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# Parties as Additional Defendants

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## NOTES

### PARTIES AS ADDITIONAL DEFENDANTS

This note is written by way of inquiry into the soundness of a decision recently handed down by a Court of Common Pleas in Philadelphia County. Trial of the case still pending, it is perhaps ethical to omit the name. The facts of the case are briefly these: Mrs. A and her infant son, A Jr. were traveling in an automobile owned by Mrs. A. B driving his automobile collided with the car of Mrs. A. Both Mrs. A and B were negligent. A Jr. was injured. Mr. and Mrs. A sued in their own right and as next friend of A Jr. B attempted to bring Mrs. A on the record as an additional defendant by a writ of scire facias. Upon the motion of Mrs. A the writ was stricken off. The reasons advanced in sustaining the motion to strike off may be divided into two fields. The first objections to this procedure are based on substantive law; the second on the application of the Sci. Fa. Act itself. These will be considered in order.

It is argued that Mrs. A, if joined as a party defendant, would be in the anomalous position of bringing suit against herself. The impossibility of such a suit seems to be generally accepted and it is not the purpose of this note to question the decisions in which this rule was enunciated. An examination of these cases will show that they are, without exception, cases in which the plaintiff, if he did recover a judgment, would be forced to pay it himself.[1]

Manifestly this is not the result in the case stated above. It is pointless to argue that under the Act of 1933, P. L. 807, Mrs. A is allowed to recover from herself as added defendant and thus comes within the objection. In the first place, if it were possible to so recover, Mrs. A would collect from B rather than pay it herself. Secondly, it will appear later that it is not possible for Mrs. A to collect from herself and thus she has no alternative other than executing on the property of the original defendant B.

The most quoted objection of the courts to a party appearing on the record as both plaintiff and defendant is that the two positions are utterly inconsistent. It is conceded that where the positions are in fact, so inconsistent, the rule should not be relaxed. In the stated case, this objection is groundless. The court felt that as plaintiff, Mrs. A was bound to do her best to establish the negligence of the defendants. On the other hand, as defendant, Mrs. A would try to prove that such was not the case at all and that she was free from blame. The answer to this is that Mrs. A does not allege or attempt to prove the negligence of the additional defendant who is Mrs. A herself. The negligence of the additional defendant is the worry of B and the burden is upon him to prove it.

Mrs. A's position is almost precisely the same as that of a plaintiff in the very common case where contributory negligence is alleged as a defense to recovery. Were Mrs. A to sue B alone and, as is the usual case, were B to allege that Mrs. A was contributorially negligent, Mrs. A would be striving to prove the negligence of B and as defendant in fact if not in name, she would be trying to establish her own freedom from negligence. In the present case, Mrs. A sues and tries to establish the negligence of B. B meanwhile, tries to establish the negligence of Mrs. A precisely as he would do were he asserting contributory negligence as a defense. In the case stated, B wishes to establish the negligence of Mrs. A for two reasons. The first reason is that by proving the negligence of Mrs. A he bars any recovery in the suit brought by Mr. and Mrs. A in their own right. The second reason is that he wishes to enforce his right of contribution as regards the recovery by A Jr. The Act of April 4, 1929, P. L. 140 amending Section 13 of the Act of May 14, 1915, P. L. 483, (Practice Act) provides that a defendant may not only deny his own negligence but may set out in his affidavit of defense the negligence of the plaintiff and set up a claim of damages against the plaintiff arising out of the

[1]DeWitt v. DeWitt, 38 Pa. C.C. 689 (1911); Griffith v. Chew's Ex., 8 S. & R. 17, (1807); Eichelberger v. Morris, 6 Watts 42 (1837).

circumstances upon which the plaintiff's case is based. It is submitted that since the position of the defendant claiming damages under this statute or when asserting the defense of contributory negligence is not regarded as inconsistent, the allegation of inconsistent positions should not be advanced as a ground for sustaining Mrs. A's motion to strike off the writ.

