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MODERN PLEADING AND THE PENNSYLVANIA RULES

Charles Alan Wright †

Fifteen years after David Dudley Field and his associates had reported their celebrated Code of Civil Procedure to the New York legislature, that code, and the system of "code pleading" to which it lent its name, had been adopted by 16 states.¹ In the years that followed another 13 states turned to code pleading as a remedy for the ills of the common law. Procedural reform showed no further signs of new or original thinking, however, until the adoption in 1938 of the Federal Rules of Civil Procedure. The impact of these new rules on state procedures has been no less marked than was that of the Field Code; in the fifteen years since the Federal Rules became effective, nine states have adopted new procedures patterned after those Rules,² while seven other states have enacted codes containing a substantial number of

† A.B., Wesleyan University, 1947; LL.B., Yale University, 1949; Assistant Professor of Law, University of Minnesota; Secretary, Minnesota State Bar Association Court Rules Committee; Assistant to the Reporter, Advisory Committee to the United States Supreme Court on Rules of Civil Procedure; assistant to the author of CLARK, *CASES ON MODERN PLEADING* (1952); co-author of *The Practicing Attorney's View of the Utility of Discovery*, 12 F.R.D. 97 (1952) and *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346 (1950); author of *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580 (1952) and articles in other legal periodicals.

1. See CLARK, *CODE PLEADING* 24 (2d ed. 1947).

2. Arizona, Colorado, Delaware (in the law courts), Kentucky, Minnesota, Nevada, New Jersey, New Mexico, and Utah. The federal model has also been followed in the territory of Alaska and Commonwealth of Puerto Rico. Developments here have indeed been swift. Thus in 1951 Kentucky and Nevada were listed among the 10 states where "neither traces of federal reform nor bar activity to that end seem apparent." Clark, *The Federal Rules in State Practice*, 23 ROCKY MT. L. REV. 520, 523 n.14 (1951). Yet the Nevada Rules, very closely patterned after the Federal model, became effective Jan. 1, 1953, while the Kentucky Rules take effect on July 1st of this year.

the concepts embodied in the Federal Rules.³ It is, then, no longer appropriate to speak of a state as adopting the "Federal Rules," for the term hides the wide popularity these concepts enjoy in state procedures, and the innovations and additions which state rulemakers have made. A more descriptive label, and one which properly connotes a system as different from code pleading as the Field Code was from the common law, is "modern pleading."⁴

During this decade-and-a-half in which modern pleading has been developed, Pennsylvania has made significant changes in its civil procedure. The first and obvious thing to say of the new Pennsylvania Rules is that they do not represent a system of modern pleading, in the sense in which that term was used above, and in which it will shortly be defined. Of the states which have undergone large scale procedural reform in the last fifteen years, Pennsylvania has been influenced the least by the new concepts and improved techniques first suggested in the Federal Rules. This observation represents no normative judgment, but merely the statement of apparent fact. The policy of the Pennsylvania Procedural Rules Committee was "to modernize procedure without sacrificing established Pennsylvania traditions which are of proven merit."⁵ No one can quarrel with such an objective. Nor would it be appropriate for an outsider to take issue with the Pennsylvania rulemakers' judgment as to which Pennsylvania traditions are of "proven merit," and which represent ancient habits better discarded. Provisions no longer required in other jurisdictions may be responsive to local needs which no outsider can gauge; rules which would be too complex for other states may represent efficient working tools in the hands of a bar as distinguished and scholarly as that boasted by Pennsylvania.

I do not, therefore, understand this invitation by the editors of the *Review* to compare the modern pleading of my adopted state with the reformed common-law pleading of my native state as an occasion to lecture Pennsylvania lawyers on how much better off they would be with rules like Minnesota's. But it may be useful to the ongoing movement for procedural reform in Pennsylvania to know what there is in your recent changes which seems particularly striking to one whose

3. Florida, Iowa, Maryland, Missouri, South Dakota, Texas, and Washington. The influence of the federal reform is also clearly seen in some parts of the codes or rules of California, Connecticut, Louisiana, Montana, North Dakota, and Oregon, while Illinois and Wisconsin have discovery provisions not materially different, and individual rules appear elsewhere, notably pre-trial rule 16, which is very widely adopted, and often rule 50, dealing with directed verdicts.

4. As in the title of a recent casebook by the principal proponent of such a system. CLARK, *CASES ON MODERN PLEADING* (1952).

5. Kenworthy, *Discovery Under The Proposed New Rules*, 20 PA. B.A.Q. 17, 21 (1948).

teaching, writing and practice have all been in a modern pleading jurisdiction.

GENERAL OBSERVATIONS ON THE PENNSYLVANIA REFORM

A few brief comments on the Pennsylvania reform are in order before turning to the Rules. Even at this distance one detects, and is puzzled by, the apathy which practicing lawyers showed toward the efforts the Procedural Rules Committee was making. Practically every statement by a Committee spokesman comments on the paucity of comments from lawyers on proposed drafts of rules.⁶ It is also of interest to note that the criticism which the Committee did receive seems not to have been directed at the Committee's draftsmanship of specific rules, nor even at the abandonment by it of the old and familiar ways, but rather at its failure to promote a reform as drastic as that wished by at least the vocal elements of the bar.

Thus, according to one distinguished member of the Committee:

"I think one of the great difficulties of the Procedural Rules Committee is the lack of constructive criticism from the members of the Bar. We have heard criticism, but it has not been directed at any one rule. It has been: 'You ought to adopt a Federal Rule.'"⁷

In Minnesota, by contrast, the bar was very outspoken when the new rules were sent out for discussion and criticism. Our rules committee was criticized for having made too many changes in the ancient practice, and it was only after significant concessions on the provisions governing discovery and compulsory counterclaims that our rules were adopted.

It is interesting to speculate whether the apathy of the bar was a cause or an effect of the disinterest in the Rules evidenced by the four outstanding law reviews in Pennsylvania. In the period 1938-1952, while Pennsylvania pleading and practice was being so thoroughly reworked, only one article, two notes, and one recent case appeared in the pages of this *Review* discussing either the Rules or the cases apply-

6. E.g., Hull, *A Critic "Views With Alarm,"* 12 PA. B.A.Q. 146, 160 (1941); Amram, *The New Procedural Rules*, 45 ANN. REP. PA. B. ASS'N 56, 59 (1939); Amram, *The New Procedural Rules*, 47 ANN. REP. PA. B. ASS'N 379, 380, 441 (1941); *Report of the Executive Comm.* 49 ANN. REP. PA. B. ASS'N 89 (1943); *Report of New Procedural Rules Comm.* 55 ANN. REP. PA. B. ASS'N 100 (1949), noting that from the thousands of lawyers who received copies of the 1943 draft of proposed discovery rules, only 45 comments were received.

7. John H. Fertig, Esq., 49 ANN. REP. PA. B. ASS'N 89 (1943). See also the remarks by the President of the Bar Association, *id.* at 86-7, and the criticism of the new Rules by the Bar Association's Committee on Procedural Rules, 51 ANN. REP. PA. B. ASS'N 91 (1945) and 55 ANN. REP. PA. B. ASS'N 172 (1949).

ing and interpreting them.⁸ The other reviews in the state did only a little better. It seems unfortunate that this opportunity to provide scholarly guidance to the Committee, in its drafting of rules, and to the bar, in its use of them, was passed up. Happily the lawyer can find help in Mr. Amram's book,⁹ surely the finest guide to the rules of a particular state which has yet been written, and the Committee must certainly have derived stimulus from the exciting series of articles in the *Pennsylvania Bar Association Quarterly* in which platoons of spokesmen for the Committee sought to parry the arguments of a determined critic.¹⁰

One general criticism which has been made of the Pennsylvania Rules is that there are too many of them.¹¹ At least in this form, the objection seems to me to be largely irrelevant, particularly when it leads to a sterile discussion as to whether each subsection of a Federal Rule should be counted as a separate rule for purposes of comparison. Rules should be criticized, not because they are too numerous, but because they are too detailed in the regulation they provide, if that be the case. Modern thinking has been in the direction of leaving as much as possible to the discretion of the trial judge, who is better able to gauge what the necessities of a particular problem in a particular case require than is a rulemaking body when it prescribes a fixed rule applicable to all cases. There is some evidence, particularly, as will be seen, with regard to joinder of claims and parties, that the Pennsylvania Rules do regulate in rather considerable detail matters which elsewhere are left to the discretion of the trial judge. If this is generally true of the Pennsylvania Rules, then they might well be criticized on that ground by persons who feel that the wiser course is, indeed, toward more flexibility and broader discretion. But this cannot be

8. The Minnesota Law Review, by way of contrast, has published six articles, two notes, two recent cases, and two book reviews discussing the Minnesota Rules since they became effective Jan. 1, 1952.

9. AMRAM, GOODRICH-AMRAM PENNSYLVANIA PROCEDURAL RULES SERVICE WITH FORMS (1951) (cited hereafter as GOODRICH-AMRAM).

10. Graubart, *Pennsylvania Is Moving Backwards*, 12 PA. B.A.Q. 137 (1941); Hull, *A Critic "Views With Alarm,"* 12 PA. B.A.Q. 146 (1941); Graubart, *A Critic Replies*, 13 PA. B.A.Q. 23 (1941); Graubart, *Baron Surrebuter Walks Again*, 14 PA. B.A.Q. 126 (1943); Kenworthy, *The Proposed Pleading Rules*, 14 PA. B.A.Q. 210 (1943); Graubart, *Comments on Proposed Procedural Rules for Depositions and Discovery*, 16 PA. B.A.Q. 34 (1944); Graubart, *Comments on the Proposed Rules of Civil Procedure Governing Actions at Law*, 17 PA. B.A.Q. 210 (1946); Kenworthy and Anderson, *The New Procedural Rules*, 18 PA. B.A.Q. 59 (1946); Kenworthy, *Discovery Under The Proposed New Rules*, 20 PA. B.A.Q. 17 (1948); Graubart, *Are We Afraid of Pretrial Discovery?*, 20 PA. B.A.Q. 166 (1949).

11. *Report of Comm. on Proc. Rules of the Pa. Bar Ass'n*, 51 ANN. REP. PA. B. ASS'N 90, 91 (1945); Graubart, *Pennsylvania Is Moving Backwards*, 12 PA. B.A.Q. 137 (1941). A similar objection to the New York Civil Practice Act has been urged as an argument for the adoption of modern pleading in that state. Keffe, Brooks and Greer, 86 or 1100, 32 CORNELL L.Q. 253 (1946).

proven by a mere counting of rules, as is shown by the usual rules on discovery of the modern pleading systems; these systems usually have twelve such rules, with numerous subsections, spelling out in considerable detail the kinds of discovery available, even though "it might have been possible or even desirable to have provided one single broad rule authorizing all forms of discovery in any civil action."¹² Yet the effect of all these rules is not to limit the trial court's discretion or the parties' freedom, but rather to make clear just how great this discretion and freedom are. Thus these rules do not offend the criterion suggested above.

The notion of regulating procedural matters by flexible discretionary action of the trial court rather than by rigid rules is one of the essential points in the philosophy which underlies modern pleading. The other essential point is that the desired goal of just, speedy, and inexpensive determination of controversies is not served by decisions on technicalities of pleading, nor is it served if results turn on the skill and diligence of counsel rather than on the merits of the case. This philosophy finds its concrete expression in three great reforms:

(1) A real and effective merger of the forms of action and of law and equity;

(2) Simplified pleadings, supplemented by a broad system of pre-trial devices for getting at the merits;

(3) Unlimited joinder of claims and parties.

Only a system in which each of these three elements is present, at least in substantial part, can be regarded as enjoying "modern pleading." The Pennsylvania Rules of Civil Procedure have liberalized the old practice in the direction of each of these three objectives; none of them has been achieved.

ONE FORM OF ACTION

The notion of abolishing the distinctions among the forms of action is not novel with modern pleading; the draftsmen of the Field Code 105 years ago spoke of its two most prominent features as being "those relating to the abolition of the common law forms of action, and to the union of legal and equitable remedies in a common system."¹³ It seems fair to say that the first part of this objective, the abolition of the distinctions between the common law forms, has everywhere worked smoothly and successfully, at least after the first few years

12. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 502 (1950).

