

## THE PENNSYLVANIA PRACTICE ACT OF 1915.

### III.

A year ago<sup>1</sup> the writer published an article on the Pennsylvania Practice Act of 1915. The present article is intended to supplement and amplify the former in the light of all of the cases reported up to January 10, 1917, and of a number of unreported cases, for reference to which the writer is indebted to judges of the county courts.<sup>2</sup>

The fact that comparatively few cases under the act have been reported may indicate that it is working well in actual practice, but the general opinion of the bench is rather critical, and some judges are quite outspoken in their demand for its repeal. There is no doubt that many of the sections of the act are unskillfully and loosely drawn and that it will take some time before the practice will be reasonably well settled. It is a weakness of all practice acts that they must leave much to judicial interpretation, and rules of court must be adopted to supply deficiencies since no legislature can anticipate all of the problems of practice that arise. In view of the fact that comparatively few practice problems reach the appellate courts,<sup>3</sup> uniformity of practice will be long delayed, and as each one of the courts in the fifty-six judicial districts in Pennsylvania is independent, it

<sup>1</sup> 64 U. OF PA. LAW REVIEW, p. 223. For convenience of reference, the act is herein discussed in the order of its sections under appropriate captions.

<sup>2</sup> The writer desires especially to acknowledge his obligation to the following judges for copies of unreported decisions as well as suggestions and expressions of views on various sections of the act: Hon. T. F. Bailey, Huntingdon County; Hon. T. J. Baldrige, Blair County; Hon. Norris S. Barratt, Philadelphia County; Hon. S. F. Channell, Tioga County; Hon. Charles Corbet, Jefferson County; Hon. L. W. Doty, Westmoreland County; Hon. William C. Ferguson, Philadelphia County; Hon. T. D. Finletter, Philadelphia County; Hon. H. A. Fuller, Luzerne County; Hon. W. R. Gillan, Franklin County; Hon. J. F. E. Hause, Chester County; Hon. J. A. McIlvain, Washington County; Hon. J. F. Miller, Montgomery County; Hon. J. W. Ray, Greene County; Hon. U. P. Rossiter, Erie County; Hon. W. H. Ruppel, Somerset County; Hon. S. B. Sadler, Cumberland County; Hon. John D. Shafer, Allegheny County; Hon. G. G. Sloan, Clarion County; Hon. S. J. Strauss, Luzerne County; Hon. H. W. Whitehead, Lycoming County; Hon. E. W. Whittelsey, Erie County; Hon. J. B. Woodward, Luzerne County.

<sup>3</sup> Thus far no cases interpreting the Practice Act have reached the appellate courts.

may adopt rules of court covering matters of practice not laid down in the act; this, together with the normal disagreement of courts in matters of interpretation, will in a few years result in diversity instead of uniformity of practice.<sup>4</sup> If the Supreme Court of Pennsylvania had been endowed by this act with power to make rules of practice for its proper enforcement, this result might have been prevented, but under section 23, the power already inherent in the common pleas court to make such rules as they deem advisable for the proper enforcement of this act, is specifically given to them. It has been suggested that even though the State Supreme Court may be permitted to make general rules of practice, the constitutional right of the independent common pleas courts to make rules of their own cannot thus be taken away. The writer is of the opinion that a sufficient answer to this objection has been given by Professor Roscoe Pound, to whose article on the subject reference is here made.<sup>5</sup>

The great desideratum in rules of practice is flexibility, so that they can readily be molded to meet all contingencies in actual practice. This is impossible in legislative rules, which can only be amended every two years, whereas rules of court can be adopted, amended, and repealed by the court as the exigencies of practice require.

Some sections of the act should be amended, and some of the undesirable features that should be eliminated or changed are discussed in the following pages.

#### APPEALS FROM JUDGMENTS OF JUSTICES OF THE PEACE.

Although section 1 limits the scope of the act to actions brought in the court of common pleas, it has been decided that the procedure applies as well to actions brought before a justice of the peace and subsequently brought into the court of common

<sup>4</sup>In 1896 Alexander Simpson, of the Philadelphia Bar, published a compilation of rules of the courts of common pleas of Pennsylvania in the Second Annual Report of the Pennsylvania Bar Association, pages 281 to 689. Over 400 pages of this report contain the rules of the common pleas and illustrate abundantly the variety of methods of procedure in the different county courts.

<sup>5</sup>In an article entitled "Regulation of Judicial Procedure by Rules of Court," 10 Ill. Law Review 163 (1916).

pleas by appeal.<sup>6</sup> The court took the view that an appeal from the judgment of a justice of the peace is only one of several ways of bringing such action in the court of common pleas. But though the result of this decision may be desirable, its logic is questionable. An appeal brings the case *into* the court of common pleas and the action was originally brought *in* the court of the justice of the peace. The result sought may be attained by the simpler and more satisfactory method of a rule of court such as now exists in Philadelphia,<sup>7</sup> Luzerne,<sup>8</sup> Somerset<sup>9</sup> and other counties.

#### EXCEPTION OF LIBEL AND SLANDER.

The title of the act as well as section 1, except from its provisions the actions for libel and slander, the pleadings in which remain as heretofore, *i. e.*, a common-law declaration and pleas. There is no apparent reason for this exception<sup>10</sup> and the affidavit of defense which by the act has been made a pleading of such dignity as to supersede all pleas, demurrers, and bills of particulars might well have been used as a proper substitute

<sup>6</sup> Richey v. Maurer, 12 Schuylkill 337; 64 Pittsburgh 672; 44 County Court Reports 600.

<sup>7</sup> Philadelphia Rule 74.

<sup>8</sup> The writer is indebted to Judge S. J. Strauss for a copy of the Luzerne Rule, see note 135, *infra*.

<sup>9</sup> The writer is indebted to Judge W. H. Ruppel for a copy of the Somerset Rule:

"Sec. 1. An appeal by a defendant from the judgment of a justice of the peace having been filed in the prothonotary's office, the plaintiff may at any time thereafter file his statement of claim in the same form and manner as provided for in original actions by the Practice Act Nineteen Fifteen, P. L. 483; and the further proceedings shall in all respects conform to the provisions of said act of assembly. If the plaintiff do not file his statement of claim, the defendant may at any time rule him to file his statement and proceed as in other cases.

"Sec. 2. When the plaintiff appeals from the judgment of a justice of the peace, he shall file his transcript or within twenty days thereafter his statement of claim, in the form prescribed by said Practice Act Nineteen Fifteen, and the subsequent proceedings shall in all respects conform to said act of assembly.

"Sec. 3. For default of any conditions imposed by this rule, either party may move for judgment for same amount as the justice's judgment, together with costs and interest."

<sup>10</sup> 64 U. OF PA. LAW REVIEW 233.

for the pleas of "not guilty" and "justification."<sup>11</sup> It is difficult if not impossible to see why the defendant should not state in his affidavit of defense,<sup>12</sup> that he did not utter the defamatory words or publish the libel, or that he did utter the words but that they constituted a privileged communication, or that the words are not false and malicious, or that the publication was proper for public information or investigation. The latter defenses should be coupled with a statement of circumstances under which the words were spoken or published so that the question of privilege or justification<sup>13</sup> might be determined *in limine* as a question of law.

Under the English practice<sup>14</sup> there is a practical equivalent to the affidavit of defense in the plea and particulars. The plea now commonly approved is in the following form:

"In so far as the said words consist of allegations of fact, they are true in substance and in fact; in so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice upon the said facts which are matters of public interest."<sup>15</sup>

The court has power to require particulars to be ordered of the allegations of fact which are relied on by the defendant in support of his plea.<sup>16</sup> With these and other precedents<sup>17</sup>

<sup>11</sup> The late Judge Robert Ralston, of Philadelphia, one of the draftsmen of the act, in an address before the Pittsburgh Law Club, 72 Legal Intelligencer 824, offers the following explanation for the retention of the old procedure: "It does not apply to actions for libel and slander in which the plea is 'not guilty' or 'justification.' Under the former plea the defendant cannot show that the defamatory words constituting the alleged slander or libel are true; if he wishes to assert their truth, which is a complete defense, he must plead 'justification.' As the defenses which may be set up under each of these pleas are well settled, and as the plea of 'justification' if not proved is some evidence of malice and will always tend to aggravate damages, it was thought better to leave these actions as they are and not change the existing practice. They were, therefore, omitted from the scope of the act."

<sup>12</sup> Under existing practice an affidavit of defense is not required, but may be filed in lieu of a plea of "not guilty," and both pleas "not guilty" and "justification" may be pleaded together. *Ferber v. Gazette & Bulletin Publ. Ass'n*, 212 Pa. 367 (1905).

<sup>13</sup> Under Act April 11, 1901, P. L. 74.

<sup>14</sup> O. 19, R. 6.

<sup>15</sup> *Lord Penrhyn v. The Licensed Victuallers' Mirror*, 7 Times Reports 1 (1890).

<sup>16</sup> *Digby v. Financial News Limited*, 1 K. B. 502 (1907). Where a gen-

before them, the draftsmen of the act might well have included the actions for slander and libel in their procedural scheme, thereby helping to promote uniformity instead of diversity in practice. It would have resulted in supplanting the verbose pedantry of the declaration for a concise and summary statement of claim, and ought to have resulted also in the abolition of the "innuendo" by requiring in all statements of claim a recital of the exact manner in which the slander affects the standing or reputation of the plaintiff and whether specifically in his vocation or as a public official.<sup>18</sup>

#### ABOLITION OF DEMURRER.

Did the legislature by section 4 intend to abolish all demurrers or do the words of the second part of the section limit the effect of the first to the demurrer to the statement of claim?<sup>19</sup> Under the former practice, the statement of claim was the only pleading attacked by demurrer. The attack on the affidavit of defense was always by rule for judgment, whether the affidavit of defense, as under the Philadelphia rules<sup>20</sup> was considered a pleading or, as in the opinion of the Supreme Court,<sup>21</sup> merely

eral charge of misconduct is made by the defendant, as for instance that the plaintiff is a swindler and defendant justifies he must in his plea give specific instances of conduct justifying such a description, and these must be pleaded with sufficient particularity to inform the plaintiff precisely what are the facts to be tried and what is the charge made against him. See Annual Practice for 1914, page 326. Defendant must set out in his plea the facts and circumstances on which he will rely as rendering the occasion privileged. Annual Practice, p. 342.

<sup>18</sup> Under the Practice Act of 1912 of New Jersey, section 3, there is but one form of civil action in the courts of common pleas called an "action at law." No distinction is made between actions *ex contractu* and actions *ex delicto*, and no exceptions in favor of actions for libel and slander.

<sup>19</sup> A distinguished judge of one of our country courts writes in advocacy of these changes, adding "pleading having become a lost art there are very few lawyers among the younger men sufficiently alert to protect their clients on these high technicalities. I think this rather unfortunate, but with the tendency of the times it casts a slur upon the administration of justice to have suitors thrown out of court for reasons like these."

<sup>20</sup> Judge Wanner says tersely "The Practice Act of 1915 sweeps away practically all that remained of the ancient forms of pleading after the passage of the Procedure Act of 1887, except in cases of libel and slander, to which the recent act does not apply." *Miller v. Penna. R. R. Co.*, 29 York 200; s. c. 6 Lehigh 407.

<sup>21</sup> Rules 54-61.

<sup>22</sup> *Muir v. Preferred Accident Ins. Co.*, 203 Pa. 338.

an interloping nondescript having a peculiar and special function but not being recognized as a pleading. Under the present act that portion of the affidavit of defense which sets up new matter by way of set-off or counter-claim is in effect a defendant's statement of claim and is so denominated in section 15. How shall this portion of the affidavit of defense be attacked by the plaintiff? Under section 4 matters of law which could have been set up by demurrer may now be set up in the affidavit of defense and as the plaintiff's reply is considered an affidavit of defense to the defendant's set-off or counter-claim, it would seem to be proper practice to attack the latter in plaintiff's reply.

In an unreported decision of one of the Philadelphia courts<sup>22</sup> the opinion was expressed orally that section 4 abolishes not only the demurrer to statement but also the rule for more specific statement of claim, but the practice in Schuylkill County<sup>23</sup> is *contra*. The decision of the Philadelphia court is open to criticism. Mr. Justice Mitchell<sup>24</sup> drew attention to the fundamental difference between the demurrer and the rule for more specific statement, and, since the act abolishes demurrers only it is very difficult to justify the ruling of the Philadelphia court. The rule for more specific statement performs a useful and special function utterly different from that of an affidavit of defense. The mere desire for uniformity in practice has already produced the abnormality of requiring a defendant to swear in his affidavit of defense to the legal insufficiency of the plaintiff's statement and, this decision would carry the principle still farther and require the defendant to swear that the plaintiff's statement is not sufficiently specific. Perhaps this is a desirable result, but it always creates difficulty when things that are essentially different are called by the same name. The affidavit of defense is now the vehicle for stating the defendant's actual defense to the plaintiff's claim, his defense of set-off or

<sup>22</sup> *Katzenberg v. Oberndorf*, C. C. P. No. 4, Sept. Term, 1916, No. 771.

