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NOTE

JOINDER OF MOTOR VEHICLE LIABILITY INSURANCE COMPANIES WITH THE INSURED IN TORT CASES—UNDER SOUTH CAROLINA LAW WHEN CAN THEY BE JOINED?

SCOPE

In this reasonably narrow vista of procedural law there still exists some confusion as to when it is permissible to join a tort-feasor's insurer in an action by the injured party for personal injury or property damage.¹ To some degree this uncertainty has resulted from: (1) the type of insurance contract involved, i. e., insurance (indemnity against liability) or indemnity (indemnity against loss);² (2) the effect thereon of the statute making insurance compulsory, and (3) the type or types of damages alleged by the plaintiff in his complaint. Also the question of removal to Federal Court has tended at times to further complicate the picture. In this note consideration is given to these details, and of necessity almost entirely as they pertain to situations wherein the tort-feasor involved is a public carrier, a bus company, a taxicab, or the like. Not discussed are the problems growing out of the rights of the insurer as subrogee, nor, to any real extent, are the problems in connection with joinder of an insurer under a policy of private liability insurance. As is obvious from the title, only South Carolina law is involved.

GENERAL CONSIDERATIONS

The plaintiff in these situations quite naturally is desirous of joining the reliable and financially responsible insurance company whenever possible. Not only is this because of his greater chance of realizing on his judgment should he be successful, but also due to the plaintiff's increased chances of receiving a jury verdict and a good one. This latter consideration stems from the element of prejudice inevitably a part of every close case and some not so close when

1. As recently as March 1953 the question of proper joinder was raised in *Leppard v. Jordan's Truck Line, Inc.*, 110 F. Supp. 811 (E.D. S.C. 1953). In this case, properly removed to the Federal Court, the plaintiff moved to remand the cause to the state courts despite the fact that punitive damages were claimed. The motion was refused on the ground that the causes of action stated were separate and as such properly in federal court.

2. "A distinction is made between contracts for indemnity against *liability*, and those of indemnity against *loss*. In the former case the insurer's obligation becomes fixed when *liability attaches* to the insured. In the latter case the insurer's liability does not attach until loss has been suffered, that is when the insured has paid the damages." 1 JOYCE, *INSURANCE*, § 27 b (2d ed.) as quoted in *Piper v. American Fidelity & Casualty Co.*, 157 S.C. 106, 154 S.E. 106 (1930).

insurance companies are involved. For essentially the same reasons, operating in the reverse, of course, the defendant seeks earnestly in the usual case to defeat joinder.

Under what circumstances joinder is allowed is governed largely by statute.³ These statutes are discussed in the section immediately following. In succeeding sections the case law as developed by the South Carolina Supreme Court is surveyed, along with the slight variation from South Carolina holdings and interpretations which apparently exists in connection with federal cases arising in South Carolina. Special treatment is given to joinder under the relatively new Motor Vehicle Safety Responsibility Act⁴ which, it is thought, leaves room for some doubt as to its effect procedurally on joinder. Lastly, in the conclusion an attempt is made to summarize the conditions which must exist before joinder of the tort-feasor's insurer can be accomplished.

STATUTES

The procedure of joining two or more distinct causes of action in a single pleading originated at common law and was permitted primarily for the purpose of avoiding as far as possible a multiplicity of suits.⁵ Although controlled by the rather strict rule that all counts joined at common law must be pursued in the same form of action, where permissible, joinder nonetheless came early to be encouraged. Now, aided by statute it is even more encouraged. In fact, in *Ripley v. Rodgers*⁶ the South Carolina Supreme Court said "the dominant idea is to permit joinder of causes of action, legal or equitable, where there is some substantial unity, and a liberal construction according to the rules as to remedial laws should be given".⁷

3. The statutes primarily concerned are found in CODE OF LAWS OF SOUTH CAROLINA, 1952:

- § 10-701 — What causes of action may be joined (Formerly included in § 487 of 1942 Code).
- § 10-702 — Joinder of principal and surety. (Formerly included in § 487, 1942 Code).
- § 58-1481 — Insurance or bond required of certificate holders generally. (Public service companies).
- § 58-1482 — Insurance required on motor vehicles transporting goods for hire.
- § 58-1512 — Liability insurance required (taxicabs).
- § 58-1513 — Bond in lieu of insurance (Taxicabs).
- § 58-1536 — Right to regulate motor vehicles used for hire (Busses and Taxies in Cities of 30,000 to 50,000).

