

## A REPLY TO PROFESSOR WRIGHT

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I am grateful for the offer of the Editors of the *Review* to comment on Professor Wright's provocative article. First, may I express my appreciation on behalf of the entire Pennsylvania Bar to him for having taken the time and engaged in the exhaustive research necessary to prepare the pungent and constructive criticism of our pre-trial procedure.

The product of any reform movement, whether it be in the field of procedural law or substantive law or politics, is bound to be affected by the strength or weakness of the opposition to it. Like the street car motorman who was asked by an impatient passenger if he couldn't go a little faster and who replied, "Yes, but I can't leave my car," the reformer who goes too fast travels an ineffectual course alone.

Our Bar is not only "distinguished and scholarly" as so graciously conceded by Professor Wright, but perhaps partly because of its scholastic eminence, it is more conscious of "established Pennsylvania traditions" than lawyers of some other states. There is no doubt that Pennsylvania lawyers look upon their established traditions with considerable pride and admiration. This has been particularly true in the field of procedural law. It must be borne in mind that procedural reform began for us in 1887. The Practice Act of 1915 was considered an extremely modern innovation. By the time our Procedural Rules Committee began its labors in 1939, most Pennsylvania practitioners were more than satisfied with the practice under it. Our third-party procedure which Professor Wright admires so much dates back to 1929.

Our Committee began its work in an almost completely hostile climate.

Professor Wright could not be expected to know these things. Quite excusably, he has been misled by the published criticisms of Miss Graubart, who has vocally and effectively presented the point of view of a small group of Philadelphia and Pittsburgh lawyers, and the inconclusive and non-representative resolution adopted by the State Bar Association.

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The fact that only forty-five of the thousands of lawyers who received copies of the 1943 draft of discovery rules submitted written criticisms to the Procedural Rules Committee is but a superficial and completely erroneous indication of apathy. By 1942, the word-of-mouth hostilities had reached such proportions that the President of the Bar Association appointed a special committee, of which Albert C. Hirsch of Pittsburgh was Chairman, whose function was to serve as a sort of vigilante committee.

In order to counteract the impression that the Procedural Rules Committee was promulgating ill-considered and unnecessary reforms, we invited the members of the Bar Association Committee to sit in on our deliberations. For a while, and until they lost interest, we complied with the request that this vigilante group have submitted to them all preliminary drafts of rules so that they would be in a position to nip in the bud these reckless reforms. By 1943 or 1944, the lawyers throughout the state had done so much ear-bending of the members of the Supreme Court that Chief Justice Maxey consulted Judge Kenworthy about the desirability of holding a special session of the court so that the opponents of procedural reform might have a public hearing. The resistance went to the point that a bill was introduced in the legislature providing for the abolition of the Procedural Rules Committee and the repeal of all of the rules which had been adopted by that time. It became necessary for Judge Kenworthy to appear before the Senate Committee in charge of the bill to prevent it being favorably reported.

For at least six years after the work of the Committee began, the individual members of the Committee were constantly engaged before local bar associations and less formally organized groups of lawyers in the defense of the Committee's program. The keynote of that defense was codification and reform, but always with loyalty to "established Pennsylvania traditions which are of proven merit." None of us, and I speak from personal experience, found any evidence of "the strong bar sentiment . . . favoring more drastic reform."

The compromises with modernism which Professor Wright describes were thus born of necessity.

Against this backdrop of history, I shall address myself to a few of the basic criticisms made by Professor Wright.

#### GENERAL PRINCIPLES

To begin at the end of Professor Wright's article, I express my full agreement with his basic conclusions:

(a) no system of pre-trial procedures is ever perfect or complete; experimentation and change are implicit in and essential to good judicial administration.

(b) our rules are far from perfect; revisions and amendments will always be in order, as experience discloses deficiencies and the need for improvement.

(c) we can profit by the experience of other jurisdictions, and should be willing to borrow freely from them.

I might add other conclusions of equal importance:

(a) no system of rules and no clarity of draftsmanship can prevent individual bad decisions, which ignore or misconstrue the rules; condemnation of a system on this basis rests on a feeble foundation.

