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Pleading and Practice--Bringing Additional Parties into an Action

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so necessary to public health and welfare—to the maintenance of the very government which is responsible for the enforcement of the right to strike wherever possible and proper.

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PLEADING AND PRACTICE—BRINGING ADDITIONAL PARTIES INTO AN ACTION.—The principles of adjective law concerning the bringing of additional parties into an action have been radically changed. Chapter 971 of the Laws of 1946, effective September 1, 1946, amended five of the sections of the Civil Practice Act dealing with this subject.[1] One section was completely repealed [2] and several sections added in its place.[3] The necessary Rules of Civil Practice have been amended as well.[4] The legislation was enacted as recommended by the Judicial Council.[5] The recommendation had been fortified by an excellent and exhaustive analysis of the defects of the law of New York prior to the enactments, the need for the amendments, and a detailed account of what would be accomplished by the new legislation.[6]

A. Addition of Parties Indispensable and Conditionally Necessary

Parties are now classified as proper, conditionally necessary, and indispensable. The former term "necessary parties" has been subdivided. Confusion occasioned by decisional law as to what was meant by a "necessary party" has been eliminated. A person whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court, is an indispensable party; a person who is not an indispensable party but who ought to be a party if complete relief is to be accorded between those already parties is a conditionally necessary party.[7] The ter-

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[1] N. Y. CIV. PRAC. ACT §§ 180, 192, 264, 278, 474. The amendments to Sections 264 and 474 are not here discussed. They merely transpose the provisions of the repealed Section 193 (2) to those sections where they logically belong. Section 192 (2) related to cross claims by the impleaded party against the original plaintiff.

[2] N. Y. CIV. PRAC. ACT § 193 prior to 1946 amendment.

[3] N. Y. CIV. PRAC. ACT § 193-a, 193-b, 193-c. § 193-c is not here discussed. It is merely the former 193 (5) transposed.

[4] N. Y. RULES OF CIV. PRAC., 102, 105, 54.

[5] 12 REP. JUDICIAL COUNCIL (1946) 43-47.

[6] *Ibid.* pp. 163-236.

[7] N. Y. CIV. PRAC. ACT § 193 (1).

minology used is similar to that employed in the federal courts.[8]

The effect of a failure to join each of these types of parties has been specifically provided for:

1. When an indispensable party has not been joined, the court *must* order such party brought in; if a party fails or neglects to bring in an indispensable party after a reasonable period granted to him to do so, the court shall dismiss the action without prejudice.[9] The dismissal follows necessarily from the definition of an indispensable party, *i.e.,* one without whom the court cannot proceed. The fact that the dismissal is without prejudice precludes any possibility of an illogical decision that the controversy has been settled on the merits between those who were parties and is therefore *res judicata.* The provision that no action or special proceeding shall be defeated by the nonjoinder or misjoinder of parties[10] has been amended to avoid possible conflict and now reads that there shall be no such dismissal except as provided in Section 193.

2. When it appears that a conditionally necessary party has not been joined, the court must order such party to be brought in if he is subject to the jurisdiction of the court and can be brought in without undue delay; the court in its discretion may proceed in an action without a conditionally necessary party if his addition would cause undue delay or if the jurisdiction can be acquired only by his consent or voluntary appearance.[12] If a party fails or neglects to bring in a conditionally necessary party after a reasonable period granted to him to do so, the court may in its discretion dismiss the action, once again without prejudice.[13]

The provisions of the new section have been made expressly applicable to all actions whether formerly denominated legal or equitable.[14] Decisional law had applied the prior statute[15] only to actions which were formerly denominated equitable.[16]

Objections of a party that a pleading showed on its face either (a) that there was a misjoinder of parties plaintiff or (b) that there was a defect of parties plaintiff or defendant, were formerly waived unless taken by timely motion.[17] The objection that there is a nonjoinder or misjoinder of parties is now raised by a motion to add or

