Index to compilation of speeches delivered by the Hon. Justice J Bryson

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 Co urt, 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 in1866. 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.

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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 new 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 chose 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 Imparlance. 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 a 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 Imparlances 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 is 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.

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RICHARD OF ANSTEY

And the Sackville Inheritance

John P Bryson

1. Richard of Anstey brought a big lawsuit before King Henry II and got a decision after many hearings over a period of about five years. The lawsuit related to the ownership of manors and other holdings in succession to Richard's late uncle William de Sackville. The lawsuit came early in King Henry's reign, before his great conflict with the Church, before he made the law reforms which extended his judicial power and before he made the administrative changes which were the beginnings of the common law courts, which came to be called the King's Bench and Common Pleas about 90 years later. In 1158 the court and the King were the same thing, the King's writ summoned the defendant to appear before the King himself, and when the King was in England that is what happened. Parts of the case were heard by people whom we would call judges, when the King delegated consideration to officers of his own, but it was the King himself who gave judgment.

2. At this early time King Henry had only two officers whom looking backwards we can recognise as judges. Like earlier Norman kings Henry had an officer called a justiciar or Chief Justiciar, and for some reason two persons occupied this office at once: Robert Earl of Leicester and Richard de Lucy. Both had held high office under King Stephen and had opposed Henry in those days, but like others they negotiated the

change of power, and may have facilitated it. Some stages of Richard's lawsuit came before Richard de Lucy, and he delegated part of his duty to other officers.

3. The justiciars had enforcement functions which we would not associate with administration of justice. They were the King's highest officers and in his absence they sometimes had functions close to regency. Sometimes justiciars led forces in the field, and the career attributed to a later justiciar, Ranulph de Glanville, included capturing the King of Scots during a border war and writing a detailed legal text. Others referred to as justices were churchmen or courtiers who had been deputed to hear a particular case, or to go on a journey through a few counties and hear judicial business.

4. Later in Henry's reign some officers can be recognised as judges because they were repeatedly given judicial tasks. Scholars have traced through great numbers of documents, carefully indexing names, and can see the careers of particular individuals, earlier perhaps as the clerk signing as witness after other witnesses, later witnessing first, or signing as the holder of an office. At the end of his reign some cases were heard by King Henry II himself or by judges who were with him at his court, which did not stay long at any one place, while other cases, perhaps thought less important, were heard by judges who stayed at Westminster. This was the distant beginning of the distinction between the two courts, greatly reinforced by a provision in Magna Carta which required judges to remain at Westminster and hear common

pleas, after King John had saved some money by not sending any judges to Westminster for a few years. This was far in the future for Richard and his lawsuit.

5. Richard's litigation took place at a time when the law of England about heirship and the jurisdiction of courts was still developing. A dispute about land title between subject and subject would not usually be decided by the King, so the interests of the King were probably involved in some way. No-one questioned Richard's entitlement to sue for King Henry's judgment about ownership. This suggests that King Henry was the direct feudal lord of some part of the Sackville lands, but this inference cannot be made good by identifying any of those lands as actually held in chief. Only later in King Henry's reign did the King and his court protect freehold titles held of other feudal lords; this use of the Writ of Right was one of King Henry's significant law reforms and extensions of Royal justice. It seems that in 1158 the most that the King usually did was to command a mesne lord or the county court to hear and determine a dispute about freehold land. There may have been some ground of jurisdiction which cannot now be clearly seen: Wardship, or the lordship of the justiciar over some of the lands, or the need to refer to the Archbishop. Richard's case may have been an early assertion of wide judicial power over land title.

6. We do not have Court Rolls for this period, although it is likely that they were kept and that they recorded what had been claimed and what had been adjudged before the King; records on long rolls of parchment made of lambskin are preserved almost

complete from 1194 to the Nineteenth Century, but we do not know of Richard's lawsuit from these.

7. We know about Richard and his claim because he was a careful man and made a meticulous record of money and resources spent as his case wound through the years and through courts of the Church to which King Henry referred the main issue, the validity of William de Sackville's marriage. Richard's record was preserved in the Exchequer, sewn to a Papal rescript which sets out an interlocutory decision in the courts of the Church. Why these two records found their way into the Exchequer, why they were sewn together and why only they were kept for centuries of all the documents which the lawsuit generated, are not known to us, although an ingenious suggestion has been made. These two documents remained in the Tower of London among a huge mass of mediaeval records, occasionally sifted through by lawyers and scholars but exposed to rot and rodents, until in the Nineteenth Century they began to be treated as the valuable documents they are. In the time of Charles II William Prynne, a politically radical Puritan who had twice lost his ears to the Star Chamber for seditious libels, also an antiquarian who published collections of information about ecclesiastical history, read through Richard's list and made an asterisk against one point he thought important, but he did not come back to refer to it in his published writings. After missing this chance of exposure to learning they slumbered for more centuries until they were included in material published in 1832 by a scholar named Sir Francis Palgrave. This generated attention, gathering pace through the Nineteenth Century. Events referred to or suggested by what Richard wrote down, and lines of

enquiry suggested by events in the lawsuit have inspired research by scholars, now for almost 180 years.

8. Much learning and scholarship have been given to tracing King Henry's itinerary; where he was from month to month and from day to day during his reign of 35 years. A Nineteenth Century scholar published an itinerary for King Henry's entire reign, generating a century and more of scholarly revision. Modern lawyers are meticulous about dates; they find it difficult to write that a marriage took place or that a judgment was given without stating when and where the event happened. In that age it was not customary to write the date on documents such as charters granting land and deeds recording the outcome of lawsuits, so their dates are established by inference from their contents, events to which they refer and other sources about the times when people named in the document as parties or witnesses flourished. If the bishop of a diocese is mentioned and signed his name, careful research may show the period during which that person was bishop. If three bishops signed the period available might be quite narrow. If an abbey is mentioned research may show when it was founded, dissolved or promoted from priory to abbey; this may help. If someone says he paid a fine to the Exchequer, the payment and its date may be found in Exchequer Rolls, which go back earlier than Court Rolls. A few generations of painstaking research on ancient documents can produce quite narrow ranges or even exactitude. The accumulation of this process has yielded many enquiries, certitudes, probable conclusions and intuitions about Richard, his lawsuit and later ownership of his manors.

9. Richard’s list of expenses has been valuable to scholars for what it shows about social relations and the conduct of lawsuits in King Henry's time, but also because he gave the dates of hearings and stages in the lawsuit. If King Henry heard part of the lawsuit at Woodstock on a stated day we establish for certain where he was, with implications about whether he could have been at some other place within a limited time before and after. The dates are given by religious festivals, usually Saints’ Days; the date of Laetare Jerusalem is transparent to historians. Richard also gave the amounts of many expenses, so we get some guide to prices and values in his time. From time to time he or his messengers lost a horse on their journeys: they left a lot of dead horses here and there, and so we know values for horses in those times. We know how much it cost to get messengers to take papers to Rome and back, and how much it cost to get advice from a Master of Laws. Richard’s document has also been the starting point for lines of inquiry about chains of family relationships, ownerships of manors, holders of offices and much else.

10. A life spent in lawsuits shows what can go wrong and cause delay. At a distance of 850 years, the events which got in Richard’s way and caused him delay, extra expense, frustrating adjournments, excursions from one court to another and interlocutory appeals are familiar; similar disasters happen nowadays, many times.

11. Richard followed a pattern often seen in the behaviour of litigants who conduct their own cases without lawyers to represent them. He did not always seem to follow the best course, but he was remarkably persistent, inaccessible to discouragement and

careless of expense, and won through in the end to decision on the merits of his case, although it took almost five years. Litigants in person can be like that. He does not seem to have been troubled, as litigants in person often are, by basic misconceptions about what his rights were or what the court could do. Richard did not have any lawyer to conduct his case before King Henry; as far as we can know there was no legal profession at that time, except that the Royal officers who were evolving into judges and their clerks must have known whatever law there was. Richard did have help: his chaplain Sampson and his younger brother John did a great deal for him, going on messages, and at hand when he needed them. He also had a clerk, Nicholas. He may have needed the chaplain to read and write his documents, all in Latin, but his generally high understanding suggests that he may have been literate himself.

12. The litigation in Church courts was conducted with the aid of lawyers; Richard had documents prepared by Masters who lived in monasteries; these Masters had to be paid fees. They were law graduates, perhaps from Bologna, they were monks and they had a practice or business of conducting litigation in courts of the Church; giving advice and preparing documents. The number of Masters referred to by Richard of Anstey, and what they did for him, show that there was a profession educated in the Law of the Church and ready and able to conduct business in its Courts. Learning on Roman Law and Canon Law was quite strong in England, the principal figure being

Vacarius who spent about 50 years in England from 1148 and seems to have taught Law at Oxford.

13. We have the dates of most events in the lawsuit: but not the dates of the underlying facts. Do not expect precision in this outline of the facts from which the controversy arose. Assertions and probabilities have often been promoted to facts. Remember Robert Graves' poem "The Devil's Advice to Story-tellers" – "Nice contradiction between fact and fact Will make the whole read human and exact."

14. Richard's uncle William de Sackville had two wives, or supposed wives. First he was either betrothed or (as the courts later decided) married to Albereda de Tregoze. There was no wedding ceremony in a church. Albereda was handed over by her father into the care of William's father and went to live in his household; we do not know for how long, but William was not there. Her dowry was paid, but they did not cohabit as man and wife. At this time Albereda was probably very young, and William may have been a child also, and the agreement may really have been made by their parents. William grew older and decided that the wife he wanted was Adelicia de Vere, daughter of Amfrid the Sheriff. The fathers rearranged matters, the dowry was repaid, Albereda was sent back to her parents and William and Adelicia were married in church. Albereda's father was sufficiently satisfied with the rearrangement to attend William and Adelicia's wedding feast. Albereda was not happy and interrupted the wedding ceremony, to no effect.

15. William de Sackville married Adelicia de Vere in a church ceremony somewhere in England - we do not know where - late in the reign of King Henry I, who died in 1135. As in all church weddings until recent days, the priest must have come to a point where he called on anyone who could object to the marriage to do so. At this stage, as every mother-in-law knows, there is a brief silence and anxious pause before the priest resumes. However on this occasion Albereda tried to make herself heard with an objection; she "…protested her claim to be his lawful wife at the marriage ceremony, forbidding her supplanter by the authority of the Church to pass into the illicit embraces of her husband." She could not get a hearing, or could not get anyone to take any notice. She later claimed "…she failed to make herself heard by reason of the crowd and the frowardness of her husband…" It seems that she was shouted down and William had her hustled out. The ceremony proceeded and William and his bride walked out of the church and embarked on a productive marriage. Their daughter was Mabel de Francheville, the defendant in Richard's lawsuit more than two decades later. It is said that they had twins, but if they did Mabel was the survivor.

16. The peace of the marriage was disturbed. After some time, perhaps years, Albereda de Tregoze who had objected at the church brought proceedings claiming that Albereda and not Adelicia was the true wife. She won too, but only after the proceedings went through an elaborate course, by way of Colchester, London, Rome and London again. Geoffrey the Archdeacon of London does not seem to have understood judicial duties; it was claimed that he had conducted a hearing at Colchester and ordered William to put Adelicia away, without giving any notice to Adelicia, who first knew about the

proceedings when the Archdeacon and his officers appeared at her home and ejected her. She did not take this well, and disputed the claim with vigour. Her defence to the lawsuit was eventually considered by the Bishop in the London synod, actually Bishop Henry of Winchester as Vicar during a vacancy of London. The lawsuit reached Pope Innocent II; historians refer to this as an appeal, but the Pope's rescript seems to be an advisory opinion on a consultation on the principles which the Bishop should apply and not a judgment by the Pope or his Curia concluding judicially on the validity of the marriage. However that may be, the final decision of the Bishop in synod was that William had gone beyond a betrothal and had entered into a marriage with Albereda, with the consequence that there was no valid marriage to Adelicia in the church ceremony. Mabel later claimed that William and the Archdeacon were in collusion; that the Archdeacon and the Bishop had been bribed.

17. William, having been told by the Church that Albereda was his wife, took her into his household and lived with her for some years, for the rest of his life. They had no children. Adelicia and Mabel went or were sent by Bishop Henry to the County of Blois in France, where William also owned property: they were probably maintained out of his property there. When William died Mabel was accepted by the Count of Blois as the heir to William's lands in that County. Mabel later alleged that he did so "[a]fter calling together the leading bishops of France and investigating the case…" Perhaps there was a lawsuit there. Blois was beyond King Henry's domains and the reach of his writ. William may have been happy to see the last of Adelicia and Mabel and he may have made no trouble for them in Blois for that reason. No record is

known of proceedings in Blois; and nothing has been published of records of the Papal Curia in Rome of any of the appeals which took place. If such records could be found they would probably add a great deal to our understanding; but there is wanted a scholar with a lifetime to give to research in Rome which may be unproductive.

18. The Sackville inheritance had come to William de Sackville in some way from Richard de Sackville who is mentioned in the Domesday Book. When William died the people who might have been his heirs and interested in his lands, according to later ideas about heirship and primogeniture, seem to have been these. His widow would have dower rights for her lifetime: there were two possible widows, but no claim of either is mentioned. Mabel the daughter of his invalid marriage should come under consideration as possibly his heir; there is no reference to any other surviving children of either of his marriages. The next people to be considered would be brothers of William (and it seems that he had none). Next are his two sisters. Agnes, Richard's mother, and her younger sister Hodierna, whose husband's name was Gernun, would have been his heirs as coparceners, co-owners in equal shares of all his lands, unless they agreed to partition the lands between them. We should infer that Agnes outlived their brother, but died before Richard brought his suit. Agnes' heir Richard would succeed to her half share, and his aunt or her heirs would succeed to the other. The law under which title to land passed to its owner's heirs continued until the Nineteenth Century, and it was always clear that only legitimate children counted;

and there was no law allowing legitimation. It would be easy to understand a rule which treated children born in a purported marriage which was later annulled as legitimate: but English Law did not. The law in France or in the County of Blois may have been different.

19. It cannot be taken for granted that rules about heirship and succession to land titles which had effect in later centuries were binding in the Twelfth Century. These rules were still gathering force and had not been altogether clearly adopted. Successions to the Crown in the Twelfth Century did not conform to them: except for the succession of King Richard I. It was not then treated as certain that an elder son would inherit land; he might be passed over or sent to a monastery if incompetent, and a father with many properties might divide them among his sons. In origin and in feudal theory acceptance by the King of rights of an heir was a concession; the King had granted the land to his own man, not to the son. This theory did not govern events: the King had to accept the heir as his new man if he was to keep the loyalty of his other tenants. So the King was brought to accept the heir as also his man by political and social pressures, and by payment of a relief, in Latin relevatio, lifting up again. Under King William Rufus the heir had to buy back the land from the King. King Henry I made a Coronation promise to allow the heir to hold the land and pay a just relief, without buying the land. Finer points and permutations of competition among sisters and sons and daughters of sisters of the deceased and sons and grandsons of his brothers were probably vague, while the rights of children born in marriages which were regarded as

valid at the time but were later found to be void are unlikely to have had an obvious answer.

20. Mabel de Francheville claimed that her father had expressed repentance at what he had done, and it was part of her case that her father had recognised her as his heir. But it was too early in history for land to be disposed of by will, whether word-of- mouth or in writing. In some way which is not recorded Mabel and her husband got possession of the Sackville inheritance in England, as well as of the land in Blois. This may have happened while Agnes was still alive and before Richard had any rights in the matter. Perhaps Agnes and her sister did not approve of what their brother had done and supported Mabel, or chose not to oppose her: things like that happen in families. It seems that there was a delay of some years between William's death and Richard's lawsuit, and this suggests that Richard's mother survived her brother and let matters rest until she died; until she died Richard had no claim to his uncle's land and could not sue. Richard would not have taken that sort of thing lying down if Mabel had taken possession when he had already become entitled as William's ultimate heir. Richard claimed a judgment establishing his title and putting him in possession of William's English lands.

21. Richard had inherited a modest fortune as the elder son of Hubert the Chamberlain. His lands included three manors in Hertfordshire: Anstey, Little Hormead and Braughing. These three manors north-west of Bishops Stortford extended about five

miles, one or two miles east of the Roman road which is now the A10. They are quiet little villages to this day. His feudal lord was the Count of Boulogne; the Honour of Boulogne had been granted by the Conqueror to a Count of Boulogne who had come to England with him, and had passed down several generations of his family, including Queen Maud, wife of King Stephen, who was Countess of Boulogne in her own right, then to her son Eustace and then to his brother William, who was Richard's feudal lord in 1158. Queen Maud or perhaps King Stephen as her husband had granted these manors to Richard's father Hubert, who was her Chamberlain, and he owed three knights' fees for them. Richard may have had other estates, but it is difficult to see from what resources he raised the funds to maintain his lawsuit for five years.

22. There were several women named Maud, in Latin Matilda, in public life. King Henry I's daughter, who fought long and hard to establish that she was Queen, was usefully referred to as the Empress long after her Emperor died and she remarried, while Queen Maud referred to the wife of King Stephen.

23. William de Sackville's inheritance was far more valuable than those three manors in Hertfordshire. Richard did not give us a list of the lands he sued for, but scholarship has shown what they probably were from information in lawsuits within later generations of his family about division of the property he recovered. There were at least two later lawsuits and one ran from 1244 to 1246. The Final Concord or deed of settlement enables identification of nine manors in Essex, Hertfordshire and Suffolk

and 14 other holdings, a rent in Colchester and knights' fees in Hertfordshire and East Anglia. The manors have been identified, with fair but not complete certainty, as Great Braxted, Bennington Hall, Kelvedon Hatch, Pledgdon, Little Anstey, Theydon Garnon, Little Leighs, Latchingdon and Great Wenham (or perhaps Little Wenham). When all the lawsuits were over the first five had passed to Richard's heirs and the others to Hodierna's. The knight's fees represented fourteen smaller manors, also spread over several counties, and most of them can be identified. This was a rich prize, worth far more than the Anstey inheritance.

24. A Knight's fee refers to a holding of land from the Crown with a feudal obligation to provide the service of one Knight, properly equipped, for 40 days in a year when the King was at war. One manor might owe several knights' fees; a holding which owed one was probably too small to be a manor. As time passed English kings became open to arrangements in which they accepted payment in lieu of service. Henry II began to call for payment, scutage, in 1159, and may not have truly wanted personal service for a limited number of days, which would produce a cumbersome army.

25. The common understanding about feudal lawsuits is that disputes about land title were decided by trial by battle. This seems to have been more theory than actual practice by King Henry's time and in his Court. What other feudal lords did may have been different. Of course trial by battle could have no place in decision in the courts of the Church. There is no mention of a possible trial by battle in the Anstey case. Nor is there any mention of trial by jury, or by assize, which came later. At the hearings

before the King or his justiciars what seems to have taken place was a reasoning process, hearing what the parties claimed and what their witnesses said, and arguing out the implications and legal results. If there was no dispute about the facts, or the facts were altogether clear, the court could apply the law to them and there would be nothing for a battle to establish.

26. Trials by battle sometimes did take place. Late in Richard's lawsuit when he attended the King at Windsor and Reading in 1163 business was delayed by a trial by battle in a criminal case, an appeal against Henry of Essex the Constable who was accused by Robert de Montfort of treason, dropping the King's standard and fleeing in a battle with the Welsh in 1157. Richard's case and all other business were deferred while Henry of Essex fought it out with his accuser. Saint Edmund, king and martyr, appeared fully armed in the air and reminded Henry of Essex of the trouble he had given the Saint by challenging the jurisdiction of his Abbey in a rape case. Accompanying St Edmund in the air was Gilbert de Cereville, a knight whom Henry of Essex had had done to death on suspicion of undue interest in Henry's wife. Robert de Montfort was not troubled by interventions like these because he had had held vigil to Saint Drausius the previous night. Henry of Essex was distracted from the battle in hand and was defeated. He was given up for dead and his body was taken away by the monks of Reading for burial, but he revived and entered the monastery himself. This trial by battle between prominent men received a great deal of attention, suggesting that such trials were not frequent.