<sup>23</sup> *Richey v. Maurer*, *supra*, note 6; *Mountain City Water Co. v. Harleigh Co.*, 12 Schuyl. 377 (1916).

<sup>24</sup> *Bradley v. Potts*, 155 Pa. 418 (1893).

counter-claim, his attack on the plaintiff's statement because it does not set up a good cause of action and also because it is not stated with sufficient clearness and particularity. A few years ago the affidavit of defense was not even a pleading; now it absorbs the functions of affidavit of defense, plea, notice of special matter, bill of particulars,<sup>25</sup> demurrer, and rule for more specific statement of claim. But as soon as we assign to this pleading so many different functions we must give it, unofficially at least, a number of different names. The tendency to name a thing according to its functions will not be checked by mere legislative enactments or rules of court. The bar, for example, will not long go on calling this pleading, in one of its important new functions an "affidavit of defense by way of demurrer" or "in lieu of demurrer." It is sometimes called a "quasi-demurrer." The Pittsburgh bar with the approval of the bench is calling it a "statutory demurrer." This is a good name and precisely defines at least one of the functions of this hybrid affidavit of defense. Other names will no doubt in time be invented and used until we shall have the different functions of the affidavit of defense represented by a number of different names. What then will be the value of having all these things done in one form? The mere unscientific conglomeration of functions by means of a single pleading is not a step toward uniformity or real procedural reform. All the dicta of legislatures cannot make a demurrer anything but a demurrer, nor can they, by saying so, make a demurrer and an affidavit of defense the same thing. The only result of such legislation is to create confusion where before there was clarity and to invite courts to say, as was said in the Philadelphia case, that a rule for more specific statement shall now also be called an affidavit of defense. It may be that "demurrer" is not a good name or that it is no longer in good repute notwithstanding its service for centuries. Then let the demurrer be called something else, if it must be, but surely not by a name which is well known as that of a procedural step having a function entirely different from that of

<sup>25</sup> *Sturtevant v. Regan*, 64 Pitts. 715 (1916); s. c. 34 Lanc. 53.

a demurrer. It seems that the trouble may be traced to the oversight of the draftsmen of the act of the fact that in the English procedure which was their model the demurrer and the defense are set forth in the same paper.<sup>26</sup> Instead of copying this provision and thus allowing or rather compelling a defendant to demur and plead at the same time they split up the procedure and required two affidavits of defense to be filed, first, one which is a demurrer and nothing else and then a second one, which is a plea and particulars, or as we would call it an affidavit of defense on the merits.

#### CONTENT AND FORM OF PLEADINGS.

In explanation of the meaning of this section, Judge Ralston<sup>27</sup> recommended that the pleading should be set forth in clear, short, positive sentences avoiding circumlocution. Instead of using participial phrases, each statement should be averred positively. For instance, instead of averring that defendant being a street car company operating a line of trolleys, *etc.*, did so and so, the statement should be that the defendant is a street car company and on the day in question operated the car which caused the injury. If documents are referred to, they should be quoted exactly as written, for instance in an action on a policy which was to become void "if the assured shall die by his own hand," the defendant insurance company should not aver that the insured "killed himself" or "committed suicide" but that the "assured died by his own hand."

Furthermore, only material facts should be stated and all unnecessary allegations and details omitted. It is a well-known fact, testified to by a number of the judges of this state, that the tendency of the bar to prolixity in pleading still persists and is overcome with great difficulty. It is probably a characteristic of the weak rather than the strong lawyer, of the one who is not quite sure of the exact legal effect of his statements and therefore seeks safety in a cloud of words. Every fact that must

<sup>26</sup> Annual Practice, 1915, pp. 424-427, and see forms, *ibid.*, p. 1489.

<sup>27</sup> See Address of Judge Ralston, cited in note 11, *supra*.



be either admitted by the other side or proved in order to establish the party's case is material<sup>28</sup> and the rule applies as well to the statement of a counter-claim or a set-off as to other pleadings.<sup>29</sup>

Other faults frequently commented on by the bench are the old trick of trying to forestall the defense in the statement of claim, and the recital of obligations and duties and failure to perform them. The latter is entirely unnecessary and indeed directly contrary to the provision of section 5 which forbids the pleading of inferences or conclusions of law.<sup>30</sup> The rule laid down in section 5, that every pleading shall be divided into paragraphs, numbered consecutively, each of which shall contain but one material allegation, has been frequently enforced and in several reported cases<sup>31</sup> pleadings faulty in this respect have been stricken from the record.

<sup>28</sup> See Address of Judge Ralston, cited in note 11, *supra*.

<sup>29</sup> Beck v. Kauffman, 26 D. R. 1 (1916).

<sup>30</sup> Delaney v. Chester, 14 Del. 49 (1916); s. c. 6 Lehigh 405; 64 Pitts. 293. In this case the court prescribes the form of statement of claim as follows:

1. The city of Chester is a municipal corporation, being a city of the third class.
2. Seventh Street, running eastwardly from Welsh Street, was a public street of said city on February 26, 1914.
3. On February 26, 1914, there was a paved sidewalk on the south side of Seventh Street running eastwardly from Welsh Street.
4. On February 22, 1914, snow existed on said sidewalk.
5. This snow became hardened and remained until February 27, 1914.
6. On February 26, 1914, at about 11 o'clock A. M., the said plaintiff was walking on said sidewalk and fell.
7. At the time of the said fall the plaintiff became injured by a cut on her head, injury to both arms, and internal injuries accompanied with pain and suffering.
8. The said injuries have continued until the present time.
9. The plaintiff has expended money for medicines and medical attendance in connection with said injuries.

A & B,  
Attorneys for plaintiff.

Delaware County, ss.:

Elizabeth Delaney, the plaintiff above named, being duly affirmed according to law, says that the allegations in the foregoing statement are true.

Affirmed and subscribed before me this                      day of                      , 1916.

To the within defendant:

You are required to file an affidavit of defense to this statement of claim within 15 days from the service thereof.

(Names of the attorneys and their addresses.)

## DEFENSE BY EXECUTORS, ETC.

An old rule of court of Philadelphia<sup>32</sup> and other counties required an affidavit of defense by executors, administrators, guardians, committees and others sued in a representative capacity. The purpose of this rule was stated by the late Judge Michael Arnold as follows, "it is to enable the plaintiff to obtain judgment where there is neither a defense nor even a desire to delay the plaintiff as in suits upon mortgages or ground rent deeds."<sup>33</sup> This rule of court required the executor to swear that he believes there is a just and legal defense. In the opinion of the Court of Common Pleas of Northampton County<sup>34</sup> the rule was held to be undesirable and was rescinded on the ground that if the executor had a belief on the subject he might be mistaken

<sup>32</sup> *Confer v. Smith*, 18 Luzerne 400 (1916); 64 Pitts. 572; 14 Del. 166; *Zulinger v. Grebe*, 33 Lanc. 401; s. c. 14 Del. 190. *Hackney v. Gorley*, 64 Pitts. 224 (1916); s. c. 33 Lanc. 220; 25 D. R. 433; 44 C. C. 273, decided that if the statement of claim contains succinct and consecutively numbered paragraphs, the mere fact that it commences with a brief introductory sentence setting forth in general terms what the case is about, so that the formal parts of the sentence may be better understood, is not a violation of this section of the act. In the two cases above cited leave was granted to file a new statement of claim within thirty days.

<sup>33</sup> "An affidavit of defense shall be required from executors, administrators, guardians, committees, and others sued in a representative capacity: Provided, that an affidavit by the defendant in said cases, stating that he has made diligent inquiry, and has not been able to obtain sufficient information to enable him to set forth particularly the nature and character of the defense, but that he believes there is a just and legal defense, shall be deemed a sufficient compliance with this rule." Adopted March 7, 1893.

<sup>34</sup> "Under the old rule, judgment could not be obtained except for want of a plea, or, if a plea was filed, until the case could be reached on the trial list and disposed of there, thus resulting in ruinous delay and loss of trust funds invested for widows and orphans. Authority to make such rule may be found in *Dixon v. Sturgeon*, 6 S. & R. 25, in which Judge Duncan said: 'I can see nothing in reason, from the representative character of an executor or administrator, to distinguish it from a suit by or against a person in his own right. The executor or administrator is deprived of no privilege, of no defense, which he possessed by the common-law mode of proceeding. He has full time to make his defense after statement filed; he is not and cannot be taken by surprise. If his defense consists of a plea to the original demand, he has sufficient time to acquire knowledge and to shape it so as to meet his case.' And in *Charlton v. Allegheny City*, 1 Grant's Cases 208, the court said, in a suit against a minor defended by her guardian: 'He has the custody of her property and is quite able to ascertain all the facts relating to the validity of the lien as if the property were his own. If he can discover no fact that will justify an affidavit of defense, he would find some trouble in making an available defense before a jury.'" 32 W. N. C. 36.

<sup>35</sup> *National Bank v. Detwiller*, 8 D. R. 515 (1899).

and ought not to be compelled to swear to such belief. Section 7 of the Practice Act requires the executor, in addition to the statement of his belief that there is a defense, to set forth "the facts upon which he bases his belief." If he does so, he is relieved from the responsibility of mistake in his belief. If the facts in the opinion of the court do not justify his belief, judgment may be given in favor of the plaintiff. If, on the other hand, the court finds that the belief is justified by the facts stated or that the statement is of suspicious circumstances which raise a reasonable doubt as to the *bona fides* of the plaintiff's claim, the court should refuse judgment and let the case go to a jury, thus requiring the plaintiff to prove his case in open court subject to cross-examination. If such a claim were presented at the audit of the executor's account in the orphans' court, ample opportunity would be given to the executor to inquire into the good faith of the claim and the claimant would be put to his proofs. The common pleas court, therefore, in an action against the executor should not permit the plaintiff to enjoy a higher right than would be granted to him in the orphans' court which is especially organized to consider claims against decedents' estates. The burden in such case obviously should be on the plaintiff to show why the claim was not pressed for satisfaction during the lifetime of the debtor. Under this section of the act, therefore, it is submitted that the defendant executor need not state facts to *justify* his belief, but merely the facts upon which he *bases* his belief, and if the court is convinced of the defendant's good faith and suspects the good faith of the plaintiff, it should send the case to a jury, as the defendant has complied with the technical requirements of the act. A case in which this question arose was considered by the Court of Common Pleas No. 5, of Philadelphia County.<sup>35</sup> The defendant's executors filed an affidavit of defense denying the indebtedness but failed to set forth their defense in language sufficiently specific, so that if such an affidavit had been filed by the decedent in a suit against him, the court would have given judgment for

<sup>35</sup> *McGlinn Distilling Co. v. Dervin*, 25 D. R. 341 (1916).

want of a sufficient affidavit of defense. But after two arguments, the court refused to give judgment on the ground that the claim was a stale one and no explanation had been offered by the plaintiff why he had made no effort to collect it during the lifetime of the defendant's testator.

#### DEFENSE BY MUNICIPALITIES.

By an early act of assembly<sup>36</sup> municipal corporations were expressly exempted from the obligation imposed on other defendants to file affidavits of defense in certain cases. After the Procedure Act of 1887<sup>37</sup> was passed, the question arose whether this exemption of municipalities was thereby repealed. It was held by Judge Allison of the Court of Common Pleas No. 1, of Philadelphia County, that it is clear there is no express repeal and a reasonable interpretation of the Procedure Act of 1887 leads to the conclusion that there is no implied repeal, and the exemption of municipal corporations from filing affidavits of defense still continues.<sup>38</sup> There is nothing in section 7 of the Practice Act which should change the law in this respect. The general rule against implied repeal of acts of assembly would apply and the exemption of municipalities from filing an affidavit of defense would still continue except as modified by the Act of May 3, 1909, P. L. 394.<sup>39</sup>

#### SPECIFIC DENIAL.

Up to the time of the passage of the Practice Act of 1915 there were no Pennsylvania decisions as to the extent to which a specific denial must go. The English rules of practice required "That the party pleading to an allegation of fact must make it

<sup>36</sup> Act of April 21, 1858, P. L. 387.

<sup>37</sup> Act of May 25, 1887, P. L. 271.

<sup>38</sup> *Malone v. Philadelphia*, 132 Pa. 209 (1890). On appeal the Supreme Court decided the case on other grounds. In *Bethlehem City Water Co. v. South Bethlehem Borough*, 14 D. R. 720 (1905), Judge Scott of Northampton County followed the decision of Judge Allison.

