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Article 26

Pleading and Practice--Joinder of Parties Defendant--Civil Practice Act, Sec. 193, Subd. 2, Construed (Hejza v. New York Central R.R. Co., 137 Misc. 824 (1930))

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the Court was of the opinion that it represented private property and was outside the "realm of commerce" because "whether the carrier would receive any part of it was a matter of speculation, being wholly dependent upon the unrestricted will of its custodians" —the reorganization managers.

The minority of the Court took the view that, in determining whether the transaction pertained to commerce, the practical operation of the plan should control rather than the formal interests of the respective parties. Applying this test to the contract governing the fund created by the payment of $1.50 per share, the Commission was acting within its powers for, in substance, the payments into this fund were part of the necessary price exacted for the new securities. The dissenting opinion points out that reorganizations of excessive cost militate against the stability of the credit of the transportation system in that the attractiveness of railroad securities as investments is impaired. Moreover, reorganization costs may play a part in determining the going concern value of a railroad company as an element of rate making [3] and, hence, the public at large has a direct interest in the matter.

Stability of credit is essential to the preservation of the transportation system to which end the Transportation Act, under which the Commission derives its powers to regulate security issues, was enacted.[4] Regulation of fees and costs charged by bankers and financiers who generally dominate reorganizations, should not be permitted to be defeated by the simple expedient of having expenses paid out by the managers for the account of the carrier rather than payment being made directly by the carrier. The majority opinion is not in harmony with the broad purpose of the legislative enactment.

E. P. W.

PLEADING AND PRACTICE—JOINDER OF PARTIES DEFENDANT—CIVIL PRACTICE ACT, SEC. 193, SUBD. 2, CONSTRUED.—Plaintiff, an employee of a car-cleaning company, was injured by shunting cars belonging to the defendant railroad company but upon land leased by it to the employer. Defendant now seeks to have the employing company brought in as party defendant under a contract by which said employer agrees to indemnify the railroad for all injuries to person or property occurring upon land leased from the railroad. The trial Court denied defendant's motion for joinder. On appeal, *Held,* reversed. Hejza v. New York Central R. R. Co., 137 Misc. 824, 246 N. Y. Supp. 34 (1930).

[3] See McCardle v. Indianapolis Water Company, 272 U. S. 400, 414, 47 Sup. Ct. 140 (1926); United Railways v. West, 280 U. S. 234, 50 Sup. Ct. 123 (1930).

[4] New England Divisions Case, 261 U. S. 184, 189, 43 Sup. Ct. 270 (1922); Dayton, Goose Creek Ry. Co. v. United States, 263 U. S. 456, 478, 44 Sup. Ct. 169 (1923).

The employer is here sought to be joined under section 193, subdivision 2, of the New York Civil Practice Act.[1] But, it is claimed, since the indemnity sought arises from a separate instrument, outside the action, that the statute does not apply. This calls for an interpretation of the phrase "for the claim made against such party in the action." This legislative ambiguity, if strictly construed, limits the application to parties liable upon the exact complaint in the action [2] and the rule would be rendered nugatory. But following a line of cases [3] which have given some breadth to the law the court here broadly interprets the statute as applying to all claims related to the same subject matter. This despite the fact that the third person's liability to defendant is based on contract while the original action was for negligence.[4] Such a construction appears to carry out the purpose of the legislature by accepting "common questions of law or fact" as the basis for joinder [5] rather than the old outmoded requirement of liability directly to the plaintiff, or failing that, to the defendant for contribution or indemnity directly under the plaintiff's claim.[6]

D. J. R.

PLEADING AND PRACTICE—JURISDICTION OVER NON-RESIDENT MOTORIST.—Defendant, a non-resident, while operating an automobile within the state collided with the plaintiff. Process was served in accordance with section 52 of the Vehicle and Traffic Law.[1] Upon the receipt appears the name of another. Defendant did not deny she received a copy of the summons by registered mail, nor did she allege she did not sign the receipt either personally or by her agent. Defendant appeared specially to contest the jurisdiction of the Court on the sole ground that the return receipt was insufficient upon its face, *Held,* the statute as construed does not require the return receipt to be signed personally by the defendant, and in

[1] N. Y. Laws, 1923, c. 250, where any party to an action shows that some third person * * * is or will be liable to such party * * * for the claim made against the party in the action, the Court, on application of such party, may order such person to be brought in as a party to the action * * *.

[2] 2 Carmody's New York Practise (1930) 874.

[3] Travlos v. Commercial Union of America, 217 App. Div. 352, 217 N. Y. Supp. 459 (1st Dept., 1926); Prescott v. Nye, 223 App. Div. 356, 228 N. Y. Supp. 156 (3rd Dept., 1928; Wichert & Co. v. Gallagher & Asher, 201 N. Y. Supp. 186 (1923); Driscoll v. Corwin, 133 Misc. 788, 233 N. Y. Supp. 483 (1929).

[4] But *cf.* Krombach v. Killian, 215 App. Div. 19, 213 N. Y. Supp. 138 (2nd Dept., 1925).

[5] Rothschild, *The Consolidated Action,* (1930) 4 St. John's L. Rev. 151, 167.

[6] May v. Mott Ave. Corp., 121 Misc. 398, 401, 201 N. Y. Supp. 189, 191 (1923).

[1] N. Y. Cons. Laws, Ch. 71.