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ADDITION OF DEFENDANTS BY THE PENNSYLVANIA SCI. FA. ACTS OF 1929 AND 1931

Much confusion has arisen in the attempted application of the Sci. Fa. Act of 1929¹ as amended by the Act of 1931.² Interpretation of the Act of 1929 is for the most part settled law, but many problems which have arisen under the amending act remain to be solved. We shall first consider the effect of the Act of 1929 and then examine the changes made by the amending act.

The Sci. Fa. Act of 1929 was passed by the legislature at the instance of the Pennsylvania Bar Association. Its object was "to enable a defendant to join in any action all parties who are liable to or with him on that cause of action."³ The words "scire facias" mean "that you make known." The Act Provides as follows:

"AN ACT

"To regulate procedure where a defendant desires to have joined as additional defendants persons whom he alleges are liable over to him, or jointly or severally liable with him, for the cause of action declared on.

"Section 1. Be it enacted, &c., That 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 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, and such suit shall continue, both before and after judgment, according to equitable principles, although at common law, or under existing statutes,

¹P. L. 479.

²P. L. 663.

³From report of Civil Law Committee of the Pennsylvania Bar Association. (34th Annual Report of Pennsylvania Bar Association, pages 42 and 43.) See also *Gilkey v. Montag*, 13 D. & C. 717, 718.

the plaintiff could not properly have joined all such parties as defendants.

"APPROVED—The 10th day of April, A. D. 1929."

THE VINNACOMBE AND PITTSBURGH BANK CASES

The two leading cases interpreting this act are the well known cases of *Vinnacombe et ux. v. Philadelphia, et al.*⁴ and *First National Bank of Pittsburgh v. Baird*.⁵ The former case was one of trespass where the plaintiff sued the City of Philadelphia for injuries caused by a defective sidewalk. The city, by means of this act, brought upon the record, as additional defendants, the landlord and tenant of the premises, the parties who would be liable over to the city if a recovery were had against it in the pending suit. The constitutionality of the act was upheld. Mr. Justice Simpson, in writing the opinion for the court, held as follows:

"In construing it, two things are plainly apparent:

(1) 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 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 were primarily liable in whole or in part. Hence, the statute is to be liberally construed to advance the legislative purpose. *Fulton Farmers Assn. v. Bomberger*, 262 Pa. 43, 47; *Dugan v. Dugan*, 291 Pa. 556. (2) Nothing in the act shows the slightest intention to affect plaintiffs in such suits. Consequently, the adding of additional defendants will give no higher right to plaintiffs than they had before. As to them, the action proceeds against the original defendant only, exactly as it would have done if the additional defendants had not been named, except that the Court below, in the exercise of a sound discretion, should give to the original defendant, who acts promptly, a reasonable extra time to bring the additional defendants upon the record, before being required to file an affidavit of defense or plea. It fol-

⁴297 Pa. 564.

⁵300 Pa. 92.

laws, that no question can arise as to an implied repeal of the statute of limitations as between the additional defendants and plaintiff."⁶

The remainder of the *Vinnacombe* case is devoted to the procedure to be followed. It is to be noted that the act wisely leaves this matter to the courts. The *Vinnacombe* case sets forth in detail the substantial form for the praecipe and writ which must be followed.⁷

The *Pittsburgh Bank* case is one of assumpsit in which the accommodation maker of a note was sued by the holder. The defendant caused a scire facias to be issued against the accommodated or real party in interest. Plaintiff entered judgment against the defendant for want of an affidavit of defense and the court held that the separate issue between the original defendant and the additional defendant who was liable over should be separately tried, though under the same term and number as the original case.⁸

The Scire Facias Act of 1929 was not intended to give the plaintiff any additional right, or to delay him in the prosecution of his suit, except insofar as it may be necessary to accomplish the purpose of the act, by the court's giving to defendant, who acts promptly, a reasonable time to bring the additional defendants upon the record, before being required to file an affidavit of defense or plea. Consequently, the *Pittsburgh Bank* case holds that notwithstanding the pendency of sci. fa. proceedings, the plaintiff is entitled to judgment for want of an affidavit of defense, if none is filed within the time prescribed by rule or by an extension thereof allowed by the court. Were the court to have held otherwise would have been contrary to what the court held was the inherent purpose of the act, viz. no additional rights to the plaintiff but the right to the defendant who acts promptly to bring upon the record those whom he alleges are liable to him for the cause of action declared on by the plaintiff. The issue created by the scire facias is

⁶*Vinnacombe et ux. v. Philadelphia, et al.*, 297 Pa. 564, 569.

⁷*Ibid.* 571, 572 and 573.

⁸*First National Bank of Pittsburgh v. Baird*, 300 Pa. 92.

strictly between the two classes of defendants only and has no bearing whatsoever upon the issue between the plaintiff and the original defendant. Mr. Justice Simpson, in writing the opinion in the *Vinnacombe* case, says:

"As to them (plaintiffs) the action proceeds against the original defendant only, exactly as it would have done if the additional defendants had not been named. . . ."⁹

A defendant is not obliged to avail himself of the procedure of the Act of 1929; if he prefers, he may proceed in accordance with the earlier practice. Before passage of the act, a defendant could only notify the third party, wholly or partially liable to him, to appear and defend, but could not proceed against that third party until the principal suit was decided. As the court in the *Pittsburgh Bank* case pointed out, this delay might be disastrous and might result, when the new suit came to be tried, in his inability to prove the notice to appear and defend, or might find the primary debtor beyond the reach of process, or dead or bankrupt.¹⁰ To this list of advantages might be added those which were outlined by the court in the *Vinnacombe* case, as follows: Avoiding a multiplicity of suits, and saving 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 were primarily liable in part or in whole.

