The Consolidated Action

Jay Leo Rothschild

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THE CONSOLIDATED ACTION
ONE TRIAL FOR ONE CONTROVERSY

IT SEEMS to be characteristic of the human mind that tendencies and movements, which received their impulse in the accidents or incidents of the moment, become enveloped, in the course of time, in a tradition of envisioned and inspired purpose, and of planned and deliberate creation.

Such is the inherent vice of looking backward. In the retrospect of the distant view, the blurring and blending of detail is mistaken for the symmetry and perfection of preconceived purpose and execution.

The contemporary critical mind is too much occupied in the mechanics of transition to afford leisurely detachment and the satisfaction of contemplating the admiration—which those of tomorrow are sure to exhibit—for the supposedly brilliant conception of today. Being an incident of the process, no wonder that he cannot become sufficiently indifferent to the maladjustments of today.

In the law of practice, this is particularly so. The Civil Practice Act, as a whole, is a thing of wonder. No single mind, building anew, could create such a masterpiece. Yet, like the work of great painters, it is only from a distance that the pattern is unmarred. On close inspection, its maladjustments are many,—its scope and course, diverse,—its execution the result of the contributions of successive collaborators of unequal skill, of inharmonious spirit, and of unconcerted purpose. Compromise too often has defeated coherent execution of its many contributors.
To appreciate that the Civil Practice Act is imperfect and that the cases construing it have not always removed those imperfections, is not to be unmindful of its merit.

The product of experience, like the figures of history, need not be devoid of human frailties to command respect and reverence.

The lawyer takes things as he finds them. It is enough that the courts have marked the way.

The judges, because they are lawyers, abide by the same standard, but, because they are judges, occasionally divert or advance the stream of progress. Responsibility and caution, essential to their function, rightly prevent rash generalization or unnecessary change.

But correction and change are the vital, dynamic forces of procedural progress, as in all other endeavors. To look backward at the procedure of the ancient common law is proof ample of that self-evident truth.

It is the function of the law teacher,—not merely to look backward and permit himself to become a part of the chimerical retrospect, as he must, in his capacity as a lawyer; nor merely to preserve the critical attitude of the contemporary critic, as he does in his function of mentor,—but, also, to look forward, and, at the risk of the later disillusionment of his students, to point the way to the future, as he must in his role of guide.

His is the organized view, where relationships, comparisons and contrasts are more important than isolated rules or decisions.

It would seem to be an apt initial effort, in this direction, to formulate a rationalization of the rules for joinder of parties and causes of action, out of the isolated and unrelated decisions on the subject,—in view of the fact that it emerges from a background characterized by all that has been said, and is, therefore, particularly incomprehensible to students, who, for the most part, will be the readers of this article.

There can be no doubt that the future will breathe into this robot, intellectual direction and mental control, so that the resultant rules will be credited to intended purpose.

In entering upon this task, we have no purpose to wend our way through the uncorrelated judicial decisions. Little
light will be found, in the language of the courts, for the wayfarer who seeks formulated understanding, on this but dimly marked path through the wilderness, which has not yet attained the proportions of a road. Rather, shall we formulate a rationalization of the results of judicial decision, as if those who created the statute preconceived and intended such to be the result.

The Statutes Involved.

The following sections of the Civil Practice Act form the subject of this discussion:*


1. Section 209,—constituting the standard for joinder of parties plaintiff, where each has an independent, separately enforceable cause of action.
2. Sections 211, 212, 213,—constituting the standard for joinder of parties defendant, and contemplating liability of defendants who might be separately and independently sued.
3. Section 258,—stipulating the conditions under which causes of action may be joined.

B. Defendant’s Interposition of Counterclaims.

4. Sections 266 and 267,—authorizing the interposition of counterclaims.
5. Section 271,—authorizing the joinder of additional parties, in connection with counterclaims.

C. Adding or Dropping Parties After Action Commenced.

6. Section 192,—authorizing the adding or dropping of parties.

* See Appendix for sections in full (infra p. 171).
7. Section 83,—permitting the continuance of an action, notwithstanding transfer of interest or devolution of liability, with the right to add or substitute the new party.

8. Section 193,—authorizing the joinder of parties, on application of the defendant, or of a third person, or by direction of the court.

9. Section 211-a,—permitting adjustment of contribution between joint tort feasors.

10. Section 287,—generally known as interpleader by order.

11. Sections 96, 97, 97-a, 338-a,—treating of consolidation of actions.

A.


The Setting of the Problem.

