

# COMMON LAW PLEADINGS IN NEW SOUTH WALES

## AND HOW THEY GOT HERE

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### **Advantages and disadvantages**

1. There can have been few stranger things in the legal history of New South Wales than the continuation until 30 June 1972 of the system of Common Law pleading, discarded in England in 1875 after evolving planlessly over the previous seven Centuries. The Judicature System in England was the culmination of half a century of reform in the procedures and constitution of the courts, prominent among rapid transformations in British economy, politics, industry and society in the Nineteenth Century. With the clamant warning of revolutions in France, the end of the all-engrossing Napoleonic Wars and the enhanced representative character of the House of Commons, the British Parliament and community shook themselves and changed the institutions of society; lest a worse thing happen. As well as reforming itself, the British Parliament in a few decades radically reformed the law relating to the procedure and organisation of the courts, the Established Church, municipal corporations and local government, lower courts, Magistrates and police,

corporations and economic organisations, the Army, Public Education, Universities and many other things.

2. The successful reforms were based on careful and well-considered study of the need for reform and the available options, and on continued attention. The process of reform was littered with failures, imperfections and omissions, and looking backwards it is marvelous that there were not more discontent and internal disorder than there were. We should guard ourselves against anachronism and against judging other Ages by the standards of our own; we can never fully understand them. The failures appear obvious; everything to do with Ireland seems to have been mishandled, the House of Lords was not disempowered or reformed until the Twentieth Century; economic equality of women was long deferred and was incomplete, and their political emancipation did not happen until 1919, long after Women's Suffrage in most British successor countries overseas (but long before France in 1945). The failures are glaring, the successes less obvious because they were successes. A lawyer who was ending a career of 50 or 60 years about 1880 must have felt that his professional life had been spent coping with rapid large changes in every circumstance of his practice, and of his life.
3. I first encountered Common Law pleadings in 1955, in a large law office or factory which defended motor accident claims in their hundreds. All these actions were tried by jury, and the interval from Writ to hearing approached five years. It was hard to grasp that this archaic language was in daily use, especially as it was no longer used anywhere else, and it was even harder to grasp its obscure principles. They were not taught at Law School, but were referred to only in incidental ways, as Legal History as if already in the Past. They were part of my legal life for another seventeen years, always awaiting their impending abolition, agonizingly slow in coming. They were part of reality and I had to learn them, and for six years at the Bar I had to be able to write them myself.
4. The system was startlingly anachronistic in form and language. Anachronism was harmful. It obstructed interaction among Common Law States and countries. Several times early in the Century High Court judges observed on anomalies. In 1952 there was a catastrophic miscarriage in Laing v Bank of New South Wales, in which the parties unwisely cast their contest into technicalities not merits, and received utterly different answers from the Court here and from the Privy Council.
5. If you have not known another system you may not share my perception that the present system of civil procedure is elegant. Its elegance is evident from experience in the earlier chaos. Nowadays the procedural law can be found; it has been collected and is ascertainable and accessible in statutes and Rules of court. (This largely true, not completely true.) If you carefully read the Civil Procedure

Act 2005 (NSW) and the Uniform Civil Procedure Rules, and the forms, you will be well on the way to understanding the system. This is quite unlike the earlier system, which grew over centuries and was never under the control of any one mind or identifiable committee or project. To make procedural law ascertainable was a great advance towards clear thought about legal principles as different subjects to procedure, a distinction which it was difficult to make before the Judicature Act 1873 (Imp). Henry Maine said in his work *Ancient Law* that in ancient times the law was secreted in the interstices of procedure; this observation has often been applied to the history of English law; and justly so.

6. The old system of procedure and pleading drifted together over centuries and had large short-comings and stunning disadvantages. Its first short-coming was complexity. It was chaotic and unsystematic, the product of centuries of judicial extensions and compromises, small statutory interventions, rivalry between courts to attract business, and changes produced by chance. This complexity brought no correspondingly great advantage. There was no systematic text which dealt with the whole subject in a clear way; there could not be, and the texts were accumulations of case law. The system could only be understood, to the extent that that was possible, by long study and long experience in practice. In England Special Pleaders were a class of lawyers whose practice consisted solely of drawing documents for litigation and advising on their use; otherwise they did not conduct the litigation.
7. A second shortcoming was the obscure and archaic language of the system. The use of English in Common Law pleadings was comparatively modern; until 1731 the record was in Latin. This was not classical Latin, the mother tongue of Western Civilization; it was an accumulation of conventional expressions, formulas and abbreviations which could be learnt only by practising law; Latin which would make Caesar weep and Virgil stammer. When English was adopted it was as stilted as the Latin had been. Trespass to land was spoken of as breaking the plaintiff's close, an awkward transliteration of Trespass *quare clausum fregit*. Latin names of many causes of action, Pleas and defences were the usual means of referring to them until 1972, used extensively in the Common Law Procedure Act 1899 (NSW) and the General Rules of Court; the textbooks cannot be understood without knowing them.
8. Many documents and procedures were known by Latin names or expressions in Latin which understood literally said nothing about what was being referred to. Some are still in use. Learning Latin would not enable you to understand them. *Qui tam* was part of a longer phrase which means "as much for the King as for himself"; in a *qui tam* action a Common Informer claimed that the court should require the defendant to meet an obligation to the King and also to pay a penalty to the Informer; understanding the words *qui tam* would tell nothing of that, you just had to know. Mandamus means "we command" and gives a small hint of what the Writ of Mandamus was about. Certiorari means "to be certified," and the Writ

required that the record of proceedings in another court be certified so that the Court could deal with it; try the case itself, or examine the record and determine whether the proceedings had been conducted lawfully; knowing Latin would give only the merest hint of what the process was. Many documents were referred to by mysterious abbreviations; a *Ca Re (capeas ad respondendum)* required the Sheriff to arrest the defendant to compel him to appear in the action, a thunder-striking way of informing the defendant for the first time that he had been sued, and in the Eighteenth Century one of the usual ways of doing so. (This was abolished in 1838, in New South Wales in 1839). A *Ca Sa (capias ad satisfaciendum)* required the Sheriff to arrest the judgment debtor and imprison him until the debt was paid; common until the mid-Nineteenth Century. Similar expressions continued in use until 1972; *Fi Fa, fieri facias* required the Sheriff to seize and sell goods to pay a judgment debt, *Ha Fa (habiri facias possessionem)* required the Sheriff to eject the defendant and deliver up possession of real property. Only those who had mastered the special language could know what these were.

9. A third great shortcoming was the curious and archaic reasoning used to compose and interpret pleadings and to debate legal issues. It is difficult to recapture or convey the patterns of thought and understanding which were brought to bear in argument about the sufficiency of pleadings; whether the allegations in a Declaration actually showed a cause of action which would succeed if the facts alleged were proved, or whether the facts raised in a Plea were a sufficient defence if proved. In a case argued on pleadings, the only facts to which argument and the court could refer were the facts alleged in sparse and conventional language in the pleadings; there was no evidence, and next to no context or detail in which the debate was to take place. Failure could be incurred for the most minor errors in form or discrepancies in facts, which a modern mind would not notice or would correct without speaking of them: and the limitations on the times when they could be brought forward and relied on were defective. In the Seventeenth Century and earlier, and even in the Eighteenth Century, judges and lawyers were able to see such rigorously confined argument as a satisfactory basis for deciding litigation. By the Nineteenth Century this was altogether unsatisfactory; judges wanted to know the underlying facts; and so also the judges of the Twentieth.
10. A fourth and the greatest shortcoming was that the system only applied to determination of rights in a court which administered the Common Law; it did not apply to a controversy or to any aspect of a controversy which was to be decided on principles of Equity. For reasons which can be explained only by recounting some centuries of legal history, different courts heard and determined claims under the Common Law and claims for equitable remedies. They had quite different systems and of practice and procedure. In New South Wales there was but one Supreme Court, but its jurisdiction at Common Law was exercised separately from its jurisdiction in Equity. In an action at Common Law the remedies available were remedies at Common Law. In a suit in Equity the remedies available were equitable

remedies: with some statutory modifications. The practice procedure and pleadings of each jurisdiction were quite unlike those of the other.

11. A court of Equity might restrain a litigant from advancing a claim or enforcing a judgment at Common Law. Part of a controversy might be determined in a Common Law court and overborne by decision of another part in a different court. Until 1854 a Common Law court was unable to grant any associated equitable remedy; the extension then conferred was very limited. The extension was adopted in New South Wales in 1857, and there was a further extension in 1957, with little effect.
12. Until the Nineteenth Century a party to Common Law proceedings, and anyone else who had an interest in the outcome, was disqualified from giving evidence at the trial, but could give evidence in interlocutory applications. In Equity a party could give evidence, in the strange way in which evidence was given, by answering interrogatories before an officer of the Court: the Judge did not see witnesses or hear them, but read what they had said. Enabling the parties to give evidence in their own cases probably did more for attainment of justice than all other Nineteenth Century procedural reforms together: few cases today could go to trial without the evidence of one or all parties.
13. There were advantages as well as disadvantages.
14. It was necessary to know, when you started your case, what it was about and the basis of your claim: the claim had to make sense as a count in a Declaration, and it was not possible to set out the facts in a directionless narrative and launch out towards a judgment over the horizon. If your claim fitted into a count in Bullen & Leake you could be fairly sure that there was such a cause of action: if it did not, you needed to address your problems at the beginning. For many cases which did not raise difficult questions of law but required detailed consideration of the evidence the system was easy to use, following routines worn smooth in thousands of cases. This was so for many motor and industrial accident claims: the particulars of negligence and damages were the important parts and all else followed precedents. Practitioners accustomed to working in this way were strongly attached to the system and saw no reason, had no reason to change. There were many of them.
15. Then too, there were those who found the elaboration and the complexity of the system interesting, even absorbing. A barrister who had spent decades coming to understand and work with the system might regret parting with it. It belonged to an Age when education was education in Classical languages and pupils composed metrical Latin verse as a scholarly exercise. With Judicature pleadings one had to part with all this and be consoled by crossword puzzles.
16. The greatest advantage was that the division between the Common Law and Equity in everyday practice kept knowledge of the division in their doctrines vivid. The



Bench and Bar of New South Wales had and still have a distinct awareness of whether a question is about a right at Common Law and of the point where consideration turns to equitable restraint or modification of reliance on rights at Common Law: a distinct understanding that unobserved slippage between the two is a failure to give full consideration.

