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## EARLY RULES OF COURT IN PENNSYLVANIA

ALBERT SMITH FAUGHT\*

William Henry Loyd in his *Early Courts of Pennsylvania*<sup>1</sup> selected the decade of the 1830's as the logical close of the early period of the judicial history of Pennsylvania, due to the revision at about that time of many of the civil laws of this state, in accordance with the recommendations submitted by a commission consisting of William Rawle, T. I. Wharton and Joel Jones, who had been appointed by the Governor in pursuance of a resolution of the Legislature in 1830.<sup>2</sup>

The scholarship of Mr. Loyd, therefore, has led to the acceptance of the year 1835 as the close of the early period of the history of the courts in the Province and State of Pennsylvania. The present study of early rules of courts will not be carried beyond the year mentioned.

The Library of the Philadelphia Bar Association possesses for the period prior to 1835 six printed editions of pamphlets containing rules promulgated by the Supreme Court. The publishers and dates of these editions are as follows:

1. Whitehall, for William Young, Bookseller, Phila. 1801, *ex libris* Zalegman Phillips, (who has endorsed the book: "Sept. 7, 1801 on Motion of Mr. Levy I was sworn in and admitted an attorney of the Supreme Court").
2. Printed for T. De Silver, Phila. 1810 (*Ex libris* James Bates April 25, 1820).
3. Printed by Jacob Frick & Co., Phila. 1819 (*Ex libris* Wm. H. Abbott (?)—no date).
4. Printed by E. Wright, Phila. 1826 (*Ex libris* Peter Price (?)—no date).
5. Second Edition of *Walker's Rules of Court* (1828) by A. Walker.<sup>3</sup>

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<sup>1</sup>Boston Book Co. (1910) Page 155.

<sup>2</sup>The Commissioners are named in Resolution No. 12, Pamphlet Laws 1830-31, page 509.

<sup>3</sup>Other editions of *Walker's Rules* in the library of the Phila. Bar Association were published in 1847 and 1857.

6. "Printed for the Gentlemen of the Bar," Phila. 1834 (*Ex libris* Thomas I. Wharton).

One other compilation of rules should be mentioned, of great value as a source book for making a comparison between the rules in force in 1821 in Pennsylvania and in twenty-three other States,<sup>4</sup> but of relatively little importance since the various "state regulations" or rules of court appear in digest form. This is *Griffith Law Register*, consisting of four volumes, published by David Allinson in 1822 at Burlington, New Jersey. (*ex libris* R. W. Sykes).

From a study of the rules as they appear in these various printed editions it seems advisable to recognize the existence of four distinct periods in the history of the courts of Pennsylvania prior to 1835. We tread warily, for no authoritative history of the Supreme Court of Pennsylvania has as yet been written.<sup>5</sup>

At least for purposes of an examination of early rules of court it is convenient to divide the years from the arrival of William Penn in 1682 to the revision of the civil law about 1835, into four periods.

*First.* From 1682 to 1722. In these 40 years a series of judicial bodies and courts of state-wide appellate jurisdiction pass across the colonial scene, one even having the phonetic spelling of "Supream Court".

*Second.* From 1722, the date of the formal organization of the present Supreme Court, down to 1786. During this period 23 rules of court were promulgated by the Supreme Court, some of which still show their influence a century and a half later.

*Third.* From 1786, when the Pennsylvania Circuit Courts were established, for which the Supreme Court made separate rules, to 1828.

*Fourth.* From 1828, when the first general revision was made by the Supreme Court of its own rules, down to 1835, at the eve of the second general revision of rules.<sup>6</sup>

Each of these periods will be considered in turn, and, after some mention of the judicial system, comments will be made on the rules themselves.

## I. PERIOD FROM 1682 TO 1722.

### *Early Provincial Courts in Pennsylvania.*

We have considerable knowledge as to the courts which were the forerunners of the present Supreme Court. Earliest in point of time was the Provincial Council, which is described in William H. Loyd's *Early Courts of Pennsylvania* as follows:<sup>7</sup>

<sup>4</sup>The New England States; those of the Atlantic Seaboard down to Georgia; also Indiana, Illinois, Kentucky, Louisiana, Mississippi, Missouri, Tennessee and Virginia.

<sup>5</sup>Mr. Loyd's work was that of a pioneer, covering only a portion of the subject. For example, he hardly mentions the subject of rules of court.

<sup>6</sup>See 1 Miles Reports 446 for Rules of the District Court of Philadelphia as revised on October 1, 1836.

<sup>7</sup>Page 63.

"During the first 20 years of its existence the amount of judicial business transacted in the council was large; prior to the establishment of the provincial court it was the only general tribunal and was not only a court for hearing appeals, but also a court of first instance for such suitors as could obtain a hearing before it."

