THIRD PARTY PRACTICE UNDER THE NEW ILLINOIS PRACTICE ACT AND CHICAGO MUNICIPAL COURT RULES

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THE NATURE OF THIRD PARTY PRACTICE

EXPRESS provisions for third party practice appear in the new Chicago Municipal Court rules,[1] and it is said that Section 25 of the new Illinois Practice Act sanctions a similar practice for limited purposes.[2] Since most lawyers are probably quite unfamiliar with this innovation, a brief account of it will precede an attempt to analyze critically the provisions and annotations in question.

Most lawyers are familiar, no doubt, with the device whereby a defendant, who believes he will be entitled to indemnity from one not a party to the action for any loss he is likely to suffer by adverse judgment in that action, may give notice to the alleged indemnitor to take over or help in the defense so that he will be concluded by the judgment establishing the defendant's liability, thus leaving only the issue of the relationship warranting indemnity to be litigated in the subsequent separate action over.[3] "Vouching to warranty" is perhaps the oldest example of this,[4] although the device is apparently available at common law in many situations.[5] This is vaguely analogous to third party practice since it obviates the duplication of issues in the two actions by preventing the indemnitor from relitigating the liability of the claimant to the original plaintiff, but is unlike it since a separate action over is still required to secure the judgment for indemnity.

Third party practice provides not only for litigation of this common issue in the original plaintiff's action but also for a trial of all other issues arising between the defendant and his indemnitor, with a judgment granting or denying indemnity, thus disposing of all issues in the plaintiff's ac-

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[1] Rules 38–45.

[2] Illinois Civil Practice Act Annotated (Foundation Press, 1933), 52. This book will be referred to hereafter as Ill. C.P.A. Ann.

[3] 1 Freeman, Judgments (5th ed. 1925), § 445 *et seq.*

[4] *Ibid.*, § 454. See also Jenks, Short History of English Law (1912) 110.

[5] *Loc. cit.*, *supra* note 3.

tion.[6] The benefits of third party practice usually accrue to claimants for contribution as well and are occasionally available for recovery of other damages arising out of the fact transaction on which the plaintiff's claim rests.[7]

Perhaps a hypothetical illustration may be helpful. Suppose P sues A, a city, for damages caused by a defect in a sidewalk adjacent to B's property, the jurisdiction in question permitting A to shift any loss it may incur in such cases to adjacent property owners by way of indemnity, i.e., where as between them the property owner is "primarily" and the city "secondarily" liable to the injured plaintiff. Such recovery over in this type of case is frequent by separate action. Under appropriate third party practice, however, A may join B as a third party defendant and litigate a cross-claim for indemnity against him in P's action, securing judgment therefor in that action if it is found liable to P and successfully prosecutes its cross-claim against B.[8] If, in any case, the independent issues arising between A and B would complicate P's trial of A, the court arranges to try them separately; otherwise the common and independent issues of P's and A's claims are tried at the same time.[9]

The cross-litigation for contribution in plaintiff's action is similar. There is, however, one fundamental difference. The claimant of contribution must prove a common liability of himself and the third party to plaintiff, whether plaintiff seeks such liability or not. In other words he must show that if the plaintiff wished he could have procured a joint judgment against himself and the third party.[10] The plaintiff may amend his complaint to include the third party added by defendant for the purpose of securing either indemnity or contribution; but only where he could have joined the third party as a co-defendant originally.[11]

The efficiency of this practice, when and if ideally perfected, is apparent. It would avoid the necessity of a second action and, if the claim is for con-

[6] Cohen, Impleader: Enforcement of Defendants' Rights against Third Parties, 33 Col. L. Rev. 1147 (1933); Gregory, Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action, 47 Harv. L. Rev. 209 (1933). Each article contains references to and discussions of various provisions and cases involving their interpretation.

[7] Gregory, *supra* note 6, 233. See Ball's Annual Practice (1934), 294, Order 16A, rule 1; Ontario Rules of Practice (1928), rule 165, and Steele v. Ferguson, [1931] Ont. Rep. 427, with which compare Mitchell v. Raymond, 181 Wis. 591, 195 N.W. 855 (1923).

[8] E.g., Bowman v. Greensboro, 190 N.C. 611, 130 S.E. 502 (1925).