### **Practice before 1972**

17. At the present day it is usual for litigation in the Equity Division to involve both the Common Law and Equity; and it is also usual for litigation to involve claims for statutory remedies which only an arbitrary allocation can place in one or the other. Little turns on which Division the plaintiff chose to nominate when the proceedings were commenced. If the older system seems chaotic, until 1972 chaos is what we had. With well-moneyed opponents there sometimes were satellite equity suits ancillary to Common Law proceedings. If litigants did not have the resources to support this, they stood or fell on the first decision about which jurisdiction to proceed in. Incorrect classification could bring failure.
18. From 1880 until 1972 procedure in Equity was generally like the Judicature System, but confined to equitable remedies. Pleadings were read strictly. The mysterious question “What is your equity?” had to be answered if the plaintiff were to succeed. Contentious Probate proceedings were also modelled on the Judicature System. Unless a lawyer limited his practice to a narrow range (as many did) it was necessary to understand both systems. The High Court of Australia, where there was then significant first-instance litigation, used a version of that System, as Queensland was the first Australian Colony to adopt the Judicature System, and Griffith CJ had practised there and knew its advantages. The Supreme Courts of the Australian Capital Territory, Papua and New Guinea and the Northern Territory were closed to a Sydney barrister who did not understand Judicature pleadings. The division between Law and Equity was deep as they had different modes of trial and different underlying principles. Each judge of the Supreme Court was generally identified with Common Law or with Equity; although some heard both. Barristers were differentiated between Common Law men and Equity men. (They were men.) Many were firmly marked with one character or the other and never conducted any other kind of case, and barristers who always appeared before juries used a quite different style of advocacy to those who always appeared in Equity. Equity was referred to as the whispering jurisdiction; there was no whispering to juries. There was always room at the top, and the true leaders of the Bar had no difficulty in appearing anywhere.
19. There was another small corner, the Commercial Causes List conducted by one judge, for many years Mr. Justice Bruce Macfarlan, father of the present Justice Macfarlan. Commercial Causes were heard without juries, unlike other Common

Law actions. “Commercial causes mean causes arising out of the ordinary transactions of merchants and traders ...” (Commercial Causes Act 1903 (NSW) s 3). If this test was satisfied (and it was often debated) preparation for hearing was closely supervised by the judge, the issues were ascertained by means devised for each particular case, sometimes without pleadings at all, sometimes on particulars stated in letters or informal documents; thoroughly modern and relatively expeditious.

20. It was usually easy to tell what kind of case you were in by seeing who was appearing in it. If the answer still was not clear you could tell by the way they folded their papers. In a Common Law case the Writ, pleadings and affidavits were on foolscap paper folded once lengthwise. In an Equity case affidavits and Chamber Orders were on foolscap paper, but Pleadings and Decrees, final dispositions, were on brief paper, about twice the width of foolscap and folded crosswise twice. (The Consolidated Equity Rules said that they were to be on foolscap, but everybody knew not to do that.) A Decree in Equity was lengthy and elaborate and needed a large sheet of paper. Before saying what the order was it recited in outline what had happened on each hearing day, which counsel had appeared and for whom, which affidavits had been read, which exhibits had been admitted and which witnesses had given oral evidence. Settling its terms might well take hours in a back room before the Deputy Registrar in Equity, who was meticulous. (There was no Registrar in Equity, just a Deputy.) In contentious Probate cases the papers were folded in the same way as in Equity, but in Common Form Probate applications, which were not contentious and usually decided by the Registrar, the papers were folded a different way again; foolscap folded cross-wise twice. If you put a Pleading or an affidavit on the wrong kind of paper, or folded it the wrong way, or put the backsheet at the wrong place, you would not be able to file it in the Registry, let alone read it in Court. It is not surprising that solicitors tended to find some class of business and specialise in it. Not least of the innovations of 1972 was to put all court documents on paper of the same size and leave them flat without a backsheet, not to fold them at all: an insight of genius.

### **The Texts**

21. Many texts and works of reference dealt with pleading, and they spoke only to the well-informed. One famous work was Tidd’s Practice, first published in 1790, the Ninth Edition in 1828 in the last years before the Reform legislation began in 1832. *The Owl of Minerva Flies only in the Twilight*. This book was strongly commended to David Copperfield by Uriah Heap: “Oh, what a writer Mr. Tidd is, Master Copperfield.” The work was a vast accumulation of case notes and references and was once very influential, and famous for its complexity: something in support of most arguments could be found in it. Tidd was admitted to the Inner Temple in 1782 but until 1813 he was not called to the Bar and practised as a Special Pleader, with much business and ten to fifteen pupils at a time, who paid for the opportunity to learn to draft pleadings while preparing for practice at the

Bar, where some became eminent. I have never opened this work and know it only from secondary sources; although Frank Hutley put it about that my arguments were based upon it.

22. A systematic work was “Principles of Pleading” by Serjeant Henry John Stephen, first published in 1824 and reaching its Seventh Edition in 1866. He made the claim, which seems to have been accurate, that this was the first publication to arrange the law according to principles. Another valuable work was the Third Edition of Bullen and Leake, *Precedents of Pleading*, published in 1868. These two works from the last days were valued texts for the New South Wales Bar until 1972.
23. There were practice books; the one most used was “The Practice of the Supreme Court...at Common Law” Fourth Edition 1958 by R.E. Walker the Prothonotary: he also published supplements and books of forms. Walker gave the text of the Common Law Procedure Act 1899 (NSW) and references to cases on it, and other statutes encountered in practice. That legislation was not a comprehensive statement of the system; it reformed and restated many details of the system, but did not state the system or teach it. Nor did Walker’s practice book.
24. A valuable work was “Personal Actions at Common Law” (1929) by Ralph Sutton later QC of the English Bar, who cannot have had personal experience of the system and did not show that he knew that the system was still in use. Sutton described the system as historically past, and described it well, for lawyers who knew nothing of it and needed it to understand what it had been. Sutton gave the pleadings in the forms they had before 1832, replete with superfluous formal expressions. Many pleadings are also set out in their tiresome length in Holdsworth’s *History of English Law* vol. IX pages 262 to 279.
25. The final work was “Principles and Precedents of Pleading in the Supreme Court...” by Arthur Rath, later Q C and a Judge of the Court, published only in 1961 in the last years: the Owl flies again. This work explained the principles of the system as actually in use, gave references to the then current legislation and precedents and was based on current practice. This truly useful work was the only book which ever dealt in principle with what in fact happened in New South Wales. Arthur Rath lectured at the Law School and the Bar Association many times and there cannot have been anyone with a more complete understanding. He was not an enthusiast for the system, and like every other task he mastered it with great industry.

### **Pleadings after the Reform legislation**

26. I will give a general description of the Common Law procedure and pleading system which was in use until 1972, and also say something about its earlier state before the Reform legislation of the Nineteenth Century. You need some understanding of the system to follow Law Reports from those times. In New



South Wales in the Twentieth Century the system was in a high state of reform, without many strange complexities which existed at earlier times. You need to understand those complexities to unravel earlier case law and I will explain some of them, but complete exposition of the developments of almost 700 years is well beyond practicality. You may find it difficult to accept that I am describing the system in a high state of reform, but I assure you that that is so.

27. Arthur Rath stated the fundamental Rules of Pleading in terms which will serve very well for today: allege matters of fact and not matters of law, state the legal effect of transactions not the evidence, state only material facts, state all facts necessary for the existence of the cause of action, defence or reply, give particularity so as to show precisely what is alleged, clearly and without prolixity. He went on to state many matters of detail which it was essential to know.
28. The most usual Common Law business, an action, was a claim for damages initiated by a Writ of Summons, issued in the name of the Queen and nominally witnessed by the Chief Justice of New South Wales; actually signed by the filing clerk. Without greeting or preamble the Queen sharply commanded the defendant to enter an appearance. Judgment could be entered by default if the Writ was served on the defendant and he did not enter an Appearance. After the defendant appeared the plaintiff filed a Declaration, which corresponds with a Statement of Claim but in altogether different language. I will set out two, from Arthur Rath's work. The first is a tort claim.

A.B. by M.N. his attorney sues C.D. for that the defendant by G.H. his servant so negligently and unskillfully drove and managed a motor vehicle along a public highway that the said motor vehicle was forced and driven against the plaintiff whereby the plaintiff was thrown down and wounded and for a long time was sick and was prevented from attending to his affairs and was permanently disabled and incurred expenses for medical attendance

AND the plaintiff claims £10,000 damages.

29. The second is a claim in contract.

...for that it was agreed by and between the plaintiff and the defendant that the defendant should sell and deliver to the plaintiff and that the plaintiff should buy and accept from the defendant 100 sacks of flour of the same quality as certain flour which the defendant had then lately sold and delivered to G H at the price of 15 shillings per sack and all conditions were fulfilled all things happened and all times elapsed necessary to entitle the plaintiff to have such flour delivered as aforesaid yet the defendant delivered to the plaintiff as and for the flour so agreed to be sold and delivered as aforesaid certain flour not of the same quality as the flour which he had so sold and delivered to the said G H but of an inferior quality whereby the plaintiff lost the price paid by him to the defendant for the said flour and the profits which he would have derived from the performance by the defendant of the said agreement by the defendant

AND the plaintiff claims &c

30. All the allegations were set out in one sentence. Arthur Rath used punctuation, but this was a modern touch. There were no particulars of time and place; Rules of Court required another document containing particulars including particulars of damages to be filed with the Declaration.
31. In the left-hand margin next to the first two lines of the Declaration the words "Sydney to wit," established the venue at which the hearing was to take place. The plaintiff could elect the place of trial; the Court could alter the venue but was reluctant to do so. On the backsheet of the Declaration was a sharp message to the defendant: "The defendant is required to plead hereto within 14 days otherwise judgment."
32. In logic there are only three kinds of defence: a traverse which denies the facts alleged or a material part of them, a confession and avoidance, which admits that the facts alleged are true but alleges other facts which show that the plaintiff is not entitled to the remedy, and a Demurrer which admits that the facts alleged are true but says that they do not in law entitle the plaintiff to a remedy. So too for later pleadings: all they could do in logic was limited in the same way.
33. The usual response of the defendant was to file Pleas. The simplest Plea, usually the first Plea, was the general issue: "Not Guilty" in a tort claim. There were other forms of general issue. For contract claims, *assumpsit*, the general issue was "*Non Assumpsit*," he did not promise as alleged, and for debt claims, *indebitatus assumpsit*, the general issue was "*Nunquam Indebitatus*," never indebted.
34. These are Pleas to the Declaration in tort given earlier:
 

The defendant by X his attorney says that he is not guilty as alleged

2 and for a second Plea as to so much of the Declaration as alleges that the defendant by G.H. his servant or at all drove and managed a motor vehicle along a public highway and that the said motor vehicle was forced and driven against the plaintiff denies the said allegations and each of them

3 and for a third Plea says that the plaintiff's injury and damage alleged were caused by the negligence of the plaintiff himself.
35. The second Plea denies and compels the plaintiff to prove that the accident happened at all: a hardy denial, usually made for the tactical reason that it made it prudent for the plaintiff to call the evidence of the police officer who interviewed the parties to prove the identity of the driver, giving the defendant the opportunity to cross-examine him. In 1966 Contributory Negligence ceased to be a complete defence and became the ground for apportionment of damages. The third Plea alleging Contributory Negligence was required by a rule made in 1966 in the last years of the system, later than Arthur Rath's book: until then Contributory Negligence was put in issue by "Not Guilty," although the defendant bore the onus of proof. The basis was that Contributory Negligence went to causation of damage

and causation was in issue under the general issue. There was little logic in this: you just had to know it.

