SOME ASPECTS OF THE PENNSYLVANIA SCI. FA. ACT FOR THE ADDITION OF DEFENDANTS NOT ORIGINALLY SUED

(ACT OF APRIL 10, 1929, P. L. 479)

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THE ACT AND ITS PURPOSE

The much discussed Pennsylvania *Sci. Fa.* Act of 1929 is simple in purpose and brief in expression. Its purpose is the equitable one of adjudicating by one suit all the rights of all the parties arising out of a particular transaction or occurrence.[1] The Act in its entirety reads 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, the plaintiff could not properly have joined all such parties as defendants."

THE TWO APPELLATE COURT DECISIONS. THE ACT APPLIED TO THE SITUATION OF LIABILITY OVER

The only two judicial pronouncements of Appellate Courts upon the Act are the well known cases of *Vinnacombe et ux. v.*

[1] See generally THIRTY-FOURTH ANNUAL REPORT OF PENNSYLVANIA BAR ASSOCIATION (1928), particularly 42, 43.

Philadelphia et al.,[2] and *First National Bank of Pittsburgh v. Baird*.[3] Justice Simpson wrote the opinion of the Court in both cases. In the *Vinnacombe* case Chief Justice Frazer, then an Associate, dissented upon a secondary question.

It will not be profitable to set forth in detail the now well-known principal doctrines laid down in these cases by Justice Simpson. Of the *Vinnacombe* case suffice it to say that the City of Philadelphia was sued by plaintiff for damages caused by a defective sidewalk. The City's right of action over against the abutting owner, added by *sci. fa.* to the record, was sustained, and the Act declared constitutional.

In the *Pittsburgh Bank* case, the holder in due course of negotiable paper sued the accommodation maker, whose right of action over against the executors of one Reed, the accommodated or real party in interest on the note, was sustained. The court said, *inter alia,* in the latter case that there was no reason, if justice required it, why the separate issue between the original defendant and the additional defendant liable over to the original defendant should not be separately tried, though under the same term and number.

In both cases Justice Simpson stresses the proposition that the Act was not intended to give to the plaintiff any additional rights. From this premise he draws the then inevitable conclusion that the issue created by the *sci. fa.* is strictly between the two classes of defendants only and has no bearing whatsoever upon the issue between the plaintiff and the original defendant. This is most strongly emphasized by his statement, already noted, in the *Pittsburgh Bank* case, that the issue between the two classes of defendants may be separately tried. In that case the question was in fact raised upon a rule for judgment as between the two defendants.

The only other noteworthy features of the two decisions are that in the *Vinnacombe* opinion Justice Simpson laid down forms for præcipes and writs and what virtually amounted to rules of

[2] 297 Pa. 564, 147 Atl. 826 (1929).
[3] 300 Pa. 92, 150 Atl. 165 (1930). Pennsylvania seems to be the only jurisdiction in which a statute of this nature exists.

court, holding that Section 3 of the Act of June 16, 1836,[4] empowered the Supreme Court so to do. In an opinion which concurred generally with the effect of the *Vinnacombe* decision, Chief Justice Frazer dissented from this one point, holding that the cited Section of the Act of 1836 had been impliedly superseded by subsequent legislation and that the function of rule-making was exclusively in the Common Pleas. In the *Pittsburgh Bank* case Justice Simpson seems in some degree to defer to the Chief Justice's view.[5]

So much for what these two decisions actually hold.[6] Let us consider whether the holdings are in the last degree conducive to the fulfillment of the legislative purpose, for that is the avowed intention of the Court. In the *Vinnacombe* case Justice Simpson says:

> " . . . the statute is to be liberally construed to advance the legislative purpose: . . ." [7]

He also says on the same page:

> "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, . . . "

If the purpose of the Act is, as stated at the beginning of this article, to adjudicate by one suit all the rights of all the parties arising out of a particular transaction or occurrence, that purpose

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[4] P. L. 784, 786.