At common law, issues were single and parties, if they were not necessary, were superfluous. It was equity which sponsored the desirability of determining related issues, in one trial, and, accordingly, developed the conception of proper parties, as distinguished from necessary ones.

The Code of Civil Procedure (the predecessor of the Civil Practice Act) accomplished at least the expression of the ideal of the single civil action.\(^1\) Distinctions between actions at law and suits in equity were no longer to be honored. Equity and law were to be administered in one court, by the same judges who would, as occasion demanded, enforce rules of law and principles of equity.

The result of this process was the gradual infiltration of principles of equity into actions at law, and the equitable rules as to joinder of parties gradually, but surely, began to supplant legal standards. The path of procedural reform is marked by the substitution of equitable for legal standards.

But, though the process was ever going on, it was not recognized by many, nor concurrently supplemented by compensating changes in related subjects.

\(^1\) C. P. A., Sec. 8.
Those who created the Code of Civil Procedure conceived of causes of action, as utterly independent of the parties who owned them or against whom they were asserted. Accordingly, there were rules for joinder of causes of action, and separate and independent rules for joinder of parties.

Furthermore, the standard for classification of causes of action was a supposedly logical differentiation between types of causes of action; not an inquiry into the identity of the controversy from which these causes of action emerged. So, for instance, if A slandered and assaulted B, at the same instant of time, these constituted two separate causes of action, which had to be separately instituted, separately prosecuted, and separately proved, though both causes of action had their origin in the same controversy, and no witness could testify as to one cause of action, without inevitably involving the other.\(^2\)

The functional standard of one trial for one controversy was, in no sense, in view.

**The Present Point of View.**

Today, however, with increasing litigation and more vivid realization of the wastefulness of duplicating trials, and hopeful, though not confident, of the increased capacity of modern-day juries to absorb and differentiate between the rights of diverse participants in a single controversy,—the effort is, as far as possible, to dispose of all phases of one controversy in one trial.

We are not concerned with logical differentiation between causes of action. We appreciate that so-called causes of action are the results of an unrealistic rationalization unrelated to the mode of proof. We understand that it is the substantial identity of the evidence, which will be adduced on the trial, which constitutes the bond between legally independent causes of action, owned by or asserted against legally unrelated litigants. We refuse to be bound by hard and fast rules as to joinder of causes of action and of parties, formulated inexorably in advance of the particular litigation.

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We prefer flexible and adjustable standards of discretion, yielding to the situation presented in the particular case.

The Merging of Inconsistent Standards.

When the Civil Practice Act was adopted, as might be imagined, there were stout adherents of both points of view. The resulting statute was a compromise.

Section 258 comes to us from the old Code of Civil Procedure. It preserves the old classification of causes of action, according to arbitrary logical standards. Contracts might be tried together, though unrelated in origin; torts might be tried together, though widely separated in point of time, place and circumstance. Slander and assault might not be joined, though involving the same persons and occurring at the same instant of time. Causes of action must be consistent; must not require different places of trial; must belong to one of the classifications specified by the statute, except that, though not embraced within any subdivision other than subdivision 9, they might be joined, if, pursuant to that section, they arose out of the “same transaction” or were “transactions connected with the same subject of action.”

This section retained the conception of causes of action as logical theories of recovery, divorced from the parties who owned them or against whom they were asserted.

Sections 209, 211, 212 and 213 were new statutes, without prototypes in the Code of Civil Procedure. They were modelled upon the English and New Jersey statutes, which recognized no distinction between causes of actions and of parties. The procedural laws of neither of these jurisdictions made separate provision for parties as distinguished from causes of action.

Under these sections, the standard for joinder of parties, who might otherwise sue or be sued independently of each other, was only that there must be a common question of fact or law. It was the same controversy which was to be investigated. How many so-called causes of action might emerge from this controversy, and what might be their character,

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1 Subdivision 1.
2 Subdivisions 2, 3.
3 Cf. Subdivisions 2 and 3.
was immaterial,—if only, from the functional point of view of what evidence would be adduced on the trial, there was substantial identity of the subject of controversy.

Obviously, upon such a standard, consistency of causes of action was immaterial. Logical consistency was inconsequential, as long as there was functional consistency in the subject of investigation.

Yet, Section 258 required that causes of action must be logically consistent, and Section 209 (and Section 211, by implication) expressly provided that independent plaintiffs might recover and independent defendants might be liable in the "alternative," which, of course, embraced "inconsistency." 6

To make confusion worse confounded, Section 213—permitting joinder of defendants, where plaintiff was in doubt—clearly contemplated inconsistent or alternative claims of liability in whole or in part.

