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THE NEW PENNSYLVANIA EQUITY RULES A SURVEY

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In Pennsylvania, equity practice since 1836 has been independent of the practice in actions at law.¹ This division coincided with the practice in England, in the other common-law states in the United States, and in the Federal courts. There are sound practical reasons for a difference in practice. This is particularly true during the trial stage of the action. The absence of any jury, the absence of any charge of the court or instructions to the jury, the difference in the emphasis on rules of evidence in the absence of a jury, the need for findings of fact and a written opinion by the trial judge, all combine to make the practice in actions at law difficult to assimilate.

Yet it has been the declared policy of the Supreme Court of Pennsylvania for years to make the practice in equity conform as closely as possible to the practice in actions at law. In the preamble to the last

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1. Equitable principles as applied by the high court of Chancery of England formed part of the common law of Pennsylvania. However, prior to the Act of June 16, 1836, PA. STAT. ANN. tit. 17, § 282 (1930), conferring the powers and jurisdiction of the Courts of Chancery upon the Common Pleas Courts, equity in Pennsylvania was administered largely through common law forms. For a full discussion of the historical basis of equity power in Pennsylvania, see *Penn Anthracite Mining Company v. Anthracite Miners*, 318 Pa. 401, 178 Atl. 291 (1935); 8 STANDARD PENNSYLVANIA PRACTICE § 2 *et seq.* (1937).

By § 13 of the Act of 1836, *supra*, the practice was made to conform to the practice in equity prescribed or adopted by the Supreme Court of the United States. The first set of Pennsylvania Equity Rules was promulgated in 1844. A second set was adopted in 1865 and revised in 1894, 1900, 1915 and 1925.

comprehensive revision of the Equity Rules, in 1925, the Court said that the Rules were promulgated "for the purpose of making the practice and procedure in equity conform as nearly as may be to the legislature's requirements in regard to practice and procedure at law" And in Rule 91, the Court provided that "In all cases where these rules do not apply, the practice shall conform, as nearly as may be, to the practice in courts of law in regard to the particular matter"

The new Equity Rules, effective July 1, 1952, carry on this same policy. In effect, a careful re-examination of the equity practice has been made in the light of the new Rules governing Actions at Law in Assumpsit. Every effort was made to exclude any need for a separate procedure in equity. With the assistance of the bench and the bar, the Procedural Rules Committee studied each of the 1925 Equity Rules to see if an adequate justification for its separate existence could be found. The thirty-five Rules approved by the Supreme Court on January 4, 1952, are the fruit of more than four years of study.

It is, of course, quite impossible to compress a treatise on equity practice into the small space available for this article. To give the bar the greatest possible help in familiarizing themselves with the new Rules, we shall confine ourselves to pointing out a few of the more important questions of policy which had to be decided, and to a Concordance of the old and new Rules. The Concordance, which is printed as an appendix to this article, has been prepared under the numbering system of the old Rules, with which the bar is familiar. With respect to each of the old Rules, the corresponding new Rules, if any, are designated, and a brief statement of changes in practice is given.

1. THE NEED FOR SEPARATE EQUITY RULES

The problem of the "single form of action" has already been considered and resolved in the Rules governing Actions at Law.² It was found impossible even to consolidate assumpsit and trespass because of the historic difference in the system of defense pleadings.³ Separate Rules were needed to cover particular phases of mandamus, quo warranto, ejectment, quieting titles, replevin, mortgage foreclosure and divorce. These are all actions at law; yet enough basic differences existed

2. See GOODRICH-AMRAM, 1 STANDARD PENNSYLVANIA PRACTICE §1001-2 (1949) [hereafter referred to as GOODRICH-AMRAM], for a full discussion of the reasons which militated against the consolidation of the actions at law. As therein pointed out, the so-called consolidation under the federal rules is to a large extent illusory, as those rules recognize the existence of independent actions and remedies such as replevin, quo warranto, attachment, etc.

3. See GOODRICH-AMRAM §1045-1 *et seq.* The broad remedial provisions of Rule 1033 permitting amendment of the form of action at any time, even after verdict, eliminate the evil of the common law emphasis on the form of action.

in these actions to warrant their continuance as separate forms of action.

In every case, of course, the basic assumpsit Rules were made the foundation of the procedure. The Special Rules confined themselves to the narrow areas in which the particular actions required special treatment. The only situation in which any substantial consolidation of forms of action was permitted lay in the field of the newly-invented action to quiet title.⁴

Since a program to consolidate assumpsit and trespass, which were substantially identical in all respects except one small matter of pleading, had already been abandoned, it hardly would be expected that any serious effort would be made to consolidate law and equity, with their substantial differences in subject-matter, special remedies, venue and service in actions quasi-in-rem, trial procedure, post-trial procedure, and enforcement process. Nevertheless, the Committee sought for a long time to find a way in which this consolidation might be effected, with the Federal Rules as a possible precedent. But, the differences were too substantial. Just as in the case of Actions at Law, consolidation would have been illusory. In any consolidated Rules, special exceptions would have to be provided for actions which were equitable in their nature. All the differences which now appear in the new Equity Rules would still have to appear somewhere in any consolidated Rules. This inclusion would lead to clumsy and complicated draftsmanship, would make it much more difficult for the bar to assimilate the new practice, and would sow confusion which would far outweigh the benefits of the fictitious consolidation. It was far more practical to recognize the existence of a separate equity practice and to assimilate it even more closely to assumpsit than had been done in the Equity Rules of 1925.

As a matter of fact, this distinction had been recognized in earlier drafts of Rules. In the field of Parties, the Rules governing Minors, Incompetents, Partnerships, Unincorporated Associations, Corporations and Similar Entities, and the Commonwealth and its Political Subdivisions, all were specifically made applicable to actions *both* at law and in equity. On the other hand, the Rules governing Real Parties in Interest, Non-Resident Defendants, Wrongful Death, Joinder, Joinder of Additional Defendants, Interpleader and Intervention, were specifically restricted to Actions at Law and made non-applicable in equity.

4. See GOODRICH-AMRAM §1061(b)-5, for a discussion of the consolidation of actions and remedies relating to the quieting of title and of the effect of the new action to quiet title on existing equity jurisdiction. For all practical purposes, the relief formerly available in equity may now be obtained under the rules to quiet title.

There were good reasons for this distinction. Actions for wrongful death are statutory and not a matter of equity jurisdiction; actions against non-residents, although theoretically available in equity,⁵ would ordinarily be brought at law; real parties in interest, joinder of parties, joinder of additional defendants, interpleader and intervention in equity were already regulated by the existing Equity Rules.

One of the effects of the decision to assimilate equity and assumpsit as closely as possible was the elimination of the reasons for these distinctions. Accordingly, special amendments to six sets of Rules (*i.e.*, all those listed, except actions for wrongful death) were simultaneously promulgated on January 4, 1952, all effective July 1, 1952, contemporaneously with the new Equity Rules. Each amendment is identical, expanding the Scope Rule to include actions in equity.⁶ This development completed the pattern. Separate practice in equity will be continued. The procedure will be identical with assumpsit in every detail, except where the Equity Rules prescribe a variance. The number of such variances has been reduced to the minimum, far below the number which existed under the Equity Rules of 1925.

2. COMMENCEMENT OF ACTIONS AND SERVICE OF PROCESS

The method of commencing an action was continued unchanged. Prior Equity Rule 26 authorized the commencement of an action either by (1) the filing of the plaintiff's bill, (2) the filing of an amicable action, or (3) the issuance of a summons under the Act of 1915.⁷ It

5. The Rules on Defendants who are Non-residents, though extended to equity for the sake of completeness, will, by their very scope, have only extremely limited application to equity. Rule 2077 (a)-1 applies the rules to the actions created by the non-resident motorists, aviators and property owners' acts. See GOODRICH-AMRAM § 2077(a)-1 *et seq.* for a full discussion of the applicability of the rules to these acts and the practice thereunder. Since actions under these acts will ordinarily be for money damages, equity will have no jurisdiction; however, conceivably, under the Non-Resident Property Owners Act when there is a nuisance use of land causing injuries to others and giving rise to equitable relief, such actions might possibly be within the scope of the Act. There are no decisions on this point.

Under Rules 2077(a), 2078(b)(2) and 2079(b), actions against non-resident individuals engaged in business may be brought in the cause of action county, and deputized service may be obtained. While actions under these sections will usually be at law, neither the acts authorizing such venue and service or the non-resident rules so confined them, and equitable relief could be available. There are no decisions in point. See GOODRICH-AMRAM §§ 2077(a)-21, 2077(a)-22, 2078(b)-1 and 2079(b)-1 for a full discussion of these rules.

6. For the most part, only minor differences in practice will result from the extension of these rules to equity. The major differences are pointed out in the concordance which is included as an appendix to this article, p. 1118 *infra*.

7. The Act of June 5, 1915, PA. STAT. ANN. tit. 12, § 1223 (1931), authorized commencement of equity actions by the issuance of a summons. The Bill in Equity, under this Act, was required to be filed within ten days after the issuance of the writ, and the defendant was required to answer within thirty days after the return of the writ. This practice is abolished by the new Equity Rules, and the procedure in assumpsit applies. Under Rule 1037(a), if an action is not commenced by complaint, the plaintiff may be ruled to file the same, and judgment of non pros. may be entered if the complaint is not filed within twenty days after service of the rule.

will be seen immediately that this is the assumpsit scheme under Rule 1007, which permits an action to be commenced by complaint, summons or amicable action.⁸

Service of process in equity has always been on a different plane from actions at law. Despite the ancient maxim "Equity acts in personam," equity courts have consistently administered a jurisdiction quasi in rem where the court had jurisdiction of the "subject-matter" of the action, but could not, for one reason or another, get personal service within the Commonwealth upon all persons who were proper parties defendant.⁹ Extra-territorial service (*i.e.*, service outside the Commonwealth) of process was authorized, and the decree of the court, although not binding in personam upon the absent defendants, did adjudicate, within this Commonwealth, their rights with respect to the subject matter of the pending action.¹⁰ This procedure differs markedly from that in actions at law, in which extra-territorial service is permitted only in a narrow statutory area. In addition, if an action were commenced by bill, service by the sheriff was not required: the bill could be served by any adult, who could prepare and file an affidavit

8. An action in equity in which the relief sought includes a prayer for money damages may also be commenced by foreign attachment under the act of May 23, 1887, PA. STAT. ANN. tit. 12, § 2866 (1951). This practice continues under the new equity rules.

9. Under the Act of April 19, 1901, PA. STAT. ANN. tit. 21, § 53 (1930), a court may order a conveyance made by a sheriff, prothonotary, clerk or a trustee appointed for that purpose where the defendant refuses to comply with a decree ordering the same. As stated in *Alpern v. Coe*, 352 Pa. 208, 213, 42 A.2d 542, 544 (1945), "The effect of statutes, such as the Pennsylvania Acts to which we have referred, has been the virtual abolition of the ancient doctrine that the decree in equity can only act upon the person of a party." See *Pomeroy's Equity Jurisprudence*, Sec. 134, 135, 428, 1317, 1318. A Pennsylvania Court of Equity, having jurisdiction of the subject matter, can act *in rem* with respect to lands lying within its territorial jurisdiction."

Rule 1529(b) continues the relief available under the Act of 1901, *supra*, and former Equity Rule 87. The new rules authorize the prothonotary or the sheriff to act for and in the name of the defendant.

10. Where no personal decree is sought, equity may act directly upon a res within its jurisdiction, and its non-resident owner need only be given such notice as is required by due process. See *Alpern v. Coe*, *supra* note 9. Extra-territorial as well as extra-county service of process was authorized by the Equity Service Act of April 6, 1859, as amended by the Act of March 20, 1941, PA. STAT. ANN. tit. 12, § 1254 (Supp. 1950).

As opposed to jurisdiction in rem, where equity acts "in personam" it cannot enter a decree against a non-resident who has not been served or otherwise subjected himself to the jurisdiction of the Court. *Atlantic Seaboard Natural Gas Co. v. Whitten*, 315 Pa. 529, 173 Atl. 305 (1934); and this disability exists even though property of the defendant is in the jurisdiction, if the relief sought is in personam. *Gallagher v. Rogan*, 322 Pa. 315, 185 Atl. 707 (1936). Actions for discovery, accounting, or specific performance imposing personal liability are considered actions in personam even though property may be involved. See *Alpern v. Coe*, *supra* note 9, 352 Pa. at 214, 42 A.2d at 544.