[5] "In all civil litigation, the trial courts, at least to the extent that they are not inhibited by statute, have the power to control the procedure so as to attain 'justice without sale, denial or delay'. It may be said, generally speaking, that, in the absence of applicable legislation, this control is only limited by the constitutional requirements of the right of trial by jury, and the litigant's right to a full and fair hearing before judgment is entered against him. . . ." 300 Pa. at 101, 150 Atl. 165, at 169.

[6] The Statute of Limitations is held not to apply to the issue between the two defendants, seemingly on the theory that the original defendant's cause of action *over* does not arise until the original defendant is sued. The original defendant must then, however, act promptly. See Vinnacombe case, *supra* note 2, at 569, 147 Atl. at 828.

[7] *Supra* note 2, at 569, 147 Atl. at 828.

is defeated by the last quoted words of Justice Simpson. It cannot be denied that the plaintiff injured by a defective sidewalk has a direct right of action against the abutting owner. Solely from the viewpoint of disposing expeditiously of the business of the courts, it is clearly desirable that this direct right of action between plaintiff and added defendant should be settled in this suit. It is not difficult to imagine a situation where the municipality originally sued would be found to be insolvent and the abutting owner financially responsible. For what good reason should the plaintiff in such a situation be put to the necessity of instituting an entirely separate suit against the additional defendant?

If we are to construe the Act liberally in accordance with the avowed intention of the Court, there seems no fundamental reason why the mere fact that the plaintiff did not originally sue the additional defendant should prevent the plaintiff from obtaining a judgment directly against the additional defendant. It is a common occurrence that a complainant who brings his bill on the equity side of the court ultimately obtains a decree giving him direct rights against various defendants or respondents who were added to the record in one way or another subsequently to the filing of the original bill. Why should such a consummation be obnoxious in a proceeding under the *Sci. Fa.* Act, especially as the Act itself says that after the additional defendant has been added:

> " . . . such suit shall continue, both before and after judgment, according to equitable principles . . ." [8]

Except for this feature, which, we respectfully submit, unnecessarily curtails the complete fulfillment of the avowed purpose of the Act, it would seem that a literal interpretation of everything that is said in both the *Vinnacombe* and *Pittsburgh Bank* opinions *as applied to any phase of the situation of liability over* presents no serious difficulties whatever save one.

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[8] To these words there is reference in the Vinnacombe opinion, *supra* note 2, at top of page 570, 147 Atl. at 828.

That difficulty arises only in cases where federal jurisdiction is introduced by reason of diversity of citizenship existing only between the two classes of defendants. If the issue between plaintiff and original defendant is to be as rigidly distinguished, as the Supreme Court declares it must be, from the issue between the original and the additional defendant, the rule that where one of several joint defendants is a citizen of the same state as the plaintiff there is no right to federal jurisdiction, obviously has no application.

In the pending case of *Thompson v. Philadelphia, et al.*,[9] plaintiff, a resident of Philadelphia, sued the City in a "sidewalk case." The City, by *sci. fa.* alleging liability over, joined a foreign corporation, the owner of the abutting premises. The amount involved being in excess of $4000, counsel for additional defendant secured a removal to the United States Court. Judge F. S. Brown, Jr., of Common Pleas, was in doubt as to whether to send down the entire record or to split the case (in the manner seemingly authorized in the *Pittsburgh Bank* opinion) and send down only the issue as between the two defendants, there being no diversity of citizenship as between plaintiff and the original defendant. The entire record was sent down and has been docketed in the United States Court, but has not as yet been listed for a hearing, so that it is still unknown whether the United States Court will take jurisdiction. If the United States Court refuses to entertain the entire case, including both issues, on the ground that it has no statutory authority to pass upon the claim sounding in tort of a citizen of Philadelphia against his own City, and remands the whole record to Common Pleas, there can be no appeal from such action. The Common Pleas Court would of course not repeatedly send the case to the Federal Court to invite repeated refusals of the United States judges to take jurisdiction. To split the two issues and adjudicate that between plaintiff and original defendant in the Common Pleas and that between the two classes of defendants in the Federal Court would seem cumbersome in the last degree and unsatisfactory to both jurisdictions as well as to the liti-

