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The Time for Filing Affidavits of Defense in Actions of Trespass

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is it easy to see how it can gain strength from such weak supports as *"Communis error facit jus."* The party penalized by this imputed laches is the body politic, the people in their capacity as constitution makers. They, as such, have no independence of action, but can proceed only through the legal sovereignty, their duly constituted and sole agents, and, *mirabile dictu,* the very agency which pronounces the limitation against them.

The force of such an argument can be more readily seen when attended by circumstances such as those which caused Mr. Chief Justice Gibson, of Pennsylvania, to change his views on the power of Courts to declare legislation unconstitutional and void. In 1825 this astute logician argued with great force against the existence of such power in a dissenting opinion.[10] In 1845 this opinion was mentioned by counsel in the argument of *Norris v. Clymer, 2 Pa. 277,* to which he replied: "I have changed that opinion for two reasons. The late convention (1838) by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the Legislature; and from experience of the necessity of the case." But how, when no constitutional revision has intervened, can assent of the people, so vital in Constitutional matters, be imputed to them from this so-called "acquiescence?"

The resentment of vested interests which are "inconvenienced" by strict adherence to the Constitution is apparently more to be reckoned with than the wrongs of a Constitution which can only suffer in silence when outraged by its protectors.

J. F. Ingham

THE TIME FOR FILING AFFIDAVITS OF DEFENSE IN ACTIONS OF TRESPASS—In a number of lower Court cases a question has been raised as to the right of the defendant in actions of trespass to file an affdavit of defense after the expiration of fifteen days from the service of the statement upon him. This same question has been raised in actions of assumpsit and the Supreme Court has decided that an affidavit of defense in actions of assumpsit may be filed at anytime before judgment for want of an affidavit of defense has been entered. *Fuel City Mfg. Company v. Waynesburg P. C., 268 Pa. 441-446.* The

[10]Eakin v. Raub, 12 S. & R. 330.

rule was the same prior to the Practice Act of 1915. *Bordentown Banking Co. v. Restein, 214 Pa. 30.*

The reason for these decisions seems to be that the judgment for want of an affidavit of defense is a default judgment which is not entered automatically upon the expiration of the time within which the affidavit is to be filed, but which must be moved for by the plaintiff. There is therefore no penalty in actions of assumpsit for failing to file an affidavit of defense except upon motion by the plaintiff. The situation is not the same with actions of trespass. Sections 13 and 18 of the Practice Act provide that failure on the part of the defendant to file an affidavit of defense within fifteen days after service of a copy of the statement operates as an admission of certain facts that might have been put at issue. These facts thereupon are excluded from the issues to be tried. *Gross v. Dickinson, 4 D. & C. 505.* In other words the default of the defendant in filing an affidavit of defense within the prescribed time operates automatically in the admission of certain facts and puts the case at issue.

The question therefore arises as to what relief is available to the defendant whose default has resulted in these admissions.

In the case of *Shoemaker v. Myers, 30 Dist. 240,* the defendant filed an affidavit of defense after the expiration of the fifteen day period. The Court said: "There is nothing in the Act (Practice Act of 1915) prohibiting an affidavit of defense being filed after the case is at issue. In our judgment, however, leave of Court should be obtained granting the right to file an affidavit of defense after the fifteen days have expired". To the same effect, see *O'Brien v. Hostetter, 11 D. & C. 171.*

The case of *Lobb v. Stitzinger, 4 D. & C. 504,* holds that in actions of trespass a defendant can, with leave of Court, file an affidavit of defense at anytime prior to trial. Such leave, however, should not be granted in a case where the plaintiff establishes, by depositions or otherwise, that he has been prejudiced by the defendant's implied admission of ownership and agency of the instrument by which the injury was caused.

The rule given in the case of *Walsh v. James, 26 Dist. 458,* is that in an action of trespass the defendant may file an affidavit of defense under the Practice Act more than fifteen days after the date of service of the statement upon him, answering the averments of the statement relating to the identity of the person by whom the act was committed,

the agency or employment of such person, ownership or possession of the vehicle, machinery, property or instrumentality involved, and all similar averments; provided it is filed within a reasonable time, and before any further action is taken or any list made up on which the case could have been placed.

We see, therefore, that there are three rules as to the filing of an affidavit of defense after the expiration of the fifteen day period. The first rule is to the effect that an affidavit of defense may be filed at anytime after the expiration of the fifteen day period provided leave of Court is obtained. The second rule modifies the first by limiting the filing of an affidavit of defense after the fifteen day period to cases where doing so would not prejudice the plaintiff. The third rule limits the filing of an affidavit of defense after the expiration of the fifteen day period to a reasonable time. The reasonableness of the time depends upon the steps which have been taken in the case, i. e., placing the case on the trial list.

This whole matter should be regulated in accordance with the Practice Act of May 14, 1915, P. L. 483, the pertinent provisions of which are as follows:

> Section 2,
>
> "The pleadings shall consist of the plaintiff's statement of claim, the defendant's affidavit of defense";
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> Section 12,
>
> "The defendant shall file an affidavit of defense to the statement of claim within fifteen days from the day when the statement was served upon him".

The above quoted portions of the act are clear in their requirement of an affidavit of defense in all cases, whether in assumpsit or trespass.

The effect of failure to file an affidavit of defense in an action of assumpsit is clearly stated by the act as follows:

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

vided in section thirteen".

Section 17,

"In actions of assumpsit the Prothonotary may enter judgment for want of an affidavit of defense, for any amount admitted or not denied to be due".