Under the Act of April 6, 1859, *supra*, there is, however, a distinction between service outside the county but within the state and extra-territorial service outside the state. In the former case, extra-county service within the state may result in judgment in personam. See *Mid-City Bank v. Myers*, 343 Pa. 465, 23 A.2d 420 (1942).

of service.¹¹ If the summons were used, since it was addressed to the sheriff of the county, service by the sheriff was required, just as in actions of assumpsit.

The new Rules make significant changes in the details of the practice, although the general principles remain the same. The first important change is accomplished by Rule 1504(a). It eliminates the prior distinction between the methods of serving a bill and a writ of summons. Since the new form of summons is no longer addressed to the "sheriff," but to the defendant himself, service by the sheriff is no longer compulsory. Therefore, the Rule now provides that *either* the writ or the complaint may be served by *either* the sheriff or a competent adult in all cases, except where an Act of Assembly otherwise requires. The writ and complaint are, of course, identical in form with those in actions of assumpsit. The life of the writ, or complaint, as process, and the rules for reinstatement or reissuance are likewise identical with assumpsit.

Since Rule 1504(a) makes service of process in equity identical with service in assumpsit, extra-county service is not permitted by this sub-section, except in those instances in which extra-county service is permitted in assumpsit actions; for example, in the case of particular defendants, such as partnerships, corporations or similar entities.¹²

All the provisions for special equity extra-county and extra-territorial service are consolidated in Rule 1504(b). Three situations are covered: (1) suits in which the Commonwealth or an administrative arm of the Commonwealth is the plaintiff and suit is brought in Dauphin County; (2) suits in which a "principal defendant" has been personally served in the county; and (3) suits in which the subject matter of the action is "property within the jurisdiction of the court."

The first category is the complement to the action at law brought by the Commonwealth as plaintiff. Under Rule 2103(a) the Commonwealth, or its agencies, has the option to bring any action as plaintiff in the courts of Dauphin County irrespective of the possibility of personal service on the defendant. This is a matter of administrative convenience for the sovereign in the conduct of official business. Such a rule necessarily includes the right of deputized service against the defendant who does not reside in Dauphin County; otherwise, the action could not proceed to a judgment in personam. The same rule must apply equally in equity, and Rule 1504(b) so provides. The second

11. See former Equity Rule 27.

12. See GOODRICH-AMRAM § 2180-6 for a full discussion as to extra-county service under the Corporation Rules; as to partnerships, see GOODRICH-AMRAM § 2131(c)-1; as to non-residents, GOODRICH-AMRAM §§ 2079(a)-2, 2079(b)-1.

and third categories continue the practice under the Act of April 6, 1859, as amended, PA. STAT. ANN. tit. 12, §§ 1254-1256 (1931). This Act provided generally for extra-county service in these two situations, and Rule 1504(b) uses the identical phrases "principal defendant"¹³ and property "within the jurisdiction"¹⁴ of the court. Generally speaking, no change has been effected in the instances in which the right of extra-county service may be invoked. The decisions under the Act of 1859 will continue to apply.

The procedure under the Act of 1859 was unnecessarily complicated, and the Act was unnecessarily prolix. It required, as a condition precedent, that the plaintiff make a "special motion" and that the court enter a special "order" authorizing such service. No sound reason for this requirement is apparent. When extra-county service is made upon a defendant, he has the duty of the next move. He may ignore the service, he may appear generally, or he may appear specially to contest the validity of the service. The existence or non-existence of a special order of the court permitting the service can have no bearing upon the defendant's choice of action or upon the validity of the service. A special order of the court, entered *ex parte* on the application of the plaintiff can have no quality of *res judicata* as against the

13. A "principal defendant" is one whose presence in the action is so necessary that the plaintiff's rights cannot be properly adjudicated by the court unless he is subject to its jurisdiction. *Bird v. Sleppy*, 265 Pa. 295, 108 Atl. 618 (1919); *Whittaker v. Miller*, 301 Pa. 410, 152 Atl. 670 (1930). For a discussion and full citation of authorities, see 8 STANDARD PENNSYLVANIA PRACTICE § 120 (1937).

Indispensable parties are those whose presence is essential to the jurisdiction of the court. Necessary parties are those who are interested in the proceedings to the extent that their rights will be affected; in their absence, the court may adjudicate the rights of the other parties. The desire to avoid a multiplicity of suits will make the court refuse to exercise its jurisdiction if available necessary parties are not brought upon the record; but if their joinder is not possible, the court may proceed without prejudice to their rights. *Hanna v. Chester Times*, 303 Pa. 252, 154 Atl. 591 (1931). See 8 STANDARD PENNSYLVANIA PRACTICE § 159 (1937).

14. Whether personal property is located within the jurisdiction of the court is often a difficult and tenuous question. As stated in *Jones v. Jones*, 344 Pa. 310, 316, 25 A.2d 327, 330 (1942), "Any attempt to assign a situs to an intangible, particularly when we regard the right itself rather than the evidence of the right, *e.g.*, the debt itself rather than the note or bond, is bound to furnish ground for a difference of opinion, for the decision frequently becomes a more or less arbitrary one."

Where personal property is involved, the principle of *mobilia sequuntur personam* may apply, and the mere presence of evidence of the debt, such as mortgage papers, within the county, has been held insufficient as not amounting to property within the jurisdiction. See *Gallagher v. Rogan*, *supra* note 10.

In certain situations, the property involved, *e.g.*, property being administered under a court receivership, may be considered within the jurisdiction of the court even though its situs is elsewhere. Under the Equity Service Act of 1859, it has been held that receivership property is within the jurisdiction of the court appointing the receiver and subject to equitable action even though located in another county. See *Slater v. Cauffiel*, 355 Pa. 186, 49 A.2d 408 (1946), in which, under the Act of 1859, real property in Somerset County was held to be within the jurisdiction of the Cambria County Court, in which such property was being administered under an equity receivership.

defendant. Whether or not the order is entered, the subsequent proceedings will be the same. This requirement of the Act of 1859 is therefore abandoned in Rule 1504(b).

Further, the Act of 1859 required, as a condition precedent, that the plaintiff furnish an affidavit or other proof of the place where the defendant might be served and of how the service might be authenticated. This again is a needless anticipation; it can serve no practical purpose. The defendant can either be served or not; the plaintiff will either know how to reach him or not; the service, if made, can always be authenticated in conformity with the usual practice. Here again, it will be the defendant who will object if the service is invalid or improperly authenticated. This requirement has also been eliminated. The special order under the Act of 1859 contained a further provision fixing the time within which the process was to be served outside the county, dependent upon how remote the place was. This provision is essential; it is not contained specifically in Rule 1504(b) because it is permitted under the general authorizations of Rules 248 and 1003. The time for service of process is always subject to extension by order of the court.¹⁵

Further, the Act of 1859 contained unusual provisions for an affidavit of service. First, the Act required an affidavit in *every* case, even where the service was made by a sheriff in another county of the Commonwealth. Secondly, if the service were made outside the United States, another special order of the court was required, fixing the method of authentication. These provisions both have been eliminated, and Rule 1054(c) simply directs that service by a sheriff needs no supporting affidavit. Service by a "competent adult" can be proved by "affidavit" under all circumstances.

The Act of 1859 contained no specific provisions for the manner of service, which was to be fixed in each case by the special order to be entered by the court. Rule 1504(b) provides a complete method of service in such cases, the method generally following service provisions already found in other Rules. Accordingly, problems of interpretation will be minimized. (1) If service is to be made in another county of the Commonwealth, it may be made either by the sheriff of that county, deputized for that purpose, or by any "competent adult." The provisions for deputization and the phrase "competent adult" are both found

15. Ordinarily, where process cannot be served within the thirty day period prescribed by Rule 1009(a), reissuance of process, either before or after such thirty day period under Rule 1010(a) (b), will be the ordinary procedure. However, where it is apparent at the time of issuance that service cannot be made and the writ returned for reissuance within the thirty day period, the time for service may be initially extended by the Court under Rules 248 and 1003.

in Ejectment Rule 1053(b). (2) If service is to be made outside the Commonwealth, whether elsewhere in the United States or abroad, it may be made by any "competent adult" or by sending a copy of the process by registered mail. The provision for a "competent adult" follows Ejectment Rule 1053(b); the provision for registered mail follows Mortgage Foreclosure Rule 1145(c). (3) If the identity or whereabouts of the defendant is unknown, service is to be made by publication "in such manner as the court, by general rule or special order shall direct." This provision follows Ejectment Rule 1053(c). The factual basis for the publication may be supplied either by an affidavit or by inclusion of these facts in the complaint itself. This provision follows Mortgage Foreclosure Rule 1145(c). If there are unknown heirs or assigns, publication may be made against them "generally." The factual basis may be supplied in the same manner. This provision follows Quieting Title Rule 1064(b).

These provisions differ from the corresponding provisions of the Act of 1859. That Act designated personal service and publication as the only authorized methods. Publication ensued in every case where personal service was not possible. Rule 1504(b) inserts the additional method of registered mail in the pre-publication stage. The Act of 1859 provided for publication where the defendant "cannot . . . be personally served with any process." Rule 1504(b) provides for publication where the defendant's identity is unknown or where the "whereabouts of the defendant is unknown." There is no requirement for any returns of service, or for any returns of registered letters undelivered, as proof that the defendant is unavailable. The mere assertion by the plaintiff is sufficient to warrant publication. This section follows Mortgage Foreclosure Rule 1145(c) and Quieting Title Rule 1064(b).

Lastly, the Act of 1859 required that the publication include "a statement of the substance and object" of the proceedings. This requirement could impose a heavy publication cost upon the plaintiff, without any corresponding assurance that the defendant would be actually informed. It also has been eliminated. The court has complete control of the publication, by general rule or special order, and has complete freedom to designate what shall be included in the publication in any particular case.

The constitutional problems raised by extra-territorial service are met in Rule 1503(a), and no change is made in the prior practice. The Rule states affirmatively that no decree may be entered against the defendant in personam unless he is personally served in the county, or in

another county of the Commonwealth, or unless he submits himself to the jurisdiction of the court.¹⁶

The plaintiff has all the necessary opportunity to make supplementary personal service upon defendants whom he cannot reach initially. Rule 1505, following the assumpsit practice under Rule 1010(d), permits supplementary service of process if properly reissued or reinstated. Accordingly, if, during the pendency of the action, a non-resident defendant, previously served extra-territorially, comes into the Commonwealth, the plaintiff may revive the process and serve the defendant in any county of the Commonwealth, as permitted in Rule 1504(b)(1). Such a service will support a judgment in personam against that defendant.

3. VENUE

The venue of an action in equity presents special problems not present in actions at law. These problems follow from the wide area of matters which equity may consider, and from the power to enter decrees in rem without the necessity of personal service upon all parties.

Like the action of replevin, venue is "double," *i.e.*, it may be laid in a county where personal service is possible, or it may be laid in a county in which the property in suit is located. The first category is further complicated by the "principal defendant" concept, discussed in the preceding section. Accordingly, Rule 1503(a)(1) authorizes the action to be brought in the county in which "the defendant" may be served or in which "a principal defendant" may be served. This choice of language is deliberate, and is intended to cover the cases of both single and multiple defendants.¹⁷ If there is but a single defendant, the problem is identical with the action of assumpsit. Venue in personam lies in any county in which personal service of the defendant can be effected.

However, if there are multiple defendants, all of them are not necessarily "principal defendants" as that term is defined in equity prac-

16. No form of constructive service can give the court power to make a decree in personam against a non-resident who has not submitted to the jurisdiction. See *Atlantic Seaboard Natural Gas Co. v. Whitten*, 315 Pa. 529, 173 Atl. 305 (1934); *Hughes v. Hughes*, 306 Pa. 75, 158 Atl. 874 (1932). Nor is the mere presence of a non-resident's property within the jurisdiction sufficient where the matter is not one "in rem" but "in personam." *Gallagher v. Rogan*, *supra* note 10; *Alpern v. Coe*, *supra* note 9. Where the defendant is within the jurisdiction but in another county, extra-county service as distinguished from extra-territorial service is sufficient to support a judgment in personam. See *Mid-City Bank v. Myers*, *supra* note 10.

