**Louisiana Law Review**

Volume 1 | Number 4
*May 1939*

# Federal Rules of Civil Procedure - Diversity of Citizenship - Third Party Practice

R. K.

dom of activity by the present practices[21] of the motion picture industry. These will continue unless halted by state or federal legislation. The present federal anti-trust laws have been ineffectual to date due to the difficulty of obtaining sufficient proof of a conspiracy in restraint of trade.[22] State legislation as to the distribution of films must run the gauntlet of invalidity on the ground of unduly burdening interstate commerce, for distribution clearly involves interstate commerce.[23] Although the North Dakota statute herein involves an intrastate activity, it does bear some relation to interstate commerce. Whether it unduly burdens interstate commerce will be decided by the Supreme Court of the United States in the near future.[24] The Supreme Court may possibly find—and properly so—that exhibition, although among the activities which are themselves intrastate commerce, has a direct and important relation to interstate commerce and is susceptible of both state and federal regulation.

*F. S.*

---

FEDERAL RULES OF CIVIL PROCEDURE—DIVERSITY OF CITIZENSHIP—THIRD PARTY PRACTICE—The plaintiff, a resident of Pennsylvania, brought an action in a Pennsylvania court against McGwinn, a nonresident, to recover for personal injuries sustained in an automobile collision. On the petition of this defendant, the case was removed into the federal court which thereupon

21. Unless affiliated with one of these companies or an independent circuit, the independent exhibitor is (1) faced with inferior bargaining power, (2) harassed by "block" booking contracts which force him to take poor pictures along with good ones, (3) subjected to clearance schedules which prevent him from obtaining the best pictures for a specified time after the first run, and (4) discriminated against in obtaining contracts. See Comment (1938) 33 Ill. L. Rev. 424; Note (1936) 36 Col. L. Rev. 635.

22. The courts have laid great emphasis on the determination of whether or not the distributors have acted in concert or as a result of an understanding among themselves in the adoption of a particular type of contract provisions. Very little consideration has as yet been given to what provisions in the contract are reasonable and why they indirectly affect but do not burden interstate commerce. Cf. Paramount Famous-Lasky Corp. v. United States, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930); United States v. First National Pictures, 282 U.S. 44, 51 S.Ct. 45, 75 L.Ed. 151 (1930); Federal Trade Comm. v. Paramount Famous-Lasky Corp., 57 F. (2d) 152 (C.C.A. 2nd, 1932).

23. Binderup v. Pathe Exchange, 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308 (1923); Majestic Theatre Co. v. United Artists Corp., 43 F. (2d) 991 (D.C. Conn. 1930).

24. There is now pending in the federal courts an action filed by the United States Department of Justice against the eight major producers and distributors for violation of the Sherman Act, seeking to compel them to relinquish their ownership or interests in theaters. United States v. Paramount Pictures (Equity 87-273, S.D. N.Y. 1938).

granted his motion under Rule 14a[1] of the New Rules of Civil Procedure to make Siegel a third party defendant. This third party was a resident of Pennsylvania and had been the driver of the car in which the plaintiff was riding at the time of the collision. On motion to quash on the ground that the plaintiff and Siegel were citizens of the same state, the court *held* that it had jurisdiction since the third party claim was merely ancillary to the original action.[2] *Bossard v. McGwinn,* 27 F. Supp. 412 (W.D. Pa. 1939).

Rule 14a is broad in its scope and if applied liberally is far reaching in its application.[3] The purpose of its adoption seems to have been to facilitate the trial of cases and to provide a means whereby two or more suits might be tried and settled at one and the same time.[4] Several states have impleader statutes, the most notable of which are those of Wisconsin, Pennsylvania, and New York.[5] Somewhat similar but much narrower in scope is Louisiana's method of vouching in warranty.[6] The New Rule 14a

1. Rule 14a, Federal Rules of Civil Procedure: "*When Defendant May Bring in Third Party.* Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant."

2. A similar conclusion was recently reached by the Federal District Court for the Southern District of West Virginia: Crum v. Appalachian Electric Power Co., 27 F. Supp. 138 (S.D. W.Va. 1939).

The question here presented is entirely new, never having been passed upon by the Supreme Court.

3. Illsen, The Preliminary Draft of Federal Rules of Civil Procedure (1937) 11 St. John's L. Rev. 212, 228: "Whether an impleader will be granted in negligence actions where there are joint tort feasors is a matter of speculation. The Proposed Rule is certainly broad enough to permit it."

4. Crim v. Lumbermen's Mutual Casualty Co., 26 F. Supp. 715 (D.C. D.C. 1939). See Bennett, Bringing in Third Parties by the Defendant (1935) 19 Minn. L. Rev. 163.

5. 1 Moore's Federal Practice (1938) 735.

6. Arts. 378-388, La. Code of Practice of 1870. Cf. Flory and McMahon, The New Federal Rules and Louisiana Practice (1938) 1 LOUISIANA LAW REVIEW 45, 58.

is patterned upon Admiralty Rule 56,[7] which seems to be less limited than any of the foregoing.