The Provincial Council was also discussed by Lawrence Lewis, Jr., in an address before the Historical Society of Pennsylvania in 1881:<sup>8</sup>

"The judicial functions discharged by them claim particularly in this place attention and classification. The amount of such business devolving upon the council was very great. Its members were, it is true, *ex-officio* justices of the County Courts.<sup>9</sup> . . . First came the appeals from the County Courts, all prior to the establishment of the Provincial court in 1684. These were expressly authorized by statutory enactment.<sup>10</sup> Next comes the jurisdiction to try great crimes, originally in the Duke of Yorke's time devolving on the Court of Assizes. . . . Another class of cases constantly brought before them were those connected with admiralty matters. . . . It assumed to itself the control and direction of inferior courts in cases of extreme hardship or manifest irregularity of proceedings."

Every well equipped law library in the country carries upon its shelves volume one of Dallas' Reports which sets forth<sup>11</sup> the "proceedings of the Supreme Executive Council of Pennsylvania in the case of the Commonwealth v. Doane," in which the council decided against the imposition of the death penalty in a particular case of outlawry.

The Duke of Yorke's Laws, Act of May 10, 1684, C. 185, created the Provincial Court already mentioned. It is succinctly described by Lawrence Lewis, Jr.:<sup>12</sup>

"To remedy these inconveniences [of travel] a court was constituted in 1684, known as the Provincial Court, to be composed of five judges. Its powers were briefly to hear and determine all appeals and try 'all titles to land and all causes as well criminal as civil, both in law and equity, not determinable by the respective County Courts.' . . . In 1685 the court was constituted anew.<sup>13</sup> . . . It was again remodeled by the Acts of 1690 and 1693.<sup>14</sup> . . . No traces of their opinions have come down to us; and judging from contemporary records, it seems highly probable that they were seldom required to pass upon a technical point of law."

Both Mr. Lewis and Mr. Loyd<sup>15</sup> advert to the jealousy of the three lower counties on the Delaware and their resentment caused by inadequate representation

<sup>8</sup>PA. B. A. REP. (1895) 353, 379.

<sup>9</sup>Citing John Hill Martin's *Bench and Bar*.

<sup>10</sup>Laws March 10, 1683, C. 70, Duke of Yorke's Laws 129.

<sup>11</sup>At page 496.

<sup>12</sup>PA. B. A. REP. (1895) 252, 368.

<sup>13</sup>Duke of Yorke's Laws, May 10, 1685, C. 187, W. 177.

<sup>14</sup>*Id.*, C. 197 & C. 163, pp. 184 & 225.

<sup>15</sup>Loyd, *op. cit. supra* note 1, at 58.

upon the Provincial Court, as being "the first open manifestation of the dissatisfaction of the territories with the union with Pennsylvania which continually increased until a separate government was obtained."

A "Law About Appeals to the Provincial Courts" was enacted on Nov. 27, 1700,<sup>16</sup> and repealed on Oct. 28, 1701. Chapters 105 and 106 reading:

"And in case either plaintiff or defendant shall apprehend themselves aggrieved with the verdict of the jury, or judgment of the court, they may appeal to have the cause of complaint heard over and determined by the then next provincial court to be held for the said county; which said appeal shall be granted, provided that the debt or damage in the said judgment be ten pounds or upwards, the appellant giving good and sufficient security to prosecute the said appeal and to pay all costs and damages that shall be awarded."

The Act of October 28, 1701,<sup>17</sup> then established a Provincial Court of five judges to sit twice a year in Philadelphia, the justices to go on circuit in the spring and fall to each of the counties.

The next appellate tribunal established in the province was the "Supream Court of Pennsylvania"<sup>18</sup> of 1710. Mr. Loyd tells us that this tribunal had power to hear appeals at law and in equity; and that upon the repeal of this and similar acts "the governor maintained the courts either by special commissions to the judges or by general ordinances."

In volume one of Smith's Laws, page XV, we find a notation about a similar tribunal:

"1715 Chap. 212, An Act for erecting a Supreme or Provincial Court of Law and Equity in this Province; passed 28th May 1715; recorded A vol. II, page 109; repealed 21st July 1719."

The Supreme or Provincial Court was established by the Act of May 31, 1718,<sup>19</sup> from which we quote:

"XVII. *And be it further enacted*, That if any person . . . shall be indicted or appealed, for any of said crimes did not or will not appear to answer such indictment or appeal the Justices . . . shall award a writ called *capias* . . . returnable before the Justices of that court, where such party is or shall be so indicted or appealed, at the SUPREME OR PROVINCIAL COURT. . . . If he who is so indicted or appealed comes not at the said day of return of the said *capias* and yield his body to the Sheriff, he shall be by the Justices of

<sup>16</sup>2 STATS. AT LARGE 134.

<sup>17</sup>2 STATS. AT LARGE 148.

<sup>18</sup>This is the spelling used by Loyd. *Op. cit. supra* note 1, at 80. He cites 2 Statutes at Large 301, in which the spelling appears as "Supreme". The note in 11 Statutes at Large 331 states: "Passed Feb. 28 1710-11. Repealed by the Queen in Council February 30 (sic) 1713-14". Mr. Loyd also mentions, on page 84, the use of the words "Supream Court" in 1763, where the reference obviously is to the present Supreme Court.

<sup>19</sup>1 Sm. L. 105, 116.

the said SUPREME COURT pronounced outlawed and attained of the Crime, etc."