17. Under prior practice, the ability to obtain service upon any defendant, whether principal or not, was the criterion of venue. See prior Equity Rule 26. The effectiveness of the action was governed by the ability to make service under the Equity Service Act of 1859.

tice. Rule 1504(b), as has been noted above, provides that if a principal defendant has been personally served in the county in which the action is commenced, other defendants may be served by extra-territorial service. If the defendant served in the county is *not* a principal defendant, no such extra-territorial service is available. Since, by definition, an action cannot proceed to a useful conclusion unless a principal defendant is served, the entire action will become abortive unless the principal defendant is brought within the jurisdiction of the court. The problem then presents itself: "Should a plaintiff be permitted to commence an action in a county in which no principal defendant can be served, in which only an auxiliary defendant can be served, and from which no extra-territorial service is permitted?" The answer is "No." The reason for the rule is eminently practical. Why authorize the commencement of an action in which the court is bound to refuse any decree to the plaintiff because of the absence of the necessary principal parties defendant? The action will be wholly futile on the merits; therefore, it is better administration to forbid its commencement.

The Rule therefore limits the venue in multiple-defendant actions in personam to the counties in which one or more of the *principal* defendants can be served. In such counties, the action can proceed to a useful conclusion on the merits in personam against the defendant served in that county, and a decree quasi-in-rem can be entered against all the other defendants, who cannot be served in that county, by the extra-territorial service permitted under Rule 1504(a). This limitation of venue in multiple defendant cases changes old Equity Rule 26. It authorized the venue to be laid, as in actions of assumpsit, in any county in which "the defendants" could be served, and made no direct distinction between principal defendants and other defendants.

The venue may also be laid in the county in which "the property or a part of the property" is found. This language follows Ejectment Rule 1052. The provision for "part of the property" as a basis of venue was not found explicitly in the prior practice. Can the court of County A, in which part of the property is located, enter a binding decree in rem which will bind the balance of the property in Counties B and C?¹⁸ There is no constitutional ground which would forbid such

18. The difficulties occasioned by such cases as *Vandersloot v. Pennsylvania Water & Power Co.*, 259 Pa. 99, 102 Atl. 422 (1917), 262 Pa. 27, 104 Atl. 799 (1918), will be obviated by this new rule. In those cases the court held that where part of a dam was located in York County and part in Lancaster County, the action being brought in York County, it could not grant relief as to nuisance "as any order or decree would necessarily affect the entire dam of the defendant, the largest portion of which is outside the jurisdiction of the Court."

a result.¹⁹ If constitutional objections existed, the Act of 1836,²⁰ which authorized venue in ejectment in any county in which part of the land lay, would have been invalid. No action can be more "local" than ejectment, and any provision for venue which is valid for ejectment will automatically be valid for other forms of action.

There are a large group of modern cases, in which there has been a failure to distinguish between jurisdiction in rem and in personam, and in which an effort was made to use the Act of 1859 to secure a decree in personam against absent defendants.²¹ Rule 1503(a) seeks to limit the possibility of further misunderstandings along this line. It states directly that no "judgment, order or decree shall . . . bind a defendant personally unless he is served within the county, or within the Commonwealth in conformity with Rule 1504(b), or unless he appears or otherwise subjects himself to the jurisdiction of the court." This qualifying language covers both of the preceding sub-divisions of this Rule. It applies to (1) cases where the action is in personam, and the venue is laid in the proper county, but there are non-resident defendants whose interests are to be adjudicated; (2) cases where the action is purely in rem and all defendants are non-residents; and (3) cases which are mixtures of these two. It makes no difference what the nature of the action may be; it makes no difference which defendants, if any, are personally served in the county or elsewhere in the Commonwealth; it makes no difference which defendants, if any, are served extra-territorially; it makes no difference what kind of property or interest is involved; there can be no decree in personam against any non-resident of Pennsylvania who is not personally brought within the jurisdiction of the court, either by personal service within the Commonwealth, or by personal submission to the jurisdiction of the court. It is hoped that the insertion of this explanatory language in Rule 1503 will reduce the number of cases in which futile efforts will be made to use the beneficent provisions of extra-territorial service to accomplish an unconstitutional result.

19. In *Alpern v. Coe*, 352 Pa. 208, 212, 42 A.2d 542, 544 (1945), the Court stated: "Because of the fixity of land and the mobility of the parties, the rule has developed that, in general, a court may adjudicate *in rem* or *quasi in rem* with respect to lands lying within its jurisdiction, even though not all of the defendants are within the jurisdiction: *Pemoyer v. Neff*, 95 U.S. 714, 727, 730 [1877]. This Rule, which is supported by the weight of considered authority, has been well stated as follows: 'A state can exercise through its courts jurisdiction over land situated within the territory of the state, although a person owning or claiming an interest in the land is not personally subject to the jurisdiction of the state.' Restatement Conflict of Laws, § 101 [1934]."

20. Act of June 13, 1836, PA. STAT. ANN. tit. 12, § 101 (1931).

21. *Atlantic Seaboard Natural Gas Co. v. Whitten*, *supra* note 16 (bill to compel non-resident defendant to enter into a lease for real property within the jurisdiction); *Gallagher v. Rogan*, *supra* note 10 (bill to compel non-resident to account for Phil-

Sub-divisions (b) and (c) of Rule 1503 continue unchanged the existing practice in cases in which the Commonwealth or one of its agencies is the plaintiff, and in cases in which an officer, instrumentality or agency of the Commonwealth is a defendant.²² With respect to cases in which the Commonwealth or its agencies may be plaintiff, the same option to sue in Dauphin County is given in sub-division (b) as has been given in actions at law in Rule 2103. This is a matter of administrative convenience for the operation of the Commonwealth's business. This sub-division is probably unnecessary in view of the fact that the Rules governing the Commonwealth and Political Subdivisions as Parties have been applicable through Rule 2101, in equity as well as at law since the date of their original promulgation. The sub-division automatically gives the Commonwealth the right to sue in Dauphin County, and makes Rule 2103 applicable to actions in equity. In actuality, Rule 1503 (b) reaffirms Rule 2103, repeated and expanded in the Equity Rules for purposes of clarity. Sub-division (c) conforms to the Act of 1931,²³ which limits venue to Dauphin County, as an administrative convenience to the Commonwealth, in actions to compel or restrain the performance of official acts. It makes no change in the prior practice in equity, but has been repeated in the Equity Rules for purposes of clarity.

Sub-division (d) is new, but it does not effect any marked change in the prior practice.²⁴ It first recognizes the exclusive jurisdiction over trusts and trustees, of the court which has the jurisdiction of the trust itself. Accordingly, it limits the venue of all actions relating to the administration of the trust or to the removal of the trustee to that court. However, it also recognizes the peculiar problem of the absconding trustee. If, for example, a New York trustee of a New York trust absconds with the trust property and brings it to Pittsburgh, the Alle-

adelphia bank account and mortgages on Philadelphia real estate); *Degan v. Kiernan*, 326 Pa. 397, 192 Atl. 404 (1937) (bill for discovery and accounting); *Commonwealth ex rel. Hilbert v. Lutz*, 359 Pa. 427, 60 A.2d 24 (1948) (bill to enjoin violation of mining laws).

22. For the practice as to Commonwealth actions, see *GOODRICH-AMRAM* §§ 2103(a)-1, 2103(b)-1.

23. Act of May 26, 1931, PA. STAT. ANN. tit. 12, § 105 (Supp. 1950). *GOODRICH-AMRAM* § 2103(b)-1.

24. The Equity Service Act of 1859, as amended, referred to trusts only in regard to actions "for the perpetuating of testimony concerning trusts, which have within the jurisdiction of such Court a substantial portion of their securities, real estate or other assets. . . ." PA. STAT. ANN. tit. 12, § 1254 (Supp. 1950). This narrow limiting language is not continued under the new Equity Rules. Rule 1503(b) provides that in actions relating to the administration of a trust or to removal of a trustee, venue is vested in the court having jurisdiction over the trustee except in cases of absconding trustees. Actions to perpetuate testimony are governed by Equity Rule 1532 which applies to all type of actions and is not limited to perpetuation concerning trusts.

gheny County court should be permitted to undertake proceedings to protect the trust. The same result would follow when there is an inter-county absconding. If a Pittsburgh trustee absconds and removes the trust property to Harrisburg, the Dauphin County court should be permitted to protect the trust. It is true that in this latter situation, it might be possible to commence an action in the Allegheny County court and serve the process by deputization in Dauphin County. But this might be a clumsy and ineffective remedy, and a direct action against the trustee in Dauphin County is much more desirable.

The Committee Note to Rule 1503 refers to two special statutory venue provisions which are unsuspending and remain effective under the new Rules. The Act of 1907²⁵ permits a deserted wife to commence an equity proceeding for support against her defaulting husband in the county in which she resides. The Act of 1937²⁶ regulates the commencement of actions to restrain stream pollution, and permits such actions to be brought in the name of the Commonwealth either in Dauphin County or in the county in which the pollution occurs or in any county in which the stream flows after pollution. This last category goes beyond the scope of Rule 1503.

4. THE PLEADINGS GENERALLY

It is in the field of the pleadings that the new Rules make their most striking changes. The historic system of equity pleadings has been scrapped completely. Gone are the bill, the answer, the replication, the preliminary objections under Rule 48, the decree pro confesso.

With the exception of the matters covered by Rules 1506 to 1510, which will be discussed below, the assumpsit practice is taken over bodily. Although the complete merger of law and equity into one form of action was not possible, the uniformity of the system of pleadings closely approximates such a consolidation. The new equity Rules contain no provisions whatever with respect to the pleadings permitted, the general rules of pleadings, the pleading of special matters such as fraud or mistake, damages or intent, the pleading of written documents and their attachment as exhibits, pleading in the alternative, the claim for relief, paragraphing, signature, verification, endorsements, and amendments of pleadings. As to all these matters, the assumpsit rules will apply.²⁷ In many respects, there will be no marked change from the prior practice, but there are a few matters which justify comment.

25. Act of May 23, 1907, as amended, Act of July 21, 1913, PA. STAT. ANN. tit. 48, §§ 131, 132 (1930).

26. Act of June 22, 1937, PA. STAT. ANN. tit. 35, §§ 691.601-691.602 (1949).

27. See GOODRICH-AMRAM, § 1017-1 *et seq.* for full discussion and analysis of the assumpsit practice.

(a) *Form of Pleadings*

The prior practice under old Rule 33 required an endorsement of the bill with notice to the defendant to enter an appearance within fifteen days and to file an answer within thirty days. This requirement permitted a judgment by default, under Rule 50, either for want of an appearance or for want of an answer. The incorporation of the assumpsit practice makes four important changes in this respect. First, the form of endorsement is now that provided by Rules 1025, 1026 and 1361.²⁸ Second, judgment for want of an appearance is abolished entirely. Third, the time for answering is reduced from thirty days to twenty days. Fourth, judgment pro confesso is abolished; plaintiff proceeds under Rule 1511 in the event of a failure to answer or other default by the defendant.

The prior practice under old Rule 52 limited "new matter" to "such additional facts . . . as [defendant] believes will entitle him to affirmative relief against the plaintiff." The incorporation of assumpsit Rule 1030 removes this narrow limitation, and broadens "new matter" to include affirmative defenses previously pleaded only as part of the answer in equity.²⁹ In actions at law, defendant has the privilege of compelling plaintiff to state his answer to such affirmative defenses; there is no reason why defendant should not have the same privilege in equity.

The archaic provisions of old Rule 7, listing the paper and typewriting specifications of equity pleadings, have been abolished, as have the requirements of Rule 8 that each party receive three copies of all pleadings. Service of copies is now regulated by assumpsit Rule 1027.

An important change has been made in the pleading of anticipated defenses. The prior practice, under Rule 34, required the plaintiff to plead all the facts "which are deemed necessary to invalidate an anticipated defense." The requirement has now been exactly reversed. Under the assumpsit system, the pleading of anticipated defenses is bad pleading. What was previously required is now forbidden.

28. See GOODRICH-AMRAM, §§ 1025, 1026 for the effect of failure to endorse properly. Failure to endorse with notice to plead relieves the defendant from any duty to proceed. Under prior equity practice, failure to endorse a bill was fatal to the proceedings. *Cassidy v. Knapp*, 167 Pa. 305, 31 Atl. 638 (1895); *Walters v. Tamaqua Borough*, 6 D. & C. 323 (Pa. 1925); *Ammerman v. Mayes*, 16 D. & C. 795 (Pa. 1931).

29. See GOODRICH-AMRAM §§ 1030-1, 1030-2. If affirmative defenses in which no affirmative relief was sought were pleaded under the heading of new matter, in violation of Equity Rule 52, defendant, under prior practice, could not require plaintiff to answer them and the plaintiff's failure to so answer would not give defendant's allegations in the answer the quality of admitted facts. *Oko v. Krzyzanowski*, 150 Pa. Super. 205, 27 A.2d 414 (1942).

