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Appealability of Denials of Motions to Implead and Related Discretionary Orders in Maryland - Northwestern National Insurance Co. v. Samuel R. Rosoff, Ltd.

APPEALABILITY OF DENIALS OF MOTIONS TO IMPLEAD AND RELATED DISCRETIONARY ORDERS IN MARYLAND

Northwestern National Insurance Co. v. Samuel R. Rosoff, Ltd.[1]

Certain homeowners, having suffered explosion damage to their premises, brought contract actions against their insurance companies to collect on their policies. The appellants, two of such insurance companies, filed motions to implead the Mayor and City Council of Baltimore, etc. and Samuel R. Rosoff, Ltd., a corporation, contending that the latter caused the damage complained of by its blasting operations in connection with the building of a water tunnel for the City of Baltimore. The motions were granted and the City and Corporation were made third-party defendants. Thereafter motions were filed by the impleaded parties to strike out the orders impleading them. From the granting of orders striking the impleading orders, the insurance companies appealed.

The appellees, the City and Corporation, moved to dismiss the appeals contending: (1) that the appeals were prematurely taken, for the orders had dismissed the third-party complaints without prejudice and were therefore not final, as they did not deny the appellants the means of further prosecuting their claim, if any, against the appellees; (2) that the right to implead is not absolute but is within the discretion of the trial court and hence no rights were denied, and therefore no direct appeal could be taken; (3) that even if the orders were appealable, there was no abuse of discretion and hence the orders dismissing the third-party complaints should not be reversed.

The appellants, on the other hand, contended that the orders were final and appealable, and if they were held liable to the homeowners, they would become subrogated to the latter's rights against the City and Corporation. Therefore, they claimed, the question of who is ultimately to pay the damages could be and should be settled in one suit. They also contended that if the impleading were not allowed, the statute of limitations might run to bar any action by them against the appellees before their liability to the homeowners had been settled in the present suit.

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[1] 73 A. 2d 461 (Md. 1950).

The Court of Appeals held that the orders striking the impleading orders were final and hence appealable, but they upheld the action of the lower court in striking said orders, saying that there was no abuse of discretion.

Prior to 1948, the only third-party practice in Maryland was that which existed under General Equity Rule 28[2] and under Section 27 of Article 50,[3] said section being a section of the Joint Tort-feasors Act[4] which was adopted in 1941.[5] These provisions were superseded in 1948 when Part Two, III, Rule 4 of the General Rules of Practice and Procedure became effective. This present Maryland Third-Party Practice Rule is based on and is similar to Federal Rule 14,[6] the Federal Third-Party Practice Rule, as amended in 1946. The purposes of this rule are to save time and the duplication of evidence by deciding in one suit what would otherwise require two suits, and thus also to obtain consistent results from identical or similar evidence, and to avoid the handicap to the defendant of a time difference between the judgment against him and a judgment in his favor against the third-party defendant.

Section (a) of Rule 4 states:

> "Where the defendant in any action claims that a person not a party to the action is or may be liable to him for all or part of the plaintiff's claim against him, he may move for leave to serve a summons and claim upon such person as a third party. The motion may be made ex parte before the action is at issue, and thereafter on notice to the plaintiff . . ."[7]

Section (b) states:

> "If the court in its discretion grants the motion, the defendant shall cause a summons and copies of the

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[2] Md. Code (1939), Art. 16, Sec. 202.

[3] Md. Code Supp. (1947).

[4] Md. Code Supp. (1947), Art. 50, Secs. 21-30.

[5] The practice of impleading third parties springs from the old practice of vouching in a party. It does not supplant this former practice, but rather is supplementary to it and more extensive, in that it decides in one action what formerly took two actions. In 1873 impleader practice was introduced in England under the Supreme Court of Judicature Act, ch. 66, par. 24(3), and as early as 1883 it was sanctioned in American Admiralty Practice; *cf.* The Hudson, 15 F. 162 (1883).

[6] Federal Rules of Civil Procedure — Rule 14(a). Rule 14 was adopted in 1937, and was amended to its present form in 1946. It allows the defendant to move to implead 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.