36. If the Plea consisted only of denials there was no room for the plaintiff to do anything but join issue on the Plea. In the example given there is an allegation in the third Plea so the plaintiff's Replication is in these terms:

The plaintiff joins issue upon the defendant's first and second Pleas

2 and for a second Replication as to so much of the third Plea as alleges that the plaintiff's injury and damage were caused by the negligence of the plaintiff himself denies the said allegation.

37. Replications might be more complex: joining issue on some denials, denying facts introduced by an allegation in some Plea and alleging some facts. There might be some further facts which gave a reason why a Plea did not operate as a defence, such as an estoppel which prevented the defendant from denying what the Plea denied, or facts such as that the plaintiff was beyond seas, or in prison, or *non compos mentis*, for some or all of the time relied on in a Plea raising the Statute of Limitations. A Replication raising such a matter set out the facts which disentitled the defendant from relying on his Plea, in the same style of language as the Declaration.
38. Other pleadings might follow. If the plaintiff alleged facts in the Replication which had not earlier appeared on the record, the defendant might deny them or allege further facts which deprived the facts newly alleged of effect, by a Rejoinder. Names existed for further pleadings; a Surrejoinder, a Rebutter and a Surrebutter. I did not ever see pleading beyond a Rejoinder, or ever hear of pleading that went beyond a Surrejoinder. As I recall Arthur Rath saying, if further pleadings are possible the Common Law has neglected to give them names.
39. Eventually this exchange reached a point where there was an issue; one side alleged a fact, the other side denied that fact, and there was an issue of fact for a jury to determine. (An issue is what comes out.) Sometimes the outcome was not an issue of fact, but an issue of law for the Court to determine, meaning the Court in Banco, usually three judges but sometimes five.
40. To raise an issue of law the party filed a Demurrer, not a Plea:
- The defendant by X his attorney says that the declaration is bad in substance.
- It is intended to argue on the hearing of the demurrer the following matters of law:  
(*Here state grounds of demurrer.*)
41. Rules of court required the point of law to be set out. This however did not bring every possible argument out of concealment, because any point of law on the whole record could be argued; a defendant who demurred to the plaintiff's Replication and wanted to argue that the facts alleged in the Replication if true did not deprive

the Plea of effect, might be met with an argument that the facts alleged in the Plea did not constitute a defence to the Declaration, or the defendant might argue that the Declaration did not allege a cause of action at all. On Demurrer judgment was given on the whole record.

42. A pleading might be expressed in ways which seem curiously oblique. A Declaration alleging breach of a contractual promise in a written agreement necessarily includes or implies an allegation about what the agreement means. The plaintiff usually alleged the contractual promise according to its effect, but could if he wished set out the whole terms of the written agreement so as to show the promise in its own words: *in haec verba*. Or if the defendant wished to contend that the agreement did not have the effect alleged and did not support the claim, he pleaded *in haec verba* thus:

The defendant by X his attorney alleges that the agreement alleged in the Declaration is in these terms...

and went on to set out the whole terms of the agreement from beginning to end. What this implied was an assertion that the agreement did not contain the promise alleged; the Plea does not directly say this, but the reader is to understand that it contends “This is everything the agreement says and it does not include the promise which the plaintiff says it includes.” This altogether oblique expression of the point was the conventional and only way to take it. It reflects the old view of the material upon which to ascertain the meaning of a written agreement, and the present law would require a different pleading. When confronted with this the plaintiff could not join issue; that would involve conceding that if the agreement really was in the terms set out the defendant would succeed. So the plaintiff must demur, and take the position that the Plea was bad and did not allege a defence because the written agreement really meant that the defendant made the promise alleged. The meaning of the document would be determined by the Court in Banco, without the body of evidence which Courts have now come to find irresistible.

43. This is enough to show that there was a world of discourse different to that of the present day.
44. Each count in the Declaration could only allege one cause of action. There were exceptions to this; a series of breaches of the same contractual promise could be included in one count; so also closely connected torts, as when the acts complained of were trespasses to the plaintiff’s land person and goods.
45. Although once this had been impossible, after the Reform legislation it was possible to include more than one count in a Declaration and to plead more than one Plea, but that did not change the nature of pleading: each count and each Plea must be sufficient in itself, just as if it were the only one, and must be expressed with the same strictness. Each count in a Declaration was a narration of a different cause of action. The second count began again and stated all the facts which led to

a remedy, and nothing else: it did not pick up and add to allegations in the first count.

46. Each count in the Declaration had to be self-contained when read alone; had to state completely facts the legal effect of which was that there was debt or right to damages, and had to state nothing else. A Declaration was not a connected document of paragraphs which were context for each other: a new narration began with each count, and it must be complete in itself.
47. A count which contained an unnecessary allegation was open to objection because it raised a false issue: because denial of a fact which was not material would lead to an issue which it was useless to decide. There was room for demurrer to a Declaration which contained surplusage, although by the Twentieth Century the judges had lost patience with technicality and usually would deal with such objections by allowing an amendment.
48. There could be no departure in pleading, that is, the facts alleged in the party's pleading had to be entirely consistent with the allegations in the party's earlier pleading and elsewhere in that pleading. A pleading containing a departure was demurrable.
49. In a Declaration only the facts giving rise to a claim could be alleged. A pleading must not anticipate an expected response, or deal with an expected response in advance. If the plaintiff contracted while an infant the Declaration could not state why the contract was binding although he was an infant: there was no need to say anything unless the defendant alleged that fact in a Plea. If the claim was more than six years old and out of time but the defendant had given a written acknowledgement, none of that could be stated in the Declaration. Unless and until the defendant pleaded the Statute of Limitations the acknowledgement was irrelevant and the plaintiff need not, must not deal with time limitations. A Plea relying on a time limitation was a Plea of confession and avoidance; unless the claim made was a good one the time limitation was irrelevant, so that Plea must speak as if the claim was a good claim except for the time limitation.
50. As for Declarations, so too for Pleas: five Pleas were not a connected document of five paragraphs and were not a progressing statement of what the defence was, but each Plea must be complete in itself and contain the facts relevant to one defence, all of them and only them. Each Plea had to state completely facts which showed a complete defence to the count to which it was pleaded, and nothing else. It had to be directed to producing one single and clear issue for determination. If there were, say, three counts and five Pleas, the number of lines which logic could trace through the pleadings to issues for determination might be considerable, and on each issue of fact the jury was required to make a finding.



51. The Common Law Procedure Act 1899 authorised the use of short forms of Declaration in claims for debt; these were known as the Common Money Counts, and their short forms did not conform with the general law about what a Declaration must say. It was open to the plaintiff to plead the contract, performance and breach giving rise to the debt at length if he chose to do so. The use of abbreviated pleadings for debt claims was convenient, but eventually gave rise to baffling difficulties.
52. One of the faults of the system before the Nineteenth Century Reforms had been that what the general issue was treated as denying was very wide and it was not possible to know what parts of the plaintiff's claim were disputed in substance; there might be facts which were not disputed, and many defences which were not denials could be raised under the general issue. *Regulae Generales* made by the English Judges in Hilary Term 1834 prescribed in some detail the manner in which issues were to be raised by Pleas, and gave the general issue Pleas narrower meanings than they earlier had. The Judges sought to require Pleas to show clear information about what the defence actually was. These Rules limited the effect of "Not Guilty" to denial of the breach of duty and required Pleas to deny other matters of fact specifically if they were disputed.
53. After 1834 the general issue "Not Guilty" did not have the effect of denying the inducement, the opening statements of the Declaration to the effect that the defendant drove a vehicle on a public road on which the plaintiff was and collided with plaintiff and so forth; it only denied the negligence. In the example given these were denied in the second Plea. A Plea denying that the plaintiff suffered damages was a bad Plea; "Not Guilty" denied the tort and was taken to deny the damages.
54. Another general issue in tort claims was "Not Guilty by Statute;" many statutes gave defences to (usually) public authorities and relieved them from the need to plead at length their reliance on their statutory authority; they were able to rely on the statute if they had pleaded "Not Guilty", without alleging the facts which showed that the statute applied to the action. Rules of court required them to indicate that they were relying on the statute.
55. In contract claims the general issue was "*Non Assumpsit*," a denial of the contract and the consideration alleged. This Plea did not deny the breach alleged; to deny breach would be irrelevant surplusage as there was no contract. A denial of the breach required a second Plea. To a claim in debt the general issue was never indebted, "*Nunquam Indebitatus*."
56. For a claim based on a deed the general issue was "*Non est Factum*," better stated as "*praedictum factum non est factum suum*," the aforesaid deed is not the defendant's deed. Under this general issue the defendant could raise more than one defence: it could mean that he had not executed the deed, but also it could mean that the nature of the document had been misrepresented to him.

57. A Plea raising some new matter of defence which had arisen since the proceedings were commenced was a Plea *puis darrein continuance*, since the last pleading.
58. It was important for the terms of each pleading to show whether or not it related only to one specific earlier pleading or should be read distributively. A Plea to the first count might be irrelevant to the second, so it was necessary to state specifically which count each Plea was intended to meet. A Plea to the second count could be a relevant and complete answer to the second count but irrelevant to the first count; as Pleas were construed distributively it was a bad Plea, and demurrable, unless confined in its terms to the second count. If what that Plea alleged was completely true and undisputed, that had nothing to do with the problem.
59. Thus far I have been speaking of Pleas in Bar: Pleas which show a defence to the claim. There were other Pleas. Some were called Dilatory Pleas, which did not raise a defence to the claim but took some objection to the process. Dilatory Pleas were not issuable: they could not lead to an issue triable by jury or to *res judicata*; the court decided them and at the most the writ was quashed. These included Pleas in Abatement, to the effect that some other person who had not been joined as a defendant was jointly liable with the defendant and was available to be sued; until 1946 this was a ground upon which proceedings could be quashed. The defendant was entitled to have the Writ abated unless all persons having joint liability with him were defendants, if they were in New South Wales. As well as objections based on the non-joinder of a defendant jointly liable, there were other objections based on the misjoinder of plaintiffs who should not have been joined and non-joinder of plaintiffs who had a joint right with the plaintiff. Objections of these kinds were greatly modified by legislation in 1946 and almost disappeared.
60. A Plea to the Jurisdiction was a Dilatory Plea by which the defendant raised a contention that the court did not have jurisdiction. A Plea to the Jurisdiction must give a jurisdiction, that is, must say in which court the action could be brought.
61. Statutory provisions enabled the defendant to pay money into court and this was usually done by a Plea. There were complexities according as the payment was intended to be in satisfaction of the whole claim, or of a part of it, or was in effect an offer of compromise and conceded nothing.
62. A plaintiff might sometimes meet a Plea by new assigning. A new assignment specified some part of the facts which, although they had not been clearly distinguished in the Declaration as first framed, fell outside the ambit of a defence which had been pleaded. The example given by Arthur Rath was a claim for wrongful imprisonment; the defendant pleaded a statutory power of arrest and detention, but the plaintiff's case was not that there was no power to arrest him, but that he was detained for longer than was necessary. He could not deal with the limits of the power of arrest in his Declaration; it was irrelevant there as his *prima facie* entitlement was to his liberty and any power of arrest had nothing to do with

the case unless and until the defendant relied on it. When the defendant pleaded a statutory power to arrest and detain, the plaintiff could now assign his claim to the period after a reasonable period of detention, part of the period of detention which had been covered by the general language of his Declaration.