[9] C. C. P. 4, June Term, 1929, No. 681, removed to U. S. District Court, E. D. of Pa., December Sessions 1929, No. 15,140.

gants. The third and last resort would be to adjudicate the entire matter in Common Pleas. This of course is impossible, being a denial of the constitutional rights of the foreign corporation joined as additional defendant.

No solution of this problem appears. If in fact there is no solution, the practical result would seem to be that in such case the writ of *sci. fa.* would have to be quashed upon motion of the additional defendant. This unfortunate necessity does not of itself strike out the usefulness of the Act as a whole, but merely excludes from its useful scope cases of liability over 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 $4000.

THE CONCEPTION OF RIGIDLY SEPARATE ISSUES IN THE SITUATION OF JOINT LIABILITY AS DISTINGUISHED FROM LIABILITY OVER. THE DOCTRINE OF CONTRIBUTIONSHIP AS A BASIS FOR THE SEPARATE RIGHT OF THE ORIGINAL DEFENDANT AGAINST AN ADDED JOINT DEFENDANT

The *Vinnacombe* and *Pittsburgh Bank* opinions are couched in language which is general and which, if read by itself, might be taken to be intended to apply to all cases arising under the *Sci. Fa.* Act whether the factual situation were that of liability over or joint liability.[10]

For the moment let us assume that this is the case and that also in the situation of joint liability, the issue between the plaintiff and the original defendant is rigidly to be distinguished from

[10] It has been so interpreted in a number of lower court decisions, *viz.*: Cohen v. Philadelphia Rural Transit Co., 13 D. & C. 465 (1930) (Philadelphia C. C. P. 2, opinion by Gordon, Jr., J.); Gilkey v. Montag, 13 D. & C. 717 (1930); O'Brien *et ux.* v. Erb *et al.*, unreported, C. C. P. 2, March Term, 1928, No. 12895, consolidated with case arising from same accident, C. C. P. 5, June Term, 1928, No. 10373, ruling by Martin, P. J., without opinion filed; Kauffman v. Tidewater Oil Co., unreported, C. C. P. 2, June Term 1930, No. 5123, ruling by Stern, P. J., without opinion filed.

the issue between the two classes of defendants, and that the plaintiff has no direct right against the additional defendant.[11]

Upon what can we found the right of an original defendant against an additional joint defendant? There is clearly nothing available as a basis for such an issue unless it be the right of contribution, and whether or not that is available as it exists in Pennsylvania law is open to considerable question. The doctrine of contributionship as it exists today in Pennsylvania is described and limited by the classic opinion of Justice Schaffer in *Goldman v. Mitchell-Fletcher Co.*[12] The *Goldman* decision stands for the single proposition that where plaintiff obtains a judgment jointly against two tort feasors and where one of the two pays the entire amount of the judgment, the payer is entitled to have the judgment marked to his use and may proceed by the doctrine of contributionship to recover back from the other judgment debtor one-half of what was paid; the operation of the doctrine being confined to cases involving non-wilful torts. In the *Goldman* opinion, Justice Schaffer says significantly:

> " . . . Our decision is predicated upon this use of the remedy . . . " [13]

It will at once be seen that the doctrine is being very considerably extended if it be applied to cases where the two defendants are not joint judgment debtors of the plaintiff but are merely joint defendants being sued in an action sounding in tort, in which no judgment against either has as yet been recovered. From a strictly logical standpoint there is no reason why the doctrine should not be extended to that degree provided the joint tort feasors stand, as it were, *in pari delicto*. If, however, the relationship of each of the two to the plaintiff is not identical, no doctrine of contributionship can be applied (before a judgment is obtained against both in favor of the plaintiff as in the *Goldman* case) without introducing into Pennsylvania jurisprudence the most complicated refinements of comparative negligence.