PLEADING ESSENTIALS

The act itself does not give us the forms of pleading to be used. These were supplied by the Supreme Court in the *Vinnacombe* case¹¹ and must be followed by the practitioner in much the same manner as one follows rules of court.

⁹*Vinnacombe et ux. v. Phila. et al.*, 297 Pa. 564, 569.

¹⁰*First Nat. Bank of Pittsburgh v. Baird*, 300 Pa. 92, 98.

¹¹297 Pa. 564.

The Supreme Court based its right to formulate these rules upon Section 3 of the Act of June 16, 1836.¹²

Mr. Justice Simpson, in writing the opinion of the court in the *Vinnacombe* case,¹³ formulated the praecipe for the writ of scire facias which must be prepared by the attorney for the defendant. The actual facts upon which defendant bases his claim regarding the liability of the additional defendant or defendants to him must be set forth in the praecipe. They must be sufficiently averred so as to give fair notice to the additional defendant, but the legislature never intended that a full, complete and formal statement of claim be presented.¹⁴ It should, however, be self-sustaining and must disclose the essentials of a cause of action.¹⁵ It is not necessary that a sworn statement of the original defendant's claim over against the additional defendant be filed with the praecipe,¹⁶ although as a matter of actual practice many attorneys prefer attaching the usual form of client's affidavit to the praecipe.

It is essential that the praecipe set forth the manner in which the additional defendant is alleged to be liable to the original defendant, i.e. whether jointly liable with the original defendant, severally liable with the original defendant, or liable over to the original defendant. The Act of 1929, as amended by the Act of 1931, permits the writ of scire facias to issue on any one of the above allegations as well as the additional allegation of sole liability.¹⁷ In the recent case of *Yellow Cab Co. v. Rodgers et al.*,¹⁸ Judge Thompson of the United States Circuit Court of Appeals

¹²P. L. 784. Chief Justice Frazer dissented on the ground that the rule-making authority is exclusively in the Common Pleas. See also opinion of Mr. Justice Simpson in the *Pittsburgh Bank* case, 300 Pa. 92, 101.

¹³297 Pa. 564, 571.

¹⁴*McCullom et al. Stiefel*, 80 *Pitts. Legal Journal*, 13; *Appel et ux. v. Phila. et al.*, 17 *D. & C.* 337, 338.

¹⁵*Folcroft Borough v. Lenhart* No. 2, 14 *D. & C.* 535, 538.

¹⁶*Forgang v. Phila. et al.*, 13 *D. & C.* 431, 432.

¹⁷The effect of the Act of 1931 will be discussed *infra*.

¹⁸61 *Fed. 2nd*, 729.

for the Third District held that failure to aver the proper liability of the additional defendant to the original defendant is fatal. This decision is far-reaching. The reasoning of the court was expressed as follows:

"It is conceivable that an original defendant might set forth in a writ of scire facias any or all of these (four) grounds for adding a defendant to an action already instituted. The original defendant in this case, however, chose to restrict its cause of action against the additional defendant to the single allegation that the additional defendant was alone liable. It would be contrary to the ordinary rules of pleading to conclude that, although the original defendant's case was based on the theory of the sole liability of the additional defendant, it might at the trial change its theory to some other form of liability than that pleaded. In *Shaw v. Megargee*, 307 Pa. 447, the Supreme Court of Pennsylvania did not deem an allegation of sole liability interchangeable with allegations of joint and several liability or liability over. See also the decision of this Court of October 24, 1932, in *Yellow Cab Co. of Phila. v. Graham and Smythe*."¹⁹

It is therefore submitted that if the facts upon which the sci. fa. are based may not make out a prima facie case of the one type of liability of the additional defendant to the original defendant, that the original defendant protect himself by having his praecipe allege sufficient grounds of liability.

The original defendant should serve upon the additional defendant with the sci. fa. a copy of plaintiff's statement of claim.²⁰ In addition to the copy of the plaintiff's statement of claim, the original defendant should set forth in his praecipe for sci. fa. a copy of any bond, contract or writing which he relies upon to establish the liability of the additional defendant to him if such bond, contract or writing does not appear in the plaintiff's statement of claim.²¹

¹⁹*Yellow Cab Co. of Phila. v. Graham et al.*, 16 D. & C. 238. Affirmed by the Circuit Court of Appeals, 61 Fed. 2nd, 666.

²⁰*Forgang v. Phila. et al.*, 13 D. & C. 431, 432.

²¹*School District of Eddystone v. Lewis et al.*, 101 Pa. Superior Ct. 588, 590; *Folcroft Boro. v. Lenhart No. 2*, 14 D. & C. 435.