We are now ready to consider the extent to which these several state-wide colonial tribunals have left records of "rules of court".

*Rules of Court Prior to 1722.*

Governor Pennypacker, in his choice collection of "Colonial Cases,"<sup>20</sup> sets forth the text of a rule of court of Philadelphia County, promulgated on "3rd, 1st mo., 1685-6" which he obtained from a manuscript docket which he characterizes as the "first rule of court", which reads:

"Ordered by this Court that it stand a continuing rule for this court, & the Courts succeeding, that no person nor persons whatsoever presume to speake in or Interrupt the said Court without Leave first asked and then given by the bench, and that whoever does in the Contrarie shall be fined, or otherwise punished, att the discretion of ye bench, from time to time."

From the same source four additional rules dated "2d, 4th mo., 1686" have been gleaned, and deserve to be quoted:

- "1. That the high sherrif, or his lawfull & approved of deputy, Clarke of ye Court, & Cryer, and at Least one of the Towne Constables (by turns) doe Constantlie attend ye Court att the precise hours of sitting, and yt they dept not the Court wtout Leave under penalty of a fine.
- "2. That no pson that is not Immediatlie Concerned in the business in agitation presume to speake wtout Leave under peine of a fine.
- "3. That plfs, defts, & all other psons speake directly to the point in question, & yt they put in their pleas in writing, (this being a Court of record) & that they forbear reflections & recriminations either on the Court, Juries, or on one another under panelty of a fine.
- "4. That all fines imposed upon any pson for totall absence, or untimely coming to Court, or for breach of these or other rules of Court hereafter to be made, shall be leavied on ye pties goods & chattells by way of distres, & yt ye execution therefore be signed in open Court before the Rysing of such Court yt Imposed the fine: & yt thes & other orders, made or to be made, be hung up in a Cable evry Court day."

The earliest statutory reference to rules of court in Pennsylvania with which the present writer is familiar is found in the Act of October 28, 1701, already mentioned:<sup>21</sup>

<sup>20</sup>1892. An address before the Law Academy of Phila., pages 90 and 98.

<sup>21</sup>2 STATS. AT LARGE 148, 154.

"Provided always, That no judges, justices or other persons shall by any means or under any pretense whatsoever make, promote, introduce, or suffer any rule, order or practice in any of the said courts, that shall exact greater fees than what are or shall be allowed by the general assembly of this government, or which may debar or render any person or persons (who for conscience' sake shall scruple to take an oath in any case) incapable to serve, officiate or act in any office, duty or service whatsoever, in or belonging to the said respective courts.

"Provided also, That where the said assembly has not made due provision for any fee or fees for any matter or thing to be acted or done by the officers of the respective courts, then and in such case the judge or justices of the said courts shall and may from time to time (until the assembly shall provide for the same) make, order and appoint all such reasonable fees as the business or matter shall require and deserve."

The two subjects in regard to which the rule making authorities were particularly warned, therefore, were conscientious objectors and the fees which should be exacted in legal proceedings.

## II. PERIOD FROM 1722 TO 1786.

During these sixty-four years we are concerned only with the Supreme Court itself.

The earliest known rule promulgated by the present Supreme Court of Pennsylvania is four years older than the earliest reported decision of this Court. This rule reads:<sup>22</sup>

### *Rule First*

September 25th 1750

Ruled by the Court that in all causes the defendant in *habeas corpus* henceforward give bail *sedente curia*, the first term or *procedendo* to issue.

The earliest case determined by the Supreme Court of Pennsylvania which appears in the reports is one entitled "Anonymous," being the first case in volume one of Dallas' Reports, which came before Chief Justice William Allen and Justice Lawrence Growden and Justice Caleb Cowland in September Term 1754. It was decided that the Statute of Frauds did not extend to Pennsylvania.

The number of rules promulgated from 1750 to 1786 totals twenty-three. They appeared numbered serially in their chronological order at page 3 of Pamphlet No. 6 (1834). We venture to make a list and abstract of the same:

<sup>22</sup>"Rules of the Supreme Court" (1834). It should be observed that a writ of habeas corpus brought up the record in civil cases, and was a standard method of obtaining a review. See *Grubb's Executors v. Grubb's Executors*, 2 Dall. 191 (Pa., 1792), where a certiorari was issued, and *Grubb v. McCullough et ux*, Executrix of Thomas Grubb, 1 Yeates 193 (Pa., 1792), where writs of habeas corpus were tendered in suits for legacies. These two reports appear to refer to the same case.