13. SUPP. TO CODE PROC. TEMPORARY ACT 3 (N.Y. 1848).

when it was viewed with suspicion by judges accustomed to the old niceties. Candor equally compels the admission that the second half of the objective of the codifiers, the union of law and equity, has not been without some travail. Particularly in New York, where the code was first adopted, the courts persist in a failure to give real thought to the procedural consequences of the union; thus one finds even today such anomalies as actions being dismissed for having been brought to the "wrong side" of a court which for a century has had only one "side."¹⁴ In the federal system, where union of law and equity was long thought to pose constitutional problems, there has been little difficulty in application of the 1938 merger. Even there, however, there has been a widely-quoted dictum, especially surprising because of the modernity of the court, showing nostalgia for the ancient distinctions;¹⁵ interestingly this dictum was uttered in the course of an opinion which reached a result impossible except under a merged system.¹⁶

Regrettably New York difficulties and Second Circuit dicta have obscured the significant lesson which should be learned from a century of experience with the merger of law and equity: in the great bulk of American jurisdictions the merger has been made effective with little discussion and even less difficulty.¹⁷ With such an important right as trial by jury turning on the identification of an issue as "legal" or "equitable," there have inevitably been cases in which parties have differed as to the effect of the merger, but, as I have said elsewhere, "their very fewness carries its own significance."¹⁸

Against this background one considers the explanations of the Pennsylvania rulemakers for their preservation of the common law actions and of separate systems of law and equity:

"The Procedural Rules Committee devoted an inordinate amount of labor, research and study to the question of the practicability of consolidating all actions into one form. This proved

14. These melancholy developments are canvassed in a thoughtful Note, *Law and Equity in New York—Still Unmerged*, 55 YALE L.J. 826 (1946). See also Kharas, *A Century of Law-Equity Merger in New York*, 1 SYRACUSE L. REV. 186 (1949); Clark and Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346, 353-7 (1950).

15. See *Bereslavsky v. Caffey*, 161 F.2d 499, 500 (2d Cir. 1947). A trial court recently relied on this dictum to reach an old-fashioned and unfortunate result, *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 107 F. Supp. 532 (S.D.N.Y. 1952), criticized 52 COL. L. REV. 1069 (1952), but was promptly reversed for having done so. 18 Fed. Rules Serv. 2.12, case 1 (2d Cir. 1953).

16. As pointed out by 2 MOORE'S FEDERAL PRACTICE 458-460 (2d ed. 1948).

17. This proposition is examined at length in CLARK, CODE PLEADING 78-127 (2d ed. 1947).

18. Clark and Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346, 354 (1950).

impossible. It is one thing to adopt a *basic pattern* for all forms of action. But it is absolutely impossible to adopt a set of rules dealing with process, venue and pleadings that are identical regardless of the type of action."¹⁹

"... [I]t 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."²⁰

There is much truth in these comments. So long as merger of procedural forms is not permitted to change substantive rights—and this is the premise on which procedural reform has been based—there will be a need for some special provisions in order to implement these substantive rights. Yet it is hard to believe that those states which have but one form of action are indulging in such an exercise in self-delusion as the quoted remarks would seem to imply. Generally when a state has abolished the forms of action it has discovered that it can also abolish many of the former differences in procedure without impairing substantive rights. Under the Pennsylvania Rules, for example, a plaintiff suing in trespass can join causes of action only if they arise from a common factual sequence.²¹ This restriction is removed if the action is in assumpsit, and the plaintiff may join claims which arose at different times and from unrelated transactions, provided only that they are similar in their legal nature, *i. e.*, they must all be either contractual or quasi-contractual.²² But if suit is in equity, all restrictions are gone, and even the most dissimilar claims may be joined if they are within the jurisdiction of equity.²³ Are these distinctions necessary to preserve any rights of substance? States with modern pleading think not, and allow absolutely unlimited joinder of claims regardless of the kind of action.²⁴ Even the code states, though

19. Kenworthy and Anderson, *The New Procedural Rules*, 18 PA. B.A.Q. 59 (1946).

20. Amram and Schulman, *The New Pennsylvania Equity Rules—A Survey*, 100 U. OF PA. L. REV. 1089, 1091 (1952).

21. PA. R. CIV. P. 1044.

22. PA. R. CIV. P. 1020(a).

23. PA. R. CIV. P. 1508.

24. *E.g.*, MINN. R. CIV. P. 18.01. I have followed the practice throughout of citing the Minnesota Rule, where it is typical of modern pleading rules discussed in the text. Because the numbering systems are generally similar, the equivalent rule in the Federal or other modern pleading system can readily be found.

they limit joinder, allow claims which are factually related to be joined regardless of their legal nature.²⁵

This example shows why Pennsylvania has found impossible what other states think they have successfully accomplished. The Pennsylvania Committee rather clearly was thinking in terms of a merger which would preserve all the procedural differences now existing, and the Committee was quite right in believing that such a merger would be illusory, and would mean an incredibly complex and unwieldy set of rules. Other states, by contrast, have thought that the whole purpose of merger was to put an end to those differences in procedure not necessary to preserve substantial rights, and they have found that a very few procedural variants, which can be quite simply stated, are enough to preserve those substantial rights—usually all that is needed is to make jury trial, venue, and means of acquiring jurisdiction turn on the nature of the action.

One of the most puzzling things to an outsider is the Committee's failure to take even a halfway step toward one form of action by combining assumpsit and trespass. The Committee itself at one time proposed rules which would have accomplished this,²⁶ in a recommendation which was justly praised.²⁷ Yet for reasons which I can nowhere find explained, this recommendation was withdrawn, and the distinction between trespass and assumpsit was preserved. The union of these two actions, even if all else was left untouched, would have greatly simplified judicial administration in Pennsylvania. Though I have no statistics for your state, I think it clear that the great bulk of the litigation in Pennsylvania courts falls under one of these two actions. In the not dissimilar Commonwealth of Massachusetts, for example, 84.6% of the actions commenced in the state courts in the year ending June 30, 1952, were of a sort which in Pennsylvania would be in either trespass or assumpsit.²⁸ Because of the importance of these two actions, it is worthwhile to examine the differences which made a merger of them "impracticable for obvious reasons."²⁹

The differences under the new Rules between assumpsit and trespass are few; they relate to venue and deputized service, joinder of claims and counterclaims, default judgments, and the defendant's ap-

25. *E.g.*, CONN. REV. GEN. STAT. § 7819 (1949).

26. *Recommendation No. 15 of the Procedural Rules Comm.*, 49 ANN. REP. PA. B. ASS'N 184 (1943).

27. Note, *The Scope of the Action of Trespass*, 47 DICK. L. REV. 242 (1943).

28. From the figures at 28 REP. MASS. JUD. COUNCIL 108 (1952), it appears that 26,709 cases were filed which, in Pennsylvania, would be in trespass or assumpsit, 3,328 cases which would be in equity, and 1,550 which would fall under one of the other actions.

29. 1 GOODRICH-AMRAM § 1001-2.

pearance and answer. So far as four of these six matters are concerned, the differences are entirely in form rather than in substance. Thus venue in assumpsit is to be laid in a county where the defendant can be served,³⁰ while a trespass action may be brought in any such county "or as provided by an Act of Assembly."³¹ The reason for the variation is that in some trespass actions the legislature has previously allowed suit to be brought in the county in which the cause of action arose, even though defendant may not be served there. This substantive right could have been as well protected by a rule, applicable to both trespass and assumpsit, which would allow bringing an action in any county in which defendant may be served or as allowed by an Act of Assembly; all that would then be necessary would be to include in the list of statutes superseded the Acts of Assembly which formerly regulated assumpsit venue, while leaving intact the statutes on venue in the old action of trespass. This is precisely what the Committee has actually done in the present lists of statutes superseded.

Closely connected with this variation in venue is the trespass rule which allows deputized service by the sheriff of another county where the action is brought in the county where the cause of action arose.³² This is, of course, quite unnecessary in assumpsit, where the action can only be brought in a county where the defendant can be served, but it is not inconsistent with any of the assumpsit rules; if the assumpsit and trespass rules on venue were combined, this rule on deputized service could be added thereto, without changing in any particular the law and practice which Pennsylvania now enjoys.

The trespass rule on counterclaims allows counterclaims which arise from the same transaction or occurrence as plaintiff's cause of action;³³ the assumpsit rule allows counterclaims which arise from the same transaction, etc., or which arise from contract or are quasi-contractual.³⁴ These rules, as they stand, are perfectly consistent, and the assumpsit rule could have been applicable also to trespass without the slightest difference in result, since only assumpsit claims can be contractual or quasi-contractual, and thus be pleaded as counterclaims under the second half of the assumpsit counterclaim rule. Such a merger would allow tort and contract claims in the same action if they arose from the same transaction, but it will be seen later that some decisions have held this permissible under the present rules.

30. PA. R. CIV. P. 1006(a).

31. PA. R. CIV. P. 1042.

32. PA. R. CIV. P. 1043.

33. PA. R. CIV. P. 1046.

34. PA. R. CIV. P. 1031(a).

The only variance between the assumpsit and trespass rules on default judgments is that the trespass rule requires a trial on the issue of damages³⁵ while the assumpsit rule allows the prothonotary to assess damages, in lieu of such a trial, where the claim is "for a sum certain or which can be made certain by computation."³⁶ The only trespass cases which would fit the quoted description, and in which a trial is required under the trespass rule while no trial would be required if the assumpsit rule were applicable, are those in which the claim is for destruction or taking of property which has an ascertainable market value. Is the right to a trial in such a case really a substantial right which needs to be preserved?

We turn now to the two respects in which there is a substantial difference between the two actions. One of those, as has already been briefly discussed, is joinder of causes of action. Claims in trespass may be joined if they arise from the same transaction or occurrence;³⁷ any claims which arise from contract or are quasi-contractual—which I take to mean any assumpsit claims—may be joined no matter how unrelated the transactions from which they arose.³⁸ When the Procedural Rules Committee was considering combining trespass and assumpsit, it proposed a combination of the two rules which would have preserved the present distinction, except that it would have been possible to join a contract claim with a tort claim provided that they arose from the same transaction or occurrence.³⁹ This proposal was essentially along the lines of the solution attempted by the Field Code.⁴⁰ Whether any limitation on joinder is necessary or advisable will be discussed later; the liberalization involved in allowing assumpsit and trespass claims to be joined is, of course, implicit in the very notion of eliminating the distinctions between the forms of action. That the failure of the Committee to adhere to this proposed liberalization has had practical consequences in Pennsylvania will also later be seen.

There is evidence that the decision not to merge assumpsit and trespass was not based on any of the five distinctions thus far discussed. Mr. Amram tells us that such a merger was impossible "be-

35. PA. R. CIV. P. 1047.

36. PA. R. CIV. P. 1037(b).

37. PA. R. CIV. P. 1044.

38. PA. R. CIV. P. 1020(a).

39. Proposed Rule 3041(a), 49 ANN. REP. PA. B. ASS'N 184, 193-4 (1943). That this need not be regarded as too earthshaking a move may be discerned by experience in other jurisdictions. Thus Massachusetts retains separate actions of contract, tort, and replevin, but allows joinder of contract and tort "when they arise out of the same matter." MASS. ANN. LAWS, c. 231, § 7 (Supp. 1952). Alabama has done much the same thing. ALA. CODE ANN., tit. 7, § 220 (1940).