[11] The propriety of adopting such a view will be later discussed.
[12] 292 Pa. 354, 141 Atl. 231 (1928).
[13] *Ibid.* at 365, 141 Atl. at 235.

For example: the settled law of Pennsylvania imposes upon the motorman of a trolley the duty to observe a *very high* degree of care towards the passengers in his car. His duty towards persons and vehicles in the street is merely the duty of ordinary care which the law imposes on all travelers on a public highway, slightly lessened in the case of a motorman by the fact that the public franchise gives the trolley company the "dominant" right upon its own track. If a passenger in a trolley is injured by reason of a right angle collision between a trolley and a truck, in which it appears that the trolley was approaching the intersection in question from the right and therefore had a technical right of way under Section 1013 (a) of the Act of May 1, 1929,[14] and if the plaintiff sues the trucking company, which adds the trolley company by *sci. fa.* as being jointly liable, can there be any contributionship? It is clear that in a direct action by the passenger against the motorman's company, the passenger can recover if the motorman fell short of the very high degree of care required of him towards his passengers; but in the proceeding under the *Sci. Fa.* Act which we have supposed, the passenger has no direct right against the motorman's company. The only claim against which the trolley company must defend in such a proceeding is that of the trucking company to which the duty of care owed by the motorman was measurable by an entirely different yardstick from his duty owed to his passenger. As has already been noted, to the trucking company he owed only the ordinary degree of care, lessened by the two factors (which are merely make-weights to point the contrast) that the trolley had the dominant right upon its track and was approaching the intersection from the right.

In such a case let us suppose the situation visualized by Justice Simpson in the *Pittsburgh Bank* case,[15] namely, that the plaintiff has already obtained a verdict and judgment against the trucking company, the original defendant, and that the issue between the original and additional defendants is to be separately tried, although under the same term and number. We then have the original defendant in court already adjudged guilty of negligence

[14] P. L. 905, 979-980.
[15] *Supra* note 3, at 96 *et seq.*, 150 Atl. 167.

in failing to observe even the ordinary degree of care required of it in the circumstances. Certainly if the claim were for damages to the truck instead of for contribution, the contributory negligence of the trucking company would be a conclusive defense in the hands of the trolley company. Even on the basis of the separate issue which we have supposed, tried after plaintiff reduced its claim against the original defendant to judgment, the original defendant in this separate issue does not stand as an agent or trustee for the plaintiff passenger who has already recovered his judgment and departed from the picture. In the issue separately tried between the two defendants, the plaintiff passenger is in no sense the use-plaintiff. If it chanced that the original defendant was execution-proof, with the result that plaintiff's judgment was uncollectible, plaintiff would notwithstanding have no special lien upon the original defendant's right of action, if any, against the additional defendant. The proceeds of any judgment recovered by an insolvent original defendant from a solvent additional defendant could by assignment readily be placed beyond the reach of the empty-handed plaintiff. Such proceeds would have exactly the same status as any other personal assets of the original defendant and therefore could be made available to plaintiff only by the timely and successful issuance of attachment execution or proceedings of that nature.

All this is merely to show that the position of the original defendant in a separate trial under the same term and number of the issue between the two defendants is not a vicarious position. The original defendant does not represent the plaintiff passenger but stands in its own shoes. It therefore cannot complain of the conduct of the motorman on the ground merely that the latter failed to observe the higher and more exacting degree of care owed to passengers within the trolley. The yardstick for the motorman's conduct would at the most be that which measures his ordinary and less stringent duty towards a truck driver *outside* of his trolley who has an inferior right upon the track and who is approaching a right angle intersection from the left.