- Rule 1. (Sept. 25, 1750). Habeas Corpus (as above).
2. (Sept. 24, 1751). Certiorari to bring up the record in its condition "at the time of the delivery of the writ".
3. (April 10, 1759). "Ordered by the Court, that for the future no persons be admitted attorneys or counsel of this court without being previously examined as to their qualifications to practice,—nor without having taken the oaths or affirmations of allegiance to his majesty and subscribed the usual declaration."
4. Notice and Capias to issue to compel appearance of defendant after plaintiff has removed "his cause into this Court by *certiorari*."
5. "Ordered by the Court, that all writs of *certiorari* and *habeas corpus* shall be returned before any rule shall be taken in the cause."
6. (Oct. 19, 1765). Those admitted as attorneys are "hereby admitted to practice as counsellors as well as attorneys."
7. (Sept. 24, 1767). This is a long rule as to admission of attorneys. "A regular apprenticeship to some gentleman of known abilities in the profession for the term of four years" and practice for one year in a county court, is required (or 3 years apprenticeship and 2 years practice), and certificate by two examiners appointed by the Court that "such person appears to be well grounded in the principles of the law and acquainted with the practice." Two exceptions are recognized: (a) Those who take up the study of the law after reaching 21 years and are persons "of fair character and certified to be well qualified" need study only two years and practice one year; and (b) "Gentlemen of character and standing from any of the neighboring colonies or elsewhere" or "have studied in any of the inns of court in England" may be admitted "as if the above rule had not been made."
8. (May 10, 1771). Permits any six of a jury of 12 to make "the view".
9. (Sept. 24, 1772). *Subpoena duces tecum* not to issue to the land officers without a previous motion and order of the court.
10. (April 10, 1775). "All motions for a new trial or in arrest of judgment in causes tried at the nisi prius courts held for the several counties shall be made within the first four days of the next succeeding term"—after notice to adversary 10 days before the term commences.
11. Venire for trials in the Supreme Court.
12. "When a cause hath been at issue in the Supreme Court for the space of one year, a term's notice of trial shall be given."
13. Upon filing a plea of the general issue "with a liberty to give the special matter in evidence" ten days written notice of the special facts or matters must be given.
14. Where defendant intends under the general issue to "defalk his account", he must furnish a copy 10 days before the trial.

15. Thirty days notice to be given of defense of failure of consideration after plea of payment to a bond or specialty.
16. "All motions for new trials and reasons in arrest of judgment in causes tried at the bar shall be made and offered within 4 days after verdict."
17. Bringing money into court is to be governed by the practice in the Court of King's Bench under Statute of 4th and 5th Ann. Chap. 16.
18. Law arguments to be on Mondays and Tuesdays.
19. Trial list to be in the order of the cases "when the issue docket is settled".
20. (Nov. 10, 1781). Stipulates as to costs in "cases of common informers".
21. (Jan. 15, 1785). Rule as to admission of attorneys and counsellors modified so (1) as to require "oath of allegiance and fidelity to this state", and (2) to require two years residence rule "excepting attorneys of law residing, practicing and originally admitted and sworn in the states of New Jersey, Delaware or Maryland"; (3) Aliens or foreigners must reside in Pennsylvania for four years.
22. (Sept. 29, 1785). Regulation of venires.
23. (Jan. 13, 1786). "Ordered, that the counsel for the plaintiff and defendant do each furnish two paper books or states of the points in controversy for the use of the judges of this court . . . at least six days before the argument."

The foregoing 23 rules contain precedents which are still followed, such as the four day rule for filing motions for a new trial. The judges of the Supreme Court were accustomed to conduct jury trials and some of the rules regulated such trials. No reference is made in these rules to the procedure or practice in the county courts.

These rules can perhaps be better understood by examining some of the reported cases for this period.

An illustration of the review by the Supreme Court in this early period by habeas corpus is found in *Geyger v. Stoy*.<sup>23</sup> Removal of proceedings from the Oyer and Terminer Court to the Supreme Court by certiorari is shown in *Respublica v. Sweers*.<sup>24</sup> Accounts of jury trials before the Supreme Court appear in *Morris v. Vanderen*<sup>25</sup> and in *Wilcox v. Henry*.<sup>26</sup>

### III. PERIOD FROM 1786 TO 1828.

These years are full of changes. At the time of the Revolution a new court had been created to take the place of the Privy Council to which appeals had been

<sup>23</sup>1 Dall. 135 (Pa. 1785).

<sup>24</sup>1 Dall. 41 (Pa. 1779).

<sup>25</sup>1 Dall. 64 (Pa. 1782).

<sup>26</sup>1 Dall. 69 (Pa. 1782).

permitted by the Act of October 28, 1701,<sup>27</sup> namely the High Court of Errors and Appeals.<sup>28</sup> This tribunal, composed of the justices of the Supreme Court and of the "Presidents" of the five courts of common pleas, heard appeals from the Supreme Court, the registers' courts and the Court of Admiralty, (until the latter was abolished upon the ratification of the new Federal Constitution).

Decisions of the High Court of Errors and Appeals are reported in 1 Dallas 288, 736, etc.

No rules of court of this tribunal appear in our six pamphlets, and if they exist they are unknown to the present writer.

This court was abolished by the Act of Feb. 24, 1806,<sup>29</sup> its jurisdiction and records being transferred to the Supreme Court. As part of the change trials in banc by the Supreme Court were abolished, and the Western District was created, so that the Supreme Court sat in Pittsburgh as well as Philadelphia. Soon a Middle District was created for Sunbury,<sup>30</sup> and then a Lancaster District and a Southern District (Chambersburg).<sup>31</sup> In 1810 the Supreme Court was again given jurisdiction to hold nisi prius courts in Philadelphia.<sup>32</sup> The following year the District Court for Philadelphia was created.<sup>33</sup>

By the Act of 1806 the judges of the Supreme Court continued to hold circuit courts but so arranged that each judge would visit each county only about once every fourth term. The circuit system had been originally introduced by the Act of 1799 for every county except Philadelphia, as a substitute for the earlier plan of holding nisi prius courts. Within three years the circuit courts were abolished by the Act of March 11, 1809; but this act in turn was repealed by the Act of April 8, 1826, and the circuit courts were automatically revived.