40. See the statute cited note 25 *supra*. For a criticism of this kind of statute, see CLARK, CODE PLEADING 450-6 (2d ed. 1947).

cause of the historic difference in the system of defense pleadings,"⁴¹ and that assumpsit and trespass are "substantially identical in all respects except one small matter of pleading."⁴² The small matter of pleading, now preserved in the trespass rules,⁴³ is the shorthand answer, styled "a general appearance," by which the defendant is deemed to admit certain types of averments relating to the identity of the tortfeasor, to agency, and to the instrumentality involved, while denying all else. Whether this special kind of pleading, which trespass defendants have been allowed in Pennsylvania since the Practice Act of 1915, should be preserved need not now be considered. Assume that it should. Does it follow that the whole distinction between assumpsit and trespass, with all the difficulty that will be seen to have been thus caused, need be preserved in order to retain this "Pennsylvania tradition . . . of proven merit"? The answer is clearly "No." This is shown by the Procedural Rules Committee itself, in its draft of rules which would have merged assumpsit and trespass and yet preserved the essence of this special kind of pleading. The Committee at that time proposed as part of the rule governing denials for lack of knowledge or information⁴⁴ the following provision:

"An averment shall not be deemed to be admitted if proof thereof is demanded and (1) the averment relates to injuries to person or property, and is not an averment of the identity of the person by whom a material act was committed, the agency or employment of such person, the ownership, possession or control of the property or instrumentality involved" ⁴⁵

Certainly this provision is cumbersome. Certainly, too, it changes the present practice to the extent of requiring defendant to file an answer in which he formally demands proof of the plaintiff, rather than, as now, merely filing a "general appearance." But the substantial right involved, that of a shorthand simplified response, rather than a detailed factual response, in tort litigation is preserved. And the cumbersomeness of the draftsmanship of one section of the rules seems to me less objectionable than the complexity and hardship which preservation of two separate forms of action has meant.

This suggestion that there should have been merger at least of trespass and assumpsit is not the counsel of a theoretical perfection;

41. Amram and Schulman, *The New Pennsylvania Equity Rules—A Survey*, 100 U. OF PA. L. REV. 1089, 1090 (1952).

42. *Id.* at 1091.

43. PA. R. CIV. P. 1045.

44. Now PA. R. CIV. P. 1029(c).

45. Proposed Rule 3042(c), 49 ANN. REP. PA. B. ASS'N 184, 194 (1943).

sound judicial administration in Pennsylvania has suffered by the failure to make such a merger. There are two ways that courts can apply the distinctions between different forms of action. They can do so rigidly and throw out cases because the wrong form was chosen. If this course is followed cases will have been determined because of procedural errors, rather than on their merits, a result which has long been universally condemned. The alternative is to be liberal, to ignore errors in the form of action, and to give the parties the relief to which they are entitled. If this salutary course is followed, the distinction between the actions is reduced to a useless and formal technicality, which accomplishes no more than to cause argument and delay the determination of meritorious cases.

Pennsylvania courts, under the new Rules, have experimented in both directions.⁴⁶ The Supreme Court has allowed a plaintiff who sued in trespass for fraud when he should have sued in assumpsit to keep his verdict without bothering with amendment of the form of action and a new trial on the amended complaint.⁴⁷ And the learned court has said:

“ . . . [T]he distinctions between trespass and assumpsit have been, in the interest of justice, to a large extent abolished and therefore in this case the form of the action should not prevent the recovery of damages to which the injured party is justly entitled and which he successfully proved.”⁴⁸

This, unhappily, is from the very same court which had announced:

“While there is a distinct tendency toward relaxation of the strictness of the common law as regards pleadings, a plaintiff cannot successfully maintain an action in one form by averring facts establishing a valid cause of action if properly brought in another form. It is immaterial that the damages recoverable might be identical.”⁴⁹

46. As is evidenced by the learned text writer, who, in an effort to conform with judicial teachings, offers the following paragraph, in which the final two sentences flatly contradict the first two sentences: “The distinction between assumpsit and trespass remains. Despite the broad right to amend the form of action, the separate identity of the two actions requires the plaintiff to identify his action correctly. The label used, whether assumpsit or trespass, is of no importance. The court will examine the complaint in any case to determine the true nature of the action.” 1 GOODRICH-AMRAM § 1001-3.

47. *Little v. Dunbar*, 365 Pa. 277, 280, 74 A.2d 650, 651 (1950), quoting from the fine opinion of the Superior Court in *Bell Telephone Co. of Pa. v. Baltimore & Ohio R. R.*, 155 Pa. Super. 286, 289, 38 A.2d 732, 733-4 (1944): “Scarcely any procedural defect is viewed with greater tolerance by modern courts than errors in the form of the action. . . . If it is expedient, as a nod to formalism, the proper amendment will be considered to be made. . . .”

48. *Taylor v. Kaufhold*, 368 Pa. 538, 544, 84 A.2d 347, 351 (1951).

49. *Loch v. Confair*, 361 Pa. 158, 162-3, 63 A.2d 24, 26 (1949).

As might be expected, this schizophrenic view as to whether the wrong choice of action is a mortal or a venial sin has seeped down to the trial courts. In one case the court concluded that plaintiff's ingenious attempt to recover for his personal injuries in *assumpsit*, by charging a breach by defendant host of a promise of safe carriage, was not permissible, but it allowed plaintiff to amend to change the form of action to an action in trespass for a tort.⁵⁰ By this liberal decision nothing was lost except the time required to bring on defendant's objections to the form of action for argument, and the work caused the court in writing its 10 page opinion deciding that *assumpsit* was the wrong name to appear at the head of the pleadings.

A somewhat different view was taken in another case in which the owner of property had served notice on one in possession, with whom the owner had no contractual relation, that he would be charged a certain rate if he remained on the premises. Subsequently the owner sued in *assumpsit* to recover for rental and use and occupancy of the premises. The court held that no contract had been created by the notice to the occupier, and that he remained a trespasser, to be sued only in trespass. But no amendment changing the form of action was allowed. Instead the court said:

"The action should be discontinued and suit brought in trespass unless the parties by stipulation agree that the case may be continued as if brought in trespass."⁵¹

Assuming that the defendant, having thus far objected to the form of action, will not generously stipulate that the existing suit may be continued as if in trespass, the plaintiff is faced with, at best, the delay and expense of starting a new suit. If the statute of limitations on a trespass action happens to have run, or if the defendant has left the jurisdiction, one shudders to think of the plaintiff's sad plight.

The harshest kind of result being reached by the trial courts remains to be presented. Plaintiff had a reservation for a seat on a certain airplane flight. When he arrived at the airport, the airline refused to allow him to board the plane, explaining that through the negligence of a new clerk the seat had been sold to a second person. Plaintiff, substantially damaged by not being able to make the flight, sued the airline in trespass, charging negligence. The court concluded that the action should have been brought in *assumpsit*. This decision may well have been right—I leave such a determination to others better versed in the scope of the common-law forms; surely the question is

50. *Minnick v. Scheffy*, 31 North. Co. Rep. 323 (1948).

51. *Eisen v. Eisen*, 66 Pa. D. & C. 347, 348 (1949).

at least difficult and doubtful. It is the penalty imposed for this understandable error in choice of action which is shocking. The court refused to allow an amendment changing the form of action, saying:

"It is only those cases where there has been a waiver of the improper form of action that the courts have permitted amendment of the form of action. Defendant having taken timely advantage of defects in the form of action and we, having decided that plaintiff cannot maintain this action in trespass although he does have a cause of action sueable in *assumpsit*. . . ."

The court ordered dismissal of the action and judgment for the defendant.⁵²

Pennsylvania's retention of the forms of action in order to avoid a somewhat cumbersome phraseology in one rule would be difficult enough to justify if the only cost were the delay, the judicial waste motion, and the occasional unconscionable result indicated in the cases just discussed where plaintiff has chosen the wrong form. There is, however, another price, and one which is exacted even of the most historically-minded plaintiffs who know exactly which of the old forms is appropriate. This is the confusion and the added expense involved when these distinctions of form become intertwined with the joinder rules. The philosophy of joinder in Pennsylvania, we are told, is to allow the parties in one action "to adjudicate all rights growing out of a certain factual background."⁵³ This is, as will later be seen, more restrictive than the philosophy of joinder followed in modern pleading jurisdictions. In truth, it states only a minimum of joinder in Pennsylvania, for in *assumpsit* claims and counterclaims may be joined which arise out of entirely different factual backgrounds so long as the claims are contractual or quasi-contractual in nature.⁵⁴ Yet in many cases even this stated minimum is not achieved in Pennsylvania because of the preservation of the forms of action.

Consider this situation: a deadbeat tenant fails to pay rent; when the lease ends he leaves the apartment in a mess, with fingerpainting all over the wallpaper, cigarette burns in the carpeting, an expensive lamp smashed into a million pieces, and an antique chair missing. The fuming landlord storms to his lawyer, brandishing a copy of the lease in which the tenant had agreed to leave the apartment in as good condition as when he moved in. "Make that rascal pay," he demands.

52. *Hohensee v. Colonial Airlines, Inc.*, 75 Pa. D. & C. 347, 352 (1950). This horror is properly castigated in 1 *GOODRICH-AMRAM*, Anno. to § 1001-3.

53. 2 *GOODRICH-AMRAM* § 2255(d)-9. To the same effect, *see* *Reo Motors, Inc. v. Wolf*, 70 Pa. D. & C. 463, 467 (1950).

54. PA. R. CIV. P. 1020(a), 1031(a) (2).

I should hate to be the lawyer who has to explain to a seething client that making the rascal pay will require not one but two lawsuits. I should hate to have to give a good reason for the added expense and bother of a second lawsuit, when, for the life of me, I can think of none. Nor do I think that the rulemakers, who contemplated that one suit would be enough to settle all the controversies "growing out of a certain factual background," would care to assert that these various claims, for rent, for damage to the wall and carpeting, and for the destroyed lamp and the missing chair, grow out of different factual background. Yet two suits it must be. Why? Because the claim for rent is a claim in assumpsit, the claim for damage to the wall and carpeting is a claim for breach of the covenant to restore the premises to good condition and thus a claim in assumpsit, but the claim for destruction of the lamp and taking of the chair is a claim in trespass. This sad situation is not the hypothetical vamping of a law professor; it is a decision of a respected Court of Common Pleas.⁵⁵ Nor can the court be blamed; it is so clear under the Rules that assumpsit and trespass claims may not be joined that no other result would have been possible.⁵⁶

Preservation of the distinction between tort and assumpsit has also caused confusion, and departure from the principle of settling at one time all controversies arising from the same factual background, where counterclaims have been involved. Here, unlike the joinder of causes of action rules, there is nothing in the Rules themselves to prevent a claim in assumpsit and a counterclaim in trespass, or vice versa, so long as both claims arise from the same transaction or occurrence. A case arose in which a former member of a dissolved partnership sued in assumpsit seeking an accounting for his share of the profits due him under the dissolution agreement. The remaining partners asserted, by way of counterclaim, that plaintiff had used his name in such a manner as to mislead the public into thinking he was still with the partnership. These conflicting claims would seem to arise from a common factual background, and to be a part of the same transaction or occurrence or series of transactions or occurrences. Yet the Supreme Court refused to allow the counterclaim:

"It is sufficient to say that that claim rests in tort and cannot be made the basis of a counterclaim in an action of assumpsit. . . . It cannot, therefore, be said to have arisen, within the intendment of Pa. R. C. P. No. 1031 (a), . . . from the same

55. *Baker v. Connolly*, 23 Northumberland Legal J. 171 (1951).

56. 1 GOODRICH-AMRAM § 1020(a)-1: "There is no change in the prohibition against the joinder of contract and tort claims in the same suit." See PA. R. CIV. P. 1020(a), 1044.

transaction from which Clarence J. O'Brien's cause of action arose." ⁵⁷

Naturally enough the trial courts have followed in this same direction, and have disallowed trespass counterclaims in assumpsit actions, even where the factual connection has been closer than in the quoted case.⁵⁸

It would be bad enough that the courts have read into the Rules a limitation on counterclaims which they do not contain, and which is at variance with the philosophy of joinder intended by the rule-makers. Confusion is confounded, however, when it is discovered that in the converse situation—suit in trespass, counterclaim in assumpsit—no such limitation is made, and the counterclaim is allowed. Worse still, in one of these cases, decided after the Supreme Court's decision quoted above, the trial court said:

"This rule permits all counterclaims which arise from the same transactions or occurrences from which plaintiff's cause of action arises regardless of whether they sound in trespass or assumpsit." ⁵⁹

About this time the Minnesota lawyer turns with new appreciation to the Minnesota rule: "A pleading may state as a counterclaim any claim against an opposing party . . ." ⁶⁰

Although I think it would have greatly simplified Pennsylvania procedure to have merged assumpsit and trespass, this does not mean that a broader merger, an effective union of all the forms of action, both legal and equitable, would not have been desirable. Obvious considerations of space make it impossible to analyze the reasons for and against retaining the separate identity of the other actions. Nevertheless an example or two of the consequences of preserving these other distinctions may help to stimulate thinking about their continued vitality.