A striking analogy to the situation just imagined, and an authority for what seems to be the undoubtedly correct proposi-

tion that the doctrine of contributionship cannot be applied before judgment as between joint defendants who do not stand *in pari delicto* towards the plaintiff, is to be found in an opinion of Judge Gordon, Jr., in the case of *Cohen v. Philadelphia Rural Transit Company,* original defendant, and *City of Philadelphia,* additional defendant.[16] In that case plaintiff sued the Transit Company which brought the City upon the record as additional defendant by means of a writ of *sci. fa.* (in which there were certain formal defects not necessary to mention here). The City demurred to the writ. The only substantive question of law considered by Judge Gordon was whether a right of contribution existed under the doctrine of the *Goldman* case. The plaintiff was a fireman employed by the City, injured in the course of his employment by reason of a collision between fire truck and trolley. The demurrer was sustained on the ground that while there might be joint tort-feasorship, the respective liabilities of the two defendants to the plaintiff were of a different nature, that of the Transit Company being on the theory of ordinary negligence, and that of the City being under the Workmen's Compensation law. The following sentence is highly significant:

> " . . . the liability of the two defendants to the plaintiff being therefore fundamentally different in nature, the question arises whether a right to contribution exists between them merely because they were joint tort-feasors." [17]

The Court then concludes that no such right exists.

Nothing further need be said to make perfectly plain that no doctrine of contributionship upon the flat "fifty-fifty" basis upon which Justice Schaffer predicates the use of the remedy in the *Goldman* case can be applied where the nature or degree of the duty owed by each alleged joint tort-feasor to the plaintiff is not the same. If there is to be contributionship at all, as between joint tort-feasors who do not stand *in pari delicto,* it must be worked out upon the theory of comparative negligence.

The Supreme and Superior Courts have many times stated that the doctrine of comparative negligence is no part of the law

[16] *Supra* note 10.
[17] *Ibid.* at 466.

of Pennsylvania. It would be difficult indeed to conceive of an average jury fairly and properly applying so delicate and complicated a doctrine, although in some jurisdictions they are instructed to do so. However, the *pros* and *cons* of whether or not the State Legislature should introduce comparative negligence into Pennsylvania law need not concern us. The fundamental fact is unquestionable that the doctrine of comparative negligence does not exist in Pennsylvania today.

It surely will not be contended that the few short sentences which comprise the entire *Sci. Fa.* Act [18] (quoted in full at the beginning of this article) and which contain no reference, express or implied, to any doctrine of *substantive* law, can be interpreted to sweep forever into oblivion all the present law of this Commonwealth as to the established doctrine of negligence and contributory negligence and to substitute therefor a highly complicated and entirely new doctrine of comparative negligence based on an entirely unwarranted interpretation of the simple and strictly limited doctrine of contributorship laid down in the *Goldman* case.

In the *Vinnacombe* case,[19] Justice Simpson says of the Act:

> "It is procedural in its nature . . . ."

The title to the Act begins with the words:

> "An Act to regulate procedure . . . ."

In the *Pittsburgh Bank* case [20] Justice Simpson says:

> " . . . the Courts must accept the legislation as it is written and apply what it says . . . ."

There is certainly nothing "written" in this purely procedural Act which would warrant the adoption by any Court of the view that the Act was intended to destroy the present substantive law of negligence and contributory negligence, and to substitute in its place the entirely new substantive doctrine of comparative

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[18] April 10, 1929, P. L. 479.
[19] *Supra* note 2, at 570, 147 Atl. at 828.
[20] *Supra* note 3, at 100, 150 Atl. at 168.

negligence which has hitherto been expressly outlawed by the decisions.

Justice Simpson says in the *Vinnacombe* case [21] that:

> " . . . the statute is to be liberally construed to advance the legislative purpose . . . ";

but if the "legislative purpose" had been to revolutionize a doctrine of substantive law as old as this Commonwealth and with which the legislators must be presumed to be fully acquainted, that purpose would have been "written" into the statute and would not have been left wholly to the imagination under an Act entitled:

> "An Act to regulate procedure . . . ."