[9] Cf. Vinnacombe v. Philadelphia & Am. S., 297 Pa. 564, 573–4, 147 Atl. 826, 831 (1929).

[10] See Gregory, *supra* note 6, 213–221.

[11] The exception to the general rule is found in Pa. Purdon's Ann. Stat. (1931), tit. 12, § 141, as amended by Pa. Acts 1931, no. 236, p. 663. Under this statute plaintiff gets the benefits of amendment without having to amend.

tribution, the re-litigation of identical issues already tried in the original plaintiff's action. It would also insure identical treatment of the common issues and would avoid possible different constructions by separate juries of practically the same evidence. The saving of money to the community and of time and trouble to the courts, jury panels, and witnesses would undoubtedly follow. The inconvenience to plaintiff resulting from the practice is thought to be more than offset by these considerations.[12]

Lawyers accustomed to bringing separate actions for indemnity and contribution, however, must be puzzled at the foregoing account of third party practice. The "cause of action" for these items does not arise at common law until the claimant is not only adjudged liable to the injured plaintiff but has also discharged such liability. Unless this rule of substantive law is changed by statute, therefore, the claimant may not anticipate his cause of action by cross-claiming against an already sued co-defendant or an added third party.[13] Jurisdictions having such statutes, however, retain the common-law rule for separate actions over.

Related to the problem concerning the cause of action is the difficulty of granting judgment on the cross-claim. Even if the claimant litigates the cross-claim of indemnity or contribution in the injured plaintiff's action, it is impossible, in the absence of a statutory provision expressly or impliedly authorizing a contingent or declaratory judgment pending the discharge of his liability to plaintiff, to give him judgment therefor against the co-defendant or third party before he himself has satisfied such liability.[14] The Wisconsin court inferred from the statute permitting cross-litigation of this sort in plaintiff's action the authority to give a "contingent" judgment to the successful claimant—a sort of declaratory judgment establishing the claimant's rights against the third party or co-defendant—to be made final on motion when the claimant showed discharge of his own liability to the plaintiff.[15] The added third party cannot be substituted as the original plaintiff's judgment debtor. Unless the plaintiff

[12] Whether this is or is not true, it is undoubtedly the belief of proponents of this practice. See, e.g., Crouch, J., in Haines v. Bero E. C. Corp., 230 App. Div. 332, 243 N.Y. S. 657 (1930).

[13] This statement seems true inasmuch as all jurisdictions having such practice also have statutes permitting it. For instances, see Judicature Act, 1925 15 & 16 Geo. 5, c. 49, § 39; Judicature Act, Ont. Rev. Stats. 1927, c. 88, § 15(d); N.Y.C.P.A. (1920), §193(2); Pa. Purdon's Ann. Stat. (1931), tit. 12, § 141; as amended by Pa. Acts 1931, no. 236, p. 663; Wis. Stat. (1931), §§ 260.19, 263.15.

[14] Final judgment could not be given because the cause of action has not yet accrued. Hence the only judgment that can be given is not final and would in this case be virtually a declaratory judgment, declaring what the claimant's rights will be after he pays plaintiff in satisfaction of his judgment.

[15] Wait v. Pierce, 191 Wis. 202, 225, 210 N.W. 822 (1926).

had originally joined him or unless, if he had been added by request of the claimant, the plaintiff amends his complaint to include such party, no rights between plaintiff and the third party are adjudicated at all.

SECTION 25 OF THE CIVIL PRACTICE ACT

This section supersedes Illinois Statutes Chapter 22, Section 34, and substantially "expresses the well-known rule in equity."[16] Its alleged sanction of third party practice to enable recovery of contribution in the plaintiff's action is doubtful.[17] In the first place the phrase "complete determination of the controversy" probably will be construed in this state as it has been in the New York Civil Practice Act, Section 193(1), and in Section 8 of the New Jersey Practice Act of 1912. Joinder under these sections is denied unless the rights of the sued defendant will be prejudiced by failure to join a third party at his request, courts construing "the controversy" to mean issues arising only between plaintiff and defendant and not those arising only between defendant and the third party which may be independently litigated in a separate action over.[18] The distinction between the intended and alleged application of these provisions is, briefly, that between provisions for necessary and for proper parties.[19]

The second sentence of the Illinois Practice Act, Section 25, providing for the joinder of a third party if he has "an interest or title which the judgment [between plaintiff and defendant] may affect," in no way permits third party practice to enable the recovery of contribution in the plaintiff's action. This is true of the corresponding New York and New Jersey sections under both of which only the third party may invoke the joinder provisions.[20] Although the Illinois Section 25 does not expressly confine such joinder to the third party's application, the provision is obviously for his benefit alone, whereas to permit third party practice it should be for the defendant's sole benefit.