The next reason advanced by the court derives whatever cogency it possesses from the common law rules concerning suits within the family. It is said that were Mrs. A made a party defendant, A Jr. would be suing his parent in tort and such suits are not permitted. Further it is said that Mr. A would be suing Mrs. A in tort and such suits are not allowed. Suits within the family on claims arising in tort have been barred because the courts fear they would cause discord in the harmony of the family. While the danger of such discord seems to be somewhat overestimated, (criminal proceedings may be instituted and suits brought concerning property), the soundness of the ruling is not questioned when the reasons supposedly justifying its existence are present. The danger of family discord is not present in the stated case for the reason that the husband, Mr. A would execute his judgment against the property of the defendant B. Under the present law this is the only thing he could do. The danger of family discord is present in any case only when the judgment recovered by one spouse must be paid by the other. As we have said, such is not possible in the stated case.

No dissension in family harmony would result from the fact that it appears from the record that A Jr. is suing his mother in tort. Under the present law, A Jr. is not permitted to sue his mother in tort and therefore he could not recover a judgment against his mother as added defendant under the facts. This would be the result even though the Sci. Fa. Act purports to allow the plaintiff to recover against the added defendant. The danger of imperiling the integrity of the home is absent. In *Briggs v. Philadelphia*,[2] the court said,

> "There has never been a common law rule that a child could not sue its parents. But there is substantial decisional authority that it is not permitted on the theory that it would be disruptive of the family peace, destructive of the enforcement of discipline, and therefore against public policy. We recognize the wisdom of these rulings as the state is vitally interested in the integrity of, and harmony in, the family."

If no judgment is to be recovered against the parent, the child is not recovering from its parent and it is difficult to see where the objection of the court has any application. It would be absurd to argue that the mere presence of the son on the record as a plaintiff and that of his parent as a defendant would endanger the home. It would seem that where the reasons justifying the existence of the rule

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[2] 112 Pa. Super. 50 (1934).

are absent, and the assertion of the rule inflicts unwarranted hardship, the rule should be inapplicable. Such a distinction would be in line with the modern trend of authorities allowing an infant to recover against its parent in tort where the parent by his negligence has injured the child and the parent is protected by insurance.[3] To hold that the infant is not to be allowed to recover against the insurance company because on the record at least, he is suing his parent in tort, and such suits are disruptive of family harmony is little short of ridiculous.

The objectionable results following a mechanical application of the rule that a child may not, under any circumstances, sue his parent in tort, appear more clearly when the question is studied from another angle. It is accepted law in Pennsylvania that a joint tort feasor may enforce his right of contribution from his co-tort feasor when it appears that the tort committed was not wilful or intentional.[4] It would seem that there is nothing to prevent B from bringing a separate action to enforce his right of contribution from Mrs. A as the accident occurred as a result of joint negligence. B's exercise of his right of contribution would enable A Jr. to do indirectly that which the law does not permit him to do directly. It is submitted that this recovery is in no manner the main purpose of joining Mrs. A as an additional defendant. It is but an incidental result of the exercise of a distinct legal right in and by B.

The statement that a right of contribution exists in favor of B will doubtless be challenged on the ground that since Mrs. A is not legally responsible to A Jr., there is no common liability which is said to be the basis of the right of contribution. It is said that equality between those whose positions are not equal is inequitable. The only case in Pennsylvania in which the basis of the right of contribution has been discussed is a lower court case.[5] The court said:

> "To determine this question it is necessary to consider whether contributionship rests on joint tortfeasorship or upon joint liability. If the former, the duty to contribute would exist regardless of whether they were both liable to the person injured, and, if the latter, the duty would not arise where one is liable and the other is not; as, for instance, in the case of the joint negligence of a charity and an individual."

Whether one argues that the right of contribution is enforceable on the theory of joint tortfeasorship or on the theory of joint liability, it is not denied that the foundation of the right rests on natural justice and equitable principles.[6]

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[3]Dunlap v. Dunlap, 150 At. 905 (N. H., 1930).