The prior practice, however, under Rule 34, did not require the plaintiff to plead either the legal theory on which he claimed equity jurisdiction or the absence of an adequate remedy at law. The plaintiff's duty was to plead the *facts* on which the court might act, not the conclusion of law that the court had jurisdiction. The existence of an adequate remedy at law was a defensive matter to be raised by preliminary objection under Rule 48. Neither of these matters is specifically covered by the new Rules. However, pleading the theory of jurisdiction would be improper as it would be a "conclusion of law"; pleading the absence of an adequate remedy would be anticipating a defense. Therefore, the effect of the incorporation of the assumpsit system is to leave these two matters just as they were under the prior practice:³⁰ neither is to be included in the plaintiff's complaint.

The incorporation of Rule 1029, dealing with the form of the defendant's answer, will alter the prior practice. Old Rule 52 did not require any answer by defendants who were infants, lunatics or other persons *non compos mentis* and not under guardianship.³¹ Such persons must now answer under the assumpsit practice. Rule 52 permitted a denial by a simple averment that the defendant "has no personal knowledge on the subject, and has made due inquiry and can obtain none." Defendant must now comply with the requirements of Rule 1029(c).

Rule 1506, which provides for the averments in a stockholder's derivative action, combines the Act of April 18, 1945, PA. STAT. ANN. tit. 12, § 1321 (Supp. 1950), with old Rule 37. It eliminates the requirement of Rule 37 that the plaintiff must allege that he was "wholly ignorant of the matters complained of" at the time he purchased his shares.

Rule 1507, which permits a party to plead that the name or interest of an adversary party cannot be ascertained in order to lay the foundation for the appointment of a trustee or guardian ad litem, is an adaptation of old Rule 24, and makes no substantial change in the prior practice.

Rule 1508 permits the free joinder of two or more causes of action cognizable in equity, without the narrowing limitation of old Rule 36 that "if there is more than one plaintiff, the causes of action included

30. For the prior practice, see *Lafean v. American Caramel Co.*, 271 Pa. 276, 114 Atl. 622 (1921); *Bank of Pittsburgh v. Purcell*, 286 Pa. 114, 133 Atl. 31 (1926).

31. The procedure when minority or incompetency was first ascertained before or during trial was already governed by Rules 2034 and 2056, which applied to equity from the date of their original promulgation. See GOODRICH-AMRAM § 2026-1 *et seq.* as to the practice in regard to minors as parties, and § 2051-1 *et seq.* as to the practice in regard to incompetents.

must be joint, and if there is more than one defendant, the liability must be one which can be asserted against all of the material defendants, unless sufficient grounds are shown for uniting the causes of action, in order to promote the convenient administration of justice." The liberal interpretations of the "unless" clause in the decisions under Rule 36,³² together with the trend toward free joinder of claims, whether "joint, several, separate or alternative," evidenced first in the Act of 1937, are carried out by the incorporation of Joinder Rules 2227 and 2229 into equity.³³ The same liberal right of joinder exists as in the assumpsit practice, so long as all the causes of action are equitable in nature.

(b) *Preliminary Objections and
Motion for Judgment on the Pleadings*

Rule 1509, which completely revamps the whole prior practice of preliminary objections, effects several important changes. Rule 48 required that the objections be accompanied by an affidavit that they were not "interposed for the purpose of delay." The assumpsit practice does away with this requirement. Rule 1509(a) incorporates all the grounds set forth in Assumpsit Rule 1017(b) as permissible grounds for preliminary objections, and thus changes the prior practice.

Rule 48 did not include "questions of jurisdiction," (*i.e.*, questions other than the existence of an adequate remedy at law), as the subject matter of preliminary objections. Separate proceedings under the Act of 1925 were necessary. Rule 1017(b)(1) now includes these questions in the objections. Rule 48 included as an objection the pleading of "impertinent, irrelevant or scandalous matter," and Rule 49 permitted a special sanction of dismissal without leave to amend, with disci-

32. In actual practice, the court has made liberal application of the "unless" clause to permit joinder of separate rights or liabilities when a common question was presented which affected all of them. *E.g.*, *Rafferty v. Central Traction Co.*, 147 Pa. 579, 23 Atl. 884 (1892) (permitting separate owners of a property to join in restraining operation of a street railway fronting their property); *Cumberland Valley R. R.'s Appeal*, 62 Pa. 218 (1869) (permitting joinder of merchants to restrain improper trade practices affecting all of them similarly); *Duncan v. Pittsburgh-Florida Fruit Growers Ass'n*, 282 Pa. 498, 128 Atl. 441 (1925) (permitting individual grove owners to sue jointly for an accounting, where they had pooled their operations under management of defendant, under an agreement to pay each owner a proportionate share of the profits).

The same liberality was permitted in the joinder of defendants in order to avoid a multiplicity of suits. *Pittsburgh v. Pittsburgh & Lake Erie R.R.*, 263 Pa. 294, 106 Atl. 724 (1919) (bill against owners of adjoining individual buildings approaching a public street); *Persch v. Quiggle*, 57 Pa. 247 (1868) (bill joining bailee and the parties who had received property from the bailees).

33. Act of June 25, 1937, PA. STAT. ANN. tit. 12, §159.1 (Supp. 1950), suspended by and substantially reenacted by the Rules on joinder of parties. See GOODRICH-AMRAM § 2229(a)-1 *et seq.* for full discussion as to the practice in permissive joinder of parties, either plaintiffs or defendants.

plinary action against counsel, and with a counsel fee to defendant. Assumpsit Rule 1017(b)(2) includes "scandalous or impertinent matter" as a ground for a motion to strike. No reference is made to "irrelevant" matter. The special sanction is eliminated entirely in order to conform the practice at law and in equity.

Practice on motions for a more specific pleading³⁴ and on demurrer³⁵ will remain substantially unchanged.

Of the four grounds for objection authorized in Rule 1017(b)(5), Rule 48 made no mention of lack of capacity to sue, or of pendency of a prior action. Apparently these objections could be raised only in an answer on the merits under the prior practice; now they will be raised by preliminary objections. As to the other two grounds, non-joinder of a necessary party and misjoinder of a cause of action, the practice will remain substantially unchanged.

Rule 48 permitted the filing of a preliminary objection alleging misjoinder of parties plaintiff or defendant. This provision has been deleted: no preliminary objection may be filed on this ground. Misjoinder will now be handled in equity just as in assumpsit, by an order of the court, dropping the misjoined party, under Rule 2232(b).³⁶

Rule 1509(b) *permits*, but does not require, the defenses of laches and of failure to exercise or exhaust a statutory remedy to be raised by preliminary objection. Neither of these defenses was specifically included in Rule 48.³⁷ Rule 1509(b) also provides that these defenses are never waived, even if not pleaded in the answer or reply.³⁸ However, if the defendant wishes to plead laches in his answer, he is required by Rule 1030 to set it up as "new matter."

Rule 1509(c) *requires* the defense of "adequate nonstatutory remedy at law" to be raised by preliminary objection, under penalty of waiver of the objection. Rule 48 had stated this requirement in per-

34. A motion for more specific pleading did not exist as such in equity practice, but Equity Rule 48(5) authorized preliminary objections where "the facts are so insufficiently averred, specifying which thereof, that it is impossible for defendant to make adequate answer to plaintiff's claim, or if discovery is sought, to know to what extent it is desired." A decree of dismissal without an opportunity to amend was improper. *Gray v. Phila. & Reading Coal and Iron Co.*, 286 Pa. 11, 132 Atl. 820 (1926).

35. Demurrers originally were authorized expressly by the Equity Rules of 1894, but were abolished by Rule 15 of the Equity Rules of 1925. The Equity Rules of 1925 failed to state expressly, under Rule 48 that a bill which failed to state a cause of action could be preliminarily objected to, but the courts construed the final or catch-all ground listed in Equity Rule 48(7) as authorizing preliminary objections thereto. That section provided "that for any other reason, defendant should not be required to answer the facts averred, since he has a full and complete defense to plaintiff's claim, specifically stated, which does not require the production of evidence to sustain." *Young v. Board of Adjustment*, 349 Pa. 450, 37 A.2d 714 (1944). Rule 1017(b)-4 now restores the demurrer to equity practice as a preliminary objection.

36. See GOODRICH-AMRAM § 2232(b)-1,-2 as to practice in misjoinder of parties.

missible form, but the Supreme Court, in *Wyoming National Bank v. Stockey*,³⁹ interpreted it to be mandatory. Rule 1509(c) therefore makes no change in the prior practice.

The procedure in disposing of preliminary objections is now regulated by Rule 1028. Except for the provision in Rule 1509(c) that an action shall not be dismissed if there is an adequate remedy at law, but shall be certified to the law side of the court (which continues unchanged in the prior practice under Rule 49), the new Equity Rules contain no special provisions for disposing of objections. The assumpsit practice is incorporated. The right of amendment as of course within ten days under Rule 1028(c) is taken from Rule 49.

The motion for judgment on the pleadings, under Rule 1034, is entirely new; the prior practice contained no similar procedure.

(c) Counterclaim

Under the prior practice, there was no general provision for any counterclaim or cross-bill, but a partial equivalent was created in the "new matter" authorized in Rule 52. It was only partial because it was limited to facts "having a direct relation to any of the causes of action set forth in the bill." No independent or unrelated transaction could be pleaded.⁴⁰ Such "new matter" was in actuality a "related counterclaim." This limitation of the prior practice is continued unchanged, although Rule 1510(a) introduces the more appropriate name "counterclaim" for the pleading. The Rule substitutes, in place of the phrase "direct relation" to the plaintiff's cause of action, the language "which arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action

37. The existence of laches, if apparent on the face of the bill, could be raised by preliminary objection. *First Nat'l Bank v. Lytle Coal Co.*, 332 Pa. 394, 3 A.2d 350 (1938); *West v. Young*, 332 Pa. 248, 2 A.2d 745 (1938); *Stimson v. Stimson*, 346 Pa. 68, 29 A.2d 679 (1943). The existence of a statutory remedy could likewise be raised by preliminary objection. *Young v. Board of Adjustment*, *supra* note 35.

38. The defense of laches was not waived even though not pleaded, and the court, on its own motion, could deny relief on that ground. *Grange Nat'l. Bank v. First Nat'l. Bank*, 330 Pa. 1, 198 Atl. 321 (1938).

39. 330 Pa. 324, 199 Atl. 146 (1938). Under the Act of June 7, 1907, PA. STAT. ANN. tit. 12, §1227 (1931), failure to object to the jurisdiction in equity on the ground of the adequacy of the remedy at law was deemed a waiver of jury trial, and the cause proceeded to final determination with the same effect as if an agreement to try without a jury had been filed. *Fidelity Trust Co. v. Simpson*, 293 Pa. 577, 143 Atl. 202 (1928); *Magen v. Neiman*, 301 Pa. 164, 151 Atl. 796 (1930).

40. Prior to the Equity Rules of 1925, a defendant in equity could assert a claim against the plaintiff by a cross bill, provided it related to the plaintiff's cause of action and did not introduce any issues not germane to the original action. *Sears v. Scranton Trust Co.*, 228 Pa. 126, 77 Atl. 423 (1910). Cross bills were abolished by the Equity Rules of 1925, and the defendant, under Equity Rule 52, was given the right to demand affirmative relief in his answer, which could, at the defendant's option, be set forth under "new matter" and the plaintiff required to reply thereto.

arose." This is the language of Trespass Rule 1046, Ejectment Rule 1056(a) and Additional Defendant Rule 2256. Rule 1510(a) specifically permits the counterclaim to be either legal or equitable in nature.⁴¹ If it is legal, the plaintiff is forbidden to attack it on the ground that there is an adequate remedy at law. In addition, the defendant, if he elects to file a legal counterclaim, waives his right to a jury trial. Rule 1510(b) directs that the counterclaim shall be tried as an action in equity, *i.e.*, by the chancellor without a jury.

5. NON-SUIT

Rule 66 provided that the judge might enter a decree of dismissal, at the end of the plaintiff's case, "which shall have the effect of a non-suit at law." It further provided that, if "exceptions" were filed thereto and overruled, the decree became final. Rule 13 also provided that, in such case, the court "shall file a statement of the reasons for its action, unless they already appear of record." This practice is modified by Rule 1512. The non-suit is now subject to review "in the same manner . . . as in actions at law." This provision means that the plaintiff will now file a motion to take off the non-suit under the Act of 1875, to be heard by the court in banc.⁴² He will no longer file "exceptions." Further, since the non-suit now has "the same effect as in actions at law," Rule 231(b) will apply.⁴³ The non-suit now becomes a final decree immediately, and bars a second action upon the same cause of action, whether plaintiff moves to take it off or not. Lastly, just as in actions at law, the court is not obligated to file any statement of the reasons for its action.