<sup>39</sup> See also Acts of Assembly of April 26, 1893, P. L. 26; March 1, 1909, P. L. 394; May 8, 1913, P. L. 172. The question was raised but not decided in *Ahrens v. Reading*, 8 Berks 246 (1916).

perfectly clear how much of it he admits and how much of it he denies." He must not deny *en bloc* everything alleged against him. A defendant must not plead that "he denies specifically every allegation contained in the statement of claim." Still, it is not necessary to write out every sentence in the statement of claim and traverse it in detail. It is sufficient when dealing with matters of inducement or any other allegations which do not go to the gist of the action, to plead that "the defendant denies each of the allegations contained in paragraph . . ." But when the pleader goes to those allegations which are of the gist of the action he must be more precise. He must plead "the defendant never agreed as alleged" or "never made such representation as is alleged in paragraph . . . of the statement of claim."<sup>40</sup> In a recent case under the Practice Act, decided by Judge Fuller of Luzerne County,<sup>41</sup> the statement of claim contained eight paragraphs, the affidavit of defense denied generally the facts set forth in seven of these paragraphs. In a later paragraph, the affidavit of defense substantially answered the pith of the statement, but it was held insufficient because the plaintiff is entitled to have a specific denial of every allegation in his statement of claim.<sup>42</sup> But the rule as to the extent of the specific denial has its limitation. If the defendant has no means of knowledge and, therefore, is unable to answer specifically, the general and proper rule is stated by Judge Barratt of Philadelphia as follows:

"Averment of ignorance and demand of proof is insufficient where the defendant has knowledge or means of knowledge, but where knowledge is beyond his means, then such averment is equivalent to a denial of the allegation in the statement."<sup>43</sup>

<sup>40</sup> *Adkins v. North Metropolitan Tramway Co.*, 63 L. J. Q. B. 361 (1893); *Annual Practice for 1914*, pp. 344-45; *Rassam v. Budge*, 1 Q. B. 571 (1893).

<sup>41</sup> *Scranton Flour & Grain Co. v. Maier*, 18 Luzerne 466; s. c. 33 Lanc. 404; s. c. 14 Del. 197; s. c. 64 Pitts. 695.

<sup>42</sup> In this case plaintiff took a rule for judgment for want of a sufficient affidavit of defense but the court refused to make the rule absolute and suspended it for fifteen days in order to enable the defendant to file a supplemental affidavit of defense.

<sup>43</sup> *Beck v. Kauffman*, *supra*, note 29. See also *Pennsylvania Railroad Co. v. Dreyfus*, 25 D. R. 265 (1916), and *Carnell v. Gordon*, 25 D. R. 189 (1916).

## STATEMENT OF CLAIM.

Section 9 provides that "in actions on contracts it shall state whether the contract was oral or in writing." This should not be left to inference. The general tendency seems to be to assume that unless a contract is stated to be in writing, in which event a copy of it must be attached under the provision of section 5, it may be presumed to be oral. The act specifically requires a statement that it is oral, if that be the case. Failure to comply with this provision of the act may result in an order to strike the pleading from the record under section 21. As a rule such defect may be cured by amendment.<sup>44</sup>

Section 9 further provides that the statement of claim "shall be sworn to by the plaintiff or some person having knowledge of the facts." Under the former practice, this was not uniformly required. Under the present act, a statement of claim must be sworn to in an action of trespass as well as of assumpsit,<sup>45</sup> and if not sworn to will be stricken off under the provisions of section 21.<sup>46</sup> If the plaintiff himself does not swear to the statement of claim, the affidavit may be made by his agent or attorney or any other person "having knowledge of the facts." The affidavit should in such cases state the reason why it is not made by the plaintiff himself and that a real disability exists which prevents him from making it. The circumstances causing the disability should also be stated.<sup>47</sup> Cases relating to the character of the allegations necessary to be made by a stranger when making an affidavit of defense on behalf of the defendant apply as well to the case of a stranger making an affidavit to a statement of claim on behalf of a plaintiff.<sup>48</sup> In an opinion filed by

<sup>44</sup> *Ballora v. Hayes*, unreported, Court of Common Pleas, Westmoreland County, August Term, 1916, No. 452; *Curtis v. Bortree*, 17 Lack. 259; s. c. 64 Pitts. 752 (1916).

<sup>45</sup> *Weber v. Consolidated Ice Co.*, 64 Pitts. 223 (1916). Where the affidavit is made by an officer of a corporation plaintiff, it is an affidavit by the corporation itself, hence by the plaintiff. *Phila. & Reading Coal & Iron Co. v. Stambaugh*, unreported, Court of Common Pleas of Cumberland County, September Term, 1916, No. 314.

<sup>46</sup> *Sorricks v. Schutz*, 14 Del. 191 (1916), s. c. 33 Lanc. 401.

<sup>47</sup> *Corosu v. Allegheny River Mining Co.*, unreported, Court of Common Pleas, Jefferson County, April Term, 1916, No. 234.

<sup>48</sup> *Safety Banking and Trust Co. v. Conwell*, 28 Pa. Super. Ct. 237;

Judge Corbet of Jefferson County,<sup>40</sup> it was held that an affidavit to the statement of claim made by the plaintiff's attorney averring, that "the plaintiffs are absent from the county and by reason thereof cannot make affidavit to this statement. Deponent is well acquainted with the facts of this case," is insufficient. Furthermore the deponent averred that "the matters set forth in the foregoing statement as a basis of claim are true" but he did not set out his means of knowledge or whether his averment was upon actual personal knowledge or upon information, and this was also held to be insufficient. The court pointed out particularly that the averments of the attorney that "he is well acquainted with the facts" is not equivalent to an averment that he "has knowledge of the facts" as required by section 9 of the Act.

Under section 12 relating to the affidavit of defense, it is provided that the affidavit of defense "shall be sworn to by the defendant or some person having knowledge of the facts." This provision being in terms precisely similar to that relating to the statement of claim should receive the same interpretation. The rules relating to this matter are thus substantially summarized by Judge Corbet in the opinion above cited, first, a sufficient reason must be set forth why the plaintiff or defendant cannot or does not in person make the affidavit. Second, that the affiant is authorized either expressly or impliedly to make the affidavit for the plaintiff or defendant and that he makes it for him. Third, that the affiant (a) has actual personal knowledge of the facts set forth, (b) deposes upon information given or sought for and obtained by him and that he believes the facts of which he was thus informed to be true and that the source of his information of the facts upon which his belief rests is as follows (setting it forth), and that the affiant expects the plaintiff or

Bushong v. Edwards, 52 Pa. Super. Ct. 376; Albright v. Fritz, 21 Pa. C. C. 444; Crine v. Wallace, 1 W. N. C. 293; Snyder v. Haas, 8 Del. Co. R. 35; Hirst, Executor, v. Core, 26 Mong. Co. T. 212; Shaw v. Liverpool & London & Globe Ins. Co., 16 Lanc. L. R. 288; Schrode v. Moyer, 16 Luzerne L. R. Rep. 15; Bumgardner v. Morris, 42 P. L. J. 355; Creighton v. National Safe Co., 10 D. R. 600; Hutchinson v. Woodwell, 107 Pa. 509; Johnson v. Smith, 158 Pa. 568.

<sup>40</sup> Corosu v. Allegheny River Mining Co., *supra*, note 47.

defendant to be able at the trial to prove the facts alleged. Judge Corbet states particularly that the rules heretofore laid down as to the verification of the affidavit of defense are now, under section 9 of the Practice Act, applicable as well to the verification of the plaintiff's statement of claim. "If these principles apply in case of an affidavit of defense made by a stranger in connection with the additional qualifications heretofore mentioned, I am unable to see why in connection with the same qualifications they should not apply in case of a statement of claim made by a stranger." The general rule thus laid down seems to be a salutary one, and tends to promote uniformity in practice.

#### ENDORSEMENT OF STATEMENT OF CLAIM.

Where the statement of claim is not endorsed as required by section 10 of the act, it will either in an action of assumpsit or trespass be stricken off on motion of defendant.<sup>50</sup>

#### PLAINTIFF ASKING FOR AN ACCOUNT.

In the article previously published<sup>51</sup> the writer ventured to criticize sections 11 and 19 and to suggest doubt as to their meaning and constitutionality. These views have been at least in part confirmed by a number of extrajudicial opinions received from judges of various county courts. In an opinion by Judge McIlvaine of Washington County,<sup>52</sup> sections 11 and 19 are referred to but their scope is not considered and a reading of this opinion would indicate that the court considered their meaning

<sup>50</sup> *Weber v. Consolidated Ice Co.*, *supra*, note 45; *Zullinger v. Grebe*, *supra*, note 31. The endorsement of the address of the attorney or of the plaintiff as required by this section of the act is essential. *Curtis v. Bortree*, *supra*, note 44. In the case of *Walsh v. James*, unreported, Court of Common Pleas, Luzerne County, October Term, 1914, No. 1530, Judge Strauss held that a pleading endorsed with the name of the attorney at Hazleton, Pa., was a sufficient endorsement of an address in a city no larger than Hazleton, where the attorney was well known and all of the members of the bar knew one another and the location of their offices. Whether the same practice might be approved in a city like Philadelphia or Pittsburgh is doubtful.

<sup>51</sup> 64 U. OF PA. LAW REVIEW 251-254.

<sup>52</sup> *Masitis v. St. Vincent B. & P. Society*, 44 County Court Reports, 289 (1916); s. c. 64 Pitts. 255.



rather obscure. There is a suggestion that an action of assumpsit might lie to recover a balance due upon an account rendered or "to be rendered." This, however, must be taken to be mere dictum or perhaps a slip of the judicial pen for as indicated heretofore,<sup>53</sup> assumpsit does not lie in cases in which the defendant must account. If an action of account render is commenced and plaintiff desires to change his action to assumpsit to recover a balance due upon an account rendered, authority may be found for such proceeding,<sup>54</sup> but it is submitted that no such change of action can be permitted from account render to assumpsit to recover a balance upon an account "to be rendered."

The question of the constitutionality of the act on account of the inclusion of sections 11 and 19 is raised but not decided in a case in the Court of Common Pleas of Greene County in an opinion filed by Judge Ray.<sup>55</sup>

<sup>53</sup> 64 U. OF PA. LAW REVIEW 253, and case cited there in footnote 112.

<sup>54</sup> Act May 10, 1871, P. L. 265, as follows: "In all actions pending or hereafter to be brought in the several courts of this commonwealth, said courts shall have power, in any stage of the proceedings, to permit an amendment or change in the form of action, if the same shall be necessary for a proper decision of the cause upon its merits, the party applying to pay all costs up to the time of amendment, and the cause to be continued to the next court if desired by the adverse party." See also *Wright v. Hopkins*, 3 D. R. 240 (1894).

<sup>55</sup> *Tennant v. Richill Township*, unreported, Court of Common Pleas, Greene County, June Term, 1916, No. 6. The portion of the opinion of the court on this point is as follows: "The defendant, in its affidavit of defense, sets out and avers, *inter alia*, (1) that the return day of the writ of summons and the day on which it is required to file its affidavit of defense are not the same, and that, therefore, the whole proceeding is void; (2) that the Practice Act of 1915, is unconstitutional in that the title of said act does not clearly express the subjects contained therein, and contains more than one subject; and because, by sections 11 and 19 of said act, it is sought to bring within the scope of an action of assumpsit actions, which heretofore, were prosecuted by action of account render, or by bill in equity; and because it provides that the plaintiff may require an accounting from the defendant, but does not provide that the defendant may require, in a proper case, an accounting from the plaintiff; and because the title to said act gives no intimation that such change in the law was contemplated. . . . The defendant's contention that the Practice Act, 1915, in its entirety, is unconstitutional, is based for the most part on the allegation that sections 11 and 19 of said act are unconstitutional, and that, therefore, the whole act must fall. These two sections provide that the plaintiff, in case he makes certain averments in his statement, may ask the defendant to account to him. We are not concerned, however, in the case at bar, with the constitutionality of these two sections. This is an action of trespass in which the defendant seeks to recover damages for the death of her husband and no accounting is asked for. Even if the

JUDGMENT FOR WANT OF AN AFFIDAVIT OF DEFENSE BEFORE  
THE RETURN DAY OF THE WRIT.

Section 12 of the act requires the defendant to file an affidavit of defense within fifteen days from the day when the statement was served upon him, and, in accordance with section 17, in actions of assumpsit, the prothonotary may enter judgment for want of such affidavit. The question now arises, when may such judgment be entered? Under the Procedure Act

two sections complained of should be declared unconstitutional it by no means follows that the whole act is unconstitutional. Part of an act not within the subject stated in the title, may be unconstitutional, leaving the rest to stand. *Mauch Chunk v. McGee*, 81 Pa. 433. *Agnew, C. J.*, delivering the opinion, says: 'It is settled in this state that a part of an act not within the subject stated in the title, may be declared unconstitutional, leaving the portion within the title to stand: *Dorsey's Appeal*, 22 P. F. Smith 192; *Allegheny Home's Appeal*, 27 *Id.* 77; *Smith v. McCarthy*, 6 *Id.* 359; *Commonwealth v. Green*, 8 *Id.* 234. . . . It is the duty of the court to reconcile the different parts of a law, if it can be reasonably done, rather than to declare any part void, and thus frustrate the legislative action. . . . It is a cardinal rule that all statutes are to be so construed as to sustain rather than ignore them: to give them operation if the language will permit, instead of treating them as meaningless; and I may add, or treating them as invalid: *Howard's Appeal*, 20 P. F. Smith 344. It is not the purpose or duty of the court to catch at pretexts to avoid legislation, where it can be fairly reconciled with the constitution. This has been the current of decision in this state in many cases: *Blood v. Mercelliott*, 3 P. F. Smith 391; *Case of Church Street*, 4 *Id.* 353; *Commonwealth v. Green*, 8 *Id.* 226; . . . In *Commonwealth v. Green*, Justice Sharswood remarked, that 'the intention of the constitutional amendment was to require that the real purpose of a bill should not be disguised or covered by the general words, "and for other purposes," which was formerly so common, but should be fairly stated: and it must be a clear case to justify a court in pronouncing an act, or any part of it, void on this ground.' So it was said in *Allegheny Home's Appeal*: 'If the title fairly gives notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary.'

