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Bills of Peace Revisited

George B. Fraser

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At common law it was usually impossible to litigate separate claims at one time even though the claims involved common issues. On the other hand, the equity court recognized that a multiplicity of suits should be avoided where there was a relationship between the claims. Therefore, a bill of peace to prevent separate trials would lie where a number of related claims were being asserted against a defendant. Unfortunately, the cases in this country have not agreed as to the nature of the relationship that must exist between the claims. Some cases, adopting the view of Professor Pomeroy, have held that a bill of peace will lie where the claims involve only common questions of law and fact. Other cases hold that the existence of common questions of law and fact is not enough although they do not agree as to what is necessary. The leading case for this view, which is probably the majority view, is Tribette v. Illinois Central Railroad. However, recent decisions and procedural changes indicate that the Tribette case should no longer be followed and that courts have the power to join claims that involve only common questions of law and fact to reduce the time and expense of litigation.

In the Tribette case a number of plaintiffs brought separate actions to recover damages for the destruction of their property by a fire that was alleged to have been started by sparks from one of the defendant's engines. To avoid having to defend a number of suits the defendant Railroad filed a bill in chancery to enjoin the separate actions and to join the plaintiffs in one suit, alleging that the various claims arose out of the same occurrence and depended upon the same questions of fact and law. The Supreme Court of Mississippi held that the Railroad could not bring the claimants "before a court of chancery in one suit, and deny them their right to prosecute their actions separately at law as begun by them." Other parts of the opinion indicate that the court objected to the fact that the plaintiffs would be deprived of their right to prosecute their actions separately, rather than that they would be deprived of their right to prosecute their actions at law. The court stated that its holding was not based on the fact that the bill had been filed in the wrong court and that even "if we had only one forum, armed with full power to administer all remedial justice; joinder of these parties in one action would not be admissible."
Also, the court stated that where diverse injuries are involved separate suits would be necessary because it would be unthinkable to determine separate damages in one suit, and even if the damages are the same, such a bill would not lie because it would be arbitrary to allow it in one case and not in the other. Therefore, the court held that a bill in equity would not lie in any case where the claims involved only common questions of law and fact. Nowhere in the opinion did the court refer to the fact that a suit in equity would result in the claims being determined by a court instead of by a jury.

The court stated that a bill of peace would lie where there is some other basis for equitable relief, or a common right or title involved, or a common purpose in pursuit of a common adversary. However, the meaning of these phrases is not clear. The court also recognized that where several persons may sue or be sued in equity their joinder as plaintiffs or as defendants in one suit is permitted.

Ten years later, in *Illinois Central Railroad v. Garrison*, the Supreme Court of Mississippi held that persons who bring separate actions at law for damages that result from a continuing trespass may be joined in one suit in equity and their separate actions at law may be enjoined. In this action a number of landowners brought separate actions for damages that were alleged to have been caused by the improper construction of an embankment. The Railroad, alleging that some of the claimants had previously brought similar actions and that all of them assert that they will bring other actions in the future, filed a bill to enjoin the separate actions and to join the claimants in one suit. The trial court denied the injunction, but the supreme court reversed. However, jurisdiction in equity was not based on the ground that the claimants could have joined as plaintiffs in a suit in equity to abate the nuisance. Instead, it was based on the ground that if the equity court did not assume jurisdiction there would be no limit to the number of suits that could be brought because a continuing trespass was involved. The court stated that "the jurisdiction of the chancery court to convene all the parties in one suit, and to determine therein the single question on which liability, past, present and future depends, so as to prevent this endless multiplicity of suits, with its attendant useless consumption of time and costs, is too well settled by modern authorities to be doubted." The court distinguished the *Tribette* case on the ground that the claims in that case arose out of a single past trespass whereas here they arose out of a continuing trespass.

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6. In Yuba Consolidated Gold Fields v. Kilkeary, 206 F.2d 884, 888 (9th Cir. 1953), the court indicates that the *Tribette* view requires privity between the members of the group.
7. 81 Miss. 257, 32 So. 996 (1902).
8. Id. at 997.
In a subsequent case, the Supreme Court of Mississippi reaffirmed the holding in the *Garrison* case that if numerous actions for damages arise out of a single past trespass a bill in equity will not lie, but if numerous actions for damages arise out of a continuing trespass, a bill will lie. This distinction is questionable because the right to combine actions that contain common questions should not depend on the nature of the wrong out of which the claims arose. Where a continuing trespass is involved, future actions may be brought, but this should not justify the consolidation of actions for damages that have already accrued where no equitable relief is requested. Similarly, where a single past trespass is involved, future claims will not arise, but this should not prevent the consolidation of actions for damages. In either situation the court should consider if a determination in one suit of the common question on which liability depends would prevent the useless consumption of time and costs.

