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## THE PENNSYLVANIA PRACTICE ACT OF 1915.

### I.

The Practice Act of 1915<sup>1</sup> relates exclusively to pleading and to motions in relation to pleadings. It might therefore properly have been called the Pleading Act of 1915, and it is the last of a long series of steps by which through Acts of Assembly and rules of the courts of Common Pleas, Pennsylvania has abandoned the common law system of pleading in favor of a modern and simplified form.

The desire for simplicity in pleading may be said to be congenital to the Commonwealth of Pennsylvania for even before the establishment of the colony, William Penn dreamed of a system of laws so plain and pleadings so simple that every person could plead his own cause, and it was so provided in his laws agreed upon in England and embodied in the Act of March 10, 1683.<sup>2</sup> One of the first acts, that of October 28, 1701, entitled "An Act for establishing Courts of Judicature in this Province and counties annexed" was repealed by the Queen in Council on

<sup>1</sup> Act of May 14, 1915, P. L. 483. In Sec. 24 it is provided that this act may be cited as "Practice Act 1915."

<sup>2</sup> "The Courts of Pennsylvania in the 18th Century, Prior to the Revolution," by William H. Loyd, 56 UNIV. OF PENNA. LAW REVIEW, p. 46. See also "The Courts of Pennsylvania in the Seventeenth Century," by Lawrence Lewis, Jr., Report of Penna. Bar Ass'n, 1895, pp. 362-363.

February 7, 1705, one of the objections being a clause which directed that the practice, while following that of the Common Pleas of England, should keep to plainness and verity and avoid "all fictions and colour in pleadings."<sup>3</sup> Although looseness in pleading was characteristic of the very early procedure, due probably to lack of knowledge of English precedents and lack of trained lawyers in the colony as well as to the comparative simplicity of the legal problems that were presented for adjudication, with the change in these conditions a more refined system of pleading based on English models came into use.<sup>4</sup>

After the Revolution, and under the influence of the principles of the French Revolution, a deep seated antagonism to English precedents manifested itself among the more radical elements among the citizens and culminated in the passage of the Act of March 19, 1810, P. L. 136, which provided "that it should not be lawful to read or quote in any court of this Commonwealth any British precedent or adjudication which had been given or made subsequent to the 4th of July, 1776, except those relating to marine law or the law of nations."<sup>5</sup>

<sup>3</sup> 2 Statutes at Large, 148 and 440, and see Loyd, 56 UNIV. OF PENNA. L. REV., p. 29, *supra*, note 2.

<sup>4</sup> Loyd, p. 47, *supra*, note 2. The course of practice in the County Courts, and particularly in those of Chester, Bucks, and Philadelphia Counties, was much more regular than has been generally supposed. Although the justices were never men of any regular legal training, they were doubtless familiar by form books or from hearsay with the ordinary mode of conducting legal proceedings, and at any rate were invariably solicitous to maintain the dignity and propriety of their respective courts. See Lawrence Lewis, Jr., in Report of Penna. Bar Ass'n, 1895, p. 361, *supra*, note 2. The increase of population, business, and commerce soon led to difficulties in the administration of justice which required for their unravelling a more artificial course of procedure and a more thoroughly trained bench and bar. The dictates of natural justice gave way to the authority of well-considered precedents, the science of special pleading by insensible degrees obtained a foothold in the legal practice of the Province, and at length the sound of "oyers" and "imparlances" became almost as familiar to the ears of the Pennsylvania practitioner as to those of his bewigged and begowned brother in Westminster Hall. The days of primitive simplicity had been left behind and forever. See Lewis *Ibid.*, p. 402.

<sup>5</sup> On this and other matters relating to the courts of Pennsylvania from the earliest times to the end of the first quarter of the 19th century, see the articles of Professor William H. Loyd and Lawrence Lewis, Esq., above referred to and also an article by Professor Loyd entitled "The Courts From the Revolution to the Revision of the Civil Code," 56 UNIV. OF PENNA. LAW REVIEW, 88, and Professor Loyd's work on "Early Courts of Pennsylvania," containing the substance of the above two articles and additional matter.

It was probably under the influence of this radical sentiment that the bar of Pennsylvania first departed from the English common law system of pleading, and on September 11, 1795, by an agreement signed by all the attorneys practicing in the Supreme Court, except two, established a practice which is the parent of the Pennsylvania affidavit of defense law and, in a certain sense, of the present Practice Act of 1915. Thirty-eight attorneys signed the agreement<sup>6</sup> which provided in substance that in all actions in the Supreme Court either by original process or by removal from any inferior court, the defendant's attorney should confess judgment to the plaintiff at the third court unless the defendant or some person for him or her should make an affidavit at or before the second term that "to the best of his knowledge and belief there is a just defense in whole or in part in the same cause." If the defense were to part only, then judgment should be confessed for as much as should be acknowledged to be due to the plaintiff, provided the plaintiff's attorney would accept such confession of judgment in full satisfaction of his demand.<sup>7</sup>

In 1799, after full experience of the effect of this practice thus instituted by agreement of the Bar, the Supreme Court adopted a rule embodying the provisions of this agreement, making the practice compulsory for the Circuit Court which was then held by the Justices of the Supreme Court. The Common Pleas of Philadelphia in 1809 and the District Court in 1812 adopted similar rules.<sup>8</sup> While this practice resulted in terminating a number of suits, two classes of cases were obviously withdrawn from its operation, *viz.*, those in which a supposed defense existed, and those in which the defendant, who would have hesitated to swear falsely as to particular facts, felt no hesitation in making the vague and indefinite affidavit required by the rule. The need for improvement in the practice to meet

<sup>6</sup> See Appearance Docket of the Supreme Court for September Term, 1795, pp. 628-29.

<sup>7</sup> *Vanatta v. Anderson*, 3 Binney 417-423 (1811). See also Gustav A. Endlich, "The Law of Affidavits of Defense in Penna.," 1884, pp. 1, *et seq.*

<sup>8</sup> 1 Troubat & Haly's Practice (5th Ed.), p. 219.

this difficulty at length found expression in the Act of 1835<sup>9</sup> which, although applying only to the District Court of Philadelphia, became the model on which the later special Acts of Assembly for different counties, and rules of court were formulated,<sup>10</sup> and the old rules of court, which, in the language of Judge Brackenridge<sup>11</sup> rendered the making of the affidavit of defense "embarrassing to a tender, and ensnaring to a hardy conscience" were improved by the legislative requirement that the affidavit of defense must set forth the nature and character of the defense, giving the facts upon which the defense is based, and leaving it to the court to determine whether or not in law they constituted a legal and proper defense.<sup>12</sup> Although the practice originally laid down in the Act of 1835 was extended by special Acts of Assembly and by rules of court to nearly all of the counties of Pennsylvania,<sup>13</sup> the plaint of Chief Justice Black<sup>14</sup> "that the only regret of those who are well informed on the subject is that it is not universally adopted in all the Courts of the State" was not finally answered until the enactment of the Procedure Act of 1887.<sup>15</sup>

In addition to the affidavit of defense system thus originated by agreement of counsel in 1795, another change in pleading was made at an early date which ultimately resulted in the abolition of the common law declaration and the substitution of the modern statement of claim. By the Act of 1806,<sup>16</sup> the object of which was to dispense with form so that every man might be

<sup>9</sup> Act of March 28, 1835, § 2, P. L. 89.

<sup>10</sup> Endlich, p. 4, *supra*, note 7.

<sup>11</sup> *Vanatta v. Anderson*, p. 425, *supra*, note 7.

<sup>12</sup> This Act of Assembly was extended to the Courts of Common Pleas of Philadelphia by the Act of April 14, 1846, P. L. 328, and to all of the Courts of Common Pleas of the Commonwealth by the Act of April 3, 1861, § 8, P. L. 307. The latter act, however, was repealed by Act of March 8, 1852, P. L. 121.

<sup>13</sup> For full detail as to the special statutes and rules of court under which the affidavit of defense system was administered prior to the Act of 1887, see Endlich on Affidavits of Defense, Chap. 2, *supra*, note 7.

<sup>14</sup> *Lord v. Ocean Bank*, 20 Pa. 384 (1853).

<sup>15</sup> Act of May 25, 1887, P. L. 271.

<sup>16</sup> Act of March 21, 1806, § 5, 4 Sm. L. 328.

his own lawyer,<sup>17</sup> it was provided that in all cases for the recovery of any debt founded on a verbal promise, book account, note, bond, penal or single bill or all or any of them, that is to say a specific class of debts, simple in their character, plain in the evidence to prove them and involving ordinarily nothing more than the right to money,<sup>18</sup> it should be the duty of the plaintiff, either by himself, his agent, or attorney, to file in the office of the prothonotary a statement of his, her, or their demand on or before the third day of the term to which the process issued is returnable, particularly specifying the date of the promise, *etc.*, on which the demand is founded and the whole amount that he, she, or they believe is justly due from the defendant.<sup>19</sup>

To this statement of the plaintiff, it became the duty of the defendant, at least twenty days before the next succeeding term to which the process issued was returnable, similarly to file a statement of his, her, or their account, if any, against the plaintiff's demand, and particularly specifying what the defendant believed to be justly due to the plaintiff.<sup>20</sup> After the statement of defense was filed, the parties had to appear at the time fixed in the act before the court. If the plaintiff failed to appear, nonsuit was entered; if the defendant failed to appear, and make defense, judgment was given by default for the sum which appeared to be due.

When, under the Procedure Act of 1887 the substitute for the common law declaration was defined, it was provided that it should consist of a concise statement of the plaintiff's demand as provided by the fifth section of the Act of the 21st day of

<sup>17</sup> *Per* Tilghman, C. J., in *Bailey v. Bailey*, 14 S. & R. 195-199 (1826).

<sup>18</sup> *Per* Sergeant, J., in *Lomis v. Ruetter*, 9 Watts, 516-521 (1840).

<sup>19</sup> The statement under this act was not confined to any particular form, *Purviance v. Dryden*, 3 S. & R. 402 (1817), and as the object of the act was to enable suitors to conduct their cases without the intervention of counsel, the statement was not required to be prepared with the same precision of averment as a declaration. *Boyd v. Gordon*, 6 S. & R. 53 (1820).

<sup>20</sup> The forms of plaintiff's and defendant's statements under this act are given in *Smith's Forms of Procedure*, 1872, pp. 587-588. When the statement was filed by the plaintiff, it was not obligatory on the defendant to put in a counter-statement within the meaning of the act, and if he pleaded technically to it as to a declaration, this was held sufficient. 1 *Troubat & Haly's Practice* (5th Ed.), p. 214, § 392.

March, 1806, and that in the action of assumpsit this statement should be accompanied by copies of all notes, contracts, and book entries, upon which the plaintiff's claim is founded. The latter provision was taken from the affidavit of defence act of 1835. Under the Act of 1806, a statement of the plaintiff's claim without a copy of the instrument upon which the claim was founded, was sufficient. Under the Act of 1835 a copy of the instrument on which the plaintiff's claim was founded without an accompanying declaration or statement was sufficient to entitle the plaintiff to judgment if no affidavit of defense was filed. In the Act of 1887 the two provisions were blended and both a statement of claim and a copy of the instrument upon which the claim was founded, were required.<sup>21</sup>

The Act of 1887 was bitterly attacked both before and after its passage notwithstanding the fact that when historically considered and in the light of the existing practice under the special statutes and local rules of court, there was practically nothing new in it on the subject of pleading. But notwithstanding the criticisms of the act, notably those of the late Chief Justice Mitchell, the Bar of Pennsylvania is convinced of the advantage of the modern system of pleading which requires statements of claim and defense in accordance with the facts rather than technical common law pleadings which gave little information and were based largely on legal fiction.<sup>22</sup>

After several years of experience under the Act of 1887 had demonstrated that much of the adverse criticism of the act was due largely to fear of the unknown and that in the main the act had justified itself, attempts were made to further improve the

<sup>21</sup>Under some of the special Acts of Assembly and rules of court a statement was also required in addition to the copy of the instrument for which the affidavit of defense could be required, so that the practice of the Act of 1887 was no doubt suggested by the practice existing in many of the counties of the state in which the provisions of the two acts of 1806 and 1835 had been blended.