'In the case of *Brode v. Philadelphia*, 230 Pa. 434, Justice Brown, delivering the opinion, says: 'An act of assembly is to be declared void only when it violates the constitution clearly, palpably, plainly and in such manner as to leave no doubt or hesitation in the mind of the court passing upon its constitutionality: *Sharpless v. Phila.*, 21 Pa. 147.'

'The title to the Practice Act, 1915, 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 served therein, and giving the courts power to enforce its provisions.' This title, as it seems to us, in the light of the authorities hereinbefore cited, is in compliance with that provision of the constitution of the state which declared that 'no bill except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in the title.' The one subject expressed in the title to the act in question relates to the practice, in the courts of common pleas, in actions of assumpsit and trespass, except libel and slander, and prescribes the pleadings and procedure therein. All that is required is that the title fairly gives notice

of 1887<sup>56</sup> if the statement was served not less than fifteen days before the return day of the writ it was the duty of the defendant to file an affidavit of defense on or before the return day, and no judgment for want of an affidavit of defense could under this act be taken before the return day of the writ.<sup>57</sup> The Practice Act, however, omits all reference to the return day of the writ, and the question arises whether a plaintiff whose writ and statement were served more than fifteen days before the return day, may take judgment for want of an affidavit of defense on the sixteenth day after the service of the writ and statement, or whether he must wait until the day after the return day of the writ.<sup>58</sup> This question came before Judge Witmer of the United States District Court for the Middle District of Pennsylvania.<sup>59</sup> As the action in this case was trespass, the question did not arise upon a rule for judgment for want of a sufficient affidavit of defense as no such judgment can be taken in an action of trespass.<sup>60</sup> The plaintiff's summons and statement were served on the defendant on January twentieth. According to the notice endorsed on the statement, the affidavit of defense was required to be filed on February fourth, but according to the mandate of the summons the defendant was not required to appear and answer before Monday, February twenty-eighth. The defendant took the ground that the attempt to require him to file an affidavit of defense prior to

of the subject of the act, so as to reasonably lead to an inquiry into its body and that, we think, this title does. For reasons heretofore stated we are not deciding whether the title is sufficient to cover the provisions of sections 11 and 19 of the act or not. The pleadings in this case do not properly raise that question."

<sup>56</sup> Act May 25, 1887, P. L. 271, Sec. 4.

<sup>57</sup> Weigley v. Teal, 125 Pa. 498 (1889); Newhold v. Pennock, 154 Pa. 591 (1893).

<sup>58</sup> The question is a practical one and might arise either under special acts of assembly antedating the constitution of 1874 and still controlling the practice in different counties of the state or under the general Act of June 11, 1879, P. L. 125, which permits courts to adopt rules to make their writs returnable to optional weekly return days.

<sup>59</sup> Watson v. Pennsylvania Railroad Co., 19 Dauphin 206 (1916); s. c. 25 D. R. 1034; s. c. 24 Lanc. 38; 64 Pitts. 432.

<sup>60</sup> Ellis v. Buffalo & Lake Erie Traction Co., unreported, Court of Common Pleas of Erie County, November Term, 1916, No. 52. Opinion by Judge Whittelsey.

the return day of the summons was illegal and he moved to quash the statement of claim. The court held that the contention of the defendant must, in part, be affirmed and, while refusing to quash the statement, made an order to set the service of the statement aside. The court took the broad ground that when a defendant is summoned to appear on a day certain and there to answer, he may not also at the same time be required to answer before such day, and as the Act of 1836<sup>61</sup> for the commencement of personal actions by summons and providing for a return day<sup>62</sup> is not repealed, the Practice Act of 1915 must be construed in harmony with it and hence the court concludes that it was intended by the Practice Act that the summons should issue and that "after the defendant is thereby required to appear in court he shall proceed as required by the Act of 1915." This opinion is approved by Judge Sadler of Cumberland County.<sup>63</sup> It was argued before him that the notice on the statement of claim to file an affidavit of defense is in such case inoperative and that the statement of claim may not be served until after the return day. The court held that the statement may be served at the time when the writ issues but no judgment can be taken for want of an affidavit of defense until the return day, if the latter is more than fifteen days from the date of the service of the writ. The difficulty here indicated has been recognized in other districts, in some of which the opinion was unofficially expressed that under the Practice Act

<sup>61</sup> Act June 13, 1836, P. L. 568, Sec. 578.

<sup>62</sup> In 1912, the committee on law reform of the Pennsylvania Bar Association recommended the passage of an act abolishing fixed return days and making all writs returnable in ten or fifteen days after service. See Eighteenth Annual Report of the Pennsylvania Bar Association, page 62. At an earlier date, in 1896, at the second annual meeting, see report for that year, page 60, the committee in recommending the abolition of the fixed return days state that they were necessary in the old days when the court was peripatetic and the bar rode on circuit. By analogy to the system under the equity rules, a change should be made so that an appearance and answer would have to be entered in law and equity alike in fifteen days after service. The committee presented the draft of an act on this subject, which met with spirited opposition and was not recommended for passage. But, although the draft of the act was poor, the spirit which inspired it was correct and should long since have found expression in some appropriate legislative enactment.

<sup>63</sup> *Phila. & Reading Coal & Iron Co. v. Stambaugh*, unreported, Court of Common Pleas of Cumberland County, September Term, 1916, No. 314.

no summons is necessary to commence an action and that the Act of 1836 is impliedly repealed and that the proper practice now is to proceed as in cases under the equity rules.<sup>64</sup> With due respect to the opinion of both the above learned courts, the writer is unable to agree with them in their interpretation of the act. It is submitted that the Practice Act of 1915 does not impliedly repeal earlier acts of assembly relating to the issuance of summons and the return day of the writ, but that it does impliedly repeal these acts in so far as they require the defendant "to answer on the return day." There are now two days on which the defendant is required to act, first, the return day of the writ, on or before which an appearance must be entered, and, second, the fifteenth day after the service of the statement of claim, on or before which an affidavit of defense must be filed. If the return day of the writ is prior in time and the defendant does not appear, judgment may be taken against him for want of an appearance. If the day when the affidavit of defense is due is prior in time and the defendant does not file an affidavit of defense, judgment may be taken against him for want of such affidavit. In the latter case, the question of a formal appearance is unimportant. The conflict between the Act of 1836 and the Practice Act is only on the question of the time when the defendant must answer, not on the question of the time when he must appear. As to the time for the answer, the conflict is irreconcilable and the provisions of the Act of 1915 must be taken to be paramount. A decision in harmony with this view was rendered by the Supreme Court<sup>65</sup> in a case arising under the Replevin Act<sup>66</sup> in which it was held that

<sup>64</sup> In order to avoid uncertainty a new rule of court was adopted by Judge Ruppel of the Court of Common Pleas of Somerset County in the following form: "Actions embraced within the first section of the Practice Act Nineteen Fifteen shall be commenced by writ of summons as heretofore, and no copy of plaintiff's statement of claim shall be served on defendant until after the case has been regularly entered on the continuance docket in the office of the prothonotary, and the copies served on the defendant shall have endorsed thereon the number and term to which the case is entered."

<sup>65</sup> *Griesmer v. Hill*, 36 Superior Court 69 (1908), affirmed by the Supreme Court in 225 Pa. 545 (1909).

<sup>66</sup> Act April 19, 1901, P. L. 88, Sec. 4.

judgment might be entered against a defendant for want of an affidavit of defense in replevin proceedings although the return day fixed in the writ of replevin had not yet occurred. The writ of replevin, like the writ of summons, directs the defendant to appear and answer on the return day, but notwithstanding this a judgment prior to the return day of the writ was held to be properly entered.<sup>67</sup> The reasoning of the court in this case seems to apply with equal force to the case now under consideration, and it should be held that the legislature intended under the Practice Act that the fifteenth day after the service of the statement should be considered as an additional return day, a return day not for the purpose of a formal appearance but for the purpose of filing an affidavit of defense. To hold otherwise would result, as in the two cases above cited, in reading into the act a clause or clauses entirely inconsistent with its purpose, which was to speed the cause, so that, according to Judge Witmer, the plaintiff has no right to serve his statement until after the return day, or, according to Judge Sadler, although he may serve the statement before the return day, he is obliged to give the defendant more than fifteen days within which to file an affidavit of defense notwithstanding section 12 of the act. It cannot be presumed that the legislature intended to take the step backward indicated in the opinion of Judge Witmer nor that it intended to create the anomalous situation indicated in the opinion of Judge Sadler, for in the latter case we are driven to either one of two conclusions, namely, that the defendant has until the return day to file the affidavit of defense even though that be more than fifteen days since the date of the service of the statement, or that the days between the fifteenth day after service of the statement and the return day are *dies non juridici*

<sup>67</sup> In *Griesmer v. Hill*, *supra*, note 65, the court calls attention to the fact that the entry of judgment before the return day is not without precedent. It may be regarded as well settled for example that under the Act of 1836 a rule of reference may be entered and pursued to award and judgment thereon before the return day of the writ. *Fehr v. Reich*, 36 Pa. 472 (1860).

during which the defendant should not be permitted to file an affidavit of defense and the plaintiff not be permitted to take judgment for want of such affidavit.

#### AFFIDAVIT OF DEFENSE BY A STRANGER.

What was said above<sup>68</sup> in considering affidavit to statement of claim by a stranger, applies to the affidavit of defense. The affiant, if not the defendant himself, must be some person having knowledge of the facts and this should appear in his affidavit. In a case in Luzerne County the affidavit was made on behalf of a defendant insurance company by A B, a member of the firm of B & Co., insurance brokers, acting as agents for the defendant. The affidavit alleged that the deponent "as a member of said firm" had knowledge, *etc.* This was held not sufficiently definite to indicate that it was not mere hearsay.<sup>69</sup>

#### SERVICE OF COPY OF PLEADING.

Section 12 provides that the defendant shall file an affidavit of defense within fifteen days from the day "when the statement was served upon him." Section 15 provides that the plaintiff shall file a reply within fifteen days from the day of "service of the affidavit of defense upon him." The same section provides for a plaintiff's reply "which shall be served upon the defendant." No provision is made in any part of the act for service of a copy of the pleadings. The question, therefore, arises whether the original statement, affidavit of defense or reply respectively shall be served on the opposite party or whether the service of a copy of such pleadings, the original having been filed in the prothonotary's office, is sufficient. Under the Procedure Act of 1887,<sup>70</sup> provision is specifically made for the service of a copy of statement of claim. Must it be presumed that by the omission of this provision from the Practice

<sup>68</sup> *Supra*, p. 437.

<sup>69</sup> *Savitz v. Massachusetts Bonding & Insurance Co.*, unreported. C. C. P., Luzerne County, October Term, 1916, No. 57.

<sup>70</sup> Act May 25, 1887, P. L. 271.

Act of 1915, the legislature intended that the original statement of claim should be served on the defendant? In order that there should be a copy of record, it would require that duplicate originals should be prepared, one to be filed of record and the other to be served on the defendant. Judge Sadler, of Cumberland County,<sup>71</sup> was of the opinion that:

"to insist that the original statement must be handed to the defendant would mean that the copy must be lodged in the office of the prothonotary or that a copy must be served upon the defendant and the original also shown to him and service thereof accepted and the paper itself returned to the proper office. Clearly this could not have been the intention of the legislature."

He held that the service of a copy of the statement of claim on the defendant was sufficient to require him to file an affidavit of defense. Judge Strauss of Luzerne County reached a similar conclusion<sup>72</sup> stating that:

"it is the original that must be filed in the prothonotary's office and the service of a copy is a full compliance with the statute, the purpose of which is not to invent technicalities to make trouble but to provide a means of giving information to the plaintiff of the facts and the substance of the affidavit."

Under a decision of Judge Woodward of Luzerne County<sup>73</sup> arising under a practice peculiar to that county under a rule of court,<sup>74</sup> the defendant's attorney took from the record a copy of a statement of claim left there for him by the plaintiff and gave a written acknowledgment of its receipt. No copy of the statement was actually served on the defendant nor was any notice served on him or his attorney that the statement had been

<sup>71</sup> Phila. & Reading Coal & Iron Co. v. Stambaugh, *supra*, note 63.