27. When society reached a settled state where conflicts could be handled by consideration and reasoning it would soon seem distasteful to settle disputes by battle, and when a legal profession was emerging its professionalism would express itself in reasoning out and defining what was in dispute and deciding a case on the information available, leaving trials by battle for disputes which could not be resolved in any other way. Reasonable people would not want to fight things out. It was difficult to be sure that the protection of your Saint was better than the protection of your opponent's Saint. There was a splendid word for bringing and arguing out a lawsuit, which unfortunately has gone out of use: to deraign, in Latin deratiocinare, to reason out, and this word explains what was going on. It was very common for lawsuits to end not with a judgment by the Court but with a Final Concord or deed of settlement among the parties: the judges encouraged or prodded the parties towards their Final Concord. The prospect of battle would help to clear minds.

28. Family relationships among the powerful suggest that there were some inner workings in the events in which Adelicia and Mabel went to Blois and were awarded William's property there. Blois, around Chartres, was not then or ever owned by English or Norman rulers. The rulers of England, Normandy and Blois were closely related. Stephen and Matilda the Empress were first cousins; his mother and her father were children of the Conqueror. Stephen had elder brothers who were given counties as their inheritances after their father, who owned several counties and much land, was killed on Crusade at the Second Battle of Ramleh in 1102. An elder brother Theobald became Count of Champagne and Blois, and Stephen became Count of Mortain in

Normandy. In his youth Stephen lived in the court of his uncle Henry I, King of England and Duke of Normandy. Henry's son and heir was drowned in the White Ship disaster in 1120; but Stephen got off the ship at the last minute before it sailed, either because he doubted the sobriety of the captain or because he had diarrhoea; perhaps both. Stephen's importance increased and he came under the patronage of King Henry I, although he was not preferred over Matilda who became the King's heir. Stephen was acclaimed King and ousted her when Henry I died, contrary to his oaths to Henry I.

29. In King Henry I's time Stephen's younger brother Henry of Blois was brought to England and rapidly promoted in the Church; Abbot of Glastonbury when 28, Bishop of Winchester when 29. He held on to Glastonbury: a pluralist. His career was very long as he remained Bishop of Winchester until he died in 1171. He was ambitious, and unsuccessfully sought further promotion, to be Archbishop of Canterbury or Archbishop of a new third archdiocese. He was Vicar of the Diocese of London during a long vacancy and for part of that time he was also Papal Legate, while Stephen his elder brother was king. Bishop Henry was one of the most powerful people in England, well-connected. At different times during the Anarchy he fought for and against Stephen: this did not harm his career, either under Stephen or under King Henry II, to whom after all he was closely related. He was also a brother of Theobald II Count of Champagne and of Blois, and an uncle of the next Count of Blois, also Theobald, who succeeded in 1151. Later in his career he took the side of King Henry II in his conflict with Thomas a Becket. He was not to be opposed

lightly, and an attack on his decision that a marriage was void, even a decision more than 20 years old, could not be made lightly. When he decided that Adelicia's marriage was void and sent her to Blois where his brother the Count saw that she or her daughter obtained William's property, the outcome must have looked quite tidy. The Archdeacon must have felt relief.

30. We know about the annulment case from other sources as well as Richard's list of expenses. John of Salisbury was a cleric in the service of Theobald Archbishop of Canterbury (yet another Theobald), and he left collections of correspondence, including letters relating to appeals. One of these letters is an apostolus, a long letter from Archbishop Theobald to Pope Alexander III, which reported what had happened in the proceedings and what each party contended, when Richard appealed to Alexander III after many hearings before the Archbishop had failed to reach a conclusion. In a document somewhat like an Appeal Book Archbishop Theobald recorded the positions contended for by each side; he did not endorse either position and he did not state his own findings of fact or conclusions.

31. Another letter in John of Salisbury's collection was sent by Bishop Henry of Winchester to Archbishop Theobald of Canterbury in 1159 and reported the contents of the rescript he had received from Pope Innocent II during the annulment proceedings about twenty years earlier. Pope Innocent II said "I declare that woman to be [the lawful wife] who, as you say, was handed over to be a wife by her father and was committed by him to whom she has been handed over into the care of the

father [of the future husband] until the latter would lead her into his house on the appointed day, because on the basis of legitimate consent she became a wife as soon as she agreed to be married by a spontaneous pact. There was indeed no promise for the future, but a confirmation for the present, therefore whatever happened with the other woman afterwards, in intercourse or in the procreation of offspring, is all the more reprehensible as what had gone before is more genuine: as the first stands, the more that is committed in connection with the second, the greater the guilt will be."

32. To restate that in more modern terms, Pope Innocent II said that the facts were and the conduct of those involved showed that Albereda agreed to be William's wife at the time when she was handed into the care of William's father, and there was not, on the facts, a promise that there would be a marriage in the future. As to the law, the rescript means that if there was a present agreement to be married, acted on to the extent of the woman's being placed in the household of the man's father, there was a complete marriage; a present agreement to marry was contrasted with a promise to marry in the future. Pope Innocent II did not, in this rescript, treat consummation of marriage as significant.

33. That was the interpretation and the view of Pope Innocent II; Bishop Henry acted on it. Whether the facts were what Pope Innocent decided they were seems contestable; but the Bishop in synod acted on the same basis as the Pope. Whether those facts meant that there was a perfected marriage is also contestable; later in the Twelfth Century decisions of Pope Alexander III probably would indicate a different outcome.

34. The Twelfth Century was a period of clarification and development in the law of the Church about the validity of marriages; an account of these developments and their complexities was given by Prof FW Maitland in an article at (1897) 13 Law Quarterly Review 133, with some references to opinion at the time of the Anstey case, the changes which happened and the impact of changes on the Anstey case. It seems quite possible that a Pope later than Innocent II or that Alexander III later in his papacy might have been directed by Grace to take a different view to that applied to William and Adelicia's annulment.

35. The point on which decision turned will be familiar to those interested in mediaeval English history. The validity of the marriage of Edward IV, and his legitimacy, were debated in uncertainty of what was then required to bring about a valid marriage. The point at which a betrothal becomes a binding marriage was never clearly settled until in the Sixteenth Century the Council of Trent required ceremonial marriage in church in (for practical purposes) all cases. After another two centuries the same rule was adopted in England by Lord Hardwicke's Marriage Act 1753 and about a century later in Scotland. (Hence the tales of marriages before the blacksmith in Gretna Green).

36. To modern eyes a decision of a court which had power to decide that a marriage was void, given in a lawsuit between the two parties to the supposed marriage during their lifetimes, should bind the whole world and everyone who then or later was interested in the question of validity; a decision in rem binding on everybody for all purposes. It should be pointless to show reasons why the earlier court had made a wrong decision,

and there could be little or nothing to debate. The Twelfth Century does not seem to have known doctrines of res judicata, estoppel by record, judgment in rem or similar doctrines; I have not seen any sign that these were considered, but the result reached accords with them.

37. King Henry II's grandfather Henry I organised the basic structure on which mediaeval government grew, and like all reformers he adapted institutions which already existed. After the Anarchy, in which King Stephen for all his historic reputation for incompetence maintained some of the basic structure of Royal government, Henry II gave his life and rule to improving extending and strengthening the structure of government, greatly extending royal power, the number of officers and the reach of his administration. His law reforms were part of this and greatly extended the royal judicial power. By the end of his life there had been a movement away from personal rule and the structure of mediaeval government was there. The absences of Richard I and the incompetence and abuses of King John allowed the structure to consolidate itself, on the principle that if you do not have clear instructions or leadership you go on doing what you were last told to do. The people of England, or the people who owned land and mattered, liked this structure and royal justice, and rebelled and obtained Magna Carta to secure them. By 1158 little of this had happened, and the Royal judicial power in civil disputes was narrow. The concerns of the king and his justiciars were much more directed to public order, securing loyalty and obedience

from magnates and defending and extending the borders. The ordinary court for civil disputes was the county, a quarterly meeting of the freeholders of each county presided over by a royal officer, the sheriff. There were many other courts, jurisdictions and powers, and each feudal lord was himself a court for disputes about land held under him.

38. An early stage in any rational disposition of a lawsuit is establishing what is in dispute and what are the issues; you cannot decide without first establishing what you are to decide. The judge must hear the parties and ask them what they are disputing about, and carry on their debate until something rational is established as the issue or issues. There is a tendency for litigants to talk about all their grievances, and this must be controlled, and so must the tendency to expand the array of issues as weaknesses appear in a party's position as earlier defined. Courts define controversies and then quell the controversies that have been defined. Without control, controversies go on for ever. If the parties have some other dispute they can start another case. People who are not lawyers find this difficult; they seem to prefer shapeless grievances and they often resent disposition limited to a defined dispute. Unless you control these things you do not have a court; you have an endless ineffectual debate in which no controversy is quelled.

39. In the time of King Henry II and long afterwards, parties came before the Court and stated orally what their positions were, what they claimed and how they defended the claim: issues emerged and were decided. Later this process took place in writing, and

as the centuries passed the process became encrusted with technical rules, sometimes of forgotten origins and purposes and no discernible utility. With the Nineteenth Century came simplifications and eventually sweeping reforms, and modernity emerged in 1875 in England, in 1972 in New South Wales.

40. In mediaeval England the power of the Church meant that sovereignty was divided; the power of the King was limited by the power of the Church, and vice versa. There were limits to the power of the King in his court, and in particular it was for the Church and its courts to decide whether a marriage existed. It was established in early hearings that it was an important issue for Anstey's case whether William's marriage to Adelicia was valid. Deciding that issue was beyond the limits of the King's power, and the justiciar did not attempt to decide it but sent the parties to obtain the decision of the Church on validity. That sent Richard to Archbishop Theobald of Canterbury on a litigation journey that took several years.

41. The King and his justiciar did not tell the parties to get a decision from the Church on what were the rules of succession to land in England, or on whether Mabel was legitimate or on whether Mabel had succession rights because she was born before it was established that her parents' marriage was invalid; those are questions about the law of succession to land, at the heart of the feudal system, outside the power of the Church. However the parties did not limit themselves to the issue which it was for the Church to decide; they seem to have thought that they could talk about anything, and

Mabel took some remarkably wide courses in the arguments she put to the Archbishop and to the Pope and his delegates.

42. This is an illustration of how litigation goes wrong; parties who do not have lawyers, and also many lawyers talk about things which might sound meritorious but do not solve the defined issue. The hearing extends beyond what is necessary or useful. The judge's function requires him to resist this, stop them if he can and keep his mind on what is really involved. This discipline is especially important where there are jurisdictional boundaries.

43. Living in a Federation in Australia we encounter jurisdictional boundaries and must respect them; they exist in all systems, far worse in the United States where, unlike Australia, state courts cannot decide federal questions. The boundary between King Henry and the Church was somewhat like the boundary between the powers of a federal government and the powers of a state government and of their courts. It is an error to decide something beyond the limits of power, the powers of the other court must be respected, lawyers and judges are aware of this, and they usually discipline themselves to debate and to decide only what they are empowered to decide. The Church courts did this: although Pope Alexander III was presented with widely ranging contentions, the Pope decided only the validity of the marriage, after which the controversy was passed back to King Henry. A huge conflict about jurisdictional boundaries lay in the near future for King Henry II and the Church: Richard was present at Woodstock in 1163 when Henry and Thomas a Becket had an early public

row, but he did not get caught up in it. Henry’s great conflicts with the Church were still to come, but tensions existed.

44. Some churchmen clearly knew what the Church courts were to decide. In Archbishop Theobald's apostolus this appears: “Since a question of matrimony was involved, and matrimony is annulled or confirmed in accordance with ecclesiastical law, the court of our catholic sovereign Henry II, king of the English, decreed that the case should return for judgment to an ecclesiastical court, where the question of marriage might be duly determined in accordance with canon law, which the clergy know, whereas the common people to not." Pope Alexander III’s decision, stated in a letter to Richard of Anstey, is carefully limited: “... we hold the sentence of the aforesaid bishop of Winchester on that case which was pronounced in a canonical way according to the procedure indicated by our predecessor for valid and we decree that the first marriage was legitimate and the second void." That is, Pope Alexander III carefully disposed only of the question of validity of marriage, and he did so on the ground that the earlier decision of the Bishop of Winchester was regularly arrived at. The Pope did not go through the mass of other considerations which had been put before him, showing that he or whoever wrote his letters had a lawyerlike grasp of relevance.

45. Richard of Anstey commenced his suit about August 1158. He needed the King’s warrant, but the King had just left England and did not return until January 1163. Richard sent a messenger after him; the King may have been difficult to find on his rapid diplomatic and military journeys through northern France, but the messenger

obtained the warrant and returned to Richard in England. Richard took it to Salisbury and obtained a writ from the Regent, Queen Eleanor. He had to take her writ to the justiciar, but first he went to Southampton and arranged for Ralph Brito, who was going to Normandy, to purchase from the King another writ referring proceedings to the Archbishop. Richard then went to Ongar and delivered Queen Eleanor's writ to the justiciar Richard de Lucy at his manor there. The justiciar gave him an appointment for 29 November 1158 at Northampton. Richard sent his clerk Nicholas to Barney in Norfolk to bring Albereda and her brother Geoffrey de Tregoze to Northampton, and Richard proceeded with his witnesses, friends and helpers to Northampton. Richard opened his pleadings at the hearing there, and the justiciar gave him another appointment for 13 December 1158 at Southampton. There Mabel stated her case in a way which showed that the validity of Adelicia's marriage was the main issue. That brought proceedings before the King's court to a stand for more than four years, until validity had been decided by the Church courts; Richard had known this would happen and had obtained the King's further writ so he could go straight to Archbishop Theobald's court.

46. Richard recorded everything he spent: 6s 8d for the messenger to Normandy, £1 6s 8d for the journey to Salisbury, £1 2s 7d for the journey to Southampton, with the loss of a horse which had cost 15s, 15s for Nicholas to go to Barney, with loss of a horse which had cost 9s, £2 14s for the journey to Northampton, £2 17s for the journey to Southampton, with the loss of a horse worth 12s. The record of expenses goes on, in detail and at every stage.

47. Richard took the King's further writ to Archbishop Theobald at Winchester (£1 5s 4d) who gave him an appointment for 22 January 1159 at Lambeth. At Lambeth there was an adjournment to 14 February 1159 at Maidstone. At Maidstone there was an adjournment to 7 March 1159 at Lambeth. During this adjournment Richard went to the Bishop of Winchester and obtained his certificate of the divorce before him in the London synod. He produced the certificate at Lambeth and there was an adjournment to 23 March 1159 at London. During the adjournment he went to see Master Ambrose who was with the Abbott of St Albans at a Priory in Norfolk, and he also sent his chaplain Sampson to Buckingham to consult Master Petrus de Melide. (On the way Sampson lost a horse worth 13s 4d.)

48. On 23 March there was an adjournment to 19 April 1159, and Richard got wind that his opponents had purchased a writ from the King exempting them from pleading until the King returned to England. This may have related to military service or other service by Mabel's husband. Richard sent his brother John to the King to get another writ removing this stay; but what Richard had heard seems to have been wrong. During the adjournment Richard went to Chichester to speak to Hilary Bishop of Chichester who (it seems) could give evidence of what happened more than 20 years before in the London synod, and got a letter from Bishop Hilary to the Archbishop testifying to the divorce. The hearing at London in April took four days; then there was an adjournment to 17 May 1159 at Canterbury. In May his opponents told the Archbishop that they could not plead on account of the summons of the King's army for Toulouse, and the Archbishop adjourned the proceedings without fixing a day.

Richard set off to Aquitaine to find the King, probably to Bordeaux and then far up the Garonne and the Tarn, and found him at Auvillar, deep in southern France on the far eastern boundary of Aquitaine, where the King was conducting a campaign to conquer Toulouse, without success. Richard waited 13 weeks for the King's attention, purchased the King's writ and returned to England, where he found Archbishop Theobald at Mortlake. (This venture cost him £4 10s.)

49. When the Archbishop saw the King's writ he gave an appointment for 25 October 1159 at Canterbury (famously, the feast of Saints Crispin and Crispinian.) The proceedings were adjourned to 18 November 1159 at Canterbury, thence to 13 December 1159 at Canterbury, and Richard sent Sampson his chaplain to Lincoln to bring Master Peter to the hearing. But Richard was ill on 13 December 1159 and had to send essoiners, witnesses of his illness, to Canterbury for him; they obtained an adjournment to 20 January 1160 at London. Then there were hearings and adjournments to Canterbury on 10 February 1160, to London on 6 March 1160, thence to London on 10 April 1160. During this adjournment Richard sent two supporters to bring in Godfrey de Marcy (and they lost another horse) and Richard went to the Bishop of Winchester to obtain a more precise certificate; he found Bishop Henry at Fareham near Portsmouth and he brought back from there Master Jordan Fantosme and Nicholas de Chandos as witnesses viva voce to what the Bishop had stated in his certificate. (It seems that these two, and also the Bishop of Chichester, had been present at the London synod earlier in their careers). At London in April the proceedings were adjourned to 22 May 1160 at Canterbury. During the

adjournment Richard went to Stafford to see the Bishop of Lincoln and obtain the assistance of Master Peter, and sent Sampson the chaplain to find Master Stephen de Binham, whom he found at Norwich. He appeared at Canterbury with his clerks, his witnesses and his friends, and the hearing there took two days. There was an adjournment to 6 July 1160 at Wingham, then to Lambeth on 6 August 1160, then to Canterbury on 29 August 1160. Then there was an adjournment to 18 October 1160 at London.

50. The lawsuit was now two years old. Archbishop Theobald allowed facts and arguments which seem to have little relation to the limited issue before him. Mabel and her advocate did not lack ingenuity. Among many contentions made by Mabel, the more virulent passages dealt with the annulment case. She said that after the death of King Henry I "... justice was banished from the realm, and as the madness of those who rejoiced in overturning the old order grew ever stronger, every man was provoked to all manner of ill; and her mother Adelicia -so she alleges- was separated from her husband for no just cause, but was cast out with violence from his house; and this was done by the machination of Geoffrey, archdeacon of London, who for a bribe spared no pains to condemn her undefended and unheard, without even having received a summons. In this he relied on the support of the Bishop of Winchester who, she asserts, had himself been corrupted by filthy lucre; ..." Mabel went on to say that when Adelicia brought her case before the Bishop presiding over the Synod of London Adelicia " ... demanded justice for the wrong done to her by the Archdeacon and her husband. But the weight of iniquity and filthy lucre had sunk the

soul of her judge so low that he could not rise to afford her justice …" She went on with complaints about the proceedings against her mother being heard in her mother's absence, while not dealing clearly with the effect of the further hearing before the Bishop in which her mother took part, or of the Bishop's decision in synod. When dealing with Richard's contentions the apostolus said "Although he alleged many things in support of his case, he laid special stress on the judgment and the sentence which he said was passed against the mother of Mabel in the London synod, where the divorce was celebrated, by the Lord Bishop of Winchester, then legate of the apostolic see and vicar of the church of London."

