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Civil Procedure—Third Party Practice-Active and Passive Negligence

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Relying upon *In re Coddington's Will*[63] the Court said that even if the statements were hearsay they were still admissible under Section 374-a of the Civil Practice Act. In *In re Coddington's Will* the Court decided that certain hospital records were admissible under Section 374-a since the purpose of this section is to overcome the objection of the hearsay rule.[64]

The objection to admitting such records into evidence, and also the primary reason behind the hearsay rule, is that such admissions deny the other party an opportunity to cross-examine the entrant of such records. The Court met this objection by relying upon *Johnson v. Lutz*,[65] which disposed of this objection, but at the same time limited Section 374-a to instances where the entrant has the duty of drawing such memoranda or records.[66] The Court then pointed out in the instant case that the Department of Welfare was required by law to keep records of all telephone calls and visits connected with their beneficiaries.[67]

The decision in this case indicates that the Court is willing to lessen the strictness of the hearsay rule by giving Section 374-a a broad construction. This means that there will be a greater infringement upon the right of cross-examination. However, with the complexity of our modern business world it seems more practical and just to admit such records into evidence where the genuineness of the records is not disputed. The hearsay rule was workable a century ago but to require the complex business world of today to abide by it would result in great hardships and oftentimes exclude the best evidence available.

THIRD PARTY PRACTICE—ACTIVE AND PASSIVE NEGLIGENCE

The right of a defendant to implead another depends upon his being able to demonstrate a right to be indemnified by the one he seeks to implead.[68] Where a defendant is alleged to be only liable for active as distinguished from passive negligence, impleader is improper as a matter of law, since an actively

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ments made out of court, this statement must be limited to the case of a witness who is not the adverse party."

63. 307 N.Y. 181, 120 N.E.2d 777 (1954).

64. 307 N.Y. 181, 195: "Section 374-a of the C.P.A., providing for the admission into evidence of records made in the regular course of business, was enacted to overcome the objection that such records were hearsay."

65. *Supra* note 57.

66. 253 N.Y. 124 at 128:

> The purpose of the Legislature in enacting Section 374-a was to permit a writing or record, made in the regular course of business, to be received in evidence without the necessity of calling as witnesses all of the persons who had any part in making it, provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information.

67. N.Y. SOC. WEL. LAW §§ 80, 132; Regulations of N.Y. State Dep't of Soc. Wel. § 1.36(9).

68. "Indemnity refers to a total shifting of economic loss to the party chiefly or primarily responsible for that loss; it is to be distinguished from contribution which means a percentage distribution of the loss among a number of responsible parties." Meriam & Thornton *"Indemnity Between Tort-feasors; An Evolving Doctrine in the New York Court of Appeals."* 25 N.Y.U. LAW REV. 845 (1950).

negligent tort-feasor is not entitled to indemnity.[69] If a complaint can be interpreted as including an allegation of passive negligence on the part of the defendant, a claim over against a third party charging him with active negligence will be allowed[70]—but if only active negligence is ultimately established the trial term will not permit a recovery over.[71]

Third party practice under Section 193-a[72] of the Civil Practice Act was further clarified, and active and passive negligence were more precisely differentiated, in the recent decision of *Putvin v. Buffalo Electric Co.*[73] In this action plaintiffs were representatives of decedents who were employees of the third-party defendant Wallace & Tiernan, Inc. The defendants, Joseph Davis, Inc. and Davis Refrigeration Co., Inc., were performing work at and around the plant of Wallace & Tiernan, Inc. when an explosion occurred which gave rise to this suit.

The third-party defendant, in asking for a motion to dismiss the suit, claimed that the third-party plaintiff was only charged with negligence in the conduct and performance of its work and in the handling of materials in connection with such work i.e., active negligence, and, therefore, could submit proof only of this active negligence on trial. After reviewing the differences between active and passive negligence and applying the language of the primary complaint to their conclusions, the Court, in affirming the Appellate Division's dismissal of the third-party complaint, held the complaint charged defendant only with active negligence and thus the plaintiffs are limited to proving defendant's affirmative acts of negligence. Since defendant could be only found liable for active negligence, it could not implead the third-party defendant.