4. S. C. ACTS AND JOINT RESOLUTIONS 1952, No. 723, p. 1853.

5. *Martin v. Keith*, 214 S.C. 241, 52 S.E. 2d 22 (1949).

6. 213 S.C. 541, 50 S.E. 2d 575 (1948).

7. *Id.* at 544.

The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable or both, when they all arise out of:

- But the causes of action so united must (1) all belong to one of these classes, (2) except in actions for the foreclosure of mortgages, affect all parties to the action, (3) not require different places of trial and (4) be separately stated.

But in 1925 the picture changed. Compulsory insurance made its entrance into South Carolina. By Act of the Legislature motor vehicle transportation companies were required to procure and maintain in force liability and property damage insurance or surety bonds for the benefit of passengers and the public receiving injury through the negligence of the transportation company and each motor vehicle used by them.⁸ This made a matter of public record the fact that common carriers were covered by liability insurance. Since the act was a public act of which every citizen is presumed to have knowledge,⁹ the jury could not in such case be prejudiced by further knowledge that the defendant was thus insured.

8. Act No. 170 of 1925 as amended by Act 663 of 1928, 34 STATUTES AT LARGE 225. These required automobile transportation companies to procure liability and property damage insurance or surety bond for the benefit of passenger and public. The requirements for compulsory insurance are now contained in CODE OF LAWS OF S. C., 1952. § 58-1481, § 58-1482, § 58-1512, § 58-1513, § 15-1536.

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actions in motor vehicle liability situations arise from the same transaction the first objection can be overcome easily.¹⁰ The objection as to lack of privity of contract is resolved on the premise that the contract between insured and insurer is transformed by the statute requiring insurance¹¹ from a private agreement to one executed primarily for the benefit of third persons, namely, the injured plaintiff and the public generally and thus enforceable as a third party beneficiary contract.¹²

Three cases¹³ followed which generally established the South Carolina law to be such as would permit joinder of the liability insurer with the tort-feasor for the reasons set forth above. But, it was pointed out, one injured due to negligence may not join the insurer as a defendant with the tort-feasor where the elements of damages claimed are different. Thus was raised the question of joinder where damages claimed included punitive damages as well as actual damages, or where actual damages alone were claimed but claimed in an amount in excess of the policy limits of the compulsory insurance. These two problems are developed further in the succeeding sections of this note.

The next major change statutory-wise came in 1935 when according to Judge Wyche in *Daniel v. Burdette*,¹⁴ "the Legislature of South Carolina, obviously for the purpose of preventing the removal of causes of action like the instant case to the federal court under the removal statute and decisions construing same, amended section 487; Code of Laws of South Carolina, 1932 . . .".¹⁵ This amendment is now found as a separate section of the 1952 code, Section 10-702, and reads as follows:

When an indemnity bond or insurance is required by law to be given by a principal for the performance of a contract or as insurance against personal injury founded upon tort, the prin-

10. Cf. *Piper v. American Fidelity & Casualty Company*, 157 S.C. 106 (1930) at 115-117. Also, *Ripley v. Rodgers*, 213 S.C. 541 (1948) at 544-545 where the insurance contract was one of indemnity against *liability* as opposed to indemnity against *loss* the "same transaction" was construed as the collision which gave rise to both the plaintiff's action in tort and, as a third party beneficiary, to his action in contract since liability to him attached under the contract at the instant of the collision.

11. CODE OF LAWS OF S. C. § 15-1481 (1952).

12. The method by which joinder could be reasoned out was first pointed up in *Piper v. American Fidelity and Casualty Co.*, 157 S.C. 106, 154 S.E. 106 (1930) but here joinder was not permitted due to claim of punitive damages as hereinafter discussed.

13. *Piper v. American Fidelity and Casualty Co.*, 157 S. C. 106, 154 S. E. 106 (1930); *Benn v. Camel City Coach Co.*, 162 S. C. 44, 160 S.E. 135 (1931); *Thompson v. Bass*, 167 S.C. 345, 166 S. E. 346 (1932).

14. 24 F. Supp. 218 (W.D. S.C. 1938), hereinafter discussed.

15. *Id.* at 220.

cipal and his surety, whether on bond or insurance, may be joined in the same action and their liability shall be joint and concurrent.