Almost sixty years after the *Garrison* case was decided, the Supreme Court of Mississippi recognized that separate claims for damages that arise out of a single past trespass should be determined at one in order to avoid a multiplicity of suits and save time and costs. In 1959, in *Stoner v. Colvin*, two persons who were injured in the same automobile collision brought separate suits for damages for personal injuries against the same defendant. Although Mississippi does not have any statutes on consolidation, the trial court, apparently on its own motion, consolidated the actions for trial. This was affirmed on appeal. The Supreme Court held that courts of general jurisdiction have the inherent power to consolidate actions "to avoid a multiplicity of suits, to prevent delay, to clear congested dockets, to simplify the work of the trial court, and to save unnecessary costs and expenses." That the claims involved only common questions of law and fact and that the damages to each plaintiff were different did not prevent consolidation. Thus, if the *Tribette* case were to arise today, the Railroad's objective could be achieved; it would not have to defend a multiplicity of suits because the separate actions could be consolidated.

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9. Cumberland T.&T. Co. v. Williamson, 101 Miss. 1, 57 So. 559 (1912). In Gulf & S.I.R.R. v. Barnes, 94 Miss. 484, 48 So. 823 (1909), the court held that the *Tribette* case had been overruled. Accord, Whitlock v. Yazoo & Miss. Valley R.R., 91 Miss. 779, 45 So. 861 (1908). However, in the *Williamson* case the court reaffirmed the *Tribette* case. In Mississippi Power Co. v. Ballard, 166 Miss. 631, 146 So. 874 (1933), the *Tribette* case was cited with approval. In this case, which involved a permanent nuisance, the court held that a bill of peace would not lie unless a claimant had brought or had threatened to bring successive actions. The court did not indicate that if successive actions are brought they must be brought in bad faith for a bill of peace to lie. For other Mississippi cases see Chaffee, *op. cit. supra* note 1, at 188; Kimbrough, *The Tribette Case*, 12 Miss. L.J. 134 (1939).


11. 110 So. 2d at 924.
In other jurisdictions it is generally held that a bill of peace will lie where a number of suits to enjoin a nuisance and for damages for injuries arising out of the nuisance are brought. But many of these jurisdictions hold that a bill of peace will not lie if the claimants only sue for damages although the claims arise out of a continuing nuisance.

It is often stated that the bill will not lie because it would deprive the parties of their right to a jury trial. It is surprising how many of these cases rely on the Tribette case without recognizing that it involved a completed tort and that in some subsequent decisions the Supreme Court of Mississippi said that a bill of peace may lie where the actions are for damages arising out of a continuing nuisance.

A few courts hold that a bill of peace may be granted where the separate actions involve only common questions of law and fact although the only relief requested is damages. In some of these cases it is stated that if the claim are subsequently found to be valid, the claimants may continue their separate actions at law for damages. Thus, the right to a jury trial on some issues is preserved. Other cases state that if there is liability, damages may be determined in the same action by a jury. A federal court held that a bill of peace should be granted where 130 landowners brought separate suits against a power company for damages for injury to their property and, if the power company were liable, the question as to the amount of damages to be awarded might, in the discretion of the court, be submitted to a jury. This would be a desirable result if it were expanded to include a jury trial on the issue of liability.

In Yuba Consolidated Gold Fields v. Kilkeary, a federal court distinguished between jurisdiction in the strict or power sense and jurisdiction in the equity or discretionary sense. It held that a court has the power to grant a bill of peace where various claims involve common questions of law and fact, but the court must determine in each case if it should exercise its power. In this case an embankment collapsed causing heavy damage to agricultural, business and residential property. The owner of the embankment brought an action in the nature of a bill of peace in which it alleged that about 2,669 tracts of farm land were flooded, that about

14. E.g., Roanoke Guano Co. v. Saunders, 173 Ala. 347, 56 So. 198 (1911); Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N.E. 47 (1909). In the Kilkeary case, supra note 19, the court remarked that a bill of peace does not deprive parties of their right to a jury trial because no such right exists where the remedy at law is inadequate.
15. E.g., Ducktown S., C., & I. Co. v. Fain, 109 Tenn. 56, 70 S.W. 813 (1902).
17. E.g., American Lead Corp. v. Davis, 111 Ind. App. 242, 38 N.E.2d 281 (1941).
19. 206 F.2d 884 (9th Cir. 1953).
8,000 persons were forced from their homes, that other damage was caused by the flood, and that six actions involving more than 100 claimants and $853,964.98 in claims had been filed against it. All claimants, including those who had not yet brought suit, were joined as parties to the action, and the plaintiff asked the court to enjoin all actions against it and to determine all claims in this action. The district court dismissed the complaint, but the court of appeals reversed and remanded the action with instructions for the trial court to determine if the remedy at law is plain, adequate and complete. The court stated that the trial judge should consider if the action in equity would actually prevent a multiplicity of litigation, if the parties would benefit by the assumption of jurisdiction, if the assumption of jurisdiction would obstruct the interests of any defendant and if the actions could be consolidated at law.