[7] Md. Code Supp. (1947) — General Rules of Practice and Procedure, Part Two, III, Rule 4, Sec. (a).

> third-party claim and the previous pleadings to be served on the third party . . ."[8]

Thus the granting or denying of the motion to implead is expressly declared to be within the discretion of the trial court.[9]

It is well settled in this state that a final order is one which finally settles some right of the parties or denies to a party the means of further prosecuting or defending his suit.[10] As a general rule, the Court of Appeals has consistently held that discretionary orders of the lower court are not final orders and hence are not directly appealable.[11] The annotations to the Maryland Code enumerate some nineteen discretionary orders from which no appeal will lie[12] and Mr. Poe in his work on Pleading and Practice cites twenty-six such orders.[13]

The rule of non appealability of discretionary orders follows from the fact that a discretionary order settles no absolute rights of the parties, for, where the granting or denying of a motion is left to the discretion of the judge, neither party could have a right to have such motion granted or denied.[14] As Mr. Bowers in his work on Judicial Discretion says:

> "Judicial discretion is the option which the judge may exercise between the doing and the not doing of a

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[8] *Ibid*, Sec. (b).

[9] This is in accord with the Federal Practice, General Taxicab Assn. v. O'Shea, 109 F. 2d 671 (D. C. 1940); the English Practice, Anno. Prac. (1946-47) 313; the New York Practice, New York Judicial Council, Twelfth Annual Report (1946) 199-201; the Missouri Practice, Laws Mo. 1943, par. 20, p. 362; and the Wisconsin Practice, Wis. Stat. (1945), par. 260.19, 260.20.

[10] Boteler v. State, 7 Gill & J. 109 (1835); Welch v. Davis, 7 Gill 364 (1848); Hazelhurst v. Morris, 28 Md. 67 (1868); Gittings v. State, 33 Md. 458 (1871); In re Buckler Trusts, 144 Md. 424, 125 A. 177 (1924); Adams v. Gillespie, 151 Md. 52, 133 A. 831 (1926); Purdum v. Lilly, 182 Md. 612, 35 A. 2d 805 (1944); 2 POE, PLEADING AND PRACTICE (Tiff. ed. 1925), Sec. 826, pp. 800-801; MILLER, EQUITY PROCEDURE, Sec. 305, p. 376.

[11] Wall v. Wall, 2 Har. & Gill 79 (1827); Warren v. Twilley, 10 Md. 39 (1856); Bell v. Jones, 10 Md. 322 (1856); Bannon v. Warfield, 42 Md. 22, 39 (1875); Zimmer v. Miller, 64 Md. 296, 1 A. 858 (1885); Gottschalk v. Mercantile Trust and Deposit Co., 102 Md. 521, 62 A. 810 (1906); Tidewater-Portland Cement Co. v. State, 122 Md. 96, 89 A. 327 (1913); POE, *op. cit., supra*, n. 10, Sec. 287; MILLER, *op. cit., supra*, n. 10, Sec. 314, p. 385.

[12] Md. Code (1939), Art. 5, Sec. 2.

[13] POE, *op. cit., supra*, n. 10, Sec. 827.

[14] On this point the Minnesota Supreme Court in Chapman v. Dorsey, 230 Minn. 279, 41 N. W. 2d 438 (1950), 16 A. L. R. 2d 1015, said, "The very existence of this discretionary power negatives any assumption that a positive legal right is involved, . . ." The court then went on to hold that "*an order denying a motion to bring in additional parties is not appealable, in that it does not involve the 'merits of the action or some part thereof'.*" (Italics supplied.)