<sup>72</sup> Walsh v. James, *supra*, note 50.

<sup>73</sup> Wilkes-Barre Anthracite Coal Co. v. Stipp, unreported, Court of Common Pleas of Luzerne County, June Term, 1916, No. 285.

<sup>74</sup> The writer is indebted to Judge Strauss, of Wilkes-Barre, for a copy of this rule as follows: "A true copy of every statement, declaration, bill of particulars, answer, affidavit, exception and plea, shall be filed at the same time and with the original and the filing noted on the record of the cause, and on the copy by the prothonotary: said copy shall be endorsed 'copy of (name of paper) for (opposite party)'; such copy may be taken out by said opposite party or his attorney upon his receipting for the same on record, or by paper filed, provided that the plaintiff may take a copy of his statement for service with the writ, and the fact of such taking shall be noted on the record."



filed and that an affidavit of defense would be required in fifteen days to prevent judgment. However, the copy of the statement which the defendant's attorney took from the record contained an endorsement of such notice requiring the affidavit of defense to be filed and the court held that the receipt of this copy was a waiver of service just as his appearance before the return day would be a waiver of service of the summons. Judgment had been entered in this case against the defendant for want of an affidavit of defense. The defendant's petition to strike off the judgment alleged as its sole reason that the judgment was not warranted by any statute or rule of court. The rule to strike off was discharged. This decision may be supported upon the technical ground that, as the copy filed of record was intended for the defendant and the defendant's attorney actually took it from the record as his copy and filed the acknowledgment of its receipt, this is not a waiver of service but an actual acceptance of service. As the court points out in the opinion cited, counsel for the defendant might have examined the statement filed of record and if he had not taken it out, no judgment could have been entered against his client by default. It would seem, therefore, that the rule in Luzerne County, adopted under the former practice, will no longer be effective under the Practice Act of 1915.

In another decision of Judge Woodward<sup>75</sup> a very drastic penalty was imposed on a defendant for failure to serve a copy of the affidavit of defense in violation of the provision of section 12, providing that it (the affidavit of defense) shall be served upon the plaintiff or his attorney. The plaintiff took a rule for judgment on account of the failure of the defendant to serve on the plaintiff the affidavit of defense "by copy or otherwise." The defendant's only excuse was that the Practice Act was new; but as this section of the act had been considered by the court in another case<sup>76</sup> the rule was made absolute.

<sup>75</sup> Boyle v. McNelis, unreported, Court of Common Pleas of Luzerne County, June Term, 1916, No. 270.

<sup>76</sup> Underwood Typewriter Co. v. Pell, unreported, October Term, 1915,

## AFFIDAVIT OF DEFENSE IN TRESPASS.

Although under section 13 the defendant in an action of trespass is now obliged to file an affidavit of defense, the legislature deemed it wise to distinguish this affidavit of defense from the affidavit of defense in actions of assumpsit. In assumpsit the defendant must specifically deny each allegation of fact in the statement of claim or else under section 8 he will be presumed to have admitted its truth, and, under section 17, failure to file an affidavit of defense or a sufficient affidavit of defense may result in judgment against the defendant. The affidavit of defense in trespass is an entirely different pleading. It merely requires the defendant to deny averments in the statement "of the person"<sup>77</sup> 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 of all similar averments."<sup>78</sup> If these are not denied, they are taken to be admitted. The defendant need not deny the averments of other facts on which the plaintiff relies<sup>79</sup> to establish liability nor the averments relating to damages. Failure to file an affidavit of defense does not entitle the plaintiff to judgment but under section 18 if the defendant fails to file the affidavit of defense within the required time the case shall be deemed to be at issue and may be ordered on the trial list. The opinion is freely expressed that in actions of trespass the defendant ought to have been required to file an affidavit of defense as in the action of assumpsit and his failure to deny specifically all allegations in the plaintiff's statement of claim, except those relating to the amount of damages claimed, should have been tantamount to an admission of their truth, and plain-

No. 1808. This case seems to have arisen before the Practice Act went into effect, it may be, therefore, that a local rule of court similar to the provision of section 12 was in force.

<sup>77</sup> In *Walsh v. James*, *supra*, note 50, Judge Strauss interprets this section of the act to mean averments in the statement of "the identity of" the person, *etc.*

<sup>78</sup> The phrase "all similar averments" is one which has not yet been judicially interpreted. It is an undesirable phrase but seems thus far to have done no harm; but see page 455.

<sup>79</sup> But see page 454.

tiff should have been given the right to take judgment against the defendant for want of an affidavit of defense or for want of a sufficient affidavit of defense,<sup>80</sup> leaving only the amount of damages to be determined by the jury.<sup>81</sup> Under the practice prescribed by the Practice Act, the plaintiff is in every case obliged to bear the burden of proof even where the defendant has admittedly no defense. The facts showing negligence which the plaintiff must allege are facts which the defendant should be obliged to answer as well as the facts specifically mentioned in section 13, yet under this section he is not obliged either to deny or to admit such averments.<sup>82</sup> The defendant has the opportunity to speculate on the ability of the plaintiff to prove his case with sufficient particularity at the trial and to move for a nonsuit in case the plaintiff fails. While it is obvious that the plaintiff should not recover unless he is able to make out a perfect case at the trial, there may be many instances in which the plaintiff may, through the usual delay before trial, be prevented from proving a good case although if the trial had taken place at once he might have been able to do so. In such cases, although the defendant has absolutely no defense, he may be able to nonsuit the plaintiff, whereas if the defendant has been obliged to file an affidavit of defense, the plaintiff

<sup>80</sup> *Hammon v. Hammon*, (4 Pitts. 537 (1916), s. c. 14 Del. 160. *Ellis v. Buffalo & Lake Erie Traction Co.*, *supra*, note 60. The late Judge Michael Arnold, who was principal sponsor for the Procedure Act of 1887, strongly advocated this practice, see his address on Law Reform, 44 *Legal Intelligencer* 4. It was also proposed in bills presented to the legislature in 1913 (H. B. 455, Sec. 8), and 1915 (H. B. 132, Sec. 23).

<sup>81</sup> By amendment of the act following herein the English (O. 13, R. 5), and Ontario (R. 39) practice, the right to take such judgment might be given, leaving the amount of damages to be assessed either by the common-law writ of inquiry or in accordance with the Act of May 22, 1722, Sec. 27, 1 *Smith's Laws* 144. It would seem that the practice under the Act of 1722, whereby the damages may be assessed by court and jury, should be preferred to the old writ of inquiry whereby the damages are assessed by a sheriff's jury, but the procedure under the Act of 1722 is practically obsolete in Philadelphia, and, as stated in the case of *MacHenry v. Railway Co.*, 14 W. N. C. 408 (1884): "In Philadelphia it is the uniform practice not to assess damages under this act except where, judgment having been taken by default against one or more defendants, issue is joined as to the others, or where judgment is given at the trial for not complying with orders for the production of books and papers."

<sup>82</sup> *Hammon v. Hammon*, *supra*, note 80.

might have had judgment without going to trial. The reasons in support of the provisions of section 13 of the act and against the assimilation of the practice in *assumpsit* and trespass given by Judge Ralston<sup>83</sup> are substantially three in number. First, that as the facts not infrequently give rise to a criminal as well as a civil liability, the defendant would probably claim that he was not obliged to make answers which might incriminate him. The illustration given in support of this objection is that where a person is killed by the negligent driving of a motor vehicle, the driver may be guilty of manslaughter and in a civil action for damages cannot be compelled to disclose in his pleadings facts which might result in his conviction of that crime. But, under the present law, if he fails to deny that he was the driver of the machine, this fact will be taken to be admitted, but this admission being merely the result of a rule of pleading could not be proved against the defendant in a criminal prosecution. Similarly, if the defendant failed to deny the other acts constituting negligence which resulted in this accident, it is difficult to see why they should not be taken to be admitted with the same force and effect. If the defendant denies that he was the driver or denies the negligent acts, he is obviously not in any danger of disclosing "in his pleadings facts which might result in his conviction of the crime," and if he fails to deny such allegations it is difficult to see why the defendant should not be entitled to a judgment followed by an assessment of damages. The second reason given is that the "defendant may have no knowledge of the facts, in which case the affidavit would consist merely of an averment of lack of knowledge or a general denial." It seems that there ought to be no difficulty in such case in following the rule in affidavits of defense in *assumpsit* as laid down by Judge Barratt<sup>84</sup> that where the defendant has no knowledge or means of knowledge, an averment of ignorance and demand of proof is equivalent to a denial of the allegation in the statement; but where the defend-

<sup>83</sup> See address referred to. *supra*, note 11.

<sup>84</sup> *Beck v. Kauffman*, *supra*, note 29.

ant has knowledge or means of knowledge, he should be required to answer specifically. The third reason alleged is "that the defense likely to be made in an action for negligence or trespass is almost always obvious." This may be true where there is a defense but where there is no defense, why should the plaintiff not be entitled to judgment at once? Furthermore, where there is a defense, why should it be left to inference because it is "almost always obvious" and why should not the defendant be obliged to set it forth specifically? The framers of the act objected to inferences in pleading in section 5, why should inferences be sufficient under section 13?

All that has been said heretofore refers as well to the actions for slander and libel as to other actions of trespass, and in these actions there should likewise be the penalty of judgment for failure to file an affidavit or a sufficient affidavit of defense to be followed by assessment of damages.

As heretofore suggested<sup>85</sup> the affidavit of defense in trespass is not an entirely new thought in Pennsylvania practice. A number of counties had rules of court requiring 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>86</sup> and so far as the writer is advised, these rules of court worked no hardship on the defendant and raised none of the questions that were suggested by Judge Ralston as objections to this practice. The only ground upon which this practice has now<sup>87</sup> been declared improper is that the court has technically no power to require such bill of particulars because it is a practice unknown at common law either in England or in Pennsylvania, and, since under the Procedure Act of 1887 the defendant in an action of trespass was not required to do more than plead "not guilty," the rule of court requiring such defendant to furnish a bill of particulars in addition to the plea of "not

<sup>85</sup> 64 U. OF PA. LAW REVIEW, pp. 256-257, and notes.

<sup>86</sup> A list of such rules is given in the paper books in the case of Kelly v. The Pennsylvania Co., 253 Pa. 553 (1916). See opinion of the lower court, 63 Pitts. 716 (1915).

<sup>87</sup> Kelly v. Penna. Co., *supra*, note 86.

guilty" was deemed of doubtful validity<sup>88</sup> and was finally declared to be invalid.<sup>89</sup> But this decision merely disposes of the matter on purely technical grounds. No reasons justifying the objection to the assimilation of the practice in actions of assumpsit and trespass have, as yet, been brought to the attention of the writer.

A case arose in Luzerne County,<sup>90</sup> decided by Judge Strauss, raising the question of the defendant's right to file an affidavit of defense in an action of trespass after fifteen days had expired from the date of service of the plaintiff's statement of claim. Section 18 provides that where the defendant in trespass fails to file an affidavit of defense within the fifteen days, the case may be ordered on the trial list. But here the plaintiff did not order the case on the trial list and long before the trial list was made up and before the case was ordered down by the plaintiff but after the fifteen days had expired, the defendant filed an affidavit of defense. The plaintiff took a rule to show cause why this affidavit should not be stricken from the record and the court held that

" . . . as this affidavit was filed within reasonable time and before any action was taken by the plaintiff and long before any trial list could have been made up; and because it gives the plaintiff knowledge of the defense along the lines required to be set out in the affidavit in this class of cases, under the discretion which we have to permit amendments and extensions of time, we dismiss this exception."

It is obvious that the affidavit of defense thus permitted to be filed could not be filed as an amendment for there was nothing on record to amend. Besides, as heretofore suggested,<sup>91</sup> the court probably has no right to grant an extension of time for filing a pleading under section 22 after the fifteen days fixed by the act have expired. It is interesting to note also that the court considers this affidavit of defense to have been filed "within a reasonable time." In the present state of

<sup>88</sup> Mitchell on Motions and Rules (2d Ed.), p. 52.

<sup>89</sup> Kelly v. The Pennsylvania Co., *supra*, note 86.

<sup>90</sup> Walsh v. James, *supra*, note 50.

<sup>91</sup> 64 U. OF PA. LAW REVIEW 266.

the practice it is difficult to see how the reasonableness of the time within which the pleading is filed is entitled to any consideration; furthermore the reason assigned by the court that the affidavit of defense "gives the plaintiff knowledge of the defense along the lines required," seems to beg the question for if no defense is allowed by reason of the failure to file the affidavit of defense within the required time, is it important that the plaintiff should be given knowledge of such defense? The opinions of Judge Strauss on the Practice Act are all marked by a strong desire to avoid rulings which would restrict the right of the court to mold the procedure so as to promote the justice of the case.<sup>92</sup>

What is perhaps the most important expression of judicial opinion under this section, is to the effect that a defense in law which might have been raised by demurrer and should now be raised in the affidavit of defense, cannot be raised at the trial if it has not been raised theretofore in the pleading. *M* was killed by a railroad train; his widow died thereafter without having brought suit for damages for her husband's death, and thereupon his children brought this suit for such damages. At the trial the defendant raised the point that the plaintiffs were not entitled to recover because under the Act of April 26, 1855, P. L. 339, the right of action survived to the children only where there was no surviving widow. The court was of this opinion but held that the defendant had no right to set up this defense at the trial because, as the facts are fully set forth in the statement of claim it became

" . . . the imperative duty of the defendant to set up its technical defense thereto in its affidavit of defense. . . . It is immaterial whether the allegations of fact on which the defense rests are to be taken as admitted under the first clause of section 13, or whether they are to be treated as at issue without answer or denial under the final clause of the said section. In either case the defense intended to be offered at the trial must first be set up in the affidavit of defense or it cannot be admitted."