Apparently the amendment was merely declaratory of existing law¹⁶ for so far as this statute related to joinder of parties in the same action, this principle had already been set out by the South Carolina Supreme Court in construing the code section relating to compulsory insurance¹⁷ in the *Piper, Benn, and Thompson* cases.¹⁸

In 1948 (amended in 1949) the present Section 58-1512, and 58-1513 were added to clarify the situation regarding compulsory insurance for taxicabs. In 1949 there was added to the code the present Section 58-1482, providing penalties of fines and imprisonment for owners of vehicles carrying goods for hire without complying with the insurance requirements of Public Service Commission set under the authority of Code Sec. 58-1481. Except for these additions there were no substantial statutory changes relating to compulsory insurance until the Motor Vehicle Safety Responsibility Act was passed in 1952.¹⁹

SOUTH CAROLINA CASE LAW

The conditions under which joinder of an insurer with the insured tort-feasor in an action for damages by an injured party could be effected first received notice in the South Carolina courts in the case of *Piper v. American Fidelity and Casualty Company*.²⁰ Here a bus of the defendant Columbia Bus Company collided with the automobile of the plaintiff. Piper brought his action in the Court of Common Pleas of Richland County. He claimed \$25,000 actual and punitive damages alleging negligent, wilful and wanton operation of the bus. The American Fidelity and Casualty Company was joined as a defendant in its capacity as insurer of the bus company on a contract of insurance required by statute to be in force and on file with the Public Service Commission. But the policy limit was \$5,000 and the risk insured against was negligence, not wantonness, nor wilfulness.

Overruling the demurrer of the defendant insurance company, the trial judge held that there was no misjoinder due to the fact that the two causes of action, one in tort and the other in contract, arose

16. *Id.* at 221.

17. CODE OF LAWS OF S. C. § 10-1481 (1952).

18. See note 13 *supra*.

19. S. C. ACTS AND JOINT RESOLUTIONS 1952, No. 723, p. 1853.

20. 157 S.C. 106, 154 S.E. 106 (1930).

out the same transaction or transactions²¹ and that the requirement of contract between the injured plaintiff and the insurer defendant was resolved by Code of Civ. Procedure, 1922, Section 430, Subsection 1²² which had the effect of giving the injured party a beneficial interest in the insurance contract and thus a cause of action in contract.

The lower court, however, had overlooked one point, punitive damages, and this was sufficient for a partial reversal. The Supreme Court on appeal held that there could be no joinder in this situation without amending the original complaint since punitive damages had been alleged. Mr. Justice Cothran in the opinion stated:

The plaintiff under the Jumbling Act . . . [Code of Laws of S. C., Sec. 10-702 (1952)] . . ., on the *tort* side of his case against the bus company has alleged two distinct causes of action, one for actual damages based upon the *negligence* of the bus company and one for *actual and punitive damages* based upon the wilful, wanton, and malicious act of the bus company, for an aggregate amount of \$25,000 damages; on the *contract* side of his case he has alleged a single cause of action based upon the policy of insurance to the extent of the amount of the policy, \$5,000, and could recover from it only such *actual* damages as may have resulted from the *negligence* of the bus company.

It seems clear that, as to so much of the plaintiff's cause of action as was based upon the negligence of the bus company, the plaintiff is necessarily limited to the amount of the policy, and the excess up to the amount sued for, \$25,000, does not at all "affect" the insurance company.

It seems equally clear that the insurance company under the Statute and under the contract of insurance was liable only for such damages as resulted from the *negligence* of the insured; it was not at all concerned in the plaintiff's cause of action for punitive damages, and was not therefore "affected" in the slightest degree thereby.²³

The *Piper* case showed the way for joinder. It was followed in 1931 by *Benn v. Camel City Coach Co.*²⁴ where joinder was held proper, the claim for damages being (on amendment of the complaint) for actual damages only and in amount not in excess of the policy

21. CODE OF LAWS OF S. C. § 10-701 (1952).

22. CODE OF LAWS OF S. C. § 58-1481 (1952).

23. 157 S.C. 106, 117 (1930).

24. 162 S.C. 44, 160 S.E. 135 (1931).

limit, and in 1932 by *Thompson v. Bass*²⁵ where again under similar circumstances the joinder of the insurer as a defendant with the tort-feasor common carrier was held proper.