<sup>22</sup>The Bar of Pennsylvania can endorse the conservative statement made by the late Judge Charles H. Noyes in speaking of the abolition of the old actions and the substitution of the statutory actions of assumpsit and trespass that "on the whole we have not suffered any loss and even the practical abolition of pleadings has caused surprisingly little inconvenience." See address delivered before the Warren County Bar Association on December 12, 1891, entitled "Procedure in Pennsylvania." 49 Leg. Intel. 135.

procedure.<sup>23</sup> As late as 1895 General Beaver who, as governor, had signed the Procedure Act of 1887 and who subsequently became one of the Justices of the Superior Court of Pennsylvania,<sup>24</sup> said, "Although I signed the Procedure Act of 1887 I did so with a great deal of reluctance. I rather like the old pleading",<sup>25</sup> a naive statement indicating the real basis for much of the opposition to procedural reform. The average lawyer has neither the time nor the inclination to study problems of law reform. He is for the most part indifferent to efforts made by his more active brethren at the bar and if a proposed reform in any way threatens to interfere with that which has become familiar to him through long usage, he may be counted on for vigorous opposition. Like General Beaver "he rather likes the old pleading" and as any change will require him not only to study new law but to readjust himself to general changes which such a law will introduce, he will be found to come forward with the well worn but still vigorous argument that as the present practice has been followed in the courts of this state since the foundation of the Commonwealth, any changes will be sure to be followed by great disaster to the public and the bar. An examination of the records of the Pennsylvania Bar Association

<sup>23</sup> Since 1887, and under the influence of the reforming spirit then aroused, a number of acts relating to procedural reform have been passed. Among them may be mentioned the Evidence Act of May 23, 1887, P. L. 158; the Stenographers Act of May 24, 1887, P. L. 199; the Procedure Act of May 25, 1887, P. L. 271; the Escheats Act of May 2, 1889, P. L. 66; the Appeals Acts of May 9, 1889, P. L. 158, May 19, 1897, P. L. 67, and May 5, 1899, P. L. 248; the Mandamus Act of June 8, 1893, P. L. 346; the Superior Court Act of June 24, 1895, P. L. 212; the Sheriff's Interpleader Act of May 26, 1897, P. L. 95; the Replevin Act of April 19, 1901, P. L. 88; the Ejectment Acts of May 8, 1901, P. L. 142, April 16, 1903, P. L. 212, and June 7, 1915, P. L. 887; the Municipal Claims Act of June 4, 1901, P. L. 364 and 367; the Insolvency Act of June 4, 1901, P. L. 404; the Mechanics' Liens Act of June 4, 1901, P. L. 431; the Service of Process Act of July 9, 1901, P. L. 614; the Execution Acts of April 8, 1905, P. L. 122 and April 20, 1905, P. L. 239; the act of May 5, 1911, P. L. 198, establishing the Allegheny County Court; the act of May 11, 1911, P. L. 279 relating to exceptions and record; the act of July 12, 1913, P. L. 711, establishing the Municipal Court of Philadelphia; the act of June 11, 1915, P. L. 935 relating to tender of judgment or payment in matters sounding in tort; the act of June 5, 1915, P. L. 847 relating to commencement of proceedings in equity by summons.

<sup>24</sup> He served from the organization of the Court in 1895 to the time of his death in January, 1914.

<sup>25</sup> Report of Pennsylvania Bar Association 1895, p. 53.

will show that efforts in the direction of law reform, both in substantive law and procedure, are being constantly put forward by a very small but vigorous minority and carried, when carried at all, in the face of opposition which, as a rule, presents arguments but no reasons.<sup>26</sup>

Among the bills proposed for further extending the procedure under the Act of 1887 was one drawn by the Hon. John B. McPherson.<sup>27</sup> This bill was rather vigorously debated at the meeting of the Bar Association, in 1902, and again presented in the following year<sup>28</sup> but neither this act nor any other was passed by the Legislature. In 1912 an act was presented by the Committee on Law Reform of the Pennsylvania Bar Association<sup>29</sup> which was the subject of discussion and amendment in 1912, 1913 and 1914, and which finally became the present Practice Act of 1915.

In 1913 a Practice Act was introduced in the Legislature but failed of passage.<sup>30</sup> In the same year an important procedural reform was instituted in Philadelphia by the new rules of court adopted by the Court of Common Pleas for that county. These rules, in so far as they related to the pleadings and were not merely reenactments of older rules, were suggested by the English practice under the English Supreme Court rules of 1883.<sup>31</sup> The Practice Act of 1915 may properly be said to be compounded of provisions taken from the Procedure Act of 1887 and the rules of the Court of Common Pleas of Philadelphia county.

This cursory review of the progress of reform in pleading in Pennsylvania, points to four great landmarks: the agreement

<sup>26</sup> A pertinent illustration may be found in the Pennsylvania Bar Association Report of 1914, pp. 205-210.

<sup>27</sup> Then Judge of the District Court of the United States for the Eastern District of Pennsylvania, and now a member of the Circuit Court of Appeals for the Third Circuit, and formerly president Judge of the Court of Common Pleas of Dauphin County.

<sup>28</sup> Report of Pennsylvania Bar Association for 1902, pp. 117 to 121; 262 to 274; 277 to 294; Report for 1903, p. 66.

<sup>29</sup> See Report 1912, p. 69.

<sup>30</sup> House Bill 455.

<sup>31</sup> See Rules of Court of Common Pleas of Philadelphia County in effect March 3, 1913, relating to pleadings, being rules 41 to 71.



of attorneys in the Supreme Court in 1795, the Statement Act of 1806, the Affidavit of Defence Law in 1835, and the Procedure Act of 1887.

## II.

We shall now consider the Practice Act of 1915 in detail, examining its provisions in the light of the existing practice and noting the changes that it introduces.

### THE TITLE.

The title reads: "AN ACT relating to practice in the courts of common pleas in actions of assumpsit and trespass, except actions for libel and slander; prescribing the pleadings and procedure to be observed therein, and giving the courts power to enforce its provisions."<sup>32</sup>

The use of the word "practice" is misleading since the act relates entirely to the pleadings and to motions in relation to the pleadings. The word "procedure" in the second part of the title is likewise misleading since it, as the act shows, means merely procedure relating to pleadings. A more exact form of the title would have been, "An Act prescribing the pleadings in the Courts of Common Pleas in actions of assumpsit and trespass, except actions for libel and slander, and the procedure relating to such pleadings; and empowering the said courts to enforce its provisions." Strictly speaking practice is a branch of procedure—procedure including practice, pleading, and evidence. Sometimes "practice" is used as synonymous with "procedure" but never properly with "pleading". An act relating to "practice" would be one relating not merely to the pleadings in the actions of assumpsit and trespass but to pleadings in all actions and to all of the steps from the commencement of an action, through proceedings prior to trial, verdict, judgment, appeal, execution, and distribution by the sheriff. A Practice Act of this character is the New Jersey

<sup>32</sup> The act is divided by the following subheadings: The Pleadings Generally, §§ 2 to 8; Statement of Claim, §§ 9 to 11; Affidavit of Defense, §§ 12 and 13; Set-Off and Counter-claim, § 14; Plaintiff's Reply, §§ 15 and 16; Motions for Judgment, §§ 17 to 19; Proceedings in Lieu of Demurrer, § 20; General Provisions, §§ 21 to 25.

Practice Act of 1912, which covers many of these topics and authorizes the courts to adopt rules practically covering all of them.

#### SCOPE OF THE ACT.

SECTION I. "Be it enacted, &c., That from and after January first, one thousand nine hundred and sixteen, in actions of assumpsit and trespass, except actions for libel and slander, brought in any court of common pleas, the procedure shall be as herein provided."

The actions of assumpsit and trespass herein referred to are the actions as defined in the Procedure Act of 1887, assumpsit including debt, assumpsit, and covenant; and trespass including trespass, trover, and trespass on the case. Following the English,<sup>33</sup> Ontario,<sup>34</sup> and New Jersey<sup>35</sup> practice, the distinction in procedure between all actions *ex contractu* and *ex delicto* was obliterated in the original draft of the Practice Act as presented to the Pennsylvania Bar Association,<sup>36</sup> wherein it was provided that all of the above named actions should be called "actions" without further designation, but this suggestion was not adopted.<sup>37</sup>

<sup>33</sup> Under Order 1 (1875) and O. 1, R. 1 of the Rules of the Supreme Court (1883) it is provided that "all actions which, previously to the commencement of the Principal Act, were commenced by writ in the Superior Courts of Common Law at Westminster or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, and all suits which, previously to the commencement of the Principal Act, were commenced by Bill or information in the High Court of Chancery, or by a cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action."

<sup>34</sup> The Rules and Practice and Procedure of the Supreme Court of Ontario (in civil matters), 1913, provide for "actions," Rules 3 *b.* and 5; and proceedings commenced by "originating notices," Rule 10.

<sup>35</sup> The Practice Act (1912) of the State of New Jersey, § 3.

<sup>36</sup> Report of Pennsylvania Bar Association, 1912, p. 69, § 1.

<sup>37</sup> The concurrent suggestion to abolish writs of summons in such cases and commerce actions by filing a statement of claim in the prothonotary's office, and serve the same in the same manner as is now provided for the service of writs of summons by the act of July 9, 1901, P. L. 614, was likewise rejected. The attempt to unify this procedure was long ago made in the original Arnold bill which became the act of 1887 (44 Leg. Int. 70) and was more recently repeated in the Wilson bills of 1913 (House Bill 1789) and 1915 (House Bill 132).

The act is restricted to the pleadings in the Courts of Common Pleas and therefore will have no bearing on practice in the Municipal Court of Philadelphia, and the Allegheny County Court. Both of these courts have a procedure simpler and more flexible than that which was prescribed for the Courts of Common Pleas, and the success of their procedure no doubt also influenced the changes made by this act.<sup>38</sup>

#### EXCEPTION OF LIBEL AND SLANDER.

Although under the Act of 1887 there is no distinction so far as procedure is concerned between actions *ex delicto*, to wit, trespass, trover and case, yet the Practice Act of 1915 excepts from its provisions the actions of trespass for libel and slander and the procedure relating to these actions therefore remains the same as under the Act of 1887, which act in so far as it relates to actions *ex delicto* may now be taken to be the Procedure Act for the actions of trespass for slander and libel exclusively.

It is difficult to say why all possible defenses in actions for libel and slander could not have been made at least as well under an affidavit of defense as under the present practice of pleas of "not guilty" and "justification". Certainly the plaintiff would have had more knowledge of the defense that was going to be relied on at the trial. The English rules have a substantial equivalent to the affidavit of defense in the "plea" and "particulars" required in such actions.<sup>39</sup>

Why did the Legislature except the actions of slander and libel? The Bar Association did not so except them and it was not until the act was read for the second time in the House of Representatives that without any reasons the title was amended to exclude the actions of libel and slander.<sup>40</sup>

<sup>38</sup> The Municipal Court of Philadelphia was organized under Act of July 12, 1913, P. L. 711, and the Allegheny County Court under Act of May 5, 1911, P. L. 198. Perhaps the strongest of all the influences making for simplicity of procedure is the great success of the system in the Municipal Court of Chicago. But the influence of the simple and efficient procedure of the Pennsylvania Orphans' Court and of the Federal Bankruptcy Courts must not be overlooked.

<sup>39</sup> O. 19, R. 6, and see Annual Practice 1914, pp. 325, 326, 329, and 342.

<sup>40</sup> See House Bill 962, session of 1915, and Legislative Journal, pp. 928-9.

## THE PLEADINGS GENERALLY.

SECTION 2. "The pleadings shall consist of the plaintiff's statement of claim, the defendant's affidavit of defense, and, where a set-off or counter-claim is pleaded, the plaintiff's reply thereto. When the affidavit of defense, or, where a set-off or counter-claim is pleaded, the plaintiff's reply thereto, is filed, the pleadings shall be closed and the case shall be deemed to be at issue, and no replication or formal joinder of issue shall be required."