The owner of a house had allowed his wife's mother and sister to share the house with him. After the death of his wife, the owner wanted to remarry; while he was willing to continue to care for his

57. *O'Brien v. O'Brien*, 362 Pa. 66, 72-3, 66 A.2d 309, 312 (1949).

58. *Calandra v. Garfield Refractories Co.*, 32 Westmoreland L.J. 127 (1950) (the court saying that the claims arise from the same transaction); *Craig v. Thoroughgood*, 61 Pa. D. & C. 220 (1947).

59. *Reo Motors, Inc. v. Wolf*, 70 Pa. D. & C. 463, 467 (1950). The commendable decision to the same effect in *Jones v. Auto Rental Co.*, 63 Pa. D. & C. 207 (1948), distinguishes the cases in which the original claim was in assumpsit.

60. MINN. R. CIV. P. 13.02.

former mother-in-law, he asked his dead wife's sister to leave, claiming he needed more space. When she refused, the owner, on February 7, 1950, brought an action to get her out, styling it "an action to quiet title." The case came on with remarkable speed; on May 19, 1950, the court held, with obvious regret, that plaintiff had brought the wrong kind of action.⁶¹ An action to quiet title would not lie, for the defendant had no right, title, or interest in the property which could be quieted. Nor, said the court, could plaintiff use ejectment to get rid of the unwelcome guest, for ejectment is proper only where the plaintiff has been entirely ousted from possession. The proper remedy, plaintiff was told, was a special summary proceeding under the Act of March 31, 1905. Dutifully the plaintiff brought a new action, before an alderman as required by the 1905 Act. The decision here was in his favor, but an appeal by defendant brought the matter once more to the Common Pleas Court. After a wrangle over procedure, the court held that an appeal from an alderman under the 1905 Act was to be tried in the same manner as ejectment—and thus in the same manner as plaintiff had been told before the action could not be tried—and applying such a procedure to the case, the court granted judgment on the pleadings for plaintiff, and ordered the sister-in-law to leave immediately.⁶² Thus on January 19, 1951, the would-be bridegroom was finally allowed to get off this procedural merry-go-round and have his house to himself, with, presumably, a feeling of fervent gratitude that he had not had to follow this tortuous path through a court calendar more crowded than that of Lancaster County.

The preservation of the bifurcation between law and equity, where the difference is only one of remedy rather than of the nature of the action, also deserves thought. Suppose that at various times two parties have made two separate and unrelated contracts, and that one of the parties has breached both. The innocent party can bring one action and recover damages for both breaches.⁶³ He may bring one action and get specific performance of both contracts.⁶⁴ But if plaintiff happens to want specific performance of one contract and damages for breach of the other—and he would have no choice if, for example, one contract was for sale of land while the other was for personal services or for sale of a fungible—he must bring two suits. Joinder of legal and equitable causes of action is not possible. By way of strange contrast, a legal counterclaim can be interposed in an equitable

61. *Baehr v. Hagan*, 74 Pa. D. & C. 145 (1950).

62. *Baehr v. Hagan* (No. 2), 76 Pa. D. & C. 251 (1951).

63. PA. R. CIV. P. 1020(a).

64. PA. R. CIV. P. 1508.

action if defendant is willing to waive trial by jury,⁶⁵ although an equitable counterclaim is not allowed in a legal action.

Enough of one form of action; Pennsylvania patently does not have it—modern pleading jurisdictions do. This outsider, after examining what preservation of this “tradition . . . of proven merit” means in practice, is not convinced that Pennsylvania has made the wiser choice.

SIMPLIFIED PLEADINGS

While the Pennsylvania Rules on the pleadings proper were under consideration, the bar was asked to give thought to whether these rules should “. . . perpetuate by an improved codification the familiar principles of our present system of *fact-pleading* . . .” or whether they should embody “. . . a new system of *notice-pleading* . . .”⁶⁶ It is true that some judges who are not students of procedure have referred to the general statements allowed under modern pleading as “notice-pleading.” The truth is that the Federal and other modern pleading systems no more allow “notice-pleading,” in the sense in which that term has been traditionally used, than does the Pennsylvania system.

Let us get straight just what “notice-pleading” is, in order that we may be sure what modern pleading is not. “Notice-pleading” is a system in which the pleading, such as it is, simply makes a very general reference to the happening out of which the case arose and no attempt is made to state the details of the cause of action.⁶⁷ A complaint in such a system might say merely:

“Plaintiff demands \$10,000 damages for negligent injuries inflicted by defendant June 1, 1948 on University Avenue, St. Paul.”

In this country Virginia alone has made any wide use of such a procedure.⁶⁸ Nor is more widespread use of “notice-pleading” advocated by any responsible spokesman of the modern pleading systems.⁶⁹ In

65. PA. R. CIV. P. 1510.

66. Kenworthy, *The Proposed Pleading Rules*, 14 PA. B.A.Q. 210, 211 (1943).

67. The definition is from CLARK, *CODE PLEADING* 240 (2d ed. 1947), where such a system is criticized as probably too general and thus unacceptable.

68. *E.g.*, *Chisholm v. Gilmer*, 299 U.S. 99 (1936); Fowler, *Virginia Notice of Motion Procedure—a Case Study in Procedural Reform*, 24 VA. L. REV. 711 (1938).

69. Thus Judge Charles E. Clark, the principal draftsman of the Federal Rules, has carefully distinguished and rejected “notice-pleading.” Clark, *Simplified Pleading*, A.B.A. JUD. ADM. MONOGRAPHS, SERIES A, 100 (1942); CLARK, *CODE PLEADING* 225-245 (2d ed. 1947). See note 75 *infra*.

honesty I must say that my own thinking is that of "cynicism and despair as far as pleading is concerned,"⁷⁰ and that I would welcome the adoption of a system of "notice-pleading" in which it would be left to the discovery processes to produce all of the facts. This idiosyncrasy of mine is of importance only as emphasizing what anyone who has studied the matter must realize—modern pleading rules do require much more than mere notice. They require "fair notice of each material fact of the pleader's cause."⁷¹

How, then, does modern pleading differ from the historic system of "fact-pleading?" The difference is all one of the degree of generality which is to be permitted, and in practice the most important application of these differences of degree are that under modern pleading rules a party may allege general conclusions, while in fact-pleading systems he must steer his course between the Scylla of evidence and the Charybdis of conclusions and state only the "ultimate facts."

Take, for example, the form to be used in an automobile accident case, as set out in the official forms which are commonly appended to modern pleading rules.

"1. On June 1, 1948, in a public highway called University Avenue, in St. Paul, Minnesota, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

"2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

"Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs."⁷²

What more could be wanted, by the court or by the defendant, than this form, with its long common-law tradition,⁷³ provides? What possibly is gained by telling plaintiff that he must specify in detail the respects in which the defendant was negligent?⁷⁴ The form set out particularizes the claim to a running-down accident with the defend-

70. Michael, *The Basic Rules of Pleading*, 5 THE RECORD 175, 192 (1950).

71. CLARK, CODE PLEADING 232 (2d ed. 1947).

72. MINN. R. CIV. P. Form 8.

73. *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848 (1883); *Couture v. Gauthier*, 123 Me. 132, 122 Atl. 54 (1923); *Reichwein v. United Electric Rys. Co.*, 68 R.I. 365, 27 A.2d 845 (1942). And Blume, *Theory of Pleadings: A Survey Including The Federal Rules*, 47 MICH. L. REV. 297, 335 (1949), points out that the quoted form "does set forth enough to show that plaintiff has a legally sufficient claim against defendant."

74. Cf. *Keys v. Jones & Laughlin Steel Corp.*, 29 Wash. Co. Rep. 216 (1949); *Peterson v. Hauck, C.P. Montg. Co.*, Sept. Term, 1947, No. 56. Similarly with regard to damages, is anything gained by requiring, as in *Spittler v. Youngling Dairy Products Corp.*, 46 Sch. L. R. 144 (1949), that an allegation of a scar

ant's automobile while the plaintiff was on a certain street on a particular date; since the parties are unlikely to have had many accidents at this same time and place, a sound basis for *res judicata* is provided. This complaint makes it clear that the case is one in which jury trial will be appropriate. And it sufficiently identifies the kind of accident so that a trained mind immediately recognizes the kinds of misdeeds of which the defendant may have been guilty, and prepares himself to face charges of such kinds of conduct.⁷⁵

Suppose, however, that we regard this as too general a complaint, and demand that the plaintiff specify the respect in which defendant is thought to have been negligent. Two courses of conduct are then open to plaintiff. Relying on his own recollection of the few traumatic seconds between the time the defendant's car hove into view and its collision with him, plaintiff may attempt to specify some way in which he thinks defendant erred. If, at the trial, evidence develops that the defendant was not negligent in the way claimed, but was negligent in some other particular, are we to throw plaintiff's meritorious claim out of court for his failure to make the right guess? Unless we do, all the supposed value of a detailed specification of negligence is gone. But if we do throw plaintiff out—as a few distinguished courts have tried⁷⁶—we have done incalculable damage to the notion of deciding cases on their merits rather than on their pleadings. Moreover, we have achieved nothing in exchange, for such a decision will merely force pleaders to set out all the possible kinds of negligence which could conceivably apply, and, for good measure, a few which could not. That this is actually the course followed in Pennsylvania we have from no less an authority than Judge Kenworthy:

on plaintiff's face set forth its length, width, and exact location, that an allegation of "internal injuries" describe their type and nature, that an allegation of injury to the nervous system state whether the injury was permanent or temporary and functional or organic, and that an allegation that plaintiff was "partially confined" state the exact extent of the confinement and whether plaintiff was able to do any work or receive any earnings?

75. Clark, *Simplified Pleading*, A.B.A. JUD. ADM. MONOGRAPHS, SERIES A, 100, 106 (1942). And see Clark, Book Review, 47 NORTHWESTERN U.L. REV. 739, 740-1 (1952), criticizing the advocacy of "notice-pleading" at MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 193 (1952): "I still do think there is much to be said for the fair compromise of the rules. The present rule is in line with traditional habits of most well-informed lawyers and has thus proved its practicability; the pleading it envisages does give a considerable amount of valuable information for the case itself, for selection of the mode of trial, and for recognition and enforcement of the principle of *res judicata*; and the rule's comparative leniency avoids undue burdens and waste. These advantages are to be weighed against the complete indefiniteness of the seemingly attractive admonition of mere 'notice'."

76. E.g., *Frosch v. Sears, Roebuck & Co.*, 124 Conn. 300, 199 Atl. 646 (1938), finding, after verdict and on appeal, a fatal variance between a complaint that plaintiff stumbled over a tricycle left in the aisle and proof that she tripped over the handle bars of a tricycle which protruded into the aisle from under a counter.

"The pleader in a negligence case—and such cases constitute most of the litigation in this state—invariably avers all the grounds of negligence which, by any strength of his fertile imagination, could possibly apply, and he follows the same procedure when he sets forth the nature and extent of the personal injuries which his client has suffered. And when the defendant reads such a pleading, he knows little about what plaintiff will actually prove except perhaps the date and location of the accident. He learns about the facts of the case from his own investigation of it, including the report of a physician who has made an examination of the plaintiff." 77

What information is given, then, by requiring statement of "the material facts on which a cause of action or defense is based . . ." 78 rather than "a short and plain statement of the claim showing that the pleader is entitled to relief?" 79 How are the issues any more clearly defined?