WHILE THE INTERPRETATION OF THE SCI. FA. ACT IN SITUATIONS INVOLVING LIABILITY OVER IS NOW TO A CONSIDERABLE DEGREE SETTLED BY THE DECISIONS, AND PRESENTS FEW GREAT PRACTICAL DIFFICULTIES, IT IS DOUBTFUL WHETHER ANY PRACTICABLE INTERPRETATION OF IT MAY BE DEVISED BY THE COURTS IN THE SITUATION OF JOINT DEFENDANTS WITHOUT FURTHER LEGISLATION, UNLESS THE WORDS OF THE ACT ITSELF AND OF OTHER UNREPEALED STATUTES BE WHOLLY IGNORED

The *Vinnacombe* decision is based upon the situation of liability over. The same is true of the *Pittsburgh Bank* case. It is respectfully submitted that there is nothing in Justice Simpson's language in those two opinions which raises any serious problems when applied to the situation of liability over; [22] but it is submitted that in the situation of joint liability, unrepealed legislation and the plain words of the *Sci. Fa.* Act itself would make it positively necessary for the Courts of Pennsylvania to refrain from applying to that situation what Justice Simpson has said in the *Vinnacombe* and *Pittsburgh Bank* opinions in connection with

[21] *Supra* note 2, at 569, 147 Atl. at 828.

[22] The only seemingly insoluble problem in the situation of liability over is discussed *supra* page 310.

the situation of liability over. To be sure his language is general, as has already been noted; but this does not import that it was intended to apply to situations of fact quite different from the facts of those two cases. In the closing portions of the *Pittsburgh Bank* opinion he indicates clearly that his words are not intended as a permanent solvent for all difficulties which may in the future arise under the Act, but that, as has been the case with other statutes, " . . . seeming difficulties . . . " must be " . . . ironed out as they arise . . . ." [23]

Even if the words of unrepealed statutes were not mandatory upon the courts, Justice Simpson's own words in another case relating to the interpretation of written documents, including prior opinions of the Supreme Court, would of themselves be a sufficient warrant for confining strictly to the situation of liability over the words of both the *Vinnacombe* and the *Pittsburgh Bank* cases. In *Schnee et al. v. Elston et ux*,[24] quoting his own words used on a former occasion, the Justice said:

> " . . . In Camden Safe Deposit & Trust Co. v. Eavenson, 295 Pa. 357, 363, we said: 'The error of the court below consisted in wresting the words relied on from their subject-matter and obvious purpose. It is axiomatic that this can never be done; . . . however general the language may be, their scope and effect are necessarily limited and controlled thereby; *ex antecedentibus et consequentibus fit optima interpretatio; verba generalia restringuntur ad habilitatem rei vel personam;* Codding v. Wood, 112 Pa. 371; Smith's Est., 210 Pa. 604; Silverthorn v. Silverthorn, 276 Pa. 579. In Comm. v. Budd Wheel Co., 290 Pa. 380, where an earlier opinion of this court was being construed,' . . . we said that 'controlling effect must be given to the subject-matter being considered when the language is used.' The same principle is applicable wherever the meaning of words, oral or written, is being considered, for only thus can it be known what the parties intended . . . ."

It is respectfully submitted that where the situation is joint liability as distinguished from liability over, the statutory mandates quoted below are constitutionally binding upon the Courts. The *Sci. Fa.* Act of 1929 provides in part:

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[23] *Supra* note 3, at 101, 150 Atl. at 168.

[24] 299 Pa. 100, 106-107, 149 Atl. 108, 109 (1930).

> " . . . 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 . . . jointly or severally liable therefor with him, *with the same force and effect as if such other had been originally sued, . . .*." (Italics ours.)