If the praecipe is not sufficiently specific or does not contain a copy of the necessary instrument, bond, contract or writing, the remedy is to rule the original defendant for more specific averments in his praecipe or by motion to strike it off. It should not be done by affidavit of defense raising a question of law.²²

It is to be noted that the writ of sci. fa. is in the nature of an action in assumpsit and the additional defendant should file an affidavit of defense to the original defendant's allegations as contained in the praecipe. Failure to so file an affidavit of defense within fifteen days may result in judgment being entered against the additional defendant and in favor of the original defendant.²³ This judgment may be taken by the original defendant against the additional defendant either before or after judgment has been entered in favor of the plaintiff and against the original defendant.²⁴ If the final judgment is in favor of the original defendant as against the plaintiff, the judgment against the additional defendant, if one had been entered, should be stricken off on motion.²⁵ But if it is adverse to both the original and additional defendants, plaintiff, upon receiving satisfaction from the original defendant, should mark the suit to the use of the latter, and the additional defendant will be liable to and execution may issue against him at the instance of the original defendant, for the proportion of the recovery adjudged to be payable by the additional defendant to the original defendant, without any further proceedings being required to establish such liability.²⁶

Writs of sci. fa. may be amended by leave of court.²⁷

²²School District of Eddystone v. Lewis et al., 101 Pa. Superior Ct. 588, 590.

²³Vinnacombe et ux. v. Phila. et al., 297 Pa. 564, 572.

²⁴School District of Eddystone v. Lewis et al., 101 Pa. Superior Ct. 583, 586, 590.

²⁵Vinnacombe et ux. v. Phila. et al., 297 Pa. 564, 574.

²⁶Ibid.

²⁷Ibid.; Cohen v. Phila. Rural Transit Co. et al., 13 D. & C. 465, 466.

WHO MAY USE SCI. FA.

The writ of sci. fa. authorized by the Acts of 1929 and 1931 is available to defendants whether the plaintiff's suit is in trespass or assumpsit.²⁸ The words of the act "in any action" have also been held to apply to suits in equity as well as actions at law.²⁹ In fact there is no limitation in the act that will prevent a defendant in a trespass action from issuing a writ of sci. fa. to bring upon the record one who is liable over to him in assumpsit.³⁰ The liability, however, must arise out of the same transaction. It must be remembered that the clear intent of the act was to determine the rights of all parties having any interest or liability in the suit in question in one action, regardless of any technical questions of procedure, and to avoid a multiplicity of suits.³¹

It is also well settled that the Acts of 1929 and 1931 are available not only to the original defendant but to any additional defendants joined by sci. fa. In the *Vinnacombe* case, the court said that the purpose of the act was to avoid a multiplicity of suits and to compel every interested person to appear and defend the action by plaintiff. Section 1 of the Act of 1929 provides that "*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 . . .*" (Italics ours).

In the case of *Amandeo et ux. v. Philadelphia*,³² the plaintiffs sued the City of Philadelphia for damages sustained by one of the plaintiffs when in the act of alighting from a trolley car, her foot went into a large hole or depression. The City of Philadelphia sci. fa.'d one Ford, alleging it had granted him a permit to repair a sewer lateral and that the excavation into which plaintiff stepped resulted from his defective work. Ford, the additional defendant,

²⁸*Vinnacombe et ux. v. Phila. et al.*, 297 Pa. 564, 570.

²⁹*McCullom v. Stiefel*, 80 Pitts. Legal Journal, 13.

³⁰*Appel et ux. v. Phila. et al.*, 17 D. & C. 337, 338.

³¹*Ibid.*

³²16 D. & C. 106.

sci. fa.'d the Philadelphia Rapid Transit Company as additional defendant, alleging it was either jointly or severally liable with him or solely liable to the plaintiff by reason of its negligence in stopping the car at a point dangerous for passengers to alight. The Philadelphia Rapid Transit Company moved to quash the last sci. fa. on the ground that the only defendant who is given the right under the Act of 1929 is the original defendant. The court held that a writ of scire facias may be issued under the Act of 1929 by a defendant joined by a similar writ, as well as by the original defendant in the suit, so as to bring in an additional defendant alleged to be liable on the cause of action declared on by plaintiff.

But a party who is already on the record as a defendant cannot be brought in again by writ of scire facias as an "additional defendant."³³ The Supreme Court reasoned that one already a defendant could not be an "additional defendant" or "third party" as defined in the *Pittsburgh Bank* case.³⁴ The court in an opinion by Mr. Justice Simpson explains how one of the defendants may safeguard his interests in such a case. If the plaintiff attempts to discontinue the action as far as it concerns one of the defendants, it then becomes the duty of the trial court, if moved by the other defendant, to do one of two things: either to strike off the discontinuance, or to give that defendant a sufficient time to issue a sci. fa. against the other defendant, which will then be an "additional defendant," and to put the case at issue under the statute. To deny this right would deprive the defendant of his statutory right under the act.

A discontinuance is presumed to be entered by leave of court, and will be stricken off in all cases where it would be inequitable to permit it to remain.³⁵

The defendant is also protected as to a non-suit in favor of the other defendant. If the plaintiff offers no evidence against one of the defendants, the trial court should

³³*Shapiro v. Phila. et al.*, 306 Pa. 216, 219.

³⁴*First Nat. Bank. of Pittsburgh v. Baird*, 300 Pa. 92, 97.