The present writer has not been able to locate any reports of the circuit courts of Pennsylvania. Nisi prius decisions are to be found in every well equipped law library.<sup>34</sup>

Since Judge George Gowen Parry has indicated the importance of preparing and preserving *Tabulae Curialis*<sup>35</sup> it may be convenient to reprint at this point a list of the courts at the time of the publication of the Whitehall Rules, printed for William Young in 1801.

On page 67 in the middle of this, our earliest edition of court rules, appears an account of "Courts held within the Commonwealth of Pennsylvania".

<sup>27</sup>2 STAT. AT LARGE 148, § 5.

<sup>28</sup>Created by Act of Feb. 28, 1780, 10 STAT. AT LARGE 52. The Court was further regulated by the Act of April 13, 1791, 3 Sm. L. 28.

<sup>29</sup>4 Sm. L. 270, 272.

<sup>30</sup>Act of April 10, 1807, 4 Sm. L. 448.

<sup>31</sup>Act of March 11, 1809, 5 Sm. L. 15.

<sup>32</sup>Act of March 10, 1810, 5 Sm. L. 158.

<sup>33</sup>Act of March 30, 1811, 5 Sm. L. 223.

<sup>34</sup>See 1 Yeates' Rep. 18, 84, 284, and 497 (1791 and 1793).

<sup>35</sup>Judge Parry recently prepared and published a complete list of judges sitting in Philadelphia since the Constitution of 1874.

- (1) Circuit Court of the United States  
At Philadelphia for Eastern District.  
At Bedford for Western District.  
William Tilghman, Chief Judge  
Richard Bassett } Associate  
William Griffith } Judges
- (2) District Court of the United States  
At Philadelphia.  
Richard Peters, Judge.
- (3) High Court of Errors and Appeals for the Commonwealth of Pennsylvania at Philadelphia.  
Benjamin Chew, President.
- (4) Supreme Court  
At Philadelphia.  
Edward Shippen, Chief Justice.  
Jasper Yates }  
Thomas Smith } Associate Judges  
Henry H. Brackenridge }
- (5) Circuit Court
- (6) Courts of Common Pleas and Quarter Sessions  
First District, John D. Coxe, President  
(Phila., Del., Bucks, Montg. & Chester)  
Second District, John F. Henry, President  
(Lancaster, York, Adams, Cumberland & Dauphin)  
Third District, Jacob Rush, President  
(Berks, Northampton, Luzerne, Northumberland & Lycoming)  
Fourth District, James Riddle, President  
(Franklin, Mifflin, Center, Huntingdon, Bedford & Somerset)  
Fifth District, Alex Addison, President  
(Wash., Green, Fayette, Westmoreland, Alleg. & Crawford)
- (7) Orphans' Court for the City & County of Phila.
- (8) Mayor's Court for the City of Philadelphia
- (9) Aldermen's Court.

*Rules of the Supreme Court, 1786 to 1828.*

During this period of about 40 years 47 additional rules were promulgated, numbered 24 to 70.<sup>36</sup> There was no formal abrogation of any rule at any time between 1722 and 1828. True, some rules may have been cancelled through inconsistency with later rules on the same subject. Thus rule 24 (January 2, 1788) regulates admissions to the bar, and repeats all of Rule 21 (Jan. 15, 1785) and adds a new section, which still controls the conduct of lawyers: "No attorney of this or any other court . . . shall be permitted or suffered to become special bail, etc."

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<sup>36</sup>Edition of 1834 gives all 70 rules, and dates of promulgation; page 3, 8, 10, etc.

Rule 26 (Jan. 2, 1788) sets up full instructions for the guidance of commissioners of bail including the exact form for the bond which is to be used "upon a cepi corpus (or upon an habeas corpus)".

By Rule 27 (Jan. 2, 1788) it is directed that upon removal of a cause by habeas corpus the proceedings are to be de novo.

The subject of priorities upon the trial list first became regulated by Rules 38 and 39 (Jan. 7 and April 8, 1789), top place being given to causes in which the Commonwealth was actually interested (disregarding those in which it was a nominal party) and then to divorce causes.

It is interesting to observe that the Supreme Court could remove by certiorari proceedings in which judgment had been given by justices of the peace. (Rule 40 April 4, 1789).

An "affidavit of defense" finds its earliest mention in Rule 42 (Sept. 17, 1791), such affidavit being required at least six weeks before trial if the defendant sought to prevent "a common jury" from trying the cause.<sup>87</sup>

Rule 58 (Sept. 11, 1795) embodies the first formal agreement of the bar as to matters of practice. It is too long to quote. It reads in part:

"It is agreed by the attorneys practicing in the Supreme Court of Pennsylvania, that . . . the defendant's attorney shall confess judgment to the plaintiff at the third court . . . unless the defendant or some person for him or her shall make affidavit at or before the second term that to the best of his knowledge and belief there is a just defense in whole or in part in the same cause, etc."