The Problem Imposed Upon the Courts.

Such was the legislative cross-word puzzle submitted to the judiciary for solution—inconsistent standards placed in juxtaposition; the standards themselves beclouded in the ambiguities and uncertainties of past judicial interpretations—a solution required as an incident of the judicial process where the legislative function had proved incapable and unavailing.

It is obvious, of course, that a progressive and advanced attitude, on the part of the courts (and such there was), was hardly adequate to cut the Gordian Knot. There was the statute, with its anachronistic remnants of a system unadjusted to present standards, which could not be ignored.

To steer a proper course, between the shoals of antiquated doctrine, in the functional approach to the newer conceptions of litigation, required nice distinctions between the judicial function and the legislative prerogative, as reflected in the statute.

No wonder, therefore, that progress was and is halting, the formulation of doctrine obscure, and the goal rather sensed than seen.

6 Cf. Webster's New International Dictionary defining "alternative."
Rationalization of the rules to be applied, in advance of precise situations calling for decision, is not to be expected, nor is it to be found, in judicial decisions promulgated under such circumstances. The process of adjustment is the arduous task of the present; the rights of litigants still to come impose restrictions on hasty judicial generalization of procedural problems. Lights and shadows flicker across the terrain, but no steady beam points the way.

Judicial Landmarks.

Two appellate decisions, containing rather comprehensive discussions of the subject of this article, loom up for consideration. They are *Sherlock v. Manwaren* and *Ader v. Blau*.

The *Sherlock* case, in the effort to give full effect to the spirit of the newer tendency, as reflected in Sections 209 and 211, 212 and 213, as to parties, ignores the restrictions of Section 258, as to causes of action.

The *Ader* case, though appreciative of the desirability of facilitating one trial for one controversy, yet in obedience to the statute gives effect to the restrictions imposed by the older limitations on joinder of causes of action.

Though much is said in the *Sherlock* case,—which, in view of the later and more authoritative decision of the Court of Appeals in *Ader v. Blau*, is not law,—yet the actual decision is well within the limits of the statute itself.

The *Sherlock* case involved joinder of causes of action, all of one class (Subdivision 2, of Section 258) and required, therefore, no application of Subdivision 9, of Section 258.

But, the significant thing about the Sherlock case, is that the problem of joinder of parties and causes of action is considered as addressed to the discretion of the Court, whereas the Court of Appeals in the Ader case decided the issues there presented as those of law.

Thus where the old standard of logical classification of causes of action comes in conflict with the new standard of functional identity of subject matter, it is the supposed logic

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*208 App. Div. 538, 203 N. Y. Supp. 709 (4th Dept. 1924).*
*241 N. Y. 7, 148 N. E. 771 (1925).*
of consistency, rather than the homogeneity of the evidence involved, which is the guiding principle.

The clash of fundamental theories is strikingly illustrated in the Ader case. The majority of the court, following the mandate of Section 258, find that Section 209 "has only a remote bearing" and, applying the logical theory of litigation, concludes that there is not one "subject of action" because there are "different negligent acts alleged in the two causes of action and that, therefore, 'who is liable for the death of plaintiff's intestate' is not * * * a common question. * * *" Judge Cardozo, who dissented, did so notwithstanding the mandate of Section 258, because he subscribed to the functional view of litigation: "* * * a death so occasioned supplies a unifying center which 'connects' the subject of action in one court with the subject of action in the other." Nevertheless, the decision of the majority was inevitable, if Section 258 were to be given any meaning.

Formulation of Rules.

The limits of this article forbid more minute consideration of the foregoing authorities and of the other decisions based upon them. The process of reaching the conclusions herein stated would, of course, be important in a complete exposition of the subject. But, keeping within the limit which we have set ourselves, we venture the following formulation of rules:

1. The Civil Practice Act maintains the distinction between joinder of causes of action, and joinder of parties who own, or against whom are asserted, such causes of action.

2. "Consistency" of causes of action is required under Section 258, as to joinder of causes of action; yet "alternative" rights to recover, or liabilities, may be joined under Sections 209 and 211, as to joinder of

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\(^{a}a^{Super Note 8, 241 N. Y. at 12.

\(^{b}b^{Ibid. at p. 13.

\(^{c}c^{Ibid. at p. 21.\)
parties. "Consistency" and "alternative" are intrinsically of identical meaning, but have two possible and different meanings, in this branch of procedure. From the point of view of joinder of causes of action, "consistency" means "logical" consistency. From the point of view of joinder of parties, "consistency" means identity of the subject of inquiry, regarded functionally from the point of view of what evidence will be adduced on the trial.