This teaching is again emphasized by the procedure, unique to Pennsylvania, of a short-hand form of answer in trespass cases.⁸⁰ Three reasons are given for this special procedure. First, an answer might incriminate the defendant if the trespass is also the basis of a possible criminal action. This argument is patently nonsense.⁸¹ The second reason given, that probably defendant will plead lack of knowledge anyhow, can hardly be more than a makeweight. The real reason for this special practice in trespass seems to be the third reason which is given for it:

"As a practical matter, the general averments by way of defense disclose nothing of importance to the plaintiff because he knows exactly what the nature of the defendant's defenses will be." 82

This is a far more cynical and despairing view of the pleadings than the draftsmen of modern pleading systems have taken. Indeed it seems fair to say that when the pleadings have closed in a Pennsylvania trespass action, the parties and the court know surely no more—

77. Kenworthy, *The Proposed Pleading Rules*, 14 PA. B.A.Q. 210, 214-5 (1943).

78. PA. R. CIV. P. 1019(a).

79. MINN. R. CIV. P. 8.01(a).

80. See text at note 41 *supra*.

81. If the allegations of the complaint are not true, defendant can surely deny them without fear of incrimination. If they are true, he need merely remain silent and the allegations will be admitted *for purposes of the trespass action only*.

82. 1 GOODRICH-AMRAM § 1045(b)-1, which is based on a speech by Judge Robert Ralston, one of the draftsmen of the 1915 Practice Act which pioneers this procedure. 72 LEGAL INTELLIGENCER 814-5 (1915).

and quite possibly less—about how the tort occurred and what the issues are than they would know in any of the modern pleading jurisdictions.

The new Rules have achieved some important advances in Pennsylvania pleading. The strictures of a critic⁸³ induced the Committee to abandon a proposal by which defendant could have first demurred, then filed a petition raising defects in bar to which an answer by plaintiff and evidence would have been necessary; and then, if still unsuccessful, defendant could finally have filed an answer admitting, denying, or avoiding the allegations of the complaint. The Committee finally rejected this "meticulously scientific and logical system"⁸⁴ in favor of a requirement that all preliminary objections be raised at one time,⁸⁵ and there are indications that the trial courts are putting teeth into this time-saving procedure.⁸⁶ The specific listing of defenses which must be affirmatively pleaded will end much idle controversy, and is in accord with modern thinking; I have some doubt, however, as to the desirability of applying this so rigidly as not to allow the named defenses to be raised by demurrer or preliminary objections where the defect is readily apparent and will dispose of the case.⁸⁷ The provision of a new step in the pleadings, the counter-reply,⁸⁸ is contrary to the trend in other jurisdictions of lessening the number of pleadings allowed. The Committee, however, cannot be blamed for the application by a trial court of a doctrine of "negative pregnant" so silly—and so wasteful, since defendant was given leave to amend—that it is studied as a horrible example by law students throughout the country.⁸⁹

PRE-TRIAL DEVICES FOR GETTING AT THE MERITS

Modern pleading systems are based on the supposition that the pleadings alone will not disclose the merits of the parties' contentions or narrow the issues; instead, therefore, of a futile attempt to make them do so, the pleadings are deliberately left more general, and other

83. Graubart, *Baron Surrebutter Walks Again*, 14 PA. B.A.Q. 126 (1943).

84. 1 GOODRICH-AMRAM § 1028(b)-1.

85. PA. R. CIV. P. 1028(b).

86. *E.g.*, Yanko v. Donaldson, 65 Pa. D. & C. 341 (1948).

87. Compare the more rigid rule of Margolis v. Miller, 170 Pa. Super. 148, 84 A.2d 213 (1951); Jamison v. United Cigar-Whelan Stores, 68 Pa. D. & C. 121 (1949); and 1 GOODRICH-AMRAM § 1030-2, with the liberal view taken in Haskell v. Heathcote, 363 Pa. 184, 69 A.2d 71 (1949); and Ambers v. Gironde, 69 Pa. D. & C. 15 (1949).

88. PA. R. CIV. P. 1017(a).

89. Martin v. Barfield, 66 Pa. D. & C. 321 (1948), reprinted CLARK, CASES ON MODERN PLEADING 279 (1952).

devices which have been found to be more effective are substituted for finding the facts and the issues. The Pennsylvania Rules, by contrast, " . . . are drawn on the theory that the issues for trial can be narrowed through the use of sworn pleadings stating the facts which each side proposes to prove, and that the auxiliary processes of general discovery, interrogatories, requests for admission and summary judgment will not be needed."⁹⁰ Perhaps because of a sound hunch that, as shown in the last section, even in Pennsylvania pleadings do not accomplish as much as people like to imagine, the Pennsylvania Rules do provide all of these supposedly-needless auxiliary devices except summary judgments.

Pennsylvania provides, for example, authority for pre-trial conferences every bit as broad as that granted in other jurisdictions.⁹¹ It is impossible for one not on the scene to tell how pre-trial has been working in your courts. There is an early report indicating great accomplishments in Pittsburgh by use of this technique,⁹² a result perhaps not unrelated to the evidenced willingness of Pittsburgh judges to make broad use of the powers given them.⁹³ In Philadelphia pre-trial was for a time made compulsory in assumpsit actions, but this trial was seemingly not successful, for the rule so providing was later rescinded.⁹⁴ Judge Kenworthy suggests some unpopularity elsewhere,⁹⁵ but he indicates, as does Mr. Amram,⁹⁶ that the trouble with the pre-trial rule is that it does not give the court the power to compel disclosure by the attorneys or to make binding rulings on parts of the case which are not disputed. These problems are more a matter of discovery and summary judgment power, than of pre-trial. So far as the usefulness of the pre-trial conference itself goes, the Pennsylvania picture seems, so far as one can judge, to be that of experimentation, with everyone concerned reserving decision until this new procedure has become more familiar. Such a development is much like that which

90. 1 GOODRICH-AMRAM § 1017-1.

91. PA. R. CIV. P. 212.

92. McNaugher, *The Pre-Trial Court At Pittsburgh*, 6 U. OF PITT. L. REV. 5 (1939), reporting that 43½% of the cases heard at a pre-trial conference were finally disposed of at that stage.

93. Cf. *Abernathy v. Pittsburgh Press Co.*, 47 Pa. D. & C. 575 (1943).

94. Rule 234(1) of the Courts of Common Pleas of Philadelphia County, adopted Dec. 21, 1939, and rescinded Dec. 3, 1942. It is interesting that Philadelphia should have required pre-trial only in assumpsit cases, since federal judges who have conducted pre-trial conferences reported, on a questionnaire, that they found the device most helpful in negligence actions. ANN. REP. DIR. OF THE ADM. OFFICE, U.S. COURTS 72 (1941).

95. Kenworthy, *The Proposed Pleading Rules*, 14 PA. B.A.Q. 210 (1943).

96. 1 GOODRICH-AMRAM § 212-7.

other jurisdictions have undergone before finally becoming convinced of the merit of pre-trial and requiring its use in every case.⁹⁷

So far as the other pre-trial devices for getting at the merits are concerned, *i.e.*, discovery and summary judgment, the Pennsylvania development has been less typical. Particularly striking to the outsider are the limitations on discovery which require that leave of court be obtained before discovery may be had, and which restrict the scope of such discovery to matter which would be admissible as evidence at a trial, and which is necessary to prove a *prima facie* claim or defense of the party seeking discovery. These limitations are the more surprising because they seem to have been adopted over the objection of the organized bar, and because they do not seem to be well received by the judges. Indeed one wonders who in Pennsylvania, except the members of the Procedural Rules Committee, favored such limitations.

The history of your discovery rules is quite interesting. The rules, as adopted, are the third set proposed by the Committee, each more liberal than the last.⁹⁸ When the second of these proposals was made by the Committee in 1948, after a 1943 proposal had been scathingly criticized,⁹⁹ a Committee spokesman explained that one of the premises on which the rules were based was that: ". . . the ends of justice are not best served by giving every litigant the power to explore without restraint his opponent's case."¹⁰⁰ A few lawyers might quarrel with

97. Thus a former Federal trial judge says: "A number of judges who have with indifference or even reluctance adopted the practice of holding pre-trial conferences are now convinced that the time spent on them is time saved at the trial, multiplied many times." Duffy, J., in *Mead v. Cochran*, 184 F.2d 579, 582 (7th Cir. 1950). And see the following very balanced statement by an exceptionally able Minnesota trial judge who was asked what the effect of pre-trial has been in the 15 months it has been used in the crowded Minneapolis courts: "Pre-trial conferences are another means for trying to speed up our calendar situation. They bring opposing attorneys before the court informally for discussion free of most of the limitations of rules of evidence. If attorneys will cooperate with the court at these conferences, I certainly believe that parties will get better justice. Whether we are accomplishing speedier justice is hard to determine statistically in the few short months that pre-trials have been used. Pre-trial conferences take one of our judges away from the trial of cases. I feel certain that we save time for the parties involved in a particular lawsuit when they get to trial. Whether we save enough time for the entire court to make up for taking him out of the work of trying cases still has to be determined. I believe these conferences are helping." Hon. Leslie L. Anderson, Judge of Hennepin County District Court, in an unpublished radio script, "You and the Law," March 12, 1953. See also Van Cise, *The Colorado Rules of Civil Procedure*, 23 ROCKY MOUNT. L. REV. 527, 532-3 (1951); Note, *Calendar Congestion in the Southern District of New York*, 51 COL. L. REV. 1037, 1050 n.74 (1951); State v. District Court, 121 MONT. 320, 194 P.2d 256 (1948).

98. "We cannot ignore the history of these rules whereby the tentative drafts submitted to the bench and bar became increasingly more liberal until they reached their present form." *Klosterman v. Clark*, 78 Pa. D. & C. 263, 264 (1951).

99. Graubart, *Comments on Proposed Procedural Rules for Depositions and Discovery*, 16 PA. B.A.Q. 34 (1944).

100. Kenworthy, *Discovery Under the Proposed New Rules*, 20 PA. B.A.Q. 17, 23 (1948).

this, the spokesman noted, but the Committee felt sure that "the vast majority of our lawyers and judges will approve."¹⁰¹

This happy prediction was speedily confounded. After a committee, in a thoroughly researched and reasoned report, had damned the proposed rules as "wholly inadequate,"¹⁰² the Bar Association adopted the following resolution:

"Resolved, That the Pennsylvania Bar Association respectfully recommends to the Supreme Court of Pennsylvania and its Procedural Rules Committee that rules governing depositions and discovery substantially in conformity with those contained in the Federal Rules of Civil Procedure be adopted."¹⁰³

Though this did result in yet a third draft of rules even more liberal, which were finally adopted, no one would claim that the rules as adopted are "substantially in conformity" with the Federal Rules or other modern pleading rules.

The requirement that discovery shall be had only upon petition of a party and order of court¹⁰⁴ is particularly baffling. Criticized as "a tedious waste of time" by the Bar Association Committee,¹⁰⁵ its only effect would seem to be that of delay and idle argument at a stage in

101. *Ibid.*

102. *Report of Procedural Rules Comm. of Pa. Bar Ass'n*, 55 ANN. REP. PA. B. ASS'N 172 (1949). Judges, too, have evidenced doubts about so restrictive discovery rules. In addition to the cases cited on specific points, almost all of which call for a "liberal" construction of the rules, see the dicta of Judge Bok: "This is relatively new ground, possibly newer than need be because it is more restricted than the Federal procedure relating to discovery." *De Simone v. City of Philadelphia*, 78 Pa. D. & C. 433 (1951). See also the fine statement by Judge Flood in a decision in which he was compelled to hold that plaintiff could not get, by discovery, an advance statement of defendant's version of the collision: "There is a very considerable body of professional opinion that such a preview of a party's testimony, as provided for by the Federal Rules of Civil Procedure, is a very desirable thing. We agree with this view. . . . But the view was rejected by those who drafted and promulgated our Pennsylvania Rules of Civil Procedure relating to discovery." *Barlow v. Waples*, 82 Pa. D. & C. 1, 2 (1952). The only good word for the present discovery rules, except from their draftsmen, that I have seen is the student Note, *Some Observations on Discovery and Deposition Under the New Pennsylvania Rules*, 26 TEMP. L.Q. 299, 309 (1953). The moderately favorable conclusion this student draws comes after a helpful discussion in which he is almost uniformly critical of particular provisions of the rules, and in which he makes a good summary of the cases, which have been equally critical of the restrictive tendencies of the rules.

