

REJOINDER FROM PENNSYLVANIA

Ella Graubart †

The Editors of the *University of Pennsylvania Law Review* and Professor Wright have asked me to prepare a rejoinder to Mr. Amram's defense of the Pennsylvania Procedural Rules. It is pleasant to welcome a new gladiator from the West, for Mr. Amram and I have argued about the rules for many years. But the rules stand alone—Mr. Amram cannot help them by anything he says, and no criticism from Professor Wright or me can make them worse than they are.

The Supreme Court appointed the Procedural Rules Committee shortly after the Enabling Act of 1937 placed the rule-making power in its hands. In the fifteen years that the Committee has been engaged in preparing rules, the Legislature of Pennsylvania has appropriated \$190,000 for its use. Pennsylvania has indeed furnished an example to the rest of the country of the longest and costliest method for procedural reform. But I have not been asked to reminisce, and so I shall attempt to answer my old friend Philip Amram with accuracy and good will.

He starts with a rhapsody about "Pennsylvania traditions," but this is flattering, not illuminating. Pennsylvania traditions have a continuing value only if they still provide the best devices for administering justice in 1953.

I am not inclined to quarrel with the description of our Bar by both Professor Wright and Mr. Amram as "distinguished and scholarly," but I must confess the apathy with which it has accepted the rules promulgated by the Procedural Rules Committee seems to me more indicative of good nature. Nor am I perturbed by the idea that Professor Wright could be misled by my published criticism of the rules as Mr. Amram suggests.

Mr. Amram refers to the Bar Association Committee which was appointed in 1942. He says its object was to counteract what were thought by the Bar to be "ill considered and unnecessary reforms being made by the Procedural Rules Committee." This is a distortion which all those who participated in the movement will quickly recognize. The

† A.B., 1917, Hunter College; LL.B., 1927, University of Pittsburgh. Member of Allegheny County Bar. Member of the firm of Patterson, Crawford, Arensberg & Dunn, Pittsburgh.

objections which the Pennsylvania Bar had in 1942 were to the failure of the Procedural Rules Committee to make *any* reforms, to the fact that the rules which were being released were overly complicated codifications of old rules. It may be that Mr. Amram considered these "reforms," but those of us who were objecting were asking for more reform, not less.

This Committee, of which Albert C. Hirsch was Chairman and of which I was a member, was invited to one session of the Procedural Rules Committee. I remember it well. We were treated with great courtesy. We were happy to persuade the Procedural Rules Committee to adopt one of the few innovations and improvements in our practice. This is Rule 1028 which requires *all* preliminary objections to be made at one time. This has proved to be an excellent rule. My recollection is that it was adopted by a very close vote and would not have been adopted except for the efforts of the Pennsylvania Bar Association Committee.

The Bar Committee was never invited to any further meetings. It is true that copies of preliminary drafts were sent to us and the issues of the *Pennsylvania Bar Association Quarterly* show the criticisms that I made from time to time of these preliminary drafts. In fairness to the Committee, I should say that some of the tentative rules which were criticized were changed.

I remember well that when Justice Maxey became Chief Justice, he showed a very active interest in the objections of the Bar to the kind of rules the Committee was preparing. Indeed, he asked me to take the Federal Rules and make such changes in them as I thought necessary to adapt them to state practice. This I did in detail and gave to him. At that time he also suggested that he would place Mr. Roy Dickie and me on the Procedural Rules Committee. Mr. Dickie accepted, but I declined as I felt that real reform could come only after this Committee had finished its work.

THE SPECIAL PLEADING IN TRESPASS

Mr. Amram seeks to justify the short answer in trespass. This is unnecessary, for neither Professor Wright nor I have any objection to it. Professor Wright assumes in his discussion that the short answer in trespass should be retained; and as early as January, 1946,¹ I stated that the practice in trespass pleading had been satisfactory and we ought to "preserve the benefits of the present practice." What Professor Wright is saying and what I and other critics have said is that the

1. 17 PA. B.A.Q. 211 (1946).

desirability of retaining the short answer is no reason for having more than one form of action.