The statement that the Illinois Section 25 "is substantially the same as New York Civil Practice Act, § 193"[21] is untrue since it contains nothing resembling or intended to resemble New York Section 193(2), the New York third party provision. The statement that the Illinois Section 25

[16] Ill. C.P.A. Ann., 51.

[17] *Ibid.*, 52.

[18] See Cahill, New York Civil Practice (6th ed. 1931), 69 *et seq.* and Supplement thereto (1933), 13–15, being annotations of N.Y.C.P.A., § 193; and Sheen, New Jersey Law Practice (2d ed. 1931), 236–7, being annotations of N.J.P.A., § 8.

[19] Cf. Osterhoudt v. Board of Supervisors, 98 N.Y. 239, 244 (1885); Chapman v. Forbes, 123 N.Y. 532, 26 N.E. 3 (1890).

[20] N.Y.C.P.A., § 193(3), and N.J.P.A., § 8.

[21] Ill. C.P.A. Ann., 51.

"is substantially New Jersey Laws, 1912, c. 231, § 8"[22] is nearer the truth; but the New Jersey court has never granted a third party application under it.[23]

Even assuming for sake of argument, however, that the practice act permits a defendant to add a third party, it still does not provide for the cross-litigation between such parties of causes of action not yet accrued at common law. Section 38 of the practice act permits under the name of "counter-claim" some kind of cross action between co-defendants already parties to the action. But this section obviously has reference only to accrued causes of action and neither expressly nor by implication does it permit litigation of cross-claims for indemnity or contribution pending the liability of defendant to plaintiff and the discharge of such liability, both necessary for the accrual of the common-law causes of action for such claims. It is apparent from the practice in other states that such cross-litigation involves a change of substantive law and is proper only when sanctioned by statute.[24]

But even if this were not so, the type of judgment necessary on such cross-claims is not available in Illinois. Such judgment merely declares the claimant's rights following the occurrence of certain contingencies, not becoming a final and executable money judgment until the claimant has discharged either all or part of a fixed liability against himself, i.e., has proved the requisites of a common-law cause of action. The Wisconsin court inferred from this statute permitting cross-litigation of these claims in plaintiff's action the right to give what they called a "contingent" judgment to the cross-claimant, to be made final on motion when he showed that he had discharged his own liability to the plaintiff.[25] In the absence at least of such a statute, however, this inference would be hardly justifiable.

THE MUNICIPAL COURT RULES 38–45

(a) Following a brief account of the rules dealing with third party practice will appear a criticism of these rules and the notes appended to them considered as a whole.

The rules provide first for notice to a third party against whom the defendant believes he will have a claim for indemnity or contribution, stating the nature and grounds of the claim. The object of such notice is to have "the third party's liability on the plaintiff's claim settled in the same suit in which the defendant's liability is determined,"[26] or, if he fails

[22] *Ibid.* [23] See Sheen, *supra* note 18. [24] *Supra* note 13.

[25] Wait v. Pierce, 191 Wis. 202, 225, 210 N.W. 822 (1926).