³⁵*Shapiro v. Phila. et al.*, 306 Pa. 216, 230.

allow the defendant to offer evidence to show that the other defendant was liable (primarily, jointly, or since the amendment of 1931, solely) for the tort complained of before entering a non-suit or directing a verdict in favor of the other defendant. This is not a denial of the second defendant's rights inasmuch as there is no legal right to a non-suit after the plaintiff has rested his case, nor can the failure to grant it be assigned as error.³⁶ But a defendant is entitled to have binding instructions in his favor after the evidence of all the parties has been given, if at that time it would not justify a verdict against him. The same rule holds true as to judgment non obstantè veredicto. Nor does the absence of pleadings as between the defendants where they are sued jointly by the plaintiff make any difference as the Supreme Court has said that the Trial Judge can, and, in such a contingency, should require the jury to make a special finding regarding the primary liability as between the two defendants.³⁷

The only disadvantage is that where the plaintiff has sued the defendants jointly, the issues between the defendants cannot be determined prior to the trial between the plaintiff and the original defendant as might be done if the one defendant were an additional defendant. If this is important enough to warrant correction, it will have to be done by legislation.³⁸

The only other limitations affecting the Sci. Fa. Acts are those which deal with questions of jurisdiction. It will be noted, however, that neither the Act of 1929 nor the amending Act of 1931 extend, alter or amend the acts relating to the service of process in actions at law.³⁹ The jurisdictional limitations arise solely from limitations present in statutes relating to service of process.

It is therefore impossible for a writ of sci. fa. under the Act of 1929 as amended by the Act of 1931 to be served

³⁶Ibid. 221.

³⁷Ibid. 221, 222.

³⁸Ibid. 222.

³⁹Kincade et al. v. Maxwell, 15 D. & C. 445, 446.

upon the additional defendant in a county other than that in which the action was brought or where the cause of action arose.⁴⁰

In the case of *Gromley v. Berger*,⁴¹ the plaintiff instituted suit in Delaware County, Pennsylvania, against the defendant for injuries sustained by her in an automobile collision. She obtained service and the defendant directed a scire facias to be issued against another, alleging joint and several liability. The Sheriff, unable to serve the additional defendant in his county, deputized the sheriff of another county. On petition of the additional defendant to strike off the writ and set aside the service, it was alleged and admitted that the automobile collision occurred in New Jersey. The court held that the Act of 1929 did not authorize service out of the jurisdiction nor did it extend the jurisdiction of the court over one who is not served in the county where the collision occurred or where the writ issued.

Act No. 125, known as the Baldi Bill, was passed in the 1933 Session of the Legislature and signed by the Governor on May 18th. This amends the Act of 1929 as amended, by providing for service of process on an added defendant in counties other than that within which the action was instituted, by the sheriff of the county in which the action was instituted deputizing the sheriff of the county wherein such added defendant resides or where service may be had upon him under the existing laws of this Commonwealth in like manner as process may now be served in the proper county.

Another jurisdictional limitation of the Act of 1929 and its amendment is contained in *Kincade et al. v. Maxwell*.⁴² An attempt was made in the case to join as an additional defendant by sci. fa. a corporation by means of service upon one of its officers within the county where suit was institut-

⁴⁰*Gormley v. Berger*, 15 D. & C. 117, 118.

⁴¹*Ibid.*

⁴²15 D. & C. 445.

ed. The court held that inasmuch as the corporation had no office within the jurisdiction of the court and that all of its business transactions and assets were located in other counties, the common law rule exempting the corporation from suit in such county was applicable.

An exceedingly interesting federal jurisdictional problem arises where a case instituted in the State Courts is removed to the Federal Courts by reason of a diversity of citizenship as between the original defendant and the additional defendant and where the amount involved is in excess of \$4,000. No reported case can be found as authority for a solution of the problem that is here presented. The State Court is faced with three possible courses: (1) splitting the case (in manner apparently authorized in the *Vinnacombe* and *Pittsburgh Bank* cases)⁴³ and sending to the Federal Court only the issue as between the two defendants, there being no diversity of citizenship as between plaintiff and the original defendant, or (2) sending to the Federal Court the entire record, or (3) refusing to send the record and retaining it in the State Court.⁴⁴

The corollary situation is found where a case is removed to the Federal Court because of diversity of citizenship existing between the plaintiff and the original defendant and the latter by sci. fa. brings in additional defendant

⁴³See notes 4 and 5 supra.

⁴⁴For interesting discussion of this problem as well as a general article on the Sci. Fa. Act of 1929, see excellent article by Warwick Potter Scott in January, 1931 issue of University of Pennsylvania Law Review, Vol. 79, No. 3, at pages 310, 311. Mr. Scott observes that by adopting the first course, a cumbersome and unsatisfactory result would follow, while the third course, if chosen, would be a denial of the constitutional rights of the foreign corporation joined as additional defendant. Mr. Scott suggests that the only practical result would seem to be that of quashing the writ of sci. fa. upon motion of the additional defendant which would perforce exclude from the scope of the Sci. Fa. Act, cases where diversity of citizenship exists between the two classes of defendants only and where there is nothing that would give the United States Courts jurisdiction of the issue between the plaintiff and the original defendant and where the amount involved is not less than \$4,000.

who has no diversity of citizenship as to the plaintiff. This was the situation in *Fisher v. Yellow Cab Co.*⁴⁵ Judge Dickinson of the District Court, in analyzing the case, stated:

"If the 'additional defendant' had been made a defendant either alone or jointly with the original defendant named, the cause could not have been removed, or, if inadvertently brought here, would be remanded"

but

"This question turns, as we view it, upon the other question of who are the parties to the action. There are, as we understand the rules of the State Courts, two cases to be tried. Although tried by the same jury and under the same evidence, they are as distinct as if made the subject of separate suits. One is by the plaintiff against the original defendant. If this is determined in favor of the defendant, there is nothing more to be done than to record the verdict. If, however, this is determined in favor of the plaintiff, then the jury determines as between the original defendant and the 'additional defendant' who is the responsible party, precisely as would have been done before the Act of 1929 if the original defendant had been sued, had paid the judgment and had brought suit against the 'additional defendant' to recoup."⁴⁶

The court commented on the size of the job thus imposed upon court and jury and concluded that the question of jurisdiction must be decided against the "additional defendant" and that the jurisdiction of the Federal Court is not ousted by the joinder as defendant of one whose residence is the same as that of the plaintiff.