ONE FORM OF ACTION

As long ago as 1914, William Howard Taft urged one form of civil action to include all the actions at law and in equity. That was almost forty years ago. It seems, therefore, somewhat unrealistic to keep insisting that the merger of all kinds of actions would result in confusion. Surely the experience in dozens of other states, in England and in our federal courts is conclusive of the desirability of one form of action.

Mr. Amram's second position is that it doesn't make any difference whether you have one form of action or several. But this argument completely ignores what the Supreme Court and the lower courts are doing under the present rules which he is defending.

For example, *Loch v. Confair*² involved a claim for damages due to the explosion of a bottle of ginger ale. The plaintiffs sued the bottling company in assumpsit for breach of implied warranty. The accident happened on April 4, 1947. On January 3, 1949, the Supreme Court concluded that assumpsit was the wrong form of action because the bottle had been picked up in a self-service store and had not been paid for. There was, therefore, no contract.

Fortunately, the plaintiffs had three months left before the Statute of Limitations barred their trespass action. They filed suit for damages in trespass against the grocer and the bottling company. The lower court granted a non-suit as to the grocer and gave binding instructions to the jury for the defendant bottling company. The court en banc granted a new trial and this was affirmed by the Supreme Court in January, 1953, almost six years after the accident.³

It seems clear from this case, as well as the lower court cases cited by Professor Wright, that the rules do *not* provide "that an error in labelling shall not affect the substantial rights of the plaintiff."

Mr. Amram asks "How is the plaintiff harmed?" In the *Loch* case, the plaintiffs might have been barred by the Statute of Limitations and they spent almost two years finding the right label for their action.

Actually the problem strikes deeper than is first observed. Because the two forms of actions exist, judges tend to emphasize differences.⁴ We all agree that if a bottle of soda explodes in 1953, the

2. 361 Pa. 158, 63 A.2d 24 (1949).

3. *Loch v. Confair*, 372 Pa. 212, 93 A.2d 451 (1953).

4. See, e.g., *McNitt v. Benner*, 75 Pa. D. & C. 265 (1950); *Hohensee v. Colonial Airlines, Inc.*, 75 Pa. D. & C. 347 (1950); *Sincavage v. Armour & Co.*, 74 Pa. D. & C. 279 (1950).

person injured should have some claim for damages. Ordinarily, he does not know what caused the accident. It is generally admitted that something was wrong because bottles with carbonated liquids do not explode if properly filled. What difference can it make to anyone, litigant or judge, under what form of action relief is sought? Ultimately, the jury must decide if the defendants were free from negligence no matter what the form of action.

Indeed, in an article in the *University of Pittsburgh Law Review*,⁵ the author shows that originally in Pennsylvania a claim on an implied warranty which is now treated as a claim in assumpsit, was an action in case—that is an action of tort. Blackstone characterized the claim as a tort action grounded in deceit. Our Supreme Court, as recently as 1938, said:

“The action upon a warranty was in its origin a pure action of tort.”⁶

Fundamentally, the breach of an implied warranty is not a breach of contract but a failure on the part of someone to take ordinary care. Whereas the earlier cases realistically analyzed the cause of action as in the nature of a tort, the new rules with their emphasis on the differences between assumpsit and trespass have proved misleading and obstructive.

It is obvious, therefore, that Mr. Amram's cavalier assumption that judges will not interpret the rules as they are written, but will overlook the differences between assumpsit and trespass, is not borne out by the cases.⁷

Even the Statute of Limitations for tort actions has been applied to assumpsit where personal injuries are involved. In *Jones v. Boggs and Buhl*⁸ the Supreme Court held that the Statute of Limitations for a suit in assumpsit for breach of contract resulting in injuries to the plaintiff was two years!

The failure to merge assumpsit and trespass encourages those differences which we have long hoped to forget. I see no reason for continuing the difference. The short answer in trespass is surely not a reason for the myriad problems which remain with us, if we continue separate forms of action.

Mr. Amram seeks to support the failure to merge law and equity. He says there are seldom cases on the law side in which equitable relief

5. Casper, *The Nature of an Action for Breach of Warranty in Pennsylvania*, 10 U. OF PITT. L. REV. 524 (1949).

6. *Ebbert v. Philadelphia Electric Co.*, 330 Pa. 257, 268, 198 Atl. 323, 328 (1938).