[26] The Municipal Court of Chicago Civil Practice Rules (1933) rule 38, note.

to come in, from thereafter being able to contest his liability for indemnity. They then provide for contest of the cross-claim by the third party, the consequence of his failure to so contest being a judgment in favor of defendant. The nature of this judgment is further described by the provision that the defendant may not execute against the third party "without leave of court until after satisfaction by such defendant of the judgment against him."[27]

Next appear provisions for the trial of issues arising only between the defendant and the third party, independent in nature of any arising between the plaintiff and the defendant. Such issues, of course, would deal only with the relationship between the defendant and the third party alleged by the former to warrant liability over. And another rule permits a third party, who believes that if he is made liable he can shift part or all of such liability to another, a fourth party, to add such party just as he himself was added by the defendant, and to litigate the fourth party's liability over in the same way.[28] The fourth party has this same privilege with respect to a fifth party, etc. The final provision allows cross-litigation of claims for indemnity and contribution between co-defendants originally joined by the plaintiff. Procedure under this rule is, with the exception of the third party notice, similar to that under the others, except that each defendant is subject to adverse judgment directly for plaintiff. Consequently either or both defendants may be claimants on mutual cross-claims for either indemnity or contribution.[29]

(b) These rules are apparently fashioned after the English and Ontario third party rules and are, with a few omissions, a more or less mixed up combination of both.[30] A fundamental difference between them, however, must prove fatal to the Municipal Court rules. Those of England and Ontario dealing with third party practice and cross-litigation in the plaintiff's action of claims for contribution, indemnity, and for other relief, rest on legislative authorization appearing in their respective Judicature Acts.[31] Such authority in each instance permits the proper courts to promulgate rules of third party practice, with additional provisions for cross-litigation by the defendants in plaintiff's action of claims, including indemnity and contribution, arising out of the subject matter of plaintiff's

[27] *Ibid.* rule 41.

[28] This provision appears in the English and Ontario rules.

[29] See citations, *supra* note 7.

[30] Ball's Annual Practice (1934), 294 *et seq.*; and Ontario Rules of Practice (1928), rule 165 *et seq.*

[31] Judicature Act, 1925, 15 & 16 Geo. 5, c. 49, § 39; Judicature Act, Ont. Rev. Stats. 1927, c. 88, § 15(d).

action, such cross-claims to be treated as if the defendant had brought a separate suit against the third party for the relief demanded therein. The Illinois legislature has never granted any such authority to the judges of the Municipal Court of Chicago;[32] hence the inference that the provisions of the third party rules under discussion, insofar as they permit cross-litigation of claims for contribution and indemnity pending the adjudication and discharge by payment of the defendant's own liability, are wholly void. Such a change in the nature of the common-law cause of action for indemnity or contribution is clearly an unwarranted attempt to change the substantive law under a rule making power sanctioning only changes in procedure.

These provisions are invalid for the additional and related reason that no authority exists in this state under which a court may render a judgment, declaratory in its nature, on such cross-claims. The rules in question provide that judgment on the cross-claims shall not be executed until the defendant has discharged his own liability to the plaintiff. The Municipal Court is creating a judgment similar in effect to that termed the "contingent" judgment by the Wisconsin court, since the finality and executability in each case depends upon a specific contingency—proof of the requisites necessary to procuring judgment on such claims at common law. But the Wisconsin judgment is inferentially authorized by the statute permitting this anticipatory cross-litigation.[33] Even if this provision in the rules under discussion were withdrawn and the proceedings deemed only to settle the issue involved (such as joint liability to plaintiff if the claim is for contribution, or liability of defendant to plaintiff if for indemnity), to be binding on the third party as defendant in a separate action over, such a view for contribution is probably unprecedented. It creates an estoppel against the alleged contributor in the separate action over, also an apparent change in substantive law.

One inclined toward a liberal system of procedure may hope that the Illinois court will regard these changes in the common law as procedural and hence valid and within the rule making power of the Municipal Court. The advantages of the perfected practice along the lines suggested in these third party rules are obvious to all. The proper way to procure such advantages, however, is not by judicial legislation but through the legislature. Since other jurisdictions enjoying such a practice have made or authorized the necessary changes in substantive law by legislation, it

[32] The Municipal Court operates under the Municipal Court Act, Ill. Cahill's Rev. Stats. (1933), c. 37, § 389 *et seq.* This act is reprinted in Municipal Court of Chicago Civil Practice Rules (1933), 205–265.

[33] See Wait v. Pierce, 191 Wis. 202, 225, 210 N.W. 822 (1926).

seems that Illinois should do likewise. At any rate, such an attitude on the part of the Illinois Supreme Court seems inevitable.