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[8] FED. R. CIV. P., 19-20.
[9] N. Y. CIV. PRAC. ACT § 193 (2).
[10] N. Y. CIV. PRAC. ACT § 192 prior to 1946 amendment.
[11] *Ibid.* as amended.
[12] N. Y. CIV. PRAC. ACT § 193 (2).
[13] *Ibid.*
[14] N. Y. CIV. PRAC. ACT § 193 (3).
[15] N. Y. CIV. PRAC. ACT § 193 (1) prior to 1946 amendment.
[16] Chapman v. Forbes, 123 N. Y. 532, 26 N. E. 3 (1890); Gittleman v. Feltman, 191 N. Y. 205, 208, 83 N. E. 969 (1908).
[17] N. Y. CIV. PRAC. ACT § 278 prior to 1946 amendment.

drop parties.[18] If there has been a nonjoinder, the court may stay all proceedings in the action until its order to bring in the additional party has been complied with.[19]

B. Impleader

"The procedural device alternately called impleader or third-party practice permits a party to an action against whom a claim is being asserted to bring in an additional party for the purpose of determining in a single proceeding not only the claim asserted in the original action, but also a related claim against the added party." [20]

The beneficial results of such a procedural device are obvious. The commonweal is promoted by avoidance of several separate suits, and one presentation of evidence suffices to dispose of the several claims. The litigant who impleads is aided in avoidance of circuity of action and multiplicity of suits. The chief benefit to the impleading party is that since all claims are litigated in the same trial before the same trier of facts, there can be no inconsistency in the results of the adjudication of the primary claim against him and his claim over against the impleaded party.

The new impleader statute [21] is entitled "Third-party practice." A defendant, after he has answered the original complaint, 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.[22] Similarly a plaintiff against whom a counterclaim has been asserted may bring in a person not a party to the action who is or *may be* liable to him for all or part of such counterclaim.[23] In either case, the impleader is commenced by service of a summons and copy of a verified complaint on the third party (denominated as the "third-party defendant") by the impleading party (denominated as the "third-party plaintiff") as to the claim over.[24]

The terms "third-party plaintiff" and "third-party defendant" are new to the Civil Practice Act and will bring refreshing clarity to the subject. The third-party plaintiff need no longer apply to the

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[18] N. Y. RULES OF CIV. PRAC., 102 (2).

[19] *Ibid.*

[20] 12 REP. JUDICIAL COUNCIL (1946) 192. As is there pointed out "The remedy of 'impleader' . . . should not be confused with the remedy of 'interpleader' provided in Sections 285-287 of the Civil Practice Act. 'Interpleader' is a procedure for the determination of adverse claims made against the same person. In 'impleader,' on the other hand, there are no adverse claims to be settled, but rather the primary liability of the original defendant for the claim made by the plaintiff, and the alleged 'liability over' of the third party defendant, are to be settled in one proceeding."

[21] N. Y. CIV. PRAC. ACT § 193-a.

[22] N. Y. CIV. PRAC. ACT § 193-a (1).

[23] N. Y. CIV. PRAC. ACT § 193-a (6).

[24] N. Y. CIV. PRAC. ACT § 193-a (1).

court for leave to bring in the third-party defendant, as was necessary under the prior law.[25] Now the liability of the third-party defendant may be contingent ("is or *may be* liable"). The pertinent section of the repealed statute[26] read "is or *will be* liable" and had been held to mean that the party applying to the court to bring in the third party must first show by affidavits that he had a clear and absolute cause of action against the party sought to be impleaded.[27]

The claim over must be related to the main action by a question of law or fact common to both controversies, but need not rest upon the same ground as the claim asserted in the main action.[28] No longer is identity of the primary claim and the claim over required. Thus, if *P* sues *D* on causes of action *X* and *Y*, *D* may implead *D2* on cause of action *Z*, if the other necessary conditions of the statute are met. Prior to this enactment, New York courts had been strict in requiring identity of claims. Their attitude is best exemplified by the decision that impleader was improper where *P* sued *D* on causes of action *X* and *Y*, and *D* sought to implead *D2* on cause of action *X* only.[29]

The third-party defendant may answer the claim asserted against him. In addition to his pleading against the third-party plaintiff, the third-party defendant may in his answer assert against the plaintiff any defenses which the third-party *plaintiff* has to the plaintiff's claim.[30] Here again the legislation has overruled prior decisions, wherein it had been held that the impleaded party had no right to answer a claim of the original plaintiff against the original defendant.[31]