The requirement that an affidavit of defense be filed in actions of assumpsit and the taking of judgment for want thereof is fundamental in our practice. The practice of taking judgment for want of an affidavit of defense prior to the Practice Act of 1915, was based upon a default in doing an act required by law. *Ruth-Hastings G. T. Company v. Slattery, 266 Pa. 288.*

Since the Practice Act of 1915, however, the procedure for taking judgment is based upon the failure to deny the averments of the plaintiff's statement and thereby raise the issues for trial. There being no issues the plaintiff is entitled to judgment, provided however, the admitted averments of his statement of claim are sufficient to support his claim.

In actions of trespass the penalty for failing to file an affidavit of defense is provided by Sections 6 and 12 of the Act, as above quoted, and

Section 13,

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

Section 18,

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

Prior to the Practice Act of 1915, in actions of trespass all matters of fact in the case were at issue whether or not an affidavit of defense was filed, except where Rules of Court provided otherwise. *Staunton v. P. & R. R. Com-*

pany, 236 Pa. 419.

Rule 10 of the Courts of Allegheny County, however, required a denial of certain facts. Rules of Court in other counties made the filing of an affidavit of defense necessary in order to avoid the admission of certain facts.

Under the Practice Act of 1915, however, an important change is made in the function of the affidavit of defense. The affidavit of defense takes the place of the plea and raises the issues to be tried and no longer simply prevents judgment by default. *M. F. G. Supply Company v. Moyer, 5 Northum. 205; Stein & Sampson v. Slomkowski, 74 Pa. Super. 156.*

All averments of fact in the plaintiff's statement in trespass are no longer at issue, but only those facts which are specifically denied or which relate to the injury, negligence, damage, etc. *Flanigan v. McLean, 267 Pa. 553.*

The principle involved and the effect is the same in actions of assumpsit and in actions of trespass. In assumpsit the whole of the plaintiffs claim may be admitted and judgment entered thereon. In trespass the effect is the same except that the averments of fact upon which the plaintiff relies to establish liability and averments relating to damage claimed or their amount need not the answered or denied.

In assumpsit the plaintiff has a positive right to take advantage of the defendants failure to plead a defense. *Bordentown Banking Company v. Restein, Supra.*

In this case *(Bordentown Banking Company v. Restein, Supra),* the Court said, "At the expiration of the fifteenth day the plaintiff has a right to judgment unless the defendant has in the meantime filed his affidavit of defense. An enlargement of the defendant's time by the Court or a judge would therefore be an attempt to curtail the plaintiff's statutory rights".

In trespass should the plaintiff's right to take advantage of a default be any less secure?

It is true that in actions of assumpsit the default does not operate automatically and the defendant may file his affidavit of defense at any time before judgment is taken against him. This is a rule carried over from the practice prior to the Act of 1915. Section 17 of the Practice Act of 1915, provides a procedure in actions of assumpsit for securing advantage of the defendant's default. There is no corresponding section enabling the plaintiff to do likewise where the action is in trespass. The proper practice, therefore, should be to enforce the provisions of the act and declare the case at issue at the end of the period for

filing an affidavit of defense thereby giving effect to Sections 6, 12, 13 and 18 of the Act.

Furthermore such a rule would make effective Section 16 which is one of the most important provisions of the Act. *Ruth-Hastings G. T. Company v. Slattery, Supra.*

Without the certain rule that an affidavit of defense cannot be filed after the case is at issue, it is impossible to intelligently prepare a case for trial.

This construction of the Practice Act is not contrary to the policy of the law.

At common law no affidavit of defense was required. The first rule requiring it in Pennsylvania was promulgated in 1795. The first affidavit of defense act was passed in 1835 and provided for judgment by default. The practice was extended by later acts until the Practice Act and its amendments. This is the final word on the subject so far as the actions of assumpsit and trespass are concerned.

The practice of taking judgments for want of an answer to complaints is quite general. It is used in most actions, i. e., Scire Facias Sur Mechanics Lien, Scire Facias Sur Mortgage, Scire Facias Sur Recognizance, Ejectment, Replevin and in Equity procedure.

This practice however is not inherent in actions sounding in contract but is the outgrowth of a continual development of the law.

The practice of requiring an affidavit of defense is not peculiar to actions sounding in contract. The actions of replevin and ejectment which are fundamentally ex delicto provide for the filing of an answer to the plaintiff's complaint and the entry of judgment in default thereof.

Rules of Court in many counties required the defendant at the request of the plaintiff to file a bill of particulars in actions of trespass setting forth his ground of defense. Rule 140 of Allegheny County provided for judgment against a defendant who failed to file a bill of particulars.

Under Sections 21 and 22 of the Act the Court has a discretion to permit the filing of a new pleading or to extend the time fixed by the act for the filing or service of any pleading.

The provisions of Section 21 apply to striking off informal pleadings and it is fair, therefore, to assume that the power to permit an amended or new pleading is for the purpose of enabling the parties to correct some informality in the pleading filed. This section, therefore, could hardly apply to the present discussion.

Section 22, however, relates to the filing of an original pleading.

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

This provision of the Act clearly applies to a time for filing the pleading that is still running and therefore can be extended, i. e. the fifteen day period following the service of the statement. After the expiration of the fifteen days the time fixed by the Act for the filing of the affidavit of defense is at an end and cannot be extended because it does not exist. Permitting the pleading to be filed after the expiration of the fifteen days when no application for an extension has been made before the expiration of that time, is the granting of a new period for filing the pleading. That is not provided for by the Act and cannot be done.

It is to be regretted that some of the Courts have been so zealous to preserve their power to mold procedure in the cases pending before them that they have lost sight of the more desirable end of rendering procedure and practice precise and certain.

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