### **The system in England before Reform legislation**

63. In Mediaeval times courts imposed limitations on what litigants could do which were directed to producing one issue and one issue only on which the action was to be decided. In that Age there could only be one claim or count in a Declaration. There could only be one defendant, unless the claim was one for which more than one person was jointly liable; only then could there be two or more defendants. (If a married woman were plaintiff or defendant her husband had to be a party too.) There could only be one Plea or Demurrer to the Declaration. The defendant could not plead more than one Plea; if he had several good defences he had to pick the best one, and bid farewell to other prospects of succeeding. In effect the Court delegated most of the process of decision to the parties by compelling the plaintiff to choose one Form of Action and rely only on that one, and compelling the defendant to pick his true and best defence and no other. If it was a good defence any other was irrelevant: if it was not he should not have told the judges that it was.
64. If there were a Demurrer the case was decided upon it, and the point of law disposed of the case. There was no room for alternatives, and no room to say that if the point of law was not correct the party also denied that he took any part in the facts at all. As an extreme example from a criminal case, Chief Justice Jeffreys, infamous for distortions of justice in the interests of King James II, heard a case where the accused was indicted for treason. The accused, who was a barrister, told the judge that he wished to demur to the indictment and contend that the facts alleged did not constitute treason at all. Jeffreys warned him that before the Demurrer was recorded he should consider that if the Demurrer did not succeed he could not plead over, and the only course which could follow failure of the argument was immediate conviction and sentence for treason; there could be no jury trial. This was probably good law at that time.
65. Courts and lawyers found ways to escape the severity of these restrictions: much complexity and obscurity resulted. As time passed the function of the jury changed from reporting on the issue to deciding it on evidence, and the imperative to reach one single issue lessened. The pleading system always retained structure imposed on it by the need to produce a single decisive issue, although modifications encrusted that structure. The system was usually altered not by changing it but by allowing evasions. The usual response was to plead the general issue, go to trial with a jury and seek to raise as many points under colour of the general issue as could be achieved in the presence of the jury.

66. In the time of Queen Anne legislation allowed the defendant to plead more than one Plea; he had to obtain leave of a judge but that was given for the asking. (It long remained impossible to plead more than one Replication to each Plea.) By that time the narrow restraints had been evaded by allowing a number of defences to be raised before the jury under the general issue.
67. In Mediaeval times pleading took place orally before the court. Writs took many forms: some commanded the defendant to appear before the Court and some commanded the Sheriff to bring him there, which he usually did by taking bail. When the parties were there the plaintiff was called on to state what his case was, and he or his counsel orally told the Court his story, in Latin *narratio*, in French *conte*, in English Declaration. Then the defendant was called on to state his case and he did so; his Plea. What the parties said was discussed for its sufficiency. The Year Books record discussions at this stage, and do not usually state the outcomes of cases, which may be found by searching the Rolls. The judges entered into discussion with the party, or with counsel or with each other, so as to arrive at what was truly involved: the issue which would decide the litigation was put into form and the judges caused their clerks to record it on the court's parchment Roll. This did not always take place on one day: counsel might ask for and be given time to talk to his client, or to his opponent, before pleading: an *Imparlanse*. Then the parties were given another day when the proceedings were to continue: a *Continuance*. If the plaintiff did not appear there was a *Discontinuance*. If the Court decided to dismiss the proceedings the parties were told "Go without day."
68. Formality came to dominate the process. Pleadings were spoken with studied care, standard forms of expression were established, and counsel spoke or tried to speak in forms which had worked before and were known to be sufficient, ready for the clerks to record. The pleading was dated as of the last day of the Term, and until then the Roll could be amended. After the Term ended there was great reluctance to allow amendments, and the judges did not do so except in cases limited by Statutes of Jeofails, a strange word which may represent "j'ai eu faut" or some such expression. It seems that about mid-Fifteenth Century the parties were exchanging written drafts before reading them out in Court.
69. Pleading orally became obsolete and in Tudor times the parties gave their written pleadings to the clerks of the Court to copy into the Roll without droning through them before the Judges. (There is an exception to everything in this subject: in the Court of Common Pleas, where only Serjeants, senior barristers could appear, the pleadings were read out or mumbled through before the Judges until the Nineteenth Century.) When the pleadings established the issues of fact all the entries on the Roll were copied into a Record to use at the trial. When pleadings were oral there had been opportunity for consideration there and then whether the court would accept what was said as a good pleading. When the pleadings were delivered in writing an extended opportunity for consideration of objections was created, and a

pleading was much more exposed to possible arguments that it was bad. There were traces of Mediaeval orality in pleadings until the end.

70. How the jury came to be the decider of facts is something I pass briefly: by late in the Thirteenth Century jury trial was the usual trial of facts, by no means the only method used. The court ordered the Sheriff of the County where the venue was laid to bring a jury of men of that County to the Court to speak of the facts in issue. Where was the Court? The Court of Common Pleas was always at Westminster, as Magna Carta seems to require. The Court of King's Bench was wherever the King was in England, forever on the move with the King, who in theory presided in the Court. The Roll recorded the proceedings as *coram rege ipso*, before the King himself, but after King John he was never there except for occasional ceremonies. A command to the Sheriff in, say, Somerset to bring a jury to Westminster, or to a Court which might be in, say, Yorkshire or might have moved on by the time the Sheriff and the jury got there, was not easy to comply with in the Medieval period, or until the Railway Age.
71. If the jury were brought to the Court the trial took place before the Court, all four judges: trial at Bar. This was never frequent. Rules of venue required trial by a jury of the County where the cause of action arose. These Rules became encrusted with technicality. They do not seem to have had caused much difficulty in New South Wales. Usually the trial took place in the County where the cause of action arose, before a Commission sent there to hear and determine pending judicial business. A Writ ordered the Sheriff to bring a jury from the County to the Court by a stated distant day unless sooner, *nisi prius*, a Commission came to the County. The Commission's primary concern was to hear all pending criminal cases, to do which they had a Commission of Oyer and Terminer and General Gaol Delivery. They had another Commission to hear civil business, a Nisi Prius commission. (There could be a Commission which was special to a particular indictment, and the King or his officers chose who was to sit on it, a great oppression in the hands of a tyrant such as Henry VIII.) The Commission was not the Court and was not a permanent institution: it was authorised to hear cases in a circuit of Counties within a stated period; when that time passed the Commission no longer existed. The persons commissioned included magnates and worthies of the County and several Judges, and a second group of less exalted persons associated with them, clerks who were there to make the records. (Hence the title Associate.) There had to be a quorum present from each group. Only one or two Judges and their clerks actually heard the cases and did the work and the other Commissioners did not attend or left after the Assizes opened. The trial took place, the jury gave its verdict and the Associate wrote it into the Record in plain Latin: the Record with the Associate's note known as the Postea was sent back to the Court when the Circuit ended. Afterwards, *postea*, in the Court's next Term the plaintiff asked for judgment and the Court gave judgment on the basis of the verdict. Trials by jury were known as trials at Nisi Prius.



72. In the courts at Westminster there were four Terms in each year, Hilary, Easter, Trinity and Michaelmas, each for about two or three weeks. At first they were fixed by a calendar of Church Festivals and after many changes they were fixed by statute. The court sat in Banco only during Terms, and as this came to be too little time there were also sittings out of Term at Serjeants' Inn, where the judges once lived. Much business which notionally took place before the court had to be attributed to a date in Term; even when pleadings came to be documents filed with court officers, they had to be attributed to a date in the next Term, and might not be effectively dated and call for response until several months after they were actually delivered. Waiting for days which were only nominally significant caused many pointless delays. Weeks might pass between verdict and entry of judgment, and the losing party could spend that time doing mischief. These complexities were abolished in 1832 in England: they do not seem ever to have had much influence in New South Wales.
73. The history of the Common Law until the Nineteenth Century can be seen as the history of the Writs by which litigation was commenced. There were scores, perhaps hundreds of different originating Writs. In the earlier centuries each writ related to a specific class of claims, without room for evolution so as to cover any other. Associated with each Writ was a body of procedural law appropriate to the time when that Writ first came into use; including modes of trial which as the centuries passed became obsolete and were no longer regarded as appropriate for determination of rights. Courts and lawyers responded by modifying and extending the claims which could be remedied by some more lately devised Writ. The intellectual processes by which these extensions were made can be seen retrospectively as devious or ridiculous, but that is not how they seemed at the time; they were means to achieve justice and to move away from some form of process which was no longer seen as achieving it.
74. One intellectual process which brought about many changes in the law was the legal fiction. An allegation which in earlier times had been essential came to be regarded as not essential; the pleadings still alleged it but the judges did not require proof of it. Any objection that it had not been proved would be waved aside. The use of legal fictions as means of law reform could be extremely creative. This can look ridiculous in hindsight, and Dickens mocked it; many good results were achieved by treating allegations as fictitious.
75. Another process of change was to treat a state of facts which was closely similar to one for which there already was a remedy as in substance the same; and extend the remedy to it. Indeed this process still continues. There was authorisation of a kind in a Statute of 1285, *In Consimili Casu*, meaning "in an altogether similar case". This authorised the Chancery to issue new Writs in similar cases to one for which a Writ already existed. It remained for the judges to decide whether the remedy actually extended so far when the case came before them. Actions on the Case did not always follow the procedure in the Statute and the judges did not always

expressly rely on it. Most of the Common Law remedies in contract and tort which were actually alive and significant in the Eighteenth and Nineteenth Centuries were Actions on the Case. The Writ of Trespass was the Writ by which to recover damages for what we would literally recognise as trespasses, injuries to the person or the property of the plaintiff. This Writ was comparatively modern in 1285 and was the Writ to which these extensions were made, and its procedural advantages included that issues of fact were tried by jury. By extensions which may not all be traceable, Actions on the Case came to be available for indirect damage to property rights, such as nuisances. They also came to be the vehicle for enforcing claims based on breaches of contract. By Tudor times there was an action on the case for slander, and an action on the case for breach of a contractual promise. The torts which are everyday subjects of modern litigation were established by the Eighteenth Century as Actions on the Case; most significantly in retrospect, negligence.