Service of the third-party defendant's answer is accomplished by serving copies on the third-party plaintiff's attorney and the plaintiff's attorney within twenty days after the service of the summons and the third-party complaint.[32] Serving the plaintiff's attorney with a copy of the answer is a necessary requirement to the newly-given right to interpose defenses against the primary claim, and the plaintiff is thus apprised of all defenses which have been made against that primary claim.[33] For the purpose of contesting the plaintiff's claim against the third-party plaintiff, the third-party defendant shall

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[25] N. Y. CIV. PRAC. ACT § 193 (3) prior to 1946 amendment.
[26] *Ibid.*
[27] Kromback v. Killian, 215 App. Div. 19, 213 N. Y. Supp. 138 (2d Dep't 1925).
[28] N. Y. CIV. PRAC. ACT § 193-a (1).
[29] Nichols v. Clark, MacMullen & Riley, Inc., 261 N. Y. 118, 184 N. E. 729 (1933).
[30] N. Y. CIV. PRAC. ACT § 193-a (2).
[31] Municipal Service Real Estate Co., Inc. v. D. B. & M. Holding Corp., 257 N. Y. 423, 178 N. E. 745 (1931); Hartford Accident & Indemnity Co. v. First National Bank & Trust Co., 281 N. Y. 162, 22 N. E. (2d) 324 (1939).
[32] N. Y. CIV. PRAC. ACT § 193-a (2).
[33] *Ibid.*

have the rights of a party adverse to the plaintiff, including the right to appeal.[34]

The plaintiff may amend his pleading to assert against the third-party defendant any claim which he might have asserted against the third-party defendant had he been joined originally as a defendant.[35] Thus if the plaintiff has a claim against a third-party defendant as to which he could have properly joined as co-defendants the third-party defendant and the original defendant, he may assert that claim despite his original failure to make the third-party defendant a co-defendant. If the plaintiff does so amend his pleading, the third-party defendant may assert a counterclaim against the plaintiff.[36]

The claims of all parties to the action shall be determined, and such judgment or judgments as may be proper shall be rendered.[37] But the stock arguments which have always been advanced to oppose the liberalization of impleader have been recognized and provided for. The controversy between the third-party plaintiff and the third-party defendant may at times unreasonably delay determination of the primary claim. Further, the trial of the two claims together might result in prejudice to one of the parties, confusion, or undue complication of issues. The court is therefore empowered to dismiss the third-party complaint without prejudice or order a separate trial of the third-party claim where undue delay or prejudice may result.[38]

Where a jury verdict for the plaintiff as to the primary claim might be based on grounds which would not support the claim over of the third-party plaintiff, the court, on motion of either the third-party plaintiff or the third-party defendant, shall instruct the jury as to the appropriate special findings necessary.[39]

The provision concerning impleader is not limited to the original parties to the action. The third-party defendant may proceed in turn against another not yet a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.[40]

C. *Intervention*

"Intervention may be defined as the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose

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[34] N. Y. Civ. Prac. Act § 193-a (2).
[35] N. Y. Civ. Prac. Act § 193-a (3).
[36] *Ibid.*
[37] N. Y. Civ. Prac. Act § 193-a (2).
[38] N. Y. Civ. Prac. Act § 193-a (4).
[39] N. Y. Civ. Prac. Act § 193-a (5).
[40] N. Y. Civ. Prac. Act § 193-a (6).

of the claim or defense presented." [41] In intervention the third party initiates the procedural steps by which he is to become a party to an action already commenced, and is thus distinguished from impleader, wherein one of the parties to an action seeks to bring in the stranger.

The new intervention statute [42] is substantially similar to the corresponding federal rule.[43] The former statute [44] was available both in actions formerly denominated legal or equitable [45] but it was severely limited in that it had been held not to be available in an action for a sum of money only.[46] The remedy is now made expressly available in, but it is not limited to an action for a sum of money only.[47]

Intervention is classified into two groups: 1. Intervention as of absolute right; [48] 2. intervention in the discretion of the court.[49] In the latter case, as in impleader, the court is to consider whether there will be unreasonable delay, prejudice, or unjustified complication or confusion of issues.