[4]Horbach's Administrators v. Elder, 18 Pa. 33 (1851); Armstrong County v. Clarion County, 66 Pa. 218 (1870); Goldman et al. v. Mitchell-Fletcher Co., 292 Pa. 354 (1928).

[5]Cohen v. Philadelphia Rural Transit Co., 13 Pa. D. & C. 465 (1930).

[6]Armstrong County v. Clarion County, 66 Pa. 218 (1870).

It does not seem to be a furtherance of such natural justice to hold that a tort feasor may defend a demand for contribution by the assertion of an immunity from suit which the law accords him for very different reasons. A Jr. did not institute this suit. His parents did that and now contend that if in this suit, they are held responsible for their wrong-doing, the harmony of their home will be imperiled. The injustice of denying B his right of contribution on the strength of this argument clearly appears. It is pertinent to note that while a child may not bring a civil action against his parent for support, a third party who has sold necessaries to the infant is not to be denied a recovery from the delinquent parent because such recovery impairs the sanctity of the home.[7]

In further support of their refusal to permit B to join Mrs. A as an additional defendant, the court refers to the statute itself and contends that the inclusion of such parties as parties defendants was never intended. The objection may be referred to as the "third party rule". In the case of *First National Bank of Pittsburgh v. Baird*,[8] the court said that the statute in referring to additional defendants meant third parties. This ruling has been interpreted to mean that each suit must have a plaintiff and a defendant and that the added defendant must be a third party, another individual. A passing glance at the facts of that case will show that such was not the ruling. To arrive at the proper interpretation of the "third party rule" it is necessary to briefly state the facts of that case. The plaintiff sued the defendant on a promissory note. The defendant contended that he was but an accommodation maker and that Mr. X was the real debtor. The defendant issued a writ of scire facias to join X as an added defendant. While a motion to quash the writ was pending, judgment was entered against the defendant for want of an affidavit of defense. The defendant argued that the purpose of the statute was to make the added defendant liable to the plaintiff just as though the plaintiff had sued him as defendant in the first instance. The court ridiculed this argument, pointing out that if this were so, the plaintiff would often be required to proceed against one as to whom he had no cause of action. The court said that the added defendant was a third party. Clearly the court meant that the added defendant was as to the plaintiff, a third party, a party against whom he had no cause of action. The plaintiff acquired no rights because of the joinder of X and there was no reason to deny him his right to proceed against the original defendant instead of delaying while the original defendant and the added defendant fought out an issue of no interest to the plaintiff. The rule that the added defendant was a third party was based on the fact that the added defendant was not liable to the plaintiff, and not on the number of parties on the record and their names. It appears that to apply this holding to the instant case is to misinterpret the ruling of that case. If one wishes to follow the argument to its logical conclusion, we

[7] John Wanamaker v. Lipps, 3 Pa. D. & C. 451 (1922).
[8] 300 Pa. 92 (1930).

find that since Mrs. A is not liable to herself she is a third party, (not liable to the plaintiff) and therefore there is no objection to joining her as an added defendant. No rights are acquired by her as a result of the joinder of the added defendant who is Mrs. A herself and therefore the suit against B proceeds just as though she had never been added. Nor does the Act of 1933 vitalize this dead objection. At first glance it seems that it might have some application because the plaintiff may now recover from the added defendant and it might be argued that since this is so, the added defendant is not a third party under the ruling of *First National Bank of Pittsburgh v. Baird, supra.* It suffices to note that the plaintiff may recover from the added defendant only when it appears that the suit could have been brought against the added defendant on the same cause of action as is the basis of the present suit. Since the court holds that a party may not sue himself, it can not appear that as added defendant he is liable to himself as plaintiff.