6. ACCOUNTING

Rules 79 and 80 provided the procedure for the auditing and confirmation of accounts filed by receivers, assignees or other fiduciaries,

41. This provision is in accord with the salutary principle that equity, having acquired jurisdiction, will dispose of all issues within the circle of contest so as to afford complete relief between the parties, even though some of the other issues to be decided would not in themselves have warranted the court's assuming equity jurisdiction in the first instance. *Bowman v. Gum, Inc.*, 327 Pa. 403, 193 Atl. 271 (1937); *Commonwealth v. Smith*, 344 Pa. 381, 25 A.2d 694 (1942); *Union of Russian Societies v. Koss*, 348 Pa. 574, 36 A.2d 433 (1944); *Milasinovich v. Serbian Progressive Club*, 369 Pa. 26, 31, 84 A.2d 571 (1951).

42. Act of March 11, 1875, PA. STAT. ANN. tit. 12, § 645 (1931). See *GOODRICH-AMRAM* § 231(b)-1 *et seq.*

43. See *GOODRICH-AMRAM* § 231(b)-5. Under prior practice, the mere entry of a compulsory non-suit was not *res adjudicata*. But, if the plaintiff filed a motion to set aside the non-suit and the decision was against him and he failed to appeal successfully, the matter became *res adjudicata*. *Dellacasse v. Floyd*, 332 Pa. 218, 2 A.2d 860 (1938); *Central Penna. Lumber Co. v. Carter*, 348 Pa. 429, 35 A.2d 282 (1944). Under Business of the Court Rule 231(b), effective April 1, 1950, the rule is now otherwise.

and for the distribution of the fund. The substance of these Rules is continued in Rule 1534, with modifications of the provisions for giving notice and advertisement.⁴⁴ But, the Equity Rules of 1925 contained no provisions at all for the procedure in actions in equity in which the plaintiff sought an accounting from the defendant. Rule 1530 sets out this procedure in detail. Several important innovations are included.

The customary method of accounting in equity, as in the action of account render at law,⁴⁵ was a "two-stage" proceeding. The first stage was trial on the issue of the defendant's obligation to account; if the plaintiff was successful, the court directed the defendant to account. The second stage was the examination and audit of the account, when filed, and the entry of a final decree for the amount due the plaintiff. Rule 1530(b) gives the trial judge the option to continue this historical method or to telescope the entire proceeding into a single stage. If, at the end of the hearing on the duty to account, the court is satisfied that there is a duty to account, the normal procedure will be to enter an adjudication and a decree nisi, under Rule 1517. To this decree, the defendant may file his exceptions, under Rule 1518, which will be heard and disposed of by the court in banc, under Rule 1519. Not until after this final decree will the defendant file his account.

It is instantly apparent that the optional procedure to telescope the proceedings into a single stage will change the entire scheme. Rule 1530(b) provides that, instead of entering such a decree nisi, the court may "proceed forthwith to hear and determine the amount due." This language is somewhat elliptical, but its practical application is clear.

44. See appendix hereto, Rules 79, 80 p. 1129 *infra*.

45. The action of account render was abolished by the Act of May 31, 1933, PA. STAT. ANN. tit. 12, § 1402(a) (Supp. 1950). Equity jurisdiction in account was made available by the Act of October 13, 1840, PA. STAT. ANN. tit. 17, § 284 (1930). Accounting was also available in assumpsit in certain specified instances under Sec. 11 of the Practice Act of May 14, 1915, PA. STAT. ANN. tit. 12, § 393 (1931), and this right to an accounting in assumpsit was extended to the defendant by the Act of May 26, 1937, PA. STAT. ANN. tit. 12, § 393 (Supp. 1950). The relief available under the Practice Act is now available under Assumpsit Rule 1021. The procedure in equity accounting followed that on the law side in account render to the extent that it provided for a two-phase proceeding, *i.e.*, a hearing on the duty to account and on the account itself. *Underdown v. Underdown*, 270 Pa. 229, 113 Atl. 192 (1921). In equity proceedings, however, the decree to account went further than in the action of account render, as it might prescribe the basis method and subject matter of the accounting. *Robinson v. Fulton*, 262 Pa. 265, 105 Atl. 276 (1918). Prior to the Equity Rules of 1894, it was apparently the practice to refer the entire case, including the right to account, to a master. *Rowley v. Rowley*, 294 Pa. 535, 144 Atl. 537 (1928). The Equity Rules of 1895 modified this practice to permit the court to refer only the accounting phase to a master, *Rowley v. Rowley*, *supra*; and this practice was continued under the Equity Rules of 1925 except that the matter was to be referred to an assessor or auditor. *Curtis v. Mankus*, 295 Pa. 381, 145 Atl. 427 (1929).

There are at least three ways in which the Rule can operate. The first, and probably the more common, will be the situation in which the plaintiff's right to an accounting is clear to the hearing judge. Immediately after the close of the testimony on this issue, the judge will dispense with requests for findings and conclusions under Rule 1516; he will permit counsel to argue orally, and he will then state of record that he finds the plaintiff entitled to an accounting. He will direct the trial to continue, uninterruptedly, upon the issue of the amount due. His adjudication and decree nisi, subsequently filed under Rule 1517, will cover both the issue of duty to account and the amount due.

The second alternative will operate as follows: After the hearing on the duty to account, the court will let the case proceed through adjudication to a decree nisi as in the ordinary action. As soon as the decree nisi is entered, the court will direct the parties to appear and try the issue of the amount due. Thereafter, an amended or supplemental decree nisi, fixing the amount due, will be entered. The exceptions and final decree will cover both issues.

The third alternative postpones the second hearing one step further. In this instance, the court will allow the case on the duty to account to proceed through adjudication, the decree nisi and exceptions to a final decree. The court will then direct the parties to appear and try the issue of the amount due, instead of directing the defendant to file an account. This alternative is a full two-stage proceeding; the Rule would accomplish little if such a proceeding were used. The second alternative would be some improvement, but only the first alternative will effect a fully single-stage trial.

One problem of interpretation of language must be solved. A defendant, seeking to prevent the court from invoking the first alternative, might argue as follows: "The Rule does not permit the court to proceed to hear the issue of the amount due until it is determined that the plaintiff 'is entitled to an accounting.' He is not entitled to an accounting at a hearing thereon until there has been a final decree: not until the final decree is the duty of the defendant or the right of the plaintiff settled. Or, in the alternative, the hearing must wait until after the entry of the decree nisi, which in turn must wait until I have had an opportunity to file requests for findings and conclusions."

The first of these arguments is clearly wrong. The word "decree" has a double meaning. It means either a final decree or a decree nisi, as is made clear by Rules 1520 and 1521. The context will determine which kind of decree is meant in a particular provision. The optional action by the court under Rule 1530 takes place at that stage of the action when the "court" is ready to enter its "decree"; *i.e.*, when the

hearing is over and the judge has decided the case. At this point, he either enters a decree for the filing of an accounting or directs a further hearing on the amount due. This necessarily is the time of the decree nisi, under Rule 1517. Support for this conclusion can be found in two other places. First, Rule 1530 refers to a decree entered by the "court." A final decree is not entered by the "court," but by the "court in banc" under Rule 1519. The word "court," used alone, never means "court in banc" in these Rules. The latter is spelled out in full whenever intended. Second, Rule 1519(a) provides that, if no exceptions are filed, the prothonotary (*not* the court) enters the decree nisi, as of course, on the final decree. In this situation, the only decree ever entered by the "court" is the decree nisi; if the decree in Rule 1530 meant "final decree," the Rule would be meaningless, since the time for the exercise of the option could never arise.

The second argument is correct in stating that the time for the exercise of the option is the time when the court is in a position to enter a decree nisi, but the rest of the argument is incorrect. It is entirely proper for a judge hearing an equity case to decide the case immediately upon the termination of the testimony and oral arguments of counsel. Requests for findings and conclusions are not mandatory; they are only "suggestions" for the convenience of the judge, who can waive them entirely if he wishes. If the judge feels the case is clear, he may dictate an adjudication to the stenographer or he may enter his decree nisi forthwith, filing the formal adjudication at a later time. In injunction cases, or in other matters in which speed is essential, this procedure is both customary and necessary.

There is therefore nothing in the language of Rule 1530 which will prevent the court from exercising the first of the three alternative uses of the Rule suggested above.

Rule 1530(e) contains a variant from the customary practice. Ordinarily, when an auditor or master is appointed in an action, exceptions to his report are initially filed with him so that he can amend or correct his report if he is satisfied that the exceptions are well taken. If he overrules the exceptions, the objecting party then files the same exceptions with the court. Rule 1530(e), however, eliminates this procedure in the interest of speeding the action and avoiding a double set of exceptions. No exceptions are filed with the auditor; they are filed initially with the court.

7. INJUNCTIONS

The historic procedure in the granting of preliminary or special injunctions, under Rules 38 to 40 and under the relevant Acts of As-

sembly, had proved basically satisfactory. Accordingly, no radical changes have been made in Rule 1531, but certain minor improvements have been effected.⁴⁶

Rule 38 made injunction affidavits a mandatory condition precedent in all instances. If the preliminary injunction were requested without notice to the defendant, the plaintiff had to file both ordinary injunction affidavits with his bill and special affidavits in support of the claim of "immediate and irreparable loss or damage." If the preliminary injunction were requested only after notice to the defendant, the plaintiff had to file ordinary injunction affidavits with the bill. Rule 1531(a) eliminates these mandatory requirements entirely.

The plaintiff's initial pleading, whether a complaint or petition, will be verified in every case. This verification will give the sanction of an oath to the plaintiff's papers. Supporting affidavits furnish no more guarantee of the truth of the plaintiff's position than his sworn complaint or petition. Further, the real protection to the defendant is not the possible penalty for perjury in making a false affidavit; it is the bond which the plaintiff must file under Rule 1531(b). Accordingly, Rule 1531(a) permits the court to grant a preliminary or special injunction, whether with or without notice, without any affidavits and solely upon the sworn averments of the complaint or petition. Affidavits of the parties or of third persons, or other proof, have been made optional: plaintiff, or defendant, may file such affidavits if he wishes; the court may demand some supporting proof if it wishes. But, the obligatory requirements of Rule 38 have been removed entirely.

Rules 38 and 40 combined to create a slightly different procedure for preliminary injunctions, as distinguished from special injunctions. Rule 38 made a hearing on a preliminary injunction mandatory in all cases, either initially or after five days, if the injunction was granted without notice. Rule 40 contained no provision for any hearing in the granting of special injunctions. Rules 1531(a) and (d) require identical procedure in both instances; in each case a hearing must be held at some time in the proceeding, either initially or after five days.

Rule 39 provided for "cautionary orders." The modern practice in the issuance of such orders, on security only, has assimilated them so closely to the preliminary injunction that their separate existence is

46. The new Rules do not affect the substantive principles regulating the grant or denial of injunctive relief. The Pennsylvania Anti-Injunction Act of June 2, 1937, PA. STAT. ANN. tit. 43, § 206(f) (1941), limiting the substantive right to injunctive relief and the procedural steps by which it can be obtained in labor disputes, remains unsuspended. Similarly, the Act of May 15, 1933, PA. STAT. ANN. tit. 71, § 733-605 (1942), relating to injunctions against the Secretary of Banking, and the Act of May 28, 1937, PA. STAT. ANN. tit. 66, §§ 1343, 1441 (1941), limiting injunctions against the Public Utilities Commission, remains unsuspended.

no longer needed.⁴⁷ Therefore, cautionary orders as such are abolished; any relief previously afforded by a cautionary order will now be granted by a preliminary injunction.

Rule 39 provided for "security being given according to law." No further detail was specified. Rule 1531(b) specifies the conditions of the security, and permits the plaintiff to file an appropriate bond or to deposit cash with the prothonotary. It also restates the exemption of the Commonwealth, its political subdivisions, and their agencies and officers, from the requirement of any bond or security. The Rule makes it clear that the filing of the security is a condition precedent to the granting of the injunction. It states this condition in affirmative language: "a preliminary or special injunction shall be granted only if" the security is provided.