3. Section 209, as to joinder of parties plaintiff, and Section 211, as to joinder of parties defendant, have no necessary application, except where, in the case of plaintiff, each owns a several and independent cause of action, which he may, if he chooses, prosecute alone,—or, in the case of defendants, each has a separate and independent liability, for which he could be sued alone,—and where, therefore, the parties plaintiff join, or parties defendant are joined—as the case may be—not as necessary, but as proper parties, to accomplish a joint trial of causes of action arising out of the same facts in controversy, as hereinafter defined.

4. Sections 209 and 211 did not create the possibility of actions being prosecuted together in favor of or against parties jointly, or jointly and severally, owning causes of action or liable by virtue thereof—as the case may be. Such joinders were permissible under the Code of Civil Procedure, and present no problem of joinder of parties, but only of joinder of causes of action, under Section 258.

5. The right to join parties plaintiff, who have several causes of action—or parties defendant, who are subject to several liability—if all of the causes of action involved are embraced within one subdivision of Section 258, other than Subdivision 9, is determined solely by Sections 209 and 211, as the case may be, without reference to Section 258. In such case, there is no problem of joinder of causes of action, but only of parties.
6. The sole standard for joinder, under Sections 209 and 211, is the presence of a fundamental, substantial or decisive question of fact or law, which is the identical subject of inquiry, and the determination of which will vitally affect the right of all plaintiffs to recover, or will similarly affect the liability of all defendants,—though not the measure of recovery or liability, as the case may be. In the case of defendants, it is not necessary that all should be interested in the relief asked, or affected by every cause of action.

7. If, however, the causes of action asserted by the plaintiffs are not embraced within one subdivision of Section 258, other than Subdivision 9, but, on the contrary, are sought to be joined under Subdivision 9 only, i.e., because it is alleged that said causes of action arise out of the “same transaction” or are “transactions connected with the same subject of action,” as used in that subdivision, then the requirements of Section 258 must be satisfied, namely: the causes of action must arise out of the same transaction or be connected with the same subject of action; they must be consistent; they must not require different places of trial. But none of these requirements (except where the joinder is expressly made under Section 213) are deemed satisfied, if the causes of action are inconsistent. “Consistency,” for this purpose, means logical consistency, and not merely identity of the subject of inquiry, which constitutes an investigation into the same facts in controversy, as in the case of Sections 209 and 211, under Rule 6 (supra). Furthermore, by the same standard, in this situation, i.e., where there is logical inconsistency—there are no common questions of fact or law arising out of the same transaction or series of transactions, under Sections 209 and 211 (though, were not Subdivision 9 involved, there would be). Accordingly, Section 258 is a limitation of Section 209, in those cases where the joinder of causes of action may be justified only by attempting to bring them within Subdivision 9 of Section 258 (supra).
8. Just as Section 258 is a limitation of Sections 209 and 211, so Section 213 (permitting defendants to be joined, where plaintiff is in doubt) is, in turn, a limitation of Section 258. Accordingly, notwithstanding the requirement of Section 258, that causes of action must be consistent, defendants may be joined as against whom alternative liability is asserted, as long as there be consistency in the functional sense, i.e., the inquiry is as to the same facts in controversy from the point of view of what evidence will be adduced on the trial. Some of the decisions have reached this result on the theory that the statute creates a new cause of action: a state of doubt, which need not be broken up into separate causes of action.⁹

9. Where plaintiff's claim is in the alternative, it would seem (though not conclusively) that joinder will be permitted, if the causes are embraced within one subdivision other than Subdivision 9 of Section 258, on the basis of the functional definition of "consistency." ¹⁰

10. Where there is no question as to the right to join parties under Sections 209, 211, 213, because there are no several rights or liabilities asserted, then the sole standard for joinder of causes of action is Section 258.

11. Ordinarily, it must, in such cases, appear that the causes of action joined, belong to one subdivision of Section 258, other than Subdivision 9,—that they are consistent (in the logical sense), and do not require different places of trial.

12. If the causes of action sought to be joined do not belong to one subdivision, other than Subdivision 9 of Section 258, then it must appear that joinder is justified under Subdivision 9, i.e., they must have


arisen out of the same transaction or are transactions connected with the same subject of action.