103. The resolution is set out at 55 ANN. REP. PA. B. ASS'N 99 (1949), and was adopted *id.* at 109. This expression of bar sentiment is consistent with the views of practicing attorneys throughout the country. I have elsewhere reported on a survey in which members of the bar in states with liberal discovery procedures were asked many questions on the expense and usefulness of discovery, culminating with the question: "Would you recommend that Minnesota and other states adopt the discovery process? 97—Yes; 1—Yes, if it is modified; O—No." Wright, Wegner & Richardson, *The Practicing Attorney's View of the Utility of Discovery*, 12 F.R.D. 97, 104 (1952).

104. PA. R. CIV. P. 4005-4013.

105. *Report of Procedural Rules Comm. of Pa. Bar Ass'n*, 55 ANN. REP. PA. B. ASS'N 172, 175 (1949).

the proceedings when it is least possible to give an accurate answer as to whether particular questions should be allowed. Thus it is that the trial courts seem uniformly to be allowing discovery if there is any possibility that the discovery sought may be proper;¹⁰⁶ having to give an advisory opinion before questioning has actually started, when there is little or no factual basis to judge the propriety of a particular line of inquiry, they could hardly do otherwise. The result is that an additional inconvenient and expensive appearance in court is required to take advantage of a procedure which its critics already denounce as inconvenient and expensive. Strangely there is no such requirement of permission from the court in order to serve a demand for an admission of the genuineness of a document;¹⁰⁷ even Mr. Amram finds this system "obviously superior."¹⁰⁸

Much more important is the restriction which prevents discovery that would disclose facts "not competent or admissible as evidence"¹⁰⁹ or "not necessary to prepare the pleadings or prove a prima facie claim or defense of the petitioner."¹¹⁰ It is this restriction, more than anything else in the Rules, which supports the charge of a local scholar: "In Pennsylvania a law suit is still to be a fight, a battle of wits" ¹¹¹ And it is of this restriction that Mr. Amram speaks when he notes that the prior practice did not operate fully to prevent surprise at the trial, and that this limitation "is designed to continue the prior practice without change in this regard."¹¹² Surprise, apparently, is another "Pennsylvania tradition . . . of proven merit."

Among the foremost tenets of modern pleading is that surprise should no longer be a permissible weapon in the lawyer's arsenal, that a party should have *all* the facts, no matter which side they favor, before coming to court, and that the rules of evidence, worthy as they may be at the trial of a case, should not bar a party from finding out where he can get admissible evidence. Even in states such as New York and Michigan, the first hopelessly reactionary in matters of procedure and the second only a little more modern, this fundamental

106. Cf. *Klosterman v. Clark*, 78 Pa. D. & C. 263, 264 (1951); *Regency Clothes, Inc. v. Progressive Clothes, Inc.*, 78 Pa. D. & C. 450, 451 (1951).

107. PA. R. CIV. P. 4014.

108. 3 GOODRICH-AMRAM § 4014-1.

109. PA. R. CIV. P. 4011(c) (2).

110. PA. R. CIV. P. 4011(c) (4).

111. Note, *A Discussion of the New Pennsylvania Rules Relating To Depositions and Discovery*, 55 DICK. L. REV. 252, 269 (1951).

112. 3 GOODRICH-AMRAM § 4011(c)-12. See Graubart, *Are We Afraid of Pre-trial Discovery*, 20 PA. B.A.Q. 166 (1949): "Every lawyer in Pennsylvania has tried at least one case which he lost because he did not have all the available evidence. Sometimes the missing evidence has been in his opponent's file; sometimes it has been in the knowledge of a witness whose name he did not have."

truth has penetrated, and has produced liberal court decisions repudiating the kind of restrictions which Pennsylvania, by rule, now imposes.¹¹³

There is a happier side to this story. Plaintiff brings a personal injury action, seeking to recover for lost earnings. Defendant wishes to get the facts as to plaintiff's earnings in the past. Are these necessary to prove a prima facie defense of the defendant, who is the party seeking discovery, and thus the "petitioner" within the meaning of the rule? I should hardly have thought so—proof of damages seems to me part of plaintiff's case but not of defendant's. Yet both judges to pass on this question have allowed such discovery.¹¹⁴ The result seems highly commendable; indeed in Minnesota we have gone to the extent of requiring plaintiffs in personal injury cases to produce their state income tax returns for the past five years, or, if they claim not to have copies, require them to authorize the Commissioner of Taxation to make these returns available to defendant.¹¹⁵ But of course in Minnesota we have not tried to retain the element of surprise in law suits.¹¹⁶

Take another case: a township brings an action to restrain defendant from practicing dentistry in an area zoned as residential. Defendant's answer raises the defense that his practice of dentistry is accessory to his use of the property as a bona fide residence. The township wishes to serve interrogatories asking how many nights in a given period defendant slept at the premises, how much time his family was there, and other similar questions. Are these proper under Rule 4011(c) (4)? Again I should have thought rather clearly not, since the township's prima facie claim is complete on a showing that the property is zoned residential and that defendant is practicing dentistry there. Yet again the court allowed the interrogatories, saying only that they were "pertinent to the issues involved."¹¹⁷

The temptation is great to look at these decisions and to say that the judges have read these restrictions, which I think unwise, out of

113. *E.g.*, *Vincent v. Van Blooys*, 263 Mich. 312, 248 N.W. 633 (1933); *Marie Dorros, Inc. v. Dorros Bros., Inc.*, 274 App. Div. 11, 80 N.Y.S.2d 25 (1st Dep't 1948). The holding of the latter case has recently been promulgated as a court rule. N.Y.R. Civ. P. 121-a, commented upon in 52 Col. L. Rev. 1071 (1952).

114. *Regency Clothes, Inc. v. Progressive Clothes, Inc.*, 78 Pa. D. & C. 450 (1951); *Dorfman v. Philadelphia Transportation Co.*, 79 Pa. D. & C. 380 (1952). These cases are approved at 3 GOODRICH-AMRAM §§ 4011(c)-4, 4011(c)-12 n.18.

115. The decisions are unreported, but are briefed at *Report of Court Rules Committee*, 10 BENCH AND BAR OF MINNESOTA 9 (1953). On the other side of the coin, some of our trial judges have been requiring defendant to produce his liability insurance policy. *Ibid.*

116. Under our rule discovery is permitted "whether it relates to the claim or defense of the examining party or to the claim or defense of any other party." MINN. R. Civ. P. 26.02.

117. *Lower Merion Twp. v. Hobson*, 79 Pa. D. & C. 385, 389 (1952).

the Rules. Such a judgment is premature, however, since the Rules are new, the decisions few, and the courts in the country not yet heard from. But these decisions do emphasize the futility of the restrictions which the Committee sought to impose. Will anyone really contend that the discovery should not have been allowed in the cases presented? Is there any real justification for trying to make the township in the zoning case wait until defendant has presented in court his evidence that he lives on the premises, and then hurry out to try and accumulate facts to refute such evidence? Or for making it similarly difficult for defendants in personal injury cases to meet the plaintiff's proof of damages?

Except in mandamus actions,¹¹⁸ the new Pennsylvania procedure makes no provision for summary judgments.¹¹⁹ This is the more surprising because the summary judgment procedure has been so widely adopted by states with all sorts of pleading—code, common-law, and modern;¹²⁰ indeed probably no state in the union has made more frequent and successful use of the summary judgment to dispose of phony claims and sham defenses than has Wisconsin,¹²¹ which does not have a generally modern pleading system. The need for summary judgments is especially great in Pennsylvania, where the old rule against the so-called "speaking demurrer" has been retained.¹²² Here the emphasis, already discussed in other contexts, on formal pleadings rather than on the real merits reaches its finest fruition. A plaintiff can bring a claim which, on indisputable facts, cannot possibly prevail,

118. PA. R. CIV. P. 1098.

119. Though the court speaks of a "summary judgment" in *Lacy v. East Broad Top Railroad & Coal Co.*, 168 Pa. Super. 351, 77 A.2d 706 (1951), it is apparent that it actually is referring to "judgment on the pleadings," a quite different—and less effective—procedure.

120. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 219-220 (1949), lists 28 jurisdictions with some form of summary judgment procedure. The figure should be taken with a healthy grain of salt, since Pennsylvania, on the basis of Rules 1037, 1071, 1084, 1098, is included on the list.

121. Wisconsin was among the first to allow summary judgment to either party in any kind of action. WIS. STAT. c. 270, § 270.635 (1951), first adopted in 1935. Further the court in that state has been liberal in allowing use of this procedure. *E.g.*, *Petrie v. Roberts*, 242 Wis. 539, 8 N.W.2d 355 (1943); Young, *The Work of the Supreme Court of Wisconsin, Pleading, Practice & Procedure, Evidence, Remedies* [1944] WIS. L. REV. 141, 161-2; Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 576 (1952).

122. *Lacy v. East Broad Top Railroad & Coal Co.*, 168 Pa. Super. 351, 77 A.2d 706 (1951); 1 GOODRICH-AMRAM § 1017(b)-11. A summary judgment rule, and particularly a provision like MINN. R. CIV. P. 56.04, which allows the court to specify the facts that appear without substantial controversy, is needed if pre-trial conferences are to have any real teeth in them, as urged by Judge Kenworthy and Mr. Amram. See text at 931 *supra*. On this interrelation of the pre-trial and summary judgment rules, see *Woods v. Mertes*, 9 F.R.D. 318, (D.C. Del. 1949); Anno., *Binding Effect of Court's Order Entered after Pretrial Conference*, 22 A.L.R.2d 599 (1952); Note, *Calendar Congestion in the Southern District of New York*, 51 COL. L. REV. 1037, 1050-1 (1951).

but he will have a trial; defendant will not be allowed to bring in any matter outside the pleadings to show that plaintiff has no right of recovery. Where plaintiff has a worthy claim, he must still wait his turn on the calendar and go to the expense of a trial in order to collect, save in the rare case where defendant has failed to draw down from his form book the appropriate stylized and purely formal allegations of an answer needed to create an apparent "issue."

Summary judgment procedure in modern pleading jurisdictions does not mean, as some have feared, "trial by affidavit." Judgment may be entered only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."¹²³ If the courts have erred in application of this test, it has been in leaning over backward to refuse summary judgment if there is any possibility of such an issue.¹²⁴ To say that a party has a right to a trial where there is no such genuine issue, and where, as a matter of law, the other party is entitled to judgment, is to exalt form over substance, at the price of expense and delay to the parties and additional business for already overworked judges.

Suppose, for example, that plaintiff brings a slander action, claiming that he did not hear the slanderous remark himself, but that defendant made it in the presence of two other people. Defendant and the two supposed hearers all swear that no such remark was ever made. What possible reason can there be for requiring a trial here when it is clear that the trial judge would have to direct a verdict for defendant at the close of plaintiff's case? It was so reasoned, and a summary judgment granted defendant, by two judges who have been most conservative in their allowance of summary judgments.¹²⁵ In Pennsylvania a trial will be had, for there is no procedure to dispose of the claim more expeditiously.

JOINDER OF CLAIMS AND PARTIES

I could write at great length on the always fascinating subject of joinder.¹²⁶ Actually the number of cases in which joinder could pos-

123. MINN. R. CIV. P. 56.03.

124. *E.g.*, *Klancher v. Anderson*, 113 Colo. 478, 158 P.2d 923 (1945); *Traylor v. Black, Sivalis & Bryson, Inc.*, 189 F.2d 213 (8th Cir. 1951); *Peckham v. Ronrico Corp.*, 171 F.2d 653 (1st Cir. 1948); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130 (2d Cir. 1945). See Melville, *Summary Judgment and Discovery: The Amended Rules Will Add to Their Usefulness*, 34 A.B.A.J. 187 (1948); Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 503-5 (1950).

125. *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952) (with opinions by L. Hand and Frank).