Active negligence may be either a fault of omission or one of commission.[74] Participation in an affirmative act of negligence clearly is active negligence. However, in answering the question of when an act of omission constitutes active negligence, a more elusive problem is posed. An act of omission may comprise active negligence where there is some knowledge or acquiescence in an affirmative negligent act, or where a defendant fails to perform some duty which he may have undertaken.

In the instant case the Court claimed it was not as difficult to determine if a defendant's negligence has been passive. "One cannot be guilty of passive negligence merely if he has been guilty of a fault of commission. It is the

69. Massaro v. Long Island R.R. Co., 274 App. Div. 939, 83 N.Y.S.2d 527 (2d Dep't 1948).

70. 2 CARMODY-WAIT, N.Y. PRACTICE § 66, p. 614 (1952); Ruping v. Great Atlantic & Pacific Tea Co., 283 App. Div. 204, 126 N.Y.S.2d 687 (3d Dep't 1953).

71. Johnson v. Endicott Johnson Corp., 278 App. Div. 626, 101 N.Y.S.2d 922 (3d Dep't 1951).

72. N.Y. CIV. PRAC. ACT § 193-a provides in part:
"After the service of his answer, a defendant may bring in a person not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him.

73. 5 N.Y.2d 447, 186 N.Y.S.2d 15 (1959).

74. McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 330, 107 N.E.2d 463, 472 (1952).

omission or failure to perform a nondelegable type of duty (e.g., the duty of an owner of realty or a shipowner to furnish the injured party with a safe place to work), as distinguished from the failure to observe for the protection of the interests of another person that degree of care and vigilance which the circumstances justly demand, which constitute passive negligence entitling one to indemnity."

Looking at the allegations found in the complaints in the present case, the Court found that the allegation of negligence in the performance of defendant's work and in the handling of materials was a fault of commission and, therefore, active negligence. The second allegation in dispute presented a more delicate problem for the Court. It charged the defendants with "failure . . . to supply the plaintiff's intestate with a safe place to work"—seemingly an allegation of passive negligence. The Court, looking at this allegation in the context of the complaint, found this not to be passive negligence since in legal contemplation the plaintiff and defendant were strangers. Under such circumstances defendant was under no duty to supply plaintiffs with a safe place to work. The Court said that this was an allegation of active negligence for it was an allegation which meant that Davis & Co., the contractor, did owe decedents a duty not to make their place of work unsafe by the manner in which it performed its work on the premises of Wallace & Tiernan, Inc., the decedents' employer.

Judge Van Voorhis dissented on the ground that it was premature to dismiss the third-party complaint before it was known upon what basis recovery, if any, may be awarded at the trial to the original plaintiff against the third-party plaintiff.

The present case, though not adding anything novel in regard to third-party practice, is a lucid and carefully prepared exposition on the intricacies of third-party pleading. It appears, however, that a right of indemnity might be denied to a defendant due to formalistic technicalities found in the original complaint in an action. Therefore, instead of a rule of realism, we have a rule of formalism. Be that as it may, it is still a rule that allows flexibility to meet the exigencies of whatever situation the courts face.

SHERIFF'S RIGHT TO POUNDAGE FEES UNDER CIVIL PRACTICE ACT SECTION 687-A

In *Personeni v. Aquino*,[75] the plaintiff, after a duly levied execution by the sheriff on a debt owed to the judgment debtor, failed to take action to collect the debt, or to obtain an order under Section 687-a, subdivision 7, of the New York Civil Practice Act to extend time in which to do so, and hence the levy became void. In rejecting the sheriff's claim for poundage fees under Section 1558, subdivision 19,[76] of the Civil Practice Act, the majority decision of the

75. 6 N.Y.2d 35, 187 N.Y.S.2d 764 (1959).

76. N.Y. CIV. PRAC. ACT § 1558:
"A sheriff is entitled for the services specified in this section to the following fees" . . . (subdivision 19, now 21) ". . . Where an execution has been vacated or set aside, the sheriff is entitled to poundage. . . ."