The court further intimates that an amendment might have been offered at the trial to meet the plaintiff's objection

<sup>92</sup> See pp. 447, 453, 466.

to the admissibility of this defense. But as the case was finally decided against the plaintiffs on the ground of the decedent's contributory negligence, the views of the court on all these practice points may be considered mere dicta. They are, nevertheless, important as expressions of opinion as to the scope of the affidavit of defense in trespass and, if they are to be taken as an interpretation of the phrase "and all similar averments," the opinion indicates the unexpected results that may follow the use of such vague legislative phrases, the meaning and scope of which must necessarily depend upon judicial interpretation.<sup>93</sup>

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

Did the legislature mean to establish any distinction between set-off and counter-claim? In discussing this question heretofore<sup>94</sup> the writer came to the conclusion that in the Pennsylvania cases no distinction seems to be made between the terms set-off and counter-claim but that possibly some distinction is now made by the Practice Act of 1915. Under this act it is possible that a counter-claim may be pleaded upon a cause of action which has arisen since the plaintiff brought suit or which was acquired by the defendant since that time and such claims, by analogy to the distinction made in England,<sup>95</sup> are, strictly speaking, counter-claims and not set-off. It is to be noted that in every passage in the Practice Act set-off and counter-claim are both mentioned except at the end of section 14. Section 2 twice refers to pleading "set-off or counter-claim." Section 6 and section 8 refer to the allegations in "set-off or counter-claim." The first part of section 14 provides that the defendant may "set off or set up by way of counter-claim any right or claim," *etc.* Section 15 refers three times to "set-off or counter-claim." Section 17 twice speaks of "set-off or counter-claim." Everywhere in the act set-off and counter-claim are both mentioned and in the disjunctive, always

<sup>93</sup> *Miller v. Penna. R. R. Co.*, 29 York 200 (1916), s. c. 6 Lehigh 407.

<sup>94</sup> *U. OF PA. LAW REVIEW* 257.

<sup>95</sup> *Annual Practice*, 1914, pp. 366-367.



set-off or counter-claim, and in section 15, in the endorsement of the affidavit of defense, the plaintiff is directed to "reply to the within set-off (or counter-claim as the case may be)." This would clearly indicate that the legislature recognized some distinction between set-off and counter-claim. What this distinction is has, unfortunately, not been set forth and as above stated cannot be found in the cases. But the caption of section 14 is "Set-off and Counter-Claim." No doubt this was a mere oversight on the part of the draftsmen of the act due to their copying rule 56 of the Philadelphia rules of court. But the last sentence of section 14 is significant in that it twice mentions counter-claim without set-off. "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." What is the effect of this section of the act? Suppose the defendant in his affidavit of defense pleads a set-off and plaintiff chooses to suffer a voluntary nonsuit, is the law as heretofore<sup>96</sup> that the plaintiff has the right to do so and that the defendant's only remedy is to begin a new action against the plaintiff based on his claim of set-off?<sup>97</sup> If the defendant had set up a counter-claim and the plaintiff suffered a voluntary nonsuit, the counter-claim nevertheless may be proceeded with. Apparently this new privilege given to the defendant does not extend to cases where he defends on the ground of set-off. Since there has apparently heretofore been no distinction between counter-claim and set-off the purpose of the apparent distinction set up in the latter portion of section 14 is mysterious, unless it shall be held to refer to such counter-claims above referred to, which could

<sup>96</sup> *McCredy v. Fey*, 7 Watts 496 (1838).

<sup>97</sup> In the case of *Lamb v. Greenhouse*, 59 Superior Court 329 (1915), it was decided that under Philadelphia Rule 57, which is in form similar to this section of the act, where the plaintiff enters a discontinuance he does so subject to the reasonable condition of the rule that the counter-claim may nevertheless be proceeded with. The court leaves the question undecided whether the rule would apply where the plaintiff had discontinued by express leave of court or whether the rule was valid so far as it relates to voluntary nonsuit. In this respect the phraseology of section 14 of the act differs from that of the Philadelphia rule of court.

not heretofore have been pleaded and which may now perhaps be set up by defendant, or unless the mystery may be more simply solved by the suggestion that the draftsmen of the act copied without much thought the Philadelphia rule of court<sup>98</sup> which in turn was based upon an English rule,<sup>99</sup> without noting that under the English practice there is a distinction between set-off and counter-claim,<sup>100</sup> whereas in Pennsylvania there appears no such distinction. Practically a defendant may in every case get the benefit of this section of the act by calling his new matter "counter-claim" and not using the term "set-off."

#### COUNTER-CLAIM IN AN ACTION OF TRESPASS.

May the defendant counter-claim in an action of trespass where the plaintiff has his election to sue either in assumpsit or trespass and has chosen to sue in trespass? This involves the question whether the plaintiff by choosing a form of action may deprive the defendant of a defense which he might otherwise have made, had the form of action been different or whether the right of the defendant depends upon determination of what is the essential basis of the plaintiff's cause of action, *i. e.*, breach of duty or breach of contract. What is the ultimate test by which this shall be determined? This is a problem which at this time can only be suggested without being discussed at length. Attention may be directed to the fact that in England and in Ontario a claim founded on tort may be opposed to one founded on contract or *vice versa*<sup>101</sup> and there seems to be no essential reason why this should not be allowed. But the act seems to settle this question by its terms in limiting the right of the defendant to plead set-off or counter-claim in actions of assumpsit, so that it would seem

<sup>98</sup> Rule 57.

<sup>99</sup> O. 21, R. 16.

<sup>100</sup> Annual Practice, 1914, pp. 366-367.

<sup>101</sup> O. 21, RR. 11, 12; Annual Practice, 1914, p. 317; see also rules of practice and procedure in the Supreme Court of Ontario, 1913, page 25, rule 115.

that the plaintiff by choosing to sue in trespass may deprive the defendant of this right irrespective of the essential basis of the action.

#### PLAINTIFF'S ATTACK ON INSUFFICIENT SET-OFF OR COUNTER-CLAIM.

In a case arising in the Court of Common Pleas No. 2, of Philadelphia County,<sup>102</sup> the defendant did not deny the plaintiff's claim but defended on the ground of set-off and counter-claim. The plaintiff took two rules for judgment, a rule for judgment for want of a sufficient affidavit of defense and another rule for judgment for the amount as to which the affidavit of defense was insufficient. Judge Barratt found that a part of the counter-claim was good in law and, therefore, since no reply was filed thereto, *pro tanto* a good defense but that the plaintiff was entitled to judgment for the balance of his claim. The court, therefore, discharged the rule for judgment for want of a sufficient affidavit of defense and made the rule for judgment for the amount of the claim as to which the affidavit of defense was insufficient absolute. A question of practice is suggested by this case. If the plaintiff, instead of taking a rule for judgment had filed a reply under section 15 of the act and had in such reply by way of demurrer to the counter-claim raised the same question of law that was here raised by his rule for judgment, could the court have entered the same judgment or would the plaintiff as to that portion of the counter-claim held sufficient by the court, have had the right by analogy to the proceedings in section 20 of the act to file a supplemental reply within fifteen days for the purpose of raising an issue of fact? In the case above cited the court virtually gave judgment for the defendant on a portion of his counter-claim and set this off against the judgment for the plaintiff on his entire claim, thus leaving a balance in favor of the plaintiff as a result of this set-off of judgment again judgment. This was made possible because plaintiff attacked

<sup>102</sup> Beck v. Kauffman, *supra*, note 29.

defendant's counter-claim by a rule for judgment and failed to file a reply. If he had filed a reply, it would seem that he could have had the question of law determined without running the danger of having what was virtually a judgment in favor of the defendant as to that portion of the counter-claim which the court held sufficiently pleaded. Apparently the plaintiff has his choice of procedure: if he takes a rule for judgment it may be treated as a common-law demurrer and a final judgment on the controversy may be entered, but if he raises the same question by a reply he should, by analogy to the procedure in section 20, be entitled in case of a ruling adverse to his contention, to file a supplemental reply and go to a jury.

Another question is here suggested. In the above-cited case the counter-claim found to be sufficiently pleaded was less than the amount of the plaintiff's claim. But if the defendant admits the plaintiff's claim and sets up a counter-claim larger than the amount of the plaintiff's claim, to which counter-claim the plaintiff files a reply, may judgment be entered for the plaintiff? In support of a negative answer it might be said that this would give the plaintiff a judgment in the face of a defense of counter-claim for which the defendant might eventually get judgment against the plaintiff, leaving a balance in favor of the defendant. This is the view taken by Judge Hause of Chester County<sup>103</sup> in a case in which the defendant filed an affidavit of defense which was insufficient as to the plaintiff's claim but set up an apparently valid counter-claim. The plaintiff took a rule for judgment "notwithstanding the affidavit of defense."<sup>104</sup> The court discharged the rule on the ground that it was not authorized by the Practice Act, saying that the result would be a judgment for the plaintiff and followed, if the defendant should ultimately recover on his counter-claim, by a judgment for the defendant. The court states

<sup>103</sup> *Farmers & Breeders' Mutual Reserve Fund v. Elliott*, unreported, Court of Common Pleas, Chester County, August Term, 1916, No. 87.

<sup>104</sup> A rule for judgment notwithstanding the affidavit of defense was taken in the case of *McFadden v. The Publishing Co.*, 12 Schuyl. 416 (1916), and held not to be a proper method of attacking a statutory demurrer.

that prior to the passage of the Practice Act where set-off or counter-claim was in excess of the plaintiff's demand and sufficiently pleaded there was no authority for the entry of judgment in favor of the plaintiff even though his claim were admitted to be due and there is nothing in the act which indicates any legislative intent to change this practice. He concludes by saying that if the set-off or counter-claim were less in amount than the plaintiff's claim, judgment could be given to the plaintiff for the difference and the cause might then proceed until the validity of the counter-claim is determined by a jury. And if at that time the counter-claim prevails, the plaintiff would recover nothing further, and, if otherwise, he would obtain a verdict for such additional amount as the jury might find.<sup>105</sup> On the other hand it may be argued that judgment should be immediately given to the plaintiff, as his claim is not denied, in order that he may be able to obtain a lien on defendant's property to protect his judgment until the defendant's counter-claim has been disposed of. Execution on such judgment in favor of the plaintiff should be stayed until after the trial of the defendant's counter-claim.

It would seem from the opinions hereinbefore cited that the rule for judgment can no longer be used freely in attacking the affidavit of defense when the defendant pleads set-off or counter-claim, and it remains to be determined, if possible, to what extent the attack must be made in the reply and to what extent the rule for judgment may still be used. The demurrer to set-off or counter-claim is, of course, out of the question, for whether the counter-claim be considered as defendant's statement of claim or as part of the affidavit of defense, an attack by demurrer would be bad practice, for section 4 of the act

<sup>105</sup> *Roberts v. Sharp*, 161 Pa. 185 (1894); *Beck v. Kauffman*, *supra*, note 29. It is intimated in the case of *Farmers & Breeders' Mutual Reserve Fund v. Elliott*, *supra*, note 103, that in the light of other facts stated in the affidavit of defense, it might be assumed that the counter-claim was invalid, but since its invalidity was not challenged either by an answer filed (presumably this would be plaintiff's reply) or by rule for judgment on the whole record notwithstanding the counter-claim and the affidavit of defense (this suggests an entirely novel procedure in Pennsylvania), the court did not feel justified in assuming such invalidity and dismissed the plaintiff's rule for judgment.

abolishes demurrers to statements of claim and in Pennsylvania practice demurrers to the affidavit of defense were never allowed.