Under the practice heretofore pleadings consisted of the declaration, *i. e.*, the statement of claim, and the plea. Formal replications were generally omitted and cases were set down for trial on filing of the plea. Said Mr. Justice Mitchell: <sup>41</sup>

"An affidavit of defense in Pennsylvania practice is no part of the pleadings, and has an entirely different function. It is a mere step or incident of the proceedings required in order to prevent a summary judgment by default. When it has served that purpose its function is ended, unless further enlarged by express rule of court. . . . The wholly different function of a plea is to raise and make certain the issue on which the controversy between the parties is to be fought out. With this the affidavit of defense has nothing to do and it may be entirely disregarded and the case put at issue on other grounds."

The change from this to the present practice is foreshadowed in the Replevin Act of 1901,<sup>42</sup> which provides that the declaration and affidavit of defense shall constitute the issues under which, without other pleadings, the question of title or right of possession shall be determined; and in the Ejectment Act of the same year,<sup>43</sup> which provides that in addition to the plea of "not guilty" now required by law, the defendant shall file an answer in the nature of a special plea, in which he shall set forth his grounds of defense with an abstract of the title by which he claims, and no action of ejectment shall be considered at issue until the plaintiff's statement and the defendant's plea and answer shall be filed. This "answer" is virtually an affidavit of defense

<sup>41</sup> *Muir v. The Preferred Accident Insurance Co.*, 203 Pa. 338 (1902).

<sup>42</sup> Act April 19, 1901, P. L. 88, § 6.

<sup>43</sup> Act May 8, 1901, P. L. 142, § 2.

and must be filed in order to put the case at issue. The function of the affidavit of defense has in the two actions named been enlarged beyond the scope of its purpose as laid down by Mr. Justice Mitchell in the case above referred to. The mere formality of the plea and the real character of the affidavit of defense is emphasized in the practice whereby judgment might be taken for want of an affidavit of defense or for want of a sufficient affidavit of defense, or for part of the amount claimed as to which the affidavit of defense is insufficient, or for the amount admitted to be due.

The affidavit of defense gradually took the place in substance, though not in form, of the common law general and special pleas, especially in those counties, like Philadelphia, in which the defendant was restricted in his proofs to the allegations of the affidavit of defense, and in which the rule as to notice of special matter was abolished inasmuch as the affidavit of defense took its place.<sup>44</sup> The purpose of the affidavit of defense system here, as pointed out by Judge Endlich,<sup>45</sup> is threefold: first, to avoid unnecessary time and expense in cases in which the defendant would be bound to recover; second, to operate as a restraint on unscrupulous or disingenuous defendants by requiring them to swear to the truthfulness of a good and practicable defense; and third, to secure to the plaintiff who has a good *prima facie* case which the defendant on his own showing is unable to controvert, a speedy judgment without the delay to which a strict adherence to the common law forms of procedure would subject him.

<sup>44</sup>Philadelphia Rules 60 and 61. The Allegheny Court Act of May 5, 1911, P. L. 108, provides in §7 for pleadings to consist of statement and answer and the Philadelphia Municipal Court Act of July 12, 1913, P. L. 711, followed in §12 with a similar provision. The Practice Act of 1915 follows the line of development of the modern system thus pointed out. The suggestion that pleas be abolished and that the case be at issue on the filing of the affidavit of defense without further pleadings is made by the late Judge Michael Arnold in his address on "Law Reform," 44 Leg. Int. 4. In the case of Dickerson v. the Central Railroad of New Jersey, 7 D. R. 104 (1898), Judge Sulzberger said in speaking of the act of 1887: "It would have been more logical and consistent to end the pleading with the affidavit of defense. When this is filed, there is a substantial issue either of law determinable on motion for judgment or of fact triable by jury. The addition of mere formal pleas causes useless delay and mars a system directed against vagueness and uncertainty."

<sup>45</sup>The Law of Affidavits of Defense in Pennsylvania, 1884, pp. 6, *et seq.*, *supra*, note 7.

A further new feature in the pleadings is the plaintiff's reply. As above stated, the common law replication had practically fallen into disuse. Where the defendant in his affidavit of defense claims a set-off or counter-claim it is but just that the plaintiff should be obliged to answer as specifically as the defendant was obliged to answer the original claim of the plaintiff. This is accomplished by means of the plaintiff's reply, which thus reintroduces in modern form the old common law form of pleading.<sup>46</sup>

The abolition of the formal joinder of issue is in line with the general theory underlying this legislation. Issue could be formally joined at any time when necessary by filing such a pleading *nunc pro tunc* and yet some times, when overlooked, the failure to do so might be the cause of delay.<sup>47</sup> As the practice served no useful purpose, its abolition will cause no regret.

When the case was at issue, under the old practice, either side might order it on the trial list. Under the present practice, if the defendant, having filed his affidavit of defense, immediately orders the case down for trial, the plaintiff may nevertheless take his rule for judgment for want of a sufficient affidavit of defense. It would seem to be desirable to establish the practice that if the rule for judgment is discharged, the case should remain on the trial list under the original order of the defendant, but that if the rule for judgment is made absolute, the case should be stricken from the trial list either on motion of the plaintiff or by the clerk of his own motion. Perhaps a rule of court for the purpose of settling the practice on this point will be required.

### THE ABOLITION OF PLEAS.

SECTION 3. "Pleas in abatement, pleas of the general issue, payment, payment with leave,<sup>48</sup> set-off, the bar of the statute of

<sup>46</sup> This practice comes from the English Rules O. 19, R. 1, by way of the rule of Philadelphia County (Rule 62). Under New Jersey Rules of Practice 16, the pleadings are: 1, complaint; 2, motion addressed to the complaint; 3, answer; 4, motion addressed to the answer; 5, reply.

<sup>47</sup> Penna. Bar Ass'n Report 1912, p. 75, § 4.

<sup>48</sup> There appears to have been no reason for referring to the plea of payment with leave since, under the Act of 1887, § 7, the plea of payment with leave is not permitted. Presumably, however, it was here included by reason

limitations, and all other pleas,<sup>49</sup> are abolished. Defenses heretofore raised by these pleas shall be made in the affidavit of defense."

The beginning of the reform consummated in this section, is found in the act of 1887, which abolished special pleading and retained in the action of assumpsit the pleas of "non-assumpsit," "payment", "set-off", and the bar of the Statute of Limitations; and in the action of trespass the plea of "not guilty". Now the requirement that defenses shall be set forth in the affidavit of defense, taken together with the provision of section 16 of this act, that neither party shall be permitted at the trial to make any defense that is not set forth in the affidavit of defense or plaintiff's reply, as the case may be, obviously makes the plea entirely superfluous and justifies its abolition.

It would have been better to have allowed questions which were formerly raised by pleas in abatement to be raised by some method other than that suggested. As to dilatory pleas subsequent to the statement of claim, the practice under section 3 may suffice, but what shall be the practice where the defendant desires to plead in abatement to a writ where the return is perfect on its face but is alleged to be false in fact? Under the practice prior to this act there was no other method than plea in abatement whereby this question could be raised. Is this now to be done by the affidavit of defense?<sup>50</sup> In view of the obvious purpose of the act to deal only with pleadings, does not a fair interpretation of this section lead to the conclusion that a plea in abatement when such plea is the only method allowed to attack the service, can still be filed and that only dilatory pleas filed after the statement of claim<sup>51</sup> were here aimed at,<sup>52</sup> and that

of the fact that notwithstanding the prohibition in the Act of 1887, the plea of payment with leave was generally used by the bar.

<sup>49</sup> The words "all other pleas" seem to be superfluous, for since the Act of 1887 no other pleas are allowed.

<sup>50</sup> This creates several technical difficulties. The affidavit of defense cannot be filed until the statement of claim is filed and is tantamount to an appearance and thus waives the question of jurisdiction over the person. If the fact of the service be decided against defendant, would he still be provided for in the service be decided against defendant, would he still be entitled later on to file an affidavit of defense to the merits as in cases provided for in Section 20?

<sup>51</sup> As in Phila. Rule 71.

<sup>52</sup> This may be fairly presumed to have been the view of the Committee of the Penna. Bar Ass'n. See Report 1912, p. 76, § 5.

the unfortunate phraseology of this section is due to too close an imitation of the English model without noting the difference between the English and Pennsylvania practice?

The English rule, which no doubt was the inspiration for this section, is as follows: "No plea or defense shall be pleaded in abatement." The cases under this rule seem to be all cases in which the defense of misjoinder of parties is raised, a defense which might have been taken by way of a plea in abatement.<sup>53</sup> The remedy, under the English practice, is not to file an affidavit of defense setting up such a defense but to take out a summons to add or strike out or substitute a party.<sup>54</sup> Where the service of the writ is to be attacked, the English rules do not permit a plea in abatement but provide for an application to set aside the proceedings for irregularity<sup>55</sup> and this application is in the King's Bench Division made by a summons, and in the Chancery Division by a motion or summons or notice. If the party applying for the motion or summons has taken any fresh step after knowledge of the irregularity, the application to set aside the proceeding will not be allowed.<sup>56</sup> For the purpose of attacking the service of the writ, a conditional appearance may be entered with a motion to set aside the service.<sup>57</sup>

In the Pleading and Practice Act introduced in the legislature of 1913, which bill failed of passage, it was proposed as follows:

"Pleas to the jurisdiction, pleas in abatement and any other dilatory pleas are hereby abolished. Every defense heretofore presentable by such pleas shall hereafter be made by motion as of course setting forth the reasons therefor and where any matter of fact is alleged therein, such motion shall be verified by affidavit."<sup>58</sup>

<sup>53</sup> O. 21, R. 20. Annual Practice 1914, p. 365.

<sup>54</sup> O. 16, R. 12. "Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before the trial by motion or summons, or at the trial of the action in a summary manner."

<sup>55</sup> O. 70, R. 2.

<sup>56</sup> Annual Practice 1914, p. 1293.

<sup>57</sup> O. 12, R. 30, and see Annual Practice 1914, p. 124.

<sup>58</sup> House Bill No. 1789, § 15. In the New Jersey Practice Act of 1912,



This practice would have been more logical and desirable than that prescribed by section 3 of the Practice Act. It is not desirable to call things essentially dissimilar by the same name. An attack on a writ or service of a writ is not a defense. It negatives the idea of defense. It is an allegation that no defense is necessary or required because the defendant is not subject to the jurisdiction of the court.

#### THE ABOLITION OF DEMURRERS.

SECTION 4. "Demurrers are abolished. Questions of law heretofore raised by demurrer shall be raised in the affidavit of defense, as provided in section twenty."

Under the former practice, where the statement of claim did not set forth a good cause of action, the established and only way to raise the question was by demurrer and where the statement of claim was not sufficiently specific, the method of attack was by rule for more specific statement.<sup>59</sup> The latter practice or the demand for a bill of particulars would seem to be still permissible under the Practice Act of 1915. In some of the counties demurrers were not allowed, even prior to the act of 1915. Under the English practice<sup>60</sup> it is provided that no demurrer shall be allowed and that any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial; provided that by consent of the parties or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial; and if in the opinion of the court or judge, the decision of such point of law substantially disposes of the whole action or of any distinct cause of action, ground of defense, set-off,

§ 38, dilatory pleas are abolished and in lieu thereof objection shall be made on motion.

<sup>59</sup> *Per* Mr. Justice Mitchell in *Bradly v. Potts*, 155 Pa. 418, 427 (1893). See also Phila. Rule 53, as amended Dec. 3, 1915.

<sup>60</sup> O. 25, RR. 1, 2, and 5. The English rule was long ago adopted practically verbatim by the Common Pleas of Northampton County. See "Compilation of the Rules of the Courts of Common Pleas," by Alexander Simpson, Jr., Penna. Bar Ass'n Reports, 1896, p. 608, § 1503.

counter-claim, or reply therein, the court or judge may thereupon dismiss the action or make such other order therein as may be just. These three sections of the English rules have been used in framing sections 4 and 20 of the Practice Act of 1915.

