

10-1-1954

Civil Practice—Joinder of Parties

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Recommended Citation

Gerard R. Haas, *Civil Practice—Joinder of Parties*, 4 Buff. L. Rev. 49 (1954).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol4/iss1/21>

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THE COURT OF APPEALS, 1953 TERM

in Syracuse. The Cleveland address was that of the principal office of the defendant, however, and was given as the defendant's address on the application filed with the Bureau of Motor Vehicles for this reason. The state of incorporation was also included on the application, but this information was not transmitted to the plaintiff. The court, by a 4-3 vote, reversed the finding of the trial court, which was affirmed by the Appellate Division, that, under the circumstances, service under Section 52 was not improper.

The majority found that the defendant was in no way to blame for the plaintiff's mistaken belief since the defendant's statements to the Bureau of Motor Vehicles were correct and the state of incorporation was included in the application. It was no fault of the defendant, they maintained, that the latter information was not communicated to the plaintiff.

Judge Dye, in his dissenting opinion, asserted that the defendant was, for purposes of service of process, a resident of Ohio. Such a concept of a non-resident domiciliary has long standing recognition in the courts.¹⁶ The dissent also suggests that the service may have been proper on a theory of estoppel analogous to the finding of misrepresentation in cases involving the use of license plates registered in the name of another.¹⁷

The only difference between the manner of service used in this case and that which would have been unquestionably allowable seems to be that the plaintiff mailed the summons to the Secretary of State, whereas personal service on that officer is the method required.¹⁸ The desirability of maintaining strict compliance with the prescribed methods of service was, however, apparently deemed to outweigh any equitable considerations in favor of the plaintiff.

Joinder of Parties

When a stockholder brings a derivative action he sues, not in his own right, but in the right of the corporation.¹⁹ Generally the stockholder must join the corporation in such a suit.²⁰ It has been held, however, that when a derivative action involves

16. *Haggart v. Moran*, 5 N. Y. 422 (1851); *Uslan v. Woronoff*, 173 Misc. 693, 18 N. Y. S. 2d 222 (City Ct. of New Rochelle), *aff'd* 259 App. Div. 1093, 21 N. Y. S. 2d 613 (2d Dep't 1940).

17. See *infra* p. 53.

18. Compare VEHICLE AND TRAFFIC LAW § 52 with C. P. A. § 228, STOCK CORPORATION LAW § 25.

19. *Clarke v. Greenberg*, 296 N. Y. 146, 71 N. E. 2d 443 (1947).

20. *Greaves v. Gouge*, 64 N. Y. 154 (1877); 13 FLETCHER, CORPORATIONS § 5997 (Rev. ed. 1943).

a defunct corporation, such corporation is not an indispensable party.²¹ In *Carruthers v. Jack Waite Mining Co.*,²² the Court of Appeals refused to extend this exception to the case where the corporation involved, although extant, is entirely under the management of another corporation.

In the instant case a stockholder of an Arizona corporation brought a derivative action in the New York Supreme Court by service on the officers of the managing corporation, which had its principal offices in this state. The Court of Appeals held that the Arizona corporation was an indispensable party. In most cases a non-participant who would ordinarily be a plaintiff would seem to be a conditionally necessary,²³ rather than an indispensable party, when he is not subject to service under C.P.A. § 194.²⁴ The peculiar nature of a corporation in a derivative action, however, as the source of the stockholder's rights required the result in this case.

A further complication caused the court to reverse a dismissal of the complaint by the Appellate Division. The Court of Appeals ruled that, although the Arizona corporation was an indispensable party, and although it was impossible to serve that corporation in New York, a dismissal was not consonant with the procedural requirements of this state. The court referred to section 192 of the Civil Practice Act which provides: "No action shall be defeated by the non-joinder . . . of parties except as provided in section one hundred ninety-three." C.P.A. § 193 requires that the court first order the joinder of an indispensable party, and dismiss only if such party is not joined within a reasonable time. A motion to add parties under Rule 102 of the Rules of Civil Practice was deemed by the court to be an essential preliminary to a motion to dismiss. Conceding that the motion to join the corporation in this case would be a futile procedure, the court felt, nevertheless, that it could not controvert the clearly enunciated policy of the Legislature.²⁵

Third-Party Practice

A covenant to repair by a lessor does not of itself impose liability on the lessor for damages resulting to third-parties from his failure to make the repairs.²⁶ Such liability to third-parties

21. *Cohen v. Dana*, 287 N. Y. 405, 40 N. E. 2d 227 (1942).

22. 306 N. Y. 136, 116 N. E. 2d 286 (1953).

23. *Eg. Keene v. Chambers*, 271 N. Y. 326, 3 N. E. 2d 443 (1936).

24. § 194 ". . . If the consent of any one who should be joined as a plaintiff cannot be obtained he may be made a defendant . . ."

25. See Twelfth Annual Report of N. Y. Judicial Council, 188 (1946).

26. *Cullings v. Goetz*, 256 N. Y. 287, 176 N. E. 397 (1931).