In place of the demurrer to the affidavit of defense the practice arose of taking a rule for judgment for want of a sufficient affidavit of defense whether the defense set up was legal or equitable. Under this rule the court could give final judgment against the defendant, and as this practice is specifically recognized in section 17 of the Practice Act, the propriety of attacking an insufficiently pleaded set-off or counter-claim in an affidavit of defense by taking a rule for judgment would seem to be incontestable. But in view of the opinions above expressed, it would seem that the rule for judgment is now to be considered as the plaintiff's appropriate method of attack only in cases in which the defendant does not defend on ground of set-off or counter-claim.<sup>106</sup> If we assume a case in which the defendant sets up three defenses, (1) a defense provable under the plea of non-assumpsit, (2) one which is provable under the plea of set-off, and (3) one which is essentially a counter-claim in the popular sense of the word, namely, a claim arising out of an entirely different transaction and one which under the present Practice Act might perhaps be set up even though it had been acquired by the defendant since the action against him was commenced, and if in such case the plaintiff desires to attack the entire affidavit of defense he should do so by a reply coupled with a rule for judgment for want of a sufficient affidavit of defense; that is to say he might, after having set forth a reply in compliance with the terms of the act, add a prayer for judgment for want of a sufficient affidavit of defense. In considering this question, Judge Fuller of Luzerne County<sup>107</sup> said:

<sup>106</sup> Exceptions to affidavit of defense are recognized in Luzerne County. What order can the court enter if such exceptions are sustained? May judgment for plaintiff be given? The practice seems peculiar. *Savitz v. Mass. Bonding Co.*, C. C. P., Luzerne County, October Term, 1916, No. 57, unreported.

<sup>107</sup> *Pennsylvania Railroad Co. v. Gibbs Milling Co.*, 18 Luzerne 467 (1916); s. c. 33 Lanc. 402; 14 Del. 193; 30 York 109; 34 Lanc. 402.

"We are not clearly informed by the act what course to pursue or how the question of law should be presented when the challenged statement of the counter-claim in the affidavit of defense is such that under the former practice it would be held insufficient on a rule for judgment. We incline, however, to the opinion and so we decide, resolving the doubt in favor of the defendant, on a consideration of sections 15 and 17, that the plaintiff should file a reply raising the question of law and then the court could dispose of the case on the whole record on motion of either party. This is one of the uncertainties liable to arise under the Practice Act which should perhaps be obviated by new rules of court under section 23, but for the present we prefer not to make new rules of court and accordingly further proceedings in the case are postponed until the plaintiff shall have filed his reply to the counter-claim."

This decision applies the principle of section 20 to the attack on the counter-claim. There is, of course, no reason why the counter-claim should not be attacked by rule for judgment except the view of the court that the provision of section 15 of the act "that the plaintiff *shall* file an answer under oath which shall be called the 'Plaintiff's Reply,'" makes it obligatory on the plaintiff to file a reply to a counter-claim and that being so, by necessary inference, makes the reply the only vehicle by which the plaintiff can attack the counter-claim either by denial of its facts or by reason of its insufficiency in law. The court, in the case above cited, seems to admit the difficulty of the question and reaches its conclusion apparently with some hesitation.

#### PROOFS UNDER THE PLEADINGS.

Section 16 provides that neither party shall be permitted at the trial to make any defense which is not set forth in the affidavit of defense or the plaintiff's reply as the case may be, except as provided in sections 7 and 13. Under the old practice the defendant was not limited in his proof to the facts set forth in his affidavit of defense and in order that the plaintiff might be fully advised as to the entire defense he could call on the defendant for a bill of particulars. This practice has survived in many of the counties of the state. On the other hand the defendant who desired to prove matters not strictly admissible

under his pleas was permitted to do so, if he gave notice of special matter which may or may not have been set forth in his affidavit of defense. When county rules were adopted providing that the defendant was limited in his proofs to the defense set forth in his affidavit of defense, the reason for the older practice permitting notice of special matter and permitting plaintiff to ask for a bill of particulars disappeared and this is now especially true in view of the provision of section 16 of the act. The pleadings are defined by section 2 of the act. Their contents are prescribed by section 5. By section 16 the parties are limited in their proofs to the allegations made in these pleadings, therefore under the provisions of the act a bill of particulars to be filed by the defendant at the request of the plaintiff is no longer necessary.<sup>108</sup>

The question may still be asked, however, whether the plaintiff has any right to a more specific statement of a counter-claim pleaded by the defendant in his affidavit of defense. This is not the same as a request for a bill of particulars from the defendant. The general practice is that the defendant may rule the plaintiff to file a more specific statement of claim<sup>109</sup> and as the counter-claim is under the terms of the act<sup>110</sup> the defendant's statement of claim, it should be open to attack by the same or similar procedure on the ground that it is not sufficiently specific.

#### DEMURRER AND ANSWER IN THE AFFIDAVIT OF DEFENSE.

Section 4 abolishes demurrers and provides that questions of law heretofore raised by demurrer shall be raised in the affidavit of defense.<sup>111</sup> Section 20 amplifies this rule by providing that questions of law may be raised in the affidavit of defense without answering the averments of fact in the state-

<sup>108</sup> *Sturtevant v. Regan*, 64 Pitts. 715 (1916).

<sup>109</sup> Unless the decision of the Court of Common Pleas No. 4, in the matter of *Katzenberg v. Oberndorff*, *supra*, note 22, shall establish the rule that affidavit of defense must be used to secure this result instead of the rule for more specific statement.

<sup>110</sup> See end of section 15.

<sup>111</sup> *McFadden v. Publ. Co.*, *supra*, note 104.



ment of claim and after such questions of law have been disposed of by the court against the defendant he may file a supplemental affidavit of defense to the averments of fact in the statement. The question now arises whether the defendant may demur and answer at the same time. Section 20 provides that he may raise any question of law without answering the averments of fact. It is nowhere provided that he may not answer the averments of fact at the same time that he raises the question of law. If the defendant demurs and answers in his affidavit of defense and the court decides against him on the question of law raised by way of demurrer, is he entitled to the additional fifteen days given under section 20 within which he may file a supplemental affidavit of defense to the averments of fact? Under the older decisions it would seem that an attempt to demur and answer in the same pleading would result in a ruling that the demurrer is waived by the answer.<sup>112</sup> A different view, however, seems to be taken by Judge Endlich of Berks County.<sup>113</sup> He was of the opinion that where a defendant demurred and answered in his affidavit of defense the court would refuse to consider the averments of fact, and he laid down the rule broadly that averments of fact may not be introduced into a statutory demurrer nor will they be considered by the court, if so introduced. This is a principle apparently new to our practice, namely, that when the defendant demurs and answers at the same time, his answer must be ignored, and if the demurrer is decided against him he may file a supplemental affidavit of defense.

#### PRACTICE ON STATUTORY DEMURRER.

When a defendant files a statutory demurrer, how shall the matter be reached and disposed of by the court?<sup>114</sup> Treating the affidavit of defense which raises the question of law as a statutory demurrer, the proper practice, by analogy to the

<sup>112</sup> 64 U. OF PA. LAW REVIEW 246, note 66.

<sup>113</sup> *Seidle v. Fidelity & Casualty Co.*, 8 Berks 251 (1916).

<sup>114</sup> This question was in part considered in the former article on this act, 64 U. OF PA. LAW REVIEW 242.

practice on a common-law demurrer, would be to have the case set down for hearing on the demurrer. The cases, however, show considerable diversity in the practice. In Cumberland County and Berks County the question of law raised by the affidavit of defense was disposed of on a rule entered by plaintiff for judgment for want of a sufficient affidavit of defense,<sup>115</sup> and in Fayette County on a motion for judgment for defendant on questions of law raised by the affidavit of defense.<sup>116</sup> It is obvious that the practice allowed in the cases in Cumberland and Berks Counties is not proper, for even if the court decides in favor of the plaintiff, he is not entitled to judgment because under the provisions of section 20 the defendant is entitled to an additional fifteen days within which to file a supplemental affidavit of defense. The practice in Fayette County seems more appropriate but is after all unnecessary since from the very character of the statutory demurrer all that need be done is to set the matter down for hearing and the court may give judgment for the defendant under section 20 although it cannot give judgment against him.

If the decision is against the defendant on his statutory demurrer, the defendant is entitled to an additional fifteen days within which to file a supplemental affidavit of defense.<sup>117</sup> If the first affidavit of defense was not a statutory demurrer but a defense on the facts, the supplemental affidavit of defense may be allowed, not, however, under the provisions of section 20 of the Practice Act but under the older practice long established in Pennsylvania whereby leave to file such supplemental affidavit of defense is discretionary with the court.<sup>118</sup> Section 17 provides that "the plaintiff may take a rule for judgment . . . and the court shall enter judgment or discharge the rule, as justice may

<sup>115</sup> Philadelphia & Reading Coal & Iron Co. v. Stambaugh, *supra*, note 63; Bingaman v. Directors of the Poor, 9 Berks 27 (1916). The improper method used in these cases was also used in a Philadelphia case without criticism by the court. Courtenay v. Logue, 26 D. R. 13 (1916).

<sup>116</sup> Hackney v. Gorley, *supra*, note 31.

<sup>117</sup> Presumably from the time that notice is given of the decision entered against him. 64 U. OF PA. LAW REVIEW 243.

<sup>118</sup> Andrews v. Blue Ridge Packing Co., 206 Pa. 370 (1903); Scranton Flour & Grain Co. v. Maier, *supra*, note 41.

require." Is the old practice under which the court could in its discretion give leave to file a supplemental affidavit of defense hereby abolished? Judge Strauss of Luzerne County seems to have no doubt about the court's right in such cases, under the broad authority given under sections 21 and 22, and he adds:

"it appears to us upon a reading of the whole statute that its purpose was not to bar any avenue leading to a just result previously opened, but to straighten, shorten and accurately define the road. Therefore, the court retains the right and ought to exercise the power to permit the supplemental affidavit of defense where a real defense appears probable, unless convinced that the original affidavit was merely evasive and not in good faith."<sup>119</sup>

Although no leave need be given after disposition of the defendant's statutory demurrer, nearly all of the courts seem to have proceeded upon the theory that it is necessary for them to give leave to file the supplemental affidavit of defense.<sup>120</sup> In one case,<sup>121</sup> however, the court, after deciding against the defendant on his statutory demurrer, made no order with reference to the filing of the supplemental affidavit of defense. This would seem to be the appropriate practice. The defendant having received notice of the decision against him on his statutory demurrer must file his affidavit of defense within fifteen days without being either specially requested or permitted to do so.

Where the court decides against the defendant on his statutory demurrer, what order shall be entered?<sup>122</sup> In a case in Westmoreland County,<sup>123</sup> the court having come to the conclusion that the statement of claim was insufficient but that if it were amended it would be sufficient and defendant would not be entitled to judgment on his statutory demurrer, entered an order giving plaintiff leave to amend his statement of claim

<sup>119</sup> *Savitz v. Bonding Co.*, *supra*, note 106.

<sup>120</sup> The form in which such leave was given varies. In *Seidle v. Fidelity & Casualty Co.*, *supra*, note 113, it is "that the defendant be at liberty to file a supplemental affidavit of defense." In *Phila. & Reading Coal & Iron Co. v. Stambaugh*, *supra*, note 63, it is "the defendant is directed to file a supplemental affidavit of defense," *etc.* In *Ballora v. Hayes*, *supra*, note 44, it is "defendant to file a supplemental affidavit of defense," *etc.*

<sup>121</sup> *Hackney v. Gorley*, *supra*, note 31.

<sup>122</sup> 64 U. OF PA. LAW REVIEW 242, 243.

<sup>123</sup> *Ballora v. Hayes*, *supra*, note 44.

within fifteen days and upon the filing of such amended statement and payment of costs accrued, judgment against the defendants on the points of law suggested in the affidavit of defense, with leave to the defendants to file a supplemental affidavit of defense to the averments of fact of the statement within fifteen days from the filing of such statement and in default of filing the amended statement within the time specified, judgment for the defendants. It is submitted that the portion of the order providing for judgment against the defendants on the points of law suggested in the affidavit of defense is not good practice.<sup>124</sup> It is not authorized by section 20 of the act which contemplates the entry of some mere interlocutory order indicating that the question of law raised by the defendant is decided against him, such decision, however, not being a judgment. The order made in the case just cited is especially anomalous in that the entry of judgment against the defendant is followed immediately by leave given to him to file a supplemental affidavit of defense. An appropriate form of order in such cases might be "affidavit of defense stricken off" or "affidavit of defense insufficient"<sup>125</sup> or "upon the question of law raised by the defendant's affidavit of defense, defendant is not entitled to judgment"<sup>126</sup> or "legal objections raised by the defendant to the statement filed by the plaintiff in the above case are overruled"<sup>127</sup> or "judgment for defendant on affidavit of defense refused."<sup>128</sup>

The question of the form of the statutory demurrer has been heretofore discussed.<sup>129</sup> It obviously cannot be drawn in the form of an affidavit of defense and an appropriate form is here suggested.<sup>130</sup>

<sup>124</sup> An order entered in Luzerne County, "judgment in favor of plaintiff upon the question of law raised by the pleadings" is open to similar objection. *Joseph Dixon Crucible Co. v. Kraft, C. C. P., Luzerne County, June Term, 1916, No. 652, unreported.*

<sup>125</sup> 64 U. OF PA. LAW REVIEW 243.

<sup>126</sup> *Bingaman v. Directors of the Poor, supra, note 115.*

<sup>127</sup> *Phila. & Reading Coal & Iron Co. v. Stambaugh, supra, note 115.*

<sup>128</sup> *Barto v. Shaffner, 9 Berks 20 (1916).*

<sup>129</sup> 64 U. OF PA. LAW REVIEW 244.