The demurrer, having been the appropriate method of raising the question whether the plaintiff has a cause of action, fell into disfavor by reason of the fact that the defendant was at the mercy of the court and might have judgment entered against him on the demurrer, without being given leave to file an affidavit of defense on the merits. The court in such cases had the right to hold the defendant to the strict legal consequences of his action in demurring to the statement of claim.<sup>61</sup> Attempts to evade the danger of demurring and at the same time to enjoy the benefit of such practice were unavailing. A suggestion of the insufficiency of the plaintiff's statement of claim,<sup>62</sup> a motion to strike off a statement,<sup>63</sup> a rule to suppress a statement<sup>64</sup> were tried. In one case<sup>65</sup> the practice that was suggested was to file an affidavit in the nature of a special demurrer, upon which affidavit a rule should be granted to show cause why the statement should not be quashed. The practice of filing a demurrer and an affidavit of defense, or a demurrer in the affidavit of defense was of doubtful validity.<sup>66</sup>

<sup>61</sup> *Bridgeman v. Swing*, 205 Pa. 479 (1903).

<sup>62</sup> *Bordentown Banking Co. v. Restein*, 214 Pa. 30-32 (1906).

<sup>63</sup> Possibly suggested by *Kauffman v. Jacobs*, 4 Penna. C. C. R. 462 (1887).

<sup>64</sup> *Boyle v. Breakwater Co.*, 239 Pa. 577 (1913).

<sup>65</sup> *Robinson v. Montgomery*, 3 D. R. 661 (1893).

<sup>66</sup> In *Duffy v. Mell*, 13 D. R. 143 (1904) the incorporation of a demurrer in the affidavit of defense was approved on the authority of *Robinson v. Montgomery*, *supra*, note 65, and *Heller v. the Insurance Co.*, 151 Pa. 101 (1892). The latter case is doubtful authority for this proposition. On the other hand in *Hanover Fire Insurance Co. v. Eason*, 17 D. R. 915 (1908), a paper was filed consisting of two parts, the first being a demurrer to the sufficiency of the plaintiff's statement of claim, and the second an affidavit of defense on the merits. The court decided that the plaintiff's statement was in proper form and set forth a good cause of action and for that reason would have dismissed the demurrer if it had been properly before it. "Even if this were not the case, however, we should be obliged to dismiss it for the reason that the defendant cannot file a demurrer and affidavit of defense at the same time and have the demurrer disposed of before he can be required to file a plea. He must elect upon what he will rely as a defense and the filing of the affidavit of defense on the merits is the abandonment of the demurrer,"

The Practice Act for the purpose of avoiding the difficulties above suggested, abolishes demurrers and permits the same matter to be set up in the affidavit of defense.<sup>67</sup> And thus the affidavit of defense, a mere parvenu in the society of venerable pleas and demurrers of most ancient lineage, has usurped their functions, inherited their estate and thrust them into the limbo of discarded and forgotten things.

#### PROCEEDINGS IN LIEU OF DEMURRER.

SECTION 20. "The defendant in the affidavit of defense may raise any question of law, without answering the averments of fact in the statement of claim; and any question of law, so raised, may be set down for hearing, and disposed of by the court. If in the opinion of the court the decision of such question of law disposes of the whole or any part of the claim, the court may enter judgment for the defendant, or make such other order as may be just. If the court shall decide the question of law, so raised, against the defendant, he may file a supplemental affidavit of defense to the averments of fact of the statement within fifteen days."<sup>68</sup>

citing *Railroad Co. v. Hayes*, 13 D. R. 671 (1904); *Schoenaman v. Schambach*, 18 York L. R. 124 (1904), and *Marshall v. Katz*, 18 York, L. R. 26 (1904).

<sup>67</sup>The Pennsylvania Bar Association Committee in discussing this point (Report 1912, p. 76), says: "If there is but one form of defense, that is an affidavit by which any defense, whether of law or of fact, may be raised, it tends to make the procedure more simple."

<sup>68</sup>In the bill introduced by Mr. William H. Wilson February 1, 1915—House Bill 132, Sec. 11, abolishing demurrers, it is provided that every defense heretofore presentable by demurrer shall hereafter be made by motion either for the dismissal of such cause or for a more specific petition—the word "petition" being used in this act instead of statement of claim. Under the New Jersey Rules of Court, No. 26, under the Practice Act of 1912, it is provided: "Demurrers are abolished. Any pleading may be struck out on motion on the ground that it discloses no cause of action, defense or counter-claim respectively. The order made on such motion is appealable after final judgment. In lieu of a motion to strike out, the same objection, and any point of law other than a question of pleading or practice, may be raised in the answering pleadings, and may be disposed of at, or after, the trial, but the court, on motion of either party, may determine the question so raised before trial, and if the decision be decisive of the whole case the court may give judgment for the successful party or make such order as may be just." See also the similar federal practice in equity, Rule 29. This seems a more rational disposition of the question than the one provided by Section 4 and Section 20 of the Pennsylvania Practice Act,

The practice provided under this section is analogous to the practice under the compulsory nonsuit act,<sup>69</sup> under which the defendant's motion for a nonsuit is in effect a demurrer to the evidence, but if decided against him, nevertheless enables him to go on with his defense. So here the affidavit of defense in the nature of a demurrer enables the defendant to have the sufficiency of the plaintiff's cause of action disposed of without depriving him, as a demurrer might have done if the decision had gone against him, of the right to file an affidavit of defense on the merits. If the defendant in his affidavit of defense raises a question of law in the nature of a demurrer it may be set down for hearing and disposed of by the court *in limine*.

Who shall set it down? <sup>70</sup> It was obviously not the intention that this so-called affidavit of defense on a question of law should be treated like an affidavit of defense on the merits. In the case of a defense on the merits the plaintiff <sup>71</sup> may enter a rule for judgment for want of a sufficient affidavit of defense, but where the defense is merely an attack on the statement, the court cannot, if it decides against the defendant, enter judgment for the plaintiff; <sup>72</sup> hence the rule for judgment for want of a sufficient affidavit of defense would be in the latter case a useless proceeding. Section 20 of the act does not state what sort of an order the court shall enter if it decides the question of law raised by the defendant against him. Probably a rule of court will be required to fix the practice herein and some new interlocutory

<sup>69</sup> Philadelphia District Court Act March 11, 1836, § 7, P. L. 78, extended to all the courts of Common Pleas by Act April 22, 1863, § 1, P. L. 554, and substantially re-enacted March 11, 1875, P. L. 6.

<sup>70</sup> It will probably not be automatically set down by the clerk because this would require the clerk to read all affidavits of defense. Perhaps the defendant may be required to give notice to the clerk that his defense is a matter of law only and thus have it set down, or perhaps it will be made the plaintiff's duty to order the matter down for hearing. A rule of court is here required.

<sup>71</sup> Under the old practice as well as under Section 17 of the Practice Act.

<sup>72</sup> Perhaps the practice may be attempted of allowing the court to enter a judgment *nisi*, that is, a judgment to become absolute if the defendant fails to file an affidavit of defense on the merits within fifteen days, and such judgment not to be recorded in the judgment index until the fifteen days have expired. Such practice would, in view of the provisions of Section 20, be of doubtful propriety.

decree invented to meet the exigencies of the new practice. It might be "affidavit of defense stricken off" or "affidavit of defense insufficient"—in each case "with leave to file supplemental affidavit of defense within fifteen days" under a standing rule of court without further notice to the defendant than a notice from the clerk that such order has been entered.

Under the old practice requiring a demurrer to the statement of claim, the court always exercised its discretion fairly and allowed a defendant to file an affidavit of defense if counsel in good standing assumed the responsibility of stating that he believed that a good defense on the merits existed, while a sharp practitioner representing the defendant ran the danger of having judgment against his client if the court believed that he had merely filed the demurrer for delay and that there was no real defense. At any rate the matter was discretionary with the court and the discretion was usually fairly exercised. Under the new practice it will be possible to enter a defense of law in every case without any possibility of being penalized, no matter how flimsy the point of law raised may be, and the defendant may gain the time between the filing of his affidavit of defense in the nature of a demurrer and the date when it is overruled, for he must in every case be given the additional fifteen days to make a defense on the merits. Whether this can be avoided by a rule of court is questionable.

From what time shall the fifteen days begin to run within which the defendant must file his supplemental affidavit of defense after the court has decided the question of law against him? Probably from the time notice of the decision is given him by the clerk or the plaintiff. Must the defendant ask for leave to file the supplemental affidavit of defense, such leave to be given as a matter of course in accordance with the requirement of the act? It would seem that no request for leave is necessary or ought to be required, but that upon the entry of a proper order and due notice thereof to the defendant, the fifteen days should commence to run against the defendant, and judgment for want of an affidavit of defense should be permitted to be entered in favor of the plaintiff, either upon his affidavit of service of

notice of the order of the court or under a rule of court which makes the giving of such notice the official duty of the clerk and therefore presumes it to have been given in every case.

How shall an affidavit of defense in the nature of a demurrer be drawn? Obviously the established form of affidavits of defense which concludes with expectation of ability to prove at the trial of the cause<sup>73</sup> is inappropriate. Shall the affidavit of defense in such cases simply conclude as in the form of the demurrer that objections to the statement of claim as set forth are well founded in law and that the affidavit of defense is not intended for the purpose of delay?

Under the old practice leave to file a supplemental affidavit of defense was to a certain extent discretionary with the court.<sup>74</sup> Under the present practice it is the absolute right of the defendant in case his first affidavit of defense raises only a question of law. If, however, he files an affidavit of defense to the merits, the old practice relating to his right to file a supplemental affidavit of defense does not seem to have been changed.<sup>75</sup>

#### CONTENT AND FORM OF PLEADINGS.

SECTION 5. "Every pleading shall contain, and contain only, a statement in a concise and summary form<sup>76</sup> of the material facts on which the party pleading relies for his claim, or defense, as the case may be, but not the evidence by which they are to be proved, or inferences or conclusions of law, and shall be divided into paragraphs numbered consecutively, each of which shall contain but one material allegation. Every pleading shall have attached to it copies of all notes, contracts, book entries, or a particular reference to the records of any court within the county in which the action is brought, if any, upon which the party

<sup>73</sup> *Newbold v. Pennock*, 154 Pa. 591 (1893).

<sup>74</sup> *Bordentown Banking Co. v. Restein*, *supra*, note 62.

<sup>75</sup> This practice is outlined in the following cases: *West v. Simmons*, 2 Whart. 261 (1837); *Bloomer v. Reed*, 22 Pa. 51 (1853); *Callen v. Lukens*, 7 W. N. C. 28 (1879); *Bordentown Banking Co. v. Restein*, *supra*, note 62; *Shunk v. Scheffler*, 7 Berks County L. J. 17 (1914).

<sup>76</sup> This according to the Annual Practice 1914, p. 320, means "briefly, succinctly and in strict chronological order."

pleading relies for his claim,<sup>77</sup> or defense, as the case may be; and a particular reference to such record, or to the record of any deed or mortgage, or other instrument of writing, recorded in such county, shall be sufficient in lieu of a copy thereof."

The first part of this section is substantially taken from the English rule.<sup>78</sup> Its alleged purpose is to introduce a more precise, though simple, method of pleading to take the place of the loose and unsatisfactory pleadings which resulted from the abolition of the old common law forms by the Act of 1887.<sup>79</sup> It will probably not have this effect because the slovenly pleader will continue to be saved by his ignorance from being intimidated by Acts of Assembly.

The act of 1887 provided that the plaintiff's declaration should consist of a concise statement of the plaintiff's demand as provided by the fifth section of the Act of March 21, 1806. The Act of 1806 referred only to statements in an action of debt founded on a verbal promise, book account, note, bond, penal or single bill. There is no form prescribed by this act and its purpose was to enable parties to conduct their suits in the ordinary simple claims for debt without the intervention of attorneys.<sup>80</sup> No provision for form of affidavit of defense was made. It merely had to be "sufficient", but the decisions under the acts of 1835 and 1887 and local rules of court established a regular

"The act of 1887 uses the words "upon which the plaintiff's claim is founded." Why was this language changed as above? Is it supposed to mean that any document upon which a party "relies," *i. e.*, needs as evidence, must be set forth in the pleading, or is the old rule still in force that only such documents as constitute the basis of claim (or defense) shall be thus exhibited?

