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LEGISLATION

Joinder of Additional Defendants Under the New Pennsylvania Rules of Procedure

No better illustration of the unsatisfactory nature of procedural rules drafted by legislative action can be had than the development in Pennsylvania of the practice of joining additional defendants. A mere authorization for the joinder was provided by statute without consideration of the machinery necessary to effectuate it.1 Gradually a procedure was


Third Party Practice was first suggested in The Royal Commissioners Reports (1869-74), First Report of the Commissioners (1869) 12. This was adopted in 1875 in the Rules of the Supreme Court (1875), Order 16, rr. 18 et seq.
worked out by the courts at the expense and delay of litigants; at best it was but a makeshift which left much to be desired. Naturally, therefore, one of the first steps of the Procedural Rules Committee was to draft a new procedure which has now been adopted by the Supreme Court.²

To understand the many changes consideration of the fundamental conflicts involved in this procedural device is necessary. In the first place, there is the plaintiff, interested only in recovering from the defendant whom he named, desiring a rapid and efficient adjudication of his claim without confusion of issues introduced by the defendant. On the other hand, the defendant seeks to join another party, either to lessen the possibility that a jury sympathetic towards the plaintiff will find him liable where he has committed no wrong, or to work out a right of contribution or indemnity without risk of loss of evidence or change in financial condition of the third party, which might occur if he is relegated to a separate action over against that party. Lastly, we find the additional defendant complaining of being subjected to suit by the plaintiff who apparently has no desire to recover from him merely because the defendant wishes to protect himself.

It is patent that complete protection could not be accorded all these interests; compromise was necessary, and the purpose of this discussion is to point out these compromises, to show why they were adopted and venture some prediction on whether they will achieve their aims. A secondary problem to be considered is whether the new rules eliminate as far as possible litigation over purely procedural aspects; whether they are so drawn as to lay down a definite practice and avoid the necessity for judicial determination of their effect which caused so much difficulty under the old Sci Fa Acts.

I. CONTROL OF PROCEDURE BY THE TRIAL COURT

Perhaps the most important and most interesting feature of the new practice is the power to control its use and operation vested in the trial court. The principle source of the control is Rule 2252 which transforms the mandatory joinder of the former procedure into a privilege to join.³

The original Pennsylvania statute was passed at the suggestion of the Pennsylvania Bar Association. See Report of Committee on Civil Law (1928) 34 Annual Report of Penna. Bar Association 42.

2. The new rules were promulgated February 14, 1939, by the Supreme Court and became effective September 4, 1939. See Joinder of Additional Parties, 332 Pa. cxxii (1939), for the text of the rules as adopted. They will hereinafter be referred to simply as Rule —.

By the provisions of the Procedural Rules Act, Pa. Stat. Ann. (Purdon, Supp. 1938) tit. 17, § 61 et seq., as amended by Act of March 30, 1939, P. L. 13, these rules are applicable to the courts of common pleas, the County Court of Allegheny County, the Municipal Court of Philadelphia, and any courts of record of civil jurisdiction created in the future by the legislature.

Rule 2263 provides for conformity as far as possible with normal practice except where the rules provide otherwise. Under the prior practice this was sought. See Vinnacombe v. Philadelphia, 297 Pa. 564, 147 Atl. 826 (1929); School District of Eddystone v. Lewis, 101 Pa. Super. 588 (1930). See also explanatory note to Rule 2252 (a). A similar provision is contained in Rule 14 (a), Federal Rules of Civil Procedure. See 1 Moore, op. cit. supra note 1, at 734.


3. Rule 2252 (a): "... the defendant ... may petition the court for leave to join as an additional defendant any person not a party to the action, or any party named therein who has not been validly served, who may be alone liable or liable over to him for the cause of action declared upon or jointly or severally liable therefor with him."
Patterned after similar provisions in the Federal and British Rules of procedure, the change will eliminate to a great extent the delay and confusion which existed under the unrestricted joinder formerly permitted.

Two objections will probably be raised: that the rule requires an additional hearing with consequent delay, and that the change was unnecessary because of the trial court’s power to sever the issues and provide for consecutive trials.

Undoubtedly the first objection bears some weight, especially in the less populous counties where the motion and argument lists are at infrequent intervals. It should be remembered, however, that some change was necessary. A system permitting the unlimited joinder of additional defendants complicating the issues beyond the understanding of any jury could not be continued.

The obvious answer to this is that the trial court has an inherent power to sever issues in complicated cases. However, the ten years of the former practice show that the power is not exercised; if it were, there would be no necessity for the change. Furthermore, the petition and hearing for joinder make fairly certain consideration of the question of overcomplication by the trial court, lack of which in all probability led to the failure to exercise the power to sever.

