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Civil Practice—Third-Party Practice

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a defunct corporation, such corporation is not an indispensible 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 indispensible party. In most cases a non-participant who would ordinarily be a plaintiff would seem to be a conditionally necessary,[23] rather than an indispensible 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 indispensible 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 indispensible 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).

is incident to occupation and control.[27] Whether control by the lessor is present is a question of fact for the jury.[28]

In *Dick v. Sunbright Steam Laundry*,[29] the lessee of a building was sued by an adjoining property owner on the ground that waste water was seeping into his premises as a result of the careless operation of laundry machinery by reason of defective plumbing. The lessee impleaded the lessor who had covenanted to repair. Control of the premises by the lessor was alleged in general terms in the third-party complaint. A motion by the lessor to dismiss the third-party complaint for failure to state a cause of action was denied by the trial court. The Court of Appeals reversed by a 4-3 vote.

Judge Dye, writing for the majority, stressed the fact that the third-party complaint contained no allegation that the landlord had retained the right to re-enter to make repairs or that he had ever done so. This alone seems to be insufficient grounds for a dismissal since the lessee did allege the landlord's control, and the issue of control being a jury question, the allegation of the ultimate fact should be sufficient.[30]

Whatever the merits of the draftsmanship of the third-party complaint may be, the decision of the majority appears to be justified under the existing law for another reason. This is that a third-party may be impleaded only when he is or may be liable to the original defendant for all or part of the original plaintiff's claim.[31] In this case the original complaint appears to have alleged only active negligence on the part of the original defendant. Since one who is actively negligent cannot recover over from a joint tortfeasor,[32] and technically the defendant should be held liable only on a finding of active negligence, the third-party could not be liable to the original defendant for any recovery against it in this case.[33]

Suit Against Unincorporated Associations

For purposes of suit the General Associations Law defines an unincorporated association as: "Any partnership or other

27. *Klepper v. Seymour House Corp.*, 246 N. Y. 85, 158 N. E. 29 (1927).
28. *Scudero v. Campbell*, 288 N. Y. 328, 43 N. E. 2d 338 (1942); *Antonsen v. Bay Ridge Savings Bank*, 292 N. Y. 143, 54 N. E. 2d 338 (1944).
29. 307 N. Y. 422, 121 N. E. 2d 399 (1954).
30. *Cf. California Packing Corp. v. Kelly Storage & Distributing Co.*, 228 N. Y. 44, 126 N. E. 269 (1920).
31. C. P. A. § 193-a.
32. *Fox v. Western New York Motor Lines Inc.*, 257 N. Y. 305, 178 N. E. 289 (1931).
33. *Bonus Indemnity Insurance Co. v. Cruise*, 277 App. Div. 1118, 100 N. Y. S. 2d 876 (2d Dep't 1950).