If, then, we obey the behest of Justice Simpson, namely, that " . . . the Courts must accept the legislation as it is written, and apply what it says despite the suggested difficulties . . . "[25] we have no choice but to treat an added joint defendant "as if such such other had been originally sued," *i. e.*, as if both defendants had been originally sued. Unless those words of the Act "as it is written" are meaningless, the plaintiff's direct rights against the added defendant can be adjudicated in this proceeding. This result is a happy one, entirely in keeping with the apparent purpose of the Act as already stated, namely, to adjudicate by one siut all the rights of all the parties arising out of a particular transaction or occurrence.

There are, however, serious practical difficulties unless the legislation be amended. The Act of 1929 contains no repealer clause, either express or implied. It merely states that the fact that the plaintiff might not have been able under pre-existing statutes to join "all such parties as defendants" shall not be a bar to the operation of the statute. This brings us squarely face to face with Section 1 of the Joint Suit Act of June 29, 1923,[26] which provides:

> " . . . *whenever it is pleaded in any suit that two or more defendants are jointly liable for the cause of action specified,* and, in the opinion of the trial judge, the evidence may not justify a recovery against some of them, the suit shall not be dismissed as to all, but the case shall be submitted to the jury, if the facts are in dispute, to determine which, if any of them, are liable, or, if the facts are not in dispute, the question of liability of any or all of them may be reserved for consideration by the court en banc, or the suit may be dismissed as to some and the trial proceed against the others,

[25] First National Bank of Pittsburg v. Baird, *supra* note 3, at 100, 150 Atl. at 168.

[26] P. L. 981 (No. 401). It is interesting that there is a reference to the Joint Suit Act for the purpose of comparison in the Pittsburg Bank opinion, *supra* note 3, at 100 *et seq.*, 150 Atl. at 168.

> in every such contingency, with the same effect as if the defendants ultimately found to be liable were the only ones alleged to be so." (Italics ours.)

This Act is in full force. It applies to every case in which there are joint defendants, for the unequivocal words "whenever it is pleaded in any suit" admit of no exception.

It follows inevitably that there is no impropriety from a technical standpoint in applying the Joint Suit Act to proceedings under the *Sci. Fa.* Act of 1929 and in dismissing from the case at the close of plaintiff's testimony one or other of the alleged *joint* defendants. This result is certainly not desirable and would in fact defeat the purpose of the Act to the extent that it would deprive the original joint defendant of the opportunity of putting on his own evidence to implicate the added joint co-defendant before that added joint co-defendant could obtain a nonsuit in cases where the evidence produced on behalf of the plaintiff did not chance to show negligence on the part of that added joint co-defendant, and where plaintiff was content to obtain a verdict against only the original joint defendant.

The courts, however, certainly cannot legislate to remedy the undesirable result. There does not seem to be any remedy for this situation other than further legislation. It would seem that the regrettable result must be that until such further legislation, the *Sci. Fa.* Act of 1929 should be limited in its application to the situation of liability over, since it cannot consistently be worked out under existing unrepealed statutes in the situation of joint liability.

It should furthermore be pointed out that the purpose of the Act, namely, to settle all respective rights of the parties in a single suit, is directly defeated in the situation of joint liability, if Justice Simpson's statements (several times reiterated in his two opinions interpreting the Act) that the plaintiff gets no direct right of action against the added defendant, are applied.[27] It would seem that this is one of the most powerful reasons for not "wresting the words [of the *Vinnacombe* and *Pittsburgh Bank* opin-

[27] The extent to which the purpose of the Act is fulfilled by the decisions in the situation of liability over is discussed *supra* page 308.

ions] relied on from their subject-matter and obvious purpose . . . however general the language may be . . . ." [28] It is submitted that what was said in the *Vinnacombe* and *Pittsburgh Bank* cases was intended to apply only to the situation of liability over and should under no circumstances be applied to the situation of joint liability. In the latter situation, if the plaintiff is to be denied his right to obtain directly a judgment against the additional joint defendant, his failure to recover against the original defendant would of course not constitute *res adjudicata* as to his rights against the additional joint defendant. This would open the way for further litigation by plaintiff against the additional joint defendant, and the Act of 1929 would have failed of its comprehensive purpose.