76. In the Action on the Case for failure to perform contractual promises a factual element which had to be alleged, but soon became a legal fiction, was that in addition to making the contractual promise the defendant took it upon himself, *assumpsit super se*, meaning promised that he would perform his contractual obligation. The doctrine of consideration grew out of development in detail of the kinds of contractual obligations which the courts were prepared to enforce. By Stuart times the promise to perform the obligation had become implied or fictitious: “Every contract executory importeth in itself an assumpsit.” The action of assumpsit was extended to claims for debt, circumventing the old Writ of Debt and its strange procedures; a debt could be claimed by an Action on the Case, and the issues of fact tried by a jury. These actions were known as *indebitatus assumpsit*, meaning that the defendant, being indebted, took it upon himself to pay his debt. The allegation of a promise to pay a debt which otherwise existed soon became a legal fiction.
77. For some Actions on the Case there had earlier been remedies with procedures which litigants found it expedient to avoid. In the times of King Henry II and his sons few remedies were available in the King’s Court for what we would classify now as contract claims. By the Writ of Debt some highly specific entitlements to be paid money could be enforced, but the means of trial was Wager of Law; the court decided which party had to wage his law, and that party had to produce a number, perhaps 12, of oath-helpers or compurgators who would swear that the debt was due, or was not due. If the defendant produced the appropriate number and they all pledged their oaths in support of him with formulaic exactitude he could defeat the plaintiff.
78. Naturally when some more rational mode of trial was available to plaintiffs they used it. However the Writ of Debt continued to exist until 1832, and occasionally some hardy or foolish litigant employed an obsolete Form of Action, evoking a flurry of scholarship into its procedure. By the Nineteenth Century the Common

Law was dragging a huge tail of Writs and procedures which theoretically might be used and occasionally were, while in each Age, changing from Age to Age, there was a body of procedural law which had current vitality.

79. For litigation relating to land titles there was another body of Writs and procedures, even more complex than those for debts and damages. By legislation in terms now lost Henry II created procedures by which recent extracurial changes of possession of freehold land could be reversed, putting the dispossessed back until dislodged by some other process in which title was determined. The best-known of these was the Assize of Novel Disseisin; there were others. The Writ of Right was for litigation to determine title to land of which the King was feudal lord; Henry II also used it to bring before the King's own court title to land held from mesne lords. This use of the Writ, known from its first word as *Praecipe*, was stopped by Magna Carta, but later in the Thirteenth Century the Royal Courts devised another Writ, not mentioned in Magna Carta, by which title to freehold land could be determined. In the Fifteenth Century amidst the Wars of the Roses the Common Pleas devised Ejectment, an adaptation of the Writ of Trespass which protected the possession of leasehold tenants: in Ejectment they could recover possession, whereas earlier they could do no more than sue for damages if their landlords or someone else ejected them. The older procedures became impenetrably complex, and by the use of legal fictions it became possible to adapt the more modern process of Ejectment to disputes relating to freehold titles.
80. A plaintiff who wished to claim title to land granted a lease to someone only nominally interested, and the nominee brought Ejectment against another person who was only nominally interested, alleged to hold under a lease from the freeholder whose title was challenged. That other supposed lessee wrote a letter to the freeholder who was the true defendant to the effect that he had been sued for possession of the property which he had leased, that he did not propose to defend the action himself and that he felt that his lessor should know; and signed "your loving friend." Use of this device had not gone on for very long before the supposed lessees and their leases were entirely fictional. The true defendant who received this letter from someone to whom he had not in fact granted a lease, of whom he had never heard because he was a fictitious person, was then in the quandary that unless he did something the Sheriff would arrive at the land with a Writ of Ha Fa and eject anybody there. So he was practically compelled to apply to the Court of Common Pleas for an order adding him as a defendant, and he got that order on terms that he must not deny the events and process which were fictitious. As time passed conventional names emerged for the nominal parties; the plaintiff or claimant was usually John Doe and the first defendant was Richard Roe. As Richard Roe did not file an appearance the defendant referred to in Law Reports was the freehold owner against whom the claim was really brought. This is what lies behind mysterious case names such as Doe dem Black v White, read as "Doe on the demise of Black against White." By the Eighteenth Century this Form

of Action which originally protected leasehold interests was usually employed in disputes about freehold titles, with fictional leases. For all its strangeness, Ejectment produced good effects.

### **Recurring difficulties before Reform legislation**

81. Before the Reform legislation, and still to some extent later, there were recurring difficulties about things which are now relatively simple. I will mention some difficulties: and glide past many more.
82. For each Form of Action there was a general issue, a Plea which denied the central matter of the plaintiff's claim. "Not guilty" in a tort claim denied the breach; for example, denied the negligence alleged ( although until the Nineteenth Century there were few negligence actions.) "*Non Assumpsit*" meaning he did not promise denied the central matter in an action of contract. These Pleas acquired conventional meanings much wider than their literal meanings. By the Eighteenth Century it had become usual for the judge at trial to allow a wide range of matters of defence to be debated on the general issue; so wide that it was not possible to understand what defences and issues were to be raised in the particular case. Blackstone, writing soon after mid-Century said that this practice had developed recently. The indeterminacy of the general issue was prominent among the difficulties which led to the Reforms of 1832 and later.
83. The record stated much more than the pleadings. It included a long detailed narration of events which were taken to have happened before the Court, but had not actually happened for some centuries, including Imparlanes and Continuances at intervals in the pleadings, which had not truly occurred but created entitlements to fees for the officials who entered them in the Roll. Holdsworth gives lengthy examples in Vol IX pages 262 to 279, and Sutton explains them at length, and gives relatively simple examples of records producing an issue of fact (at pages 76 to 80) and an issue of Law (at pages 97 to 102) and many other extensive examples. Some skill was needed to see which parts of the record related to the instant case and which were merely formulaic. Many expressions had acquired meanings different to their literal meanings, or had become superfluous but still required to be included. In an action for damages for trespass there had to be an allegation that the trespass took place *vi et armis et contra pacem regis*, with force and arms and against the King's Peace; it was quite unnecessary to show that there was a breach of the Peace or that any weapon was used, but to omit these allegations was to incur failure. Every word of the whole record had to be perfect; statutory ameliorations began in 1664, but were never adequate. Nineteenth-Century Law Reporters often set out the pleadings extensively: their readers needed to know that the formulation had passed challenge, or that it had failed. Their length and superfluous complexity baffle the modern reader.

84. The process for commencing an action and carrying it to the point of appearance or default of appearance was almost impenetrably complex. An original Writ in the appropriate form of action was only one of many means actually in use. Each of the three courts had an array of further means, in some of which there notionally was an original writ but it was a fiction. If the defendant was already in custody in some other matter no writ was necessary to bring him before the court and he could be proceeded against by Bill. Officers of the court enjoyed a privilege of being sued only in that court, for which there was special process. Each court had its own process commencing proceedings by arresting the defendant, and in some cases he could be released on bail while in others he could not. The Crown commenced proceedings by Information and not by Writ and Declaration. The Exchequer had process peculiar to itself. A table from the report of the Commissioners in 1829 given by Holdsworth vol IX page 249-250 gives, for the King's Bench, the Original Writ and four classes of Bills, some with subcategories, for the Common Pleas three classes of Writs and two classes of Bills and for the Exchequer six different processes. Tidd's Practice used 154 pages to describe the process up to appearance.

85. Amendments were difficult to obtain.

86. So too were adjournments in the course of the trial. Plaintiffs often had to discontinue when some problem arose which showed that the facts in the Declaration were not exactly supported by the evidence, even though the evidence showed another good cause of action. A non-suit, *non sequitur clamorem suum*, he does not pursue his claim, ended the proceedings without judgment on the facts, and the plaintiff could pay the costs and sue again if there was still time. This was explained by Windeyer J in Jones v Dunkel (1959) 101 CLR 298 at 322 to 332. Until 1972 the defendant could ask that the plaintiff be non-suited: if the plaintiff argued this application he impliedly agreed that he would be non-suited if his argument failed, but if he refused to argue it the defendant had to decide whether to ask for a verdict by direction, for which he had to give up his own opportunity to call evidence. This scene of forensic manoeuvre is now closed: the defendant can only ask for a verdict by direction, and can only do so when all evidence has been tendered.

87. Another recurring source of technical problems was the constitution of the suit and the joinder or non-joinder of parties. Legislation in 1946 largely ended these problems: not completely, as some may still be encountered. Joining Third Parties and Cross-claims against Third Parties were not possible until Twentieth Century reforms.



88. Another recurring source of problems was the defendant who disobeyed the Writ and did not appear. For many centuries this was left unsolved and process could be frustrated: the defendant could be outlawed for his contempt, with large disadvantages for him, but the case did not go to judgment. Early in the Eighteenth Century a better process was authorised by statute. In 1725 legislation in some cases authorised the plaintiff to enter an appearance in the name of the defendant on proof of service of process. There were later changes, and a similar device was adopted in New South Wales. However satisfactory provision for default judgment in the absence of an appearance was not made until 1852, in New South Wales 1853 by the Common Law Procedure Act 1853 ss 23 and 24. The Reform legislation produced an efficient system much as now, including the Specially Indorsed Writ claiming a debt, the Plea to which had to be verified on oath.
89. The problem of the non-appearing defendant was circumvented in various ways. The courts of the City of London invented Foreign Attachment, in which process was enforced by attachment against any goods that a foreign (meaning non-Citizen) defendant had in the City. This was abolished by statute in 1852, but reinvented by Lord Denning one morning as the Mareva Injunction. Another was the Bond and Judgment, in which the lender of money took a bond by which the borrower appointed the lender his attorney to accept service, enter an appearance and confess judgment for the debt.
90. The strangest circumvention of all was the Bill of Middlesex and Writ of Latitat. These could have a long explanation, but their short effect was that the defendant was arrested on process which asserted, quite fictitiously, that he had been sued in a Writ of Trespass and had been in custody in the King's Bench prison in Middlesex or on bail, had escaped or broken bail and could not be found. The first the defendant knew of the proceedings was that the Sheriff arrested him: to get out he had to give bail, and entering an appearance was a condition of bail. The earlier steps were fictions: even the original Writ was not taken out unless the defendant made a technical objection to its absence. Defendants often responded by giving fictitious bail, with sureties who actually owned nothing. The Common Pleas invented a similar process based on a fictional Ejectment action. Until 1832 these were common ways of commencing proceedings, especially in debt claims.
91. Another recurring source of difficulty was bringing together claims with cross-claims and set-offs and obtaining one decision which had regard to all of them together. Until the time of Queen Anne cross-actions were and could only be separate proceedings and cross-claims could well be heard and enforced at different times: the fact that the plaintiff owes you money is of course no defence to his claim that you owe him money. People in some relationships such as partners and

co-venturers found their way into Chancery, which would deal with all entitlements together. Set-off was first invented to assist debtors get out of prison and enlist in Marlborough's Army, but bad legislative drafting made set-off available to all. The Reform legislation gave shape to process on cross-claims. Set-off remains a technical and obscure subject in our own day.