> thing, the doing of which cannot be demanded as an absolute right of the party asking it to be done".[15]

Some discretionary orders however, are made directly appealable by statute and such is the case, for example, with injunctions in equity, the granting or denying of which, though discretionary with the judge, is immediately appealable.[16]

In the absence of statute, since a discretionary order affects no rights of the parties, it would seem that a discretionary order should only be appealable where it denies to a party the means of further prosecuting or defending his suit. An illustrative case is *Purdum v. Lilly*,[17] in which case plaintiff's petition for an examination of an alleged lunatic under Discovery Rule 5, Part II of the General Rules of Practice and Procedure of 1941, was dismissed by the lower court. Upon appeal, the Court of Appeals, after holding that the application for examination was addressed to the sound discretion of the trial court which would not be interfered with unless such discretion was manifestly abused, went on to say:

> ". . . it is now a well settled principle that the ruling of the court below, must in order to form the proper basis for an appeal be so far final as to determine and conclude the rights involved in the action, or to deny to the party who seeks redress by an appeal, 'the means of further prosecuting or defending the suit' in the court of original jurisdiction".[18]

The Court, however, proceeded to hold this order appealable saying:

> "While we must not be understood as countenancing an appeal from every order construing the General Rules of Practice and Procedure, adopted in 1941, we do feel that from the very nature of the issue involved in the instant case the denial to the appellant of the privilege of having an examination of the alleged incompetent made by disinterested physicians prior to the sanity hearing before the sheriff's jury was tantamount to the denial to her of 'the means of further prosecuting the suit' presented by her original petition".[19]

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[15] BOWERS, JUDICIAL DISCRETION OF TRIAL COURTS (1931), par. 12, 20.
[16] MILLER, *op. cit., supra*, n. 10, Sec. 311, p. 390.
[17] 182 Md. 612, 35 A. 2d 805 (1944).
[18] *Ibid*, 621.
[19] *Ibid.*

In *Tidewater Portland Cement Co. v. State*,[20] the Court of Appeals said that in criminal cases with a death penalty, the defendant has an absolute right of removal and hence a refusal to allow removal would be a final order and immediately appealable, but in criminal cases without a death penalty, whether or not the defendant can have his case removed to another court is discretionary with the judge so that:

> ". . . an order in such cases, refusing the application of removal is not to be regarded in the nature of a final order from which an immediate appeal will lie, but as in the case of like rulings on demurrers and other interlocutory judgments, no appeal lies therefrom until final judgment".[21]

In *Gottschalk v. Mercantile Trust and Deposit Co.*, the Court said:

> "It is not necessary at this late date to cite authorities in support of the well settled doctrine that an appeal will not lie from an order or decree passed in the exercise of an undoubted discretion of the lower Court".[22]

Too numerous to cite are the Maryland cases holding that matters resting in the discretion of the lower court are not reviewable on appeal, and it goes without saying, that if they cannot be reviewed on appeal from a final judgment, then certainly they do not admit of immediate appeals. Most of the later cases, however, now recognize that discretionary orders may be reviewed where there has been an abuse.[23] In every case in which the Court of Appeals has held that there was no abuse of discretion, however, the court, to so hold, must first have reviewed the discretion, hence the court does in fact review discretionary orders even where there is no abuse. Thus the phrase, "not reviewable unless there has been an abuse", which is so often used by the Court in dismissing from its consideration matters in which it has found no abuse, is

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[20] 122 Md. 96, 89 A. 327 (1913).
[21] *Ibid*, 100.
[22] 102 Md. 521, 522, 62 A. 810 (1906).
[23] Skirven v. Skirven, 154 Md. 267, 273, 140 A. 205 (1928); Buckner v. Jones, 157 Md. 239, 145 A. 550 (1929); Dougherty v. Dougherty, 187 Md. 21, 48 A. 2d 451 (1946); Taylor v. State, 187 Md. 306, 49 A. 2d 787 (1946); Jones v. State, 188 Md. 263, 52 A. 2d 484 (1947); Naughton v. Paul Jones & Co., 190 Md. 599, 59 A. 2d 496 (1948).

incorrect and misleading. It would seem that what the Court should say is that the discretionary order will not be *disturbed* or *reversed* unless there has been an abuse.

In the instant case, before ruling on the question of whether or not there had been an abuse, the Court of Appeals, after citing the fact that the motion to implead was within the discretion of the trial court, said:

> "That does not necessarily mean, however, that where the action of the lower court is clearly arbitrary or has no sound basis in law or in reason, it could not be reviewed, but it does mean that we will not *reverse* the judgment of the trial court, unless there is grave reason for doing so".[24] (Emphasis supplied.)