Rule 38 forbade the introduction of *ex parte* affidavits at the hearing, whether it occurred initially or after five days. It also permitted the use of depositions in addition to oral examination of witnesses. Rule 1531(a) is more flexible. It permits the court, "in determining whether a preliminary or special injunction should be granted," to consider "the averments of the pleadings or petition" and also the "affidavits of parties or third persons, or any other proof which the court may require." This provision means that the court has the power, as under Rule 38, to hear witnesses orally and to receive depositions, and has the added power to consider the pleadings and to receive affidavits. The consideration of the pleadings was not specifically permitted by Rule 38; the reception of affidavits was specifically prohibited.

8. RECEIVERS

As in the case of injunctions, the historic practice in equity receiverships did not justify basic and fundamental revision. Rule 1533 generally incorporates the provisions of old Rules 41 to 47, but minor improvements have been made.

Rule 41 permitted the appointment of a temporary receiver, *ex parte*, and without notice. The Rule required "security . . . for the use of all those who may be injuriously affected by the appointment." Rule 1533 (a) parallels Injunction Rule 1531(b) in specifying the

47. The Equity Rules of 1925 did not define a cautionary order. Under the early practice, it was apparently an anticipatory judgment, creating a lien on property and thus preventing its fraudulent disposition to defeat the claim of a plaintiff. It was not available as ancillary relief upon a simple contract claim. See *Monahan v. Auman*, 42 Pa. Super. 480 (1910). In Equity, however, cautionary orders, which in effect preserve the status quo, were permitted where the equities so required. Where the equity action involves title to real estate, the commencement of the action may be indexed by the prothonotary upon the judgment index; thus, in effect notice of a *lis pendens* is created by Act of April 22, 1856, PA. STAT. ANN. tit. 17, § 1905 (1930); Act of May 22, 1878, as amended PA. STAT. ANN. tit. 17, §§ 1910, 1912 (1930).

conditions of the security, permitting the alternatives of a bond or a cash deposit, and exempting statutory receivers under special Acts of Assembly.

Rule 41 provided that notice of the hearing on the continuation or revocation of the temporary receivership should be given by the "plaintiff." Rule 1533(a) directs that the notice shall be given by the temporary receiver. This is a considerable practical improvement. Notice must be given to "all persons interested, including creditors and stockholders." The identity of such persons will ordinarily be unknown to the plaintiff; such information will come from the books and records of the company. These books and records do not come into the possession of the plaintiff, but rather into the possession of the temporary receiver. In addition, notification of parties in interest is a routine duty of a receiver. It is far better to put upon him the burden of giving notice, and relieve the plaintiff from a duty which he may be unable to fulfil.

Rule 44 contained a blanket provision requiring a bond from all receivers, whether temporary or permanent. This requirement was in direct conflict with the Acts of Assembly exempting the Secretary of Banking and the Insurance Commissioner from filing any bond when they act as statutory receivers for banks or insurance companies. Rule 1533(d) recognizes this conflict, and rewrites old Rule 44 accordingly.

Rule 46 likewise contained a blanket provision for the appointment of appraisers which was in conflict with certain Acts of Assembly. Rule 1533(f) resolves this conflict. Rule 46 provided that "at least one of the appraisers shall be appointed without suggestion from either party." This provision has been eliminated.

In drafting the receivership Rule, the problem of handling possible conflicts with the various statutory receiverships was solved by excluding such conflicts from the Rules. Reference has been made above to the retention of the statutory exceptions in the requirements of a plaintiff's bond, of a receiver's bond, and of appraisers. The policy is emphasized by the separate sub-division (h) in Rule 1533, specifically retaining the statutory scheme and directing that, in the case of any conflict between the Acts of Assembly and the Rules, the former shall take precedence.

9. PERPETUATION OF TESTIMONY

The perpetuation of testimony, for use in a future action at law or in equity, has been a subject of equity jurisdiction since 1836.⁴⁸ The

48. The Act of June 16, 1836, PA. STAT. ANN. tit. 17, §281 (1930), conferred on the Common Pleas Court the jurisdiction and powers of a court of Chancery insofar as they relate to the perpetuation of testimony.

Equity Rules of 1925 contained no regulations of the procedure in such actions, either as to the pleadings or the method of taking the testimony at the hearing on the merits. However, the essential requirements of the plaintiff's case were well settled in the prior practice.⁴⁹

Rule 1532(a) sets forth the required contents of the plaintiff's complaint. It is self-explanatory and does not change the principles of the prior practice. The plaintiff must of course designate the prospective parties to the contemplated action. Rule 1532(a)(1), using the language of Quiet Title Rule 1064(b), permits him to identify unknown heirs and assigns generally. He must also describe the nature of the contemplated action, his interest in it, and the need for perpetuating the testimony. Lastly, he must identify the persons whose testimony he proposes to perpetuate and describe the general nature of the testimony. All these requirements are so obvious, as parts of a prima facie case, that no problems should arise.

Rule 1532 does not spell out the procedure in detail after the complaint is filed. It will operate as follows:

- (1) The plaintiff files his complaint.
- (2) The defendant either consents to a judgment or contests the propriety of the perpetuation of the testimony.
- (3) If there is a contest, the case becomes an ordinary equity case, and proceeds to hearing and judgment as in any other equity matter.
- (4) When the case is ripe for judgment, the court enters a preliminary decree allowing or denying the taking of the testimony. If the testimony is to be taken, the method will be designated.
- (5) After the testimony is taken, whether in open court or by depositions, the case comes back to the court for further proceedings. In these proceedings, the issue is: what part of the testimony already taken, if any, shall be perpetuated?
- (6) The court then enters a "final decree" directing what testimony, if any, shall be perpetuated.

The prior practice was not clear on the manner in which the testimony to be perpetuated might be taken. Under the early practice, it was customary to take the testimony before a master.⁵⁰ The Equity

49. See 1 BREWSTER, EQUITY PRACTICE § 5533 *et seq.* (1895).

50. Under common law practice, the bill was not set down for hearing as at regular trial. The bill to perpetuate testimony was not considered a bill for discovery, and the only issue was whether plaintiff should examine witnesses and record their testimony. In England, the order which was entered provided for the taking

Rules of 1925 contained no provision at all, while, at the same time, Rule 15 forbade the appointment of masters unless a statute or one of the Equity Rules authorized it. This prohibition indirectly but effectively eliminated the master in this situation. Apparently, the court had to hold a hearing and take the testimony to be perpetuated, just as in any other equity case.

Rule 1532(b) affords much greater flexibility. The court itself may hear the witnesses in open court, or it may relieve itself of all burdens in the matter, and let the plaintiff take the testimony by the ordinary deposition procedure. The plaintiff makes the initial choice. If he wants to take the testimony by deposition, his complaint, in addition to the matters set forth in Rule 1532(a), must satisfy the requirement of Rule 4012(a)(2), *i.e.*, it must give the name of the person before whom the deposition is to be taken. If the court approves the plaintiff's request, or if it determines to order depositions of its own motion, it will enter an order in conformity with Rule 4013. The testimony will then be taken in accordance with the general Depositions and Discovery Rules.

Finally, Rule 1532(c) regulates the extent to which the perpetuated testimony may be used if, as and when the anticipated litigation is initiated. Rule 4020 is incorporated by reference, so that the testimony may be used at a future trial in exactly the same manner and to exactly the same extent as though it were a deposition taken in the pending action. This result follows whether the perpetuated testimony was taken by deposition or at an open hearing in court. Its availability or use at the future trial cannot be affected by the manner in which it was taken down. Rule 1532(c) continues the prior practice in permitting the use of the testimony against successors in interest of the original parties to the action to perpetuate the testimony. This procedure conforms to the practice under Rule 4020(b). Rule 1532(c) also continues prior practice in permitting the testimony to be used in any county of the Commonwealth in which the future action is brought. The whole procedure would be a farce if the perpetuated testimony could be used only in the county in which the proceedings to perpetuate the testimony had been brought, for under such a rule the entire pro-

of evidence before a master. This procedure was incorporated into the Pennsylvania Equity Rules of 1895, which, while limiting the office of examiner or master, did provide for its continuance in proceedings such as bills to perpetuate testimony. The Equity Rules of 1925 contain no express reference to the appointment of masters and examiners in connection with the perpetuation of testimony, and the practice under those rules was not clear. The testimony was usually taken in open court where the witnesses were available. See *Baker v. Weiss*, 43 D. & C. 707 (Pa. 1942), in which the order of the court specifically provided for the taking of testimony in open court. The court did not discuss the problem of whether it had power to refer the same to a master.

ceeding could be destroyed by starting the future action in another county.

There are no special Rules for venue or service of process in such actions. The ordinary venue and service provisions will govern. However, Rule 1549(2) saves from suspension the Act of 1844,⁵¹ which provides a special rule for service of process if the proceedings involve title to lands and the Commonwealth is a necessary party.

10. CONCLUSION

As stated in the introduction, no pretense is made that the preceding discussion covers the whole of equity practice, or the whole of the new Rules, or that it even covers fully all the details of the topics considered. For example, nothing has been said about the entire topic of Parties, previously covered by Rules 16 to 25. That topic has been omitted because there are no Rules at all upon it. As is shown in the Concordance which follows, the content of old Rules 16 to 25 is now provided by the various chapters of Rules governing various kinds of Parties, all of which now apply to equity. Therefore, there will be no differences in the practice at law and in equity as far as parties are concerned. Similarly, nothing has been said about amendments of parties or pleadings, previously covered by Rules 56 to 59. Here again, the new Rules omit any reference to this topic, and the content of the old Rules is provided by the incorporation of the entire assumpsit practice.

We have endeavored to point out the more important areas in which the new Rules will modify the prior practice. This discussion, together with the Concordance which follows, should give the reader a good working introduction to the new equity practice.

51. Act of April 6, 1844, PA. STAT. ANN. tit. 12, § 1251 (1931).

CONCORDANCE OF THE JANUARY 1, 1925 EQUITY RULES
TO THE NEW EQUITY RULES EFFECTIVE JULY 1, 1952

The Equity Rules of 1925 have no titles; the titles added here are for convenience of discussion. The numbering system 1 to 92 is the numbering of the Equity Rules of 1925. The new Rules are numbered from 1501 to 1550.

GENERAL PROVISIONS

Rule 1. Court Open.

This rule is supplied verbatim by new Rule 1502.

Rule 2. Regulation of Hours of Prothonotary's Office.

The new Equity Rules do not mention this topic. Such details as the hours of the prothonotary's office will now be regulated by local rules.

Rule 3. Dockets to be Open. Pleadings to be Entered, etc. Entered When Filed.

The new Equity Rules do not mention this topic. These administrative details will now be regulated by local rules.

Rule 4. Power of Individual Judge to Enter Interlocutory Order.

The new Equity Rules do not mention this topic. It is covered already in Business of the Court Rule 249, effective July 1, 1952.

Rule 5. Filing of Pleadings, Accounts, Exceptions, Depositions, Decrees, etc. Allowed as of Course.

The new Equity Rules do not mention this topic. The issuance of process, the filing of pleadings, and the amendment of pleadings will now be regulated by the Assumpsit Rules. The practice in commissions, letters rogatory and depositions will now be regulated by the Depositions and Discovery Rules. Entry of judgment by default is now regulated by Rule 1511. The suspension or revocation of any action is left to the inherent power of the court.

Rule 6. Rules Not Grantable as of Course. Notices, Rules, Orders Not as of Course. Notice and Hearing.

The new Equity Rules do not mention this topic. The practice on motions and rules will now be regulated by the assumpsit practice as modified by local rules.

Rule 7. Printing and Typewriting Specifications of Pleadings.

This Rule has been abolished.

Rule 8. Copies of Pleadings. Three Copies to Each Party Appearing by Separate Counsel.

This Rule has been abolished. Service of copies of pleadings is now regulated by Assumpsit Rule 1027.

Rule 9. Verification of Pleadings and Petitions as to Matters Not of Record.

The new Equity Rules do not mention this topic. Verification of pleadings is now regulated by Assumpsit Rule 1024; verification of petitions is now regulated by Business of the Court Rule 206.

Rule 10. Notices to be in Writing. Notice to Attorney as Notice to Party.

The new Equity Rules do not mention this topic. The form and manner of giving notices to parties will be regulated by the assumpsit practice. Under Assumpsit Rules 1012 and 1025, every appearance and pleading must be endorsed with an address in the county. Service at that address, or upon the attorney of record, is permitted by Rule 1027. See also Rule 1002.

Rule 11. Extension of Time by Written Agreement.

The new Equity Rules do not mention this topic. Business of the Court Rule 248, effective July 1, 1952, and Assumpsit Rule 1003 provide an even wider power, since they include both the extension and the contraction of time.