126. Indeed I have, 53 pages worth. Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580 (1952).

sibly be appropriate does not justify the central position which this subject has had in procedural reform; it is of importance, however, because it so well illustrates the fundamental thrust of modern pleading in the direction of speedy and economical disposition of controversies, and of achieving this end by broad discretion in the trial court rather than by detailed rule. Joinder is of interest, too, because here, perhaps more clearly than in other contexts, it is seen that the rules now so in vogue are an improvement on the past but not yet the final answer. The trend for the last century has been toward throwing off the ancient shackles, and making possible completely free joinder; for the future one can expect progress toward requiring joinder of similar claims and related parties.¹²⁷

The rules on joinder now in effect in the modern pleading systems are quite simple. Effectively unlimited joinder is allowed at the pleading stage, with discretion given to the trial judge to order separate trials for particular claims or issues "in furtherance of convenience or to avoid prejudice."¹²⁸ Surely this is as much as can be asked; if joinder of claims and parties, no matter how unrelated, seems desirable to one of the parties, and if this joinder will not prejudice anyone, nor cause the case to become too complicated for the jury to unravel, there can be no possible objection to such joinder. The trial judge, who can see how the case is to be tried and what the issues will be, is better able to decide what convenience and the avoidance of prejudice require than are the rulemakers when they try to make a detailed rule on the subject.

Pennsylvania has adopted a rather curious compromise on this subject. Your Rules give the trial court the needed discretion to order separate trials of separate issues where convenience or possible prejudice so indicate, in language almost identical with that used in the modern pleading systems.¹²⁹ Yet this discretion is actually of little importance, for the rules on joinder are so detailed and so restrictive that there must be very little occasion for the trial judge ever to exercise this power.

127. As in the popular rule *requiring* defendant to assert as a counterclaim any claim arising out of the same transaction or occurrence as plaintiff's claim. *E.g.*, FED. R. CIV. P. 13(a). This rule is now in effect in 16 states, two territories, and all the Federal courts. Only in Minnesota has there been doubt as to its usefulness. See note 164 *infra*. And see generally Blume, *Required Joinder of Claims*, 45 MICH. L. REV. 797, 812 (1947): "Judges have been appalled by the thought of trying in one action all claims which might arise from a major disaster. The writer is appalled by the thought of any other course." See also Note, *Joinder of Actions*, 40 KY. L.J. 105, 112 (1951).

128. *E.g.*, MINN. R. CIV. P. 42.02.

129. PA. R. CIV. P. 213(b).

Enough has been said in other parts of this paper to show the strange restrictions which limit joinder by a plaintiff of causes of action;¹³⁰ on the one hand, a claim for an injunction can be joined with an entirely unrelated claim for specific performance,¹³¹ while on the other hand, the landlord whose case we examined must bring two suits to obtain redress for the various harms inflicted by the deadbeat tenant.¹³² Another illustration of the trouble caused by trying to regulate joinder at the pleading stage involves the counterclaim rule. Plaintiff sued for the wrongful attachment by defendant of plaintiff's truck on February 13; defendant counterclaimed charging that on February 2 plaintiff had wrongfully attached defendant's automobile. In a decision particularly forceful because it is from the pen of one of America's greatest living judges, a motion to strike the counterclaim was granted, on the ground that it had not been shown that the two wrongs arose from the same series of transactions or occurrences.

"Merely because two people separately attach each other's property does not mean that they are at odds over the same thing. . . . My conclusion is that Pa. R. C. P. 1046 was not intended to allow two parties to try in one suit every cause of action that exists between them, connected or not, but rather to try in one suit all claims and phases that grow out of a single cause of action. If it were otherwise, confusion would be confounded."¹³³

I do not suggest that this decision is necessarily wrong—it may well be that the two attachments were entirely unrelated, and that confusion would have been confounded by trying them together. My objection is to a system which demands that this decision be made on the pleadings alone, and thus at a time and on a record from which no one can possibly tell whether the joinder would be in the interest of fair and expeditious disposition of litigation. It is quite possible—indeed the proximity in time of the two attachments tempts me to use stronger language—that the wrongs claimed here may turn on but one controversy between the parties. If this is so, then the solution of this controversy should be enough to dispose of both claims, and the niceties of "what is a cause of action" should not bar settlement of the matter in one lawsuit. If it should turn out the other way, if it should appear after discovery and a pre-trial conference that the claims do turn on issues so different that they could not conveniently be litigated

130. See text at note 21 *supra*.

131. Pa. R. Civ. P. 1508.

132. See text at note 55 *supra*. *Baker v. Connolly*, 23 Northumb. Legal J. 171 (1951).

133. *Bok, P.J., Watkins Produce Co. v. Kanitsky*, 68 Pa. D. & C. 198, 199-200 (1949).

at one trial, the judge could then use the power given him by the Rules to order separate trials of the separate issues. What sense is there in absolutely barring the counterclaim at the outset because of the chance that it might later be necessary to order a separate trial of it?

Again what advantage is there in preservation of the common-law rule that a counterclaim must be for all the defendants and against all the plaintiffs in the same capacity in which they are joined on plaintiff's claims?¹³⁴ It may be that allowing a counterclaim that does not meet this test will be inconvenient or prejudicial, but whether this will be true in a particular case cannot be told until the case has arisen and the issues in it have been discovered.

The counterclaim rules have some strange quirks which result from the Committee's attempt to provide detailed regulation by rule. Suppose again the case previously considered, where the parties have made two entirely distinct and unrelated contracts. We have previously seen that the plaintiff may join claims for breach of the two contracts, whether he sues for damages¹³⁵ or specific performance.¹³⁶ Further, if plaintiff asks damages for breach of one of the contracts, defendant may counterclaim for damages for breach of the other contract.¹³⁷ But if plaintiff asks for specific performance of one contract, defendant cannot assert any counterclaim on the other contract, for this does not arise from the "same transaction" as plaintiff's claim.¹³⁸

The Pennsylvania rules on joinder of parties¹³⁹ are unobjectionable; they allow a very broad joinder, in terms almost the same as in the modern pleading jurisdictions, and to date they seem to have been liberally interpreted.¹⁴⁰ One caveat needs to be noted: in the pages of procedural history, there is hardly any story as sad as that of bold and liberal provisions for joinder of parties being restricted by older and more confining rules on joinder of causes of action. The classic case is the decision of the New York Court of Appeals in *Ader v. Blau*.¹⁴¹ In that case one defendant was charged with negligence in

134. Compare *Dickerson v. Dickerson Overseas Co.*, 369 Pa. 244, 85 A.2d 102 (1952) with *Abraham v. Selig*, 29 F. Supp. 52 (S.D.N.Y. 1939); *Alpaugh v. Battles*, 235 App. Div. 321, 257 N.Y. Supp. 126 (1st Dep't 1932).

135. PA. R. Civ. P. 1020(a).

136. PA. R. Civ. P. 1508. But he may not ask for damages for breach of one contract, and specific performance of the other. See text at note 64 *supra*.

137. PA. R. Civ. P. 1031.

138. PA. R. Civ. P. 1510.

139. PA. R. Civ. P. 2227-9.

140. E.g., *Sarfert Hosiery Mills, Inc. v. Parayarn Co.*, 75 Pa. D. & C. 58 (1950); see *State Employees' Retirement Board v. Dumbauld*, 59 Dauph. Co. Rep. 446, 454 (1948).

141. 241 N.Y. 7, 148 N.E. 771 (1925). There is a wealth of law review comment on this case; it is collected at CLARK, CODE PLEADING 439, 440 (2d ed. 1947).

having erected a dangerous iron fence, on which plaintiff's intestate was impaled, while a second defendant was charged with having caused the death by negligent treatment of the injured youth. The court, over a dissent by Judge Cardozo, held that the rules on joinder of defendants were limited by the older rules on joinder of causes, that the claims against the two defendants constituted two causes of action, and that these were not causes "arising out of the same transaction or transactions connected with the same subject of action." Thus the joinder was found to be improper. Though a different result could have been reached in that case,¹⁴² the restrictive decision actually handed down dealt joinder in New York a blow from which it took 24 years, several legislative revisions, and finally a liberal decision of the Court of Appeals, to recover.¹⁴³

He would be a bold soul indeed who would predict that *Ader v. Blau* would be differently decided in Pennsylvania, for all the elements which produced that decision are present in your state. The Pennsylvania rules on joinder of parties are almost identical with the statutes then in force in New York, while the rule on joinder of causes in trespass¹⁴⁴ is, if anything, more restrictive than was the New York statute. A number of Pennsylvania decisions evidence a very narrow understanding of the concepts "cause of action"¹⁴⁵ and "same transaction."¹⁴⁶ There is a Common Pleas decision allowing joinder in a situation analogous to *Ader v. Blau*;¹⁴⁷ until such a holding has been approved by the Supreme Court, there can be no assurance that your fine new party joinder rules will not be emasculated by your restrictive rules on joinder of causes of action.

There are no very great differences between the Pennsylvania rules providing special devices of party joinder, such as class suits, intervention, and interpleader, and the rules in the modern pleading

142. *Kraft v. Smith*, 24 Cal.2d 124, 148 P.2d 23 (1944); cf. *De Groot v. People's State Bank of Reeseville*, 183 Wis. 594, 198 N.W. 614 (1924); *Adderton v. Aetna Casualty & Surety Co.*, 182 S.C. 465, 189 S.E. 736 (1937), disapproved 85 U. OF PA. L. REV. 843. *Contra*: *Grady, Recr. v. Warren*, 201 N.C. 693, 161 S.E. 319 (1931).

143. See *Cark and Wright, The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346, 357-9 (1950).

144. PA. R. CIV. P. 1044.

145. *E.g.*, *Land Title Bank & Trust Co. v. Cheltenham Nat. Bank*, 362 Pa. 30, 68 A.2d 768 (1949); *Volta v. Markovitz Bros.*, 351 Pa. 243, 40 A.2d 388 (1945); *Pennsylvania R.R. v. Myers*, 67 Pa. D. & C. 430 (1949). *But cf.* *Bollin v. Elevator Construction & Repair Co.*, 361 Pa. 7, 63 A.2d 19 (1949).

146. *E.g.*, *O'Brien v. O'Brien*, 362 Pa. 66, 66 A.2d 309 (1949); *Watkins Produce Co. v. Kanitsky*, 68 Pa. D. & C. 198 (1949).

147. *McCaslin v. Bell*, 71 Pa. D. & C. 620 (1950), allowing joinder of the owner and operator of the car which struck plaintiff, and two repairmen who made repairs to plaintiff's car which might have caused the accident. Lest too much weight be given this decision, it should be noted that the New York lower courts also allowed liberal joinder until the Court of Appeals slapped their fingers in *Ader v. Blau*. CLARK, CODE PLEADING 439 n.15 (2d ed. 1947).

jurisdictions. The Pennsylvania rules providing for what we call "impleader" or "third party practice" and what you call "joinder of additional defendants" are especially admirable. The most striking and important feature of the Pennsylvania rules on this subject is that which allows joinder of a third party who may be "alone liable or liable over . . . or jointly or severally liable" ¹⁴⁸ Most modern rules allow defendant to implead a third party only if the third party "is or may be liable to him for all or part of the plaintiff's claim against him." ¹⁴⁹ Thus it is not possible in most states, as it is in Pennsylvania, to bring in someone who is thought to be liable to the plaintiff, rather than merely liable over to the defendant. Most states preserve the right of the plaintiff to choose which of a number of possible defendants he will sue; this deference to plaintiff's whim can have serious consequences to the defendant who is barred in this way from getting contribution from a joint tortfeasor, ¹⁵⁰ or who is put under the handicap of trying to convince the jury that someone else is responsible for plaintiff's injuries, without having this third party in the case where the jury can assess the blame against him. ¹⁵¹

Among the other excellences of the Pennsylvania impleader rules is that they allow impleader as of right; no leave of court is required and the impleader, if timely, cannot be refused on any ground. ¹⁵² In other jurisdictions it is usually discretionary with the court whether to allow impleader. ¹⁵³ Such a provision is especially unsound because it requires the trial court to exercise this discretion at the time of serving the third-party complaint, when decision is in a vacuum, rather than after the third-party defendant has answered, or raised his own objections to being brought into suit, at which time it could be much better seen whether the impleader will complicate or delay the litigation. ¹⁵⁴ Also worthy of favorable note is the holding that a defendant

148. PA. R. CIV. P. 2252(a), 2255(d).

149. *E.g.*, MINN. R. CIV. P. 14.01.

150. *E.g.*, *Fox v. Western New York Motor Lines, Inc.*, 257 N.Y. 305, 178 N.E. 289 (1931); *Brown v. Cranston*, 132 F.2d 631 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943).