13. Inconsistency, where Sections 209 and 211 are not concerned, may be established in any of three ways: (a) where the causes are such that the plaintiff is put to an election of remedies; 11 (b) where there is logical inconsistency, i.e., where proof of one cause of action would exclude any other theory of liability, as distinguished from factual contradiction of allegations of the several causes of action; 12 (c) where there is procedural embarrassment in the mode of trial, the rendition of the verdict, the form of the execution, or by reason of statutory inhibition or public policy. 13

14. "Same transaction" or "transactions connected with the same subject of action" have different signification in law and equity cases.

a. Ordinarily, at law, causes of action arise out of the "same transaction" or are "transactions connected with the same subject of action," if the right of action accrues by reason of the incidence of the same producing cause or event which is responsible for plaintiff's injury. 14

b. In equity, causes of action arise out of the "same transaction" or are "transactions connected with the same subject of action" if they involve an inquiry into the same facts in controversy, from the point of view of the evidence which will be adduced on the trial. 15 The standard is that which has been imported even into law actions, where joinder of parties plaintiff or de-

15 Idem.
fendant is authorized under Sections 209 and 211. The standard is the same, i.e., whether there are fundamental and substantial common questions of fact or law. Consistency in these cases is required only in the functional sense as with respect to parties, under Sections 209 and 211.

c. There are some cases at law where there are no questions of parties involved, and where the equitable standard prevails, i.e., cases in which it is said that bound within the limits of the "same transaction" are both a cause of action for fraud inducing a contract, and a cause of action for breach of the contract itself. These cases illustrate the process of transition from legal to equitable standards.

B. Defendant's Interposition of Counterclaims.

On the subject of counterclaims, the Civil Practice Act combined old and new as well. Sections 266 and 267 are not substantially different from their prototypes in the Code of Civil Procedure. But Section 271 was added to make it possible for a defendant to bring in additional parties, so as to accomplish a more inclusive litigation,—carrying out the same idea of one trial for one controversy.

The right to counterclaim was not broadened in any respect, as to substance. As before, in actions at law, there is the distinction between contract actions and all others. There need be no relation between any contract counterclaimed and any contract forming the basis of action. But, where the subject of a counterclaim is not a contract, then a counterclaim can be interposed only under conditions which would permit the joinder, under the requirements of Subdivision 9 of Section 258, of the cause of action contained in the counterclaim with the cause of action contained in the complaint, were both owned and prosecuted by the plaintiff. "A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or

connected with the subject of the action," as used in Section 266, is none other than one which arises out of the "same transaction" or is one of the "transactions connected with the same subject of action," as used in Subdivision 9 of Section 258. So close and perfect is the analogy, that the same double signification is given to the correlative phrases, just as under Subdivision 9 of Section 258. Here, too, "same transaction" or "transactions connected with the same subject of action" require an identical producing cause or event in law cases,17 but only substantial identity of the subject of inquiry, in equity cases,—and here, too, where fraud inducing a contract is involved, there is the stage of transition where, in law cases, equitable standards are applied.19

Section 271 made it possible for a defendant, where he "sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons," to bring in those persons, "who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action."

Here, too, there has been and still is a difficult problem of interpretation as to whether the logical or functional standard should be adopted.

May the defendant bring in third persons who would be liable to him alternatively with plaintiff, or only jointly, or jointly and severally with plaintiff?

May a defendant bring in third persons, where, if defendant were plaintiff, he might sue said third persons, together with plaintiff, on the theory that he is in doubt, under Section 213?

Thus far, there have been intimations that defendant cannot avail himself of the rights of a plaintiff under Section 213.20 It is said that such counterclaim would not "raise questions between himself and the plaintiff along with any other persons."

This is merely a repetition of the controversy as to what is meant by "consistency." If we look for logical consistency, the contention just stated would seem to be correct. Logical consistency undoubtedly was the standard imposed by Section 266, before it was incorporated in the Civil Practice Act. But why not adopt the functional standard, that consistency requires only identity of the subject of inquiry? Certainly, that would comply with the requirements of Section 271, which only provides that questions shall be raised between said third persons along with plaintiff. Logical consistency is not thereby required. Functional identity of inquiry would seem to be enough. If there be identity of the subject of inquiry, with respect to a counterclaim properly interposed under Section 266, what of it if the question presented in the counterclaim be "who is liable," rather than "what is the extent of the liability of each"?

If we have in mind the modern standard, that there should be one trial for one controversy, there would seem to be no greater difficulty in construing Section 271 to be an extension of or exception to Section 266, than there has been in construing Section 213 to be an extension of or exception to Section 258.

There is at least one authority which points that way. But there is no recognition of the problem.

C.