In both the *Benn* case and the *Thompson* case the doctrine of the *Piper* case was cited with approval and considered as controlling. In addition in the *Thompson* case the court clarified another point by holding that the contract of insurance involved "carried with it the Statute of the State, makes it part of it"²⁶ and despite a contract provision to the contrary the contract was one to indemnify against liability and not one to indemnify against loss.

It was at this point that the Legislature acted amending Section 487 of the 1932 Code by adding what is now Section 10-702 Code of Laws of S. C. (1952).²⁷ This was the amendment which Judge Wyche said in *Daniel v. Burdette*²⁸ added nothing new as far as joinder was concerned but was only declaratory of the law previously delineated in the *Piper*, *Benn* and *Thompson* cases.²⁹

Then came a series of cases further amplifying the established law. *Miles v. Thrower*³⁰ held that even where the statute provides for joinder of separate causes of action in one suit they must be stated separately in the complaint. But this question as to the form of the complaint was again before the court in *Holder v. Haynes*,³¹ the holding there being clearly that the plaintiff is not required to state separately the various causes of action set out in the complaint. Thus was overruled the contrary holding in the *Miles* case which quite possibly was decided without consideration of the 1935 amendment to the joinder statute as no mention of it was made. In *Andrews v. Poole*³² the text of the decision deceptively pointed toward joinder in cases of privately owned vehicles as well as common carriers, but it was held from the facts only that joinder was proper where a common carrier was involved since the defendant was in fact a common carrier doing business as "Poole's Transportation". *Cox v. Employer's Liability Assurance Corp.*³³ repudiated the apparent holding in *Andrews* case, *supra*, as to privately owned vehicles and held:

... one who alleges injury due to the negligent operation of a motor vehicle which is privately owned and privately used, and

25. 167 S.C. 345, 166 S.E. 346 (1932).

26. *Id.* at 349, 350.

27. See text reference of note 14, *supra*.

28. See note 14 *supra*.

29. See note 13 *supra*.

30. 181 S.C. 392, 187 S.E. 818 (1936).

31. 193 S. C. 176, 7 S.E. 2d 833 (1940).

32. 182 S.C. 206, 188 S.E. 860 (1936).

33. 191 S.C. 233, 196 S.E. 549 (1938).

not used as a common carrier, may not unite in his complaint a cause of action in tort against the owner and operator of the motor vehicle with a cause of action on a contract of liability insurance carried by the owner of the motor vehicle.³⁴

Joinder of the insurer with the insured tort-feasor in the case of an action by the injured party against the owner of a private vehicle is prohibited on the theory that the injured party has no original right to proceed against the insurer, the latter's liability being only to absolve the insured from loss and not such as to be joint and concurrent with the liability of the tort-feasor. Then came *Holder v. Haynes*,³⁵ holding that an insurer although properly joined under the statute cannot be held liable where the insured employer cannot be held due to the fact that the negligent act was committed by an employee acting entirely outside of the scope of his employment. *Bryant v. Blue Bird Cab Co.*,³⁶ relying on the *Piper* and *Benn* cases, held that joinder was proper even though the words of the insurance contract purported it to be one of indemnity rather than one of insurance.

Another step forward was made in clarifying the situation by *Daniel v. Tower Trucking Co.*³⁷ Until that point no action had been brought and joinder allowed wherein damages claimed exceeded the policy limits of the liability insurance. This was probably due to the decision in the *Piper* case which indicated that the safest course for plaintiff to pursue to join successfully the all important defendant insurer was to keep his claim for damages within the policy limits and completely free of all indication of punitive damages. In the instant case in an opinion by Mr. Justice Stukes the court held the joinder proper where damages claimed were actual damages although the amount of the damages claimed was \$25,000 as compared to liability policy limitation of \$5,000. Said the Court:

The result of the circuit decision . . . runs afoul of the well-known intention of the Code to simplify actions and procedure, because it would necessitate appellant bringing separate suits upon causes which . . . may be properly joined against the defendants. . . .

It will be easy and simple for the trial Judge of the case to instruct the jury, if the evidence substantiates the allegations of the complaint, that the casualty company's liability is limited

34. *Id.* at 235, 236.

35. See note 31 *supra*.

36. 202 S.C. 456, 25 S.E. 2d 489 (1943).