The only legitimate feature of these third party rules, as the writer sees them, is the notice to an alleged indemnitor to take over the defense, thus compelling him to be bound in the subsequent separate action against him by the outcome of the present action. But this is already orthodox at common law. They might legitimately have permitted a singly sued defendant to add a third party in order to claim damages other than by way of contribution or indemnity but arising out of the same fact transaction as plaintiff's claim. Allowing such a cross-claim in the plaintiff's action involves no change of substantive law since the cause of action has accrued and a final judgment may immediately be given to the successful claimant. It is fundamentally different from the cross-claim for either indemnity or contribution since it necessitates the claimant's freedom from negligence or other fault to the plaintiff (such a claim generally arising out of negligence cases), whereas the latter claims presuppose the defendant-claimant's liability to the plaintiff. But the failure of the Municipal Court to provide for such cross-litigation renders further discussion of it unnecessary.[34]

(c) Assuming for purposes of further discussion, however, the validity of the Municipal Court rules, they are still subject to a good deal of criticism as rules of third party practice. It is unfortunate that much of the material appearing in notes to the various rules was not included in the rules themselves, inasmuch as the notes are declared to be part of the rules.[35] In the note to Rule 38, some of the statements are not clear. The second paragraph permits the practice by the plaintiff with respect to counter claims filed against him by defendant. This is quite orthodox. In the third paragraph of this note, the court prevents the possibility of employing such practice for any purpose but that of securing contribution or indemnity. This seems unfortunate, indeed. The fourth paragraph of the note declaring that the third party is not a defendant is mystifying. If the third party, however he be added, is not a defendant in the action, what is he? Doubtless the court has in mind the plaintiff's amending his complaint to include the third party. This, however, is nobody's concern but the plaintiff's and nothing in the rules requires or depends on such amendment of the plaintiff's complaint. The plaintiff is permitted to so amend in the note to a later rule.

The note to Rule 38 entitled "Common Liability" is odd. Naturally common liability of some sort is necessary for contribution but this is not

[34] The rules are confined to claims for indemnity and contribution.

[35] See Rule 309.

at all true for indemnity. This part is an unnecessary restriction not in keeping with the liberal spirit evinced in the rules generally. A seemingly better restriction would have been the conveniently vague statement that the cross-claims must arise out of the subject matter involved in the plaintiff's claim.

The next paragraph of this note, entitled "Tortfeasors," seems strange. Except in one or two situations, it is true, Illinois does not permit contribution between tortfeasors. But the writer had supposed that indemnity between persons liable in tort was everywhere orthodox.[36] In fact it is difficult, if possible, to imagine such a case, the appropriate cross-relief if any being indemnity as distinguished from contribution, in which the claim for indemnity would not lie.

The matter contained under "General Principle" in the note to Rule 38 is very misleading, if not incorrect, particularly that which is stated in the last paragraph thereof. This statement reads: "But where the defendant's claim is an independent right depending upon his failure or success in the action, it is not a claim for indemnity within this rule." It is submitted that if the defendant's "failure or success" has reference to the plaintiff's claim against him, as it must have to mean anything, this statement is incorrect, since all claims for indemnity are "independent" claims and can accrue only when the claimant has himself been found liable.[37] This whole section of the notes should have been omitted or, perhaps, should simply have stated that the claim must arise from the subject matter involved in the plaintiff's claim.

The matter in the notes to Rules 39, 40, 41, and 42 has either been criticized above or is quite satisfactory. But that in the note to Rule 43 deserves considerable attention. The first sentence of the first paragraph of this note tells us that "care must be taken to prevent third parties from being subject to injustice," from what quarter it does not say. The inference from the succeeding sentences, however, makes it clear that the court as a rule-making body is not precluded by this admonition. The first paragraph of the note continues by denying the third party, against whom plaintiff has not amended his complaint, the privilege of introducing de-

[36] As to this see Leflar, Contribution and Indemnity between Tortfeasors, 81 Univ. Pa. L. Rev. 130 (1932).