Thus, the Court here used the correct phrase and this sentence was cited with approval by the Court of Appeals in the subsequent case of *Day v. State*,[25] in which the Court, on appeal from a final judgment, reversed a conviction for murder because the judge abused his discretion in denying a motion to sever.

Though in fact appellate courts now review discretionary matters, the tendency in recent times has been not to enter upon such a review unless an abuse of discretion has been alleged by the appellant. However, reviewing a discretionary matter when an appeal has been taken from a final judgment is far different from allowing an immediate appeal from such an order, and the fact that an abuse of discretion has been alleged should not be sufficient reason for allowing an immediate appeal. In every case the judge must make several discretionary rulings, and if a party could appeal from each one, just by alleging an abuse, it would open up a wide avenue for repeated delays and would certainly tie up the already overcrowded docket of the Court of Appeals.

The Maryland cases substantiate this view. In *Snyder v. Cearfoss* the Court said:

> "The fact that a ruling complained of may, under certain circumstances be reviewable on the ground of abuse of discretion, does not make it reviewable forthwith".[26]

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[24] Northwestern National Insurance Co. v. Samuel R. Rosoff, Ltd., 73 A. 2d 461, 466 (Md. 1950).

[25] 76 A. 2d 729, 731 (Md. 1950).

[26] 186 Md. 360, 366, 46 A. 2d 607 (1946).

In *State v. Haas*,[27] the Court held that an application for leave to examine a confession, alleged to have been made, should be left to the discretion of the trial court, which discretion was subject to review if abused. However, the Court went on to say that no method is now provided that such a review can be had before trial.[28]

Although no previous Maryland case has ever determined whether or not the striking out of an impleading order is appealable, there have been two cases on the appealability of discovery orders under Part Two, II, Rule 4 of the General Rules of Practice and Procedure.

In *Hallman v. Gross*,[29] the Court of Appeals dismissed an appeal from an order granting discovery saying that there was nothing final in the proceeding and that rulings on questions whether or not the matter produced by discovery process was pertinent and material and not privileged, would be considered by the reviewing court only on appeal from a final decree. The other case is the earlier one of *Eastern States Corp. v. Eisler*,[30] which, though it allowed an appeal from an order granting discovery, is not contrary to *Hallman v. Gross*.[31] In this case the defendant demurred to the complaint and the plaintiff sought discovery before issue was joined by an answer. The Court of Appeals said that by filing the demurrer the defendant had questioned the jurisdiction of the court and until the demurrer was ruled on, it was questionable whether the passage of the order was within the discretion of the court. The Court of Appeals then went on to quote from *Gottschalk v. Mercantile Trust Co.*, in which the Court, after saying that discretionary orders were not appealable, said:

> "The question whether the subject-matter of the order or decree was within the area of the discretion of the Court which passed it, is open to examination upon an appeal in the same case, for a Court cannot improvidently extend the exercise of its discretion to matters which lie beyond its legitimate reach".[32]

The Court of Appeals, in the *Eisler* case, also said that the Maryland Discovery Rule was patterned after Rule 34 of the Federal Rules of Civil Procedure, and there being

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[27] 188 Md. 63, 76, 51 A. 2d 647 (1947).
[28] *Ibid.*
[29] 190 Md. 563, 59 A. 2d 304 (1948).
[30] 181 Md. 526, 30 A. 2d 867 (1943).
[31] *Supra*, n. 29.
[32] *Supra*, n. 22, 522.

no Maryland case explaining the Rule, it would look to the Federal Courts for interpretation.