Leaving the problem to the discretion of the trial court does not completely settle it. Though the power granted is broad, it was hardly intended to be exercised arbitrarily and the facts of the particular case should to a great extent be controlling. For instance, if the plaintiff can show that if the joinder is permitted, the additional defendant will file a counterclaim so unrelated to the principal issue that it will cause confusion, the petition would be properly denied. Again, where a party previously added to the record seeks to join another, the original parties could object if the joinder would result in overcomplication and prejudice.

Further control over the procedure is granted in Rule 2260 which makes mandatory the pretrial conference provided for in Rule 212. The conference, modeled after the similar device in the Federal Rules of Procedure, is intended to simplify the trial by reducing the case to its basic issues through agreements by counsel as to admissions of fact, and of documents which will avoid unnecessary proof, limitations of expert witnesses, and any other matters which will simplify proof. Although commend-
able, it will be of little effect where counsel for either party refuses to agree, since the rule contains no sanction.\textsuperscript{9} The Federal procedure has a remedy in Rule 56 (d) which provides that wherever counsel for either party moves for a summary judgment the court may, in disposing of the motion, enter a summary order adjudicating what issues are to be submitted to the jury and what matters are admitted or are insufficiently denied.\textsuperscript{10} Whether a similar provision will be adopted when the Procedural Rules Committee deals with the subject of summary judgment cannot now be stated, but until some method is adopted to force recalcitrant parties to reach some agreement, the rule can be easily circumvented. However, the conferences are made mandatory, and will in most cases lead to a simplification of the issue to be tried. Certainly if it is to be of value in any case it will be most useful here, where both need and opportunity for simplification are greatest.

Power is also given the trial court to determine the extent to which parties of record may participate in proceedings not directly affecting their rights and liabilities, and also to determine the order of presenting evidence.\textsuperscript{11} Probably the rights of the additional defendant are directly affected by the plaintiff-defendant suit, and therefore he is entitled to complete participation. The same rule should certainly apply to the defendant in the plaintiff-additional defendant suit. However, in the suit between the defendants, the plaintiff will be subject to any limitations the court sees fit to impose since the adjudication can in no way affect his rights. Certainly this is true where he has filed no supplementary statement of claim; so too where he has filed one, since his right against the additional defendant is fully protected.\textsuperscript{12}

These three features of the new rules vesting a greater degree of control in the trial court should end almost entirely the confusion which reigned under the prior practice. While at first the increased power may appear a startling innovation, consideration shows it to be the only possible solution, though admittedly a compromise, to the difficulties which arose under the old practice.\textsuperscript{13}

\textsuperscript{9} See Amram, supra note 5, where it is suggested that sanctions could be applied in the case of the plaintiff by local rule forbidding the case to go to trial where the failure to reach an agreement is the fault of the plaintiff; constitutional objections probably prevent such rules from being applied to the defendant who refuses to come to an agreement.

\textsuperscript{10} 3 Moore, op. cit. supra note 1, at 3171.

\textsuperscript{11} Rule 2261.

\textsuperscript{12} On the question of participation by the additional defendant in the principal suit, the English practice places the matter in the discretion of the trial judge, but the binding effect of the judgment in that suit is proportioned to the extent to which the additional defendant participates. Ann. Prac. (1938) Order 16a, r. 8. As a general rule, where a bona fide defense is made by the original defendant, leave to defend will be denied the additional party. Barton v. London & N. W. Ry., 38 Ch. D. 144 (C. A. 1888). However, the additional party will be allowed to defend where the original defense is poorly handled, or where it is neglected entirely either because of collusion with the plaintiff or because, for some reason, it was advantageous for the original defendant not to fight the plaintiff's claim. Witham v. Vane, 49 L. J. 242 (Ch. 1880); Eastern Shipping Co., Ltd. v. Quah Beng Kee, [1924] A. C. 177 (J. C.). But cf. Byrne v. Brown, 22 Q. B. D. 657 (1889). As to plaintiff's rights where additional party is permitted to defend see MacAllister v. Bishop of Rochester, 5 C. P. D. 194 (1889).

\textsuperscript{13} The court must also either prepare or approve written questions to be submitted to the jury for specific findings in writing. Rule 2262 (a).

Rule 2262 (b) provides that "In every action in which an additional party has been brought upon the record, the court or the jury, as the case may be, in addition to any general verdict or finding, shall make such specific findings as will determine the liabilities of all parties inter se. The judgments entered in such action shall determine the liabilities of all parties inter se."
II. LIMITATIONS OF THE JOINER

On the question of the availability to a defendant of the petition and order for joinder which are the new substitutes for the praecipe and writ of *sci fa* of the old practice, the new rules present a peculiar picture. In one instance, the scope of the practice is broadened; in others it is contracted not only by restriction of the situations in which it may be used, but also by reducing the procedural rights of the defendant who chooses to avail himself of the benefits of the practice.