51. Mabel's main points may be summarized. (1) The agreement was in fact an agreement to be betrothed, not an agreement to be married, had been made by the fathers of the parties and had been set aside by their agreement, with refund of the dowry, release of obligations and full approval by Albereda's father of the marriage to Adelicia. (2) A betrothal is not a marriage, and a marriage is not complete until it has been consummated. (3) A marriage celebrated in Church takes precedence over a betrothal. (4) The annulment did not in fact ever happen. (5) Alternatively if it did happen it was not rightly celebrated because Archdeacon Geoffrey was bribed and gave his decision without giving Adelicia notice, and Bishop Henry had been bribed. (6) Bishop Henry was not the Legate when the case began, Adelicia sought justice from the previous

Legate Bishop Alberic of Ostia who commanded Bishop Henry to do justice, which he did not do because he was bribed. (7) William and Albereda had a Church wedding after the annulment and this proved that they were not married earlier. (8) The decision of Archdeacon Geoffrey was void for lack of notice and procedural irregularity. (9) Mabel's parents were not to blame for not knowing that the previous arrangements were effective. (10) On his deathbed William had expressed repentance for acquiescing in the Archdeacon acting fraudulently in ejecting Adelicia. (11) Mabel (and her children) were not parties to the annulment proceedings, were not mentioned in the decision and were not bound by it. (12) Theobald Count of Blois had investigated the case and decided that William's children were his heirs in Blois.

52. Richard replied to this, and his main point was reliance on the annulment decision. He took other points in answer to Mabel's defences, and the argument got well away from the real issue. Mabel put many more points in reply, and these are some of them. (13) If Richard were right the children of King Louis VII of France would be disinherited. (14) Mabel was innocent of any sins of her parents. (15) Adelicia only asked Bishop Henry to discipline the Archdeacon and did not know he would decide that the marriage was void. (15) Bishop Henry had deliberately mis-stated the facts and had misled Pope Innocent II, and the Pope's rescript did not deal with the actual facts. (17) The Emperor Marcus Aurelius made a concession and legitimized the children of a void marriage in a similar case.

53. Archbishop Theobald did not distinguish himself as a judge in this case. What was he to do with the allegation that Henry Bishop of Winchester had been bribed to grant the annulment? He was well out of his depth. He did not reach a conclusion in 19 months and 19 appointments. On most of these occasions there had been no hearing on the merits of the case, only an adjournment. Mabel obtained most of the adjournments on various grounds, maternity, illness, the absence of her husband on the King's service. Richard asserted that she was shifty. Richard lost his patience and left the Archbishop and his court, as he was entitled to do, by appealing, in modern terms removing the case to a higher court. Archbishop Theobald had been severely rebuked by Pope Adrian IV in 1157 over his conduct of judicial business. He had spent his career in crises, and although he had helped steer the course from his patron King Stephen to the accession of King Henry II he was not always in King Henry's good favour. He was over 70 years old and had been Archbishop since 1139. A papal election in September 1159 produced two rival popes, and it was not clear which one the English Church should adhere to until some time after June 1160. Until then it would have been unwise to try to take the case out of Archbishop Theobald's hands by appealing to the Pope, which would need King Henry's permission at a time when the King was considering which Pope he wished to recognise. So Richard had been locked in to Archbishop Theobald and Theobald had been concerned with much greater things.

54. Richard crossed to France, found King Henry II and obtained his licence to appeal to Rome. (He lost a horse worth 16s on the way.) When he appeared on 18 October

1160 he told the Archbishop and his opponents that he appealed to Rome and named 26 March 1161 as the date for the appeal. He asked the Archbishop for his writ of appeal, meaning the apostolus reporting on the proceedings; the Archbishop refused to issue it immediately and gave him an appointment to collect it at Canterbury. Richard went to Canterbury and received an unsealed draft which he was to show to his advocates for their opinion. Richard took it to Bishop Hilary of Chichester for his advice. Then he sent Sampson to Lincoln to see Master Peter de Melide, and then sent a messenger to show it to Master Ambrose whom he found at Binham. Richard took it back to Canterbury where the Archbishops' clerks refused to seal it but gave him another draft. This too was taken and shown to Master Peter and to Master Ambrose for their advice and corrections. Then Richard found the Archbishop at Wingham and he sealed it. Then Richard sent his brother John to Winchester to get Bishop Henry to certify to the Pope what he had already certified to the Archbishop, and went to Salisbury himself to get Bishop Hilary of Chichester to do likewise. John had to go to Winchester three times to get Bishop Henry's attention. Then Richard sent his representatives off to Rome: Sampson the chaplain, Master Peter de Littlebury and an attendant. He spent £3 6s 8d to outfit them with horses and clothing and gave them £16 13s 4d for the journey: but when they came back they had spent another £2 and he had to pay this back to one of the Bishop of Lincoln's clerks who had lent it to them.

55. The Pope, who was at Anagni south-east of Rome, sent back a brief dated 8 April 1161 appointing delegates to hear the appeal and decide it: and the Pope limited

appeal rights, so that there could be no appeal until all evidence and argument had been received. If there was an appeal at that stage the delegates were to put everything in writing and send the writings under seal to the Pope. The delegates were Laurence Abbot of Westminster and, surprisingly, Hilary Bishop of Chichester, who was a witness of the annulment proceedings and had given certificates about what had happened in them. Appointing Bishop Hilary as a delegate seems to have been Pope Alexander's way of establishing whether the annulment proceedings in the London synod had really taken place. Archbishop Theobald died in April 1161: if the prescient Richard had not appealed all the hearings before Theobald would have come to nothing.

56. The Pope directed the delegates to decide within three months, and they were expeditious. Richard took the brief to the delegates who gave him an appointment for 6 October 1161 at Westminster. Richard attended with his advocates, his friends and his witnesses, but the case did not start for three days while the delegates attended to business of the King. After a day's hearing there was an adjournment to 18 November 1161. Richard tried to arrange for Godfrey de Marcy to attend as a witness, and sent John for him, but he was ill and his son came in his place. (John lost another horse on this journey, value 15s.) At this hearing Richard hoped to obtain the delegates' judgment, showing that the evidence was at last complete, and he was kept at court for five days. But completion of the evidence and argument meant that his opponents could appeal to the Pope, and they did appeal and nominated 18 October 1162 for the appeal. The exercise of obtaining an apostolus was again undertaken, with a journey

to Oxford to receive the draft on 30 November 1161, a journey to Lincoln to consult Master Peter, a journey to Winchester to have it sealed on 13 January 1162, but the Bishop would not seal it in the absence of the Abbot, and eventually it was sealed at Westminster on 18 March 1162.

57. Richard needed or thought it wise to obtain letters from the Primate and other bishops to the Pope supporting his position in the appeal. Whatever was his reason, these letters must have been important, because Richard went to great trouble to get them. Archbishop Theobald's successor Thomas a Becket was not consecrated until June 1162. Robert found the Archbishop of York at York with the Bishop of Durham, and obtained from each a writ deprecatory addressed to the Pope. He then went to Lincoln and obtained a like letter from the Bishop there, then sought the Bishop of Winchester and found him at Glastonbury, for a like letter. Then he sent off his clerks with the documents to the court of Rome. At this time there were two rival popes, but the Kings of England and France recognised Alexander III; that Pope and his Curia were at Tours. Richard's clerks attended for 62 days before they got a decision, but the decision was the one which Richard wanted. The sentence was issued late in December 1162. They brought back three briefs stating the Pope's sentence; one directed to Archbishop Roger of York, one directed to Richard de Lucy the justiciar and the third to Richard of Anstey. The litigation was far from over: it moved back to the King and his court.

58. Richard took the sentence to Richard de Lucy, who did not act on it, probably because the King was about to return to England after an absence of four years and five months. The King landed at Southampton on 25 January 1163, and was met by a large assembly of notables. Richard followed the court for three weeks before he could make fine with the King; this refers to the need to agree with the King or his officers about a payment relating to the lawsuit, not to the conclusion of the lawsuit. When the King saw the Pope's brief and the sentence he was vexed because the Pope had not directed any brief to the King himself. Richard sent a messenger on the following day to Pope Alexander to obtain a brief directed to the King, and the messenger brought it to him at Windsor on 31 March 1163. Richard then made fine with the King and the King gave Richard de Lucy a precept to continue with the case. The justiciar gave an appointment for pleading at London on 3 March 1163 (the dates are anomalous) but when Richard attended with his following the justiciar could not attend to this plea for four days because he had to attend a council and deal with the King's business; Richard was given an appointment for 31 March 1163 at Windsor. Richard sent his brother John to arrange for Ranulph de Glanville to attend; Glanville was later justiciar himself, and he was probably to attend as a lawyer or adviser for Richard. (On this journey John lost a horse, value 20s.) But no business was done at Windsor, as the court had to attend to Robert de Montfort's appeal against Henry of Essex, business was postponed from day to day, the justiciar moved to Reading where the trial by battle took place, and then the justiciar moved with the King to Wallingford.

59. The King then required Richard de Lucy to go with him to Wales, so Richard de Lucy removed the case to the other justiciar Robert Earl of Leicester at London. Richard could make no progress with the Earl, and did not get a new appointment, so he wrote to Richard de Lucy in Wales, and de Lucy ordered Oger the Steward and Ralph Brito to do justice. These were men in royal service, not necessarily clerics, who appear from time to time over many years as witnesses to documents. Ralph Brito had taken papers to the King for Richard early in the case. Many years later he was an Itinerant Justice. Deputing them suggests that the case was not thought complicated any more. The case came before them and presumably they reported to the justiciar who appointed them, because the justiciar and also the King sent writs to the defendants to hear judgment at Woodstock. The parties attended at Woodstock, where the King was in July 1163, and after keeping them waiting for eight days the King adjudged William's land to Richard.

60. At every stage Richard recorded what he spent. The document becomes very tiresome, but the cumulative amounts spent are astonishing. He spent well over £300, and although we do not have national accounts, the King's annual revenue may have been in the order of £30,000, and Richard spent one percent of that on his lawsuit. He had income from his first inheritance, and he borrowed money from the Jewish moneylenders who alone could lend at interest, but it is likely that he had other supporters, possibly Albereda's Tregoze relatives. Many people who had assisted him had claims on his generosity which it would take years to meet. He had to pay a large sum to the King which may have been a relief on the Sackville inheritance, and it took

him years to pay that off. An insightful scholar has suggested that Richard may have sued on behalf of his aunt or her heirs as well as himself, and that as the elder stock of those interested in coparcenary he was entitled to sue on behalf of all with similar rights to himself: a right called esnescy. In this interpretation he carefully tabulated all his expenses because he wanted to get half of them back from the people interested in the other half of the inheritance. This seems reasonably possible, but is not clearly established, and Richard himself did not mention his relatives or their entitlement. It could explain how the record of expenses was among Exchequer records: he may have sought satisfaction by throwing more of the burden of feudal services onto those with whom he shared the inheritance.

61. Richard recorded all his borrowings from moneylenders, and the rates of interest seem very high, but may have been reasonable when weighed with his apparent prospects of a favourable outcome. In that age there was nothing like an effective mortgage security over land, or over anything that was not portable. The moneylenders were Vives of Cambridge who charged 4d per week per pound or 87 per cent, Comitissa of Cambridge, Bon-enfaunt, Dieu-la-Cresse, Jacob of Newport, Hakelot who charged 3d per week, Benedict of London, Bruno who only charged 1½d, and Mirabella of Newport who lent him money after he had won his case and charged him the highest rate again. In 1165 he was again borrowing from Hakelot to pay instalments on his relief, and the rate was only 2d.

62. Richard paid fees in the Archbishop's court to clerks and pleaders £7 6s, in the Bishop of Winchester's court £9 6s 8d, to Master Peter de Melide £6 13s 4d and a gold ring, to Master Robert de Chimae 13s 4d. In the King's court he made gifts of gold, silver and horses worth £11. He gave Master Peter de Littlebury £2 and gave gifts of money and horses to other pleaders and neighbours totalling £8 6s 8d. He paid Ralph the physician £24 6s 8d, but does not say what for. He paid the King £66 13s 4d, and the Queen (who issued his first writ) one gold mark.

63. Richard is unlikely to have been treated with much dignity by King Henry and his officers, or by his courtiers. In that age the way to get a fortune in land was to fight for it, to serve the King in war and receive conquered or forfeited land as a reward. The King himself spent most of his life in wars and conflicts, and leading figures at his court did the same. The pathway to dignity and respect was military; Richard did not follow it, but repeatedly claimed the King's attention for processes of reasoning and debate which were not the usual path to advancement. Mabel's husband was sometimes absent in the service of the king, and this led to adjournment. Richard did not go the wars; no reason is given and none appears. He may have had some disability. He had a duty to give or provide Knight's Service; but there is no reference to war service calling him away from his lawsuit. Richard may have paid someone else to perform his Knights' Service; he may have negotiated a payment with the King's officers.

64. On four occasions Richard claimed the King's attention in the midst of more pressing events: the siege of Toulouse, the King's return after four years' absence, at Windsor and Reading when Henry of Essex did battle and at Woodstock when Thomas a Becket confronted the King in their first public shouting match, before an assembly of notables. For Richard to appear at court claiming attention, waiting around until the King would give it to him, sometimes for days, sometimes for months, was not a dignified situation. He must have been well known in his own times, trailing along muddy roads in all weathers in England and France towards wherever the King the justiciar or the Archbishop might be, with bundles of documents and his little following of witnesses and supporters, sending messengers to Rome and hither and yon, borrowing heavily, spending money and getting nothing for it for years on end. This probably brought him wide undignified fame, even mockery. A very large item in his expenditure, about a twelfth of the total, is the money he paid to Ralph, Radulphus medicus regis, sometimes translated as Ralph the King's physician but sometimes less kindly as Ralph the Leech; it seems that to get King Henry's attention and time it was necessary or it was wise to pay bribes to the physician. Soldier knights who won their fortunes by fighting for the King are unlikely to have respected a litigant waiting about and slipping money to the physician to get some attention.

65. We do not know much about Richard personally. There are no portraits or descriptions. In later decades he had sons. Richard does not complain about his journeys, and he did not make his record to set out his hardships or his complaints; he had a different purpose. As a Norman and a freeholder Richard was a privileged

person: an ordinary Englishmen would have had difficulty moving away from his own village unless he was carting goods or otherwise serving his master, and would be unlikely to have had resources or motivation for travels. Journeys along mediaeval roads and across the sea had burdens, discomforts and perils which challenge the modern imagination: a world without sealed roads, police, printing, signposts, timetables, clocks, post offices, diaries, notebooks, pencils; there were no regular shipping runs and there was the challenge every day of finding an inn, abbey or barn to accommodate and feed men and horses, enquiries for the whereabouts of notables who were themselves on the move, chaffering with sea captains for passage and horse dealers for transport. Information was never reliable, everything took a long time, forty miles was a long journey for a day, ships navigated by dead reckoning and there was not much protection from the weather.

66. To dispose of litigation the judicial mind must be brought to engage with the relevant issues. To bring this about the litigant must pass through mazes of practicalities, which beset Richard of Anstey with unusual force. Difficulties like these are constants of litigation, and they confronted Richard in intensity. Richard needed determination to the point of the fanatic. There can have been few in his time who brought civil litigation before the King, and even fewer who achieved decision. Half a century later the path of litigants was smoother, and relative efficiency and utility had been produced by King Henry's reforms, the Writ of Right, the assizes, the jury, a functioning routine produced by a flow of business, a staff of judges who continued in office, a known location for the court: generally, institutionalisation. Access to royal

justice had become a valued right worthy of claims to protection in Magna Carta. Richard's persistence and success in the face of years of delay, expense and circuitous process mark him as a rare personality, immune to discouragement. If litigants in person ever meet to exchange recollections or praise famous men, they should toast Richard of Anstey.

67. A note on sources.

Richard of Anstey's Account of Expenses and documents from John of Salisbury's Letters appear in Latin and English in "English Lawsuits from William I to Richard I" Volume II, (1991) Volume 107 Selden Society edited by Professor Van Caenegem – documents under 408 at pages 387 to 404. There are references to Henry of Essex and his trial by battle at documents under 407, pages 381 to 387.

The Pipe Roll Society has been publishing the Great Rolls of the Pipe, records of dealings in the Exchequer, and other medieval records, since 1884. "The Anstey Case" an article by Dr Patricia M Barnes appears at page 1 of the Society's Volume 74 for 1960 and states in detail what was then known, with references to earlier publications.

Dr Paul Brand's Article "New Light on the Anstey Case" was published in (1983) Vol 15 Journal of Essex Archaeology and History at page 68 and contains striking insights based on study of records of litigation among later generations of Richard's family,

and other records. Dr Brand wrote the article on Richard of Anstey in the on-line Oxford Dictionary of National Biography. Dr Paul Brand FBA, now Senior Research Fellow at All Souls College Oxford and a Vice President of the Selden Society, kindly pointed out some misunderstandings in my draft, although as the reader will see, I have made my own interpretations of material which leaves many uncertainties.

I have drawn on Pollock and Maitland, "History of English Law Before the Time of Edward I" 2 ed 1898.

There is a large literature on Henry II and his times, and new publications appear frequently. I have been influenced by general reading but I should mention:

"Henry II New Interpretations" edited by Professors Harper-Bill and Vincent, The Boydell Press, Woodbridge 2007

"Becket & Henry; The Becket Lectures" James J Spigelman, The St Thomas More Society Sydney 2004.

Print Page | Close Window

Farewell Ceremony For The Honourable Justice John Bryson

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

SPIGELMAN CJ
AND THE JUDGES
OF
THE SUPREME
COURT

Wednesday 28
February 2007

FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE JOHN BRYSON
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES

1 **SPIGELMAN CJ:** Almost 21 years ago your Honour was sworn in as a judge of this Court. You sat in the Equity Division for about 18 years and in the Court of Appeal for three years. This is a record of service to the administration of justice that few can equal. It is fitting that so many of us are gathered here today to honour it.

2 Being in your Honour's presence has always been, even from the bar table on the losing side, a delight of the first order. Appearing before you was always a pleasure. However, what transformed pleasure into delight was your Honour's personal style – in essence, a black letter lawyer with élan – which style was, quite simply, inimitable, in the strict sense that it defies imitation.

3 Your Honour has an inexhaustible supply of arcane anecdote, informed by a wide ranging intellectual curiosity, a keen eye for the ribald and the ridiculous and a fascination, bordering at times on the world weary, for human fallibility.

4 Everyone in this room has relished your Honour's mode of expression: cliché free, pregnant with insight, deliciously unpredictable, devoid of malice, uncluttered by excessive verbiage, manifesting a love of language and exuberantly sprinkled with wit – that form of humour which illuminates the truth. Often your expression was self-consciously old fashioned. However, as the English essayist, drama critic, caricaturist and parodist Max Beerbohm once put it: "To be outmoded is to be a classic, if one has written well." You are a classic.

5 For those of us who have had the pleasure of interacting with you frequently, we enjoyed examples of your facility with words on a daily basis. You are, so far as I am aware, the only judge of this Court, perhaps of any Australian court, who has ever had the privilege of a personal column in the journal of the Bar Association. Entitled "Brysonalia", the column set out quotable quotes from your early cases. Regrettably, your Honour's prolific output of such quotes has, by and large, not been recorded. On this occasion I wish to place two examples from my time at the bar on the record.

6 I once attended a conference on "Law and Literature" at a time when, from my ignorance, I thought that this sphere of discourse had something to do with "literature" rather than, in the post modernist fashion, a preoccupation with something called "texts".

7 I was sitting next to your Honour during an address by a feminist scholar – it was early days in the process of gender sensitising lawyers. The scholar announced to the assembled audience that it was essential that in the future all lawyers should be "femocrats". Immediately, your Honour put your head in your hands and said: "How can she mix those Latin and Greek roots like that? The correct word, if any, is 'gynaecrat'."