<sup>78</sup> O. 19, R. 4. This English rule became the basis of the Philadelphia Court Rule 44, applying only however to the statement of claim. Philadelphia Rule 54 supplemented this by requiring: "The affidavit of defense shall be drawn in accordance with the provisions of the rules relating to statements so far as they are applicable." *United Shoe Machinery Co. v. Winston*, 24 D. R. 1047 (1913). Rule 62, referring to defendant's claim of set-off or counter-claim and plaintiff's reply thereto provided: "Both shall be drawn in accordance with and shall be governed by the rules relating to statements and affidavits of defense." These rules established the Philadelphia practice in substantial accordance with the requirements of this section of the Practice Act.

<sup>79</sup> See Report of Committee on Law Reform, Report of Penna. Bar Ass'n 1912, p. 76, §7.

<sup>80</sup> *Bailey v. Bailey*, 14 S. & R. 195 (1826).

practice as to the proper form of both statement and affidavit of defense. Nevertheless, since the old forms of the common law had been abolished and pleaders had to think, instead of merely filling in printed blanks, proper pleading under the act of 1887 required more than ever a thorough knowledge of the law of the case. The courts were kept busy in criticising pleading and as the tendency was against penalizing parties for the mistakes of their attorneys, much time was wasted in hearings which resulted in merely amending defective pleadings. Some of the cases contain drastic expressions of disapproval of the Act of 1887,<sup>81</sup> but the fault lay rather with the pleaders than with the act which did indeed invite but certainly did not approve the breaches of the rules of pleading which were committed in its name. All of the requirements of this section of the Practice Act of 1915 excepting the one referring to numbered paragraphs were necessary in a good statement under the Act of 1887 although that act did not so state in express language.

The requirement of numbered paragraphs has been in force in England for upwards of thirty years<sup>82</sup> and in Philadelphia since March, 1913, and no serious criticism of the practice seems to have been made.

The second part of section 5, requiring copies of documents or reference to records on which the pleader relies for his claim or defense, is a substantial reenactment of the second part of section 3 of the Procedure Act of 1887 containing these requirements for the plaintiff's statement of claim. The question is debatable whether good pleading requires a document to be copied in full or merely to have its effect stated unless, as in an action of libel, the precise words are material.<sup>83</sup> The Pennsylvania practice of requiring copies of documents has on the whole justified itself.<sup>84</sup>

<sup>81</sup> The late Chief Justice Mitchell was especially severe in his expressions. See *Hubbard v. Tenbrook*, 124 Pa. 291 (1889); *Fritz v. Hathaway*, 135 Pa. 274 (1890); *Bradly v. Potts*, 155 Pa. 418 (1893).

<sup>82</sup> See Annual Practice 1914. For forms, see Appendices C, D, & E.

<sup>83</sup> As under the English Practice, O. 19, R. 21.

<sup>84</sup> As to the necessity for copies of documents, see *Acme Manufacturing Co. v. Reed*, 181 Pa. 382 (1897). As to reference to records in the county,



## SPECIFIC DENIAL.

SECTION 6. "Every allegation of fact in the plaintiff's statement of claim, or in the defendant's set-off or counter-claim, if not denied specifically or by necessary implication in the affidavit of defense, or plaintiff's reply, as the case may be, or if no affidavit of defense or plaintiff's reply be filed, shall be taken to be admitted, except as against an infant, a person of unsound mind, or one sued in a representative capacity as provided in section seven, and except as provided in section thirteen."

This section is based on the English<sup>85</sup> and Philadelphia<sup>86</sup> rules. A similar rule of Allegheny County was thus approved by the Supreme Court: "As a means of promoting justice and expediting the trial of causes, the rule under consideration has proved to be most valuable."<sup>87</sup> A recent case in Philadelphia interprets the Philadelphia rule.<sup>88</sup>

There is no difference in effect between denying and not admitting an allegation. The distinction usually observed is that a party denies any matter which, if it had occurred, would have been within his own knowledge, while he refuses to admit matters which are alleged to have happened behind his back. But where he denies or does not admit he must make it perfectly clear how much he disputes and how much he admits.<sup>89</sup>

see *Siegel v. Wood*, 3 D. R. 463 (1894). As to records outside the county, see *Finch v. White*, 190 Pa. 86 (1899). In *Hendley v. Rittinger*, 249 Pa. 193 (1915), it was held that the failure to attach copy of the contract to a statement of claim was not a reversible error. The claim was on a book account which was fully set forth and the receipt of the merchandise was admitted in the affidavit of defense. The copy of the original contract between the parties was therefore not material, either in establishing the claim or sustaining the defense and to reverse the case because the copy was not attached to the statement would have been a decision based upon a mere technicality which effected neither party to the cause.

<sup>85</sup> O. 19, R. 13.

<sup>86</sup> Rule 59. See *Cumberland Nat. Bank v. Holden*, 22 D. R. 963 (1913).

<sup>87</sup> Allegheny County, Rule 9, § 1, "Such items of the claim and material averments of fact as are not directly and specifically traversed and denied by the answer shall be taken as admitted." See *Higgins Carpet Co. v. Latimer*, 165 Pa. 617 (1895).

<sup>88</sup> *Penna. Forge Co. v. Delaware River Transportation Co.*, 24 D. R. 1017 (1915). The reference in the case is to Rule 62, but Rule 59 is by necessary inference likewise interpreted.

<sup>89</sup> Annual Practice, 1914, p. 337.

SECTION 8. "It shall not be sufficient for a defendant in his affidavit of defense to deny generally the allegations of the statement of claim, or for a plaintiff in his reply to deny generally the allegations of a set-off or counter-claim; but each party shall answer specifically each allegation of fact of which he does not admit the truth, except as provided in sections seven and thirteen."

This section provides for a specific denial in all cases except those provided for in sections 7 and 13, but section 6 has already substantially provided for this and has fixed the penalty for non-compliance. The fact that this rule also appears in the English rules<sup>90</sup> no doubt led to its adoption. If superfluous, it is certainly harmless in restating the duty of the defendant,<sup>91</sup> and at any rate it removes any possible doubt as to the meaning of specific denial as used in section 6.

The Pennsylvania decisions are silent as to the extent to which the specific denial must go. The English decisions may therefore be of value.<sup>92</sup>

#### DEFENSE BY EXECUTORS, *Etc.*

SECTION 7. "When the affidavit of defense, or plaintiff's reply, is made by an executor, administrator, guardian, committee, or other person acting in a representative capacity, he need only state the facts he admits to be true, and that he believes there is a just and legal defense to the remainder, and the facts upon which he bases his belief."<sup>93</sup>

Under the Philadelphia rule which is here substantially re-enacted it was not necessary that the facts upon which the affiant based his belief should be stated. But it was decided that under

<sup>90</sup> O. 19, R. 17.

<sup>91</sup> Philadelphia Rule 55 in part covers the same subject matter. Under this rule if the defendant admitted any paragraph of the statement he was obliged to say "admitted." This would now seem to be unnecessary.

<sup>92</sup> See *Adkins v. North Metropolitan Tramway Co.*, 63 L. J. Q. B. 361 (1893); *Rassam v. Budge*, 1 Q. B. 571 (1893). See also *Annual Practice for 1914*, pp. 344 and 345.

<sup>93</sup> If the plaintiff sues on a decedent's promissory note and the executor defendant does not deny its execution, proof of execution is not required at the trial. *Lowenstein v. Michael*, 55 Super. Ct. 628 (1914).

this rule the facts which justified the executors' belief that they had a just and legal defense to the claim should be briefly set forth for the information of the court or the plaintiff.<sup>94</sup> This is now specifically required by the Practice Act.<sup>95</sup> Where the transaction is between the plaintiff and the executor personally, the latter cannot avail himself of this rule, which was intended to apply to transactions between the deceased and the plaintiff and hence he must answer fully the allegations of the statement.<sup>96</sup>

#### STATEMENT OF CLAIM.

SECTION 9. "The statement of claim shall be as brief as the nature of the case will admit. In actions on contracts it shall state whether the contract was oral or in writing. It shall be sworn to by the plaintiff or some person having knowledge of the facts, and, if there be an attorney, shall be signed by his attorney."<sup>97</sup>

The provision that the statement of claim shall be as brief as the nature of the case will admit is entirely unnecessary. Section 5 of the act covers this fully. The sentence is copied from the English rules<sup>98</sup> where it is important because under the English rules as to costs, the taxing officer in adjusting the costs of the action could, at the instance of a party, or might without any request, inquire into any unnecessary prolixity and order the costs occasioned by such prolixity to be borne by the party chargeable with the same. There is no provision in Pennsylvania practice for taxing the cost of preparing the pleading against the losing party.

<sup>94</sup> Phila. Rule 58, *Hirsch v. Michael*, 21 D. R. 70 (1912).

<sup>95</sup> The Allegheny Rule, Rule 13, Sec. 3 (1915), was as follows: "In all actions brought against executors, administrators, guardians, committees, or trustees, upon contracts alleged to have been made by the decedents, minors, lunatics, or others whose interest they represent, the defendant shall file an affidavit of defense, setting forth particularly the nature and character of the defense, or that he has made diligent inquiry and investigation and has been unable to obtain sufficient information to set the same forth particularly, but that he believes there is a just and legal defense to the action, setting forth its general nature so far as he has been able to ascertain."

<sup>96</sup> *Hutzell v. Ruane*, 23 D. R. 172 (1914).

<sup>97</sup> See Phila. Rule 41 and English Rule O. 19, R. 4.

<sup>98</sup> O. 19, R. 2.

The "concise statement" required by the fifth section of the act is interpreted by the cases under the Act of 1887 which define the meaning of "a concise statement" of the plaintiff's demand. "The statement should contain all the ingredients of a complete cause of action, averred in clear, express and unequivocal language, so that if the defendant is unable to controvert or deny one or more of the material averments of claim, a judgment in default of an affidavit or sufficient affidavit of defense may be entered and liquidated,"<sup>99</sup> or as stated in another case, it must include "every ingredient of a good cause of action averred with the same completeness, accuracy and precision that were required in a declaration at common law."<sup>100</sup>

The provision that in actions on contracts the statement shall state whether the contract was oral or in writing is in accordance with the requirements of the Philadelphia Rule of Court,<sup>101</sup> but likewise seems superfluous in view of the provisions of section 5.

The provision that the statement shall be sworn to is in accordance with the established practice. The Act of 1887, following the practice under the common law declaration, did not require the statement to be sworn to, but it was held that this could be required by rules of court.<sup>102</sup> This practice has been pretty generally followed throughout the state.

Under section 3 of the Act of 1887 it is provided that the statement shall be signed by the plaintiff or his attorney. Under the present act the plaintiff is not required to sign the statement. If the plaintiff swears to the statement he will of course have to sign the *jurat*,<sup>103</sup> but as some one else having knowledge of the facts may swear to it and the attorney must sign it, it would appear that statements of claim may be filed without the signature of the plaintiff.

<sup>99</sup> *Byrne v. Hayden*, 124 Pa. 170-177 (1889).

<sup>100</sup> *Newbold v. Pennock*, 154 Pa. 591, 596 (1893).

<sup>101</sup> Rule 45.

<sup>102</sup> *Edison Electric Co. v. Thackara Manufacturing Co.*, 167 Pa. 530 (1895), and see Philadelphia Rule 41.

<sup>103</sup> Such signature has been decided to be a sufficient signature to the statement of claim. *Dilley v. Rowe*, 23 W. N. C. 491 (1889).

## INDORSEMENT OF STATEMENT OF CLAIM.

SECTION 10. "The statement of claim shall be endorsed as follows:

"To the within defendant—

"You are required to file an affidavit of defense to this statement of claim within fifteen days from the service hereof."