Adding or Dropping Parties After Action Commenced.

The general purpose of the statute, to facilitate the consolidated action, is evidenced from an examination of the remaining statutes.

Section 192 authorizes the adding, dropping or substitution of parties at any stage of the proceeding. This section has not, to date, been liberally construed, but indications are that it will be, when its interpretation is presented to the Court of Appeals. The contest as to whether there may be

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complete substitution of parties is the old one, between the logical and functional theories of a litigation. The substitution of all the parties on one side of a litigation, according to strict logic, is the commencement of a new action, but functionally is the continuation of the same controversy. But the debate here seems entirely unjustified. The statute so plainly permits substitution of parties, that there should be no room for discussion. Of course, the right to substitute parties is an important phase of the effort to dispose of as many phases of one controversy as possible in one litigation.

Section 83 is a statute conceived in the same purpose. The transfer of interest or devolution of liability pending an action does not abate it. New parties may be substituted or joined. Though this statute received but scant recognition in the past, it has now come into its own.\textsuperscript{23a}

Subdivision 2 of Section 193 is another section in the same direction. It makes it possible for a defendant, within the discretion of the court, to bring in a person who will be liable to him by reason of the same facts in controversy. It is not necessary to show joint, or joint and several liability of the third person with defendant, to plaintiff. Being a new statute the standard is the same as that applied in Sections 209 and 211, \textit{i.e.}, are there substantial common questions of fact or law?

In this connection, Section 211-a is a recent addition of importance. It permits an adjustment of the right to contribution between joint tort feasors, who are both parties defendant in the action. This was the procedural supplement to the fundamental change in the substantive law,\textsuperscript{24} making

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{23a} Philips v. West Rockaway Land Co., 203 App. Div. 202, 196 N. Y. Supp. 723 (2nd Dept. 1922). Observe the attempt to distinguish the elevated railway cases.
\item \textsuperscript{24} The amendment to the Debtor and Creditor Law, in 1928, by the addition of Sections 230-240, brought tort feasors under the same classification as other joint obligors, and brought joint tort obligations under the same rules as joint contract obligations. This will appear from a reading of Section 231, which is as follows:

\begin{quote}
\textit{231. Definitions.} In this article, unless otherwise expressly stated, 'obligation' includes a liability in tort; 'obligee' includes a person having a right based on a tort. 'Several obligors' means obligors severally bound for the same performance.'
\end{quote}
\end{enumerate}
\end{footnotesize}
it possible for a joint tort feasor to seek contribution. It would seem that, accordingly, where one of several tort feasors is not made a party defendant, the defendant on his motion might have him brought in, to the intent that he might, in that same action, be required to contribute his just obligation.\textsuperscript{24a} No reason appears to the contrary. Such a result is within the spirit of the Civil Practice Act, which fosters the idea of the consolidated action, notwithstanding a recent Special Term decision to the contrary.\textsuperscript{25}

Section 287 (interpleader by order) is the converse of Subdivision 2 of Section 193. Whereas the latter permits a defendant to bring in a third person who will be liable to him, interpleader by order permits a defendant to substitute or join a third person, who has a claim against defendant. But here, too, the standard is whether there is substantially the same subject of inquiry.

Subdivision 3 of Section 193 carries the same idea one step further: It permits the third person to intervene as a matter of right in the litigation of others, in order to interpose his claim to the property involved. Here, too, there has been difference of opinion as to how specific that interest must be. Indications are that the third person must have an interest in specific property;\textsuperscript{26} yet there is considerable

\textsuperscript{24a} Since contribution between joint tort feasors, prior to the amendment \textit{supra} Note 24) was impossible, only by reason of the enforcement of an arbitrary exception to the general equitable principle, it would seem to the author that the purpose of the statute and its result was to assimilate the rules of contribution, with respect to tort feasors, to those which have always operated in equity, with respect to contractual obligors.

Thus viewed, Section 211-a of the Civil Practice Act is not an isolated innovation, but supplementary to the change of the substantive law, represented by Sections 230-240 of the Debtor and Creditor Law. It carries out the idea of those changes in the substantive law, by making it possible, procedurally, to adjust the rights of joint tort feasors, who are parties in the action. That was always possible as to joint contractors, under Section 264 of the Civil Practice Act. Where some of joint contractual obligors were not present in the action Subdivision 2 of Section 193, as we shall show, permitted the defendant to bring them in. Tort feasors could not then be brought in because there was no contribution between them. The change in the substantive law by assimilating tort feasors with other joint obligors makes the Subdivision 2 of Section 193 applicable to joint tort feasors, as well, where all of them are not before the court, in the same manner as in the case of contractual obligors.