The class of actions in which the practice may be used has been increased by Rule 2251, which broadens the definition of “action” laid down in *Borsalino v. Reading*. In that case the *Sci Fa* Act was held to contemplate only “. . . a technical ‘action’ brought in court by a ‘plaintiff’ against a ‘defendant’ in which the plaintiff files a ‘declaration’ or statement of the cause of action on which he relies.” So interpreted, it was improper to join, in an eminent domain proceeding, a negligent contractor by writ of *sci fa* either in the proceedings before the viewers or on appeal to the court of common pleas. Under Rule 2251, the joinder on appeal is made proper, and even though such a rule might seem to be conducive to an increase of litigation by stimulating appeals, it will tend to end separate suits for the damages caused by negligence and will provide for a uniform determination of the rights of all the parties arising from the single factual situation.

Under the new procedure, the grounds for joining the additional parties are restricted to those existing prior to 1937 Amendment of the *Sci Fa* Act. Facts must be alleged to show that the party to be joined is “alone liable, or liable over to him (the defendant) for the cause of action declared upon or jointly or severally liable therefor with him.” The provision “. . . or in the alternative . . . or because any question or issue, relating to or connected with the subject matter of the litigation, is substantially the same as a question or issue arising between the plaintiff and defendant and should properly be determined . . .” found in the 1937 statute has been omitted.

15. *Borsalino v. Reading*, III Pa. Super. 549, 554, 170 Atl. 711, 712 (1934) (italics supplied). *Cf. In re Mayer*, 21 Pa. D. & C. 238 (1934), where the court said: “The vital idea of an action is a proceeding on the part of one person as actor against another, for the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or the law.” See also *McCullom v. Stiefel*, 80 Pitts. L. J. 13 (Pa. 1931), where a *sci fa* was issued in an *equity* proceeding, and note particularly that Rule 2251 says “at law” (italics supplied).
17. Rule 2252 (a).

For examples of the type of case which would be affected by this omission, see 1 *Moore*, op. cit. supra note 1, at 742 n. 10, 756 nm. 2, 3, 757 n. 5. See also explanatory notes to *Ann. Prac. (1938) Order 10a, r. 1*.

Rule 2252 (a) follows in general Rule 14 (a) of the Federal Rules of Civil Procedure. 1 *Moore*, op. cit. supra note 1, at 734.

It is interesting to note that the language of the provision omitted is very similar to that found in Rule 213 (a), providing for the consolidation of actions on motion of the court or of any party.
Two reasons are assigned for the change: the 1937 Amendment was so broadly drawn that confusion and prejudice to the various parties would result from the indiscriminate joinder there permitted,¹⁹ and, more important, it would allow joinder of an express indemnitor.

The latter objection affords some support for the omission. It is true that the English practice expressly permits the joinder of such additional defendants,²⁰ but the rule has been closely limited by judicial decision, and joinder of insurers is never permitted where the trial is before a jury.²¹ Under existing Pennsylvania procedure the decision as to the joinder must be rendered before it can be known whether there will be a jury trial, and therefore the defendant cannot be allowed to join the insurer at all.²² However, this fact alone is hardly sufficient justification for so sweeping a change, since the trial court could give ample protection to insurers and other express indemnitors through exercise of its discretionary power, as is done under the English practice,²³ without necessity for a general curtailment of the benefits of the procedure.

Similarly, the danger of confusion arising from complication of issues assigned as justification for the change could be easily avoided by exercise of the same discretionary power. The experience of other jurisdictions shows this to be true. The English practice which is the prototype of all the American practices contains a joinder provision, at least as broad and possibly broader than that found in the 1937 Amendment,²⁴ and the Wisconsin statute contains a similar provision.²⁵ Furthermore, the Texas practice, which was developed solely by judicial decision, permits the joinder where the *fundamental facts to be proven* in the determination of the issues between the plaintiff and defendant and between defendant and third party are the same.²⁶ If so broad a rule would lead to confusion and injustice, the court unhampered by statute would hardly have adopted it.

However, even admitting that this difficulty would be avoided, the general terms of the omitted provisions would require judicial interpretation, and the consequent expense and delay resulting from litigation over a procedural matter may be sufficient justification for the change which in no way affects the substantive rights of the party.

It remains to determine when the joinder will be allowed, to discover just what interpretation has been put on the words “liable . . . for the cause of action declared on or . . . liable therefor with him”²⁷ by an examination of the cases under the old practice. The principal classes of actions where the joinder will be available are in the so-called side-walk cases,²⁸ suits on negotiable instruments where a prior party is added by the defendant,²⁹ suits against a surety who seeks to join the principal debtor.