(b) the only sound basis for criticizing a system of pre-trial procedures is to see how well or how badly it achieves in actual practice its fundamental purpose.

(1) does it make clear in advance of trial what is admitted and what is contested, what must be prepared for proof at trial and what need not be prepared?

(2) is each side sufficiently well informed on all the facts so that surprise at the trial, and the miscarriage of justice which may flow from surprise, are reduced to a minimum?

(3) can cases be disposed of in advance where there are no issues of fact to be tried, and where a trial would be a waste of time and effort?

(4) is it efficient and economical of time, effort and expense?

#### THE SPECIAL PLEADING IN TRESPASS

The bulk of the first part of Professor Wright's article relates directly or indirectly to the local peculiarity of the answer in trespass. The problems of merger of forms of action, joinder of causes of action, counterclaim and form of pleading which he analyzes, all relate back in some degree to the unique defense pleading.

Not only has this been a standard feature of Pennsylvania pleading since 1915, almost forty years, but the Supreme Court instructed

the committee (the only instruction, by the way, that it has ever specifically issued) not to propose any change in this system in preparing its pleading drafts. This admonition was followed.

It is easy to prove, as Professor Wright has shown, that the special trespass rule is not completely logical or scientific. I agree that the various arguments and explanations that are offered to support it are weak. But has the rule done any real harm, as a practical matter? Has it produced confusion, injustice, or delay in the trial of negligence cases?

The new pleading rules have been in effect for over five years. Has there been one voice lifted in the State demanding the abolition of the trespass pleading rule and pointing out the injustices flowing from it? If so, I have not heard it. This is the more curious, since some of the ablest lawyers in Pennsylvania make up the plaintiffs' negligence bar. If the defense pleading rule harmed them effectively; if they were troubled in the preparation of their cases; if they spent unnecessary time and effort in useless preparation; if surprise at the trial was rampant, the Committee would certainly have heard of it, and forcefully, long before this.

The problem is, I think, something like that of the United States Government. Any good political scientist can, like Lord Bryce, prove that our Constitution is designed to produce a theoretically unworkable federation. Yet it does work. Similarly, any good procedural expert, like Professor Wright, can prove that our trespass pleading rule must result in confusion and injustice. Yet it doesn't. And, since the proof of a procedural system is in its practical operation, I do not feel that we are perpetuating a significant evil in this area, although I would personally like to see uniformity in defense pleadings in all cases.

#### ONE FORM OF ACTION

The debate over "one form of action" has always seemed somewhat unrealistic to me. The real merger, the abolition of the common-law forms in contract and tort cases, was accomplished in Pennsylvania as far back as 1887, when covenant, debt and assumpsit were consolidated and trespass, trover and case were consolidated.

The consolidation of assumpsit and trespass would clearly be desirable, and would unquestionably have been proposed, were it not for the defense pleading differences just mentioned. But how far should the merger be carried? Are there not real differences between a proceeding for a divorce, a proceeding to foreclose a mortgage, a proceeding to replevy an automobile, a proceeding to quiet title to real estate

and a proceeding to collect for goods sold and delivered? Venue, process, service and parties are all different, and necessarily so. They don't, and can't, all fit in a single form of action, unless that form is flexible enough to provide for many different "forms of relief." The Federal Rules frankly recognize this in Rules 64 and 81. Actually, in comparison with Pennsylvania practice, the Federal Rules do no more than consolidate assumpsit, trespass, mandamus and equity. If we consolidated these four, and left all other forms of action in existence, we would be side-by-side with the federal practice.

What real difference is there between an "action to foreclose a mortgage" and an "action at law" seeking the relief of mortgage foreclosure? If labels are not important, and if a party will be granted the relief to which he is entitled, in the one case without regard to his having initially used the "wrong form of action," and in the other case without regard to his having initially asked for the "wrong form of relief," where is there the slightest difference in the excellence of the judicial administration?