"This notice shall be followed by the name of the plaintiff's attorney or by his own name if he sues in person, and an address within the county where all papers are to be served."<sup>104</sup>

The indorsement of notice to the defendant to file affidavit of defense follows the practice established by the Philadelphia rule of court.<sup>105</sup> The general rule under the older practice was that the statement of claim should be indorsed with a rule on the defendant to file an affidavit of defense, though some counties required the affidavit of defense to be filed merely upon service of statement and notice that the same was filed. The problem under the Act of 1887 created by reference to the return day of the writ,<sup>106</sup> cannot now arise and the procedure is as simple as it probably can be made. The notice requires the defendant to file his affidavit of defense within fifteen days from the date of the service of the statement of claim. Rules of court will no doubt require affidavit of service of the statement to be made and filed of record in case the sheriff does not make the service. After fifteen days from date of service if the defendant has not filed an affidavit of defense, the plaintiff may take judgment for want of the affidavit of defense, under section 17 of the act, which is merely declaratory of the existing practice.

## PLAINTIFF ASKING FOR AN ACCOUNT.

SECTION 11. "If the plaintiff avers that the defendant has received moneys as agent, trustee, or in any other capacity for which he is bound to account to the plaintiff, or if the plaintiff is

<sup>104</sup> Requirement of indorsement of address for service follows the English Practice, O. 4, R. 1.

<sup>105</sup> Rule 42.

<sup>106</sup> *Weigley v. Teal*, 125 Pa. 489 (1889).

unable to state the exact amount due him by the defendant, by reason of the defendant's failure to account to him, the plaintiff law action of account render which, though unrepealed, has been may ask for an account."

Prior to this act the law of Pennsylvania enabled the plaintiff to obtain an accounting from the defendant by the common rendered obsolete by the remedy by bill in equity.<sup>107</sup> In 1887 Judge Michael Arnold, under the scheme of reform suggested by him, proposed a modern proceeding at law in place of the action of account render.<sup>108</sup> In the English rules the plaintiff may ask for an account by merely indorsing his writ with a claim therefor, and if the defendant does not appear, or by affidavit or otherwise satisfy the judge that there is some preliminary question to be tried, an order for an accounting will be made. If the demand is made in King's Bench Division, which does not have the necessary machinery for taking accounts, the case is transferred to the Chancery Division.<sup>109</sup> The union of all the courts and the merger of law and equity in the English system makes this a simple and appropriate procedure.

The draftsman of the Practice Act probably had both Judge Arnold's scheme and the English rules before him, but his attempt to engraft this procedure on the Pennsylvania practice seems doomed to failure for several reasons. The present act does not according to its title purport to do more than relate to practice in the present actions of assumpsit and trespass. It cannot, therefore, in view of the constitutional provision that "no bill except general appropriation bills shall be passed containing more than one subject which shall be clearly expressed in its title,"<sup>110</sup> give a new right of action, *i. e.*, a right to proceed in assumpsit where heretofore only account render or bill in equity

<sup>107</sup> Act Oct. 13, 1840, § 19 P. L. (1841) 7. The advantage of the proceeding in equity over account render is set forth in the report of the revisers of the statute law of the state made in 1835. 1 Troubat & Haly's Practice (5th Ed.), p. 49.

<sup>108</sup> In an address before the Law Academy of Philadelphia January 4, 1887, in advocacy of his Procedure Act, which resulted in the act of 1887, 44 Leg. Int. 4.

<sup>109</sup> O. 3, R. 8; O. 15, R. 1.

<sup>110</sup> Constitution of Penna., Art. III, Sec. III.

lay. The committee of the Pennsylvania Bar Association seemed to realize this for they said:

"This section is intended to cover cases where assumpsit will lie, but the plaintiff is unable to tell how much the defendant owes him because the defendant has not furnished an account. There seems to be no reason why the plaintiff should be obliged to file a bill in equity in such cases, nor why the defendant should bring his books into court to state the account there. The plaintiff accordingly is given the right to demand an account."<sup>111</sup>

This statement shows mental confusion. For if it is intended to cover cases in which assumpsit lies, it cannot include any cases in which the defendant must account, for in such cases assumpsit does not lie.<sup>112</sup> The committee seems really to have wanted to give the plaintiff in assumpsit the same rights that the plaintiff in account render or in equity enjoys, *i. e.*, to compel the defendant to account. No doubt this can be done by appropriate legislation. The present attempt must remain futile.

SECTION 19. "When the plaintiff asks for an account, and moves for judgment for want of an affidavit of defense, or for want of sufficient affidavit of defense, the court may enter an order for an account, which may be enforced by attachment or otherwise, and judgment may be entered for the amount shown to be due in favor of the plaintiff or the defendant."

This section shows the purpose of the draftsman of the act to give to the plaintiff in assumpsit the remedies in account render and equity and strengthens the argument against the constitutionality of the act. It provides that when the plaintiff asks for an account and the defendant does not file an affidavit of defense or files an insufficient affidavit of defense, the court may enter a judgment, not for a specific amount as in an action of assumpsit, but a judgment equivalent to the old judgment *quod computet* in account render. The issue raised by the affidavit of defense, therefore, must have been whether the defendant should account, which issue was found against him as a matter of law.

<sup>111</sup> Report 1912, p. 80, § 19.

<sup>112</sup> *Brubaker v. Robinson*, 3 P. & W. 295 (1831); *Reeside v. Reeside*, 49 Pa. 322 (1865); *Burton v. Trainer*, 27 Super. Ct. 626 (1905).

Then it is provided that this judgment or order, as it is called, may be enforced by attachment or otherwise. In equity the decree could be enforced by attachment for contempt, but what is the meaning of "or otherwise"? Does it mean that there shall be execution, sequestration, or statement of an account by auditors or a master? Did the committee intend to apply the federal equity rule<sup>113</sup> for enforcement of final decrees? Can such methods not heretofore applicable in Pennsylvania practice in such cases be assumed to be included in a phrase like "or otherwise"?

If the defendant files a sufficient affidavit of defense all this procedure is inapplicable and the case must go to the jury on the issue whether defendant shall account. No provision for this and subsequent procedure is made. If the jury finds that he shall account, what verdict and judgment shall be entered and how shall the account then be enforced? As to this, the act is silent. It seems therefore that the attempt to give a new right of action renders the entire act of doubtful constitutionality, or makes sections 11 and 19 meaningless. At best, if the act shall be sustained by the Supreme Court as constitutional and these sections as enforceable, they will raise more problems of practice than they purport to solve.

#### AFFIDAVIT OF DEFENSE.

SECTION 12. "The defendant shall file an affidavit of defense to the statement of claim within fifteen days from the day when the statement was served upon him. The affidavit of defense shall be as brief as the nature of the case will admit. It shall be sworn to by the defendant, or some person having knowledge of the facts. It shall be served upon the plaintiff, or his attorney, at the address for the service of papers indorsed on the statement of claim, and shall be indorsed with the name of the defendant's attorney, or of the defendant if he defends in person, and an address within the county where all papers are to be served."

<sup>113</sup> Rule 8.



This action requires substantially the same formalities for the affidavit of defense as are required for the statement of claim. It does not state when, or how soon after filing, the affidavit of defense shall be served on the plaintiff. This and similar rules as to the time of serving the statement of claim and plaintiff's reply can be supplied by rules of court.<sup>114</sup>

#### AFFIDAVIT OF DEFENSE IN TRESPASS.

SECTION 13. "In actions of trespass the averments, in the statement, of the person by whom the act was committed, the agency or employment of such person, the ownership or possession of the vehicle, machinery, property or instrumentality involved, and all similar averments, if not denied, shall be taken to be admitted in accordance with section six; the averments of the other facts on which the plaintiff relies to establish liability, and averments relating to damages claimed, or their amount, need not be answered or denied, but shall be deemed to be put in issue in all cases unless expressly admitted."<sup>115</sup>

SECTION 18. "In actions of trespass, when the defendant fails to file an affidavit of defense, within the required time, the case shall be deemed to be at issue, and may be ordered upon the trial list."

These sections introduce a change in Pennsylvania practice, in providing for an affidavit of defense in actions of trespass.

Under the Act of 1887 the defendant was required to file an affidavit of defense only in actions *ex contractu*, and not in actions *ex delicto*.<sup>116</sup> Under the present act the defendant in

<sup>114</sup> Under Philadelphia Rule 54 the affidavit of defense having been filed, a copy of the same had to be served on the plaintiff or his attorney within forty-eight hours after it was filed. "Otherwise the plaintiff may take a rule for judgment supported by an affidavit that a copy of the affidavit of defense has not been served as required by this rule." This provision of Philadelphia Rule 54 was incorporated in the original draft of the act prepared by the Pennsylvania Bar Association, but was subsequently stricken out. See Report of Pennsylvania Bar Association, 1912, p. 72, § 20. It is related on the Philadelphia Rule in the amended Rule adopted Dec. 3, 1915.

<sup>115</sup> See English Rules, O. 21, R. 4.

<sup>116</sup> In *Stanton v. The Philadelphia & Reading Railroad Co.*, 236 Pa. 419 (1912), it was held that the defendant must file an affidavit of defense

actions of trespass if he intends to deny certain allegations in the statement of claim, or to set up certain defenses as in confession and avoidance, must file an affidavit of defense. If he fails to do so, he is taken to have admitted certain averments in the statement of claim, and the plaintiff may order the case down for trial. At the trial the plaintiff need not prove who committed the act complained of, that such person was the agent or employee of the defendant, that the car or engine or machine was owned by the defendant or in his possession, that the premises on which the act was committed were the defendant's premises.<sup>117</sup> The defendant may offer no testimony to contradict these facts nor to prove any defense in confession and avoidance, *i. e.*, in justification, excuse, discharge, or release, but he may offer evidence as heretofore to meet the plaintiff's other evidence of liability and damages. For although neither party is permitted to offer evidence of a defense not pleaded in an affidavit of defense, yet as the defendant in an action of trespass is not obliged to file any affidavit of defense to other facts on which the plaintiff relies to establish liability, and averments relating to damages claimed or their amount, he is not precluded from offering evidence to contradict the plaintiff in these matters.

The affidavit of defense in an action of trespass is not an entirely new thought in Pennsylvania practice, for the rules of several counties required the defendant at the request of the plaintiff to file a bill of particulars in an action of trespass, setting forth his grounds of defense.<sup>118</sup> Under the Act of 1887 the

where the breach of contract occurred through negligence tortious in its character, but where the defendant enjoyed no profit or advantage from the wrong done. The basis of the plaintiff's claim was a breach of a contract and the action was held to be rightfully brought in assumpsit. The distinction between this case and that of *Corry v. Pennsylvania Railroad Co.*, 194 Pa. 516 (1900), in which case no affidavit was required was based upon the fact in the latter case no contractual relation had as yet arisen between the plaintiff and the defendant and that the action, if any, sounded in tort.

<sup>117</sup> This practice was in Allegheny County, provided for by rule of court. Rule 10.

<sup>118</sup> Such rules were in force in the following counties: Lycoming, Schuylkill, Washington, Berks, Northampton, Allegheny, Cumberland, Venango, Delaware, Mercer, Juniata, and Perry. In Allegheny County by Rule 140 if the defendant failed to file a bill of particulars, he could have judgment entered against him. If he did file such a bill, he was at the trial confined to the defense therein set forth unless amendment was allowed by the court for cause shown.

defendant in such actions was obliged merely to file a plea of not guilty, but there was no prohibition express or implied of the right of the court to make rules requiring the defendant to particularize his defense and restricting him at the trial to such particulars.<sup>119</sup> But the terms of section 13 of the Practice Act of 1915 which exempt the defendant from answering or denying the "averments of the facts on which the plaintiff relies," *etc.*, probably nullify the rules in so far as they require the defendant to furnish a bill of particulars as to such matters.

