

Pleading: Demurrer for Non-Joinable Causes of Action Intermingled in One Count

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from the legislature. This leads one to speculate on the possibilities of there being a change in the law of lateral support through legislation. In the Wellauer case, the plaintiff based the defendant's liability on a city ordinance which provided: "Any person, firm, or corporation making excavations or causing the same to be made, shall properly guard them and shall protect them that the adjoining soil shall not cave in, and no one shall excavate so as to injure any adjoining ground or building."¹³ The court held that this ordinance could not be interpreted as placing the duty of supporting the building on the party doing the work. On page 24 Eschweiler, J. points out that "such well established property rights as are here involved cannot be taken away or substantially changed except by express declaration of the legislature, either by statute or by expressly delegating such power to the common council. Neither of such is found in this case." The ordinance has apparently never been changed. Since this decision was handed down the Home Rule Amendment was added to our constitution. We wonder what would be the effect of a charter ordinance similar to the ordinance quoted above, bearing in mind the fact that the law on lateral support as it exists in Wisconsin today is entirely bench made law.

JOHN J. McRAE

Pleading; Demurrer for Nonjoinable Causes of Action Intermingled in One Count

Ernst vs. Schmidt 223 N.W. 559 (Wis.)

Plaintiff loaned money to the Elmwood Co., a corporation engaged in the development of Texas oil lands. The defendants, stockholders in said corporation, agreed in writing that in the event that the plaintiff was compelled to foreclose on the corporate property to secure the loan, they would pay their pro rata share of the loan and take their pro rata share of the fee. The debt was not paid, plaintiff foreclosed on said property, and now sues the stockholders to obtain the amount of the loan according to the agreement.

The plaintiff joined the defendants in one action failing to separately state and number the separate causes of action. The defendants demurred separately on the ground that several causes of action had been improperly united. The lower court overruled this demurrer. On appeal it was held that such demurrer should have been sustained. The court said that where the causes of action are joined in one complaint, and instead of being individually stated in separate counts they are joined in one count, the defective pleading is properly reached under

¹³ Milwaukee Code of 1914, IV, 43.

the statute by a motion to make more definite and certain. This goes upon the theory that causes of action are joinable, and can be properly pleaded in one complaint. On the other hand, where they are nonjoinable, they have no proper place in the complaint at all, and cannot be united, either in separate counts or in a jumble in one count. It is therefore considered that the statute requiring a motion to make more definite and certain was intended for an intermingling of non-joinable causes of action in one count, leaving an intermingling of non-joinable causes of action in one count subject to the statutory provision which authorizes a demurrer where two or more causes of action are improperly united. This distinction is manifested to a degree in the decisions of this court, and seems to be the uniform rule in other jurisdictions.

A defect in joining causes of action in one count may be reached by a motion to make more certain by separately stating and numbering where causes are joinable, but where there are nonjoinable causes of action which cannot be united in the complaint, either in separate or in single counts; such a complaint is demurrable and it is not necessary to make a motion to separately state and number before demurring.

The court follows the case of *Fischer vs. Hintz*, 145 Minn. 161, 176 N. W. 177, which holds that defendants may demur for misjoinder, though the pleading in form sets forth but one cause of action, if in reality it embraces two or more *that cannot be joined in any form*.¹

An examination of the authorities upon the subject in this state discloses that in *Buerger vs. Buerger*, 178 Wis. 352, 190 N. W. 126, and *July vs. Adams*, 178 Wis. 375, 190 N. W. 89, and *McIntyre vs. Carroll*, 193 Wis. 382, 214 N. W. 366, language is used based, however, upon the respective issues in these cases, which does not distinguish between joinable and nonjoinable causes of action.

After due and careful consideration, the court is of the opinion that a distinction between joinable and nonjoinable causes of action should be definitely recognized. By so doing the court will be in harmony with the overwhelming weight of authority in other jurisdictions.

GERALD F. HARDY

Statute of Frauds; Extrinsic Evidence in Relation to Description

In *Pierson vs. Dorff*,—Wis.—, 223 N. W. 579, the validity of an agreement for the sale of real estate was questioned on the ground that the description of the property did not comply with the Statute of

¹ *Pomeroy's Code Remedies*, sec. 344; *Bass v. Upton*, 1 Minn. 408 (Gil. 292); *Anderson v. Scandia Bank*, 53 Minn. 191, 54 N.W. 1062; *Goldberg v. Utley*, 60 N.Y. 427; *Leidersdorf v. Second Ward Bank*, 50 Wis. 406, 7 N.W. 306; *Mulholland v. Rapp*, 50 Mo. 42.