We may assume that the "modern" systems pass over errors in the demand for relief and grant broad powers of amendment. But, in our system, error in the form of action is equally harmless and amendable in similar cases. No one, in either system, would talk seriously about amending a replevin case into a divorce proceeding, or an action to quiet title into a suit for damages for personal injuries, or a suit on a promissory note into a mandamus action. Almost all the debate on "one form of action" comes down to the merger of assumpsit, trespass and equity.

If our rules provide for the separation of assumpsit and trespass, because of the difference in defense pleading, and if they provide that an error in labelling shall not affect the substantive rights of the plaintiff, where is there an absence of "good judicial administration . . ." ? How is the plaintiff harmed? And our Rules 126 and 1033 provide exactly this. Professor Wright is disturbed by the *Hohensee* and *Eisen* cases.<sup>1</sup> He fears that they mean that our rules are to be interpreted to hold:

(a) the labelling of an action as "assumpsit" or "trespass" is a matter of fundamental importance.

(b) if an action is wrongly labelled, the court is powerless to give any aid to the plaintiff unless the defendant stipulates his agreement to such aid.

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1. See notes 51-52 and text of Professor Wright's article.

(c) in the absence of such a stipulation, the court must dismiss the action on the merits, leaving the plaintiff to start a new action, under the correct label, if he can get service on the defendant and if the statute of limitations does not bar him.

To the extent that either the *Eisen* or the *Hohensee* case will support such a medieval, anachronistic and unjust result, it is totally and inexcusably wrong. It is the kind of individual aberration which so often occurs during the early days of the interpretation of a new procedural system. It is paralleled by similar aberrations in the first years of the Federal Rules. Our rules can no more be condemned on the basis of such decisions than the Federal Rules can be condemned because some individual district judge galloped off in the wrong direction in 1938 or 1939.

Rule 1033 makes it very clear that consent of the defendant is not a condition to amendment of the form of action. The defendant's consent is an *alternative* to leave of court, and leave of court is wholly free from the need of adversary consent. Further, the court, in exercising its discretion under Rule 1033, should follow the precepts of the Act of 1871, P. L. 265, the Supreme Court's directive in *Little v. Dunbar*<sup>2</sup> ("Scarcely any procedural defect is viewed with greater tolerance by modern courts than errors in the form of the action"), the requirements of Rule 126, and the dozens of opinions under the new rules brushing aside objections to the assumpsit v. trespass form of the action.

Properly interpreted, our rules forbid the "horror" cases which have troubled Professor Wright in this field.

To the other important branch of the "one form of action" problem—the merger of law and equity—Professor Wright devotes only a single paragraph. The reason is simple. It is nearly impossible to conceive of a situation in which equitable relief will be sought in an action at law. A plaintiff will not bring assumpsit to secure an injunction, nor trespass to put a corporation into receivership. The converse, however, frequently arises. An action will be brought in equity which should have been brought at law, and in which the constitutional right to trial by jury exists. Both the old and the new equity rules contain a specific mandate, requiring the court to ignore the formal error, and to transfer the case from the equity list to the jury list forthwith. No substantive rights of the plaintiff may be affected in any way by the formal error.

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2. 365 Pa. 277, 280, 74 A.2d 650, 651 (1950).

Professor Wright intimates that our rules may still be criticized because they require the plaintiff to go through the trouble of a "motion" to get relief in these cases. I am not impressed by the significance of this objection. After years of practice in the District of Columbia, under the Federal Rules, I find no difference in the two systems in the number of "motions" which will be made during the course of any hotly-litigated case.

#### JOINDER AND COUNTERCLAIM

Professor Wright is on much sounder ground in his criticism of our rather narrow joinder and counterclaim rules. However, I cannot possibly go with him in his plea for absolutely unlimited joinder of causes of action and counterclaims.

At the risk of confessing myself hopelessly old-fashioned, I can think of no doctrine of good judicial administration which would validate, simply because of identity of parties plaintiff and defendant, the joinder of (a) a suit on a promissory note (personal service required), (b) the replevin of an automobile (seizure by the sheriff required), and (c) an ejectment (action purely in rem; no personal service required) followed by a counterclaim by the defendant (a) to foreclose a mortgage and (b) for a divorce. To dump all these into one pot and leave it to the court to separate them seems much more confusing to me than to have these wholly independent matters separately brought and then to let the court order joint hearings on those which properly should be heard together.