[37] The writer has an uneasy feeling that he has not quite understood what this statement quoted in the text means. But when is a claim for indemnity dependent or independent on or of what? That it is always dependent on the claimant's liability to the injured party seems apparent. How the claim arises, whether by contract or implication of law, would seem a matter of indifference so long as it is an undertaking or implication to indemnify for the claimant's liability to the plaintiff in question. Whether or not the plaintiff could have joined the indemnitor in question as a co-defendant would seem equally unimportant.

fensive matter against plaintiff. This is proper as far as it goes; *but* because of this the third party is not bound by the adjudged liability of the sued defendant to the plaintiff and may litigate such liability as a separate issue arising under the defendant's cross-claim. Thus it is possible in such an action to find as between plaintiff and defendant that the latter is liable, and as between defendant and third party that the defendant is not liable, to the plaintiff. The second finding, of course, does not affect the plaintiff in the least. Any attempt, however, to bind the third party by the adjudication of liability between plaintiff and defendant without giving the third party an opportunity to defend the plaintiff's action, either directly (which the note in question forbids) or in the defendant's name and virtually for the defendant, would be invalid as not due process of law.[38]

A practical alternative is for the defendant to let the third party defend the plaintiff's action for him and in his name, trying the issue of the relationship or undertaking from which the alleged obligation to indemnify is inferred as the only issue arising under the cross-claim. Even then, however, the defendant might not wish to leave the entire defense to the third party but might prefer that he simply assist, unless he was fairly certain he would defeat the third party on the remaining issues arising under the cross-claim. Under the present rules, however, the defendant has no choice but that just described. Apparently this would also be true of a cross-claim for contribution, where the defendant wants the third party bound by the finding of his own liability to the plaintiff. This would embarrass the defendant, however, since he is much more interested in proving his non-liability to the plaintiff where he can at most shift only half of his adjudged liability to the third party. Yet any other procedure would be lack of due process or would leave the third party free under the cross-claim to litigate the issue of defendant's non-liability to the plaintiff.[39] This alternative might place the defendant in the ridiculous position of denying his liability to the plaintiff, as far as the latter's claim is concerned, but of insisting on such liability as far as the cross-claim is concerned.

The easiest way out of this whole difficulty is by amending the rules to permit the third party to plead and introduce evidence directly, and in his own name, against the plaintiff on the issue of defendant's liability to plaintiff, leaving the defendant to defend as he sees fit. The Municipal Court's provision denying this privilege is probably based on the similar

[38] Municipal S.R.E. Co., Inc. v. D.B. & M. Holding Corp., 257 N.Y. 423, 178 N.E. 745 (1931).

[39] *Ibid.*

English provision.[40] This precedent is unsafe, however, since England is not hampered by the constitutional provisions requiring due process. Permitting the third party to plead directly is hard on the plaintiff, of course, since he did not sue the third party and is not interested in him. But it is not unconstitutional. A really effective third party practice can be had only at the cost of some inconvenience and embarrassment to the plaintiff. Legislatures and courts imposing this inconvenience on him might well be guided by the reflection that courts of justice are not run for plaintiffs alone but rather for the ultimate good of all and that a law suit is not a game but a serious attempt to do complete justice.

Discussion of the second paragraph of this note to Rule 43 ties up with the matter immediately preceding. This paragraph reads: "Third parties, if they are really the parties who are fighting the plaintiff, may be allowed to defend by admitting liability to indemnify the defendant."[41] If this has reference to situations where plaintiff has amended his complaint to include the third party (which it almost certainly has not) it is patently unwarranted. There seems little doubt, however, that it has reference to situations where the defendant doesn't care whether the plaintiff recovers against him or not, because, if he does, the defendant will promptly shift the liability to the third party whom he has brought into the action for that very purpose. The defendant, of course, cannot *implead* the third party as a co-defendant in plaintiff's action. The plaintiff may wish to sue only the defendant, even assuming he could have joined the third party. The defendant may let the third party take over his defense in such a case, however, and still press the claim for indemnity against him by way of cross-claim. As shown in the previous paragraph, the easiest way to resolve the difficulty in the United States is to permit the third party to plead directly against the plaintiff. But this can't be done by forcing the third party to admit his obligation to indemnify the defendant as the price to pay for such privilege. Such a step would be similar to compelling the alleged indemnitor at common law, notified to come in and defend plaintiff's action, to undertake such defense only if he admits his obligation to indemnify; and yet to be concluded by the outcome of plaintiff's action against defendant, even if he refuses to defend so that he may later dispute the obligation to indemnify in the separate action over. But this would be dreadful and is without precedent at common law. Unless the third party is given a full opportunity of disputing and litigating not only defendant's liability to plaintiff but also his own liability to indemnify or contribute to

[40] See Ball's Annual Practice (1934), 306, note to rule 7.