<sup>130</sup> Following the beginning of the usual form of affidavit of defense, the defendant states that he has a full, true and legal defense to the plain-

## STRIKING PLEADINGS FROM THE RECORD.

The right given to the court in section 21, upon motion, to strike from the record a pleading which does not conform to the provisions of the act and to allow amendments or new pleadings to be filed upon such terms as it may direct, has been frequently exercised and is referred to in a number of the reported cases.<sup>131</sup> The question as to whether a statutory demurrer might be treated as a motion to strike off a statement is decided in the affirmative in Lancaster County<sup>132</sup> but *contra* in Berks County.<sup>133</sup> In the latter case Judge Endlich disposed of this objection which was raised in a statutory demurrer, by stating that it should have been raised by motion to strike off the statement and he refused judgment without making any order with reference to the statement which had failed to comply with the provisions of the act. This seems rather a technical decision for although a statutory demurrer is not the same as a motion to strike a pleading from the record, yet as its purpose is to obtain judgment on account of failure of the plaintiff to set forth a cause of action, it should, except on the purest technical ground, be held to be tantamount to a motion to strike off on the principle that the greater includes the less.

tiff's statement of claim of the following nature and character, to wit, that the facts set forth in the statement of claim are insufficient in law and do not constitute a good cause of action for the following reasons (here set forth the objections specifically followed by the signature of the affiant and the jurat). And a rule of court might require in analogy to the older practice that the defendant shall swear that his statutory demurrer is not intended for purpose of delay. This paper should be endorsed "affidavit of defense." It is recommended that it should also be endorsed (statutory demurrer).

<sup>131</sup> A statement in trespass not sworn to and not endorsed with notice to file affidavit of defense was stricken off. *Weber v. Consolidated Ice Co.*, 64 Pitts. 223 (1916). A statement not averring whether the contract was written or oral was stricken off. *Curtis v. Bortree*, 17 Lack. 259 (1916). A statement containing many paragraphs setting forth unessential matter lacking directness, alleging a trespass upon advice and belief was stricken off, with leave to file a new pleading within three weeks. *Weiss v. Schafer*, 12 Schuyl. 209 (1916). A statement not paragraphed and numbered was stricken off with leave to file a new statement within thirty days. *Cunfer v. Smith*, 14 Del. 166 (1916). A statement not paragraphed or endorsed with notice to defendant was stricken off, with leave, *etc.* *Zullinger v. Grebe*, 14 Del. 190 (1916). A statement in trespass containing inferences and conclusions was stricken off with leave. *Delaney v. Chester*, *supra*, note 30.

<sup>132</sup> *Sorrick v. Scheetz*, 33 Lanc. 401.

<sup>133</sup> *Barto v. Schaffner*, 9 Berks 20 (1916).

## APPLICATION TO PENDING PROCEEDINGS.

Judge Endlich of the Court of Common Pleas of Berks County<sup>134</sup> said:

"As pointed out in *Thomas's Election*, 198 Pa. 546, while statutes governing procedure may reach pending litigation, the question when or how far any given statute of that class does so, is one of legislative intent to be gathered from the language and terms of the enactment, and to be negatived unless expressed or necessarily implied. In view of the abolition of the plea by section 3 of the Act of 1915, and its provision in section 2 for the formation of the issue to be tried by declaration and affidavit of defense (and reply thereto in certain cases), there is reason for inferring that the procedure ordained was intended to apply to pending cases not at issue when the act went into operation. But there seems to be none for holding that it applies retroactively to causes actually and formally at issue before that time."

It is intimated in this opinion that the Practice Act does apply to cases pending January 1, 1916, but not then at issue,<sup>135</sup> and it is so ruled in a case in Delaware County.<sup>136</sup>

*David Werner Anram.*

*Law School,  
University of Pennsylvania.*

<sup>134</sup> *Ahrens v. Reading*, 8 Berks County L. J. 246 (1916).

<sup>135</sup> It has been decided that the Procedure Act of 1887 applied to pending cases. *Krause v. Penna. Railroad Co.*, 4 County Court Reports 60 (1887); see also *Swartz v. Lawrence*, 12 Phila. 181 (1877). It was held in the case of *Smith v. Travilla*, 1 Clark 78 (1842), that the Act of 1842 applied to pending suits. When the legislature does not desire to have a new procedural statute apply to pending litigation, it usually protects such cases by a proviso. This is illustrated by the Act of May 12, 1897, P. L. 62, Sec. 1, relating to foreign attachment. In Luzerne County the question is set at rest by the following rules of court: "1. In every action which has been begun in this court, but in which no statement has been filed before January 1, 1916, and in every case brought into this court by appeal from a justice of the peace in which no special statement has been filed before said date, the said act shall apply to all of the pleadings. 2. In every such action in which a statement but no subsequent pleading has been filed before said date, and in every case brought into this court by appeal aforesaid in which a special statement but no subsequent pleading has been filed before said date, it shall be optional with the plaintiff to stand upon such statement subject to the former practice, or to file *de novo* and serve a sworn statement as provided in said act, which shall then apply to all of the subsequent pleadings. 3. In every such action and appeal in which a statement and affidavit of defense have been filed, or in which issue has been made by plea filed before said date, the former practice shall apply. 4. In every case brought into this court by appeal aforesaid, after said date, the transcript shall no longer be considered as the statement but the plaintiff will be required to file a statement under said act which shall apply to all of the pleadings."

<sup>136</sup> *Delaney v. Chester*, *supra*, note 30.

## GEORGE MIFFLIN DALLAS.

The Honorable George Mifflin Dallas was born February 7, 1839, read law in the office of St. George Tucker Campbell, a leader of the Philadelphia Bar, and was admitted to practice in 1860. While a young man, Mr. Dallas was elected a member of the Constitutional Convention of 1872-73. His speeches on the law of libel in Pennsylvania—"The Freedom of the Press"—in that convention attracted attention and were published in pamphlet form. It may be remarked here that Mr. Dallas was an attractive speaker, indeed an orator, with strength of thought, grace of diction and a very agreeable voice. Those who listened to his brief address in the United States court-room on "John Marshall Day," February 4, 1901, and who remembered the appearance of Judge Dallas as an advocate in jury trials, noticed that his powers of elocution had not failed from disuse.

Mr. Dallas practised law for some years in partnership with Mr. George L. Crawford, who was a very able lawyer, and of exceptionally clear judgment. The two men were warm friends and older members of the Bar can readily picture the offices of Crawford and Dallas on South Fourth Street, on the first floor of two adjoining typical Philadelphia houses, where ample room, high ceilings, and shelves filled with law books, seemed the arcana of legal mysteries, but wherein law was practised with great ability and with the observance of professional ethics and personal courtesy according to those traditions which have made the widespread reputation of the Philadelphia lawyer. There was something impressive in such offices, before the days of high buildings, with floor-space rented by the square foot and in the absence of those useful adjuncts, the ever-tinkling telephone and the constantly ticking typewriter. Yet what is dignity contrasted with utility?

An instance of the confidence reposed in Mr. Dallas is to be found in *Gowen's Appeal*, 106 Pa. 288—more fully reported in 10 W. N. C. 85, an interesting and close case in which there was a dissenting opinion by Trunkey, J., concurred in by Sharswood, C. J., and Sterrett, J. The Court of Common Pleas No. 2, of Philadelphia, appointed Mr. Dallas master to preside at and supervise the proceedings at a special meeting of the stockholders of the Philadelphia and Reading Railway, held for the election of officers and managers. The question in the case was whether such election

was invalid by reason of the fact that less than a majority of the stockholders attended in person or by proxy; but there was not any criticism of the master. It was probably as an outcome of his experience in that case that Mr. Dallas delivered an address before the Law Academy, on January 15, 1884, on "The Law of Procedure in Corporation Meetings." There seem to be few publications from his pen, but the conclusion of that paper well may be quoted: "Any portion of the law which relates to corporations may demand your most careful investigation. The number of these artificial persons has grown so great, under liberal statutory provisions for their creation, that it might almost be supposed to be a mandate of the law that they shall increase and multiply; and they form so important a class of our business community that no lawyer can safely omit to instruct himself upon any matter which concerns them; they have become our chief bankers, transporters, manufacturers and miners; they build and navigate our ships; construct and operate our telegraphs; and insure our property and titles, and our lives. They provide graves for our dead bodies, and administer our estates; and, mindful of our immortal part as well they include even the support of public worship within the scope of their beneficence." These statements are fully as pertinent now as they were in 1884. A little wave of sadness creeps over the heart of the reader of the last words.

Mr. Dallas was the special master in the important and voluminous proceedings which were evolved in the first receivership of the Philadelphia and Reading Railroad. He wrote over thirty reports and his judicial qualities were proved by his treatment of the important matters which came before him. It was, therefore, with the hearty concurrence of the profession that he was appointed a judge of the Circuit Court of the United States, with its wide jurisdiction, on March 17, 1892, which position he held until his resignation, March 11, 1909, and it is as a judge that he will specially be remembered. Soon after he went on the bench, he received the degree of LL.D. from Princeton University. In his case this was a deserved honor, for he was indeed *legum doctor*—a teacher of law. In his judicial bearing he was dignified, but free from pomposity, attentive in hearing counsel, free from the criticism, "An over-speaking judge is like an easily bent wand"; combining kindness, patience and courtesy with firmness. A natural gift for mechanics was a help in the consideration of many cases



which came before him in the Federal Court. He had no *cacoethes scribendi* and his opinions were not mere digests. Perhaps one of the most widely known was in *Northern Securities Co. v. Harriman*, 134 Fed. 331, in which he decided that the question therein involved had not been decided in the great case of the *Northern Securities Co. v. U. S.*, 193 U. S. 197, which discussed and determined the grave question of a combination in restraint of trade and commerce. His opinion was affirmed in *Harriman v. Northern Securities Co.*, 197 U. S. 244. A perusal of his statement of facts and his conclusions will show the distinctive clarity of his mind.

After Judge Dallas ceased his active and successful work he enjoyed his well-earned rest in congenial pursuits and recreations until his physical failure some months ago.

Those who were admitted to his personal friendship were won by the lovable traits which it seemed he could not help displaying in personal association, as well as by his marked humor. He told a funny anecdote in admirable fashion, had the happy faculty of generously enjoying the wit or stories of other men and was absolutely without the pose of those who can appreciate nothing witty that is not of their own utterance, whether it be original or borrowed.

Our community has been blessed by the character, by the citizenship, by the judicial labors, by the personal worth of such a man; and the Law School of the University of Pennsylvania may well be proud of his record as one of its teachers, while those who loved him will never cease to hold his memory in respect and unceasing affection.

*John W. Patton.\**

*Emeritus Professor of Law, University of Pennsylvania.*

#### DEATH OF HON. GEORGE MIFFLIN DALLAS; RESOLUTION OF THE FACULTY OF THE LAW SCHOOL.

The entry of a minute in memory of the Honorable George M. Dallas, who died, distinguished and beloved, on January 21, 1917, must be a recital in substance of the sincere tribute paid to him in

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\*This tribute to the memory of Judge Dallas was prepared by his colleague, Professor Patton, at the request of the Faculty of the Law School.

the year 1906, upon his retirement from active duty as a professor in the Law School. Yet there is comfort in the thought that the expression of esteem and affection was made known to him and not delayed until he had passed from earthly ken.

The regret was then expressed that the Law School had lost the praiseworthy service of a lawyer of great ability, learning and high judicial position, whose reputation had added much to the prestige of this department of the University. When he was sworn in on March 22, 1892, as a judge of the Circuit Court of the United States, under the Act of Congress of March 3, 1891, which brought into existence nine appellate tribunals, an interesting item in the *Legal Intelligencer*, which gave notice of the ceremony, stated that it "was witnessed by a large assemblage of the bar and the students of the Law Department of the University in which Judge Dallas is a professor." This evidence of the regard in which he was held by those who were honored by his instruction was maintained continuously during his entire tenure of his chair, for fifteen years in all.

It is easy to believe that his study as a teacher must have aided him in reaching those clear and logical rulings which marked his career on the bench; and that, on the other hand, his practical administration of the principles of law and nice distinctions on points of evidence were of great value to him in the preparation of his lectures to students.

The following causes of regret were stated:

That our students were deprived of the benefit of his teaching and the example of his dignified and courteous bearing.

That his colleagues of the faculty would no longer have his wise counsel, the fruit of his wisdom and experience, which was so often asked and gladly received and followed.

Yet it was a gratification to know that the Trustees of the University elected Judge Dallas Professor Emeritus, that he accepted that position and that his name and interest would still benefit the University.

Yet beyond all appreciation of his official relation to this School, he evoked and kept, on the part of his colleagues in the faculty, a warm affection, which made the too rare occasions of meeting him since his retirement sources of great pleasure; and it is with unfeigned sorrow that we realize that we shall see his face no more or respond to his genial greetings and feel the influence of the personal charm which has secured him so many friends.