There is another practical limitation in the use of the Sci. Fa. Acts of 1929 and 1931. Both the *Vinnacombe* and *Pittsburgh Bank* cases⁴⁷ are based upon the situation of liability over. Liability over of the additional defendant to the original defendant is most commonly found in "street cases" where the property owner is liable over to the munic-

⁴⁵16 D. & C. 251.

⁴⁶Ibid. 252.

⁴⁷See notes 4 and 5 supra.

ipality, in negotiable instrument cases where the additional defendant is a prior endorser to the original defendant, and in cases of independent contractors whose work is alleged to have caused plaintiff's loss and for which damage the additional defendant under his contract is responsible to the original defendant. For such cases the Sci. Fa. Acts have not had difficult application.

However, in the situation involving joint liability, there have appeared many difficulties, many of which have not been definitely settled. The only basis in Pennsylvania for the right of the original defendant against an additional joint defendant is the right of contributionship. In the case of *Goldman v. Mitchell-Fletcher Company*,⁴⁸ Mr. Justice Schaffer stated that the operation of the doctrine of contributionship among joint defendants is confined solely to cases involving non-wilful torts and that its only application is that of where the plaintiff obtains a judgment jointly against the two tort feorsors, the one of the two paying the entire amount of the judgment is entitled to have the same marked to his use and may proceed to recover back from the other judgment debtor one-half of what was paid.

The Act of 1929 as amended by 1931 purports to give the original defendant the right to join as additional defendants all parties jointly liable with the original defendant. It will be readily seen that the doctrine of contributionship would have to be extended if it is to be applied to joint defendants in which no judgment against either has as yet been recovered.⁴⁹

⁴⁸292 Pa. 354. See also *Bailey v. Lavine et al.*, 302 Pa. 273; *Gilkey v. Montag*, 13 D. & C. 717. Two excellent articles have recently appeared in current publications, viz. "Contribution Between Wrongdoers", (Pennsylvania law), Vol. 34 *Dickinson Law Review*, January, 1930, pages 123-131, by Honorable Fred S. Reese; and "Contribution and Indemnity Between Tort Feorsors," (general law), *University of Pennsylvania Law Review*, December, 1932, pages 130-159, by Robert A. Leflar.

⁴⁹See discussion of Warwick Potter Scott on this subject in January, 1931 *University of Pennsylvania Law Review*, pages 311-323. Mr. Scott sees no reason why, this doctrine should not be extended so

If the joint tort feasons stand on an equal footing as far as the standard of negligence is concerned, there is apparently no real difficulty encountered. Where, however, the measure or standard of one of the joint feasons is greater than that of the other, we are faced with the dilemma of either adopting the doctrine of comparative negligence or are prevented from using the sci. fa. in such cases. The doctrine of comparative negligence is not recognized in Pennsylvania and this doctrine with its refinements and complications was certainly not intended by the Legislature in the Sci. Fa. Act to have supplanted our well established doctrine of negligence and contributory negligence. As was ably developed by Warwick Potter Scott,⁵⁰ the act is entitled "An Act to regulate procedure . . ." and was never intended to destroy the present substantive law of negligence and contributory negligence.

It is therefore submitted that the Sci. Fa. Acts cannot be applied to situations where the liability of the joint tort feasons is of a different grade. This view was reached in the case of *Cohen v. Philadelphia Rural Transit Company et al.*⁵¹ In this case the original defendant brought upon the record the City of Philadelphia by means of sci. fa. The City employed the plaintiff as a fireman and he was injured in the course of his employment by reason of a collision between the fire truck and trolley of the original defendant. The original defendant's liability to the plaintiff was based on the theory of ordinary negligence, while that of the City was based upon that outlined in the Workmen's Compensation Law.

Under the doctrine of the *Goldman* case,⁵² the Sci. Fa. Acts of 1929 and 1931 cannot be successfully maintained unless the original defendant can show in cases of joint liability that a right of contribution between him and the

as to include the situation as provided in the Act of 1929 and amended by Act of 1931 providing the joint tort feasons stand in *pari delicto*.

⁵⁰University of Pennsylvania Law Review, *ibid*.

⁵¹13 D. & C. 465.

⁵²*Goldman v. Mitchell-Fletcher Co.*; 292 Pa. 354.

additional defendant as joint tort feasons exists.

TIME FOR USING SCI. FA.

The act is silent on the time in which a scire facias to bring in additional defendants must issue.⁵³ Consequently, rules have been adopted by some of the courts requiring the issuance of a writ within a certain number of days after service of the statement of claim.

Every court of record has inherent power to make rules for the transaction of its business. The only limitation of the power is that they must not be contrary to law or unreasonable.⁵⁴

A rule of court requiring that a scire facias to bring in additional defendants under the Act of 1929 must issue within thirty days after service of the statement of claim was held to be not a reasonable regulation of the procedure prescribed by that act and that in such cases sixty days should be prescribed subject to extension by the court for cause shown.⁵⁵ The appellant contended that not only was the thirty-day time limit unreasonable but that the rule was invalid because it was an abridgement of a right conferred by the Act of 1929 to bring action against the additional defendant within the period of time prescribed by the statute of limitations. Mr. Chief Justice Frazer, in writing the opinion for the court, clearly and logically rebutted this contention and held that mere failure to comply with the rule cannot affect a defendant's primary right to seek compensation or reimbursement from a third party, for whose act or default he has been held responsible, nor can it prevent an action to recover the amount of the judgment where the relations between the defendant and such third party are governed by contract so as to give rights for a claim for indemnification. The court again reiterated as follows:

⁵³Weinstock v. Phila. et al., 17 D. & C. 411.