The foregoing rule, or rather the agreement of the bar, is the origin of the practice which still requires the filing of affidavits of defense. Notice, however, that the affidavit under Rule 58 need not set forth the nature of the defense or of the facts constituting it.

In the edition of 1826 (E. Wright, printer) containing, *inter alia*, "Rules for the practice of the Courts for the County of Northampton," there appears in ink a notation, reading:<sup>88</sup>

#### "Agreement of the Bar.

"It is agreed that in all cases of Appeals in Civil causes from the judgments of Justices of the Peace the Plaintiff, whatever may be his cause of action, may declare in *Indebitatus assumpsit* for money had and received, etc."

"Easton Nov. 18, 1807." The names—not too legible—of nine attorneys follow as having made the bar agreement. Accordingly definite agreements of the bar have their place in the structure of rules of court.

Returning to a consideration of the old rules of court we find Rule 52 (Sept. 15, 1801) authorized the prothonotary to enter a non pros "as a matter of course"

<sup>87</sup>The power of the Court of Common Pleas to make a rule requiring the filing of an affidavit of defense was upheld, after elaborate argument, in *Vanetta v. Anderson*, 3 Binney 417 (1811).

<sup>88</sup>After page 31.

when a declaration is not filed within 12 months of the first day of the term to which an action is brought.

A single Rule No. 54 (Sept. 15, 1804) is made to apply "in the Supreme Court, Circuit Courts and Courts of Nisi Prius", as to the trial of cases: one of the counsel "maintaining the affirmative of the issue" is to open, call and examine witnesses, read the papers, and then one of the opposing counsel does the same. When the evidence is closed, one of the counsel on the affirmative side "shall sum up". The two opposing counsel shall then speak in succession—"the remaining counsel on the affirmative side shall then be heard in reply." The reply is to be confined to the points made by the opposite counsel and to "the enforcing of those made by his colleagues". "Alternative speaking shall be wholly abolished."

"Specifications of the particular errors which he assigns" appear first to be required to be filed by Rules 62 and 63 (Jan. 11, 1823).

Our source for the 70 old rules of court has been the edition of 1834. Those rules which had been promulgated prior to its publications also appear in the Whitehall Edition of 1801, but rearranged under topics, followed on page 34 by eight "Temporary Rules of the Supreme Court." On comparison we find that three of these "temporary rules" became incorporated in the list of 70 rules, being Rules 45, 46 and 47. The other temporary rules are dated September 1797. No. 4 reads:

"On motion, the court enlarges the times for filing affidavits of defence to within three days of the respective stays of execution."

Temporary rules 5, 6 and 7 also extended certain motions. Rule 8 reads:

"The court order and direct, that such of the Jurors as are absent this Term, shall be put on the special jury list . . . until they attend."

Let us now consider the rules promulgated during this period by the Supreme Court for "the better conducting and expediting the business of the several Circuit Courts, in pursuance of the two Acts of General Assembly passed on the 25th day of September 1786 and on the 20th day of March 1799."

#### *Rules by the Supreme Court for the Circuit Courts.*

Three of our six pamphlets contain rules for the circuit courts.

The edition of 1826 is verbatim the same as that of 1801.<sup>39</sup> The absence of changes is doubtless due to the abolition of the circuit courts in 1809 and their restoration in 1826, of which mention has been made. The edition of 1834 repeats the rules with minor changes chiefly relating to the venire.<sup>40</sup> No date of promulgation appears, but since the rules appeared in the edition of 1801 they doubtless were prepared promptly after the passage of Act of 1799.

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<sup>39</sup>Edition of 1801 (Whitehall) in middle section of pamphlet page 1. Edition of 1826 (R. De Silver) page 12 in middle section of pamphlet.

<sup>40</sup>Page 21 in middle section of pamphlet.

One change in practice is to be observed. Rule 12 notes the fact that "the record itself being now removable by *Habeas Corpus cum causa* in all causes removed thereby into the Supreme or Circuit Courts, the proceedings therein shall begin upon the last rule in the court below," etc. Heretofore the record did not go up, and the proceeding was de novo on removal into the Supreme Court.

It is interesting to observe that "the validity of a judge's order may in all cases be impeached by an application to the next Supreme Court or Circuit Court" (Rule 25 in edition of 1801, same as Rule 23 in edition of 1834). The reference seems to be only to judges of the Supreme Court.

Before closing the discussion as to the circuit courts it should be mentioned that by the Act of March 20, 1799, Section 1, they superseded the courts of *nisi prius*. Also that express rule-making power was conferred upon the Supreme Court by the Act of Sept. 25, 1786.<sup>41</sup>

No rules of Court for the High Court of Errors and Appeals have been found.