151. This disadvantage is well discussed in a case which, however, does not involve impleader. *Way v. Waterloo, C.F. & N.R.R.*, 239 Iowa 244, 257-8, 29 N.W.2d 867, 874 (1947), 27 NEB. L. REV. 590 (1948).

152. 2 GOODRICH-AMRAM § 2252(a)-1.

153. *General Taxicab Ass'n v. O'Shea*, 109 F.2d 671 (D.C. Cir. 1940); Commentary, *Discretion of Court on Motion to Implead*, 2 FED. RULES SERV. 648 (1940).

154. I have suggested that courts should allow impleader as of course, leaving it to a later motion to strike service of the third-party complaint to test whether the impleader is worthwhile. Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 612 (1952). It has recently been held, however, that such a motion to strike would amount to a rehearing of the court's order allowing impleader, and that it is, therefore, improper. *Texas Eastern Transmission Corp. v. Standard Acc. Ins. Co.*, 13 F.R.D. 324 (M.D. Tenn. 1953).

and the third party he impleads are truly adverse parties, and that the original defendant must be prepared to state his whole case against the third party when he impleads him, and to enter a claim at that time for all the relief to which he may be entitled arising out of the cause of action upon which the suit was originally brought.¹⁵⁵

Unfortunately all is not sweetness and light even in these outstandingly fine rules on impleader. Trouble comes from the restrictive definition of "cause of action" which has led to a prohibition against impleader of an express indemnitor or insurer,¹⁵⁶ though impleader is allowed where the duty to indemnify arises by operation of law.¹⁵⁷ Nothing in the Rules themselves bars impleader of defendant's insurer, and a commentator admits that the real reason why such impleader will not be allowed is "the Pennsylvania policy prohibiting the disclosure in personal injury cases of the fact that the defendant is insured."¹⁵⁸ Yet in other jurisdictions, where this policy is no less strong than in Pennsylvania, impleader of the insurer is invariably allowed.¹⁵⁹ The problem can arise, after all, only when the insurer has refused to defend the action, since if it is conducting the defense it is hardly likely to implead itself. Impleader in such a circumstance surely does not prejudice the plaintiff, and if the defendant thinks he would be prejudiced thereby he has his remedy in refusing to bring in the third party. The only party possibly prejudiced is the insurer, which has already breached its contract by which it had agreed to defend the action;¹⁶⁰

155. *Simodejka v. Williams*, 360 Pa. 332, 62 A.2d 17 (1949), approved 10 U. OF PITT. L. REV. 421. The criticism of this case at GOODRICH-AMRAM, ANNO. to § 2252(b)-1, seems to ignore the desirability of settling at one time all controversies arising out of the same factual sequence, the goal which is lauded at 2 GOODRICH-AMRAM § 2255(d)-9.

156. *Volta v. Markovitz Bros.*, 351 Pa. 243, 40 A.2d 388 (1945); *Pennsylvania R.R. v. Myers*, 67 Pa. D. & C. 430 (1949); *Scott Grosse v. Krall*, 41 Luz. Legal Reg. Rep. 380 (1951); *Globe Electric Repair Co. v. Eagle Ind. Co.*, 99 Pitt. Legal J. 533 (1951); 2 GOODRICH-AMRAM § 2252(a)-7. But cf. *Turberville v. West Penn Water Co.*, 60 Pa. D. & C. 557 (1947); *Bollin v. Elevator Const. & Repair Co.*, 361 Pa. 7, 63 A.2d 19 (1949), approved 10 U. OF PITT. L. REV. 594, where it is claimed that this case silently overrules *Volta v. Markovitz Bros.*, *supra*.

157. *In re Hannan*, 52 Pa. D. & C. 160 (1944); 2 GOODRICH-AMRAM § 2252(a)-7.

158. 2 GOODRICH-AMRAM § 2252(a)-7. Compare Amram, *The New Procedural Rules*, 47 ANN. REP. PA. B. ASS'N 409, 416 (1941): "I have been told by lawyers from other states that they consider Pennsylvania somewhat medieval in the way it carefully protects insurance companies who carry casualty insurance in connection with automobile litigation. . . ."

"Those of us who try jury cases know that most jurymen, in passing on automobile cases, are rather inclined in the jury room to discuss first the question as to whether or not they think the defendant is insured, before they discuss the question of liability and damage."

159. I have collected the cases, and analyzed the problem in detail, at Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 615-7 (1952).

160. See *Jordan v. Stephens*, 7 F.R.D. 140, 142 (W.D. Mo. 1945). Even the prejudice to the insurer may be an imaginary horrible. See the sophisticated Com-

if there is any fear of prejudice to the insurer, the power to order separate trials of separate issues provides sufficient protection.

CONCLUSION

Analysis of the Pennsylvania Rules of Civil Procedure, and the decisions in which they have been applied, has shown some unusual tendencies: cases are being decided on pleading technicalities rather than on their merits; surprise has been retained as a weapon of shrewd counsel; the pleadings are asked to accomplish certain functions which experience in Pennsylvania, as elsewhere, shows that they cannot successfully do; joinder is still regarded as a matter of pleading, rather than of trial management to be left to the discretion of the judge. These tendencies cannot help but be dismaying to an outsider who has seen in his own state the improvement which has resulted from movement in the opposite direction.

Yet, as I promised at the outset, I do not urge you in Pennsylvania to adopt the Minnesota Rules or the Federal Rules or any other set of rules. I would not so urge even if I were sufficiently acquainted with Pennsylvania needs and problems to judge intelligently what procedure is best adapted to your courts. There are those who think that you would be well advised to make your local practice uniform with that which prevails in the federal courts in your state;¹⁶¹ I would regard such uniformity as barren and stultifying.

The one lesson of transcending importance to be drawn from the whole history of procedural reform has been well stated by that science's most distinguished votary:

" . . . no system of pleading yet devised may be considered final . . . unless pleading rules are subject to constant examination and revaluation, they petrify and become hindrances, not aids, to the administration of justice."¹⁶²

I have great confidence in, and respect for, the members of the Advisory Committee to the United States Supreme Court, who were charged with the preparation of the Federal Rules, and the amendments thereto, but I am sure that they would be the first to urge that they not be the

ment, *Estoppel, Third Party Practice, and Insurer's Defenses*, 19 U. OF CHI. L. REV. 546, 552-6 (1952), which argues persuasively that it will be in the insurer's interest to be impleaded.

161. Note, *The Bar Favors Uniform State and Federal Rules of Civil Procedure*, 18 TEMP. L.Q. 145 (1943).

162. CLARK, *CODE PLEADING* 60 (2d ed. 1947). See also Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 507-8 (1950).

only ones to carry on this process of "constant examination and revaluation," and that they be helped by independent Rules Committees in each state. One of the real advantages of a federal system of government is that it provides 48 laboratories in which to experiment with judicial procedure, as with all other branches of civil government.

Examples of this thesis, that experimentation by individual states may be helpful to all, are so numerous that only a few can be stated. Modern pleading itself is essentially a codification of a number of different procedures which various states had tried and found good. The committee which prepared the very recent Nevada Rules modelled one of these, not on the corresponding Federal rule, but on the rule adopted in Minnesota; yet in doing so it made a change which provides, I think, a more satisfactory solution than that which had been achieved in either the Federal or the Minnesota systems.¹⁶³ In my state we are about to try a fourth different form of the compulsory counterclaim rule.¹⁶⁴ Even this, I think, will not be the final answer: when we do achieve a satisfactory solution of this problem, it will be because the lawyers have learned for themselves from experience what works best, rather than accepting someone else's dogma. In Pennsylvania you have made similar frequent changes in the rules governing third party practice;¹⁶⁵ by such a process you have arrived at a rule which is, in many respects, better than that to be found in other jurisdictions.

Of course there is a corollary to this proposition that experimentation in procedure is desirable: when a number of jurisdictions have demonstrated that a new technique works well, other states should

163. Compare NEV. R. CIV. P. 81(a), and the Advisory Committee Note thereto, with FED. R. CIV. P. 81(a), and MINN. R. CIV. P. 81.01.

164. The original draft of the Minnesota Rules required a claim to be pleaded as a compulsory counterclaim if it arose out of the "transaction or occurrence" from which plaintiff's claim arose. The critical phrase was then changed to "contract or transaction," and finally to "transaction," the form in which the rule now stands. For this history see Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 587-591 (1952). The Bar Association's Court Rules Committee has now recommended that the key phrase be changed back to "transaction or occurrence," but that a proviso be added to the effect that the claim need not be pleaded as a compulsory counterclaim if defendant has any contract indemnifying him against liability for all or part of plaintiff's claim against him. It may be suggested that Minnesota has ignored the very favorable experience with compulsory counterclaims in all kinds of litigation in a score of other jurisdictions and to some extent I agree with this criticism. The answer of the Minnesota rulemakers would be that they have been impressed with the sad results of requiring counterclaims where defendant is represented by an insurance company lawyer, as shown in such a case as *Keller v. Keklikian*, 362 Mo. 919, 244 S.W.2d 1001 (1951); cf. *Ross v. Stricker*, 153 Ohio St. 153, 91 N.E.2d 18 (1950). But the result reached in the cases thought so horrible has also been reached, on grounds of estoppel, in a state which has no compulsory counterclaims. *Kelleher v. Lozzi*, 7 N.J. 17, 80 A.2d 196 (1951).

165. 2 GOODRICH-AMRAM § 2251-1; 3 MOORE'S FEDERAL PRACTICE § 14.22 (2d ed. 1948).

accept that experience and that finding in the absence of any compelling local problem. The creative scientist does not waste his time duplicating experiments which others have successfully performed. Similarly Rules Committees should not be induced, by that xenophobia with which lawyers customarily view the practice of other jurisdictions,¹⁶⁶ to ignore the record of successes¹⁶⁷ and of failures¹⁶⁸ which particular reforms have made in other places. To the extent that particular concepts and rules have worked well in other places and are adaptable to Pennsylvania necessities, and to that extent only, would I suggest that your Committee consider modelling your practice on such other rules. The indications discussed earlier that there was strong bar sentiment in Pennsylvania favoring more drastic reform seem to support my own feeling that your state could profitably adopt rules considerably closer to those of the modern pleading jurisdictions than so far you have done. Certainly, too, your experience would be more helpful to procedural reformers in other jurisdictions if you had adopted at least the framework of modern pleading; in most instances nothing significant can be learned by study of your rules because they presuppose an emphasis on medievalisms which most jurisdictions have long since rejected.

In the course of this study I have been particularly impressed by the Pennsylvania rule which allows impleader of a third party who is alone liable to the plaintiff;¹⁶⁹ if continued experience with this rule in Pennsylvania is as successful as it seems to be to date, I would hope that Minnesota might profit from that experience and make a corresponding provision in its rules. Similarly I should hope that lawyers and scholars in Pennsylvania will study our experience in allowing impleader of defendant's insurer;¹⁷⁰ perhaps you will conclude

166. The classic example is the study in *MORGAN et al.*, *THE LAW OF EVIDENCE* c. 3 and App. A-D (1927); lawyers of New York, Connecticut, and Massachusetts, questioned with respect to the three strikingly different attitudes toward the admissibility in evidence of declarations of deceased persons, all believed firmly that only the attitude of their own jurisdiction was sound. *Dellefield v. Blockdel Realty Co.*, 128 F.2d 85, 93 (2d Cir. 1942). Compare Cardozo, J., in *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111, 120 N.E. 198, 201 (1918): "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."

167. As I think may have been true of the Pennsylvania Procedural Rules Committee in not providing for summary judgment. See text beginning at note 118 *supra*.

168. As I think may have been true of the Pennsylvania Procedural Rules Committee in overlooking the possibility that their joinder rules might be subjected to such a restrictive interpretation as were the similar New York rules in *Ader v. Blau*. See text at note 139 *supra*.

169. See text at note 148 *supra*.

170. See text at note 159 *supra*.

that your practice would be improved by allowing such impleader. What is needed, above all, in procedural reform is such a willingness to learn from others, and to reexamine local practices with a fresh viewpoint, rather than one inhibited by years of habit. It is to such a process in Pennsylvania that I hope this paper may contribute.