two separate funds for two distinct purposes. His interest in each case is entirely separate and distinct. As the representative of the wrongful death beneficiaries the cause of action in favor of the estate does not affect him, and as a representative of the estate that of the beneficiaries does not concern him. Wherefore it is said that technically he serves in two distinct capacities, just as if the legislature had appointed two independent agents.

It is said in answer, however, that none of these considerations involves any serious difficulty in the trial of the two causes together, nor do they occasion any delay, prejudice, or undue confusion to the defendant. Consequently, the majority of jurisdictions today do permit

a joinder of these two causes of action. *Illinois Central R. R.* v. *Crudup*, 63 Miss. 291 (1885); *St. Louis*, etc. *R. R.* v. *Hengst*, 36 Tex. Civ. App. 217, 81 S.W. 832 (1904); *Hindmarsh* v. *Sulpho Bath Co.*, 108 Nebr. 168, 187 N.W. 807 (1922); *Chicago R. I. & P. R. R.* v. *Jenkins*, 183 Ark. 1071, 40 S.W. (2d) 439 (1931); *Ranney* v. *R. R.*, 64 Vt. 277, 24 Atl. 1053 (1892); *Nemecek* v. *Filer Co.*, 126 Wis. 71, 105 N.W. 225 (1905); *Eldridge* v. *Barton*, 232 Mass. 183, 122 N.E. 272 (1919); *Callison* v. *Brake*, 129 Fed. 196, 63 C.C.A. 354 (1904). *Contra*, *Bennett* v. *Sportanburg Co.*, 97 S.C. 27, 81 S.E. 189 (1914); *Anderson* v. *Wetter*, 103 Me. 257, 69 Atl. 105 (1907). The same broad policy is evidenced in *Townsend* v. *Buckeye Stages*, 28 Ohio N.P. (N.S.) 222 (1930), where a party was allowed to join counts under both statutes in a death action. This case is clearly distinguishable from the principal case, however, in that the issue was presented to the court on a counter-claim in which it was the defendant who set out the two causes and no demurrer for misjoinder of causes set forth in a counter-claim is interposable. Ohio Gen. Code, sec. 11324. Nevertheless, it is to be noted that the reasons there given by the court for allowing the joinder of like causes in the plaintiff's original petition.

The two causes do have a close kinship. The same plea can be made to both, both can be prosecuted by the same kind of proceedings, and both may be brought in the name of the same party. Both actions affect all the formal parties thereto, and in each action the plaintiff sues in the same capacity, *viz.*, as the personal representative of the estate. The damages, in each cause, arise out of the same transaction, and on claims arising from injuries to the same person. The acts of the parties, the time, place, and circumstances are the same in each cause and must be proved by substantially the same evidence. How anomalous it would be then, to grant a recovery on the one cause and to deny it on the other. For practical reasons the courts should permit the joinder. The separate funds recoverable present no difficulty; there is an adequate device in the special verdicts provided for by our law.

Ohio Gen. Code sec. 11306, declaring what causes should be joined, should receive a liberal construction to prevent a multiplicity of actions. *Cincinnati S. and C. R. R.* v. *Cook*, 37 Ohio St. 265 (1881). It, like all statutes relating to procedure, is remedial and should be broadly interpreted. *Wellston Co.* v. *Rinehart*, 108 Ohio St. 117, 140 N.E. 623 (1923). The policy of the law is to discourage, rather than to encourage litigation. The state itself has an interest in clearing the dockets so far as it can be done without prejudice to the rights of the

parties, yet the necessary effect of the decision noted is to give new life to an old and technical refinement of very shadowy substance.

Today more and more states are reflecting a far broader policy toward pleading in general by adopting provisions similar to those contained in the new proposed federal rules which repudiate the strict, cumbersome, legalistic techniques of a former day in favor of a system better adapted to a more efficient administration of justice. Therefore, since the ground has already been broken by the *Townsend* case, and since a joinder of these two causes is within the letter and spirit of our law, it would seem that the way is clear for the courts of Ohio to place themselves in accord with the more liberal trend of the day. This should be done as soon as conveniently possible so as to permit such a joinder as was attempted in the principal case.

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TORTS

JUDICIAL NOTICE — NEGLIGENCE OF BAILEES — ORDINANCES AS SAFETY AND INDEMNITY MEASURES

Plaintiff filed an action in Municipal Court of Cincinnati against defendant for personal injuries sustained in an automobile accident caused by a car owned by defendant and rented to one Jesse Dunn. The city enacted an ordinance, No. 50-1927, in Feb., 1929, which provided in effect, that no license to operate any public vehicle should be issued by City Treasurer until the applicant should deposit with the City Treasurer a policy of liability insurance, providing for indemnity for or protection to the insured against loss as provided under this ordinance. It also provided that it should be unlawful to operate any such public vehicle, or permit such vehicle to be operated until the requirements of the ordinance had been complied with, and imposed a fine for its violation. The defendant in violation of the above ordinance rented a car to Jesse Dunn against whom the present plaintiff had obtained a judgment which was not satisfied. The plaintiff in the present action was denied relief by the Municipal Court, and on appeal the appellate court reversed the judgment. The Supreme Court reversed the Court of Appeals and affirmed the judgment of the trial courts, denying plaintiff recovery. *Orose* v. *Hodge Drive-It-Yourself Co.*, 132 Ohio St. 607, 9 N.E. (2d) 671 (1937).

One of the defenses offered was that the upper court would not take judicial notice of the ordinance, since it was not contained in the record.