37. 203 S.C. 121, 26 S.E. 2d 406 (1943).

by the terms of its policy, whereas the carrier's liability is limited only by the amount of damages alleged and proof thereupon.³⁸

The *Daniel* case was followed and cited with approval in *Kelly v. Driggers*³⁹ and *Scott v. Wells*.⁴⁰ In the *Scott* case the lower court was reversed due to the fact that the judge failed to charge in accordance with the rule of *Daniel v. Tower Trucking Co.*⁴¹ The Court said:

It is as surely prejudicial to a defendant to introduce into the trial the element of insurance, where permissible as here, and withhold from the jury knowledge of the limit of such insurance as it is to introduce it at all where it is not permissible. It may be said with logic that the prejudice begins in the latter case at zero and in the former, using the figure applicable to the case in hand, it begins at \$5,000. Rarely can the applicability of judicial reasoning be defined with such mathematical precision.⁴²

After the *Daniel* case came *Massey v. War Emergency Co-Operative Ass'n*.⁴³ In an action by his administratrix for the wrongful death of Oscar Massey, American Fidelity and Casualty Company was joined under allegations that it was surety upon two statutory policies of liability insurance carried by its co-defendant, one pursuant to state statute and the other pursuant to the Motor Carrier Act of the United States of 1935.⁴⁴ There were demurrers and motions to state the causes of action separately by both defendants. These were denied. But a motion to strike that portion of the complaint concerned with the federal statute was granted by Circuit Court Judge Sease. This action was affirmed by the Supreme Court which took judicial notice of the rules of the Interstate Commerce Commission and the Motor Carrier Act. The Court pointed out that this act differs from the South Carolina law⁴⁵ in that under the federal act the policy shall be conditioned to pay within the amount of the policy of insurance any final judgment recovered against such motor carrier, and in effect is a policy to indemnify against loss

38. *Id.* at 124.

39. 214 S.C. 237, 51 S.E. 764 (1949).

40. 214 S.C. 511, 53 S.E. 2d 400 (1949).

41. See note 37 *supra*.

42. 214 S.C. 511, 516 (1949).

43. 209 S.C. 292, 39 S.E. 2d 907 (1946). See also companion case, *Lawter v. War Emergency Co-operative Ass'n*, 213 S.C. 286, 49 S.E. 2d 227 (1948).

44. 49 USCA 315.

45. Now CODE OF LAWS OF S. C. § 58-1481 (1952).

rather than one indemnifying against liability. The South Carolina law on the other hand requires that the policy issued shall insure or indemnify the public receiving personal injury by reason of any act of negligence in such amounts as the Public Service Commission may determine and in effect is one of indemnity against liability.⁴⁶ The court held that federal rules applied and joinder could not be had in this action upon the policy posted with the Interstate Commerce Commission despite the fact that joinder was proper on the policy posted with the South Carolina Public Service Commission.

The situs of the injury or damage sometimes causes difficulty. In *Mobley v. Bland and Pennsylvania Casualty Company*⁴⁷ a South Carolina plaintiff was injured in a motor vehicle collision in North Carolina. Mobley attached one of defendant Bland's trucks when it entered Dillon County, South Carolina, and instituted this action. Bland was a resident of Georgia but submitted to the jurisdiction of the South Carolina court. The defendant insurer challenged the joinder on jurisdictional grounds. The Circuit Court ruled the joinder proper but the Supreme Court disagreed holding that the causes of action arose out of an accident occurring in North Carolina and therefore must be tried in accordance with North Carolina law. Since a North Carolina statute prohibited the joinder, the Pennsylvania Casualty Company was improperly joined. In *Craft v. Hall*⁴⁸ joinder of the insurer with insured taxicab operator was held proper even though the accident giving rise to the action occurred outside of the city limits of the City of Orangeburg. It was held that the city ordinance making the carrying of liability insurance compulsory, pursuant to which the defendants entered into the present contract of insurance, clearly contemplated operation outside the city limits. Likewise, the policy itself contemplated operations outside the city providing for coverage for liability for damages occurring in the city and in an area of ten-mile radius. The accident occurred about three miles from the city.

Other recent South Carolina cases⁴⁹ present some variations but offer no real departure from the rule derived originally from the *Piper* decision and developed as outlined above. One case, however, is interesting in that it points up again the uniform fear of prejudice

46. 209 S.C. 292 (1946). The rules of the South Carolina Public Service Commission fixed the limits of the liability insurance required at \$5,000 as to injury to any one person in any one accident.

47. 200 S.C. 448, 21 S.E. 2d 22 (1942). See also case cited note 1 *supra*.

48. 208 S.C. 187, 37 S.E. 2d 537 (1946).