\textsuperscript{25} Rowe v. Denier, 238 N. Y. Supp. 9 (Erie County, Dec. 1929).

\textsuperscript{26} Cf. Wilcox v. Mutual Life Ins. Co., 235 N. Y. 590, 139 N. E. 746 (1923) in the light of the dissenting opinion of Judge Crane.
authority that it is enough that he will be affected by the outcome of the litigation.27

This statute comes to us from the old Code of Civil Procedure and has carried with it, the interpretation of the decisions adhering to the logical theory of a litigation.

Finally, there are the rules as to consolidation of actions. The statute affords no affirmative standard. Yet, the implied standard would seem to be clear: Are there substantial common questions of law or fact, which justify one trial for one controversy, without unduly prejudicing any of the litigants?

Even here, however, there is debatable territory.

Conceded that the Court may consolidate actions pending between litigants who are parties to all of them,—may it do so with respect to plaintiffs who appear only in some of the actions and resist consolidation of these actions? 28

Much depends, in our answer to this question, on whether we adopt the logical or functional theories of litigation.

Surely the new provisions for consolidation of libel actions, on the application of defendants, is a most decisive step toward the functional view of the trial.

**Conclusion.**

Thus, in outline, we have sketched the ideal of the consolidated action: one trial for one controversy.

There can be no question that what is new in the Civil Practice Act tends inevitably towards the consolidated trial of functionally related controversies. There can also be no question that what was transferred from the Code of Civil Procedure has hampered the full development of that result.

Nevertheless, we must remember that we are in the process of transition. The purpose to accomplish one trial for one controversy, which was never fully formulated, will eventually be accomplished. The stresses and strains of conflicting forces, emanating from irreconcilable theories of the proper scope of a single litigation, will finally reach a state

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27 See authorities cited in dissenting opinion of Judge Crane.
of equipoise,—perhaps not as perfect nor with as high a degree of utility, as if the structure had been built to plan under the guidance of a single architect, but, nevertheless, with the advantages which can come only from trial and experience, and all the interest which attaches to historic and monumental creations—which, through the vicissitudes of alterations and reconstructions, survive to capture our admiration and command our respect.

But the procedural result will be that tested by functional utility. So-called logical and rational standards will gradually be submerged. The logic of procedural reform is measured unerringly by the utility of the functional result.

Solution will be imminent when Section 258 is repealed.

JAY LEO ROTHSCILD.

New York City.
APPENDIX

Sec. 209. Joinder of Plaintiffs Generally.—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 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.

Sec. 211. Joinder of Defendants Generally.—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 judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Sec. 212. Defendant Need not be Interested in All the Relief Claimed.—It shall not be necessary that each defendant shall be interested as to all the 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.

Sec. 213. Where Doubt Exists as to Who is Liable.—Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties.

Sec. 258. Joinder of Causes of Action.—The plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries, except libel, slander, criminal conversation or seduction.
3. For libel or slander.
4. For injuries to real property.
5. Real property in ejectment, with or without damages for the withholding thereof.
6. For injuries to personal property.
7. Chattels, with or without damages for the taking or detention thereof.
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. 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.

10. For penalties incurred under the conservation law.

11. For penalties incurred under the agricultural law.

12. For penalties incurred under the public health law.

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.

A provision of statute authorizing a particular action, or regulating the practice or procedure therein, shall not be construed to prevent the plaintiff from uniting in the same complaint two or more causes of action pursuant to this section.

Sec. 266. Counterclaim Defined.—A counterclaim, except as otherwise provided by statute, must tend to diminish or defeat the plaintiff’s recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff or the plaintiff and another person or persons alleged to be liable a separate judgment may be had in the action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff’s claim or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract existing at the commencement of the action.

Sec. 267. Rules Respecting the Allowance of Counterclaims.—The counterclaim specified in subdivision second of the last section is subject to the following rules:

1. If the action is founded upon a contract which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand existing against the party thereto or an assignee of the contract at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim to the amount of the plaintiff’s demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange which has been assigned to the plaintiff after it became due, a demand existing against a person who assigned or transferred it after it became due must be allowed as a counterclaim to the amount of the plaintiff’s demand, if it might have been so allowed against the assignor while the note or bill belonged to him.
3. If the plaintiff is a trustee for another or if the action is in the name of a plaintiff who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.