In the present case, the Court of Appeals recognized that no previous Maryland case had ever determined whether or not the striking out of an impleading order was immediately appealable. It likewise recognized that the Maryland Third-Party Practice is similar to Federal Rule 14. However, the Court refused to follow the Federal case of *Baltimore and Ohio R. R. Co. v. United Fuel Gas Co.*,[33] which directly held that the dismissal of an impleading order was not a final order and hence, not appealable. Instead, the Court of Appeals chose to follow two Maryland cases[34] and four other Federal cases[35] in which a direct appeal was allowed from an order dismissing an impleaded party, but in none of which was the point raised that the appeal was premature. The Court stated that though these cases did not decide the point, yet they felt that they could not assume that all of the judges overlooked it, or were ignorant of it, and that before hearing the appeals, they must have determined that they were appealable.[36]

In holding the particular discretionary order in the instant case appealable, the Court of Appeals thus chose a course contrary to the only Federal decision directly on the point under the related Federal Rule, and the Court failed to refer to the many cases in which discretionary rulings of the lower court were held not to be final orders and hence not directly appealable. In *Cornell v. McCann*,[37] the Court had said that the opinion of a judge is not in any sense the final act, however positive, so as to be the subject of appeal, as it may always be altered or changed before final decree.

In the present case, though the order in question was one dismissing a person already impleaded, the Court of

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[33] 154 F. 2d 545 (4th Cir., 1946).

[34] Baltimore Transit Co. v. State to use of Schriefer, 183 Md. 674, 39 A. 2d 858 (1944); Standard Wholesale Phosphate and Acid Works v. Rukert Terminals Corp., 65 A. 2d 304 (Md. 1949).

[35] General Taxicab Ass'n. v. O'Shea, 109 F. 2d 671 (D. C. 1940); Sheppard v. Atlantic States Gas Co., 167 F. 2d 841 (3rd Cir., 1948); Brown v. Cranston, 132 F. 2d 631 (2nd Cir., 1942); City of Philadelphia v. National Surety Corp., 140 F. 2d 805 (3rd Cir., 1944).

[36] This statement by the Court of Appeals is referred to in 16 A. L. R. 2d at p. 1027 in footnote 8 to the annotation's statement that:

> "Cases in which appeals from orders denying or granting motions for the joinder of additional parties were heard without objection as to their appealability are no authority upon the issue of appealability, because they may be explained by the fact that the issue of appealability was never raised or called to the attention of the court."

[37] 48 Md. 592.

Appeals considered it the same as the denial of a motion to implead in the first instance, and its holding was worded in terms of the latter. It would seem that the Court was correct in making no distinction here, for in either case, the effect on the parties is the same.[38] The Court did however make a distinction between the granting and denying of the motion to implead. It said:

> "A situation where a third party is impleaded differs materially from one where an application to implead is denied. Where a third party is impleaded, he is in no worse situation than if he had been originally sued. Nothing final has been decided against him. He still has the opportunity to try his case, and if it goes against him, he can then appeal. No rights of the original plaintiff have been interfered with, because the result is only that he has another defendant in the case, against whom he may recover . . . On the other hand, where the trial court declines to implead a third party, the defendant's right to proceed against that third party, in that proceeding, has been finally determined, and he should have the right to have that question settled by the appellate court before he is forced to submit to trial without such third party in the case. We think, where impleading is denied, the spirit and the intention of the rule are best served by immediate appeals. It is our conclusion, therefore, that the orders herein are final, and that the appeals are not premature, but can and should be heard at this time".[39]

Thus, the Court of Appeals is here holding that the granting of a motion to implead is not final and hence not appealable, whereas the denying of the motion is final and appealable. In a recent annotation in A.L.R.,,[40] it was

[38] In the Minnesota case cited, *supra*, n. 14, it was argued to the court that though denials of motions to join additional parties were not appealable, yet the denial of a motion to vacate such an order was appealable and several Minnesota cases to this effect were cited. However, the court in this case expressly overruled these former decisions. It quoted the general rule that:

> "'A non-appealable order cannot be carried to the supreme court for review on the merits by means of an appeal from an order granting or refusing a motion to vacate such an order. That which cannot be done directly cannot be done indirectly'."

The court then went on to hold that:

> ". . . The rule of non-appealability applies to orders which deny or grant motions for the vacation of an order either denying or granting the joinder of additional parties to an action."

[39] *Supra*, n. 24.