In the case of *First National Bank of Pittsburgh v. Baird,*[9] *supra,* after setting out the argument of the defendant that it was the purpose of the Act to make the additional defendant liable just as though the plaintiff had sued him in the first instance, the court said,

> "Appellants whole contention on the point is built on the word 'defendants' in the clause 'additional defendants'. The legislature might just as well have used the words third parties and then this supposed argument could not have been made."

Clearly this ruling has reference to the liabilities between the parties. It has no application to the number or names of the parties but deals solely with their liabilities.

The Supreme Court is responsible for the common misapplication of the "third party rule". In *Shapiro v. Philadelphia*[10] the plaintiff sued both the City of Philadelphia and the transit company for injuries suffered by reason of the negligence of the defendants. The City attempted to bring the transit company on the record as an additional defendant. The purpose was to enable the City to enforce its right of contribution without the expense of a separate suit, should the judgment be executed against the City alone. The lower court made absolute a rule to strike off the writ and this ruling was sustained by the Supreme Court. The court said:

> "The court below quashed the writ because it could not understand how one who was already a defendant could be an additional defendant or third party as we defined those words in First National Bank of Pittsburgh v. Baird, 300 Pa. 92. The manifest purpose of the Act

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[9]300 Pa. 92 (1930).
[10]306 Pa. 216 (1932).

> is to enable the defendants who have been sued to bring upon the record as additional defendants those not already there who are alleged to be liable to those who are. The procedure establishing this liability is not specified in the statute but is wisely left to be worked out by the judiciary. In doing this however, we can not interpret it so as to make one an additional defendant who is not, and can not be 'additional' as to the defendant or defendants already there. As the only complaint made against the court below was its refusal to permit this impossible thing, we must, of course, affirm its order."

The sagacity of the legislature in permitting the courts to handle the details of the Act is questionable. It appears that the court misapplies its own rule as laid down in the *First National Bank of Pittsburgh v. Baird* case,[11] *supra.* The courts have worked out the details so that if a plaintiff sues the defendants as joint defendants, the tort feasor paying the judgment must bring a separate suit to enforce his right of contribution. If, however, the plaintiff sues but one of the parties responsible and the party sued brings the other responsible party on the record by a writ of scire facias, the right and extent of contribution may be settled in the single suit. This senseless distinction is drawn though the proof, issues and opportunities to defend are the same in both cases. In *Shapiro v. Philadelphia,*[12] *supra,* the court continues:

> "It is true also, that as the record now is, the city can not have the issue between it and the transit company determined prior to the trial between the plaintiff and the original defendant as it might be able to do if the transit company were an additional defendant; but if this is so important as to require compulsory process to enforce it, complaint will have to be made to the legislature."

Just how the right and extent of contribution between two negligent tort feasors could be determined prior to any recovery against either is a matter of conjecture. In all events, the court recognizes the desirability of permitting the legislature to handle the details.

Now to revert to the original argument advanced by the court. Is Mrs. A bringing suit against herself? Clearly she is not. As we noted before, under the present law, as against herself she has no cause of action. A party may not bring suit against himself. Under the Act of 1933 amending the Act of 1929,[13] the added defendant is liable to the plaintiff only when it appears that the plaintiff could have brought the suit against the added defendant in the first instance on

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11300 Pa. 92 (1930).
12306 Pa. 216 (1932).
13Act of Apr. 4, 1929, P. L. 140, amending Sec. 13 of Act of May 14, 1915, P. L. 483.

this same cause of action. Thus it can not appear that Mrs. A is liable to herself and her position on the record as both plaintiff and defendant goes no further than the caption of the suit.

For the same reason, Mr. A is not suing Mrs. A. His part of the action proceeds against B just as tho Mrs. A had not been added as a defendant. The same is true of the suit by A Jr.