49. *McIntosh v. Whieldon*, 205 S. C. 119, 30 S.E. 2d 851 (1943); *Piedmont Fire Ins. Co. v. Burlington Truckers*, 205 S.C. 489, 32 S.E. 2d 755 (1944); *Pringle v. Atlantic Coast Line Rwy. Co.*, 212 S.C. 343, 47 S.E. 2d 722 (1948).

which immediately enters the picture when it is revealed or suspected that the defendant is covered by liability insurance. In *McCrae v. McCoy*,⁵⁰ the insurer was originally joined but was dismissed when found to be insolvent. Defendant McCoy sought in vain to introduce into evidence the original pleading to show why the insurer was no longer a party and that he, McCoy, stood alone. The verdict and judgment went against McCoy. He appealed contending that the evidence should have been allowed, not so much to decrease his liability "but to remove from the mind of the jury the illusory image of a giant pot of gold from which they might bring forth a portion for the admittedly unfortunate plaintiff".⁵¹ However, the Supreme Court agreed with the Circuit Court as to the exclusion of any mention of the insurer on the principle that the solvency or insolvency of the insurance company could not affect the amount of damages suffered by the plaintiff and therefore the matter was irrelevant.

FEDERAL CASES ARISING IN SOUTH CAROLINA

Federal courts were apparently first confronted with the question of joinder of an insurer with his insured tort-feasor in cases arising in South Carolina in 1938 when District Court Judge Wyche decided *Daniel v. Burdette*.⁵² This was subsequent to the passage of the amendment to the statute permitting joinder.⁵³ Here was an action for wrongful death. It had been removed to the federal court by the defendant insurance company which the plaintiff had joined in his action against Burdette, the owner of one of the vehicles in the collision. The question before the court was whether or not to remand the cause to the state court. The court in denying the motion to remand held that since punitive damages were claimed, under the doctrine of the *Piper* case both defendants were not affected by both causes of action and therefore these causes of action were separable and properly removed to federal court. Judge Wyche had this to say:

. . . The fact that under the state statute plaintiff has a right to unite the causes of action in a single suit is not alone sufficient to affect the right granted to the defendant insurance company by the laws of the United States to remove the controversy to the federal court. 28 USCA Sec. 71.⁵⁴ *Hilton v. Southern*

50. 214 S.C. 343, 52 S.E. 2d 403 (1949).

51. *Id.* at 348.

52. 24 F. Supp. 218 (W.D. S.C. 1938). Not to be confused with *Daniel v. Tower Trucking Co.*, 203 S.C. 121, 26 S.E. 2d 406 (1943). See text reference note 37 *supra*.

53. CODE OF LAWS OF S. C. § 10-702 (1952). See text reference note 15 *supra*.

54. Now 28 USCA 1441.

Railway Co., (D.C.S.C. 1937) 21 F. Supp. 17. Had the plaintiff limited her demand against Burdette to the insurance policy limits, and for negligence only, the case would unquestionably not be removable, because the amended statute in such event would make the cause of action joint and concurrent. But where the plaintiff seeks to recover from the insured defendant a greater sum of money than the policy limits and for wilfulness, the causes of action do not affect all parties, and in this respect, fall short of the statutory requirements.⁵⁵

In *Behling v. Rivers*⁵⁶ a 1946 case, Judge Waring cited *Daniel v. Burdette* with approval. This case from a factual point of view was similar to the *Daniel* case except involved here was a claim for actual damages only and in an amount not in excess of the policy limitations. The court accordingly held that a separate controversy was not stated, that a joint action was stated, and remanded it to the state court. Judge Waring summarized the law of South Carolina on the subject of joinder of liability insurer with the insured in tort cases as follows:

From these cases and a number of others more recently decided we may summarize the law of South Carolina to be that where one has a cause of action for personal injuries against a carrier for hire (but not against a private conveyance) which is required by State statute to furnish liability insurance, that such insurance is for the benefit of the general public, including the person injured, and having been entered into before and issued for the purpose of indemnifying any such person, such injured person has an interest in the policy and can bring suit directly against the insurance company and under the provisions of the Code (hereinabove cited) such action may be brought jointly against the owner and the insurance company and is to be considered as a joint action. However, this is limited to the amount of the insurance and to actual damages sustained, and such a joint suit may not be maintained if punitive damages are claimed, or where the amount claimed is larger than the amount of the insurance.⁵⁷

Although it made no difference as to the outcome of the instant case, apparently Judge Waring overlooked *Daniel v. Tower Trucking Co.*,⁵⁸ decided some three and a half years before and which al-

55. *Daniel v. Burdette*, 24 F. Supp. 218, 221 (W.D. S.C. 1938).