#### *Early Rules of Other Courts.*

Rules of Court promulgated prior to 1835 appear in the various pamphlets which have been mentioned:

1. The Whitehall Pamphlet of Rules (1801) also includes:
  - "Rules and Orders for Regulating the Practice of the Courts of Common Pleas. Established by the Presidents of the Several Districts in Pennsylvania."<sup>42</sup>
2. The De Silver pamphlet (1810) contains the following additional rules:
  - (a) "Rules for Regulating the Practice of the Circuit Court of the United States for the District of Penna." (April 1794 to Nov. 15, 1809) (at page 35).
  - (b) "Rules for Regulating the Practice of the Court of Common Pleas of Philadelphia County". (Dec. 1784 to June 16, 1810) (at page 45).
3. The Frick pamphlet (1819) also sets forth:
  - (a) "Rules for Regulating the Practice of the Circuit Court of the United States for the District of Pennsylvania." (April 1792 to May 7, 1818).
  - (b) "Rules Regulating the Practice of the District Court for the City and County of Philadelphia." (Jan. 1, 1819) (at page 52).
  - (c) "Rules for Regulating the Practice of the Court of Common Pleas of Philadelphia County." (Dec. 16, 1780 to Dec. 1817) (at page 72).
  - (d) "Rules adopted by the Court of Common Pleas of York County in April Term 1811." (At page 91).
  - (e) "Rules adopted by the Court of Common Pleas for Lancaster County on April 23, 1811." (At page 93).
  - (f) "Rules of the Court of Common Pleas in the Seventh District". (At page 96).

<sup>41</sup>2 Sm. L. 391, § 6.

<sup>42</sup>There were then five districts, soon increased to 6, and augmented to 16 by 1825. For list of districts in last mentioned year see at end of Wright pamphlet of rules (1826) page 21.

4. The edition of 1834 also includes the following rules of court:
- (a) "Rules by the District Court for the City and County of Philadelphia" (1837).<sup>43</sup>
  - (b) Rules of the Court of Common Pleas (not dated, at page 65).
  - (c) Rules of the Orphans' Court, April 8, 1830. (At page 82).
  - (d) Rules and Orders of the Supreme Court of the United States (Feb. Term 1790 to Jan. Term 1834). (At page 85).
  - (e) Rules at Law of the Circuit Court of the United States for the Pennsylvania District. (No date. At page 99).
  - (f) Rules in Equity Ordered by the Supreme Court. (No date. At page 103).

Other pamphlets belonging to the Philadelphia Bar Association disclose the following additional early rules of Court:

- (A) "Rules for Regulating the Practice of the Courts of Common Pleas, Quarter Sessions and Orphans' Court of Philadelphia County" by Abraham Small (1824) (*Ex libris* John Hallowell).
- (B) "Rules of the Court of Common Pleas and Orphans' Court of the City and County of Philadelphia, adopted 8th day April 1830". Printed by John Young (Phila.) (1830).<sup>44</sup>
- (C) "Rules for Regulating the Practice in the Courts of Common Pleas and other Courts of Allegheny County". Printed by Johnston & Stockton, Pittsburgh (1830) (*Ex libris* William Wilkins).<sup>45</sup>

#### IV. PERIOD FROM 1828 TO 1834.

We read on page 20 (middle section) of the edition of 1834 that the old rules promulgated prior to its publication appear therein, which rules, with a new set of 24 rules, are "approved and adopted". These rules are arranged under the following subjects arranged alphabetically:

- |                                     |                                       |
|-------------------------------------|---------------------------------------|
| 1. Appeals from the Orphans' Courts | 14. Judgments                         |
| 2. Arbitration and Awards           | 15. Letters Rogatory                  |
| 3. Arguments                        | 16. Money Paid into Court             |
| 4. Attachments                      | 17. Motion Days                       |
| 5. Attorney and Counsel             | 18. New Trials and Arrest of Judgment |
| 6. Bail                             | 19. Notices                           |
| 7. Bills of Particulars             | 20. Pleadings                         |
| 8. Calendar                         | 21. Records                           |
| 9. Certiorari                       | 22. Reports of Referees               |
| 10. Costs                           | 23. (No rule)                         |
| 11. Depositions                     | 24. Subpoena                          |
| 12. Errors and Appeals              | 25. View                              |
| 13. Incorporation                   |                                       |

<sup>43</sup>Date from interior title page. Doubtless several pamphlets were bound together.

<sup>44</sup>These rules superseded all earlier rules by order of the Court of Common Pleas of Philadelphia, April 8, 1830 (page 24).

<sup>45</sup>This edition is exhaustively annotated from "Abatement" to "Attorney at Law". Dates of adoption of particular rules are given ranging from September Term, 1796, to May 22, 1830. The "Other Courts" in the titles indicated aspiration which was not achieved.

Rule 5 introduces the principle of reciprocity in admitting attorneys from other states:

"No person shall be admitted to practice as an Attorney of this Court . . . unless he be a citizen of the United States, and also unless it be shown that the Attorneys of this Court are entitled by the practice of the Court where the applicant has been admitted, to admission under the like circumstances."

The same rule introduced a provision which is still valid:

"All agreements of Attorneys touching the business of the court shall be in writing, otherwise they shall be considered of no validity."