92. At first a Declaration could contain one count only, and that count had to be within the Form of Action in which the proceedings had been commenced; even small differences could take a count out of the Form of Action. Multiple counts began to appear in Stuart Times, restatements of essentially the same cause of action in several different ways. Until the Forms of Action were abolished there was very limited scope for including more than one count. Inclusion of diverse claims in one action was not possible until 1852.
93. Colour or express colour was a device by which the defendant's Plea attributed a good but fictitious case to the plaintiff on one part of the plaintiff's claim so as to present clearly an issue of law which the defendant wished to take on another part. By the Nineteenth Century this device had almost died: but it was expressly abolished by the Reform legislation.
94. A special traverse introduced into a Plea, made express and expressly denied some state of facts which a general denial would have denied. It made the defence more explicit and extended the pleading by an additional document. There was always a slight air of doubt about whether a special traverse was correct, or was necessary. The Reform legislation abolished this device.
95. Many examples of pitiless logic applied to pleadings are given by Holdsworth IX pages 278 to 292. The point intended to be raised could be blankly obscured from all but those fully instructed in the system. Usually the decisions in Holdsworth's examples are extremely difficult for a modern mind to grasp; lawyers and judges of past times had a capacity to observe distinctions now within the grasp of few, and Rules which appear logical and simple produced baffling results. A late example was taken from a report of the Common Law Procedure Commissioners in 1830: "In another case where the plaintiff brought his action on a contract to deliver goods, though he took the precaution of stating it in two different ways; viz. in one count, as a contract to deliver within fourteen days, and in another, as a contract to deliver on the arrival of a certain ship, yet he was nonsuited, because at the trial it was proved to be a contract in the alternative; that is to deliver within fourteen days *or* on the arrival of the ship; and he had no count stating it in the alternative. The

cause of action however was the non-delivery of the goods after the expiration of the fourteen days, and also after the arrival of the vessel, so that the variance was wholly immaterial to the real merits of the case."

96. In many cases, probably the great majority, litigants did not involve themselves in complexities or in debate about pleadings and their sufficiency, and conducted themselves so as to get their case to hearing before a judge and jury.
97. The mentality of that Age attributed precision to language which we no longer believe it has. Professional opinion supporting the system was extravagant in its respect and praise for its logic and precision and often referred to it as a science. Those who proposed reform contended with strong adverse professional opinion. Their arguments were adorned with some pointed mockery: see Holdsworth IX Appendix pages 413 and following, including the Nursery Rhyme composed by the Reporter Adolphus for imaginary infants with the nursery names Fi Fa and Ca Sa:

Good Mr. Doe had done you no harm  
When you ejected him out of his farm;  
Fie on you, naughty Richard Roe,  
How could you break the closes so?

### **The Process of Change in England**

98. From 1832 onward extensive changes were made in procedure and pleading in the superior courts in England. The process of Reform continued for more than forty years until the system was discarded by the Judicature Act. Earlier reform processes which began about 1810 abolished many sinecure offices and substituted salaries for entitlements to fees, and so diminished economic interests in older practices and institutional impediments to reform.
99. When Reform began the width of the issues which a defendant could raise under the general issue, and the opportunities for taking the plaintiff by surprise, were seen as prominent parts of the need for Reform. A significant event, by no means the first call for Reform, was a speech of many hours on the Courts of Law by Lord Brougham in the House of Lords in 1828; he explained, characteristically in language on the verge of ridicule, how many different defences might actually lie unstated behind the general issue. In 1825 Henry John Stephen had published the first edition of his *Principles of Pleading*. He became one of the Commissioners whose six reports were the basis of reform legislation beginning in 1832. In the Commissioners' view reform lay in the direction of limiting the effect of the general issue to what it literally meant, and requiring other defences to be specially pleaded. (In New South Wales Forbes CJ had invented a different solution, in which the general issue could be pleaded but particulars of the defences actually relied on had to be stated also: a less technical solution.)

100. In England the work of the Commissioners produced the Uniformity of Process Act 1832, the Limitation Act 1833, and the *Regulae Generales* of Hilary Term 1834 by which the judges adopted recommendations of the Commissioners. The principal effect of those Rules was that the general issue was limited to what it literally meant and special pleading was required in many cases where earlier it was not. In principle and in theory this led to clarity and precision in defining issues, and to fairer trials. In actuality it brought about a torrent of cases about the sufficiency of pleadings, in which old complexities were brought to bear on far more arguments than they had earlier been. A difficulty which soon emerged was drawing Replications to the elaborate Pleas which defendants filed. In effect the courts allowed a general issue Replication (named for reasons I cannot explain as the Replication *de injuria*.) Earlier there had been much technicality about this Replication, but the technicalities disappeared under the strain.
101. The Uniformity of Process Act 1832 abolished the Forms of Action and reduced the methods of commencing Common Law litigation to a simple few, mainly the Writ of Summons. This Act was not adopted in New South Wales and was not needed because Rules of Court made by Forbes CJ had already given the Supreme Court uniformity of process. The Legislative Council adopted some Imperial Acts which made procedural reforms, but not this one. In England a further Common Law Procedure Commission reported in 1850, leading to the Common Law Procedure Act 1852 which carried the reform process far forward, ended the need to specify a Form of Action in the Writ, ended fictions and banished Doe and Roe.
102. Abolishing the Forms of Action assisted thought about the law to focus on what we now think of as important classifications, whether a claim is in contract and what is the law of contract, whether it is a claim in tort and what is the law of tort. In our Age, whether or not a claim fits within some Form of Action is not likely to have much influence on a conclusion about whether there is a remedy. We see things that way because we have had 180 years to free our thinking from old characterizations; that freedom could not be achieved in one lifetime, and the importance of the Forms of Action for reasoning about the law and its development continued for a long time, and may not have wholly vanished.

### **How the system reached New South Wales**

103. Adoption in the Supreme Court of New South Wales of Common Law pleadings took place in curious stages. Simply transposing the system from England to New South Wales worked many simplifications. There were three superior courts at Westminster, and other Common Law courts in London and Counties Palatine, and inferior courts throughout England. Each court had its own history, legislation, practices and habits. The superior courts had originally had different main subjects of jurisdiction, although there were many overlapping areas and each contrived over the Centuries to bring much of the business of other courts to itself. Their distant Mediaeval origins made litigation including criminal

litigation in which rights of the Crown were involved the concern of the King's Bench; the Common Pleas, where proceedings were generally slower, more solemn and sleepier, had as its concern litigation between subject and subject, especially relating to land titles, and the Exchequer had a concern with the revenue rights of the Crown: it also had equity jurisdiction and was regarded as the appropriate court for litigation about rights in the Established Church. The Common Law powers of all these Courts were given to the Supreme Court, so a maze of Rules and practices special to each court did not apply here. The legislation and Charter establishing the Supreme Court provided for Rules of practice to be made by the Privy Council, and by the judges here subject to confirmation.

104. By the New South Wales Act 1823 4 G 4 c 96 s 2 the Supreme Courts of New South Wales and of Van Diemen's Land "...shall have Cognizance of all Pleas, Civil, Criminal or Mixed, and Jurisdiction in all Cases whatsoever, as fully and amply to all Intents and Purposes ...as His Majesty's Courts of King's Bench Common Pleas and Exchequer at *Westminster*, or either of them, lawfully have or hath in *England*;..." Then s 9 makes the Courts "Courts of Equity...and shall have Power and Authority to administer Justice ...as the Lord High Chancellor of *Great Britain* can or lawfully may do within *England*." There were separate conferrals of jurisdiction, and provisions for different modes of trial: at Common Law by a Judge and two assessors, in Equity by the Court meaning the Judges or Judge. The Australian Courts Act 1828 again conferred the jurisdictions separately, the jurisdiction of the Common Law Courts by s 3 and the jurisdiction of the Lord Chancellor by s 11.
105. When Forbes CJ opened the Court in May 1824 and for some months afterwards he did not know what the Privy Council had done, and he continued the practices of the previous Supreme Court and made some Rules of his own in January 1825.
106. The Order in Council of 19 October 1824 recited the extensive powers to make Rules given to the King in Council by 4 G 4 c.96 and authorised the Judge to make Rules and orders with limitations: "... such Rules and Orders as to [the Judge] shall seem proper and necessary, touching and concerning the several matters and things in the said Act of Parliament and hereinbefore mentioned ..." The Judge was given power to alter, amend and revoke. There was a proviso that the Rules were not to be repugnant to or inconsistent with the Act, the Charter or the Order in Council. There were also provisos: "... such Rules and orders ... shall be consistent with and similar to the Law and practice of his Majesty's Supreme Courts at *Westminster*, so far as the conditions and circumstances of the said Colony will admit. And that, as far as conveniently may be, the appropriate Language and technical terms of the Law of England shall be adopted and observed in framing such Rules and Orders ... the said Rules and Orders shall be so framed as to promote, as far as possible, oeconomy and Expedition in the Dispatch of the business of the said Court. And that, as far as conveniently may be, the same shall be plain, simple and compendious, avoiding all unnecessary, dilatory or vexatious forms of proceeding



in the said proceeding ..." So there were outer limits to the changes which Forbes could make. The Order in Council, like Rules of Court always, was paved with good intentions.

107. Forbes probably foresaw what the Order in Council would provide, as he had had a hand in drafting legislation and instruments for the creation of the Court. When Forbes had the terms of the Order in Council he made eight Rules dated 22 June, published on 23 June 1825. In July 1826 he called for the profession to comment on a new draft, which continued most of the Rules of June 1825, revoked some and added 52 more: these were promulgated on 9 September and notified in the Sydney Gazette on 20 September 1826. These continued in effect until 1 January, 1840, although there were amendments from time to time.
108. The Rules of June 1825 contained some basal provisions. The Rules opened with a lengthy statement of the authorisation to make Rules in legislation and the Order in Council, and Forbes took care to act within their limits. By Rule I Forbes adopted the Rules of the King's Bench and the Exchequer on the Common Law side, of the Chancery for Equity suits and the Consistory Court of London for Probate: except as specifically altered by his own Rules. Forbes did not adopt the Rules of the Common Pleas. His Rule II, which became Standing Rule 32 in the Rules of 1840, was: "II. That the proceedings of the said Supreme Court, within its several jurisdictions as aforesaid, be commenced and continued in a distinct and separate form." So separate administration of Common Law, Equity and Probate jurisdictions was provided for from the beginning. Keeping the actual conduct and form of litigation in Equity and at Common Law separate, and providing for separation in the Rules of Court was no more than compliance with the arrangements made in legislation and in the Order in Council, which required Forbes' Rules to be consistent with and similar to the practice of the Courts at Westminster. If Forbes' Rules had not complied the Privy Council could have disallowed them.
109. To a lawyer of Francis Forbes' time it was hardly possible to separate legal doctrine from the procedure by which a right was to be enforced. Lawyers' minds did not go to the question whether such and such a state of facts was a tort, but to whether the state of facts could be sued on by a particular Writ or Form of Action. One cannot escape the mentality of one's own time.
110. In retrospect it seems unfortunate that the division between the Common Law jurisdiction and the Equity jurisdiction was maintained as fully as it was. At that time it would have been difficult for a trained lawyer to envisage their being administered together. We cannot rebuke the judges and other lawyers of New South Wales in the 1820s for failure of imagination in that they did not then and there devise the Judicature system; that would have required them to escape from their own times, to devise new ways of thinking about the legal system and impose their ideas on the profession and the legislature of a small distant colony with a

population well under 50,000, half a century before the changes were made in England. That was not humanly possible. If they did not work with different process and separate jurisdictions for Common Law and Equity they would have lost their bearings. At times in the eighteen-forties there were suggestions that a separate Chancery Court should be created.