In the unreported case of *Simpson et al. v. Loutt et al,*[29] President Judge Finletter interpreted the Act "as it is written" and conducted the trial in all respects as if two joint defendants "had been originally sued." Fortunately, the irreconcilable question of whether or not either defendant was entitled to a nonsuit under the Joint Suit Act did not arise. In that case the plaintiff was a passenger in the back seat of an automobile which collided at right angles with an automobile driven by the original defendant. The latter by *sci. fa.* alleging *joint* liability, brought upon the record the driver of the automobile in which plaintiff was a back seat occupant. The added defendant was not in fact plaintiff's agent, so that there was no contributory negligence in the case. President Judge Finletter charged the jury that they might find a verdict for the plaintiff against either defendant, or against both, precisely as if both defendants had been originally sued by the plaintiff. The jury returned a verdict in favor of the original defendant but against the additional defendant and in favor of the plaintiff. This verdict was allowed to stand by the court

[28] Schnee *et al.* v. Elston *et ux.*, *supra* note 24, at 106, 149 Atl. at 109.

[29] C. C. P. 4, June Term 1928, Nos. 4777, 4778, notes of testimony pages 88, 93.

en banc, and judgment in favor of the original defendant and in favor of the plaintiff directly against the additional defendant was entered. No appeal was taken.

Another consideration which would seem to point to the necessity for further legislation is the situation where plaintiff originally sues as joint defendants under the Joint Suit Act, *X* and *Y*. *X* fears that *Y* may obtain a nonsuit before *X's* testimony is put on. Would it be a prudent measure on the part of counsel for *X* in spite of the fact that *Y* is already on the record as a joint defendant, to add *Y* to the record a second time as *joint* defendant, "as if such other had been originally sued"? If the last quoted words of the *Sci. Fa.* Act mean anything, this is clearly not necessary, for he has already been originally sued, but if the *Sci. Fa.* Act, *ipso facto,* without repealer clause and without verbal inconsistency, repealed the Joint Suit Act so as to defeat the right of nonsuit as to one of two joint defendants brought in under the *Sci. Fa.* Act, then counsel for *X* should certainly take such a precautionary step. This is merely another feature showing the impossibility of sensibly applying the present legislation to the situation of joint defendants.[30]

It is respectfully submitted that the accomplishment in the fullest possible manner of the purpose of the *Sci. Fa.* Act as stated at the beginning of this article is thoroughly desirable, but that this purpose cannot be accomplished in any satisfactory way without a most extensive revision of the legislation, particularly with a view to distinguishing carefully between the situations of liability over and of joint and several liability. With regard to the former situation, an adjudication of the direct rights of the plaintiff,

[30] The words of the *Sci. Fa.* Act "severally liable with", if they mean anything at all, would seem clearly to indicate an intention to give to a plaintiff a direct right of action against an added defendant who has been added on the theory that he is severally liable, as if he had been severally "originally sued". This aspect of the Act has been three times ignored, within the knowledge of the writer, in decisions of the lower courts. See O'Brien *et ux.* v. Erb, *et al., supra* note 10, in which a writ of *sci. fa.* was quashed on the ground that it alleged on behalf of the original defendant that "the accident was caused solely by reason of the negligence" of the additional defendant. To the same effect is a ruling of President Judge Stern in Kauffman v. Tidewater Oil Co., *supra* note 10. See also the words of Gordon, Jr., J., in commenting upon pleadings which were said to be defective in Cohen v. Philadelphia Rural Transit Co., *supra* note 10.

in cases where direct rights exist, against the added defendant, should be made possible in order fully to accomplish the Act's comprehensive purpose. In the situation of joint and several liability, the respective rights of each of the parties as against each of the other parties should be brought within the scope of the adjudication "according to equitable principles", and inconsistent, unrepealed legislation should be specifically mentioned and, to the extent necessary, modified.