Intervention is permitted as of right: "(a) when a statute of this state confers an absolute right to intervene; or (b) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (c) when the applicant has an interest in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief; or (d) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of, or subject to the control of or disposition by, the court or an officer thereof." [50]

Intervention is permitted in the discretion of the court: (a) when a statute confers a right to intervene in the discretion of the court; or (b) when such applicant's claim or defense and the main action have a question of law or fact in common.[51]

Intervention is accomplished by serving a notice of motion to intervene upon all parties who have appeared.[52] The notice shall contain a statement of the grounds of intervention and shall be ac-

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[41] 2 MOORE'S FED. PRAC. (1938) 2307.
[42] N. Y. CIV. PRAC. ACT § 193-b.
[43] FED. R. CIV. P., 24.
[44] N. Y. CIV. PRAC. ACT § 193 (4) prior to 1946 amendment.
[45] Rosenberg v. Salomon, 144 N. Y. 92, 38 N. E. 982 (1890).
[46] Bauer v. Dewey, 166 N. Y. 402, 60 N. E. 30 (1901); Brooklyn Cooperage Co. v. Sherman Lumber Co., 220 N. Y. 642, 115 N. E. 715 (1917).
[47] N. Y. CIV. PRAC. ACT § 193-b (1) (2).
[48] N. Y. CIV. PRAC. ACT § 193-b (1).
[49] N. Y. CIV. PRAC. ACT § 193-b (2).
[50] N. Y. CIV. PRAC. ACT § 193-b (1).
[51] N. Y. CIV. PRAC. ACT § 193-b (2).
[52] N. Y. CIV. PRAC. ACT § 193-b (3).

companied by a proposed pleading which is to set forth the claim or defense for which the intervention is sought.

The present section on intervention is preferable to the previous section which formerly required an "interest" in the "subject" of the action. The present provision is more definite in its requirements and will not be subject to conflicting interpretations as to whether such interest must be "direct" or "indirect."

It is apparent from the foregoing discussion of the new amendments that they will do much to clarify and facilitate methods of procedure in the New York courts.

JOSEPH F. DOLAN.

DOMESTIC RELATIONS—ADULTERY AS A GROUND FOR SEPARATION.—The Civil Practice Act has been amended to allow a spouse to maintain an action for separation from bed and board on the ground of an act of adultery of the other spouse.[1]

Prior to the amendment the innocent party was entitled to a separation upon proving one of four grounds, to wit: abandonment, conduct of the defendant rendering it unsafe or improper for plaintiff to continue to cohabit with the defendant, neglect or refusal of the husband to support the wife and cruel and inhuman treatment.[2] When adultery constituted legal cruelty it was cause for a judicial separation. Thus it was held, ". . . if the adultery is open and notorious, flaunted in the eyes of the public or dragged into the presence of the blameless wife or husband, two wrongs arise out of the act: the adultery itself which is so gross an offense against the marriage as in itself to lead to a dissolution of the marriage, and cruelty. . . ." [3] Clandestine adultery was not sufficient justification for the separation; [4] adultery in and of itself did not constitute cruel and inhuman treatment.[5] There was thus created the somewhat anomalous situation that a wrongful act greater in degree could not be the ground for relief lesser in extent. With the addition of sub-

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[1] N. Y. CIV. PRAC. ACT § 1161, amended by Ch. 774 of the Laws of 1947, effective April 10, 1947.

[2] Old N. Y. CIV. PRAC. ACT § 1161.

[3] Hofmann v. Hofmann, 232 N. Y. 215, 218, 133 N. E. 450, 451 (1921); Jacobstein v. Jacobstein, 201 N. Y. Supp. 1, 3 (Sup. Ct. 1923), *aff'd without opinion*, 240 N. Y. 693, 148 N. E. 761 (1925); *accord*, Goldsmith v. Goldsmith, 151 Misc. 198, 199, 270 N. Y. Supp. 48, 49 (Sup. Ct. 1934).

[4] *Compare* Hofmann v. Hofmann, 232 N. Y. 215, 133 N. E. 450 (1921), with McKee v. McKee, 241 App. Div. 149, 271 N. Y. Supp. 384 (1st Dep't 1934).

[5] *See* Lanyon Detective Agency, Inc. v. Cochrane, 240 N. Y. 274, 278, 148 N. E. 520, 521 (1925).