111. From the first Forbes' Rules provided for commencement of Common Law actions by Summons, and many elaborate procedures and devices used at Westminster were not adopted. The Summons directed the Sheriff to summon the defendant to enter an appearance. In 1840 this became a Writ of Summons directed to the defendant. Until 1853 the plaintiff was required to state the Form of Action in the Summons or Writ. Forbes provided for default judgment for want of Appearance by the device that the plaintiff entered an Appearance in the name of the defaulting defendant; simpler provision was made in 1853.
112. Forbes' Rules did not require parties to use the Common Law pleading system, but contemplated that they might. His Rules provided for simple procedures and the avoidance of technicalities, as was required by the Order in Council. The plaintiff could file Particulars of his demand instead of a Declaration, and "...may file a short Declaration, setting forth in a plain, simple and compendious manner, the true cause for which the Plaintiff brings his Action, and particularly avoiding all superfluous forms and unnecessary matter." The defendant was prevented from taking points on whether a claim was properly in Trespass or an Action on the Case, a common quibble. The Defendant could file a Plea or a defence, and could plead the general issue and file notice of the special matter "on which he intends to insist in evidence;" there was no need for a special Plea. There were provisions to the same general effect in later Rules, although the contemplation that parties might not use the pleading system disappeared. Forbes' Rules did not require the preparation of a lengthy Record, and instead required the Clerk to take the original pleadings into Court at the trial: Rule XXXIV.
113. Forbes' Rules said next to nothing about Equity business after the opening Rules established that they were to be separate, and they were left to follow Chancery practice.
114. The Australian Courts Act 1828, 9 G 4 c 83 adopted for New South Wales the law in force in England in 1828 so far as applicable, in the place of the law in force in England in 1788. This did not adopt the practices of the Courts in England because the Supreme Court already had its own practices established in accordance with law. So it would seem: Forbes continued the then practices, with further changes in the Rules from time to time. Most of his experience of legal practice had been in Colonies where there were few lawyers and judges, and high technicality could not be sustained. Forbes seems not to have been interested in technicality and sought rather the substance of procedural justice.

115. The New South Wales legislature adopted the Limitation Act 1833 (Imp) by the Limitations Act 1837 (8 Wm IV No1.) This established time limitations and abolished many writs and processes in litigation about land titles, and left only the process of Ejectment. Section 36 of the adopted Act lists and abolishes many ancient writs, with names of formidable obscurity.
116. Forbes retired in 1837. The judges who followed him included some who attributed much greater value to the practices at Westminster than he. Among these were Burton J and Alfred Stephen, acting judge, judge and soon to be Chief Justice in 1844. Serjeant Henry John Stephen, prominent in a numerous and talented family of lawyers and a cousin of the well-connected Chief Justice who had read for the Bar in his Chambers, was a leading intellectual force in the reform of procedural law and an enthusiast for the Rules of Hilary Term 1834 and their wide detailed reforms. In 1839 the judges of the Supreme Court made comprehensive Rules of Court which replaced some of Forbes' Rules and continued others, with effect on 1 January 1840. The Rules of 1840 followed and adopted some of the Rules of Hilary Term 1834. From 1840 onwards the legislation and the Rules and practices of the court assumed that the Common Law pleading system had been adopted; and it must be taken that it had been, although there is no passage which provides for that in so many words. Legislation and Rules of Court assumed that the system existed; they did not make a complete statement of the law of pleading but altered and reformed it, showing the assumption.
117. In the Rules of 1840 Standing Rule 128 expressly adopted the English Rules of Hilary Term 1834 dealing with the general issue, and abolishing Several Counts and Several Pleas. S R 31 again adopted the Rules forms and manner of proceeding on the courts at Westminster, apparently bringing adoption of Westminster practice up from 1826 to 1840, with the qualification "so far as the circumstances and condition of the said Colony shall require and admit, and so far as [they] shall or may not herein or at any time hereafter, be altered by Rule specifically provided and adapted to the conduct of business in the said Supreme Court." This made it clear that the Common Law pleading system was to be followed. Stephen CJ said that this rule was promulgated in First Term 1834; and this may give a date to the end of the informal Particulars for which Forbes' Rules had provided. It also made it clear, as was already clear, that the separate administration of jurisdictions was entrenched and was to continue. The separation became even more entrenched in 1842 when the Act 5 Vic No 9 provided for appointment of a Primary Judge to hear and determine alone all causes and matters in Equity at Sydney.
118. Some specific provisions of the Rules of 1840 show that the system in New South Wales was simpler and less technical than that in England. SR 129 provided "... to prevent a failure of justice by reason of mere errors or defects of Pleading" that any such objection could not be taken after Verdict and had to be taken by Special Demurrer, while SR 130 provided that at any time after such a Demurrer

the party whose pleading was objected to could amend as of course without leave. SR 131 gave the Judge power of amendment in cases of variance between the pleading and the matter proved, a wider power than in England where the power was available only where the matter was not material to the merits. The end result was that technicalities of pleading had less influence in New South Wales than in England. This may have been influenced by local legal culture, a small profession with no Special Pleaders, and less wealth in the community to spend on debates on side issues.

119. Several further reforms followed, not always exactly, reform processes in England. The Common Law Procedure Act 1853 followed and largely adopted the English Common Law Procedure Act 1852. The Common Law Procedure Act 1857 again followed some significant English reforms, there were later changes and the Common Law Procedure Act 1899 was largely a consolidation. Legislation and Rules of Court are never static and there was always a flow of small changes, but the system remained much as it was in 1857, in England until 1875 and in New South Wales until 1972. The Rules of Court were consolidated as the *Regulae Generales* of 22 December, 1902. These were in force, often amended, until the General Rules of Court took effect on 1 January 1953. The large task of reconsidering and recasting the Rules shows that the judges of 1952 correctly foresaw a long future for the system.
120. As I have said, the system in use in New South Wales in the Twentieth Century was in a high state of reform. It is difficult enough to perceive that this is so, but the system was far improved on what had become intolerable in England by 1832. The major disadvantages had been neutralized, leaving a workable system with anachronistic principles and archaic language.

### **Procedure in the Court in Banco**

121. There were important Common Law powers for the court to exercise in addition to trying actions for debt and damages. The highest were the Prerogative Writs, with functions now called Judicial Review. Writs of Prohibition, Mandamus and Certiorari enforced compliance with the law by other courts and public authorities, usually by confining them to action within their powers. There were other Prerogative Writs: Quo Warranto required a person exercising a public power to show how it was conferred. These writs originated as protection for the Royal Prerogative against encroachment on Royal power, and acquired functions protecting rights of the subject which were not their original purpose. They retained some older and simpler functions. Certiorari could remove a case into the Supreme Court for trial, perhaps simply for the convenience of hearing several cases together. Habeas corpus was a Prerogative Writ to bring an imprisoned person before the court: *habeas corpus ad subjiciendum* brought about adjudication on the lawfulness of imprisonment, and *habeas corpus ad testificandum* brought the prisoner up to give evidence and then go back to his cell. In its origin in the

distant past *Subpoena ad testificandum* was a Prerogative Writ, and was available only to the Crown.

122. Applications for Prerogative Writs were usually made to the Court in Banco, without notice and without filing any papers in advance, for a Rule Nisi. The first business when the court sat was that the Associate called “Motions Generally” and counsel who had applications applied orally, in order of their seniority. Counsel said “I move for an order (stating the order, say, for the issue of a Writ of Prohibition) upon the affidavit of (stating the deponent’s name)...” and read it out. If the Court thought fit it made a Rule Nisi for issue of a Writ of Prohibition: this was the first document in the court’s file. The Rule was refused only if there was obviously no case. When the court had dealt with Motions Generally it proceeded with the appeal or other business listed for the day. The Rule Nisi ordered the respondent to appear at a stated time and show cause why the Writ should not issue. On the return the respondent was usually called first and read out his affidavits. From its terms a Rule Nisi seemed to show that the Court had made a *prima facie* decision which the respondent needed to displace: this was not the reality and the applicant bore the forensic burden. Other means of applying were provided for but were little used. Statutory prohibition referred to an appeal from Petty Sessions, heard by a single judge, where there was no evidence to support the Magistrate's decision.

123. The law on Appeals (as we now call them) was complex. Many statutes conferred rights of appeal to the Court in Banco or to a single judge, but these did not apply to a jury trial. The grounds on which a jury verdict could be set aside were limited, as they still are. After verdict, entering judgment was a formality unless the unsuccessful party applied to the court in Banco for an order to set the verdict aside. The application was by Notice of Motion, usually referred to as an appeal, not accurately. The applications referred to in the Common Law Procedure Act were applications for a new trial, motion in arrest of judgment, and applications for judgment *non obstante veredicto*. The Reform legislation greatly limited earlier opportunities to store up points and bring them forward after the trial. Technical objections were usually treated as cured by pleading over, or cured by verdict. The only real hopes for setting aside a jury verdict were to show that there was no evidence to support it, or to show that the trial had miscarried or that the verdict was one which reasonable jurors could not reach. In earlier times there had been other processes: a Bill of Exceptions was a document to which both sides agreed at the trial, listing points of law which could be taken after verdict: with the effect of relieving the Trial Judge from ruling on them and relieving the plaintiff from the risk of being non-suited. By the Nineteenth Century this seems to have been obsolete.

### **Court and Chambers**

124. A curious provision in the Supreme Court Act 1970 (NSW) is:



s 11(1) The distinction between court and chambers is abolished.

(2) The business of the Court, whether conducted in court or otherwise, shall be taken to be conducted in court.

What can this mean? Before 1972 the distinction was basic to procedural law, and an explanation begins in Medieval England.