56. 74 F. Supp. 350 (E.D. S.C. 1946).

57. *Id.* at 352.

58. 203 S.C. 121, 26 S.E. 2d 406 (1943). See text reference note 37 *supra*.

lowed joinder where \$25,000 actual damages were claimed although the policy limit of the insurance involved was only \$5,000, for the Judge made no mention of that case in his summary set out above. The South Carolina case was decided subsequently to *Daniel v. Burdette*⁵⁹ yet it is on the law of this latter case that Judge Waring relied.

As the procedural law of the federal court appears from these two cases, having subsequently not been modified, a plaintiff joining an insurer with his insured in compulsory insurance situations where only actual damages are claimed, but claimed in an amount in excess of the policy limits, runs the risk of having the controversy removed to federal court, provided, of course, the diversity of citizenship and jurisdictional amount requirements are also met. This premise is based on the *Daniel v. Burdette* holding and the subsequent holding of the *Behling* case in which latter opinion the court apparently failed to avail itself of the procedural refinement of the *Daniel v. Tower Trucking Co.* case as to situations where actual damages only are claimed but in an amount in excess of policy limits.

JOINDER UNDER THE MOTOR-VEHICLE SAFETY RESPONSIBILITY ACT

Briefly, the Motor-Vehicle Safety Responsibility Act of 1952⁶⁰ provides for a deposit of proof of financial responsibility by persons involved in most automobile accidents and in the more serious traffic violations. Proof of financial responsibility includes liability insurance policies, surety bonds, or deposits of cash. In two principal situations proof of financial responsibility is required, both of which have to do with the operation of motor-vehicles. Noncompliance with the Act in this respect will bring down on the individuals involved suspension or revocation of drivers' licenses and in some cases also revocation of automobile registration.

The first of these principal situations arises when proof of financial responsibility is required from a party involved in an automobile accident which resulted in death, bodily injury, or damage to property of any one person in excess of fifty dollars. The second involves situations where proof of financial responsibility for the future is required of persons upon certain convictions. Where a conviction leads to suspension or revocation of the offender's driver's license he will also lose his automobile registration. Neither of these can be reinstated until the offender has posted proof of financial responsibility. And he must thereafter maintain this proof of financial responsibility for at least three years. In other words where, because

59. See note 14 *supra*.

60. S. C. ACTS AND JOINT RESOLUTIONS 1952, No. 723, p. 1853.

of a conviction, a driver's license and automobile registration are revoked, the posting of liability insurance, surety bond, or cash deposit is a condition precedent to this individual's subsequent use of the highways.

The Act became effective January 1, 1953, and under this Act there have as yet been no decisions from the South Carolina Supreme Court on the point of joinder of the insurer with the insured in tort action. However, in view of the already decided law on the point interpreting the previously existing statutes concerning compulsory insurance and in view of certain specific provisions of the Act itself, it would seem that joinder should not be proper in the case of the first situation above, and probably not easily accomplished in the second.

Common carriers are not involved here but only private citizens and privately owned and operated automobiles covered by private liability insurance. The decision in *Cox v. Employer's Liability Assurance Corporation*⁶¹ was to the effect that insurers of private individuals could not be joined on the theory that there was no original right to proceed against the insurer whose liability was only to absolve the insured from loss. The contract of insurance was interpreted as being one of indemnity against loss rather than indemnity against liability. Earlier it had been held that where liability insurance was compelled by statute, in construing the insurance contract issued pursuant thereto, the statute must be read into it as a part of the contract.⁶² Also, where the contract read as if it were a policy indemnifying against loss rather than against liability (in an effort to preclude the injured party from an original right to proceed against the insurer) the contract would nonetheless be construed in light of the purpose of the statute, determined to be one indemnifying against liability, and the injured party deemed to have a beneficial interest therein.⁶³

In the first of the principal situations outlined above, although the wording of Section 9⁶⁴ of the Act might be argued to make for a contract for the benefit of the injured party and thus provide the necessary privity of contract between injured and insurer, the wording of Section 10⁶⁵ clearly shows a legislative intention to make any policy of insurance or surety bond posted pursuant to this portion of the Act, a contract to indemnify against loss rather than one to

61. 191 S.C. 233, 196 S.E. 549 (1938).