7. *E.g.*, *Karp v. Sun Insurance Office, Ltd.*, 82 Pa. D. & C. 392 (1952).

8. 355 Pa. 242, 49 A.2d 379 (1946).

is sought. In Pennsylvania, we cannot get equitable relief in a law action and so we usually file a complaint in equity asking for equitable relief and any other relief on the law side which can by hook or crook be included. But if we could combine equitable relief in a law action, many cases could be combined and the practice made uniform as it is in other states.

JOINDER AND COUNTER-CLAIM

In this section of his reply, Mr. Amram displays the extent to which his imagination of difficulties obscures his insight.

The practice in other states which permit a free joinder of causes of action between the plaintiff and the defendant is proof that this can be done with a maximum of satisfaction. Mr. Amram agrees that we should be able to bring two trespass actions which the plaintiff has against the defendant in one suit and we should be able to counter-claim a tort action in an assumpsit action and vice versa. He says the only reason this has not been done in Pennsylvania is because many tort cases are defended by insurance carriers. But such an excuse for not adopting a broad rule for joinder and counter-claims is surely too great a concession to insurance companies.

I have personally had a number of cases recently in which it would have been extremely satisfactory and beneficial to have had an assumpsit claim joined with a trespass action. They happened to be cases in which I represented a large utility which does not carry insurance. How can it be said with fairness that such a corporation should be denied the right to have an assumpsit claim against an additional defendant because in many cases the defense of tort actions by insurance companies would become difficult if such joinder were allowed? The insurance problem exists in all the states and has not served to penalize other litigants by not permitting a joinder of actions.

PLEADINGS

Mr. Amram indicates that most of the lawyers in Pennsylvania would like pleadings detailed and specific. This is indeed an astounding idea. The Practice Act of 1915 simplified pleadings and the forward trend throughout all English-speaking countries is for more simplified practice. Mr. Amram has probably forgotten that in addition to the committee formed by the Pennsylvania Bar Association in 1942 to get more modern rules, a Procedural Rules Committee was appointed by the Pennsylvania Bar Association in 1947 and 1948; and that resolutions were passed by the bar associations in Philadelphia

and in Pittsburgh asking for simpler rules. We had a debate in Atlantic City in 1944 about the need for simpler pleadings.

My objection to our pleading rules is of a homely and personal nature. If a plaintiff prepares a complaint which is five or six pages long with turgid and repetitive language, I do not like to deny each phrase and clause in precisely my opponent's language. Unless I do this, he will be able to urge at the trial that I have admitted some part of his long and involved sentences. Other jurisdictions have fared very well with general denials which somehow seem to me a more mature way of handling the matter. The absorption of the Bar in the minutia of pleading can only narrow the horizon of its thinking.

DISCOVERY AND SUMMARY JUDGMENT

It is gratifying to learn that Mr. Amram favors a rule for summary judgment and perhaps he will persuade the Committee to recommend such a rule without further delay.

Mr. Amram says that even though the Pennsylvania rules on discovery are not as broad and flexible as those in other jurisdictions, they are still more than most lawyers want. I do not think you can measure the value of discovery rules by men who do not use them. In Allegheny County, we have had a very interesting development under the present Procedural Rules on Discovery.

Recently, the Court of Common Pleas of Allegheny County appointed a committee of lawyers who are active practitioners, both on the plaintiff's and defendant's side of the table and submitted these questions to them:

1. Does the Court of Common Pleas have the power to adopt a federal rule of discovery or a substantially similar rule for use at pre-trial?
2. Is it desirable that it do so?

I was appointed Chairman of this committee with four of the most active trial lawyers in Allegheny County on the committee. We met and made a report to the Court of Common Pleas. It then called a meeting of about thirty lawyers and the matter was discussed from all angles. It was apparent that lawyers want to get names of witnesses, want to examine books of account, want to have physical examinations, want names of experts and want to submit interrogatories and take depositions. They do not want to file a large number of petitions, answers, affidavits and other paper work in finding out these things.