125. When the Royal courts came to be recognised as courts about the middle of the Thirteenth Century, one judge did not sit alone to hear a case. There was always a bench of judges, usually four, and matters for decision by the court were decided by all of them. Over the centuries practice established that some functions of the court could be exercised by a single judge. Lord Coke deprecated this practice, but it was established in spite of his view. Eventually the court in New South Wales took the view that a power conferred on the court in general terms by statute could be exercised by a single judge: Robbie v Director of Navigation (1944) 44 SR(NSW) 407. However statutes were very various, and sometimes (for example) conferred power on a judge of the Supreme Court in terms which created doubt whether the power was a function of the court at all; the judge might be merely *persona designata*. The power might be conferred on a judge in Chambers. If the case was contentious the hearing did not take place literally in Chambers, but in a court room, referred to as Public Chambers, and the judge and counsel did not robe. Sometimes statutes made the single judge the court when he acted under the statute. In Vacation a single judge constituted the court. Rights of appeal were different and clearer when the judge constituted the Court on his own. There could be a direct appeal to the High Court or to the Privy Council, if leave conditions were met. Section 11(1) made much unproductive technicality obsolete.

### **Diverse Statutes and Procedures**

126. The problem of diversity of methods of commencing litigation was not completely cured by the Reform legislation. Many statutes conferred rights which the Court was to enforce and went on to make some procedural provision special to applications under it. The cumulative effect was bewildering: it was hard to be sure that there was no procedural peculiarity about the case in hand. The Supreme Court Act 1970 greatly simplified this, but the problem has begun to grow again.

### **Every-day workings of the system of pleading**

127. The Act of 1852 in England and the Act of 1853 which followed it closely in New South Wales completed the Reform process comprehensively and put the system in a sufficiently high state of reform for it to be accepted, or tolerated, for another 120 years. It was no longer necessary to name a Form of Action or cause of action in the Writ of Summons. There were detailed and workable provisions for default judgment in the absence of appearance. There were detailed provisions about non-joinder and misjoinder, with improvements in the law and opportunities for amendment, although difficulties remained. There was authorisation for causes

of action of different kinds to be joined in the one action if the parties were in the same interest in each. The Acts removed formal, fictitious and needless averments and demurrers on technicalities, and made other useful simplifications. A number of provisions simplified the matters which had to be and could be included in pleadings. Generally, many formal and effectively meaningless expressions were dispensed with, so what documents said became much closer to the substance of what they dealt with.

128. Short forms in frequently recurring cases were set out in the Common Law Procedure Act 1853 and a Schedule; if these forms were used the party was safe from any technical objection. Some of them were short indeed, a few words. There were provisions authorising more than one Plea and more than one Replication; at first with a judge's leave, but later Rules of court dispensed with the leave. Many opportunities for objections which did not go to substance were removed.

129. The first six short forms of Declaration, found in the Third Schedule to the Common Law Procedure Act 1899, are the Common Money counts. There are extremely brief; to understand them it is necessary to know what they are taken to imply. The first one is Goods Bargained and Sold:

The plaintiff A B by CD his attorney sues E F for money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant.

130. Others are expressed with the same brevity; Work and Materials provided at the Defendant's Request, Money Lent, Money Paid for the Defendant at his Request, Money Had and Received to the Use of the Plaintiff and Money Found to be Due on Accounts Stated. To these the general issue, item 32 in the Third Schedule was:

...he was never indebted as alleged.

131. To expand their effect it was necessary to know what the Rules of Court said they involved. In the Rules of 1902 Rule 65 provided that Never Indebted "... will operate as a denial of those matters of fact from which the liability of the defendant arises." In the short form Declarations the matters of fact from which the liability of the defendant arises were not even sketched out, and each form opened by alleging that the claim was for money payable, skipping over all facts which produced its payability. "Never indebted" had the effect that every fact upon which the claim depended was denied. Other Rules required that all matters of confession and avoidance, which introduced new allegations such as the Statute of Frauds or the Statute of Limitations, be pleaded specially. Of course, payment in whole or in part was one of those.

### **Anachronism and Catastrophe**

132. An attempt to litigate under those Rules produced a spectacular disaster in Laing v Bank of New South Wales (1952) 54 SR (NSW) 41 (FC) and 76 (PC.) The

plaintiff sued the Bank for the balance of his current account, but did not give credit for eight forged cheques which had been paid by the Bank. The plaintiff had demanded payment by presenting for payment eight cheques for the same amounts as the various forged cheques, which the Bank had refused. He sued on the Common Money count for Money Had and Received to his Use, which was wrong and ridiculous as a bank holds money as owner and the customer has no more than a debt. The Bank pleaded Never Indebted: nothing else. At the trial the plaintiff amended to add a count for Money Lent, an available view of what happened when he deposited money in his account. The plaintiff tendered the bank statements and some correspondence in which he asserted that the cheques were forged; the Bank's letters did not admit this but seemed to mean that the plaintiff's former accountant had told the Bank that he had forged them. Under the evidence law at that time the assertions in the letters were only evidence that the assertions had been made, not that they were true. No-one tendered the cheques or said in evidence whether or not they were forged or were signed by the plaintiff: no-one went into the witness box.

133. The plaintiff's case stood on the bank statements and the pleadings; the bank statements showed that the plaintiff had paid in all the money he claimed had been lent; they also showed debits for the forged cheques, but the plaintiff argued that as there was no Plea of Payment the debit side was irrelevant to the issue, which was simply whether or not the plaintiff had lent the Bank the money deposited. This argument prevailed at the trial and in the Full Court before four judges who had practised with Common Law pleadings all their careers. To them, Payment was a Plea of Confession and Avoidance which the Rules required to be pleaded, and such a Plea could not be a denial of anything; forgery of the cheques would be pleaded in reply by denying a Plea of Payment: but none of this had been pleaded, so none of it was in issue.
134. When the case reached the Privy Council the Law Lords were of great eminence, but they had only known Judicature pleadings. They based themselves on Rule 65, that the Plea operated as a denial of the matters of fact on which the liability of the defendant arose; in the relationship of banker and customer the bank was only obliged to honour a cheque if there was money in the account when the cheque was presented. To them the Plea meant that it denied all matters of fact which taken together would show that there was money in the account when the plaintiff's eight cheques were presented. They saw the action as a claim to enforce the contractual relationship of banker and customer: they did not see the action as a claim for Money Lent, which was what the amended Declaration said it was.
135. Their Lordships did not have the perception that what the Plea denied and all that a Plea could deny were facts alleged in the Declaration, whereas KW Street CJ had said (at 44) "... it denies the loan and nothing more." All judgments deplored the way the parties had conducted the hearing, as well they might, and it is unlikely that the Law Lords had ever seen such a war of manoeuvre around technicalities.

Both dispositions seem to be supported by strong reasons: they took place in different mentalities.

136. The real lesson of Laing's case seems to be that it was time to use a modern system that people could understand, and 20 years later that happened. Until then there was always a shadow around what Never Indebted meant, although the General Rules of Court may have made the position a little clearer.

### **The End**

137. It is not easy to say why the Judicature system took so long to be adopted in New South Wales. Four other Australian Colonies adopted it within 10 years, and in Tasmania the process was completed in 1932. Many lawyers must have understood the need for this change, but the need was difficult to communicate to people who were not lawyers. Some leaders of the profession treated Common Law pleadings with disdain, spoke of the system disparagingly and exercised themselves judicially to find ways around any problems which it was said to produce; I particularly remember disdain expressed by Sir Kenneth Jacobs P and derision by Sir Maurice Byers QC. However there were also senior lawyers who had experience of the system working well in the hands of those who had learned how to use it, and they saw no reason to change. Many barristers saw the system as very suitable for doing what in the great majority of cases was the only thing it did: establishing issues for trial by jury, which had been a large influence on its evolution. Some saw change as the unnecessary introduction of new complexities. Great strictness, approaching perverse ingenuity, was sometimes applied to Equity pleadings, and this did not help. The administration of justice did not serve any clearly recognizable sectional interest and was too abstract a concept to resonate with the political system in New South Wales. The change did not lend itself to the usual processes of ludicrous ambit claims and negotiation down to lame compromise by trading support for some other project. The origin of the Judicature system in England may not have helped. The Upper House, the appropriate place for care of the administration of justice and such broad public interests, was in an unusually torpid state at mid-Century, and had a policy of not initiating legislation.
138. In the years of the nineteen-sixties the winds of change blew strongly. New South Wales began to review the archaisms in its legal Museum. In 1966 the Court of Appeal was created. The early reports of the Law Reform Commission began an *aggiornamento*. In a few years reports and legislation transformed the Application of Imperial Acts, the Jacobean Statute of Limitations and the practice of the Courts. The process smoothed away anomalies in the Common Law between New South Wales and other States and countries. The Empire was definitely over and in Australian Consolidated Press v Uren (1967) 117 CLR 185 at 238-239 the Privy Council accepted separate development of the Common Law in Australia. By many decrements trial of actions by jury became less frequent and almost vanished.

Parliaments sent more and more problems to the Courts. Litigated issues became more complex.

139. The Law Reform Commission Report (LRC 7) gives some history, starting with a strongly favourable Select Committee Report in 1880, bills introduced in 1898, 1906, 1923, 1930, 1931 and 1932, full attention to drafting bills from 1933 to 1936 when the draftsman died, then lapse until 1961 when the Chief Justice's Law Reform Committee took up the subject and reported in 1965. If this should be attributed to Evatt CJ it lends a distinction to his tenure which is otherwise lacking. The Attorney General's reference of 11 March 1966 asked for a draft Bill and Rules to modernise court procedures and bring about fusion of law and equity in procedures. The Law Reform Commission reported on 8 September 1969, the Supreme Court Act was enacted in 1970 and commenced on 1 July 1972 after comment and revision. Their draft was not a simple adoption of English practice and was based on a wide survey of Rules of Court in England, other States, New Zealand and the then Federal Courts, and some in the United States. It ended the old system by providing for quite different new procedures which were much more intelligible. Pleadings were to be stated in summary form, and they were not to continue until all issues were exhaustively defined, but were to end at the Reply. The general issue was abolished and there was no provision for Demurrers.
140. Herron CJ gave himself to the project with enthusiasm, and spent part of his Sabbatical leave in the library of the High Court in Belfast, collecting precedents, surprisingly many dealing with fraudulent sales of public houses: and published them with editing assistance by a young barrister, Mary Gaudron.
141. The legislation fused the administration of Law and Equity, as had happened in England and in other States, provided for Divisions as a matter of convenience only including the Common Law Division and the Equity Division and removed jurisdictional barriers. The future arrived.
142. It is difficult to say that the present system works well: counsel sometimes show little foresight of what issues will really influence decision, and legislators send many disputes to new tribunals, always with the expressed hope of simpler process. Notice of what is to be debated is basal to fairness at the hearing. As the Court passed to a modern system and contemporary language a great opportunity was marred by lapse in the perceived value of definition of issues and the attention the Profession has given to it. The production of clear issues to which the hearing is addressed has come to seem less imperative. Sometimes a case is presented as a formless narration, in the manner of James Joyce. My experience since 1972, including experience on the Bench, has led me to regret the inattention of the



Profession to ascertainment and definition of issues: many do not seem to understand the concept, let alone use or value it.

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The Lecture was delivered on 30 August 2011 under the sponsorship of the New South Wales Bar Association, the Francis Forbes Society and the Selden Society.