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¹⁹ See explanatory notes to Rule 2252 (a). See also Amram, *Changes in Practice Resulting From the New Supreme Court Rules* (address before the Philadelphia Bar Association, April 21, 1939) II.
²⁰ Ann. Prac. (1938) Order 166, r. 1 (c).
²³ See the explanatory notes to Ann. Prac., loc. cit. supra note 18.
²⁴ Id., r. 1.
²⁷ Rule 2252 (a).
and cases of joint negligent torts where the tortfeasors are in pari delicto. Originally it seemed that even a person who had contracted to indemnify the defendant from loss resulting from a judgment in the plaintiff-defendant action could be joined in the original proceedings. However, in Jones v. Wohlgemuth the court held that there were two separate and distinct causes of action, one based on the facts giving rise to the defendant's liability to the plaintiff, the other arising on the happening of the condition of the contract of indemnity, and from this concluded that the joinder was improper. Whether this decision was correct in stating that the situation was not contemplated by the Sci Fa Act is another question; certainly there is nothing in the statute to require such an interpretation.

Simple and exclusive as this rule may appear, its effect apparently has been limited by several Superior Court decisions which with little or no discussion have permitted joinder where the two causes of action have been separate and distinct. School District of Eddystone v. Lewis, decided four years prior to the Jones case, permitted the joinder of a surety of a subcontractor whose failure to complete his work had given the plaintiff his right of action against the defendant contractor. Here there were two distinct causes of action: one a right based on the contract between the plaintiff and the contractor, the other based on the agreement of the surety to indemnify the contractor from loss caused by failure of the subcontractor to fulfill his obligation. Although apparently violating not only the rule of the Jones case, but also the policy behind it—i.e., protection of express independent indemnifiers—the case has never been expressly overruled.

Furthermore, in Huber Investment Co. v. Philadelphia Nat'l Bank and in Boosel v. Agricultural Investment Co., both decided the year following the Jones case, the Superior Court again allowed joinder where the action over was based on a separate and distinct contract. In the Boosel case, the plaintiff sued the defendant insurance company for a fire loss. Defendant alleged payment by check endorsed and collected by the subcontractor whose failure to complete his work had given the plaintiff a claim. For instance, defendant is entitled to bring in an indemnitor, with whom he had a claim. For instance, defendant is entitled to bring in an indemnitor, with whom he had a claim. For instance, defendant is entitled to bring in an indemnitor, with whom he had a claim. For instance, defendant is entitled to bring in an indemnitor, with whom he had a claim. For instance, defendant is entitled to bring in an indemnitor, with whom he had a claim. For instance, defendant is entitled to bring in an indemnitor, with whom he had a claim. For instance, defendant is entitled to bring in an indemnitor, with whom he had a claim.

32. See First Nat'l Bank of Pittsburgh v. Baird, 300 Pa. 92, 97, 150 Atl. 165, 167 (1930): 'To compel plaintiff 'to move against' everyone brought in by the scire facias, would often require him to proceed against one regarding whom he never had a claim. For instance, defendant is entitled to bring in an indemnitor, with whom plaintiff was not connected in any way.' It is interesting to compare Justice Simpson's broad view in the above case with his narrow definition of "cause of action" in King v. Equitable Gas Co., 307 Pa. 287, 291, 161 Atl. 65 (1932). For a case where an insurer could not be joined, see Bass v. Bass, 19 Pa. D. & C. 230 (1933).
33. 313 Pa. 388, 169 Atl. 758 (1934). See also cases cited note 35 infra.
35. See Dively v. Penn-Pittsburgh Corp., 332 Pa. 65, 71, 2 A. (2d) 831, 834 (1938), where the court said: "The introduction into the case of these parts of the lease would have violated the salutary rule that the existence of an insurance or indemnity agreement should not be brought to the attention of a jury in actions of this kind. . . . Nor did defendant claim that the additional defendants were liable over to it, but merely that they alone were liable to plaintiff. Even had such a claim been made, it could not have been proved by proof of those provisions of the lease, because liability of an additional defendant . . . cannot be considered in an action of tort brought against the indemnitee." Murray v. Pittsburgh Athletic Co., 324 Pa. 486, 188 Atl. 190 (1936); Bass v. Bass, 19 Pa. D. & C. 230 (1933); cf. Revay v. Schenley Apt. Co., 84 Pitts. L. J. 760 (Pa. 1936).
was a forgery. Thereupon the defendant by writ of *sci fa* joined the bank which had guaranted the signature on the ground that it was liable over to it. The joinder was permitted without discussion, the court holding that in such a case the plaintiff was not entitled to judgment against such an additional defendant, but that a judgment could be rendered in favor of the plaintiff against the original defendant and in favor of the original defendant against the additional defendant. Here again we find a joinder permitted where the action over is on a separate and distinct cause of action in seeming violation of the rule of the *Jones* case.

Even if the status of *School District of Eddystone v. Lewis* is considered doubtful, the fact that these later decisions have gone uncriticised indicates that their result is correct, suggesting in turn that the joinder provision is on a broader base than as limited by the *Jones* case.