On the other hand, Professor Wright does make a logical point on joinder of actions in personam, particularly those growing out of the same factual background. Looked at impartially, there is no apparent reason why a plaintiff should not be able to join two independent trespass actions against the same defendant. He can, of course, join two independent contract actions. Similarly, there is no apparent reason why he should not be able to join a trespass action with a suit on a promissory note. And, most clearly, he should be able to join a tort and a contract claim if they grow out of the same set of circumstances.

The argument of complexity of issues, or confusion of the jury, is not convincing in the light of the enormously complicated cases which are thrown into the jury box daily in multi-party automobile accident cases. There may be three or four joint plaintiffs, two or more joint defendants, and two or three additional defendants all with cross-claims and counterclaims. Joining a simple tort with a simple contract case,

with only one plaintiff and only one defendant, would seem infinitely less complicated.

Similarly, why should the defendant not have a right to counterclaim a tort claim for personal injuries against a suit on a promissory note, or vice versa; where there is only one plaintiff and one defendant?

The reason behind the apparently illogical rule stems from the fact that Pennsylvania still belongs to the group of states which forbid the proof of the defendant's insurance in tort cases. Consider the simple situation of the joinder of a routine personal injury tort claim with a suit on a note by one plaintiff against one defendant. The undisclosed, and undisclosable, insurance carrier undertakes the defense of the tort claim under its policy, selecting its own counsel to appear for the defendant. Who will appear for the defendant to defend the suit on the note? The note claim may be for a very large amount and involve enormously difficult questions of law. The defendant may insist that his own counsel try the note case. Must the defendant let the insurance company's lawyer try the note case? Or must the insurance company let the defendant's counsel represent it? Or should both lawyers appear and each try one part of the case, which would clearly tell the jury that the defendant is insured?

Clearly, if joinder were originally authorized, a severance in such a case would be necessary. Is it any more burdensome to have separate actions started initially, than to compel severance proceedings? Since a very large bulk of tort claims are insured cases, free joinder or unrestricted counterclaim will multiply the number of severance motions many times. It is a question of balancing the procedural assets and liabilities in these cases. The Committee preferred limited joinder and restricted counterclaim. It preferred separate actions in these cases, with joint trials or hearings permitted when desirable. It found this preferable to unlimited motions for severance. Professor Wright will disagree.

If the insurance problem did not exist, the limitations on joinder and counterclaim might be more difficult to justify. But the insurance problem exists, and its practical effect cannot be ignored.

#### PLEADINGS

There is very little new that can be added to the discussion on pleadings. During the preliminary stages of the drafting of the rules, there was extensive discussion of the Federal vs. Pennsylvania systems, and a whole series of articles, plus discussion at Pennsylvania Bar Association meetings, exposed both points of view. If there is "strong

bar sentiment in Pennsylvania favoring more drastic reform" in our pleading system the Committee would be interested to hear of it. Unfortunately for Professor Wright's thesis, most of the criticism I have heard in my many talks all over the state has been in the other direction. The Committee has been leading, not dragging behind.

Again may I point out that general criticism should not be based on isolated lower court cases. Professor Wright at one point says, "The Committee, however, cannot be blamed for the application by a trial court" of a particular doctrine, but at another point he erects a structure of criticism on just such a single lower court decision in the *Spittler* case.<sup>3</sup>

#### DISCOVERY AND SUMMARY JUDGMENT

In his discussion of the residue of "surprise" still permissible in trials in Pennsylvania, and of the inability to dispose of cases in advance of trial, Professor Wright advances criticisms which should be carefully studied by every trial lawyer.

The comparatively new discovery rules, which are slowly coming into use and gradually being interpreted, are a frank compromise with the "modern" federal system. They consciously refuse parties the same full discovery rights which the Federal Rules authorize. They set up restraints and limitations. The majority of the Committee were of the opinion that the abuses permitted by the full sweep of the federal system should be controlled, particularly where a large portion of cases are in amounts much less than the \$3,000 minimum in diversity cases. The economic factor in such cases could not be overlooked.