⁵⁴Carroll et ux. v. Quaker City Cabs, Inc. et al., 308 Pa. 345, 348 and 349.

⁵⁵Ibid. 349, 350.

"The Act of 1929 was intended to expedite procedure by avoiding a multiplicity of suits, and it confers undoubted benefits upon defendants who pursue the remedy indicated therein; but it does not alter the rights which existed previous to its passage. Defendants who prefer to follow the old methods or who fail to avail themselves of the benefits of the act within a reasonably proper time are not thereby prejudiced within the period of the statute of limitations."

An additional defendant brought in by writ of scire facias may raise the defense of the statute of limitations by a rule to quash. After the statute of limitations has run against an action by the plaintiff against such additional defendant, the original defendant has no right to bring in upon the record by sci. fa. the additional defendant.⁵⁶

While no time limitation is set forth in the statute, in the absence of a court rule, the original defendant desiring to proceed under the Act of 1929 must act promptly.⁵⁷

CHALLENGES

In this connection, it might be well to state that each defendant having an antagonistic interest at the trial is entitled to four peremptory challenges.⁵⁸

NON-SUIT

It was pointed out in the *Shapiro* case⁵⁹ that the trial court should allow the original defendant to offer evidence to show that the additional defendant is liable before a non-suit or directed verdict can be entered in favor of the additional defendant. However, the additional defendant is entitled to have binding instructions in his favor after the evidence of all parties has been given, if at that time there

⁵⁶*Malone et ux. v. Union Paving Co. et al.*, 16 D. & C. 644; *Shaw et al. v. Megargee (et al.)*, 307 Pa. 447, 451.

⁵⁷*First National Bank of Pittsburgh*, 300 Pa. 92, 97.

⁵⁸Act of March 29, 1860, P. L. 344, Section 1, as interpreted in the light of the Joint Suit Act of June 29, 1923, P. L. 981 and the two Sci. Fa. Acts. *Shaw et al. v. Megargee (et al.)*, 307 Pa. 447.

⁵⁹*Shapiro v. Phila. et al.*, 306 Pa. 216.

is not sufficient evidence as would justify a verdict against him, and the same is true of judgment non obstante veredicto.

It has also been previously noted that where the sci. fa. to bring in the additional defendant alleges merely that the additional defendant was solely liable, the court may enter a non-suit or direct a verdict for the additional defendant as to whom the original defendant had not made out a prima facie case of sole liability.⁶⁰

VERDICT

The Supreme Court has suggested that in all cases where the jury is called upon to determine the relative rights of litigants, especially where if one defendant is liable and another is not, or one, if liable, may have a right of recovery over against another, that the jury, in addition to rendering a general verdict, be called upon to answer specifically definite questions submitted to them, with leave to the court to mould the verdict in keeping with the answers returned.⁶¹

If, at the trial, the jury's verdict is in favor of the original defendant, they need go no further; but if they find in favor of the plaintiff, they should also specify in their verdict whether or not the additional defendant is liable over to the original defendant for the amount awarded to the plaintiff and the extent of such liability. The court has a right to grant a new trial to, or to enter judgment non obstante veredicto, in favor of any one of the parties, without disturbing the other verdict in the case. Whenever the final judgment is in favor of the original defendant, the judgment against the additional defendant, if one has been entered, should be stricken off on motion.⁶²

⁶⁰Yellow Cab Co. v. Rodgers et al., 61 Fed. 2nd, 729.

⁶¹Malone et ux. v. Union Paving Co. et al., 306 Pa. 111, 120.

⁶²Vinnacombe et ux. v. Phila. et al., 297 Pa. 564, 573.

EFFECT OF SCI. FA. ACTS UPON PENDING LITIGATION

Litigation existing at the time of the passage of the Act of 1929 was subject to its terms because the act is procedural in its nature,⁶³ but a writ issued by virtue of the Act of 1929 and the amending Act of 1931 is void if issued before the effective date of the act or its amendment.⁶⁴ The latter Sci. Fa. Act was adopted June 22, 1931⁶⁵ but because of the Act of May 17, 1929, P. L. 1808,⁶⁶ it did not go into effect until September 1, 1931.

It therefore appears that the Sci. Fa. Act of 1931 also applied to litigation existing at the time providing that the writ authorized by the act did not issue before September 1, 1931.

EFFECT OF THE ACT OF 1931

The Act of 1929 was amended by the Act of 1931 to read as follows:

"AN ACT

"To regulate procedure where a defendant desires to have joined, as additional defendants, persons whom he alleges are *alone liable* or liable over to him, or jointly or severally liable with him, for the cause of action declared on, and providing for entry of judgments against such additional defendants.

"Section 2. That section one of said act is hereby amended to read as follows:

"Section 1. Be it enacted, &c., That 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

⁶³Ibid. 570.

⁶⁴Shaw et al. v. Megargee (et al.), 307 Pa. 447, 452.

⁶⁵P. L. 663.

