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Intervention Allowed to Defend Constitutionality of Statute Granting Partial Tax Exemption

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two independent wrongs in such a case, and indemnification has been allowed against the negligent physician.[105]

The allowance of impleader in the instant case was proper because it was certainly possible (in fact, quite probable) that the defendant would be found only "passively" negligent as to the wrongful death action. Even though the complaint did charge the defendant with *actively* injuring plaintiff's intestate's hand, it was reasonable to infer an allegation of "passive" negligence on the part of the defendant as to the fatal injury. It has been held that where a defendant "is alleged to be guilty of both active and passive negligence, impleader of the person claimed to be guilty of active negligence is proper. . . ." [106]

The decision in *Musco* is also in accord with the purpose of third-party practice in that it avoids circuity and multiplicity of actions by furnishing a method of trial of all issues between the parties without seriously prejudicing the rights of any party.

Intervention allowed to defend constitutionality of statute granting partial tax exemption.

Representatives of thirteen railroads sought to intervene [107] as defendants in an action [108] brought to contest the constitutionality of a statute granting partial real property tax exemptions to railroads.[109] Movant-intervenors urged that they had a substantial economic interest in the outcome of the action since they had already realized a substantial tax reduction under the statute. Plaintiff contested the motion, claiming that the intervenors' interest was not such a "real interest" as would justify the granting of the motion. The court, exercising the discretionary power given it by CPLR 1013, granted the motion to intervene. Stressing the disastrous economic effect on all the railroads in the state if plaintiff were successful in invalidating the statute, the court concluded that the railroads had a "real and substantial interest in the outcome of this proceeding." It was further indicated that plaintiff would nowise be prejudiced by the granting of the motion; nor would there be any unusual delay occasioned by the intervention. To ensure that there would be no delay, the court conditioned its order by stating that the intervenor could not reopen any

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[105] See Rizzo v. Steiner, 36 Misc. 2d 701, 233 N.Y.S.2d 647 (Sup. Ct. 1962); Rezza v. Isaacson, 13 Misc. 2d 794, 178 N.Y.S.2d 481 (Sup. Ct. 1958).

[106] Putvin v. Buffalo Elec. Co., *supra* note 97, at 455, 158 N.E.2d at 695, 186 N.Y.S.2d at 21.

[107] CPLR 1012 (intervention as of right); CPLR 1013 (intervention by permission).

[108] City of Buffalo v. State Bd. of Equalization & Assessment, 44 Misc. 2d 716, 254 N.Y.S.2d 699 (Sup. Ct. 1964).

[109] N.Y. REAL PROP. TAX LAW § 489 a-v; N.Y. STATE FIN. LAW § 54(b).

phase of the case nor duplicate any of the proceedings already undertaken. However, the intervenors were given the opportunity to move to dismiss the complaint pursuant to CPLR 3211(a)(3) and (7).

The court's holding seems consonant with the liberal attitude toward intervention which has been adopted by most of the courts which have considered the question.[110] When the intervenor has a definite interest in the litigation and can shed valuable light on the issues before the court, without causing undue delay, intervention is usually permitted. The practitioner would do well to keep the instant case in mind whenever intervention is sought either to sustain or contest a statute in which his client has a substantial interest—be it pecuniary or otherwise.

Nominal corporate defendant allowed substitution as plaintiff despite lack of express sanction in Article 10.

Lazar v. Merchants' Nat'l Properties, Inc.,[111] was a stockholders' derivative suit wherein the corporation was named as a nominal defendant[112] after refusing to bring suit in its own name. During the trial, however, the board of directors resolved that the prosecution of the action would be in the best interests of the corporation. It therefore moved to substitute the corporation as plaintiff in place of the plaintiff-shareholder, who did not object.[113] The appellate division, first department, granted the motion for substitution over the objection of the real-party defendants.[114]

The significance of this decision is that the court granted substitution in the absence of any express statutory provision[115] or judicial precedent authorizing such procedure. Impliedly,

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[110] See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1012.04 (1964) and cases cited therein.

[111] 22 App. Div. 2d 253, 254 N.Y.S.2d 712 (1st Dep't 1964).

[112] A corporation, in whose name a derivative suit is brought, is held to be an indispensable party to the action for two reasons: (1) recovery must run in its favor, and, (2) it must be prevented from *itself* suing the defendants at a later date on the same cause of action. BAKER & CARY, CASES AND MATERIALS ON CORPORATIONS 650 (3d ed. abr. 1959). Therefore, it must be named as a defendant when it refuses to be joined as a plaintiff. CPLR 1001(a).

[113] An interesting and as yet unanswered problem would have arisen had the plaintiff-shareholder refused to acquiesce when the corporation requested substitution. There appears to be no case in which such a problem has been presented.

[114] The defendants had already made a motion to dismiss, and since CPLR 3211 allows only one such motion, the court conditioned the granting of substitution upon the corporation's consenting to allow defendant to make a new motion under that rule.

[115] Neither the CPLR nor the Business Corporation Law contains any provision which would expressly sanction such a procedure.