At the request of the Court of Common Pleas, I have submitted rules based on the Federal Procedural Rules. As a practical matter,

at the pre-trial of a case in Allegheny County, each side now asks for what it wishes, and the court requires the other side to produce the evidence by letter. Although we thus by-pass all the paper work specified in our present rules, there remains one handicap. The pre-trial is almost two years after suit is filed and for those lawyers who wish information before the pre-trial, simpler methods of obtaining it by way of motion will have to be developed. The rules submitted are under consideration by the Court of Common Pleas of Allegheny County and it is hoped they will be adopted. Such rules would not be inconsistent with the rules adopted by the Procedural Rules Committee; they would merely shorten the procedure and lessen the burden for both the courts and counsel.

Pennsylvania Rule 4011 places a number of impractical limitations on discovery. For example, discovery may not be had if the facts "are not relevant and material to the subject matter of the pending action; are not competent or admissible as evidence; are not necessary to prepare the pleadings or prove a prima facie claim or defense of the petitioner." A thoughtful appraisal of the purposes of discovery makes it obvious that at the threshold of a case in pursuit of discovery, no one can tell whether information sought will ultimately be relevant or material, or incompetent or inadmissible or required to prepare pleadings or prove a prima facie claim or defense. Discovery by its very nature embraces a wide area. You cannot tell in advance what you are going to discover. It may well be that in seeking to discover an irrelevant piece of information, you might end up with a relevant piece; or that in seeking to investigate a counter-claim, you might unearth information in support of a prima facie claim.

Because of the impractical limitations which the Procedural Rules Committee injected into our discovery procedure, the Philadelphia Common Pleas Courts, while paying lip service to the limitations, have virtually ignored them. They have refused to determine before the trial of the case whether the facts sought will be admissible or inadmissible.

Almost every judge in the Common Pleas Court in Philadelphia has given a liberal interpretation to the rules and has refused to conclude irrelevancy in advance of trial.⁹ While, therefore, the discovery

9. See, *e.g.*, *Klosterman v. Clark*, 78 Pa. D. & C. 263 (1951); *De Simone v. Philadelphia*, 78 Pa. D. & C. 433 (1951); *Regency Clothes, Inc. v. Progressive Clothes, Inc.*, 78 Pa. D. & C. 450 (1951); *Brecht v. Philadelphia*, C.P. No. 4, Phila. County, Dec. Term, 1950, No. 2523 (1952); *Dorfman v. Philadelphia Transportation Co.*, 79 Pa. D. & C. 380 (1952); *De Simone v. Philadelphia*, 79 Pa. D. & C. 337 (1952); *Lower Merion Twp. v. Hobson*, 79 Pa. D. & C. 385 (1952); *Fetterolf v. Levick*, 80 Pa. D. & C. 523 (1952).

rules were apparently written for the country lawyers who do not use them, the metropolitan courts and members of the Bar have found ways of implementing the federal practice in the state courts. This, in a way, could not be avoided because every lawyer who practices in both courts cannot carry two different yardsticks for his discovery practice. Counsel on both sides, having become accustomed to a satisfactory system in the federal courts, tend to ignore the limitations in the state rules.

At the 1949 Mid-winter Meeting of the Pennsylvania Bar Association in Reading, a resolution was adopted by the Procedural Rules Committee of the Bar Association criticizing as inadequate and unsatisfactory the discovery rules which had been recommended. A subcommittee was appointed and a report was made to the Association at its meeting the following June. The Committee consisted of Judge Harold L. Ervin, Chairman; J. Wesley McWilliams, now Vice-President of the Pennsylvania Bar Association; Philip H. Streubing of Philadelphia and myself. The report to the Bar was fully discussed and a vote taken by the members of the Pennsylvania Bar Association recommending to the Supreme Court and to the Procedural Rules Committee that Pennsylvania adopt rules for depositions and discovery substantially like the federal rules. This recommendation was ignored as were others submitted by local bar associations and individuals. Under the circumstances, it is not surprising that the rules have been criticized not only by Pennsylvania lawyers but by our friends outside the Commonwealth.

Indeed, Mr. Philip Amram's defense of the Rules has the nostalgic quality of a "Confession and Avoidance."