62. *Thompson v. Bass*, 167 S. C. 345, 349. See text reference note 26 *supra*.

63. *Bryant v. Blue Bird Cab Co.*, 202 S.C. 456, 25 S.E. 2d 489 (1943). See text reference note 36 *supra*.

64. S. C. ACTS AND JOINT RESOLUTIONS 1952, No. 723, § 10, p. 1859.

65. *Ibid*.

indemnify against liability. In addition, as to the security posted under this portion of the Act, Section 11⁶⁶ specifically prohibits any reference to it in any way at the trial of any action at law to recover damages. It therefore appears that joinder in this first situation would be improper.

In the second situation where under the Act proof of financial responsibility for the future is required, a somewhat different situation is presented. As described above this proof may consist of a liability insurance policy, a surety bond or a deposit of cash. Where cash is deposited there is, of course, no problem of joinder. If a surety bond is posted, Section 24(b)⁶⁷ sets out the procedure as to action to be taken against the surety and provides for a sixty day period after the judgment has become final against the principal before there can be commenced any action on the bond or any proceeding to foreclose any lien on real estate scheduled by the surety. From this it can be seen that where a surety bond is posted no joinder is feasible.

However, under this second portion of the Act when the proof of financial responsibility consists of a liability insurance policy, the situation is more favorable to joinder. There is no similar specific prohibition against the reference in a proceeding at law to the security filed under this portion of the Act as there is in Section 11 with respect to security posted following an accident, our first principal situation. Also, here the required contract is clearly specified as one of indemnity against liability. In fact, Section 21(f) of the Act stipulates that the "liability of the insurance carrier with respect to the insurance required by this act shall become absolute whenever injury or damage occurs".⁶⁸ The same section goes on to set out that "the satisfaction by the insured of a judgment for the injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of the injury or damage".⁶⁹

It would seem that joinder could be successful only in this latter situation, where the proof of financial responsibility for the future is posted in the form of liability insurance, and in no other situation arising under the Motor Vehicle Safety Responsibility Act. In this connection refer again to Code Section 10-702 which reads in part: "When . . . insurance is required by law . . . as insurance against personal injury founded on tort . . . the principal and his surety . . .

66. *Id.* at 1860.

67. *Id.* at 1868, 1869.

68. *Id.* at 1866.

69. *Id.* at 1867.

may be joined in the same action and their liability shall be joint and concurrent".⁷⁰

Despite the fact it may appear that technically joinder could be had in the particular circumstance set out above, it is difficult to conceive of so inconsistent a holding as to the Act as a whole. The Act undoubtedly was intended primarily to benefit the innocent third party, the injured citizen, but joinder, or at least the well known jury prejudice against an insurer, was apparently not too far from the legislative mind when the Act was made law. Although these provisions do not apply to the entire Act, prohibitions against use of reports of or, for that matter, any mention of the security posted are specific, and procedures for measures to be taken against the insurer or surety should a judgment be uncollectible are clearly set out. With regard to the relative positioning of the various sections and on a strict interpretation of the wording of the statute, in the one situation outlined, joinder may be permitted. However, the surer prediction is that the Act will be construed as a whole and under it no joinder allowed in any circumstance.

CONCLUSION

From a legislative point of view there appears an inclination toward additional forms of compulsory liability insurance. The passage of the Motor-Vehicle Safety Responsibility Act is one recent indication of this tendency. If this premise proves correct quite possibly there shall be available in the future additional situations wherein it will be determined proper to join a tort-feasor's insurer. As the law stands today, however, joinder of motor vehicle liability insurance companies with the insured in tort cases apparently is permitted under South Carolina law only when all of the following conditions are fulfilled: (1) the insured tort-feasor is one required by statute to provide liability insurance; (2) the statute has been construed as being one compelling liability insurance which indemnifies against liability and not simply indemnifies against loss; (3) the statute has been construed as being one for the benefit of the injured party and the public generally thereby conferring upon the injured party a beneficial interest in the contract sufficient to provide privity of contract between the insurer and the injured party; (4) damages claimed are actual damages only and not punitive damages thus affecting all parties to the action, and (5) in South Carolina courts, damages claimed are not in excess of policy limitations, or if in ex-

70. CODE OF LAWS OF S. C. § 10-702 (1952).