8 I give one other example of your Honour's style. An issue arose in a case as to whether or not certain water licences fell within the extent of the security under a mortgage of rural properties. I handed to your Honour an extract from the 9th edition of the English text Fisher & Lightwood on *Mortgages* which stated, without citation of any authority, that "all incidental rights … will follow the security" [1]. I then handed to your Honour an unreported judgment of your brother Mr Justice Young, who quoted that sentence and applied it to conclude that a licence for an abattoir was within the mortgage[2]. Finally, I handed to your Honour the 10th edition of Fisher & Lightwood on *Mortgages* which contained exactly the same sentence but, on this occasion, had a footnote attached to the words "all incidental rights", namely a reference to the unreported judgment of Mr Justice Young[3].

9 Your Honour inspected each of the three documents, looked up and said: "This is going to be very difficult to stop".

10 Your principal contribution to this Court is, of course, in the judgments you have delivered over some 21 years. According to a computer search you have sat on about 2,600 cases. They cover the full range of equity jurisprudence in this State and, in recent years, the even broader range of the civil appellate jurisdiction.

11 You brought to the judicial task a profound understanding of, and empathy for, the role of legal practitioners, which you had acquired over many years of practice both as a solicitor and as a barrister. You were always aware that matters are not always as they appear to be, particularly by the time a dispute reaches an appellate court.

12 Your Honour's insight in that respect was no doubt informed by your role as instructing solicitor for the State Crown, appearing for the GIO, in the classic case of *Jones v Dunkel* when the High Court, somewhat scornfully, commented on the failure of counsel to call or explain the absence of the defendant and crucial witness, being the truck driver accused of negligent driving. You maintain to this day that the High Court should have taken into account the possibility that there may have been such an explanation that could not have been safely adduced before a jury. Indeed there was. In that case, it was difficult to explain to the jury that had to decide whether the defendant had been driving negligently, that he could not be called as a witness, because he was in prison interstate having been convicted on a charge of culpable driving causing death.

13 Your Honour always approached each individual case without preconceptions and with a willingness to hear the facts and arguments as they evolved in the course of a traditional common law trial.

14 Those appearing before you never had a sense that you had already formed a view or that you intended to determine the matter in accordance with some pre-existing philosophy of the law, let alone any pre-existing social philosophy. Your focus was always on what the law and the facts required in the individual case. This approach made your Honour frustratingly difficult to predict in prospect. No one left your Honour's court without the complete conviction that they had had a fair hearing according to law.

15 In words with which you may agree and in a style not dissimilar to your own, Max Beerbohm, the foremost drama critic of his day, expressed a preference for attending trials over the theatre and, whilst preferring the Kings Bench, said this of Chancery cases:

> "There is a certain intellectual pleasure in hearing a mass of facts subtly wrangled over. The mind derives therefrom something of the satisfaction that the eye has in watching acrobats in a music hall. One wonders at the ingenuity, the agility, the perfect training. Like acrobats, these Chancery lawyers are a relief from the average troupe of actors and actresses, by reason of their exquisite alertness, their thorough mastery (seemingly exquisite and thorough, at any rate, to the dazzled layman). And they have a further advantage in their material. The facts they deal with are usually dull, but seldom so dull as facts become through the fancies of the average playwright. It is seldom that an evening in a theatre can be so pleasantly and profitably spent as a day in a Chancery court." [4]

16 Your Honour also always evinced a great love for the theatre of the law, albeit with a more discerning eye for the verbal and tactical gymnastics of counsel.

17 Your Honour's long service as a judge of the Equity Division has meant that your Honour's judgments cover the entire range of that diverse jurisdiction. You have delivered judgments on patents and trademarks, company takeovers, special investigators, disclaimers by liquidators, the disqualification of company directors, the validity of meetings, the efficacy of a deed of charge, the interpretation of contracts, the incidents of a joint venture, the interpretation of wills, the fiduciary obligations of solicitors and partners, the law of landlord and tenant, the role of equitable rights under the Torrens system, the interpretation of superannuation trust deeds, the law of estoppel by convention, the rights of patients to access their medical records, the requirements for the admission of documents into evidence, too many permutations of Family Provision Act conflicts to mention and numerous other matters covering the full panoply of equity jurisprudence.

18 Your Honour brought to the appellate process your long experience as a trial judge and emphasised the respect required of an appellate court for judicial discretion. However, your elevation was accompanied by a noticeable restriction on your Honour's usual list of conversation topics. We all lost the benefit of your running commentary on the inadequacies of the Court of Appeal.

19 This appointment broadened your Honour's caseload: returning to an early practice with personal injury law, where your Honour displayed a compassion for plaintiffs that few had predicted. In your three years on the Court you delivered judgments of significance on such matters as the law of defamation, the liability of public authorities and the law of fiduciaries, notably observations about the threat to proper principle occasioned by the restitution industry.

20 "Designation of a relationship as fiduciary", you said, "is not a signal for exercise of judicial bounty"[5]. No one else has put it quite like that.

21 In similar style, your Honour rejected the proposition that it was negligent for two parents to go to sleep at midnight on the basis that it was not reasonably foreseeable that the guests at their teenage son's party would attempt to reignite a barbeque at 2.00am and proceed to douse it in methylated spirits. Your Honour produced the definitive judgment on what was reasonably foreseeable conduct by teenage males in such circumstances. You identified as foreseeable: "Horseplay, leapfrogging, dancing on tables, swinging on tree branches and arm wrestling"[6] but not throwing metho on a barbeque.

22 I know that all the judges of the Court and the profession as a whole are grateful that your contribution is to continue. I could not be more pleased personally that your Honour has agreed to return as an acting judge of the Court, to sit both at first instance and on appeal. Your continued presence will maintain the strength of this Court.

23 As is reasonably well known, I have more than a passing interest in legal history. I have, accordingly, particularly appreciated our own exchanges on historical matters. Your Honour's breadth and depth of knowledge in this regard is awe inspiring. You are able to summon from your prodigious memory a broad range of anecdote and information about British and Australian legal history, usually replete with full quotation.

24 In this, as in so many respects, the entertainment and educational value of interaction with your Honour has always been of the highest order. Inevitably, in the future, that interaction will be less frequent, albeit not absent. Insofar as it is reduced I, like all your colleagues, will miss, to that extent, the way that your joy for language, for history and for the law has enriched all of our lives.

25 **MR M SLATTERY QC, PRESIDENT, NEW SOUTH WALES BAR ASSOCIATION:** On behalf of the New South Wales Bar I farewell your Honour from the bench of this Court and thank your Honour for your years of dedicated service to the law in this State.

26 The retirement of any member of this bench resembles the passing of an age. Everything will be just that little bit different after you are gone. In your Honour's case the change will be keenly felt because of your Honour's rigorous intellectual life and unique sense of humour. Your Honour's contribution to the law in this State started as a solicitor and a barrister.

27 After a time at Allen Allen & Hemsley your Honour came to the Bar in 1966. You soon became a much loved member of the tenth floor of Wentworth Chambers where Ken Hall, one of the great clerks of that era, helped launch your practice. With your Honour's typical modesty as a junior you could

never quite understand in those days why your services were always so much in demand by senior counsel. You had a practice with an essentially equity flavour but, as with all great advocates, you did everything that came your way.

28 Despite the success of your junior practice it is said that it took the Honourable Trevor Morling to overcome your natural modesty and persuade you to take silk after twenty years in 1986. As senior counsel you blossomed. Your own special combination of inexorable legal logic and care for your clients placed you much in demand, so much in demand that solicitors could not always get you. Your Honour was then appointed to this bench in 1988.

29 Your Honour loved the Bar. When you left your Honour was heard to say, “It’s such a good life. Don’t tell too many people. They’ll all want to do it.” Your Honour further explained, “It’s the last refuge of the true eccentric.” Your own life on the bench perhaps proves that the bench too has one or two eccentrics.

30 Once your Honour went to the bench it was very obvious that you greatly valued the work of the Bar before you in court and your long-standing personal friendships with individual members of the Bar. All the same, your fondness for the life that you had left always exhibited a healthy scepticism. Some years ago your Honour travelled to France. Rather thoughtfully you sent a postcard to a former Bar colleague. The postcard depicted in close up the medieval gargoyles facing out from the roof of Notre Dame Cathedral in Paris. On the card you simply wrote “Thinking of you always.”

31 Your Honour brought many things to the bench. Special among them is your sense of humour. To remember your Honour’s judicial humour is to capture an instant in one’s own life. Your Honour’s humour is the humour of the moment, this often a moment of insight into all human pretension and absurdity. Your Honour’s remarks are captured and fondly remembered and then savoured by the profession in joint reminiscences for years. These moments often celebrate your Honour’s deep sense of humility. One such moment is forever remembered by one senior counsel who was appearing before your Honour in an interlocutory application in chambers some years ago. All counsel were ushered into your Honour’s chambers. Seated, your Honour commenced to read the court file. It took some time. Counsel remained standing for a period. One of them then said, “Does your Honour mind if we sit down?” To this your Honour said, “Feel free. You can kneel if you wish.” As if that wasn’t enough your Honour then added, “But I shouldn’t offer you those temptations.”

32 No one can really quite classify your humour. It is droll. It is mordant, it is dry, but above all it shows a unique appreciation of the incongruous - a quality probably essential to all judicial life. Shortly after you came to the bench and when Justice McColl was editor of Bar News when she was at the Bar your judicial sayings were spread through a special column, as the Chief Justice has said, entitled “Brysonalia”.

33 Your Honour has a rich intellectual life which does not just reside outside the law. It is constantly on display in the rich humanity of your judgments and is seamlessly connected with your professional work as a judge. To many of us your Honour’s interest in the first and second crusades and the hundred years war would appear to have only a distant relevance to the Monday companies list over which you presided so successfully for years. To your Honour these were essential background to assist in a proper understanding of the modern corporate and business mind.

34 On the bench your Honour has always been a model of judicial gravitas and reserve. No one has the slightest idea of what your politics are although you have never been heard to propound any radical views. Behind the scenes there is much which is simply impromptu in your Honour’s approach to life. This should not perhaps be a complete surprise in one with such a deep love of poetry as your Honour. To make a point to your judicial colleagues you will occasionally pull out a little black book and from it recite an apt piece of verse or put on your Soviet Air Force cap and act out the issue. Your judgments, too, have long shown the same playfulness with language. In *National Australia Bank Limited v Italo Australian Club Limited*, decided in your first year on the bench, your Honour said this about the conduct of the then State Rail Authority:

> “In pursuing this opportunity to obtain rental revenue the SRA took little notice of the signals displayed by persons not on its staff and proceeded on iron rails to a timetable and a destination known only to itself.”

35 Yet again in *Gosper v Gosper*, a *Family Provision Act* proceeding, your Honour observed of the testator that, "His life would furnish new scenes for The Rakes Progress by Hogarth." Without insult to the family here your Honour clearly conveys the coded communication, "The testator was a rotter."

36 In another matter, *Moon v James*, your Honour described the defendant's personality and place in the family hierarchy without giving any offence by saying, "There would be few debates in which the defendant would prevail and few minds he could ever overbear or persuade."

37 Your Honour's love of language occasionally led you into drafting judgments with rather longish paragraphs and sentences peppered with semi colons. Last year this provoked one of your fellow judges to offer to give you the Bret Walker Award for complex syntax.

38 Your interests also embrace the great questions of philosophy - about what is and what is logically possible. If any of us too have ever tried to imagine the possibility of a universe in which equity judges led a calm, measured and balanced life then of necessity your Honour would be in it. You exemplify that in everything you do. Two years ago you holidayed in the Galapagos Islands. Last year you went walking in the Bay of Fires in northern Tasmania.

39 There are many differences between equity and common law judges. Some of these are more obvious than others. One of these is their luncheon habits. By long tradition common laws judges have held a Monday judges' lunch. In equity things were always different. It is not a widely publicised fact but when your Honour was first appointed to the equity division regular judges' picnics were initiated at Lane Cove National Park. For your Honour this represented a unique problem: How would you be able to keep the general public away whilst you all discussed the rule in Dearle and Hall? Your Honour solved the problem by making up a sign which has been placed ever since in front of these picnics. The rest of the time it sits in your Honour's chambers. With your Honour's signature genius for metaphor the writing you crafted onto it simply says, "Dried Fruits Conference."

40 This type of judicial strategy doesn't always work. A few years ago your Honour checked into a hotel for a judges' conference in Melbourne. When asked at the desk why you were visiting the State you rather guardedly explained, "I'm here for the dried fruits conference." Overhearing this, a woman guest next to you said excitedly, "How delightful. My husband grew up in Mildura. We've always wanted to see a dried fruits conference."

41 Your Honour's taste in signs is even more exotic than this. One in your chambers taken from the nineteenth century German poet and philosopher, Friedreich Schiller, presents a special mystery and reveals your delicious sense of incongruous ambiguity. Written in German it reads, "Mitt der dummheit kampfen gotter selbst vergebens." The German translates literally as "The very gods themselves struggle with stupidity." This principle is becoming so useful in modern judicial practice that I understand that the Law Reform Commission is considering writing it into the *Civil Procedure Act*.

42 To many at the Bar your Honour's very courtroom image as a judge is shared with your long-serving and loyal associate, Carolle d'Argent, who joined you barely three months after you were appointed to this Court and has been with you ever since. Your personal concern for the welfare of Carolle and that of all your tipstaves over the years is very well known. At least one of your tipstaves, Natalie Obrart, has come to the Bar. Inspired by you, others too have progressed through the law. As with all the treasured parts of your Honour's life there is a special brand of your humour reserved just for them.

43 About seven or eight years ago Justice Einstein and a number of judges of the Court became interested in acquiring Dragon voice activated software for dictating judgments. Whilst your Honour is no Luddite you had a firm view about the effect that this development was likely to have on your own much loved staff. When asked by a fellow judge, "Why aren't you taking up the new voice software?" you simply said in an unreconstructed moment, "Why should I get a dragon when the one that I've got does such a great job?"

44 Your Honour sat in all the various work that equity practice can provide. From specific performance suits to trusts and public law your Honour took pleasure in mastering the full range of work in the division, producing detailed and well reasoned judgments which developed the law in every field. Although the corporations list was not seen as your natural habitat when you first went to the bench you made a significant contribution to the law of takeovers and schemes of arrangement. You brought

your sensitive understanding of human nature to the immense number of Family Provision matters that you adjudicated.

45 Your Honour always felt the challenge of trying to bring order into the law. Some years after Walton's Stores and Maher was decided by the High Court your Honour tried to map out the entire law of estoppel to attempt to find some order in it. Your Honour later confessed that you couldn't. At about the same time you could often be heard reminding counsel who were seeking to amend process to add a plea of estoppel: "It is not yet compulsory to include an allegation of estoppel in every pleading".

46 Your Honour was utterly unflappable on the bench. Much of your work was in property law and occasionally that required your Honour to go on circuit. When he was at the Bar Justice Harrison and I conducted a property case before your Honour at the Local Court house in Temora. The court went to Temora so a proud and elderly defendant did not have to travel to Sydney. The case was memorable for your Honour's patient resignation in the face of adversity. Whenever either bench or Bar asked this defendant a difficult question the response came back from the old man, "What would you know, you aren't 90 yet." Your Honour didn't flinch.

47 It could never be thought that your Honour's good nature meant that your Honour would not be absolutely firm when required. Your Honour has sent the Sheriff to arrest parties in contempt of the Court's orders but even when being firm your Honour's style was unique. Once faced with a persistent questioner at the bar table your Honour ruled, "I reject that question". When it was repeated your Honour immediately said, "No, I've told you I reject that question". When counsel had a third go your Honour simply said, "If you ask that question again I'll leave the bench."

48 Your Honour's appointment to the Court of Appeal in 2003 was itself a celebration of your judicial achievements. You were quite amused by the fact that at the age of sixty-seven you had become the oldest ever appointment to the Court of Appeal. Your Honour has the prodigious capacity for work which so typifies this bench. You became as hard-working a member of that Court as you were in the Equity Division. A rather out of date judicial handbook in this State advises that in their last weeks on the bench retiring judges should stay off the bench and confine themselves to quiet administration and judgment writing. We can infer what your Honour thinks of this advice. Your Honour took a motions list yesterday and is involved in handing down a judgment today.

49 Your judicial style and sense of humour all adjusted themselves to your new way of life on Appeal. Being deprived of live witnesses barely altered your outlook but your experience as a puisne judge gave you a healthy resistance to the temptation to interfere with interlocutory or discretionary decisions of trial judges.

50 More difficult though was the subject of your accommodation in the Court of Appeal. You now occupy the chambers once used by the Honourable Roderick Pitt Meagher when he was on the bench. No one can remember who had them before that. When Justice Meagher was in residence the chambers displayed some of the cluttered ambiance of a Persian Bazaar. There is something about this set of chambers. On taking over your Honour erected a prominent warning sign that is perhaps your Honour's judgment upon all its known occupants. In large letters the sign simply reads "Tact Free Zone". So far it has been difficult to find any permanent successor to your Honour for this room.

51 The Bar wishes you well in retirement. We hope that in the next few years you will be able to get to the odd dried fruits conference. You have much to look forward to in the years to come. After all, the evidence called before you strongly suggests that when you get to ninety at last you will know everything that matters.

52 **MR G DUNLEVY, PRESIDENT, THE LAW SOCIETY OF NEW SOUTH WALES:** It is a great honour to join with distinguished members of the bench, the Bar and the community this morning to mark your Honour's retirement from the judiciary and to celebrate your outstanding legal career.

53 Just over twenty years ago, in May 1986, your Honour's family, friends and colleagues gathered in this very Court to celebrate your appointment as a judge of the Supreme Court of New South Wales.

54 At the time your Honour modestly apologised for being quite a dull subject for speech makers, having done "very little of colour or interest."

55 In preparing for today's speech, speaking to solicitors who have come before your Honour and those who worked with you in your many legal manifestations over the years, this has been found to be very far from the truth.

56 As we have heard, your Honour grew up in the inner west of Sydney before it was a real estate hot spot for young professionals such as solicitors.

57 Upon leaving school your Honour juggled full-time work in the Public Service with part-time lectures at Sydney University.

58 During these formative years I am told that your Honour was not only honing your legal knowledge, skills and experience, your unique, dry and often "cheeky" sense of humour was also beginning to flourish and to infiltrate the legal circles of Sydney.

59 Your Honour continued on to pursue what can only be described as a well-rounded legal career. In the words of one colleague, "He left no legal avenue unexplored".

60 Your Honour worked across courts and jurisdictions. You worked in government, public and the private sectors across areas of litigation and a variety of specialisations and you held positions as a clerk, solicitor, barrister, judge, mentor, confidante, adviser, husband, father and friend.

61 If one wanted to demonstrate the breadth of possibilities a career in the law can offer one would simply reference your Honour's resume but despite your resume, your rank and robes, people still refer to your Honour as a "lawyer's lawyer" and a true "man of the people".

62 Your Honour has helped to educate the legal profession by giving up your time to present seminars on issues relevant to litigation and mediation. You have remained focused on serving the community and the law and in doing so have done justice both in and to this honourable Court.

63 So, far from lacking colour and interest, your Honour, I find that you are a speech maker's dream. Your career has been characterised by humour, passion, commitment, camaraderie and the pursuit of justice and your success is based on a well balanced mix of talent, ability and good old fashioned hard work. These are certainly the ingredients for a colourful speech and for a truly fulfilling life.

64 Your Honour, if I may conclude by once again referencing your swearing-in speech of 1986, you noted that you had run no marathons and climbed no mountains, published no learning and composed no songs. Retirement will surely give you space and time needed to pursue these interests so the solicitors of New South Wales look very much forward to undertaking the Sydney Marathon in September this year. We also look forward to the premiere of the first ever Brysonian Concerto.