[40] Appealability of Order With Respect to Motion for Joinder of Additional Parties, 16 A. L. R. 2d 1023 (1951).

pointed out that Maryland and Pennsylvania stand alone in making this distinction. In the absence of a statute making the order appealable, and in the absence of a particular fact situation by virtue of which the order does affect a substantial right of the appellant, or works an irreparable injury, the annotation points out that all the other states which have ruled on the matter adhere to the general rule that ". . . an order requiring, or permitting, or refusing to permit, the joinder of additional parties is not appealable, since it is interlocutory and not final in nature".[41] Query, whether there is any basis in law for the distinction made by the Maryland and Pennsylvania Courts?

On the face of it, it indeed seems strange to have a discretionary matter in which, if the judge rules one way, the complaining party may appeal, whereas, if he rules the other way, the complaining party cannot appeal. The Court recognized that nothing final would have been decided against the appellees had the motion to implead been allowed to stand. Where, however, has anything final been decided against the appellants in dismissing the motion?

The order in question did not deny the appellants the means of further prosecuting or defending their suits for it was expressly granted without prejudice and therefore did not bar them from later suing the City and Corporation in a separate proceeding. It in no way affected the defendant's defense in their suit with the homeowners. The order determined nothing concerning the liability of the appellees to the appellants. The Court of Appeals said that the defendant's *right* to proceed against the third party in that proceeding had been finally determined. However, the Maryland Third-Party Practice Rule gives him no such *right*. As pointed out above, it leaves the granting or denial of a motion to implead to the discretion of the trial court.[42]

The order striking the impleading order was merely procedural. It determined that as a matter of trial convenience, the appellants should not bring the appellees into their suit with the homeowners. Professor Moore in his noted work on Federal Practice says:

> "It is important at the outset to note that third-party practice, and particularly the practice provided for in Rule 14, is procedural. Rule 14 does not 'abridge, enlarge, nor modify the substantive rights of any

[41] *Ibid*, 1028.
[42] *Supra*, n. 8.

> litigant.' It creates no substantive rights . . . The Rule does not establish a right of reimbursement, indemnity, nor contribution; but where there is basis for such right, Rule 14 expedites the presentation, and in some cases accelerates the accrual, of such right".[43]

Again the same author states:

> "An original party may, but is not obliged to move to implead a third party, and his failure to do so, or the court's refusal to permit him to do so, affects none of his substantive rights.[44]

Though Professor Moore is speaking with regard to Federal Rule 14, it must be kept in mind that the Maryland Third-Party Practice Rule is similar to and is based on the Federal Rule. On the point in question in the instant case, Professor Moore says, *"Where the defendant's motion to implead a third party is denied, the order would not be appealable, inasmuch as it does not finally dispose of any rights of the defendant".*[45] (Emphasis supplied.)

Since the present case was decided there have been two Federal cases directly on the point at issue. Both of these held that an order dismissing an impleaded party was not a final order and hence not immediately appealable.[46] In *County Bank, Greenwood, S. C. v. First National Bank of Atlanta,*[47] the third-party defendant moved to dismiss the third-party complaint which had been entered against it. The motion having been granted, the third-party plaintiff appealed and the court said:

> "We find it unnecessary to discuss the question raised by the instant appeal, for we think the appeal is premature and must be dismissed. The decision of the District Court is in no sense a final judgment, since it does not settle the issues in this case".[48]

Thus we find that every case which has determined the point under the related Federal Rule has reached a conclusion *contra* to the Maryland Court of Appeals. The Maryland Court, however, did cite the Pennsylvania case

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[43] 3 MOORE, FEDERAL PRACTICE (2nd ed., 1948), Sec. 14.03, p. 409.
[44] *Ibid*, Sec. 14.06, p. 416.
[45] *Ibid*, Sec. 14.19, p. 450.
[46] County Bank, Greenwood, S. C. v. First National Bank of Atlanta, 184 F. 2d 152 (4th Cir., 1950); Carolina Power & Light Co. v. Jones Construction Co., Daily Record, Aug. 21, 1950 (4th Cir., 1950).
[47] *Supra*, n. 46.
[48] *Ibid.*

of *Cummings v. A. F. Rees, Inc.*,[49] referred to in the A.L.R. annotation discussed above, which held that the quashing of a writ of *scire facias* (used to implead a defendant) was immediately appealable, whereas allowing the impleading would not have been appealable. The Court pointed out that Pennsylvania has been a pioneer among the states in third party practice and therefore its decisions are entitled to added consideration. However, it should be observed that under the Pennsylvania Rule a defendant may implead another defendant "as of course",[50] and therefore in Pennsylvania the dismissal of the impleaded party would seem to finally settle a right of one of the parties and for that reason would be appealable. Hence, the analogy of that case is of doubtful validity in Maryland where impleading is discretionary.