⁶⁶This date applies since no other date was "specified in the Act (of 1931) itself."

had been originally sued; and *such original defendant shall have the same rights in securing service of said writ as the plaintiff in the proceedings had for service of process in said cause. Where it shall appear that an added defendant is liable to the plaintiff, either alone or jointly with any other defendant, the plaintiff may have verdict and judgment or other relief against such additional defendant to the same extent as if such defendant had been duly summoned by the plaintiff and the statement of claim had been amended to include such defendant, and as if he had replied thereto denying all liability.*

"Upon the joinder of additional defendants under the terms of this act, such suit shall continue, both before and after judgment, according to equitable principles, although at common law, or under existing statutes, the plaintiff could not properly have joined all such parties as defendants.

"APPROVED—The 22d day of June, A. D. 1931."

It will be noted that sole liability is added by the Act of 1931 to the classifications of liability as set forth in the preceding act. It was not possible under the Act of 1929 for the defendant to assert such a right.⁶⁷ The original defendant or any additional defendant can now sci. fa. an additional defendant or defendants alleging one or more of the following grounds of liability on the part of the defendant to be added: sole liability to the plaintiff, joint liability with the original defendant or defendant issuing sci. fa., several liability with the original defendant or defendant issuing sci. fa., and/or liability over to the original defendant or additional defendant issuing sci. fa. Much doubt exists as to the proper interpretation of that part of the amending act which reads as follows:

"Where it shall appear that an added defendant is liable to the plaintiff, either alone or jointly with any other defendant, the plaintiff may have verdict and

⁶⁷Shaw et al. v. Megargee (et al.), 307 Pa. 447, 452; King v. Equitable Gas Co., 307 Pa. 287, 291; Vinnacombe et ux. v. Phila. et al., 297 Pa. 564; Graham v. Yellow Cab. Co. et al., 16 D. & C. 238, 240—affirmed in 61 Fed. 2nd, 666; Folcroft v. Lenhart, 14 D. & C. 535,

judgment or other relief against such additional defendant to the same extent as if such defendant had been duly summonsed by the plaintiff and the statement of claim had been amended to include such defendant, and as if he had replied thereto denying all liability."

Does the above portion of the act make it possible for a jury to find in favor of the plaintiff as against the additional defendant or are we bound by the doctrines as set forth in the *Vinnacombe* and *Pittsburgh Bank* cases to the effect that the plaintiff is not given any additional right and that the issue created by the sci. fa. is strictly between the two classes of defendants only?

The first case to raise this interesting question was that of *Graham v. Yellow Cab Co. et al.*⁶⁸ In this case, a trespass action was brought in the State Court and the case was removed to the District Court as a diversity of citizenship case. In a very interesting opinion, Judge Dickinson observed that the statute in question was open to either of two constructions, reasoning as follows:

"It might be read that when one is sued to whom, in case of a judgment against him, a third party is liable over, such third party may be brought into the original action as 'additional defendant' as if the action had been brought against both' and if judgment be rendered for the plaintiff, it might have been against both or either defendant 'according to equitable principles,' whatever this phrase may mean. When so brought in, the 'additional defendant' would not be at liberty to object that the plaintiff could not have joined him as a defendant in the original action. The statute might also be read as a procedure to try two issues in one form of action; one raising the question of the liability of the original defendant to the plaintiff, and the other the liability of the 'additional defendant' to the original defendant. This would mean that there were two actions calling for two verdicts and two judgments."⁶⁹

⁶⁸16 D. & C. 238. Affirmed by Circuit Court of Appeals by opinion of Judge Thompson October 24, 1932 in 61 Fed. 2nd, 666.

⁶⁹*Ibid.* 239.

The averment in the *Graham* case was that the additional defendant was alone responsible for the damage of which the plaintiff complained.

By the express terms of the Act of 1931, Section 2, amending the Act of 1929, an additional defendant may be joined by scire facias although he is alone liable to plaintiff for the cause of action declared on.⁷⁰

Truly an anomalous situation develops under the Act of 1931 where the original defendant sci. fa.'s an additional defendant alleging that the latter is solely liable to the plaintiff. The original defendant's own affidavit in effect avers that he has no cause of action against the "additional defendant." If the doctrine of the *Vinnacombe* case is applied, the scire facias of the "additional defendant" makes two actions, one of the plaintiff against the original defendant alone, and the other an action over by the original defendant against the "additional defendant" to recover in whole or in part whatever the original defendant must pay to the plaintiff. If the finding of fact in a case was that the "additional defendant" was solely liable, obviously the plaintiff could not recover against the original defendant and under the reasoning in the *Vinnacombe* case could not recover against the "additional defendant" because the plaintiff is not affected by the sci. fa. proceedings instituted by the original defendant.

If, however, he is an "additional defendant" in the sense he would have been if made a defendant along with the defendant named in the original suit, so that a verdict might be rendered in favor of the plaintiff and against the original defendant or the additional defendant or both, many of the difficulties confronting us would disappear.⁷¹

The court adopted the first construction and applied the classic interpretation of the *Vinnacombe* case to the Act of 1931. Under this court's ruling, the plaintiff cannot have verdict or judgment against the additional defendant. The

⁷⁰*Graham v. Yellow Cab Co. et al.*, 16 D. & C. 238, 240, affirmed in 61 Fed. 2nd, 666. (See note 67.)