As applied by the Superior Court, the phrase "... liable over for the cause of action declared on ..." will allow joinder where the additional defendant will be liable to the defendant as a result of the plaintiff's recovery from the original defendant, and it is immaterial whether the two causes of action are entirely independent provided recovery in the action over is conditioned on a judgment for the plaintiff in the plaintiff-defendant cause of action. Admittedly this conflicts with the reasoning of the *Jones* case. There, however, a ruling that the *Sci Fa* Act was sufficiently broad to permit joinder where the action over was based on a different cause of action than the principal suit would have resulted in a violation of the well-established policy against joining insurers, and as a result the statute was strictly limited. Created to meet a particular situation, the Superior Court has been correct in ignoring the rule where the problem which gave rise to it is absent, especially since the alternative interpretation is equally plausible. Furthermore, under the new rules, even the logical difficulties in reconciling the two lines of cases can be eliminated by an adoption of the practice permitted in the Superior Court, the joinder in the negligence-indemnitor cases or in any other where the element of prejudice is present being refused under the discretionary powers of the trial court.

Liability over may also be the ground for joinder where some rule of law bars a direct recovery by the plaintiff against the additional defendant. Where the statute of limitations has run on the plaintiff's claim against the third party, the defendant cannot join such a party where he alleges him to be solely liable since the plaintiff is not entitled to judgment against the third party. However, where liability over is asserted, the joinder is proper, the grounds being that the statute of limitations would not begin to run on the right of contribution or indemnity till after the judgment in the principal suit.

An analogous situation exists where a wife is injured by the negligence of her husband and another. Public policy forbids a suit against her husband, but in *Koontz v. Messer* it was held that she could sue the third party, the husband's employer, and recover, even though the husband was joined in the action by a writ of *sci fa* alleging that he was liable over to the third party. The court stated that the public policy of

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38. Because it was decided prior to the *Jones* case, and conflicts not only with the rule stated therein but also with the policy behind it.
40. See note 32 supra.
43. 320 Pa. 487, 181 Atl. 792 (1935).
promoting domestic bliss did not protect the employer, and that therefore he was liable. The action over against the husband was said to be entirely separate. However, in these cases where some public policy prevents a suit directly against the additional party, he cannot be joined by a writ alleging sole liability. Thus, in *Jackson v. Gleason* 44 it was held that an employer could not be joined in a suit against a negligent third party by employee where the writ of *sci fa* alleged that the employer was solely liable for the injuries to the employee. Since there was no election by either party not to come under the benefits of the Workmen's Compensation Act, the employer had no common-law liability to the plaintiff and the joinder was improper, 46 although if liability over had been alleged it would have been proper. 46

An indirect limitation on the defendant's privilege to join additional parties is contained in the restriction placed on his right to counterclaim or setoff where he has joined an additional defendant. 47 The practical effect of this restriction probably will be to deter the joinder where the defendant feels that it is more advantageous to assert the claim against the plaintiff than to have the right against the third party adjudicated. Under the old practice, in an ordinary suit where a defendant had been added, there was a possibility that the jury would have to decide as many as six issues: the original cause of action, the two related causes of action normally resulting from the joinder; and three unrelated causes of action—counterclaims against the plaintiff by both the defendant and additional defendant and by the additional defendant against the original defendant. It was impossible to deal with such a situation; no jury could follow a charge dealing with all the issues which could arise, and unjust verdicts frequently resulted. 48

A few lower court decisions attempted to correct this by denying the additional defendant the right to counterclaim on the ground that the *Sci Fa* Act could not have intended a procedure which could only serve to delay the plaintiff and injure his chances of a fair trial by confusing the jury with extraneous issues. 49 Such rulings were arbitrary and completely ignored the fact that the additional party was being involuntarily joined by the act of the original defendant. Furthermore, under a broad construction of the *Vinnacombe* 50 case it would seem that there existed a right in the additional party to assert such counterclaims. 51

To remedy this situation, and clarify the rights of the additional defendant, the new rules provide that the original defendant must yield his right to plead an unrelated counterclaim or setoff. Since his answer must be filed before the petition for joinder, any counterclaim will appear at the hearing on the petition and the trial judge will be bound either to strike off the unrelated counterclaim at defendant's request or refuse to grant the joinder. If the defendant later moves to amend his answer and

44. 320 Pa. 545, 182 Atl. 498 (1936).
47. Rule 2259 (a).
51. Rule 2259 (a).
include an unrelated counterclaim, the trial judge should refuse to grant it or strike it from the record.\(^{52}\)

The basis of the modification is that where the defendant has joined the additional party on the theory that all the issues arising from the single factual situation should be tried simultaneously, he should not be permitted to plead an unrelated counterclaim which would tend to confusion and defeat the proper determination of those issues.\(^{53}\)

