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Civil Practice—Suit Against Unincorporated Associations

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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).

company of persons, which has a president or a treasurer . . ."[34] An action may be maintained against an unincorporated association by proceeding against such president or treasurer.[35] No action, based on the liability of the association, may be brought against individual members until a judgment against the whole group has been returned unsatisfied.[36]

In a recent case, suit to recover for legal services rendered was brought against an unincorporated religious body. The association was composed of a General Church and a number of episcopal districts. Both the General Church and the districts had presiding officers. The trial court found that the plaintiff had been employed by the First Episcopal District and that this employment was ratified by the officers of the General Church. Judgment was entered against the presiding officer of the First Episcopal District. The Court of Appeals reversed, holding that no judgment could be entered against the District until a final judgment against the General Church was returned unsatisfied.[37] The trial court had obviously treated the District as an association in its own right, while the Court of Appeals regarded it as a member of the General Church.

It is not clear whether the finding of ratification by the officers of the General Church was a prerequisite to the plaintiff's recovery. Since the trial court did find such ratification, and thereby placed primary liability on the General Church, the entry of judgment against the officer of the District seems inconsistent, and the reversal by the Court of Appeals sound.

Res Judicata

Plaintiffs had brought suit alleging alternative claims in contract and unjust enrichment. In each claim the prayer was for damages only. Judgment was rendered for the defendants as to both.[38] Plaintiffs subsequently brought suit for the return of stock transferred to the defendants in the transaction sued upon in the previous action. The Court of Appeals held that inasmuch as an action for restitution can be maintained only when there has been unjust enrichment,[39] the first action was res judicata and a complete bar to the second.[40]

34. GENERAL ASSOCIATIONS LAW § 13.
35. *Ibid.*
36. *Id.* § 16.
37. *Flagg v. Nichols*, 307 N. Y. 96, 120 N. E. 2d 513 (1954).
38. *Slater v. Gulf, Mobile & Ohio R. Co.*, 279 App. Div. 166, 108 N. Y. S. 2d 145 (1st Dep't 1951), *aff'd* 304 N. Y. 636, 107 N. E. 2d 163 (1952).
39. *Milman v. Denniston*, 271 App. Div. 988, 68 N. Y. S. 2d 325 (2d Dep't), *leave to appeal denied*, 297 N. Y. 1038, 74 N. E. 2d 869 (1947).
40. *Slater v. Gulf, Mobile & Ohio R. Co.*, 307 N. Y. 419, 121 N. E. 2d 398 (1954).