Thus, it would seem that the Court of Appeals would have been more in accord with its past holdings as to non-appealability of discretionary orders, with the federal interpretation of the related Federal Rule 14, and with the general rule elsewhere, had it here held that the lower Court's discretionary denial of defendant's attempt to implead the appellees, (no *rights* having been settled by such order) was not a final order and no appeal could be taken until final judgment.

In ruling to the contrary the Court of Appeals said:

> "It seems to us in the nature of things that to decline to hear an appeal from an order dismissing third-party complaints, thereby requiring the original defendant to try his case without having the third-party in it, and then, on a second appeal to have a judgment against the original defendant reversed on the ground that the third-party defendant should have been in, would make somewhat of a mockery of the rule which is designed to have all parties in one action if they can be properly brought before the court, and to prevent a multiplicity of suits".[51]

What the Court feared here, however, could only occur where there has been an abuse of discretion, for only where

[49] 126 Pa. Super. 117, 190 A. 416 (Pa. 1937).

[50] Purdon's Pennsylvania Statutes (1936), Tit. 12, par. 141:

"Any defendant, named in any action, may sue out, *as of course*, a writ of *scire facias* to bring upon the record, as an additional defendant, any other person alleged to be alone liable or liable over to him for the cause of action declared on, or jointly or severally liable therefor with him, with the same force and effect as if such other had been originally sued." (Italics supplied.)

[51] *Supra*, n. 24, 465.

there is such an abuse could the case be reversed on appeal for not having the third party in it. The Court itself recognized this when, in deciding whether or not there had been an abuse, it said:

> "Questions of this nature are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred. There is nothing in the cases before us which shows any of these considerations to be present in the slightest degree, and we will, therefore, affirm the orders of the lower court".[52]

Only on infrequent occasions has the Court of Appeals held that the lower court abused its discretion. Something that occurs so rarely should not be made sufficient reason for a holding that is contrary to the related holdings of the federal courts as well as the majority of state courts and seemingly contrary to the policy of other Maryland cases.

A factor in the present case, which might explain its result, is that there were more than forty similar cases in which homeowners were suing their insurance companies to collect for explosion damage caused by the City and the Rosoff Corporation, and in all of these, the lower court had refused the defendant's motion to implead. These cases were awaiting the result of this appeal, and any delay in this case would have resulted in a delay to all forty. Hence, if the Court had dismissed the appeal as premature without deciding the question whether or not the City and Corporation should have been impleaded, then all forty cases would have been left in doubt. If the Court later had determined, on appeal from a final judgment, that there had been an abuse in not allowing the impleading, then it would have meant a retrial of not one but forty cases. To avoid this undesirable result, therefore, might well have been the real reason behind the Court's decision that the striking of the impleading order was directly appealable.

Assuming that such was the case, in light of the fact that every case on the point, found by the writer, is *contra* to the Maryland view, except the above referred to Pennsylvania case, if the issue should again be presented to the Court of Appeals in a normal case without the pressing need for haste, it seems fair to speculate, whether the Court

[52] *Ibid*, 467.

would then adhere to stare decisis and follow its present holding, or whether it might not then overrule the instant case and line Maryland up with the Federal and other State Courts decisions by holding that the dismissal of a third-party complaint is not a final order and hence not directly appealable? Or, in light of the fact that under the circumstances of the instant case, the dismissal of the third-party complaint really had only a practical as distinguished from a legal finality, it might be desirable for the Court of Appeals to exercise its rule making power and remove the conflict between the Maryland and Federal cases.