The inability to plead the unrelated setoff or counterclaim should in no way prejudice the original defendant since he still may file a separate suit.\(^{54}\) No substantive rights are modified, and practically the only difficulty which could arise would be in the case where the plaintiff was a non-resident. Here, if there is danger that service could not be secured to institute the separate action, a foreign attachment could be used by defendant, naming himself garnishee of the plaintiff's action against himself.\(^ {55}\)

In the case of the additional party, however, no justification for a denial of a complete right to counterclaim exists, save where he also has added an additional party. However, the new rules very properly limit the right to those parties who assert a claim against him.\(^ {56}\) As a result, it would seem that where the joinder is on the basis of sole liability to the plaintiff, he is not entitled to assert a counterclaim against the original defendant since it would be a strained construction of words of the limitation to hold that the original defendant was asserting a claim. Furthermore, the additional defendant will have no right to plead a setoff or counterclaim against the plaintiff where the plaintiff fails to file his supplementary statement of claim, as he must do to acquire any rights against the additional party.\(^ {57}\)

### III. PLEADING

Under the Sci Fa Acts, the additional party was frequently required to answer fully a writ filed by a defendant who had not yet answered the statement of claim. Where the additional party was joined on the ground of sole liability, and the allegation was that he, his agent or his instrumentality caused the injury by the act of negligence alleged by plaintiff, failure to file an affidavit of defense would be an admission of the identity, agency or ownership in the defendant, and the sci fa would be stricken off.\(^ {58}\) But this was the sole instance in the trespass cases where the defendant was required to file an answer at all, and even here, as in the assumpsit actions, the joinder could be made before the affidavit was filed.\(^ {59}\)

Obviously it was inequitable to require a complete answer by the additional party when the latter had no means of knowing what defense was to be made in the principal suit. To remedy this the new rules require that the defendant who seeks to join an additional party must first file

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52. See explanatory notes to Rule 2259 (a). The Federal Rules impose no limitation on the right to counterclaim. See 1 Moore, op. cit. supra note 1, at 734.

53. See explanatory notes to Rule 2259 (b).


56. Rule 2259 (b) and explanatory note. Where a counterclaim or set-off is asserted against the plaintiff, he is permitted to join additional parties. See Rules 2259 (c) and 2251.

57. See infra p. 206.


an affidavit of defense to the plaintiff's statement of claim in all suits.\textsuperscript{60} The defendant, seeking by the joinder to secure a full and fair adjudication of his rights and liabilities, cannot complain where he is required to protect the interest of the additional party by stating fully his position in the action. The objection that the rule requires a pleading heretofore unnecessary in most trespass cases is baseless in view of this, especially since the rule that no answer need be filed is an anomalous one.\textsuperscript{61}

The second change is in the pleadings in the defendant-additional defendant suit. As the practice was defined in the \textit{Vinnacombe} case the \textit{sci fa} writ, the defendant's "statement of claim", was unsworn.\textsuperscript{62} However, a sworn answer was required, with the result that in a trespass case quite frequently the additional party was filing a sworn answer to the claim of a party who had filed no sworn pleading.

To remedy this Rule 2252 (b) requires filing of a sworn petition containing substantially the allegations found in the \textit{præcipiæ} and \textit{sci fa} of the former practice.\textsuperscript{63} This petition, if joinder is permitted, is served on the additional party together with the order of the court and stands as the defendant's statement of claim.

As a pleading, this petition must state a cause of action against the additional party, and if it fails to do so will be stricken from the record.\textsuperscript{64}

Where the allegation is that the additional party is solely liable, the petition may either allege that the liability is based on the act of negligence asserted by the plaintiff as the cause of his injury,\textsuperscript{65} or on a different act of negligence which the defendant claims caused the injury.\textsuperscript{66} Of course, where sole liability is alleged as a ground for joinder the additional

\textsuperscript{60} Rule 2252 (a): "After the defendant in an action has filed an answer in the manner and form required of a defendant in an action of assumpsit he may petition the court for leave to join as an additional defendant . . . ."

\textsuperscript{61} Amram, \textit{New Procedural Rules}, supra note 48, at (23).


\textsuperscript{63} "The petition shall contain a statement framed in the manner and form required for the initial pleading of a plaintiff in an action at law, setting forth the residence and citizenship of the proposed additional defendant, the facts relied on to establish his liability and the reasons for his joinder in the action." Rule 2252 (b). Cf. Richardson v. Charleroi, 10 Pa. D. & C. 248 (1933).