65 Your Honour, on behalf of the nearly 21,000 solicitors of the State of New South Wales I would like to humbly extend our gratitude for the contribution which you have made and the dedication which you have shown to our profession. Not only will we miss the rigour and honesty you brought to the bench but also the sparkle of your wit and the relentlessness of your intellect. Your retirement will leave a considerable void in the judiciary but your legacy will be long and fondly remembered.

66 On behalf of the solicitors of New South Wales I convey our best wishes to you and your family and join with you in celebrating your retirement.

67 **BRYSON JA:** Chief Justice, I thank you for this occasion of ceremony and I thank those who have been so kind as to attend and Mr Slattery and Mr Dunlevy who have made such kind observations and, indeed, such searching enquiries and have found such generous things to say.

68 There are many friends and supporters here and I thank them also. Foremost is my wife, Edwina, who shared my life throughout almost all my career. I'm happy also to see our four daughters, our sons-in-law, our seven grandchildren, my sister Jennifer and my brother Peter and others close to me. All will now see more of me.

69 My father taught me wide-ranging reading of history, my mother taught me poetry; neither is a

career. I have had good fortune in my career, which has taken a course which was once common but has become quite uncommon. I decided to work towards the Bar when I entered high school aged 11, although I had little idea what barristers did. It was more attractive than the alternatives set before me which were teaching and the Presbyterian clergy. A part of my good fortune has been to attend Fort Street Boys' High School. My education was free, secular and compulsory, high principles, and I'm grateful. This was my only patrimony and it proved sufficient. I came into the legal world without introductions or friends, well-placed uncles or such advantages. I found a bounty of warm friends and helpers and I tried to repay by being helpful to beginners from time to time.

70 I began working in the State Public Service in January 1954 when I was 16. Except for short holidays I've been working for my living at all times since then. All my university study was part-time and when I hear of those who lived in college and achieved high distinctions and left with the warm favour of Professor Shatwell an inner voice says to me "as well they might."

71 I first worked on the site of this court building in the Department of the Attorney General and Justice as assistant record clerk doing very humble things, and took the opportunity to read all the Ministers' letters in and out to get some idea of how the community was governed. I attended lectures in the mornings and evenings at the Law School in Phillip Street. There was no possibility of leisure or time for reflection.

72 Next year I was assistant staff clerk and became adept in calculating recreation leave balances. I proceeded to the State Crown Solicitor's office. While my contemporaries were acquiring culture and wisdom in academe, examining the unexamined life and distributing the undistributed middle, I was attending taxations of costs before Mr Deputy Prothonotary Cyril Herbert, a taxing experience in at least two senses, in multiples of six shillings and eight pence with typewriting at one shilling per folio of 72 words. Without any training I was given responsibility for managing litigation, scores of very large and very small law suits and almost all about motor accidents. This was a strange task to give to an untrained undergraduate aged 18 but I learnt a lot of practicalities in a short time. I read a lot of medical reports and files about injuries, minor to catastrophic, when I was 18 and 19 and this gave me habits of caution and a profound sympathy for disability.

73 I travelled the State by steam train to instruct counsel before District Courts at remote places before impatient judges who plainly yearned for home. There were no funds for air travel. District Court judges in that age ranged very widely in ability, from polite scholar gentlemen with learning to grace any court to those who entered court at 10.00am purple with fury and stayed that way all day. Over several years from 1956 I often instructed Kenneth Gee in cases in Wollongong District Court before a judge whose personality was as difficult as any I've encountered. I classify that judge, long dead, as a perverse genius. Ken Gee showed me the appropriate conduct of a barrister in difficult situations. I believe that he is here today.

74 I also had the management of some appeals, including High Court appeals, Commissioner for Railways and Scott about the action Per Quod Servitium Armisit, now utterly forgotten, and *Jones v Dunkel* whose fame continues. I've heard *Jones v Dunkel* misquoted every week of my appellate career. We lost three to two and we had Dixon on our side.

75 My academic career did not flourish, nor did I spend time running four minute miles or whacking leather on willow. I attended to earning my living. No professor ever saw any use for me. My feelings for most of them were reciprocal but I greatly admired Benjafield, Parsons, Stone and a philosophy lecturer called Ilmar Tamello who was obviously trying to teach me something important, although I could never find out what it was.

76 I also had some splendid lecturers from the Bar, superbly Bob Hope and Ken Jacobs. Most Law School academic staff in that age displayed disdain for part-time students, while I wondered that they found employment of any kind. By passing Admission Board examinations as well as university examinations I was admitted to the Bar in November 1959. Edwina was there and Ken Gee moved my admission. I finally satisfied the professors and graduated not long after that. A needless Alexandrine ends the song, that, like a wounded snake, drags its slow length along.

77 I mainly learnt law by doing it but I read some marvellous books on the way. Justice Hutley told various people that I learnt law from Tidd's Practice, which was commended by Uriah Heep to David Copperfield, "He's a great writer, that Master Tidd." The fact is, however, I have never read Tidd's Practice. The first law book I ever read was Henry Maine's Ancient Law which I bought from Tim

Studdert in 1954 with a job lot of first year text books he'd just finished with, I think I paid him ten pounds. Of all the people now associated with the Court Justice Studdert is the one I've known the longest. Henry Maine showed me the interaction of legal rules with the workings and development of human society within cultures, and interested me in learning some law which was closer to life's practicalities than the law Henry Maine dealt with. I have always looked at law from the perspective of its history, and during quiet periods early at the Bar I read Holdsworth's History of English Law, much of it twice over.

78 I left the government service at the end of 1959 and worked in two very different law offices, a small family firm doing the legal work of ordinary suburbanites to whom every expenditure was a challenge, and several years in the litigation mill of Allen Allen & Hemsley where the clients were large corporations from Australia and overseas, banks, charities, churches and schools, which were pillars of society governed by partners of the firm. This introduced me to the big end of town and large scale litigation, hearings that lasted months and years.

79 I actually embarked on practice at the Bar in February 1966, the day before the Commonwealth Government called in all the money and burnt it. I plodded steadily on doing a great amount of work which was very important to all concerned but unspectacular to those not involved. My work at the Bar drew me a certain distance into constitutional law, a fascinating and fluent subject, more unregulated and difficult to predict the closer it is examined. Constitutional cases tend to start at the top, so less than most other fields is constitutional law polished in the appellate process. I encountered the arcane recesses of s92 and s90, Excise. I saw something of the electoral and senate litigation of the Whitlam era. Some advice which I joined with McHugh QC in giving to the State about its legislative powers appears to have won me a modest place in history as it is mentioned in Anne Twomey's Chameleon Crown. To my mind the advice then given was as obvious and unremarkable as anything I have ever set my name to, yet the historian found it interesting.

80 I had one or two brushes with history through membership of the Tenth Floor of Wentworth Chambers. Adulation rang out at our dinner to celebrate the appointment of Sir John Kerr as Governor General. Sir John Kerr and the then Prime Minister had both practised on the Tenth Floor. The Prime Minister spoke well. While ladling butter from alternate tubs Stubbs butters Judkins, Judkins butters Stubbs.

81 Late in my bar career I had many cases about professional duty, a long series of diaster stories in which my clients diverted trust accounts, built dams which fell over, buildings the facades of which collapsed in the street, put houses on the wrong block and gave the wrong horse pills to racehorses which promptly laid down and died. The expression in the trade was "became recumbent." I was happy to leave this for the Equity Division. There are only 10,001 equity suits and when 18 years had passed I had heard them all and I was able to find my way through them with no great difficulty. In my career I have given many judgments, 56 volumes like this one, about 25,000 pages. I don't think they will trouble posterity a great deal. W H Auden described the poet on the great day of judgment:

82 "God may reduce you to tears of shame on judgment day, reciting by heart the poems you would have written had your life been good."

83 I suppose judges are given a law report with the judgments they should have written. My defence is that I wrote them as well as I could in the circumstances.

84 At 67 I was the oldest person ever to have been appointed to the Court of Appeal. I had to revisit law which I had not looked at for a while. It was challenging but amenable to hard work, energy and application. Appeals brought me back to personal injuries litigation with which I had had so much to do in an earlier era. The juries had vanished, changing everything. I find litigation about personal injuries very harrowing, the impact on lives and feelings is so profound. I hope it's true that negligence law makes people more careful in their behaviour. The thought that this may be true has assisted me. On the Court of Appeal I think of myself with T S Eliot:

> "No, I am not Prince Hamlet, nor was meant to be, am an attendant lord, one that will do to swell a progress, start a scene or two, advise the prince; no doubt an easy tool, deferential, glad to be of use, politic, cautious and meticulous, full of high sentence but a bit obtuse."

85 Those of you who know it may finish the passage if you think it's appropriate.

86 As I said when I was sworn in, little I have done has been spectacular. I have continued in that line, left the mountains unclimbed and rivers unswum. I have not hammered out judgments for the instruction of posterity, discerned any overarching principles or bothered posterity with insights into law and society, written text books, served on lofty commissions. I don't tutoyer Archbishops or make causerie with Vice Chancellors, never so much as confer a degree. There has really been nothing for it but to get up early and go to work every day.

87 I find legal work very laborious. I have never written with facility. My object has been to produce work conforming to the current authorities with appropriate attention to the arguments put forward. It has not been my object to display originality or brilliance, but to come to grips with and resolve what the litigants understood to be their controversy and their problem, work of good artisanal quality, to be the good of which the best is mysteriously the enemy. Judges make law but it has not been my object to make any. There are many judges and the chaos if more than a few of them made some law is alarming. I know that the mood, the approach and the outcome change greatly with generational changes and I have seen much of this transformation. The Court and the law have made immense transforming journeys while I have been observing them. I have not been happy with all legal rules, and I think of the *Evidence Act* 1995 as a late work of the committee which designed the camel.

88 I first had some colleagues of whom I was slightly awestruck and I mention Hope and Glass and Needham. There are others I forebear to name as they are still with us, people significantly older than I schooled in the old practice before 1972. That pleading system had a high value which has not been destroyed by my perception that the present system is a better one.

89 I know I don't always talk generously about others. I know I may have given offence on occasion by sacrificing civility in the interests of a sharply turned phrase. I apologise to any who have suffered in this way but I cannot help myself. I have always found it difficult to think generously about my contemporaries. It is easy to reduce people of one's own age to the human scale, but as time has passed there are more and more people on the Court and at the Bar who are far younger than I and I found it easier to perceive and admire high ability, which to my observation is abounding in the legal world in Sydney. The careers of people much younger than I who are joining the Court now fill me with optimism.

90 I value my opportunity to serve the community according to the judicial oath which has guided my life and work for over 20 years. I have tried to respect the confidence which the community reposed in me to take this part in its government. Without just disposition of controversies there would be very little public order. Justice under law is my way of contributing to the peace and order of the community and seeking the commendation which a high authority gave to peacemakers. My admiration for the Court as an institution and for its members as my colleagues is profound. As I did at the Bar, I have always found on the bench colleagues to admire, who think and work with disconcerting speed and facility. I have never been involved in any conflicts, quarrels or arguments with any member of the Court which have descended to a personal level. The spirit in which its members approach their duties has always seemed to me to conform to the ideals of the institution; high purpose and scholarly ideals tempered with good humour and humane attitude. An aphorism says "no human institution looks good from the inside." This is not true of the Supreme Court.

91 Then I must say how well motivated and effective the Court's staff are; almost everybody who works here in any capacity has shown that they value the opportunity to make the Court work well in the interests of justice and the interests of the community. I've hardly ever known anyone who did less than their best. I've been particularly well served by tipstaves and researchers and most of all by my associate, Carolle d'Argent, who has been with me for almost all my appointment. She's told me what I should do, what I should not do, what I have left undone and the order in which I should write the unwritten. Without her attention to practicalities while my mind has been lost in the abstractions, I may not have sustained this office for as long as I have.

92 For everything there is a season and a time to every purpose under heaven, a time to keep and a time to cast away. I have spent over 20 years here. It's two days since I turned seventy. It's time to go.

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END NOTES

[1] Fisher & Lightwood's *Law of Mortgages* 9th ed London Butterworths 1977 at p37.

[2] *Daniels v Pynbland Pty Ltd* NSW Supreme Court, unreported, 12 April 1985.

[3] Fisher & Lightwood's *Law of Mortgages* 10th ed London Butterworths 1988 p57 fn(m).

[4] Max Beerbohm *Yet Again*, William Heinemann, London, 1951, "Dulcedo Judicorum", pp275-276 accessible at http://www.worldwideschool.org.

[5] *Blythe v Northwood* [2005] 63 NSWLR 531 at [211].

[6] *Parissis v Bourke* [2004] NSWCA 373 at [52].

Print Page Close Window

Book launch: Australian Society and the Law - Volume 1 The Citizen and the Law

Parliament House
Theatrette.
Book launch: Australian Society and the Law.
Volume 1 The Citizen and the Law
Michael Peters

Justice John Bryson Friday 26 November 2004

Ladies and Gentlemen, Teachers and Scholars. I am really happy to speak to you at the launch of Michael Peters' book on Australian Society and the Law and its first volume The Citizen and the Law. The book is a text for the use of higher secondary scholars in the pleasant interval between the School Certificate and the year which must be dedicated to the Higher School Certificate, when all studies have to be specifically focused on examination subjects and the relation between examination performance and higher studies or career choices presents itself with gripping reality, even with the risk of excessive dominance over life and attention. Students in Year 11 have opportunities for wider reading, for reflection, for coming to an understanding of the world around them and for coming to terms with it. This is one of your opportunities to think over whether you are seriously involved in life, learning and scholarship, or whether you have just come along for the ride as a member of the human race. If you don't put much in, you may end up thinking that you did not get much out.

Although this is not always obvious and it is not true for everybody, on the whole in present day Australia we live in serene prosperity, and to be here and join in Australian society should be understood to be splendidly good fortune, an understanding which you can only reach if you have knowledge of the circumstances of life in other places of the world, and at other times earlier than our own, in our own country and far away. There are many qualifications to what I have said about how good life in Australia is, but you must not allow the disadvantages and qualifications to obscure the splendid overall generalisation. At the centre of Australian life is this characteristic: Australia is an egalitarian democracy, where all functions of government and public life are ultimately under the control of the people, the adult population at large who are the electors. In some aspects of life and government this ultimate control is rather remote, but it is always there. To be an Australian citizen is to share in our government, even if no more intensely than the ordinary duties of the citizen, to cast votes at elections and when casting votes to make a real choice, and to serve on juries, and other basic obligations including paying taxation, not a burden but a responsibility and a privilege.

Study of the law in its context in Australian society brings with it an understanding of some of the basic conditions of our national life and happiness. If you are to live your life out in Australia and bear these responsibilities you will need to have an understanding of the organisation of society. You need to know the institutions that exist to make the rules, the institutions which see that the rules are kept, and what the rules are that make the enormous complexities of the interaction of more than 21 million people over a huge area come out in a way which almost all of them find acceptable, which does not promote conflict which people are not prepared to put up with, which does not issue in civil disorder. Not in a great deal of civil disorder anyway, we do have the occasional brawl, but not to an extent which people are not prepared to tolerate. The citizen is committed to taking a part in all this; you cannot just sit back and let it go by and be run by others, without thinking for yourself about how it all works. If there is something you find very unsatisfactory and want to change, you need to know how it all works if you are to start to act in an effective way. You can see in the news from the Ukraine how close disorder is when people have cause to be seriously discontented.

Mr Peters' text takes the scholar through the legal system in Australia, the basic concepts of the legal system and the philosophies which have been put forward to explain law and its social action. It deals with the sources and origins of contemporary Australian law, how the legal system operates and the relationship between the individual and the State. This relationship is one of the central sources of conflict: the State has to be powerful enough actually to achieve public purposes and benefits to the community at large by rationally organising affairs, and by pursuing objectives which could only be obtained if they are supported by public authority: but the individual also has to be respected. Nobody can be crushed or brushed aside to achieve some useful end or public purpose; all has to be kept in a

reasonable balance, one which the community is prepared to accept. The community is made up of individuals, and achieving something important in the interest of the community is ultimately achieving something important in the interest of the individuals who are its members. So the legal controls over public power are a study of central importance. The study is as much about process as it is about outcomes. It is about how to make sure as far as possible that things are fully and carefully considered before the power of the State is committed to some course which will bear heavily on an individual; to due process, fair hearings, real consideration of what is involved on both sides before an outcome is decided upon. Nobody is given a public power just to enable him to confer an advantage on himself; all public powers exist to achieve public purposes and they must be exercised in good faith with the intention of achieving public purposes. The interaction between the individual and the State is a central study.

Mr Peters' volume also deal with topics which have claimed the attention of all reasonable people in modern times, in my lifetime. These topics reflect the concern of the law, not only the formal law but of the legislatures who make law, with the interests of people who have come to be perceived as disadvantaged, who have been dealt with on an unfair basis, who have not been treated in accordance with the ideal treatment which should be accorded by the community to members of the community, and to other people who come within reach of its power. As the decades go past and generations of people come and go, perceptions change of what is acceptable treatment for minorities. We are all aware that our perceptions have become more acute and that groups of people who in the past suffered disadvantages or injustices that went unnoticed are entitled to better treatment. Mr Peters' book introduces the far-reaching changes in law which have in the past few decades followed from realisation that Aboriginal and Torres Strait Islander people were not actually achieving a fair place and reasonable treatment in our community, under laws which on their face seemed to treat everyone in the same way. Mr Peters deals with the operation of the legal system in relation to native title; this is highly legalised and embodied into elaborate formal structures. He also deals with less organised responses to the realisation that indigenous peoples have not had outcomes that accord with the ideals of the community. This has had a particularly strong impact on public life and on the law in Australia, and other communities overseas with which we can see some things in common, including the United States and Canada, have had similar experiences. Mr Peters also deals with the law in the focus of migration and of persons who seek or claim to seek asylum in Australia from persecution in other countries, and with measures for achieving justice for women, for minority groups and for others whom we have come to see have not been given fair treatment. In past ages, even earlier in my own life, most of these were blind spots which we did not see. As you study history you will see that in other ages, not necessarily very long before the present, there were huge blind spots which have been remedied. Each generation has to examine itself and check its perceptions for what are its blind spots, what injustices it is not seeing, what it is complacent about, and where the community and its legislators should be concerning themselves with remedies. There are more realisations around the corner; we do not know now what all our blind spots are, and what will come, in the next twenty or thirty years or so, to be seen as calling out for remedy. That will be your business. You have the advantage over me of looking forward to a long future.

There are yet more dimensions for legal study beyond the need to understand your own citizenship and its responsibilities. Law is the key to a fascinating array of studies. It gives a new light to history. For a full understanding of the legal system in Australia now it is useful to be steeped in the long historical processes which produced it. Almost every institution that produces a good outcome for us to do with democracy, parliamentary government, the courts, the legal system and institutions, arose out a long evolution over many centuries, mostly in Britain and mostly in England. Law schools no longer work this way, but my legal studies were framed around English legal history, starting with the Conquest in 1066, indeed with a little attention to English law before then, and working through the evolution of the common law, the courts, of parliament, conflicts over the royal power, restrictions on royal power, the revolutions, the transformations of parliament from community power based on aristocracy, wealth and social position into a law-making body based on election by the people. The process continues; only last week the Queen announced, in the Speech from the Throne opening a British Parliamentary session, that there will be a bill to abolish the last hereditary peers in the British Parliament. The process of reform and, from our point of view the process of improvement, never stops. The way the Law School worked in those days gave me a life-long interest in history: I am always reading something, usually about English and Australian Law and government. You can see some papers I have written on English Legal History on the Web – Supreme Court of New South Wales – Speeches - Bryson JA. Understanding and appreciating how fortunate we are to live under our present institutions of government is enhanced by reading the conflicts and struggles which brought it about, and seeing the arrangements, to modern eyes unsatisfactory, which existed in the past. The study of legal cases reveals in detail what strange and to modern eyes unsatisfactory rules were thought to be quite sufficient and appropriate to govern a community which was the predecessor of our own, and what strange rules continued for centuries.