To sum up the whole situation, B wishes to join Mrs. A as an additional defendant to secure and enforce his right of contribution in the same action and upon the same proof as establishes his liability to A Jr. The first reason advanced by the court for denying him this right is that a party may not appear on the record as both plaintiff and defendant. While such dual position is occupied as a matter of fact in cases where a defendant asserts the defense of contributory negligence or asserts a claim under the amendment to the Practice Act, cited supra, the presence of his name on the record as both a plaintiff and defendant is fatal. The family harmony argument is applied though logically it has no application. The "third party rule" is misinterpreted and misapplied, of necessity, limiting the remedial effect of the Act in whole. Under the present ruling of the court, B to enforce his right of contribution must bring a separate suit. The patently undesirable features of such procedure are best stated by the court itself. In *Vinnacombe v. Philadelphia,*[14] the court said:

> "The Act is a remedial one. Its purpose is to avoid a multiplicity of suits; to compel every interested person to appear and defend the action by the plaintiff; and to save the original defendant from possible harm resulting from loss of evidence as might result if compelled to await the end of the suit before proceeding against those who are primarily liable in whole or in part. Hence the statute is to be liberally construed to advance the legislative purpose."

It is submitted that the above chaotic situation should be remedied either by a complete and intelligent discussion of the whole matter by the Supreme Court or by action by the legislature.

Two very recent cases confirm the views hereinbefore set forth.

In the case of *Koontz v. Messer,* 181 *Atl.* 792 (Pa., 1935), the wife was injured by the negligence of her husband. At the time of the accident, the husband was acting as servant of his employers. The wife sued the employer who issued a writ of scire facias bringing the husband of the plaintiff on the record as an additional defendant, alleging that he was liable over to the employer.

The court, after reviewing the authorities, held that the marital immunity of the husband could not be claimed by the master. The court points out that

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[14] 297 Pa. 564 (1929).

such immunity is based upon the policy of preserving domestic peace and felicity and that this policy is not furthered by extending the immunity to the master.

To the argument that the presence of the husband on the record as a defendant was sufficient to bar the suit by the wife, the court points out that the suit by the wife proceeds exactly as if the husband had not been joined.

The court cites with approval the case of *Chase v. New Haven Waste Material Corp.*, 111 *Conn.* 377, 150 *Atl.* 107 (1930) in which an unemancipated minor was permitted to recover against the master for the negligence of its parent, a servant of the master.

The effect of this case is to remove several of the questions considered in this note. With the court's clear definition of the limits, within which the immunity from suit by members of a family may be asserted, it would appear to be proper for B to join Mrs. A as an additional defendant.

While there is nothing in the decision relating directly to the theory of the right of contribution between joint tortfeasors it would seem to be settled that a joint tortfeasor could not defend a demand for contribution by the assertion of a marital or parental immunity from suit as preventing the presence of the basis of the right, i. e., joint liability to the plaintiff.

It would seem that under the interpretation of the principle of *Koontz v. Messer,* 181 *Atl.* 792 (*Pa.,* 1935), as discussed in the case of *Murray v. Lavinsky,* 120 *Pa. Super.* 392 (1936), that B, in the supposed case, could allege that Mrs. A is jointly liable with him, rather then liable over to him. To hold that since Mrs. A. is not liable directly to her son, A Jr., and therefore not jointly liable with B to A Jr. and thus not within the terms of the statute, would be a gross injustice. This appears when one remembers that in the case of *Koontz v. Messer, supra,* the defendant was permitted to bring the husband of the plaintiff on the record as an additional defendant, on the theory that the husband was liable over to the original defendant. In other words, the original defendant was entitled to be indemnified by the husband of the plaintiff for any loss, while in the present case, the original defendant seeks only partial indemnification, his right of contribution.

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## VENUE IN THE HAUPTMANN CASE

Although a great deal has been written and said about the *Hauptmann* case, or more exactly the case of *State v. Hauptmann,* 180 At. 809, very little has been said about the substantive points of law involved. Much has been written about the admissibility of evidence, the competency of witnesses, and the general ballyhoo which surrounded the trial. The purely legal aspects of the case have not been dealt