Rule 2253 provides that "No petition shall be granted if filed by a defendant later than sixty days after the service upon him of the initial pleading of the plaintiff or any amendment thereof, if he is an original defendant, or of the petition and order by which he was brought upon the record or any amendment thereof, if he is an additional defendant, unless the court shall upon application made prior to the expiration of the sixty days' period extend the time for filing such petition upon cause shown." See Carroll v. Quaker City Cabs, 308 Pa. 345, 162 Atl. 258 (1932), which approved a local rule similar to this one. It would seem the amendment, to extend the period, would have to be substantial. See Blessing v. Philadelphia R. Tr. Co., 325 Pa. 12, 168 Atl. 572 (1936); Williams v. Chevrolet Motor Co., 31 Luz. L. Rep. 237 (Pa. 1934). But cf. Richter v. Scranton, 321 Pa. 430, 184 Atl. 252 (1936). See Megargee v. Philadelphia, 16 Pa. D. & C. 598 (1932), on the question of extending the time for filing for cause shown. Cf. Snyder v. Lebo, 23 Pa. D. & C. 465 (1935).


defendant will be stricken from the record unless a supplementary statement of claim is filed by the plaintiff.\(^{67}\)

Proof of a prima facie case of sole liability is necessary to carry the issue to the jury, but when such a case is made out, a finding that the additional defendants were jointly or jointly and severally liable will not be upset. To do so would defeat the equitable purpose of securing a complete adjudication of all issues arising from a single factual situation in one action. In such a case, judgment will be rendered on the verdict as found, and the additional party will be held liable.\(^{68}\)

Closely connected with this is the problem of duplicitous pleading. In \textit{Bowers v. Gladstein}\(^{69}\) the Supreme Court by way of dictum said that a writ of \textit{sci fa} alleging both sole liability for the cause of action declared on and joint and several liability with the defendant therefor was duplicitous. However, a later Superior Court case held that an alternative pleading would be proper where intended to meet a situation created by difference in the claim of the plaintiff against the defendants and the issue between the defendants.\(^{70}\) Certainly such a situation can frequently arise, and to limit the defendant to one ground for liability when he files his petition forces him to make an election even though the situation he will have to meet is unpredictable. For instance, in \textit{Majewski v. Lempka},\(^{71}\) defendant alleged sole liability in his writ of \textit{sci fa}. He proved the prima facie case of sole liability necessary to get the case to the jury and therefore the verdict that the additional defendant was jointly and severally liable with him could be sustained. However, if no prima facie case had been made out, the verdict would not have been proper,\(^{72}\) and the defendant would be forced to sue for contribution in a separate action over. Such a situation could not arise if the pleading in the alternative were permitted and for that reason the Supreme Court should reconsider its dictum in the \textit{Bowers} case.\(^{73}\)

One of the principal causes of delay in the adjudication of the plaintiff's rights under the prior practice lay in the additional defendant's power to attack the writ of \textit{sci fa}. Four dilatory steps were permitted him: an attack on the jurisdiction of the court over the person or subject matter,\(^{74}\) a motion to strike for defects of form, a motion for a more specific writ, and a statutory demurrer.\(^{75}\) The time allowed for answering these moves as well as that ensuing before argument and decision on a question in which the plaintiff had no interest served unduly to delay him.\(^{76}\) To shorten this period, Rule 2256 requires that all defects of form and substance be objected to specifically in a single motion to dismiss which must be filed within twenty days after service.\(^{77}\) If the amalgamation proves practical, it will serve to eliminate a major portion of the delay existing

\(^{67}\) See explanatory notes to Rule 2258.


\(^{69}\) 317 Pa. 539, 178 Atl. 44 (1935).


\(^{71}\) 321 Pa. 369, 183 Atl. 777 (1936).

\(^{72}\) Yellow Cab Co. of Phila. v. Rodgers, 71 F. (2d) 720 (C. C. A. 3d, 1934).


\(^{74}\) See Pa. STAT. ANN. (Purdon, 1931) tit. 12, §§ 672-4.


\(^{76}\) See Amram, \textit{Changes in Practice Resulting From the New Supreme Court Rules}, note 19 \textit{supra}, at 13.

\(^{77}\) If the motion is overruled, the additional defendant has twenty days in which to answer on the merits. See Rule 2256 (c).
under the old procedure since the additional defendant will be limited to two dilatory steps, the attack on the jurisdiction as at present and the motion to dismiss. However, difficulty may be encountered in cases where the petition is not sufficiently specific to enable the additional party to make his attack on the substance in the same motion. If the experience of practice shows this to be true, the motion to dismiss may have to be limited so that defects in substance can be raised by a separate attack.

The answer to the petition for joinder must be filed within twenty days after service or where service has been by deputization within thirty days. Within five days of such filing, copies of the answer must be served on all other parties of record.