So as well as studying law to assist your citizenship you have before you, as one of many choices, the prospects of law as a career. I will tell you some things about my own career. You have to dispel the idea that practising law is a bastion of privilege and that the only people who can do it are people who are backed by wealth, social networks of power and influence and old school ties. In law, as in practically all other walks of life, having well placed uncles and inherited wealth, and knowing the right people and going to the right school, will not get you very far; it may get you some rewards, but they are usually not worth having, mere pickings. Anything that is really worth having has to be worked for and gained on the basis of work and ability. My own career is that when I left Fort Street School I worked in the State Public Service, and at the same time I studied law part-time at Sydney University; the law school was then in Philip Street, in the middle of the legal world and close to the courts and the barristers' chambers. The Law School will move away from there in the next few years; the system worked well in the old time but it is out of date now. Then I worked in some solicitors' firms in the City, a small firm that did the legal business of families and ordinary suburbanites, and a very large firm that acted for banks and international corporations and the powers in the land. Then when I was almost 30 I went to the Bar, and practised as a barrister here in Sydney for 20 years. I became a senior barrister, Queen's Counsel, and then, 18 years ago, I became a Judge of the Supreme Court. I had no well placed uncles, no influence, no family money to back me up, send me to Oxford, buy me barrister's chambers or libraries or any of that, nothing but my own resources; they were enough, and this can work for you too.

As a solicitor and later as a barrister I did a great deal of very ordinary cases. Reading Mr Peters' book you will be fired with enthusiasm for working on the front line in conflicts which achieve social justice, and you can let your imagination run to cases in which you get writs of habeas corpus, see that the unjustly imprisoned are released, win struggles for oppressed minorities and generally participate in high drama and important conflict. You should realise that a great deal of life is not like that. There are a lot of cases about very ordinary things in life; people who have been injured in car crashes, people whose builders have not performed as well as they feel they should have, people who do not want to pay the paper hanger because the panels of wallpaper are not quite straight, and a great deal of very ordinary business about conflicts over wills, family property, who should get grandpa's estate, whether a small private company or partnership has been properly managed and who owns what after friendly arrangements of 20 or 30 years have come to an end and people realise that they did not write down a clear agreement about what they were doing. All the very ordinary work has to be done properly, by people who have seen that they got themselves properly trained, know what they are doing, and are able to get interested in and bring enthusiasm and application to bear on business which is not inherently very dramatic.

If something is going seriously wrong in our society, the problem soon turns up in the courts. The courts are a part of the structure of Government. They are not part of the elected government. Judges are appointed by Ministers who have to answer to Parliament for their decisions. This is enough to make Ministers careful to appoint qualified people. The courts are independent. Powers are separated. There is no telephone justice, as there was in the Soviet Union, when the Party Secretary rang the Judge and told him what to do. Dispel the ideal of the Judge as very powerful. The Court itself is bound by the law. The Judge acts in a web of rules which determine what evidence he can receive, what facts he can consider, what hearing he has to give to people who may be affected and how he is to explain what he decides.

The Court acts in the open. Most business is done in a public room: there is no limit on who can go in and hear what is happening. The door is open. (Of course there are exceptions.)

The Court must, in every important decision state the reasons for the decision. The public can hear and read the reasons. The Press can comment on them: they have to be minimally polite, but they can comment forcefully. In most cases – not all cases – the parties can appeal. What the Judge decides must stand up to scrutiny: it must be seen to be right when new minds are brought to bear on the problem. Not only must the process be fair: it has to be seen to be fair. The Judge cannot decide a case if he has an interest in the outcome. The Judge avoids (but there are practical limits) cases where people he knows are parties, or are witnesses. At every stage there is a concern that the people affected by a decision have an opportunity to oppose it, to bring forward facts and arguments which should be considered.

The law is for you as a career if you can discipline yourself to plenty of intensely interesting work, with endless demands for your close attention and application and, let me add, reasonable rewards for your trouble. Law is a culture and a way of life. Professional life is disciplined life: self discipline. You must equip yourself with a broader view than just studies of law; you have to have a feeling for

language, you must train yourself for the ability to stand up and explain something, on the basis of having organised what you are going to say in your own mind, perhaps with a few notes; you have to have enough understanding of the art of persuasion and of other people to realise how you must express something, even something they are not at all happy about hearing, in a persuasive way, or if not that, in the best way that the situation admits of. You have to steel yourself to being associated with people who are unpopular, even deservedly unpopular, and you have to have the strength of character to see what their interests are and uphold them, fearlessly if there is anything to fear, to see, serve and assist the interests of people who are unpopular, oppressed, unfortunate, economically disadvantaged. If you are prepared for a life of study, a life of work, and a life which always presents you with something interesting to do, law may be the career for you. Open Mr Peter's book and you may be opening the first chapter in this career.

Print Page Close Window

Law and Politics of Magna Carta

Lecture:
Law and Politics of Magna Carta
Justice John Bryson.
Plantagenet Society of Australia. 18 September 2004.

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1 King John is best known to history as the King from whom the barons of England compelled the Magna Carta, which he caused to be sealed at Runnymede on 15 June 1215. Although there were times and events in his life when he displayed considerable ability and achieved stunning successes, his career overall was a series of failures and reverses, rebellions and misfortunes which his occasional feats of brilliance did not avert. He lived in interesting times, when the maintenance of the royal authority required endless vigilance, endless journeys and endless expenditure, and depended on personal bonds of loyalty which were always fragile and were broken repeatedly. The territories for which he was responsible were very widely extended, and did not have any centrally organised structure of government other than himself in person. Their extent is illustrated by the plans now displayed. The map shows King John's central problem: his lands were so extensive that, in the conditions of his time, control could not be achieved: distance and time defeated communication of information and orders, movement of food and forces, and the claims of loyalty.

2 John was born at Oxford on Christmas Eve 1166, the eighth (known) child of Henry II and Eleanor of Aquitaine and the fourth of the sons who became adults. Henry governed Normandy in his own right as duke and also ruled an extensive empire in what in modern days is south-western France, the Duchy of Aquitaine of which his wife Eleanor was duchess. She was 11 years his senior and he had married her within a few months of her being divorced or put aside by the King of France to whom she had borne several children. Relationships and shifts of power within the Plantagenet family were chaotic during the last decades of Henry II's life. He kept Eleanor in captivity for many years, it seems so that he could maintain his personal control over her territories, the loyalty of which was given to him only on her behalf; and there were conflicts with his sons, the young Henry whom he appointed to be an under-king, and died young, then with his remaining sons Richard, Geoffrey and John, who in shifting alliances were from time to time all in rebellion against him.

3 His favoured son, young Henry, at times in rebellion yet his favourite, died of dysentery in 1183. His third son Geoffrey, who ruled Brittany on behalf of his wife Constance, was killed in a tournament in 1185, leaving a posthumous son Arthur. Late in Henry II's life Richard and John the survivors were in rebellion against him, and the disappointment this caused was said to have brought Henry II's life to an end. By more modern ideas, when Henry II died his heirs were first Richard, then Arthur, then John; but inheritance law was not then settled, succession to the Crown was politics not law, and Arthur was only four and lived in Brittany.

4 John's first big adventure and failure were in Ireland. Nicholas Breakspear, Pope Adrian IV the only English Pope, assumed to give Ireland to Henry II, sending him a Papal Commission or Bull Laudabiliter (meaning praiseworthy) authorising him to conquer Ireland. Henry had much else to conquer, and Norman adventurers set about conquering Ireland themselves, only nominally with Henry's authority. Henry made one expedition to Ireland but could not establish real control over the Norman barons and the Irish kings, who pursued their own conflicts. In 1185 when John was 18 he was given the title Lord of Ireland (Dominus) which then meant King-designate but not yet crowned, and he was sent to Ireland with a court, an army and supplies of money to establish himself as Lord in reality. He had no success, and stayed only a few months; he misspent the money he was furnished with and showed unreadiness to pay troops or to use money with political wisdom; and his accompanying young courtiers had no grasp for politics, and took to laughing at bearded Irish chieftains who came in to give homage. John's Irish expedition was ineffectual militarily and politically, and although he continued all his life to use the title Lord of Ireland, and to maintain a nominal position as such, issuing titles, making grants of land which had to be fought for if the grant were to mean anything, appointing officers of government, not always with any effect, as the Norman invaders and the Irish kings pursued their own conflicts and alliances. They exploited rebellions and troubles elsewhere, and at times allied themselves against John when that course seemed to offer advantage. When John was himself in rebellion against his brother King Richard, Normans and Irish took the opportunity to ally themselves and claim to support Richard. John made another expedition into Ireland many years later, for some months in 1212, this time with personal royal authority and resources, and

with better soldiery; he had much greater success on this occasion in imposing the reality of authority, but this meant little after his departure.

5 When Richard succeeded as King in 1189 his most urgent project was to assemble money and talent so as to go on Crusade in the Holy Land, which was then in crisis. About the end of the first century of the Crusades most of the Holy Land had been overrun by Saracens, who had conquered Jerusalem and what is now Jordan, reducing the Crusaders to ports on the coast and larger holdings north in what are now Lebanon and Syria. Richard spent several years on Crusade. He took some of his father's best administrators with him and appointed others to govern England, but did not give his brother John any formal place in the government. He conferred great benefits on his brother, including the one he valued most, the County of Mortain in Normandy, and very wide estates, titles and castles in England. Richard's first plan was to require John to remain out of England for three years while Richard was on Crusade, but he did not keep to this, and left John free to remain in England as he wished, so that he became a focus of ambition and power to rival the ministers whom Richard had left in charge. Richard did not designate John to be his heir, and there was a touch of blasphemy about claiming to be the King's heir or letting others treat one as such. John became a figure in the politics of England although not appointed by Richard to any political authority, and had some part and influence when conflicts broke out among Richard's ministers. He was also maintaining a government of his own in Ireland at a distance.

6 Richard during his return from the Crusade was captured and held to ransom, eventually by the German Emperor, little other than Imperial banditry. While Richard's English ministers were given the task, with other dominions, of raising 100,000 pounds as his ransom, John took to intrigue and rebellion with the French King Philip Angustus who was seeking his own advantage in various ways. Philip hoped that Richard would remain indefinitely in captivity leaving Philip free to seize his lands in France, and planned at times to pay the ransom himself and buy Richard's custody from the Emperor. John intrigued with him in this, and became a rebel against Richard's government, whose many difficulties included raising a sum of money which was well over three times the annual revenue of England, then about 30,000 pounds. The first instalment was sent to the Emperor, who then released Richard on promises to pay the rest and to subject England to the Holy Roman Empire, none of which were kept; and it seems possible that the Emperor saw advantages in releasing the energetic Richard in order to make trouble for the King of France. Richard arrived back in England unexpectedly, suddenly reassumed Royal power as he was most welcome to do, set about confronting all the rebels, and engaged John in conflict in Normandy. After a few months John abjectly sought his favour again and was granted it, with observations that he was but a child, he then being 27 years of age. From then on he was a figure in Richard's government and a member of his Court, exercising some civil powers and from time to time taking part in Richard's endless and endlessly complicated military affairs on the continent, where Richard spent almost all of his time. Richard was the ruler of the Duchy of Aquitaine, still then owned by the Queen Dowager Eleanor, who although by this time well over 70 years of age was very energetic in her own interests, undertaking travels and diplomatic missions herself, to the extent even, as she approached 80, of making a winter journey into Spain on some diplomatic business about a royal bride for the French Royal Family. Richard's conflicts both with King Philip and with other powers in France never ended until his death; he attempted to impose dominance even over Toulouse as far as the Mediterranean coast.

7 This left England and Wales largely in the hands of ministers who had been schooled in the relatively methodical government of King Henry. Kings who are always absent pursuing wars overseas may generate chaos at home, but that was not Henry II's bequest to the nation; he left behind what was in medieval terms growing efficiency and method in government. Although many in the highest offices were churchmen, many were neither clergy nor nobles, and a class of literate professional administrators, judges and lawyers was growing up. It is wrong to think of public office as solely in the hands of noblemen and churchmen. Of particular interest to me is the judicial system, given system and vigour by Henry II's reforms, which gave the King's Court and its judges much more to do than they had earlier had. A recognisable and continuing body of judges came into existence in Henry's time, not simply persons appointed to hear and determine particular cases in the place of the King himself, but holding continuous office. As well as a central core of judges who followed the King as part of his household, or when the King was absent his Justiciar, in their endless perambulations around England, from about 1180 onwards another group of judges, not altogether distinct from the first, remained at Westminster to hear cases sent there. The more important cases tended to be heard and determined where the King was, but the convenient institution began to grow up that other judges, having less authority in some undefined way, remained in a fixed place, usually at Westminster, and heard pleas in which the King was not a party. Eventually these groups would develop into the Court of King's Bench and the Court of Common Pleas, and with another court which grew out of the Treasury or Exchequer, these were the three courts which over centuries formed English Common Law. During the last five years of Richard's reign John had some part in this civil administration. It seems that he

was competent, and if his career had taken a different form he might have been a minor figure in history as a competent administrator in the English administration of a long-lived King Richard. However things did not go that way, Richard was killed in a siege in 1199 and John rapidly established himself as the King of England. He also became the male representative and in effect the duke of his mother's extensive duchy.

8 During his reign John had recurring troubles from the Scots. The Scots' King William threatened to advance his claim to be Earl of Northumberland, and offered fealty to John if he had it; but also offered the same bargain to those in charge of 14 year old Arthur, a possible alternative English King. The Scottish King was compromised by fear of losing lands which he and his family owned within England, including Tynedale and Huntington, and had unresolved problems with Norway and with Norsemen to the north of his kingdom in Shetland and Orkney. He spent years in manoeuvre and negotiation with King John until in 1209 John made preparations to invade Scotland and the Kings reached some agreement at Norham Castle. The terms of the agreement are not fully known but they included elaborate arrangements about marriages which did not take place, payments which were not made, hostages who were surrendered by the Scots and concessions for Scottish merchants to trade in England; and there seems to have been some arrangement about the Berwick Bridge which had been washed away a few years earlier. King William, who was old, gave little trouble after this treaty. His successor Alexander II had the benefit of some arrangements in cl.59 of Magna Carta directed at compelling King John to resolve outstanding causes of conflict. This did not work, and after Magna Carta Alexander took land in Northumberland, Cumberland and Westmoreland which this clause seems to have been intended to concede to him, captured Carlisle and received in response a savage and brilliant 10-day invasion and campaign by King John in January 1216, the last year of his life. Later in the year Alexander took advantage of the invasion by the French Prince Louis. In October 1216 when he died, King John was travelling northwards, perhaps to deal with Alexander again.

9 King John engaged in continual conflict in Wales, usually at relatively low intensity, endlessly seeking to divide the Welsh chieftains. Wales was not part of England, and conflict was conducted there with even greater savagery than conflict in England. Marcher Lords, Norman rulers of parts of the borderlands, were given extensive delegations of regal powers. Pembroke in the southwest of Wales was a Norman or (from the modern viewpoint) English stronghold, as the village names on its map still show. Little by little John acquired the upper hand in Wales, but from 1211 onwards his position deteriorated. He always had too many claims on his attention elsewhere to bring an overwhelmingly heavy hand to bear on Wales. At one point, when confronted with a rebellion, he indicated his determination by hanging 28 Welsh hostages on the one day, but then his attention was called away by greater troubles elsewhere. The Welsh Prince Llywelyn established an ascendency in Wales, supported by all the leading Welsh princes, and by 1215 John's almost overwhelming troubles included an alliance between the Welsh princes and the English barons, an unheard-of circumstance, and the capture of Shrewsbury by the Welsh.

10 All the troubles I have narrated however are minor compared with John's troubles on the Continent.

11 When Richard died, John as Count of Mortain was a guest of his nephew and rival Arthur of Brittany. However John immediately made for Chinon, site of the Angevin Treasury, established control of that, and gained the support of William the Marshall, an elder statesman of long service to Henry II and Richard and a man widely admired. Some of the nobles of the Angevin lands in France adhered to Arthur at the instance of his mother Constance of Brittany, but John was well received in Normandy, acclaimed and invested as Duke, and was accepted as King in England through the efforts of William the Marshall, the Archbishop of Canterbury who was John's half brother as an illegitimate son of King Henry, and the Justiciar Geoffrey FitzPeter, who persuaded the barons to swear fealty to John. John assembled a Norman army and he, with Richard's mercenaries sent up from the south by Queen Dowager Eleanor, established control of Anjou and Maine; then he could return to Normandy, leaving Constance and Arthur in control of Brittany. John proceeded to England late in May 1199, was crowned two days later at Westminster Abbey, and within three weeks returned to Normandy and embarked of the reconquest of the midlands of the Angevin Empire, Maine, Anjou and Touraine. John had the advantage of Richard's mercenary army, commanded by a mercenary Mercardier; he was confronted by the Bretons, and also by the French King Philip. In a campaign of some months John displayed a capacity for rapid action and bold generalship, overbore Constance, Arthur and the Bretons, and in May 1200 was accepted by the French as the successor of Richard – the Treaty of Le Goulet. There were still some discontents at his accession but overall John achieved great success in establishing his position as King.

12 At this time the Norman barons of England, four or five generations after the conquest were coming to see themselves as and actually to be distinct from the Normans of Normandy, and very distinct from

other French. The phenomenon of ownership of lands both in England and on the continent, with the need to pay homage in different directions, while still present, was beginning to fade through the influence of wars and of inheritance in an age of conflict. Military organisation had changed; calling out landowners to perform the military service owed on their fiefs was becoming less and less effective, as succeeding generations saw themselves as landowners, not as soldiers who owned land, and they jealously limited the time and zeal they were prepared to give to their military service. It made more sense to King and knights for the King to call for payment of scutage, shield money, as a substitute for calling on the knights to turn out for actual military service. A knight would give military service unstintingly if the Scots or the Welsh or some other enemy were nearby, and military service was called for to defend among other things his own property; but a call across the sea to fight in France produced a very different response, especially as the obligation was limited to service of 40 days, most of which would be used in the journey to and from the scene of conflict. From Henry II's time onward kings depended increasingly on mercenary soldiers, whose loyalty was not complicated by land ownership or a wish to return to reap crops. This in turn increased the royal dependency on revenue.

13 Although from our point of view looking backwards 12th Century England seems very disordered, in its own terms it was a time of economic progress, increasing areas of cultivated and improved land, growing population, improvements in agriculture, establishment and growth of towns and ports, foundations of monasteries and construction of cathedrals. Normans became (relatively) more settled, less military and more interested in rights and legalities. King John is credited with founding, or perhaps chartering Liverpool and building Dublin Castle, and re-establishing the Navy. London Bridge was rebuilt, by an engineer monk, in a long project that extended into King John's reign: probably the first bridge there since Roman times.

14 At the end of the 12th Century there was a strong burst of inflation, the source of which is obscure, but possibly related to some new supply of silver from mining on the Continent. Whatever the source was, inflation ran strongly during the first five years of John's reign when he needed armies and mercenaries to establish himself. During this five years his English revenues continued much as they had been, but the pressures on him to raise money, joining with unfortunate aspects of his character, enabled and required him greatly to increase the royal revenues, by processes of oppression and extortion as well as by full exploitation of the opportunities of his royal office. From 1204 onwards, when he lost Normandy and its revenue, his revenue from England rose rapidly, and multiplied several times over.