There was no right of contribution between joint tortfeasors at common law.[8] An injured party could sue either or both, and neither had any right against the other,[9] the underlying theory being to deny a party the right to invoke the law to seek indemnity for his own violation. Since the third party defendant is a joint tortfeasor he, as well as the third party plaintiff, may be found liable[10] and may have to satisfy the whole judgment.[11]

Had the plaintiff originally instituted suit against the defendant McGwinn and third party defendant Siegel in the same suit as joint tortfeasors, the federal court would have been deprived of jurisdiction;[12] but through the effectual application of Rule 14a, the third party defendant was called in and the third party claim was treated as merely ancillary and incidental to the principal action. The holding that the third party defendant was not an indispensable party seems to be well within the general rule that when the jurisdiction of the federal court has once attached it is not subject to divestiture by subsequent events.[13]

The present case is somewhat analogous to *Phelps v. Oaks*,[14] where a citizen of Pennslyvania brought suit in a Missouri court to recover property from a citizen of Missouri. The case was removed to the federal court and the defendant, a tenant, moved to bring in the real owners of the property who were residents of Pennsylvania, as allowed by state statute. A motion to dismiss

---

7. Chesnut, Analysis of Proposed New Federal Rules of Civil Procedure (1936) 22 A.B.A.J. 533, 536.

8. Merryweather v. Nixan, 8 T.R. 186, 101 Eng. Rep. 1337 (1799).

9. Union Stock Yards Co. v. Chicago, B. & Q. R. Co., 196 U.S. 217, 25 S.Ct. 226, 49 L.Ed. 453, 2 Ann. Cas. 525 (1905); Thalheim v. Suhren, 137 So. 874 (La. App. 1931); Manowitz v. Kanov, 107 N.J. Law 523, 154 Atl. 326, 75 A.L.R. 1464 (1931); Royal Indemnity Co. v. Becker, 122 Ohio St. 582, 173 N.E. 194, 75 A.L.R. 1481 (1930); City of Tacoma v. Bonnell, 65 Wash. 505, 118 Pac. 642, Ann. Cas. 1913B 934, 36 L.R.A. (N.S.) 582 (1911).

10. The Beaconsfield, 158 U.S. 303, 15 S.Ct. 860, 39 L.Ed. 993 (1895); Wrabek v. Suchomel, 145 Minn. 468, 177 N.W. 764 (1920); Nashville, C. & St. L. Ry. v. Jones, 100 Tenn. 512, 45 S.W. 631 (1898). See also Harper, Torts (1933) 676, § 302.

11. Merryweather v. Nixan, 8 T.R. 186, 101 Eng. Rep. 1337 (1799). See Note (1938) 1 LOUISIANA LAW REVIEW 235, 238. Cf. Note (1939) 1 LOUISIANA LAW REVIEW 634.

12. Carpenter v. Carden, 294 Fed. 515 (C.C.A. 2nd, 1923).

13. Clarke v. Matthewson, 37 U.S. 164, 9 L.Ed. 1041 (1838); Phelps v. Oaks, 117 U.S. 236, 6 S.Ct. 714, 29 L.Ed. 888 (1886); Cohen v. Maryland Casualty Co. of Baltimore, 4 F. (2d) 564 (1925); Simkins, Federal Practice (3 ed. 1938) 337, § 384.

14. 117 U.S. 236, 6 S.Ct. 714, 29 L.Ed. 888 (1886).

the case because the plaintiff and one of the defendants were both citizens of Pennsylvania was denied.[15]

If the instant decision is permitted to stand, it may prove a means of evading the *effect* of section 24 of the Judicial Code of the United States[16] whenever the plaintiff and one of the defendants are citizens of the same state.[17] The result would be an increase of litigation in the federal courts in cases in which only one of two or more joint tortfeasors have been sued. On the other hand, if Rule 14a is given a narrow construction it will frequently be absolutely useless.[18]

*R. K.*

---

INSURANCE—CONSTRUCTION OF "VACANT OR UNOCCUPIED" CLAUSE IN FIRE POLICY—PROOF REQUIRED TO INVOKE LOUISIANA ACT 222 OF 1928—The plaintiff sued the defendant insurance company to recover for the destruction by fire of his dwelling house and its contents. The policy sued upon contained the provision that, if the premises were vacant for a period exceeding 30 days, or unoccupied for a period exceeding 60 days at any one time, the policy would be void unless a special form of permission therefor was attached. Payment was resisted on the ground that the plaintiff had not lived upon the insured property for a period of 112 days preceding and up to the time of the fire. Expert testimony to the effect that an unoccupied property increased the physical hazard was introduced.[1] *Held,* that the insured's failure to

15. The same rule was later followed in Cohens v. Maryland Casualty Co. of Baltimore, 4 F. (2d) 564 (1925), where the plaintiff, a resident of the Eastern District of South Carolina, brought an action of assault against the Maryland Casualty Company, a Maryland corporation that was surety on a sheriff's bond. This bond provided for indemnity of the Casualty Company by the sheriff if it was subjected to liability. The sheriff, a citizen of the Western District of South Carolina, was permitted to join the Casualty Company in defending the suit. The court held that since the jurisdiction of the court had once attached it could not be defeated by an extraneous agreement for indemnity between the Casualty Company and the sheriff.

16. 28 U.S.C.A. § 41 (1926).

17. Under § 24 of the U.S. Judicial Code, 28 U.S.C.A. § 41 (1926), it is provided: "The district courts shall have original jurisdiction as follows: First . . . Of all suits of a civil nature, at common law or in equity . . . where the matter in controversy . . . is between citizens of different States. . . ."

18. Crum v. Appalachian Electric Power Co., 27 F. Supp. 138, 139 (1939).

1. Proof of the increased moral or physical hazard is necessary under La. Act 222 of 1928 [Dart's Stats. (1932) § 4191], providing that a policy of fire insurance cannot be avoided for "breach of any representation, warranty or condition contained in the said policy, or in the application therefor" unless such breach exists at the time of the loss and increases either