The discussion of the cases indicates that there are two primary objections to granting a bill of peace where the various claims are for damages arising out of a tort. In the Tribette case the court refused to join all claimants in one action because it would “deny them their right to prosecute their actions separately at law as begun by them.” Other courts have refused to grant a bill of peace because it would deprive the parties of a jury trial.

The Stoner case rejected the view that the plaintiff’s choice of parties controls and that neither the defendant nor the court can add other parties to an action. This is the better view because the plaintiff is not the only person who is affected by the litigation. The defendant, the witnesses, the jurors and the court are necessarily involved, and the proper administration of justice requires the court to see that the interests of these persons are protected. Where the plaintiff will not be prejudiced, his right to prosecute his separate action without other persons being made parties must yield to the interest of the defendant, the witnesses, the jurors and the court in decreasing the burden of litigation by reducing the number of suits. Therefore, the view that the plaintiff’s action cannot be expanded has passed into oblivion with many other common law concepts, and modern statutes and rules of procedure contain numerous provisions for the joinder of claims and the consolidation of actions.

In most jurisdictions statutes or court rules permit persons whose claims arise out of one transaction or occurrence, and involve common questions of law or fact, to join in one action as plaintiffs. Joinder is optional with

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21. E.g., Fed. R. Civ. Proc. 20. See Akely v. Kinnicutt, 238 N.Y. 466, 144 N.E. 682 (1924), where 193 claimants with separate causes of action joined as plaintiffs in one suit. The existence of common questions of law or fact should be sufficient, and the requirement that the claims arise out of one transaction or occurrence should be deleted from Federal Rule 20. Blume, Free Joinder of Parties, Claims and Counterclaims, The Judicial Administration Monographs 41, 46 (A.B.A. 1942). The unfortunate effect of the requirement that the
the plaintiffs, however, rather than with the defendant although the defendant is the party who would be vexed by a multiplicity of suits if the claims are not joined. Other claimants may intervene. Also, a plaintiff may join as defendants persons who may be liable to him either jointly, severally or in the alternative, where their liability arises out of one transaction or occurrence and involves common questions of law or fact.

The defendant may assert a claim against the plaintiff or a co-defendant if his claim arises out of the transaction or occurrence that is the basis of the plaintiff’s action, and the defendant may assert a claim against a new party for contribution or indemnity, although he may not implead a third party to recover damages for his own injuries. Nevertheless, modern rules of procedure do not provide defendants the same freedom of joinder that is available to plaintiffs. Although a defendant may be harassed by a multiplicity of suits that arise out of some transaction or occurrence, the rules do not authorize him to implead the persons who are asserting claims against him so that the single question on which liability depends may be determined in one action. Since the claimants could have joined as plaintiffs, impleader should be allowed. The action would be no more difficult to try where the claimants are brought in by the defendant then where they voluntarily join as parties.

In addition to authorizing the joinder of claims, modern statutes and rules of procedure permit a court to consolidate actions that are pending before it for a joint trial of some or all of the issues where consolidation would avoid a multiplicity of trials and would not prejudice any party. Where actions can be consolidated, a bill of peace will not be allowed. However, the provisions which permit consolidation will not always prevent a defendant from being harassed by a multiplicity of suits.

22. E.g., FED. R. CIV. PROC. 24(b).
23. E.g., FED. R. CIV. PROC. 20.
25. E.g., FED. R. CIV. PROC. 14.
28. E.g., FED. R. CIV. PROC. 42(a), Hotel George V v. McLean, 1 F.R.D. 241 (D.D.C. 1940) (consolidate for trial of one issue); Annot., 68 A.L.R.2d 1372 (1959). In Shacter v. Richter, 135 N.W.2d 66 (Minn. 1965), the consolidation of two separate suits by one plaintiff against different defendants for injuries arising out of two separate occurrences was upheld because there was a common question as to damages. After consolidation, some issues may be separated for trial. Kelly v. Greer, 295 F.2d 18 (3d Cir. 1961).
29. Equitable Life Assur. Soc. v. Wert, 102 F.2d 10 (8th Cir. 1939).
because generally, actions that are pending in different courts cannot be consolidated, and consolidation is not available where the claimants have not filed suit.