15 The Writ of Right and other reforms of King Henry, which protected those who held land of subordinate feudal lords by removing their lawsuits into the King's Court, gave no corresponding protection to the King's own tenants, who still had to deal with their own feudal lord directly. It was easier for the King and his judges to produce an objectively just decision over a few acres of meadow in which the King had no interest than over the forfeiture of a Barony which would pass into the hands of the King himself.

16 There were profits to be gained from the administration of justice, profits to be gained from withholding and then extending the royal favour, quarrels to be pursued or invented with nobles, rebellions and treasons to be punished by forfeiture. There was money to be earnt by selling writs directed to the judges, telling them to get on with hearing a case, or not to hear a case, or to give effect to the King's favour towards a litigant. John greatly increased the royal revenues, to the point where his ability in that direction was marvelled at by his contemporaries. With revenue he gained power; the means to gain loyalty and employ those loyal to him, in soldiering and the wardship of castles. He was ruthless in compelling loyalty by holding hostages, far more so out of England than in England, but ruthless within England. He destroyed some baronial families who rebelled or fell out of his favour, seizing all their property and leaving their women and children to die of starvation in prison. Some of his measures of exploitation are reflected in provisions of the Charter which attempt to prevent them.

17 From 1204 onwards disasters built one on another on John. Eleanor died and he became Duke of Aquitaine in his own right. However he did not enforce any real control, and the counts and barons of Aquitaine, nominally his subjects, did very much as they wished. He was never truly at peace in his territory in France under the arrangements made in 1200 by the Treaty of Le Goulet. When his nephew Arthur fell into his hands, Arthur disappeared. Chronicles tell different stories about what happened to Arthur, including a claim that King John personally murdered him; but that he disappeared, and with him the possibility of a rival claimant to the heirship of England and the Angevin territories, is undoubted. This enhanced John's reputation for ruthless cruelty; but not uniformly so, as he received an endorsement from Pope Innocent III for destroying Arthur; the Pope pointed out that Arthur had sworn fealty to John and was in rebellion, and in feudal terms had forfeited his life. John did not retain the loyalty of the counts and barons of Normandy; in 1204, in a rapid series of incursions by the French

supported in part by Norman nobles, his authority collapsed, while King John displayed strange inaction. He also in the course of one or two years lost his position in Anjou, Maine and Touraine which had been the central and ancestral territories of his family.

18 From time to time John attempted to recover parts of his territories; he never made any headway in Normandy, he sometimes displayed great energy and considerable generalship in the territories to the south but could never restore his position, and although he remained Duke of Aquitaine, he gained little advantage by it. There were some sad events in which he sought to assemble armies and received no support in England, and nobody of importance answered his summonses; there was an occasion when he assembled a fleet and army and his nerve failed and he did nothing with them. He built a navy of some force, and on one occasion achieved an enormous success over the French with it, but no long-term advantage flowed from this. Late in his career an alliance with the Emperor and the Court of Flanders suffered an appalling reverse in a battle at Bouvines in Flanders, the final eclipse of any hope he may have had of recovering Normandy. He also had a long and obscure conflict with the church which led to England being under Interdict for some years, creating for him a reputation as heretic and faithless man, very adverse to him out of England, although doing him less harm in England, where some bishops and many clergy adhered to him.

19 King John has suffered much from the monks who compiled chronicles. Those who were objective and fair could not say a great deal well of him. Those who were hostile recorded many tales which it is hard to believe. One recorded that during the Interdict he sent envoys to the Emir of Morocco and offered to convert to Islam. The St Albans chronicler Matthew Paris, writing over 20 years after the supposed event, says that envoys found the Emir reading St Paul's epistles in Greek: and the story gets even less credible from there on. It is reported that King John was irreligious and never took communion, that he swore "by God's feet," and that he sent a message to a Bishop to shorten the sermon as he wanted his dinner. He was short-five feet five inches. He was suspicious and untrusting, and could be very vengeful. He was the fourth brother who had come to the throne by chance after three more favoured brothers died young, and he had a long history of failures. He lost wide territories and large revenues, and many were disloyal to him. In the course of his career he quarrelled, it seems, with almost everyone who mattered, and he could and did destroy people whose conduct, or whose existence did not suit his purposes. It is surprising that he received loyalty, yet there were many who gave it to him.

20 The King had power to determine how much was due to him in many transactions. He, or his officers, did bargains to settle for money his entitlement to feudal services which were not literally rendered. He assessed reliefs, which were payments on inheritance, and other payments at turns of events in the feudal order of entitlements and duties: payments to be appointed guardian of wards, payments to be designated to marry a widow or an heiress, payments by widows and heiresses to be left unmarried: payments for Writs and fees at stages in lawsuits: payments in return for appointments to public offices; payments to be allowed to refuse them: payments, when in disfavour, for the return of the King's favour. The King decided when he was to call out his knights for military service, when they were pay scutage in lieu, and when the Cinq Ports were to provide ships. There were no legal controls over how much was charged, or over how often. John knew all the opportunities which the Royal power gave him, and used them. He enforced his rights with vigour, and employed unscrupulous people to carry out enforcement by seizure of goods, lands and persons.

21 In his time King John's ability to collect and accumulate money was astonishing to his contemporaries. As he understood the law and the means of administration well, and as he was profoundly suspicious and deeply ruthless, he was able to exploit opportunities to raise revenue by pursuing conflicts with barons, exacting forfeitures, and levying huge fines for the return of his favour. He pursued all opportunities for exacting large reliefs, payments for allowing heirs to take up inheritances from their deceased fathers, brothers or ancestors. Many lawsuits ended with the Judges' decision that a party was "in mercy," leaving it to the King to come to terms with the party in mercy for the purchase of his mercy, in other words, to assess the fine. The King also received fees for granting procedural concessions in the conduct of law suits, for example, in a law suit over title to land, allowing the demandant, now the plaintiff, to have the case tried by an assize, the predecessor of a jury, although at law this was a right only of the defendant.

22 While John had many enemies both among the laity and among the clergy, including the monks, he also had many allies who were loyal to him, who showed him great fidelity in keeping and defending castles and strong points, and monasteries which kept money and treasure safe for him at widely dispersed places. The King and his government were forever travelling and seldom stayed in the one place for more than a few months, and he was capable of moving very rapidly according to the standards of his own times, and of appearing in strength and equipped with funds where he was not

expected.

23 King John engaged in a long conflict with the Church which was, at least nominally, about the control of the Pope over appointments to the highest offices, Archbishops and Bishops. His Chancellor Hubert Walter, Archbishop of Canterbury died in July 1205; he had long been a mainstay in administration and the judiciary as well as in the church. John was unable to control the election by the cathedral clergy of the successor Archbishop; they accepted Cardinal Stephen Langton to England, nominated by the Pope and consecrated by the Pope in 1207, but John refused to admit Langton and drove the cathedral monks out of Canterbury. This led to a series of reverses, and to the Interdict which, at least nominally and to the extent to which the English clergy complied, forbade most religious ceremonies. Then it led to excommunication and, with continuing war with Philip Augustus King of France, to the threat of an invasion. In 1213 King John reversed his policy, accepted Stephen Langton as Archbishop, agreed to make recompense to the Church and, at least in form, became a feudal vassal for England and Ireland of the Pope, with an obligation to pay an annual tribute. With great expense and humiliation John returned to the fold, and his excommunication ended in July 1213. Few of the magnates of England accepted the reality of John's apparently parting with ownership of England to the Pope, and the arrangement had little influence after his death. However at the time it secured him a new and powerful ally in the Church, particularly the more distant Church, Pope Innocent III, embodiment of the Church Triumphant. In 1215 in the months before Magna Carta, he even professed to take the Cross, to promise to go on Crusade, although he never departed from England for that purpose.

24 For several years during John's conflict with the church he did not maintain the justices who for 20 years or so had conducted judicial business at Westminster. His justices remained with him, or in his absence with his Justiciar, and business in the King's Court had to be taken to wherever the royal household happened to be. The inconvenience of this is reflected in one of the clauses in Magna Carta.

25 John inherited a wide empire; then enemies closed in on John. In spite of his great exertions in 1212 he continued only nominally to be Lord of Ireland. His fighting and troubles in Wales never really ended, and the possibility of conflict with the Scots was usually present, although it could usually but not always be contained diplomatically. The French threatened to invade in 1213, but earlier in the following year John's navy achieved an entire victory over the French fleet at Damme in Flanders. He resumed campaigning in France, again with some shows of brilliance and success, but overall he was unable to improve his position, which became irretrievable in July 1214 when his allies were completely defeated by the King of France at Bouvines in Flanders, a rare instance in that age of a full battle in the field. Fighting more typically took the form of seizure of castles, towns and strong points, and endless manoeuvre in the field, rarely concluding in open battle. John was left with the Channel Islands, the County of Poitou and with Gascony in the duchy of Aquitaine; his influence there was not great and they were not a source of strength to him. It was well over two centuries before the English lost control of Gascony.

26 Baron, in Latin Baro, means "a man" and refers to the lord's man, or the King's man, in the feudal relationship of lord and man in which the King or feudal lord received fealty homage and services, most typically service as a knight, and the baron received land. The King's men, his barons, were the tenants in chief who held land directly from the King. Some held much land and many manors: these were nobility, Earls and Barons, in Latin Proceres. There were also lesser barons, who held smaller fiefs, and were not politically prominent. This was not a large community: under the Conqueror there were about 180 of them, and by King John's time there were probably many more. These and the leading churchmen were the political community: no-one else had any real voice in public business. Internal English politics revolved around the interests of this group of landholders.

27 From late in 1214 onwards English magnates and barons exerted themselves with demands for concessions from King John, claiming to have back the old laws of Edward the Confessor and Henry I. Following the logic of John's submission to the Pope, they took to petitioning the Pope to intervene in the government of England. His sheriffs and officers continued to enforce the scutage he had levied in May for the war in France. He levied many scutages, it seems 11, much more frequently than earlier kings. John returned to England in October 1214. The war was lost, few had paid scutage and even fewer had responded by giving actual service. About the time of his return there was a meeting of Earls and Barons at Bury St Edmunds, ostensibly on a pilgrimage, in fact to hold a political meeting in the Church of the Saint. They then confronted the King with a demand for renewal of a charter of Henry I, probably his Coronation Charter, which would not have secured much for them: so their demand was largely symbolic. The leaders were Barons from Yorkshire and further north and the Barons were sometimes referred to as the Northern Rebels, although there were many others. Northern lords had

shown the firmest resistance to the government and to the tax-gathering of John's Justiciar in his absence. The true demand was for John to submit to control. Before Christmas he put them off to Epiphany. At Epiphany he said he would answer them after Easter. In the spring parties willing to fight against the King, and those willing to fight for him, decided where they stood: and so did a larger group not willing to fight at all.

28 Early in March and before Easter John announced that he had professed himself as a Crusader. This put him under the protection of the Church for a moratorium against claims for three years, and increased the difficulty of opposing him. The Pope urged peace, and peace terms. Nothing definite happened at the meeting at Northampton on the Sunday after Easter. On 3 May the Rebel Barons met at Brackley near Oxford, renounced their homage and fealty, and attacked the castle at Northampton, held for the King: the attack was not successful. There were military movements throughout May, the most significant being that the Rebel Barons occupied the Tower of London and controlled the City. There was not much fighting, and friends and foes began to identify themselves, as did those who proposed to sit at home. John and his government began negotiations at once. Archbishop Langton promoted peace and agreement, although he cannot have been an enthusiastic supporter of King John. The King took his position in strength at Windsor. Although he was not very active militarily, he did give a clear indication of what was at stake by granting out the lands of some who had renounced allegiance to new feudal tenants, who of course could take up their new lands only if the King won. Quite often the feudal tenant stayed at home and showed no disloyalty while his heir or younger sons who had no land yet which they could forfeit adhered to the Rebel Barons.

29 Although a majority of barons acted against the King, and are referred to in later ages as Rebel Barons, there remained a core of loyalists who were powerful, most strikingly William Marshal Earl of Pembroke and Ranulf de Blundeville Earl of Chester. Looking backwards from the modern age, these should be called constitutionalists, unwilling to disrupt the established order, rather than inspired by personal loyalty to King John. John seized and fortified castles and equipped himself with mercenaries. At all times he seems to have had available to him many people with military experience who were prepared to give him loyal service and to be guardians of castles and strong points. Manoeuvre rather than open war continued, with proposals for arbitration by the Pope, and seizures of castles. The Tower of London, and the City of London became and remained a centre of hostility to King John.

30 In some negotiations which are not clearly recorded a conference emerged at Runnymede, beginning on 10 June 1215, and negotiations continued for some days between the Barons whom history designates as rebels, and another party representing King John. Runnymede, then as now an open field, was chosen because it was half way between the King at Windsor and the Barons at Staines. The Barons prepared a document called the Articles of the Barons, a draft recognizably the origin of Magna Carta. It seems that King John put his seal on the Articles of the Barons on 15 June, but this did not become Magna Carta; agreements made verbally were written down over the next few days and embodied in Magna Carta, arranged into clauses or articles by the clerks in the Royal Chancery, sealed and back-dated to the day of agreement. Copies of this document were circulated to sheriffs, the Cinq Ports and other authorities around England, and the Barons renewed their allegiance on 19 June. The familiar scene of King John sitting at a table in a meadow and sealing Magna Carta on 15 June does not exactly represent what happened, and it took some centuries for the Charter to enter into English folklore as a major turn in English history. It is not mentioned in Shakespeare's play "King John," although when the play was popular in Victorian times the Runnymede Scene was often added, as new Shakespeare which the Bard forgot.

31 Sealing the Charter proved to be an early event in the conflict between King and Barons: most of the fighting came after the Charter, and it continued when he died, and after.

32 King John may well have foreseen that, as happened, Pope Innocent III denounced the Charter as soon as he heard of it, and by the end of September when the Pope's decision became known it was quite clear that King John was not prepared to give effect to the agreement he had made in June. A real civil war ensued. A pivotal event was that Archbishop Langton refused to give up control of Rochester Castle to King John, who successfully besieged and captured it; this engrossed his attention for several months, but observers throughout England, near and distant, saw his energy and success, and while his enemies continued to be his enemies, there were many loyal to him and many strong points throughout the country on which he could rely, for security for himself, his followers and his treasure. Barons opposed to him began to ally themselves with the French Prince Louis, who, not altogether in accordance with his father's authority, began to intervene in English affairs. Prince Louis eventually came to England in 1216, set up a royal government and for about a year claimed to be and acted as if he was King Louis of England, with his capital at London and with some power and influence at other places.

33 In December 1215 and January 1216 King John, in his 50th year, carried out a military campaign which took him from the south of England to the Scottish borders and back, with an astonishing display of rapidity of movement of armed force and a number of successes, overcoming barons, castles and towns opposed to him and dispersing hostile forces at many places the length of the country. He left St Albans on 19 December 1215, marched north, pursued the King of Scots who had advanced to Cambridge, confronted him near Newcastle and pursued him north, reached Berwick on 14 January 1216, spent 9 or 10 days invading Scotland, marched south by way of Newcastle, Durham, Barnard Castle, Scarborough, York, Pontefract, Lincoln, Bedford, and was again at St Albans at the end of February and continued his campaign in East Anglia. This traversed most of the territory where rebel Barons predominated, but did not touch their stronghold at London and did not end their rebellion. They joined with the French in plans for invasion: the French arrived and established themselves in London. Civil war between King John, many of his barons and the rival government of the French Prince Louis continued through 1216, in a situation where, although there were rebels in many places, there were also many places where King John could find strength and resources.

34 In September 1216 King John embarked on another campaign of rapid movement. Rebels held the southeast and much of the east of England, but many castles and towns were held for King John, notably Dover and Windsor. John set out from the Cotswolds, down the Thames Valley to disturb but not relieve the siege at Windsor, then through the eastern counties and to Lincoln, then to Lynn in Norfolk, a major seaport. This movement relieved Lincoln which had been under siege. At Lynn he organized shipping to support a march northward, probably again to pursue the Northern Barons and the Scots. Lynn has since that time called itself King's Lynn, the association being that he contracted dysentery there by overindulging in peaches and cider (October seems late in the season for peaches). He set off in poor health, campaigning northward again by way of Wisbech, and north to Lincolnshire, to the castle at Newark held for him by the Bishop of Lincoln, and there he died on 18 October 1216. Death overtook him in the midst of one of his displays of energy and success, rapid movement and dispersal of opposition. In the course of his journey at least some or perhaps much of his baggage and of the treasure which he took with him on his campaign was lost in a quicksand. There is no good record of exactly what was lost, or where: it may have been a vast treasure, it may have been a few pack animals. Some items of importance such as the Empress Matilda's imperial regalia disappear from records at about this time, and it could well be that he lost something quite valuable. Whatever he lost, it is certain that adventurers in the 19th and 20th centuries spent far more than it was worth looking for it, without success; the geography of the Wash has changed greatly over the centuries, and what was then a river crossing or quicksand may now be hard dry land. He cannot have lost all his treasure, because the chroniclers record, possibly with exaggeration, that when he died his personal servants stole what was left.

35 His death completely changed the politics of rebellion; barons who were ready to rebel against John had a completely different balance of advantages when dealing with the new government organized by William the Marshall Earl of Pembroke in the name of and on behalf of John's nine-year-old son Henry III. The attractions of a French king began to fade. The French themselves did not conduct themselves with great energy in exerting Prince Louis' cause. They drank all the wine in London, and complained about the ale. William the Marshall and other barons were able to establish a government in the name of the infant, and in 1217 Louis came to terms with them, abandoned his invasion and returned to France.

36 The Charter contains a list of the advisers at whose instance the King entered into it. They include the Archbishop of Canterbury and seven other English bishops, Pandulf, a sub-deacon who in some way represented the Pope and may be thought of as a diplomat, the Master of the Temple, William Marshall Earl of Pembroke and three other Earls, and eleven others who appear to be barons or officials of the government in England and France. Two other advisers were the Archbishop of Dublin and the Constable of Scotland, whose presence probably reflected an alliance or commonality of interest between Northern Lords and the Scottish King; one clause conferred benefits on the Scottish King. The Charter named 25 barons who were given the power to enforce it even against the King, if necessary by seizing his property; this is a different group to the advisers. Although King John's Charter soon lost effect, a very similar but not identical Charter was issued by the boy King's government soon after King John died, and there were further reissues, with modifications, on a number of occasions throughout the 13th Century.

37 The Clauses of the Charter reflected the sources of discontent in English politics at that time. The discontents of barons and tenants in chief, important landholders, and of the English church received the most attention. The discontents of towns and the merchants received some attention, but the interests of the great majority of the population were hardly affected at all. The document was not a Charter of Liberties or a statement of basic constitutional rights, as it came to seem in later Centuries. It did not restore the old laws of Edward the Confessor and Henry I. It accepted the change and evolution

which had happened. It worked its way through many contemporary grievances, mostly about excesses of power by King John, and corrected them one by one.