[41] This also is copied from the English rules. See *loc. cit.*, *supra* note 40.

the defendant, judgment against him on the cross-claim will be invalid as without due process of law.[42]

The third paragraph of this note permits the plaintiff to amend his complaint against the added third party if he wishes to take judgment against him. In most other jurisdictions having third party practice, the plaintiff may do this if he wishes, the restriction being that he cannot so amend unless he could have joined both defendant and third party as co-defendants originally. Since the Municipal Court rules unfortunately do not permit the defendant to add a third party unless there is a common liability between them to plaintiff, however, such a restriction is unnecessary in this paragraph. In Pennsylvania the plaintiff may take judgment against a third party not only without having to amend but also when he could not have joined him as a co-defendant originally.[43] This seems highly desirable, since it enables by plaintiff's direct execution against the indemnitor-third party a sort of exoneration of defendant, obviating possible financial embarrassment on the latter's part in satisfying the plaintiff's judgment against himself and saving him the trouble of execution over against the third party. In all jurisdictions, however, it is clearly understood that the plaintiff does not have to amend and proceed against the third party the essential benefit of third party practice being merely to facilitate the original defendant's recovery over.

Only a few further points deserve mention. The Pennsylvania third party practice as first conceived would not permit the defendant to deny liability to the plaintiff and at the same time add a third party for purposes of shifting part or all of a possible liability to plaintiff, such a stand on defendant's part being declared inconsistent. The legislature quite naturally amended the statute to permit in express terms what the court had denied.[44] This problem apparently does not arise under the Municipal Court rules since it is not mentioned, the inference being that the rules will be construed in accordance with the obviously better present rule in Pennsylvania. To give the defendant the advantage of third party practice only at the price of admitting his own liability to plaintiff would either emasculate a practice designed for defendant's benefit or would visit great hardship on the third party, whether the latter were bound by such ad-

[42] Municipal S.R.E. Co., Inc. v. D.B. & M. Holding Corp., 257 N.Y. 423, 178 N.E. 745 (1931).

[43] See *supra* note 11.

[44] See Gregory, *supra* note 6, 235–236. See also King v. Equitable Gas Co., 307 Pa. 287, 291, 161 Atl. 65 (1932), for practice in Pennsylvania before and after amendment to the *Scire Facias* Act in Pa. Acts, 1931, no. 236, p. 663. As to this situation in Pennsylvania, see also Scott, Some Aspects of the Pennsylvania Sci. Fa. Act for the Addition of Defendants Not Originally Sued, 79 Univ. Pa. L. Rev. 306 (1931).

mission or not. For if the third party were not bound by the defendant's admission of liability to plaintiff the whole point of third party practice would be lost; and if he *were* bound he would be denied the opportunity of defense to which he has a right.

Many interesting and very complicated problems arise in connection with the cross-litigation of claims for contribution between co-defendants in the plaintiff's action, whether or not third party practice is involved. Several of these problems do not appear at the trial but relate only to appeals and judgments. Lack of space forbids treatment of these questions but they have been more or less thoroughly discussed elsewhere in connection with tort contribution,[45] the practical issues being much the same whether contribution be based on tort or contract liability, with the exception of those arising in jurisdictions requiring joint judgment liability as the common obligation necessary to tort contribution.

CONCLUSION

The preceding discussion shows beyond much doubt that the Illinois Legislature did not intend to enact third party practice in any sense of the phrase as part of its new Practice Act. Apparently it has never authorized the judges of the Municipal Court of Chicago to promulgate rules of third party practice. The Municipal Court's attempt to institute such a practice is highly commendable, even if it involved considerable "legislation" of substantive law concealed as procedural changes authorized under its rule-making power. It is unfortunate that this attempt must inevitably miscarry. But if the legislature ever does sanction third party practice, either as part of the state Practice Act or as part of the Municipal Court's rule-making power, it is hoped that the practice as set forth in the new Municipal Court rules will undergo considerable revision along the lines here suggested.

[45] See Gregory, *supra* note 6.