SEC. 271. NEW PARTIES SET UP IN COUNTERCLAIM. Where a defendant sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall set forth the names of all the persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action. Where any such person is not a party to the action he shall be summoned to appear by being served with a copy of the answer. A person not a party to the action who is so served with an answer becomes a defendant in the action as if he had been served with the summons. Any such person named in an answer as a party to a counterclaim may reply thereto within the time within which a defendant might serve an answer to a complaint, or he may serve a notice of appearance on the party interposing the counterclaim.

SEC. 192. NONJOINDER AND MISJOINDER. No action or special proceeding shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added or substituted and parties misjoined may be dropped by order of the Court at any stage of the cause as the ends of justice may require.

SEC. 83. PROCEEDINGS UPON TRANSFER OF INTEREST, OR DEVOLOPMENT OF LIABILITY. In case of a transfer of interest or devolement of liability the action may be continued by or against the original party, unless the Court directs the person to whom the interest is transferred or upon whom the liability is devolved to be substituted in the action or joined with the original party as the case requires.

SEC. 193. DETERMINATION OF RIGHTS OF PARTIES BEFORE THE COURT. 1. The Court may determine the controversy as between the parties before it where it can do so without prejudice to the rights of others or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties the Court must direct them to be brought in.

2. Where any party to an action shows that some third person, not then a party to the action, is or will be liable to such party wholly or in part for the claim made against such party in the action, the Court on application of such party may order such person to be brought in as a party to the action and direct that a supplemental summons and a pleading alleging the claim of such party against such person be served upon such person and that such person plead thereto, so that the claim of such moving party against such person
may be determined in such action, which shall thereupon proceed against such person as a defendant therein to such judgment as may be proper.

3. Where a person not a party to the action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the Court to be made a party, it must direct him to be brought in by the proper amendment.

4. The controversy between the defendants shall not delay a judgment to which the plaintiff is entitled, unless the Court otherwise directs.

SEC. 211-A. ACTION BY ONE JOINT TORT-FEASOR AGAINST ANOTHER.—Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro-rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro-rata share of the defendant or defendants making such payment; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro-rata share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice.

SEC. 287. INTERPLEADER IN PENDING ACTION.—A defendant against whom an action to recover upon a contract or an action of ejectment or an action to recover a chattel is pending at any time before answer upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him may apply to the Court upon notice to that person and the adverse party for an order to substitute that person in his place and to discharge him from liability to either, on his paying into court the amount of the debt or delivering the possession of the property or its value to such person as the Court directs; or, upon it appearing that the defendant disputes in whole or in part the liability as asserted against him by different claimants or that he has some interest in the subject-matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The Court, in its discretion, may make such order upon such terms as to costs and payments into court of the amount of the debt or part thereof or delivery of the possession on the property or its value or part thereof as may be just, and thereupon the entire controversy may be determined in the action.
SEC. 96. CONSOLIDATION AND SEVERANCE OF ACTIONS.—An action may be severed and actions may be consolidated whenever it can be done without prejudice to a substantial right.

SEC. 97. CONSOLIDATION OF ACTIONS PENDING IN DIFFERENT COURTS.—Where one of the actions is pending in the Supreme Court and another is pending in another court, the Supreme Court, by order, may remove to itself the action in the other court and consolidate it with that in the Supreme Court.

SEC. 97-A. CONSOLIDATION OF ACTIONS FOR LIBEL.—It shall be competent for the Court upon an application by or on behalf of two or more defendants in actions instituted by the same plaintiff for or on account of respective libels of similar purport or effect, to make an order for the consolidation of such actions, so that they shall be tried together; and after such order has been made, and before the trial of the said actions, the defendant in any new action instituted by the same plaintiff for or on account of a libel of a similar purport or effect shall also be entitled to be joined in such consolidated action upon a joint application being made by such new defendant and the defendants in the actions already consolidated. In a consolidated action under this section the jury shall assess the whole amount of the damages (if any) in one sum, but a separate verdict shall be taken for or against each defendant in the same way as if the actions consolidated had been tried separately; and if the jury shall have found a verdict against a defendant or defendants in the consolidated action, they shall proceed to apportion the amount of damages which they shall have so found between and against such defendants and shall render the verdicts accordingly.

SEC. 338-A. EVIDENCE IN ACTION FOR LIBEL.—At the trial of any civil action for libel, the defendant may prove, for consideration by the jury in fixing the amount of the verdict, that the plaintiff has already recovered damages, or has received, or agreed to receive, compensation in respect of a libel or libels of a similar purport or effect as the libel for which such action has been brought.