

were filed in a civil court, could be tried notwithstanding that the defendant should fail to appear.⁽⁹⁾

It might have been better to prescribe that an application for joinder may be made in neither case, for there is no point in filing and considering an application which must be dismissed. In practice, an injured party indicating his intention to require a joinder in such cases should forthwith be referred to a civil court without his having to make a written application for joinder or to be shown the list of witnesses, since these formalities would serve no purpose in the particular instance.

b) The application will also be dismissed where the civil claim is pending in a civil court or the applicant is not qualified to sue. In the first case, the dismissal is based on the rule *electa una via, non datur recursus ad alteram*: the injured party may at his option claim compensation in a civil or a criminal court, but if he has elected to sue in either of such courts, he may not subsequently sue in the other.⁽¹⁰⁾ As for dismissal by reason of want of qualifications, this would have to be ordered if the injured party were suing in a civil instead of a criminal court.⁽¹¹⁾

c) Any dismissal ordered under Art. 155 (1) (e) or (f) on the ground that the hearing of the civil claim would complicate or delay the hearing of the criminal case can be explained by referring to the general principle laid down in Art. 100 (3) Penal Code, according to which "in cases of a complicated nature or where the circumstances of the case make it expedient so to do, particularly where an inquiry has to be held in connection with the offence or where it is necessary to have the report of experts, the court sitting in criminal

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9. This restriction presumably also entails that an application for joinder must be dismissed if it is made in a case where the court is trying a petty offence, since in such a case the accused need not appear (Art. 168) or may be tried notwithstanding that he fails to appear (Art. 170 (4) 1).
 10. However, the choice thus made is not necessarily final. On the one hand, the injured party who has been allowed to join in criminal proceedings may at any time before judgment withdraw his claim and file it in a civil court (Art. 157). On the other hand, foreign precedents would show that a person who filed a claim in a civil court may withdraw it and join in criminal proceedings where the civil court had no jurisdiction or the claim was filed therewith in ignorance of the fact that the cause of action arose from a criminal offence. May it also be noted that the court may not of its own motion dismiss an application on the ground of pendency; pendency has to be pleaded by the parties, as it would have to be if the claim were tried by a civil court.
 11. Doubts have sometimes arisen as to which persons exactly can be deemed to be injured parties or persons having rights from such parties. In France, for instance, it was held that the person to whom the victim of the offence assigns his claim may not apply for a joinder since, properly speaking, the cause of action then arises from a contract, and not from an offence (Court of Cassation, February 25, 1897). Such a situation could not occur in Ethiopia (see Art. 2146 (1) Civil Code).

court may remit the case for decision by the civil court."¹² Inasmuch as a joinder of proceedings may be allowed where it is convenient for the purpose of justice, it follows that it may not be granted where it is inexpedient.

d) So too, the application will be dismissed where the amount of compensation claimed is such as to fall outside the pecuniary jurisdiction which the court trying the offence would have if it sat as a civil court. Thus, where in the case of an offence contrary to Art. 539 Penal Code (common wilful injury, triable by a Woreda court) the injured party claims 1000 dollars compensation, a joinder of proceedings may not be allowed for a Woreda court has jurisdiction to hear such civil cases only where the amount involved does not exceed 100 dollars.

In all such cases, the court is obliged by law to reject the application. There are but two questions in respect to which the court has some discretion: (a) are the witnesses to be called in support of the civil claim too numerous; and (b) will the hearing of the civil case complicate or delay the hearing of the criminal case? Where either question is answered in the affirmative, the application must be dismissed.

3. One may wonder whether an application may be dismissed on other grounds than those mentioned in Art. 155 and, more specifically, whether the accused may raise such preliminary objections as a defendant would be entitled to raise if the claim were tried by a civil court. This question, which is not expressly dealt with in the law, can be answered as follows.

A defendant may apply for the dismissal of a claim on the ground that it has previously been tried or settled by compromise; that it is pending in another court; that the other party is not qualified to sue or, where appropriate, has not obtained prior permission to sue; that the claim is to be settled by arbitration. What would be the effect of any such objection (other than an objection based on pendency or lack of qualifications to sue, covered by Art. 155 (1) (c) and (d)) being raised at the time when a joinder of proceedings is applied for?

a) An application for joinder will be dismissed where the subject matter of the claim is *res judicata*. If, prior to the institution of the criminal proceedings, a decision has been given on the question of compensation, the injured party may not take advantage of the institution of such proceedings in order to cause the said decision to be revised. This is true whether the claim has

12. Under the Criminal Procedure Code, the dismissal is then compulsory, and not optional as it is under the Penal Code.

been decided by a court or the parties have compromised on the amount of damages (Art. 3312 (1) Civil Code). However, if the Civil Procedure Code should adopt the rule *le criminel tient le civil en état*, it would then be unlikely that a judicial decision would be previously given whereas, if a civil claim should arise from a criminal offence, the civil proceedings would have to be suspended until the completion of the criminal proceedings.

b) where the accused objects to the joinder on the ground that the civil claim is barred by limitation, the objection will be overruled in accordance with Art. 2143 (2) Civil Code: a civil claim arising from a criminal offence is not barred so long as the criminal proceedings in respect of such offence are not barred.

c) Where the accused declares that the court has no local jurisdiction, the objection will again be overruled: as the injured party is given the choice of suing in a civil or a criminal court, his choice may not be questioned on the ground that, had the claim been filed in a civil court, it would have been tried in a different area of jurisdiction.¹³ If, on the other hand, the accused pleads to the material jurisdiction of the court, two situations may occur. Where he alleges that, by reason of its *amount*, the claim is triable by another court, the provisions of Art. 155 (2) will apply. Where he alleges that, by reason of its *nature*, the claim is triable by another court, no joinder may be allowed if the objection is well-founded.¹⁴ One will remember that a court which has not material jurisdiction must decline to hear the case and need not wait for an objection to be raised on this point.

d) With regard to the want of prior permission to sue, it will be recollected that the Civil Code in some cases, especially in cases of filiation, makes the institution of proceedings conditional upon a permission given to this effect by the court. However, these cases are quite different from those in relation to which a joinder may be applied for, since the purpose of requesting the said permission is not to be allowed to claim compensation.

13. The cases where the accused may wish to raise such an objection are likely to be few, for both areas of jurisdiction ordinarily coincide. A criminal offence is normally triable at the place where it was committed. Similarly, a claim for the compensation of the damage caused by an unlawful act is normally triable at the place where such act was performed (although there is at present no specific legal provision to this effect).

14. This may occur where, under the law, the civil claim comes within the exclusive jurisdiction of a given court, different from that which is trying the offence. For instance, it might be provided that all cases involving the civil liability of public servants for offences committed in the discharge of their official duties are triable by the High Court. Such a provision would have the effect of prohibiting a joinder of proceedings whenever the criminal offence giving rise to liability is not also triable by the High Court (and few of them are so triable under the First Schedule to the Criminal Procedure Code).