Rule 12. Additional Security. Power of the Court to Order Same. Effect of Failure to Enter Additional Security.

The first sentence of this Rule is now supplied by Rule 1535, which provides an even wider power, since it includes both the increasing and the decreasing of security. The new Rules, however, do not mention the topic of the second sentence, *i.e.*, the effect of failure to enter the additional security as directed. No attempt is made to prescribe the effect in particular cases; the court is left to work out in each instance an appropriate sanction against the defaulting party, for example, dissolving a preliminary injunction previously granted [see Rule 1531(b)], or revoking a receivership [see Rule 1533(b)].

Rule 13. Opinion Required upon Dismissal, Entry of Decree or Transfer to Law Side of Court.

There is no exact equivalent in the new Rules. However, Rule 1517 requires findings and discussion in every adjudication. Certification to the law side of the court is now handled as a preliminary objection [Rule 1509(c)] and will be regulated by Rule 1028. Involuntary dismissal is now handled just as an involuntary non-suit in an action at law (Rule 1512).

Rule 14. Discontinuance as of Course Prior to Trial. Leave of Court.

The new Equity Rules do not mention this topic. Discontinuance before trial is now regulated by Rule 229(a); partial discontinuance by Rule 229(b). No substantial change is made. Discontinuance after trial has commenced has been abolished. Voluntary non-suit is now the exclusive method of voluntary termination of an action during trial [Rule 230(a)].

Plaintiff's rights in this respect have been reduced. Rule 14 permitted discontinuance, with leave of court, after the trial was over, but before the court filed its findings. Rule 230(b) forbids any voluntary non-suit, with or without leave of court, after the close of all the evidence.

Rule 15. Bills of Revivor, Cross Bills, Demurrers, Pleas and Replications Abolished. Examiners, Masters or Auditors Not to be Appointed except Where Authorized by Statute or Rule.

The new Rules contain no specific equivalent of the first part of Rule 15 relating to the abolishing of certain pleadings. The allowable pleadings in equity are now governed by Assumpsit Rule 1017. The limitation of the appointment of masters, examiners or auditors is now regulated by Rule 1514, which is narrower and stricter than Rule 15. Rule 15 excluded examiners, masters or auditors except as provided by *statute* or by rule. Rule 1514 excludes examiners, masters or auditors "except as otherwise provided by rule of the Supreme Court." Masters heretofore permitted in equity, by statute, are now forbidden, unless a Rule specifically authorizes them.

PARTIES

Rule 16. Joinder of Defendants. Class Actions.

The new Equity Rules do not mention this topic. Compulsory joinder is now regulated by Joinder Rule 2227; permissive joinder by Joinder Rule 2229; class actions by Joinder Rule 2230; the effect of joinder and practice in general by Joinder Rule 2231. No substantial change is made in the prior practice.

Rule 17. Joinder of Additional Parties at Any Stage of Proceedings.

The new Equity Rules do not mention this topic. Practice will now be broadened considerably. Additional parties may be added under Joinder Rule 2232(c), which provides that the court at any stage of the action may order the joinder of any additional person who could have joined or who could have been joined in the action and may stay all proceedings until such person has been joined. In addition, the joinder of additional defendants, by the sci. fa. procedure under Rules 2251-2275, is now made applicable to proceedings in equity.

Rule 18. Permissive Joinder of Principal and Surety. Rights of Defendants to Join Additional Defendants.

The new Equity Rules do not mention this topic. Practice will now be broadened considerably. Joinder of defendants who are jointly and severally liable is now regulated by Joinder Rules 2229(b) and 2229(d). Joinder of additional defendants, by the sci. fa. procedure under Rules 2251-2275, is now made applicable to proceedings in equity. The language of Rule 18 was limited to the situation of "principals or sureties"; Rules 2229(b), 2229(d) and 2251, *et seq.* are unlimited in their coverage.

Rule 19. Persons Represented by Executors, Administrators or Trustees Need Not Be Made Parties Unless Personal Decrees Are Sought.

The new Equity Rules do not mention this topic. The identity of indispensable parties is a matter of substantive law. Further, Rule 1503 provides that no judgment order or decree shall bind a defendant personally unless he is served within the Commonwealth or voluntarily submits to the jurisdiction of the court.

Rule 20. Parties Not Sui Juris. Appointment of Guardian Ad Litem.

The new Equity Rules do not mention this topic. Actions by and against minors or incompetents are regulated by the Rules on Minors as Parties, 2026 *et seq.*, and Incompetents as Parties, 2051 *et seq.*

Rule 21. Bill or Answer to Contain Specific Averments as to Parties Not Sui Juris.

The new Equity Rules do not mention this topic. The Minors and Incompetents Rules, 2026 *et seq.* and 2051 *et seq.*, regulate pleading and practice where a minor or incompetent is a plaintiff or defendant. The practice will be substantially the same as under Rule 21, except that no order will now be made "before . . . service of process." See Rules 2029(a) and 2055(a).

Rule 22. Necessary Parties. Outside Jurisdiction. Fact to be Stated in Bill. Service When They Come within Jurisdiction.

The prior practice is continued in Rule 1504(b) (3), which provides that the plaintiff may obtain service by publication on non-resident defendants if the fact of such non-residence is set forth in the complaint or an affidavit is filed that the identity or the whereabouts of the defendant is unknown. The new Rule is more flexible than the old Rule, as the plaintiff may set forth the information in his complaint or by separate affidavit. No special order is now required, as was previously required by the Act of 1859. Rule 1504(a) supplies the remaining portion of Rule 22 by providing that non-resident defendants who have not been served may be served at any time they come into Pennsylvania during the pendency of the action, providing the writ or complaint has been reissued or reinstated within thirty days before such service.

Rule 23. Non-Joinder of Necessary Parties. Right of Court to Proceed without Prejudice as to Absent Parties.

Joinder Rule 2232(c) permits an action to proceed in the absence of particular parties if jurisdiction over them cannot be obtained and the party is not indispensable to the action. Rule 1503 provides that judgments, orders or decrees shall not bind any defendant personally unless he is served within the Commonwealth or unless he submits to the jurisdiction of the court.

Rule 24. Joinder of Parties Whose Names or Interests in the Subject Matter Are Unascertainable and Whose Interests Are Not Represented. Appointment of Representatives.

Rule 1507 supplies the substance of this Rule. A trustee or guardian ad litem may be appointed as a representative for such parties.

Rule 25. Intervention. Right to Intervene at Any Stage of Proceeding.

The new Rules do not mention this topic. The practice as to intervention is now regulated by the Intervention Rules, 2326 *et seq.* Rule 2328 continues the requirement of leave of court; Rule 2329(1) continues the requirement of subordination.

PROCESS, SERVICE AND APPEARANCE

Rule 26. Venue. Process Permitted. Bill of Complaint, Writ of Summons or Amicable Action.

Venue is now regulated by Rule 1503. The changes effected are discussed in section 3 of the article to which this Concordance is an appendix. Assumpsit Rule 1007 continues the permission to commence an action by a writ of summons, a complaint or an agreement for an amicable action. Amendment of the form of action from "law" to "equity," if necessary, is permitted by Rule 1033.

Rule 27. Service of Summons or the Bill in Equity. Proof of Service. Who May Make Service.

Service of process is now regulated by Rule 1504. The changes effected are discussed in section 2 of the article to which this Concordance is an appendix.

Rule 28. Endorsement of Notice to Appear and of Name and Address Within County Where Process May Be Served on Plaintiff.

The provisions of this Rule relating to appearance have been abolished. As in the assumpsit practice, appearance is no longer mandatory, and there can be no judgment for want of appearance. The form of the writ of summons is prescribed by Rule 1351. Rule 1025 regulates the endorsement of a name and address. Rule 1026 regulates the endorsement of the complaint. The practice in equity is now identical with that in assumpsit.

Rule 29. Objection to Jurisdiction. Petition to Set Aside Service. Rule to Show Cause. Appearance De Bene Esse.

This procedure is abolished. Questions of jurisdiction are now raised by preliminary objection under Assumpsit Rule 1017(b)(1).

Rule 30. Defendant May Appear Within Fifteen Days. Appearance to Specify Name and Address Where Papers May Be Served.

Assumpsit Rule 1012 now regulates the entry of a voluntary appearance. There is no change in the requirement of an address in the county at which papers may be served.

Rule 31. Equity Actions Begun by Amicable Action or Writ of Summons. Bill in Equity to be Filed Within Ten Days Thereafter. Bill May Contain Additional Defendants upon Whom Bills Shall Be Served or Bill May Omit Parties Named in Writ upon Discontinuance.

The new Rules do not mention this topic. There is now no mandatory period for the filing of the complaint. Assumpsit Rule 1037(a) provides for a rule by the defendant on the plaintiff to file the complaint within twenty days, under penalty of non-pros. Joinder of new defendants after the issuance of the writ will be governed by Joinder Rule 2232(c) which permits such joinder, with leave of court. Discontinuance as to parties already served will be regulated by Rule 229. Rule 229(b) prohibits a discontinuance as to less than all defendants without leave of court. This changes the prior practice, which did not require leave of court in either instance.

CASE STATED

Rule 32. Case Stated. Available at any Stage of the Proceedings. Form of Complaint. Procedure. Relief Available.

The new Rules do not mention this topic, nor do the Assumpsit Rules provide for it specifically. However, Assumpsit Rule 1003 authorizes the exact equivalent of a case stated, which may be regarded as an agreement between the parties, waiving process and pleadings and substituting the case stated.

THE BILL

Rule 33. Bill in Equity. Endorsement of Notice to Appear and Answer.

This Rule is abolished. Assumpsit Rules 1025, 1026 and 1351 regulate the endorsement and notice to plead to be included in the complaint. Compulsory appearance is abolished; the time to plead is reduced from thirty days to twenty days.

Rule 34. Form of Bill of Complaint. Concise Statement of Facts. Paragraphing. Attachment of Writ Instruments.

The new Rules do not mention this topic. The new pleading in equity is discussed in section 4 of the article to which this Concordance is an appendix.

Rule 35. Production of Documents on Cause Shown. Right of Plaintiff to Set Forth in Bill of Complaint Prayer That Defendant Attach Documents to Defendant's Answer.

The new Rules do not mention this topic. Production of documents will now be regulated by Depositions and Discovery Rule 4009.

Rule 36. Joinder of Causes of Actions. Liabilities. Defendant Jointly and Separately Liable. Severance.

Joinder of causes of action is now governed by Rule 1508. The right is broader than the prior practice; the qualifying "but" clause of Rule 36 is abolished. See also Rules 2227-2229. Severance is now governed by Rule 213(b).

Rule 37. Stockholders' Bills. Specific Averments Required.

Rule 1506 now regulates this topic. It follows almost verbatim the text of the Act of April 18, 1945, PA. STAT. ANN. Tit. 12, § 1321 *et seq.* (Supp. 1950). The requirements of Rule 37 that the plaintiffs must aver that they were wholly ignorant of the matters complained of at the time they purchased their shares, and that their vendors could have successfully maintained the bill if they had not sold their stock, have been eliminated, since they are inconsistent with the Act of 1945.

INJUNCTIONS

Rule 38. Preliminary Injunctions. Ex Parte Injunctions. Injunction Affidavits. Requirement of Hearing in Five Days after Ex Parte Injunction.

Rules 1531(a), (c), (d) and (e) now regulate this topic. The changes effected are discussed in section 7 of the article to which this Concordance is an appendix. Depositions will be taken pursuant to the Depositions and Discovery Rules. The provision of Rule 38 that a certificate of counsel will take the place of a rule to take depositions of a witness has been eliminated. Rule 4003 must now be followed.

Rule 39. Cautionary Orders. Requirement of Security. Requirement of Notice of Preliminary Injunction. Dissolution of Preliminary Injunction for Failure to Give Notice or to Hold Hearing within Five Days.

Cautionary orders are abolished. Relief by preliminary injunction or special injunction can supply the equivalent of the remedy previously administered through cautionary orders.

Rule 40. Special Injunctions. Preservation of Status Quo.

Rule 1531(a) provides identical procedure for preliminary and special injunctions. No separate Rules for the latter are provided.

RECEIVERS

Rules 41-47. Practice in Equity Receivership.

These seven Rules are now supplanted by the first seven subdivisions of Rule 1533. The changes effected, and the effect of subdivision (h) on statutory receiverships, are discussed in section 8 of the article to which this Concordance is an appendix.