⁷¹*Graham v. Yellow Cab Co.*, 16 D. & C. 238, 241. Affirmed in 61 Fed. 2nd, 666.

court's ruling is based entirely upon the construction of the Act of 1931 because the liability alleged against the additional defendant was that he was alone or solely responsible for plaintiff's damages and it was impossible, as we have already observed, to sci. fa. an additional defendant to the record under the Act of 1929 on the ground of sole liability.⁷² The court held that the Act of 1931 permitted this ground for the issuance of the sci. fa. Judge Thompson affirmed this opinion in the United States Circuit Court.⁷³

The same conclusion was again reached in *Fisher v. Yellow Cab Co.*⁷⁴ in an opinion written by Judge Dickinson, author of the *Graham* case.⁷⁵ We have already discussed this opinion in the light of a federal jurisdictional problem. This case also interprets the Act of 1931 as being bound by the *Vinnacombe* doctrine of two cases in one, the first being the case of plaintiff versus original defendant, and the later being the case between the two defendants.

On the other hand, it appears that the trial court in *Shaw et al. v. Megargee (et al.)*⁷⁶ construed the Act of 1931 under which the additional defendant had been brought upon the record on the ground of sole liability, to permit the trial of the case as if the plaintiffs had instituted their suit against the original defendant and the additional defendant as joint and several tort feasons on the apparent ground that there could be no issue in controversy between the two defendants.

Unfortunately, the Supreme Court was not called to pass upon this matter because the additional defendant, alleged to be solely liable, had been properly dismissed from the case by the trial court where it appeared that the claim against him was barred by the statute of limitations.

The United States Circuit Court of Appeals in the case of *Yellow Cab Co. v. Rodgers et al.*⁷⁷ took special pains to

⁷²See note 67.

⁷³61 Fed. 2nd, 666.

⁷⁴16 D. & C. 251.

⁷⁵16 D. & C. 238.

⁷⁶307 Pa. 447.

⁷⁷61 Fed. 2nd, 729.

set forth in its opinion that it was not deciding whether or not the Act of 1931 permitted the determination of the case between the plaintiff and the additional defendant. The court stated as follows:

"We need not here consider whether the Act of 1931 makes it necessary for the trial court to submit the case between the plaintiff and the additional defendant to the jury since the plaintiff does not complain of the action of the trial court in directing a verdict for the additional defendant."

Certainly the express words of the amending act would of themselves and if standing alone, permit the plaintiff to have verdict and judgment directly against the additional defendant. The Act of 1931 reads in part as follows:

" . . . the plaintiff may have verdict and judgment or other relief against such additional defendant to the same extent as if such defendant had been duly summoned by the plaintiff and the statement of claim had been amended to include such defendant, and as if he had replied thereto denying all liability."

It is to be noted that the portion of the act above quoted has attempted to dispose of the pleading requirements. The act in itself makes a complete denial for the additional defendant of all of the allegations of the plaintiff's statement. Prior to the Act of 1931 the *Pittsburgh Bank* case was authority that the additional defendant need not answer the plaintiff's statement of claim. It is respectfully submitted that no serious difficulties would be encountered by way of pleadings were the Act of 1931 to be interpreted as giving the plaintiff a direct right against the additional defendant. Certainly the substantive law is not changed if the facts in themselves warrant liability of the additional defendant to the plaintiff.

Regardless of what the legislative intent was as expressed in the Act of 1929, it is submitted that the intent was clearly expressed in the Act of 1931 to give this direct relief both in matters of sole liability as well as joint liability. While the only definite authorities on this matter are the

Graham and *Fisher* cases,⁷⁸ which applied the doctrine of the *Vinnacombe* and *Pittsburgh Bank* cases to the Act of 1931 and prevented direct relief, it is submitted that the proper interpretation of the Act of 1931 leads us to the contrary result.

It is respectfully submitted that the doctrine of the *Vinnacombe* and *Pittsburgh Bank* cases is not applicable to the Act of 1931, especially to situations alleging sole liability on the part of the additional defendant to the plaintiff. Before the doctrine in these cases could be applied, it is necessary for the original defendant to attempt to found his action against the additional defendant on pure fiction. When his praecipe alleges that the additional defendant is solely liable to the plaintiff, he thereby precludes any right of action on his part against the additional defendant. If in fact the additional defendant were solely liable to the plaintiff, under the *Vinnacombe* doctrine, verdict and judgment would be rendered in favor of the original defendant, and even though the additional defendant were in fact liable to the plaintiff, the plaintiff would be prevented from recovering in that action against him but would have to institute a new action directly against the additional defendant for the same facts that were adjudicated and bring himself within the statute of limitations.

This is the very thing that the act attempts to avoid. Its purpose is to prevent circuitry of action, delays and hardships, and to simply, directly and equitably determine a case. Not only does it appear that the proper interpretation of the 1931 Act is to give the plaintiff his direct relief against the additional defendant in matters of sole liability, but in matters of joint liability against both original and additional defendants as well.

The limitation as set forth in the case of *Cohen v. Philadelphia Rural Transit Co. et al.*⁷⁹ limiting the use of the sci. fa. in matters of joint liability to tort feorsors who stand

⁷⁸*Graham v. Yellow Cab. Co. et al.*, 16 D. & C. 238; *Fisher v. Yellow Cab Co.*, 16 D. & C. 251.

⁷⁹13D. & C. 465.

on equal footing as far as standards of negligence are concerned would also appear to be applicable to direct relief that could be given the plaintiff in matters of joint liability. It is submitted however that the *Vinnacombe* doctrine would and should remain applicable to matters of liability over.

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