#### SET-OFF AND COUNTER-CLAIM.

SECTION 14. "In actions of assumpsit a defendant may set off or set up by way of counter-claim against the claim of the plaintiff, any right or claim for which an action of assumpsit would lie, and a verdict may be rendered in his favor for the amount found to be due, and judgment entered thereon. If in any case in which the defendant sets up a counter-claim the action of the plaintiff is discontinued, dismissed, or a voluntary nonsuit suffered, the counter-claim nevertheless may be proceeded with."

The first part of the section makes practically no change in the law. Since the Defalcation Act of 1705<sup>120</sup> the defendant pleading payment and proving that the plaintiff was overpaid might receive from the jury a certificate showing how much the plaintiff was indebted or in arrears to the defendant and the amount certified could be recorded with the verdict and become a debt of record. Upon this verdict the defendant was entitled

Similar provisions may be found in the rules of other counties. It was held in *Stell v. Moyer*, 9 D. R. 516 (1900) that the right to require the defendant to file a bill of particulars in an action of trespass was not affected by the act of 1887, and that under section 7 of that act providing that the pleadings were to be subject to the rules of the respective courts as to notice of special matter, the old rule of court was still enforceable.

<sup>119</sup>In *Johnson v. R. R.*, 163 Pa. 127 (1894), it was held that a defense of release was admissible under the plea of the general issue and as it did not have to be specially pleaded at common law was not required to be set forth in "notice of special matter" under a rule of court. But this decision did not affect the right of the courts to make a rule such as that now in force in the counties mentioned in note 118.

<sup>120</sup>Act of January 12, 1705 (1 Sm. Laws 49), § 1.

to judgment and execution in the same manner as if the verdict had been in favor of the plaintiff.<sup>121</sup> The courts have construed this act most liberally, and have held, in the words of Mr. Justice Sharswood: <sup>122</sup>

“Unliquidated damages, arising *ex contractu* from any bargain may be given in evidence under our Act. When the damages arise from a tort, they certainly cannot be allowed<sup>123</sup> and perhaps there may be cases of contract where damages are not capable of liquidation by any known legal standard, which are not within the spirit of the Act; as for example breach of the contract of marriage. . . . The Defalcation Act allowed the defendant to set off a demand . . . arising out of a bargain or contract, when, although the sum claimed, legally speaking, consists of damages, and cannot be reduced to certainty by the terms of the bargain itself, yet the law has fixed and given a standard by which it can be ascertained by a jury of the country.”

An examination of the cases shows that the existing law was practically as broad as the statement in the present act.<sup>124</sup> Possibly some exceptional cases may now be provided for which could not have been set off heretofore, as where the set-off arises from a cause of action of the defendant against the plaintiff which has arisen since the action brought by the plaintiff against the defendant, or from a cause of action of a third person against the plaintiff, but acquired by the defendant since the suit was brought against him by the plaintiff.<sup>125</sup> In the Pennsylvania cases no distinction seems to be made between the terms set-off and counter-claim<sup>126</sup> probably because the Pennsylvania Defal-

<sup>121</sup> Act of April 11, 1848, P. L. 537, § 12.

<sup>122</sup> Hunt v. Gilmore, 59 Pa. 450 (1868).

<sup>123</sup> Under the English Rules, O. 19, R. 3, a defendant in an action may set off or set up by way of counter-claim any right or claim whether it sounds in damages or not. It need not be an action of the same nature as the original action. A claim founded on tort may be opposed to one founded on contract or *vice versa*. O. 21, RR. 11, 12; Annual Practice (1914), p. 317. A similar rule prevails in Ontario, “Rules of Practice and Procedure in the Supreme Court of Ontario” (1913), p. 25, Rule 115.

<sup>124</sup> See Pepper & Lewis Digest of Decisions, Title “Set-off and Defalcation.”

<sup>125</sup> Morrison v. Moreland, 15 S. & R. 61 (1826); Pennell v. Grubb, 13 Pa. 552 (1850).

<sup>126</sup> “Set-off is in substance a cross-action,” Pennell v. Grubb, *supra*, note 125. In the Philadelphia Rules 56, 57, 62, and 65 and in this act, §§ 14, 15, there seems to be no distinction in the use of these terms.

cation Act of 1705, under which set-off could be first pleaded, is broader than the later English Statute of 2 Geo. II. c. 22. The distinction in England is thus stated:

“The right to plead a set-off was at first conferred on a defendant by the Statute 2 George II. c. 22. Until then a defendant who had any cross-claim against the plaintiff could not raise it in the plaintiff’s action; he had to bring a cross-action. But the Judicature Act gave to a defendant a very wide power of counter-claiming. Neither the Judicature Act, however, nor other order or rule made in pursuance thereof, expressly stated what is the distinction between the new counter-claim and the former set-off. It is this: A set-off remained precisely what a set-off used to be under the statute of 2 George II. c. 22 and 8 George II. c. 24 as when allowed in cases which fall within these suits. Every other kind of cross-claim is a counter-claim. . . . A set-off is a defense proper to the plaintiff’s action; a counter-claim is in the nature of a cross-action. . . . Every set-off can be pleaded as a counterclaim . . . but a counter-claim cannot be pleaded as a set-off.”<sup>127</sup>

If this distinction has any validity in Pennsylvania it might be thus applied: that set-off prior to the act of 1915 meant as well set-off as counter-claim, but that claims which can now be set off, but could not have been prior to the act of 1915 are strictly speaking counter-claims and not set-off.

The second part of section 14 is based on the English rules.<sup>128</sup> Under the established practice in Pennsylvania, although a plaintiff could not discontinue without leave of court, he had the absolute right to suffer a voluntary nonsuit even though the defendant had pleaded set-off.<sup>129</sup> This right has now been made valueless, since the defendant may have what is virtually his cross-action tried without being at the mercy of the plaintiff for his opportunity. In the English and Philadelphia rules the same right is given to the defendant when the plaintiff’s action is “stayed”, a word not used in the Practice Act and instead of which the word “dismissed” is used. The dismissal of action

<sup>127</sup> Annual Practice (1914), pp. 366, 367.

<sup>128</sup> O. 21, R. 16, followed in Philadelphia Rule 57. Apparently there are no decisions under this rule of practice in Pennsylvania. Some decisions under the English rule may therefore be of interest. See Annual Practice (1914), pp. 363, 364.

<sup>129</sup> *McCredy v. Fey*, 7 Watts 496 (1838).

is the final determination of the action though not necessarily of the right of the plaintiff to begin again in another proceeding.<sup>130</sup> It seems to be a phrase large enough to include discontinuance, voluntary nonsuit, and stay, and in addition thereto the entry of judgment of *non-pros*, compulsory nonsuit, or judgment on an affidavit of defense in the nature of a demurrer.

The question arises, did the act intend to restrict the right of the defendant to have his counter-claim tried, to cases where the plaintiff upon his own motion had the case dismissed, discontinued, or nonsuited, or did it mean to allow him to enjoy this right in cases where he, the defendant, through his motion, was the cause of the dismissal, *etc.*, of the plaintiff's action. The word dismissal is broad enough to include such cases, though the specific mention of voluntary nonsuit in the act might give weight to the argument that compulsory nonsuit was not to be included. The modern tendency to dispose of all controversies between the parties in one action, though not yet perfectly realized in Pennsylvania is obviously reflected in the Philadelphia rule and in this action of the Practice Act.<sup>131</sup>

There is no provision under this section for the manner in which the set-off or counter-claim is to be pleaded. The Philadelphia practice provided that when a defendant relies upon a set-off or counter-claim he should first answer the averments of the statement and then set out his set-off or counter-claim under the heading "set-off" or "counter-claim", which should be stated in accordance with the rules for drawing statements.<sup>132</sup> It is

<sup>130</sup> *Weigley v. Coffman*, 144 Pa. 489 (1891); *Leese v. Sherwood*, 21 Cal. 151 (1862).

<sup>131</sup> The committee of the Bar Association in its report in 1912, pp. 72 and 73, recommended in this connection that the English and Ontario practice should be followed and that any right or claim, whether sounding in damages or not, should be permitted to be set off or set up by way of counter-claim, with the right in the court in its discretion to require the matter thus set up to be disposed of in a separate trial. This recommendation, however, was not adopted. The committee also recommended in its Report of 1912, p. 73, that the statement of the set-off or counter-claim should be under a separate head with separate numbered paragraphs, stating the relief to which the defendant claims to be entitled. This is in accordance with Philadelphia Court Rule 56, but was likewise omitted from the act.

<sup>132</sup> Philadelphia Rule 56. This is in accordance with Ontario Rule 113,

quite probable that this method of pleading will be enforced by rules of court following the Philadelphia practice which recommends itself as reasonable and proper, for it prohibits the defendant from mingling allegations of defense and counter-claim, and requires him in an orderly manner first to answer the plaintiff's demand and then set up, by what is substantially a new pleading incorporated in his affidavit of defense, the new matter which constitutes his claim of set-off or counter-claim.<sup>133</sup>

The question of the right of the court to order separate trials of claim and counter-claim seems never to have been raised in Pennsylvania. In view of the character of the rights that may be set-off or counter-claimed, the question is not likely to arise.

#### PLAINTIFF'S REPLY.

SECTION 15. "When the defendant in his affidavit of defense sets up a set-off or counter-claim against the plaintiff, the plaintiff, with fifteen days from the day of service of the affidavit of defense upon him, shall file an answer, under oath, which shall be called 'Plaintiff's Reply,' which shall be served upon the defendant, or his attorney, at the address for the service of papers indorsed on the affidavit of defense. In such cases the affidavit of defense shall be indorsed as follows:

"To the within plaintiff—

"You are required to file a reply to the within set-off (or counter-claim, as the case may be) within fifteen days from the service hereof."

"The set-off or counter-claim shall be regarded as the defendant's statement of claim, and the plaintiff's reply as an affidavit of defense thereto."<sup>134</sup>

This section substitutes a new pleading for the common

which followed the established practice under the English rule, O. 21, R. 10. See Annual Practice for 1914, p. 360.

<sup>133</sup> See Report of Committee of Pennsylvania Bar Association, 1912, p. 82, sec. 24.

<sup>134</sup> In the proposed act presented to the legislature on January 19, 1887 (Senate Bill 1, § 15) the practice set forth in §§ 14 and 15 of the Practice Act of 1915, relating to set-off and counter-claim and the plaintiff's reply thereto, was fully anticipated.

law replication. Under the Procedure Act of 1887 the plaintiff's reply was not provided for. In Philadelphia the English practice was adopted and a rule was provided which is in substantial agreement with this section of the act.<sup>135</sup> In other counties, however, the replication was still used and pleadings subsequent to the replication in accordance with common law forms were not improper and were occasionally resorted to.<sup>136</sup> The Act of 1915 provides for no pleadings subsequent to the reply. Rejoinders, sur-rejoinders, rebutters, and sur-rebutters may be deemed luxuries not essential to the perfect legal life.<sup>137</sup>

The plaintiff's reply need not be filed unless the defendant indorses his affidavit of defense as set forth in the act. Then the plaintiff may be penalized, under section 17, by judgment in favor of the defendant for want of a reply or for want of a sufficient reply, in the same manner as the plaintiff might take judgment against the defendant for want of an affidavit of defense or for want of a sufficient affidavit of defense. As the practice under the rules for judgment is well established, it will no doubt easily be applied to secure judgment for want of a reply or sufficient reply.

#### PROOFS UNDER THE PLEADING.

SECTION 16. "Neither party shall be permitted at the trial to make any defense which is not set forth in the affidavit of defense, or plaintiff's reply, as the case may be, except as provided in sections seven and thirteen."

This is but an application of the well-known principles applied at common law, prohibiting the party from proving any matter not admissible either under the plea of the general issue or the special pleas filed by him. Under the English rules if the

<sup>135</sup> Rule 62.

<sup>136</sup> A notable though very unusual illustration may be found in the case of *Allen v. Colliery Engineers Co.*, 196 Pa. 512 (1900), in which counsel indulged in an orgy of common law pleading. The pleadings are set forth in full in the report of the case and the defendant's plea was followed by replication, rejoinder, sur-rejoinder, rebutter, and sur-rebutter, and judgment entered for the defendant on a demurrer to the sur-rebutter, but reversed in the Supreme Court.