PRELIMINARY OBJECTIONS TO THE BILL

Rule 48. Preliminary Objections. Time for Filing. Grounds for Objections. Disposition of Objections.

The new practice on preliminary objections is discussed in section 4(b) of the article to which this Concordance is an appendix.

Rule 49. Preliminary Objection. Amendment. Waiver of Objections.

The new practice on preliminary objections is discussed in section 4(b) of the article to which this Concordance is an appendix. There is nothing in the new Rules or in the Assumpsit Rules similar to the provision of Rule 49 that a defendant, who fails to order objections down on the argument list within ten days after the expiration of the time for amendments, waives the same. This matter may now be regulated by local rules.

PROCEEDINGS IN DEFAULT OF APPEARANCE OR ANSWER

Rule 50. Failure to Appear or Answer. Judgment Pro Confesso. Attachment of Defendant. Release of Defendant for Purpose of Performing Decree.

Judgment by default for failure to plead is now regulated by Rule 1511. Judgment for want of an appearance is abolished. Under Rule 1511(b), the court may take testimony to assist in framing the decree. Rule 1529(c) provides that a party failing to comply with a decree may be arrested and conditionally released for the purpose of performing the decree. This provision permits the continuance of the practice of attachment under Rule 50 if a decree is first entered. Rule 50 did not require a decree, but permitted the attachment merely upon defendant's refusal to answer the bill.

Rule 51. Decree Pro Confesso. Opening of Decree. Effect of Decree Pro Confesso as to Parties Served or Appearing.

The new Equity Rules do not mention this topic. The entry of an appropriate final decree is supplied by Rule 1511(b). The opening of default judgments is not specifically regulated; it is left to the inherent power of the court, under present practice. Rule 1522 permits rehearings only upon application.

ANSWERS AND REPLICATIONS

Rule 52. Answers. Paragraphing. Requirement of Specific Denial. Averments of Information and Belief. New Matter. Affirmative Relief. Anticipation of Defenses.

The new Rules do not mention this topic. The new pleading in equity is discussed in section 4 of the article to which this Concordance is an appendix.

Rule 53. Right of Defendant to Compel Production by Plaintiff of Books and Documents.

The new Rules do not mention this topic. Production of documents will now be regulated by Depositions and Discovery Rule 4009, as in the case of plaintiffs. See Rule 35, *supra*.

Rule 54. Replications. Necessity of Specific Denial.

The new Rules do not mention this topic. Plaintiff's reply to new matter or counterclaim will be regulated by the assumpsit practice.

Rule 55. Answer or Reply Subject to Preliminary Objection under Rule 48.

The new Rules do not mention this topic. Preliminary objections to the answer or reply are now regulated by Rule 1509 and Assumpsit Rules 1017(b) and 1028. See Rule 48, *supra*.

AMENDMENTS

Rule 56. Amendments. As of Course Prior to the Filing of Next Pleading or Within Ten Days Thereafter. Amendment upon Leave of Court after Ten-Day Period.

Rule 1528 provides that the prayer for relief may be amended as of course at any time. This provision continues the practice under Rule 56. The right to other amendments is now regulated by the assumpsit practice. Rule 1033 requires leave of court or agreement of counsel, other than the right, under Rule 1028(c), to amend as of course to meet preliminary objections. Under Rule 1033, an amended pleading may aver transactions occurring after the filing of the original pleading, even though they give rise to a new cause of action. In this respect, the new Rules are more liberal than the prior practice. The new Rules are less liberal than the provisions of Rule 56, which permitted amendments as of course at any time prior to the filing of the next pleading or within ten days thereafter, including the addition or substitution of parties. Leave of court will now be required.

Rule 57. Substitution of Parties.

The new Rules do not mention this topic. Substitution of parties is now regulated by Substitution of Parties Rules 2351 *et seq.*

Rule 58. Responsive Pleading to an Amended Pleading.

The new Rules do not mention this topic. The assumpsit provision for a twenty-day answering period will govern.

Rule 59. Amended Pleading. Pleading Fact Occurring after Former Pleading or of Which Plaintiff Had No Knowledge at Time of Pleading.

The new Rules do not mention this topic. Rule 1033 permits broad amendments, including transactions or occurrences occurring after the filing of the original pleading even though they give rise to a new cause of action or defense. This provision is more liberal than the prior practice.

PRELIMINARIES TO TRIAL BY CHANCELLOR

Rule 60. Right to Depositions, Commissions, Letters Rogatory.

The new Rules do not mention this topic. Depositions, commissions and letters rogatory are now governed by Depositions and Discovery Rules 4001 *et seq.*

Rule 61. Jury Trial. Advisory Verdict.

The substance of the prior practice is continued in Rule 1513. The rule to show cause, provided in Rule 61, has been eliminated. The jury trial continues to have a preference on the trial list, but this list will now be regulated by Business of the Court Rules 214 and 215.

TRIAL AND ARGUMENT LISTS

Rule 62. Trial and Argument Lists. Regulation by the Court.

The new Rules do not mention this topic. Preparation of trial and argument lists is now regulated by the Business of the Courts Rules 214 and 215 and local practice. No fixed times are specified.

TRIALS

Rule 63. Submission to Referees.

This Rule has been abolished. The Act of 1874 has been specifically suspended by Rule 1550(8). Submissions to referees are no longer authorized.

Rule 64. Continuances. Ground.

The new Rules do not mention this topic. Continuances are now regulated by Business of the Courts Rules 216, 217 and 218. The requirement of Rule 64 that a trial, once commenced, must continue without interruption or postponement, except for good cause, has been deleted. The handling of the trial is placed within the control of the trial judge.

Rule 65. Appointment of Accountants, Experts or Assessors.

Rule 1515 continues the substance of this Rule. A new provision, making the expert's report available to all other parties, is added.

Rule 66. Dismissal at Close of Plaintiff's Case.

The changes effected by Rule 1512 are discussed in section 5 of the article to which this Concordance is an appendix.

REQUESTS, ADJUDICATION AND EXCEPTIONS

Rule 67. Requests. Adjudication.

Rules 1516 and 1517 continue the prior practice unchanged.

Rule 68. Decree Nisi. Notice by Prothonotary.

Rule 1517 continues the prior practice unchanged.

Rule 69. Exceptions. Time for Filing. Waiver of Objections by Failure to Except.

The substance of this Rule is continued in Rule 1518. The time allowed is extended from ten to twenty days. 1518(b) provides that exceptions to findings of fact or conclusions of law may refer to them by number only and need not quote them. This language did not appear in Rule 69.

Rule 70. Failure to File Any Exceptions. Waiver of Objections. Entry of Final Decree.

Rule 1519(a) continues the prior practice unchanged.

Rule 71. Deposition of Exceptions. Argument. Order of Court.

Rule 1519(b) continues the prior practice unchanged.

Rule 72. Appeals to Supreme or Superior Court. Matters Not Excepted to Not Assignable as Error.

The new Rules do not mention this topic. The subject of appellate review is governed by statute and by the appropriate Rules of the Supreme and Superior Courts.

DECREES

Rule 73. Decree. Preparation by Counsel. Notice to Adverse Party. Exceptions to Proposed Decree. Entry of Same.

The new Rules do not mention this topic. Preparation and entry of decrees are now matters for local rule or practice.

Rule 74. Form of Decree.

The first part of this Rule has been abolished. Rule 1520 continues the second part unchanged.

Rule 75. Correction of Mistakes, Omissions, Clerical Errors in Decree.

The new Rules do not mention this topic. Correction of clerical or other errors or omissions is left to the inherent power of the courts and to local rules.

Rule 76. Decrees, Entry on Judgment Index. Revival.

Rule 1521 continues the prior practice unchanged.

Rule 77. Entry of Decree. Notice to Counsel by Prothonotary.

Rules 1517 and 1519(c) continue the prior practice unchanged.

REHEARINGS

Rule 78. Rehearing. Petition. Verification. Hearing. Order.

The substance of this Rule is continued in Rule 1522. Procedural details have been omitted. The requirement of an affidavit that the application is not made for the purpose of delay has been deleted. The form, content and verification of the petition and answer, and the duty to petitioner to proceed and take depositions, are now regulated by Business of the Courts Rules 206, 207, 208 and 209. The last clause of Rule 78 has been deleted.

ACCOUNTING AND DISTRIBUTION

Rule 79. Accounting by Receiver, Assignee or Fiduciary. Notice of Filing of Account. Exceptions. Hearing. Confirmation.

The substance of this Rule is continued in Rules 1534(a) and (b). Procedural details have been changed. The specific provisions in Rule 79 for the giving of notice by advertising and mailing have been supplanted by general provisions giving control and discretion to the court. Details of the method of audit and exceptions are deleted and left to local practice and local rules.

Rule 80. Receivers, Assignees, Fiduciaries. Partial Distribution. Refunding Bonds.

The substance of this Rule is continued by Rule 1534(c).

COSTS

Rule 81. Security and Costs.

The substance of this Rule is continued by Rule 1524.

Rule 82. Costs Allowable.

Rule 1523 continues unchanged the prior practice of limiting costs to those items fixed by statute or allowed by the court, together with the fees of the examiner, master, auditor, accountant or expert appointed by the court. Details of what these items include, and of the cost of printing, have been deleted.

Rule 83. Interlocutory Orders. Payment of Costs. Stay of Proceedings until Costs Paid.

Rule 1525 continues the prior practice unchanged.

Rule 84. Liability for Costs. Costs to Follow Decree Unless Otherwise Ordered by the Court.

Rule 1526 continues the prior practice unchanged.

Rule 85. Taxation of Costs by Prothonotary. Appeal.

Rule 1527 continues the prior practice unchanged.

EXECUTION PROCESS

Rule 86. Execution Process. Attachment of Defendant. Writs of Sequestration of Assets.

The substance of this Rule is continued by Rule 1529(a), which permits execution process available in actions at law to be used in actions in equity and by Rule 1529(c), which authorizes arrest by attachment and sequestration of property.

Rule 87. Compliance with Decree. Prothonotary May Be Authorized to Act in the Name of and for Delinquent Party.

Rule 1529(c) is somewhat broader than Rule 87. The sheriff as well as the prothonotary may perform the act which the party fails to perform within the time specified by the order or decree. The employment of the sheriff will supply the equivalent of relief under the old writ of assistance.

Rule 88. Interlocutory Decree. Enforcement by Execution Process.

Rule 1529 makes no distinction between final and interlocutory decrees. All remedies provided in Rule 1529 will be equally applicable to interlocutory or final decrees.

Rule 89. Enforcement of Orders by or against One Not a Party but against Whom or in Whose Favor an Order Has Been Made.

The new Equity Rules do not mention this topic. Parties, in whose favor or against whom orders are to be made, must now intervene or be added under the Intervention or Joinder Rules. Under Joinder Rule 2230(a), a judgment in a class action will not impose personal liability upon anyone not a party thereto. Under Rule 1503(a)-2, a judgment, order or decree will not bind the defendant personally where no jurisdiction has been obtained over him either as a result of proper service or of voluntary submission by him.

Rule 90. Execution. Parties Secondarily or Partially Liable.

Rule 1529(a) continues the prior practice unchanged. The language of Rule 90 has been revised and shortened.

ADDITIONAL RULES AND PRACTICE

Rule 91. Matters Not Covered by Specific Rules. Conformity to Practice in Equity of the Supreme Court of the United States.

Rule 1501 now provides that the assumpsit practice shall govern all situations not otherwise provided for in these Rules.

Rule 92. Supremacy of Procedural Rules over Inconsistent Equity Rules.

This Rule has been abolished. It is no longer necessary. The equity practice is now completely rewritten. To complete it, the following Rules have been made applicable to equity: actions by real parties in interest, Rules 2001 to 2025; defendants who are non-residents or conceal their whereabouts, Rules 2076 to 2100; joinder of parties, Rules 2226 to 2250; joinder of additional defendants, Rules 2261 to 2275; interpleader by defendants, Rules 2301 to 2325; intervention, Rules 2326 to 2350.

CAVEAT—This Concordance covers all ninety-two of the Equity Rules of 1925, but it does not thereby cover all the new Equity Rules of July 1, 1952. The new Rules contain a number of provisions not found in the old Rules. For example, Rule 1530 (which regulates actions for an accounting), Rule 1535 (which regulates objections to security), and Rule 1532 (which regulates the perpetuation of testimony), deal with topics which the old Rules did not mention. Rule 1531(b) contains new provisions for the bond on preliminary or special injunction. Rule 1533(h) exempts statutory receivers from the receivership Rules.