While the form of the additional defendant’s answer remains unchanged, the effect of an insufficient answer is greatly modified. Under the rule of the *Vinnacombe* case, a judgment for want of a sufficient affidavit of defense could be entered although the extent or even the existence of liability was as yet undetermined. Such a judgment was of uncertain effect; whether it could operate as a lien on the additional defendant’s real estate or attachment could be issued on it to hold property as security against recovery by the plaintiff was never decided. Rule 2257 (c) ends this anomalous practice by providing that all material facts insufficiently denied are conclusively admitted as between the additional defendant and the party bringing him on record. Such a rule achieves the purpose of the judgment by default since it is a penalty for failure to answer, but subjects the additional party to no danger of liens or attachments on his property while his liability is yet uncertain.

The supplementary statement of claim required of the plaintiff if he desires to enforce against the additional defendant any rights arising out of the transaction which led to the principal cause of action is a complete innovation. Under the *Sci Fa* Acts, the plaintiff could get judgment against the additional defendant without pleadings. The purpose of the change was to secure full sets of pleadings on every right being litigated with a consequent clarification of issues and simplification of the trial.

However, merely requiring that plaintiff file the supplementary statement would be to injure him. Frequently the sole source of the facts alleged to establish the liability of the additional party will be the pleadings between that party and the defendant and just as frequently these will be inconsistent with the facts alleged in the original statement of claim. Plaintiff would be faced with a dilemma; if he fails to file against the additional party he loses his right against him, while if he does file, his pleading will in many instances be inconsistent with the original statement of

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78. Rule 2252 (c); see note 77 supra.
79. Rule 2257 (b).
80. Rule 2257 (a): “The answer shall be framed in the same manner and form as is required for the pleading of a defendant in an action of assumpsit.”
81. See Amram, *Changes in Practice Resulting From the New Supreme Court Rules*, cited note 50 supra, at 13.
83. Rule 2252 (c) abolishes the judgment for want of an appearance which could be entered under the former practice. The order of joinder requires only an answer, but there is no penalty imposed for filing an appearance.
84. See PA. STAT. ANN. (Purdon, Supp. 1938) tit. 12, § 141.
85. The clear delineation of the issues in the three distinct suits involved in this situation will facilitate exercise of the power of severance under Rule 213, and the Pre-Trial Conference discussed supra, at p. 196.
claim. The solution offered by Rule 2258 (a) allows the plaintiff to plead upon information without prejudice to his right to prove the allegations in the original statement. It is justified by the fact that the defendant, who sought the joinder, should not be able to force the plaintiff to elect a remedy as against himself and a third person whom the plaintiff did not sue. The propriety of complete adjudication in one justifies the requirement that the plaintiff proceed against the additional defendant in the same action if he is to recover at all from him, but the defendant’s power to join granted to secure that adjudication cannot be permitted to work an injustice on the plaintiff.

IV. Process

In the method provided for obtaining jurisdiction over the additional defendant, the new rules are a complete innovation. In place of the old writ of *sci fo* with its formal return date, there is substituted an order of the court joining the additional party.\(^8^6\) The life of this order is thirty days, but this can be extended or the order reinstated on cause shown, provided the motion is filed within the sixty day period prescribed for filing the petition for joinder.\(^8^7\) As the rule is worded adding the time necessary for filing a petition, fixing a hearing and entering the order to the thirty day effective period, it is obvious that not more than one extension could be granted. Furthermore, when the petition is filed during an extension of the original period, the order becomes ineffective at the expiration of thirty days without possibility of reinstatement. Though the last may seem arbitrary when the defendant could show sufficient grounds for an extension of the original filing period, the plaintiff will already have been delayed more than one hundred days and his interest in securing a prompt adjudication of his claim can no longer be set aside in favor of the defendant’s interest in securing joinder of the additional party. The rule balances the interests of the two parties, preventing undue delay to the plaintiff yet giving the defendant a reasonable opportunity to secure the joinder through prompt action.

More important and more interesting is the extension of the defendant’s right of service. Although the new rules abolish the limitation laid down in *Heaney v. Mauch Chunk*,\(^8^8\) which held that the 1933 Amendment to the *Sci Fa* Act did not give any right of extra-county service where the action did not arise under the Vehicle Code, it appears that they also restrict the doctrine of *Gossard v. Gossard*,\(^8^9\) which held that in actions arising under the Vehicle Code, the defendant could have deputized service even where the action was instituted in a different county from that in which the cause of action arose. Rule 2254 provides that “... If the action was instituted in the county where the cause of action arose, or where the transaction occurred out of which the cause of action arose, the defendant shall also have the right of service in any other county ...” The rule represents a new policy with regard to service heretofore only recognized in Pennsylvania in cases arising out of automobile accidents. The theory is that where the defendant has participated in a liability-creating transaction, he should be subject to suit in the county where the transaction took place or where the cause of action arose. It is only proper that he be compelled to defend the suit at the place where the right came into being. Under this theory, defendant’s right to extraterritorial service is

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86. Rule 2252 (c) and explanatory notes thereto.
87. Rule 2255.