Absence of counsel is regulated by Rule 5 (6):

"No cause on the Calendar shall be left open on account of the engagements or absence of Counsel, unless the engagements be on public duty, or the absence arise from sickness."

Rule 5 (7) became the precedent for Common Pleas rules in about half the counties prior to the promulgation of this new Rules of Civil Procedure.<sup>46</sup>

"Upon rules to show cause of action, or to dissolve foreign attachments, the Counsel who is to show cause will begin and conclude, etc."

The forerunner of the practice as to affidavits raising questions of law is to be found in Rule 8 (3):

"When issues are joined both in fact and law, the latter shall be first disposed of, unless otherwise directed by the court, and in the meantime the cause shall be placed only on the argument list."

Priority on the trial list is now given only to causes in which the Commonwealth is an interested party, by Rule 8 (c). The rules are silent as to the priority previously accorded to divorce proceedings.

Security for costs may be obtained under Rule 10 (i) as to nonresident plaintiffs.

We have completed this survey of the scope of the early rules promulgated by the Supreme Court of Pennsylvania, a subject not included in the classic volume by Mr. Loyd on the *Early Courts of Pennsylvania*. Certain impressions—they cannot be called conclusions—remain from this perusal of forgotten legal learning.

*First.* An authoritative history of the Supreme Court of Pennsylvania should be prepared and published, using not only materials easily available in printed form, but the records of the court itself.

*Second.* Since 1795 the members of the bar have themselves been active in drafting rules of court which regulated the practice in the courts.

*Third.* While statutory authority has been relied on in the exercise of the rule making power of the courts, such power is inherent in the courts of Pennsylvania.

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<sup>46</sup>Pa. R. C. P. No. 11, effective March 20, 1939, annotation.

*Fourth.* Many of the existing rules of court have an ancient lineage extending more than a full century into the past.

*Fifth.* The proper purpose of rules of court lies in the domain of procedure and adjective law.

*Sixth.* Sufficient information is available as to the text and content of early rules of court as to repay research when questions arise as to whether a particular matter is one of procedure or one of substantive law.

#### APPENDIX

##### *Early Rules of Court in England.*

In the Library of the Philadelphia Bar Association there is a volume containing complete copies of the early rules or "general orders" of the High Court of Chancery beginning with those published by "Lord Chancellor Bacon" in 1618, down to one promulgated by Lord Chancellor Eldon on December 13, 1814, shortly before the printing of the volume in 1815 by Reed and Hunter, Law Booksellers, Bell-Yard, Lincoln's Inn. The compiler and author of this volume was John Beames, Esq., of Lincoln's Inn, Barrister at Law.

In the same library is a similar volume printed by Henry Lintot in 1747 containing the text of the "Rules, Orders and Notices in the Court of King's Bench" from 1604 to April 3, 1747, and the "Rules and Orders of the Court of Common Pleas" from 1457 to 1743.

The opportunity of inviting attention to the existence of these early compendiums of English rules of court is the reason for adding the present appendix to an article which may have already taxed the patience of the reader.

A few brief excerpts may be sufficient to acquaint the modern reader with some of the problems which confronted the courts three centuries ago when undertaking to exercise the rule making power. The problem of overcrowding of the bar was faced in 1573, in the 15th year of Elizabeth, by an Order of the Common Pleas Court, reading:<sup>47</sup>

"For Reformation of the excessive and unprofitable number of Attorneys of this Court, It is ordered, That all such Attorneys as have been absent, and not given their due Attendance here according to their Oath, or that have not been towards any cause or matter in this Court for the space of two years last past, shall be put out of the Rolls. And the like Order to be kept hereafter."

The problem was not solved, and a new order, in the 14th year of James the First (1616), was "considered of by the judges" of the Common Pleas Court:

"That the number of Attorneys of each Court be viewed, and to have them drawn to a competent Number in each Court, and the

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<sup>47</sup>The pages in this volume are not numbered. References therefore are made according to the dates of the rules and orders.

superfluous Number to be removed, wherein respect to be had, and that the most unfit and unskilfullest persons be removed."

The record is happily silent as to whether the "most unfit and unskilfullest persons" were ever removed from the rolls of the lawyers, for the rule was only "considered".

A desire to hasten proceedings in equity and to shorten the law's delays resulted in the promulgation in 1635 by "Lord Coventry, Lord Keeper of the Great Seal with the advice and assistance of the Right Honorable Sir Julius Caesar, Knight, Master of the Rolls" of the following order:<sup>48</sup>

"The Register shall, within ten days after the end of every term, certify to the Lord Keeper, what references depend in the hands of any Master, and how long they have depended, that if any of them have depended over long, the Court may require an account thereof from the Master, and quicken him to a speedy dispatch."

Finally, a rule of the Court of King's Bench entered in 1687 may serve as a precedent for those who wish to enforce quiet in the court room free from the disturbance by street noises:

"He is Ordered that no Carts or Drays pass in King-Street Westminster, in Term-Time between the Hours of Eight and Two."

PHILADELPHIA, PA.

ALBERT SMITH FAUGHT

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<sup>48</sup>Beames, page 81.