Further, in drafting the discovery rules, the Committee had before it another "established Pennsylvania tradition" of clear hostility to broad discovery of facts before trial. Despite the relatively liberal language of the Act of 1836, there were 100 years of narrow and restricted interpretation. Judge Kenworthy's excellent article<sup>4</sup> collates this material.

The power of this tradition has continued even after the effective date of the new rules. Judge Kenworthy in the western part of the State, and I, in the central part, have had occasion to address meetings of bar association groups in rural counties during the last few months. Both of us have found to our astonishment that, although the discovery rules have been in effect for well over a year, a number of counties

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3. See note 74 and text of Professor Wright's article.

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

did not have one single case in which the rules had ever been used, and other counties had had but one or two cases. Many of the lawyers in our audiences had never read the rules and did not know what the procedure permitted.

These experiences do not prove that the apathy toward discovery is because our rules are so monstrously bad that the bar refuses to use them at all until we adopt the federal procedure in full. They do, in my opinion, prove the significance of our local tradition. They prove that the bar in these counties as a whole does not now feel any compulsion toward the use of extensive discovery procedures in routine, ordinary litigation. They prove that these lawyers feel that the existing methods of pre-trial preparation of cases, in which they are well-trained, are reasonably efficient, inexpensive and adequate in the great run of law suits. They prove that these lawyers feel no actual need now for discovery in ordinary contract and tort cases.

I hope that this situation will change, and that the merits of discovery procedure will soon become apparent to all members of the Bar. Extensive use of the discovery rules will soon determine whether there will be widespread demand for the broadening of their scope by amendment.

Of course, the new discovery rules have not gone all the way, but they are a step in the right direction. What is vitally important at the moment is whether the rules, with their generalized terms capable of wide differences of interpretation, are liberally and constructively interpreted by the courts. As Professor Wright shows by his analysis of what happened to the Field Code in New York, the best drafted procedural rules can be ruined by restrictive judicial interpretation.

These rules are admittedly experimental. Admittedly, they still permit a substantial amount of "surprise" at trial. Admittedly, many lawyers and judges would prefer the federal system in full; they would endorse Judge Flood's statement in the *Barlow* case.<sup>5</sup> It is still too early to forecast how well the rules will work in practice, and what, if any changes will be demanded and required.

The absence of the federal device of summary judgment on preliminary motion, supported by affidavits and depositions *in which there is no issue of fact*, is not easy to justify. Judgment on the pleadings is not a full equivalent, because the pleadings do not include (and may not include) all the factual details, particularly evidentiary documents, on which such a motion may be based. The value of this device is well known to all lawyers who have spent much of their time operating

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5. Note 102 of Professor Wright's article.

under the Federal Rules. It is true that it cannot be used in the vast majority of lawsuits because there are actual issues on relevant facts. But that is no ground for not making it available for use where it would permit quick and summary disposition of cases where pleadings can be drawn without necessarily revealing material which will defeat the claim or the defense as a matter of law.

### CONCLUSION

It has not been my purpose to prove that Professor Wright is wrong, or to prove that the Pennsylvania Rules are better than the Federal or Minnesota Rules. In fact, I concur in many of the points he makes. What I have tried to do is to point out some of the "Pennsylvania traditions which are of proven merit," and also to emphasize certain "local needs" which have influenced our rule-making. Lastly, I have tried to establish the importance of the influence of our special trespass pleadings, and the non-disclosure of casualty insurance in trespass cases, on the problems of pleading, consolidation of forms of action, joinder and counterclaim.

None of our rules has been drafted without knowledge and study of the comparative devices used elsewhere. Whether we have done well and wisely the future will disclose.

All of us, however, interested in good judicial administration in Pennsylvania, are indebted to Professor Wright for making us re-think these problems. I earnestly hope that his article will be the first of a long series of careful studies of every phase of our procedure, that more of our Bar will take the time to examine comparative procedures in other states, and that our procedural devices will be constantly reviewed and revised to achieve the ultimate goal of the decision of every lawsuit speedily, economically and solely on the merits.