<sup>137</sup> See English Rules, O. 23, R. 2; Ontario Rule 119.



defendant proposes at the trial to rely on any defense or counter-claim not disclosed in his affidavit, he must, within four days after the master has given him leave to defend, deliver to the plaintiff's solicitor the particulars of such defense or counter-claim in writing and be precluded from relying on any defense or counter-claim not raised in his affidavit or in such particulars, except by leave of the judge who tries the action. If any defense arises after the statement of defense or the plaintiff's reply has been delivered, upon leave of court obtained, such other defense or reply may be set forth.<sup>138</sup>

Under the Philadelphia practice neither party shall be permitted at the trial to make any defense except that set forth in the affidavit of defense or plaintiff's reply as the case may be.<sup>139</sup> New matter may be added only by amendment by leave of court and a copy of the amendment shall be served on the adverse party or his attorney at least ten days before the day set for trial. This rule is practically incorporated in section 16 of the act and in section 21 providing for amendments or new pleadings to be filed on such terms as the court may direct.

#### MOTION FOR JUDGMENT.

SECTION 17. "In actions of assumpsit the prothonotary may enter judgment for want of an affidavit of defense, or for any amount admitted or not denied to be due. The plaintiff may take a rule for judgment for want of a sufficient affidavit of defense to the whole or any part of his claim, and the court shall enter judgment or discharge the rule, as justice may require. When the defendant sets up a set-off or counter-claim, he may move for judgment against the plaintiff for want of a reply, or for want of a sufficient reply to the whole or any part of the set-off or counter-claim; and the court may enter judgment in favor of the plaintiff, or the defendant, for such amount as shall be found due, with leave to proceed for the balance."

This section is a substantial reenactment of Acts of Assem-

<sup>138</sup> O. 14, R. 8, and see Appendix "K" to the Rules of the Supreme Court, No. 7 A; O. 24, R. 2.

<sup>139</sup> Philadelphia Rule 60. See also Allegheny County Rule 9, § 4.

bly<sup>140</sup> providing for judgment against the defendant for want of an affidavit of defense, or for the amount admitted to be due, or for want of a sufficient affidavit of defense to the whole or any part of the plaintiff's claim.<sup>141</sup> A partially new practice is established giving a similar remedy to the defendant where the plaintiff fails to file a reply or files an insufficient reply to the whole or any part of the defendant's set-off or counterclaim. This practice existed in Philadelphia under a rule of court which has been practically incorporated in this section of the act.<sup>142</sup>

This practice of granting a summary judgment in actions *ex contractu* where no defense or no sufficient defense is set up by the pleading has justified itself and is firmly established in Pennsylvania procedure. Our courts do not provide statistics showing the number of judgments entered for want of an affidavit of defense or for want of sufficient affidavit of defense and no comparison, therefore, can be made with the number of such judgments and those entered on nonsuit or verdict. But an examination of the motion lists of the courts will furnish proof, even though the same may not be statistically confirmable, that a very large amount of litigation is thus disposed of prior to trial.

#### GENERAL PROVISIONS.

SECTION 21. "The court upon motion may strike from the record a pleading which does not conform to the provisions of this act, and may allow an amendment or a new pleading to be filed upon such terms as it may direct."

SECTION 22. "The court, in its discretion, upon motion and notice to the opposite party or his attorney, may extend the time fixed by this act for the filing or service of any pleading."

<sup>140</sup> Act May 25, 1887, P. L. 271, § 5; Act April 22, 1889, P. L. 41, § 1; Act May 31, 1893, P. L. 185, § 1; Act July 15, 1897, P. L. 276, § 1.

<sup>141</sup> The judgment for want of an affidavit of defense may be entered as of course by the prothonotary, with the same effect as if moved for in open court, providing a rule of court or standing order authorizes him to do so. Act of April 22, 1889, P. L. 41, § 1. The judgments for want of a sufficient affidavit of defense however require a rule to show cause and must be entered by the court.

<sup>142</sup> Philadelphia Rule 65.

SECTION 23. "The courts of common pleas shall make such rules as they deem advisable for the proper enforcement of this act."

SECTION 24. "This act may be cited as 'Practice Act, nineteen fifteen.'"

SECTION 25. "All acts or parts of acts inconsistent with the provisions hereof are repealed."

Section 21 gives the court complete control of the pleadings and plenary power to strike out a pleading which does not conform to the provisions of the act or to allow an amendment or a new pleading on such terms as the court may direct. In Philadelphia a similar rule was in force and this, together with the Amendment Act of 1806<sup>143</sup> gave the Philadelphia courts substantially the same power which is now conferred by this section of the act. The words of Lord Justice Bowen may be here cited as furnishing a reasonable interpretation of this rule:<sup>144</sup>

"The rule that the court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right."

It would seem proper, therefore, that, if an application is made to strike out a pleading because not in conformity to the provisions of the Act of Assembly, the applicant should be compelled to show that he is in some way prejudiced by the irregularity complained of. The English rules provide:<sup>145</sup> "No technical objection shall be raised to any pleading on the ground of any alleged want of form. . . . Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise

<sup>143</sup> Philadelphia Rule 64; act March 21, 1806, 4 Smith's Laws 329, Section 6.

<sup>144</sup> Knowles v. Roberts, 38 C. D. 270 (Eng. 1888).

<sup>145</sup> O. 19, R. 26; O. 70, R. 1; and see Annual Practice (1914), p. 348.

dealt with in such manner and upon such terms as the court or judge shall think fit."

Section 22 enables the court to modify the statutory requirement that the affidavit of defense and the plaintiff's reply shall be filed within fifteen days from the date of service of the statement of claim and affidavit of defense respectively.<sup>146</sup> Under the former practice an enlargement of the defendant's time by the court or a judge would be an attempt to curtail the plaintiff's statutory right to judgment for want of an affidavit of defense and was beyond its power.<sup>147</sup> Under the present practice the court may in all cases, in the exercise of its judicial discretion, grant additional time for the filing and service of the statement of claim, affidavit of defense, or plaintiff's reply. It is suggested in the act that this power should be exercised upon motion and notice to the opposite party or his attorney. For the purpose of preventing abuse, a rule of court, requiring a petition under oath setting forth reasons, upon which a rule to show cause with stay of proceedings may be granted, would be a proper practice. Under the English practice the court has power to enlarge the time, although the application is not made until after the time fixed for the filing has expired.<sup>148</sup> No such grant of power is given in the Practice Act and it will probably be held that the application for the extension of time must be made before the expiration of the fifteen days fixed by the act.

Section 23 seems unnecessary. Every court of record possesses general powers to make rules for the regulation of its business. It is a power inherent in the nature of the constitution of the court. Statutes have nevertheless from time to time been passed in which such powers are conferred. The most recent in Pennsylvania provided that "the several courts of common pleas of this commonwealth shall have full power to make all necessary rules and regulations for the transaction of all business brought before them."<sup>149</sup> This section therefore seems superfluous.

<sup>146</sup> There is no time fixed by the act for the service of papers.

<sup>147</sup> *Bordentown Banking Co. v. Renstein*, 214 Pa. 30 (1906), *supra*, note 62.

<sup>148</sup> O. 64, R. 7.

<sup>149</sup> Act May 24, 1878, P. L. 135, § 2.

## SUMMARY AND CONCLUSION.

In summing up this review of the Practice Act of 1915 we find among the new features, sections 3 and 4, the abolition of pleas and demurrers; section 13, the affidavit of defense in actions of trespass; sections 15 and 17, the plaintiff's reply and the right to enter judgment for want of such reply or for want of a sufficient reply; section 14b the right of defendant who has set up a counter-claim to proceed with his cause notwithstanding the discontinuance or dismissal of the plaintiff's action or his voluntary nonsuit; and section 22, the right of the court in its discretion to extend the time fixed by the act for the filing or service of any pleading. These new features will probably commend themselves to the bar after their effect has been tested by experience.

There are several other new features, however, which will probably be found undesirable. These are, section 1, the exception of the actions of libel and slander from the procedure relating to other actions of trespass; sections 3, 4, and 20, the substitution of the affidavit of defense for plea to the jurisdiction and for demurrer to statement; and sections 11 and 19, the attempt to give to the plaintiff in actions of assumpsit the right to ask for an accounting.

Many of the sections of the act are merely declaratory of the existing law, such as section 5, relating to the content and form of pleading, excepting the requirement that the paragraphs of the pleading shall be numbered; sections 6 and 8, relating to specific denial; section 9, to statement of claim; section 10, to the indorsement of the statement of claim, excepting that it substitutes a notice for a rule and requires an address for service to be indorsed; section 12, to the affidavit of defense; section 14a, to what may be set-off or counter-claimed; section 17, to motions for judgment, excepting the proviso extending such procedure to the plaintiff's reply; sections 21 and 23, to the power of the court to deal with the pleadings and to make rules relating to them. The sixteenth section is likewise declaratory, excepting that it applies to the pleadings under their modern names the rules which were applicable to the pleadings at common law.

There are certain other features of the act which are partly new and which will likewise be found serviceable in actual practice, such as the provisions for the closing of the pleadings with the reply, section 2; and for an affidavit of defense from executors, *etc.*, section 7.

There are a number of purely procedural details that ought properly to have been disposed of in rules of court, but were introduced because in Pennsylvania the only method for securing uniformity in practice is by legislative enactment. This raises the question involved in the consideration of all matters of procedure, as to whether the prevailing method of providing for judicial procedure by legislative enactment should not be changed in favor of the English and Canadian system partly adopted in some of the United States, wherein the legislature has renounced the right to prescribe the details of procedure and has ceded it to the courts.<sup>150</sup> It has been suggested that an act of the legislature giving the right to the Supreme Court of Pennsylvania to make uniform rules for all of the courts of the state is of doubtful constitutionality and a bar to the adoption of the system above referred to. If this be so, then the present practice in Pennsylvania whereby the legislature biennially tinkers with matters of judicial procedure must be continued until the constitution is amended. At present, the practice is an amalgam of legislative rules and rules of court. The tendency indicated in the more recent legislation is toward the enlargement of powers of the court in purely procedural matters, although the emphasis is still laid too strongly on the right of the legislature to prescribe such procedure.

Attention may again be drawn to the fundamental problem involved in the consideration of this subject, namely the plan of unification of the entire judicial system of the commonwealth.<sup>151</sup> This plan includes the constitution of a judicial council consisting

<sup>150</sup> For an analysis of the English system see Samuel Rosenbaum: *Studies in English Civil Procedure—The Rule-Making Authority*, 63 *UNIV. OF PENNA. LAW REVIEW*, 151.

<sup>151</sup> See Bulletin 7 of American Judicature Society entitled "First Draft of a State-wide Judicature Act," October, 1914.

of representatives of the appellate and county courts among whose functions will be the power to make and amend all rules relating to procedure. The subject is one which invites the most serious consideration of the bar. The plans thus far suggested and proposed in the light of a broad study of comparative judicial procedure have so much to recommend them that their careful study and discussion by the bar is highly to be recommended.

No attempt has been made in this review and criticism of the Practice Act of 1915 to consider many matters which might have been provided for in the act or matters which were included in the original drafts, but ultimately abandoned. Nothing is easier than to suggest a thousand and one things that have not been provided for in any scheme of procedural regulation. It is much more important, certainly more difficult, and surely more considerate, to appraise that which has been accomplished.

On the whole, the Practice Act of 1915, if it shall be declared to be constitutional, will introduce certain new features into the general practice of Pennsylvania which will probably be found to be efficient in promoting the object of the law to secure a speedy trial of the merits of contested questions. If practice during the year 1916 under this act will show that some of its features are undesirable, the legislature of 1917 may correct them. The general progress of the movement toward simplicity in procedure which began in the very infancy of the commonwealth and has manifested itself in various procedural reforms during the nineteenth century is promoted by the present Practice Act, the good features of which incorporated in the general procedure of the state, will help to prepare the bar for the ultimate step above suggested, namely, the relegation of the entire problem of procedural regulation to the courts.

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