Where there are numerous claimants, a few courts permit a potential defendant to bring an action for a declaration that he is not liable for conduct which is asserted to be tortious. However, an action for declaratory relief is not adequate unless the court also enjoins the prosecution of pending actions and the commencement of new ones.

Since the provisions for the joinder of claims and the consolidation of actions do not fully protect a defendant from being harassed by a multiplicity of suits on claims that involve common questions of law or fact, a bill of peace to enjoin the separate suits and require the claimants to assert their claims in one action should lie. However, the parties should not be deprived of their right to a jury trial.

In a jurisdiction that has merged its courts of law and equity an action does not have to be deemed to be an equitable action for all purposes. The court could use its equity power to enjoin the separate actions and to require all claimants to assert their claims in one suit, but the action could be deemed to be legal action for the trial on the merits. This would preserve the advantage of an action at law—the right to a jury trial—and the advantage of a suit in equity—the prevention of a multiplicity of actions by determining liability in one suit.

A similar approach has been taken by a few courts in interpleader actions. Although interpleader is traditionally an equitable action, the dispute between the claimants has been tried by a jury. In one case the court


32. Atchison, T. & S.F. Ry. v. Taylor, 87 F. Supp. 313 (E.D. Mo. 1949) (defendants counterclaimed for damages); State v. Adelmeyer, 221 Wis. 246, 265 N.W. 838 (1936). Where only one claimant is involved, courts, as a matter of discretion, usually refuse to hear an action for a declaration that plaintiff's conduct was not tortious. Sun Oil Co. v. Transcontinental Gas Pipe Line Corp., 108 F. Supp. 280 (E.D. Pa. 1952), aff'd, 203 F.2d 957 (3d Cir. 1953); Illinois Cent. R.R. v. Bullock, 181 F.2d 851 (5th Cir. 1950). In several cases the court took jurisdiction although the question was not discussed. Standard Brands v. Bryce, 1 Cal. 2d 718, 37 P.2d 446 (1934); Caddo Contracting Co. v. Johnson, 222 La. 796, 64 So. 2d 177 (1953).


stated that the equitable remedy of interpleader is available for the protection of the stakeholder, and after the court finds that the stakeholder has a right to interpleader, the basic nature of the issue between the claimants should control the right to a trial by jury.\textsuperscript{85} Similarly, a bill of peace should prevent a person from being oppressed by a number of actions that involve the same facts and legal issues, but after the court grants the bill, the nature of the issues between the parties should determine the method of trial.

Modern rules of procedure permit a court to order separate trials of specific issues, such as liability and damages.\textsuperscript{86} Thus, after granting a bill of peace, a court could separate the issue of liability from the issue of damages and determine the common issue of liability at one time for all claimants.\textsuperscript{87} Then, if the alleged tortfeasor is found to be liable and the claims are so numerous that the evidence may be confusing, the court may separate the damage claims for trial. Even persons who oppose the separation of liability and damages for trial where only one plaintiff and one defendant are involved, recognize that separating the issues is desirable where there are multiple parties.\textsuperscript{88}

The holding in the \textit{Kilkeary} case that a court has the power to enjoin the prosecution of separate suits where the claims involve common questions of law and fact, and that the court must consider the effect that a single trial of the various claims may have on the parties in order to determine if it should exercise its power, is a desirable rule and should be followed in other jurisdictions. If a saving of time and cost will result from trying the issue of liability at one time, and if no one will be prejudiced by a single trial, a bill of peace should be granted. Moreover, it should be immaterial whether the claims arose out of a past trespass or a continuing nuisance. Adoption of this rule would make it unnecessary to distinguish between a community of interest, a common right or title, a common interest, etc. Bills of peace would then become a useful procedure for simplifying the litigation arising from a mass tort.\textsuperscript{39} However, if a court grants a bill of peace, the parties should be entitled to a jury trial of all issues.

\textit{Stare decisis} should not apply to rules of procedure.\textsuperscript{40} Therefore, courts

\begin{footnotes}
39. Some claimants could not be joined because they are beyond the jurisdiction of the court, but only the claimants who are joined will be affected by the action. See Comment, \textit{Procedural Devices For Simplifying Litigation Stemming From Mass Tort}, 63 \textit{YALE L.J.} 493, 507-509 (1954).
\end{footnotes}
which have limited the usefulness of bills of peace should reexamine their restrictions in light of the principle that actions for damages which involve common questions of fact should be tried at one time where no one will be prejudiced thereby, and the procedural developments that permit courts to grant legal and equitable relief in the same action and to separate for trial the issues of liability and damages. Also, statutes and rules of procedure should be amended to include a provision that would authorize a defendant to join in one action, persons who assert claims against him that involve common questions of fact. The provision should state that the basic nature of the issues involved will determine the method of trial.