38 The first clause confirmed the independence of the English Church, and restated part of King John's earlier submission to the rights of the English church (not to the rights of the Pope. The Barons, and the King's advisers, were not exerting themselves in the interests of the Pope.) Clauses 2 to 8 protected the interests of landowners against excesses of the King's power in a number of situations relating to succession and payment of relief, wardship of infants and the duties of guardians, the marriage of heirs and widows, and the freedom of widows not to remarry. Clause 9 protected land from enforcement of judgments for debts, so that movable goods had to be sold first. This protection, which continued until the 19th Century, tended to protect the interests of heirs: it made it less likely that an inheritance will have disappeared to pay the debts of an improvident forebear. Clause 11 controlled recovery of interest and debts to Jews, who were the only lawful money lenders, and who were specially under the King's protection and control. Clause 12 was of very long-term importance; it was to the effect that aid and scutage, which were taxes, could not be levied in the kingdom without the kingdom's general consent (with 3 established exceptions). This was the forerunner, some centuries later, of parliamentary control over taxation. Clause 14 stated how the general consent of the kingdom to new taxation was to be obtained, in a process which sounds somewhat like the process of summoning a parliament. However parliament was still some decades away, and only levying aid and scutage were contemplated, not legislation generally. Clause 13 guaranteed the rights of the City of London and other corporations. There were controls in Clauses 15 and 16 on enforcement of feudal rights by persons other than the King. Clause 17 continued in effect until the 19th century: "Ordinary law suits shall not follow the Royal Court, but shall be held in a fixed place." This gave rise to a clearly distinct Court of Common Pleas, which did not hear cases in which the King was a party, and remained fixed at Westminster, where it stayed until 1875. There were many other provisions regulating conduct of the courts, and requiring the King to send out assize judges to each county 4 times a year, and a clause requiring fines to be reasonable, and the fines of Earls and barons to be assessed by their peers. Many other clauses established rights of clergy, towns and counties in their dealings with the Crown. The power of the Church to control the distribution of the goods of intestates was confirmed. There were provisions about the environment in Clause 33 which required the removal of fish weirs, which had begun to appear on rivers in earlier decades. There were to be standard weights and measures (Clause 35); and persons were not to be placed in trial without producing credible witnesses (Clause 38).

39 Clauses 39 and 40 have had long resonances in English law.

40 Clause 39: "No free man shall be captured or imprisoned or disseized or outlawed or exiled or in any way destroyed, nor will we go against him or send against him except by the lawful judgment of his peers or by the law of the land."

41 Clause 40: "To no one will we sell, to no one will we deny or delay right or justice."

42 These guarantees, if they had been enforced, represented the reversal of much oppression which King John had practiced. There were provisions for free movement of merchants and others, except in wartime. Clause 45 required that appointments of justices, constables, sheriffs and bailiffs were only to be men who knew the law of the realm and well desired to keep it. There were many provisions about Forest law, which was an area of resented royal privilege. From Clause 49 on, the current political violence begins to exert itself. The King was at once to return hostages and documents which he held as security for peace or loyal service. He was to remove all foreign knights, attendants and their horses and arms from England, and in particular, he was to remove 8 named Frenchmen who were kinsmen of one Gerard de Athée, in some cases with their brothers; not all these people are known to history, but they were well enough known to the barons to be specially mentioned, and they were to lose their Royal offices permanently. Gerard had already died after long service doing some of John's dirtiest work, but his relatives were still causing trouble.

43 A number of powers to restore or overcome wrongs committed by King John or his predecessors were conferred on a committee of 25 barons. Clauses 56, 57 and 58 were directed to redressing injuries which had been inflicted on Welshmen; the sons of Llywlyn who were held as hostages and his Charters were to be returned, and injustices were to be reversed. In some way these clauses reflect an alliance between the Welsh Princes and the Rebel Barons or some of them. Clause 59 in a similar way provides for restoration of the sisters and hostages given by Alexander the King of Scotland, and an undertaking to deal justly with him. This reflects an alliance of some kind between the King of Scotland and some Northern Lords, and the presence among those named as advisers to King John of Allan Galloway, the Constable of Scotland. There are a number of other minor provisions, and a general

pardon, reconciliation and assurance of future respect for rights. Clause 61 dealt with the functions of the committee of 25 which was to supervise King John from then on, and dealt very fully with their powers, which enabled them to override the King himself; they were given the right to "… distrain upon him in every way possible, with the support of the whole community of the land, by seizing castles, lands, possessions or anything else except his person and the persons of his Queen and their children, until they have secured such redress as they have determined upon." If the Charter had really taken effect, King John was in effect deposed or reduced to insignificance in any manner which this Committee decided they should do. In medieval terms, he might as well not be King at all, and there could be no surprise that he found his way out of the obligation within a few months.

44 The Charter shows that the Barons liked the growth of regularity, legality and a system of justice which was not an instrument of Royal power. Over some centuries the law developed as they wished. Real independence of the Courts, and real control over Royal power were not achieved until 1689, almost five centuries on: but the Charter was a step on the way.

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WEDNESDAY 25 FEBRUARY 2004
JUSTICE JOHN BRYSON

SUBPOENAS, DISCOVERY AND INTERROGATORIES

1 This paper primarily relates to practice in the Supreme Court. *Some references to practice in the Federal Court are given in italics.* Subpoenas, discovery and interrogatories deal with two different general subjects. One is getting out information, establishing what documents exist and tend to prove facts in issue, or contain information about facts in issue. The other is bringing documents to the Courtroom at the hearing so they can be put into evidence. Getting out information is the general subject of discovery and bringing documents to the Court is the general subject of subpoenas. Parties to proceedings have obligations to reveal to their opponents before the hearing the information, including the documents, which they have about the facts in issue; their opponents have a right to compel them to disclose those documents and information. Strangers who are not parties to the proceedings do not have any obligation to reveal, in advance of the hearing, what documents and information they have about the facts in issue. They do however have an obligation to produce documents so they can be put in evidence. In recent decades changes in the Court's practices have come to mean that strangers can be compelled to produce documents before the hearing, not just, as once was the case, at the hearing. What strangers cannot be compelled to do is to say on oath and in advance of the hearing what they know about facts in issue, nor can they be compelled to give discovery and to produce all documents in their possession relevant to facts in issue. They have no obligation to swear that they have produced all such documents. Essentially the duty of a stranger is to produce the documents which the Court orders him or her to produce. The stranger has no obligation and should not be ordered to carry out elaborate or difficult searches and inquiries, or to give detailed consideration to deciding whether some document is relevant to the facts in issues in a case in which the stranger is not a party. The use of subpoenas to compel a stranger to do these things is oppressive, and if asked to do so the Court may set aside a subpoena which has that effect, or may modify the operation of the subpoena.

It is not really appropriate for the parties to litigation to serve subpoenas for production of documents on each other. Sometimes exigencies of time require it. Where there is time for proper preparation the parties should ascertain what relevant documents their opponents have by following the procedures for discovery in Pt.23 of the *Supreme Court Rules* 1970 or O 15 of the *Federal Court Rules. (In what follows, the position in the Supreme Court is described first, and then the position in the Federal Court).* The relatively simple process in Pt.23 r.2 is that a party may require the opponent to produce any number of documents up to 50 if the documents are referred to in any originating process, pleading, affidavit or witness statement, and any other specific document. Then r.2 fixes the times for rights to have the documents produced and inspected. A more elaborate process for discovery is dealt with in r.3; a Court order requires discovery of documents within classes specified in the order and then the opponent must produce a list of the documents falling within the classes and make a verifying affidavit. (These procedures do not apply to personal injury and death claims unless there is a special order under r.5.) These procedures give each party an opportunity to inspect the opponent's documents, and there is no need to serve a subpoena on the other party to bring about production of a document. Such production of a document by another party at the trial can be secured by a notice under Pt.36 r.16, which may be made returnable before the trial, or at the trial.

2 Part 23 applies to proceedings commenced after 1 October 1996. An object of Pt.23 was to simplify discovery procedure by making them relate only to specified classes of documents. Before then

experience was that discovery was very elaborate and disproportionately expensive for the purposes it served. I have heard the view voiced that the process of identifying and specifying the classes of documents to which discovery is to relate makes so much claim on attention and time that there is no real advantage over the old procedure: people say you might just as well discover everything. The introduction of Pt.23 in 1996 has brought about a considerable change in the use made of discovery. Except in very large litigation, the use of discovery seems to have become far less frequent than it was. Part of the reasons for this is that Pt.23 r.1(d) defines the concept of relevance more narrowly than before: it used to be enough that a document contained information which could lead to a chain of inquiry which would produce relevant evidence. It is always important to keep a sense of proportion about the amount expended on getting a case ready, but the basic need to find out what documents the opponent has, and the need to know in advance what you are up against, appear to me to dictate the continued use of discovery, even if it is only in the simple form of a call for up to 50 specified relevant documents.

3 *In the Federal Court, discovery is managed by the Docket Judge to whose docket the case has been assigned on the commencement of the proceeding. No party has a "right" to require discovery: rather, O 15 r 1 makes the leave of the Court a prerequisite. A party seeking leave to give a notice for discovery (Form 21) can expect to be asked by the Docket Judge to explain why discovery is necessary and to justify the ambit of discovery sought.*

4 *The most important rule governing discovery in the Federal Court is O 15 r 2, with which must be read Practice Note 14. Order 15 r 2 in its current form and Practice Note 14 came into effect on 3 December 1999.*

5 *Subject to any order to the contrary, discovery is to be given of:*

> *"(a) documents on which the party relies; and*
> *(b) documents that adversely affect the party's own case; and*
> *(c) documents that adversely affect another party's case; and*
> *(d) documents that support another party's case; and*
> *(e) documents that the party is required by a relevant practice direction to disclose." (O 15 r 2(3))*

6 *The party giving discovery is required to discover only those documents just described of which that party is, "after a reasonable search", aware, at the time discovery is given (O 15 r 2(3)). However, a document need not be disclosed if the party giving discovery reasonably believes that the document is already in the possession, custody or control of the party to whom discovery is given (O 15 r 2(4)).*

7 *In determining what is a "reasonable search", a party may take into account:*

> *"(a) the nature and complexity of the proceedings; and*
> *(b) the number of documents involved; and*
> *(c) the ease and cost of retrieving a document; and*
> *(d) the significance of any document likely to be found; and*
> *(e) any other relevant matter."*

8 *Federal Court Practice Note 14 is as follows:*

> *"1. Practitioners should expect that, with a view to eliminating or reducing the burden of discovery, the Court:*
> *(a) will not order general discovery as a matter of course, even where a consent direction to that effect is submitted;*
> *(b) will mould any order for discovery to suit the facts of a particular case; and*
> *(c) will expect the following questions to be answered:*
> *(i) is discovery necessary at all, and if so for what purposes?*
> *(ii) can those purposes be achieved:*

· by a means less expensive than discovery?
· by discovery only in relation to particular issues?
· by discovery (at least in the first instance - see (iii)) only of defined categories of documents?

(iii) particularly in cases where there are many documents, should discovery be given in stages, eg initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?
(iv) should discovery be given in the list of documents by general description rather than by identification of individual documents?

2. In determining whether to order discovery, the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.

3. To prevent orders for discovery requiring production of more documents than are necessary for the fair conduct of the case, orders for discovery will ordinarily be limited to the documents required to be disclosed by Order 15, rule 2(3)."

9 Interrogatories are another means of getting out information from the opponent in advance of the hearing. There have been very great changes in the use made of interrogatories in the Supreme Court of New South Wales. They have almost faded away; it is very rare for an answer to an interrogatory to be tendered in evidence. Like discovery, interrogatories were part of Equity procedure until the *Judicature Act* reforms in the United Kingdom, subsequently adopted in New South Wales in 1972 by the *Supreme Court Act* 1970. For 20 years or so after 1972 interrogatories flourished, except in personal injury cases. Great efforts were put into producing elaborate arrays of questions, sometimes many hundreds of questions, which sought to compel the opponent to state the position on oath about as many aspects of the facts in issue as could be thought of. Then an amendment to the *Supreme Court Rules* 1970 Pt.24 r.1 in 1991 greatly changed this practice by limiting the number of questions to 30; more questions can be asked, but leave has to be obtained. An object of this change was to direct the questions to the heart of the matter; on the whole it seems likely that, no matter how complicated the issues are, the most important things that the opponent should reveal can be collected into 30 questions. The remarkable and unforseen result of imposing the limit to 30 questions was that the use of interrogatories almost disappeared.

10 The arid interpretation is that in the past interrogatories were not being used to get out information, but to engage and distract the opponent's attention by giving him or her a lot of work to do and a lot of costs to incur, and to promote his or her distaste for the contest. Whatever the true position was, the fashion for lengthy interrogatories has passed. A large influence against the extensive use of interrogatories has been the growth of new practices in which parties are frequently directed to exchange affidavits or witness' statements in advance of the hearing. It seems that parties have learnt to rely on the contents of affidavits or witness' statements to reveal what the opponent's case truly is. Interrogatories should still be considered as a useful tool if they are confined to a few matters of central importance in order to establish what the opponent's knowledge is.

11 *Many of the above observations also apply to the Federal Court. In the Federal Court, as in the Supreme Court, interrogatories are rarely administered. Order 16 of the Federal Court Rules deals with interrogatories. Consistently with the Federal Court's case management system, a notice to answer interrogatories may be given only with the leave of the Court: O 16 r 1. Since leave to administer interrogatories is required in all cases, a numerical limit on the number of interrogatories which can be exceeded only with the leave of the Court would be otiose in the Federal Court.*

12 My main subject is the practice of the Supreme Court dealing with subpoenas for production of documents. This paper is not concerned with subpoenas to attend. As usual, there is much to learn from patiently reading through Pt.37, Forms 46 to 48 of the *Supreme Court Rules* 1970 and Practice Note 51, *and, in the case of the Federal Court, O 27 and Forms 41-43. In both Courts the rules relating to subpoenas are about to be replaced by "harmonised" subpoena rules, which will take effect in the Federal Court on 1 April 2004 and in the Supreme Court on 1 May 2004. Justice Lindgren will speak about the text of the new rules. My subject is general principles which will have an ongoing importance.*

13 Before 1972 practice relating to subpoenas for production was largely established by the judgment of Jordan CJ in *Commissioner for Railways v. Small* (1938) 38 SR NSW 564. That was a Common Law case where the plaintiff claimed damages under the *Compensation to Relatives Act* 1897 for the death of her husband who fell from an electric train. In 1938 the Court would not have ordered discovery in a personal injury or death claim; the power existed, but it was not the practice. The plaintiff's solicitor served a subpoena on the Commissioner for Railways to produce relevant documents. However he only served it with two business days' notice, returnable on the day of the hearing, and called for an

enormous array of documents with which it was, fairly obviously, impossible to comply. It included all documents relating to self-closing doors, falls from electric trains and complaints about the running and control of electric trains. Even though there had only been electric trains for about 11 years, this was an impossibly tall order. Jordan CJ treated the manner in which the subpoena had been dealt with as part of the grounds on which a new trial was ordered.

14 In the course of his judgment Jordan CJ stated some propositions which have largely set the practice since. See pages 572 to 575. A subpoena to a stranger must specify with reasonable particularity the documents which are required to be produced. The subpoena ought not to be issued to a stranger requiring him or her to search for and produce all such documents as he or she may have in possession or power relating to a particular subject matter. It is not legitimate to use a subpoena for the purpose of endeavouring to obtain discovery of documents against a stranger. A stranger ought not to be required to go to trouble or expense in ransacking his or her records and endeavouring to form a judgment as to whether any of his or her papers throw light on a dispute. Where a subpoena is addressed to a party it is still necessary that it should state with reasonable particularity the documents which are to be produced. It is not legitimate to use a subpoena as a substitute for an application for further and better particulars, or for discovery of documents. Jordan CJ contemplated that where there was a need for a party to give discovery there would be discovery, and a subpoena would not be a substitute for it; the subpoena would call for production of specified documents, but the information about the documents would have emerged earlier from the discovery. A party is not entitled to use a subpoena for fishing: to discover whether he or she has a case at all. A subpoena to a party will be set aside as abusive if great numbers of documents are called for and it appears that they are not sufficiently relevant.

15 What has actually taken place in practice has never, in my experience, conformed in a pure way with what Jordan CJ said. Lawyers who conduct personal injury litigation have always been markedly averse to discovery. I cannot fully explain why, but it would often be true that the plaintiff has next to nothing to disclose while the defendant has extensive documents which could bear on negligence. Scatter-shot subpoenas have always been popular, in spite of their susceptibility to being attacked and set aside.

16 One of the inconveniences of subpoenas under the old practice, remarked on by Jordan CJ in *Small's case* was that at the beginning of a trial, while the jurors (if any) were waiting around and all the concerned wanted to get on with the case, time was taken by a procession of persons called to answer subpoenas. They each told their stories; yes they did produce the documents, they did produce some of them, no they had no documents, they had had a fire, or whatever the story was. Then there would be discussion about whether there was any good reason why documents should or should not be inspected, and time would also be taken to inspect the documents just produced. The time used was expensive, with all parties, their lawyers, witnesses and the Judge in attendance, and little was being achieved. Stumbling prologues postponed the drama. The *Supreme Court Rules* 1970 *and the Federal Court Rules* made the innovation of providing for production of documents to the Registry in advance of the hearing. This brought about large changes in the practice of litigation, in the impact of subpoenas on third parties and in the volume of documents which are required to be produced. It does not seem that such large changes were foreseen; but the use of subpoenas has expanded greatly.

17 As the documents are produced in advance, and by and large the strangers who produce them do not object to inspection by the parties, time is available to inspect documents in advance and copies can be made. As a result the amount of time, effort and cost which can be put into subpoenaing and inspecting documents in advance have expanded greatly, with the consequence that the time, effort and cost which actually are put into them have expanded greatly. This has given rise to what I think of as the Subpoena Industry, a very large effort, which requires a great deal of attention from the Court's officers in the Registry, and imposes responsibility on the Registry for huge volumes of documents, a steady tide in and out, with the need to record movements, keep track and be responsible for other people's valuable documents. It was not like this in the old days; the documents produced were handed to the Judge's Associate at the beginning of the trial and either went into evidence or were handed back by the Associate at the end of the trial, giving the Registry no trouble.

18 The rise of Xerox copiers and lever-arch binders has contributed a large part to the growth of the Subpoena Industry. Another large part has been the Court's recognition of the claim of justice of persons required to make searches and produce documents to be paid for their expenses and loss. This entitlement is now recorded in the *Supreme Court Rules* 1970 Pt.37 r.9 *and the Federal Court Rules*, O 27 r 4A. Some large commercial enterprises which receive many subpoenas do not seem to have any sense of oppression or resentment about being confronted with very wide ranging calls for documents requiring searches and detailed attention of staff; as they are paid for this it is a profit

centre. The motivation which used to apply to set aside a subpoena which made excessive calls and imposed a need to search out papers, give consideration to relevance, copy volumes of papers and produce them, with a lot of attention by staff, no longer operates; instead the recipients of subpoenas do the work and send the bill. These bills have sometimes been extremely large. I have been told that banks sometimes give the solicitor who served the subpoena running reports on how much work they have done and how much the bill is now, and ask whether they are to perform further work at the same rate. I was once told that a solicitor had been billed for $14,000 by a bank which had not yet completed its searches. I do not know how common such large charges are, but I have come to think that many labourers in the Subpoena Industry are more or less happy in the service, being given large tasks and sending large bills for doing them.

19 An effect of this is that one of the things that Jordan CJ said could not happen tends to happen, that is, strangers are compelled to give discovery. On the face of things a subpoena that calls for production of "all documents relating to" a subject matter is contrary to one of Jordan CJ's rules; "A stranger to the cause ought not to be required to go to trouble and perhaps to expense in ransacking his records and endeavouring to form a judgment as to whether any of his papers throw light on a dispute which is to be litigated upon issues of which he is presumably ignorant."(at 573) In the Court's practice now, a call for documents "referring to" or "relating to" some subject matter is not necessarily the hallmark of an oppressive subpoena; the call must be considered in the circumstances, including the circumstances of the recipient and its capacity to produce documents.

20 What is required is reasonable particularity (*Small* at 575). "Reasonable" is not a dogmatic word. In *Waind v. Hill & National Employers Mutual General Insurance Association Ltd* [1978] 1 NSWLR 372 at 382 Moffitt P for the Court of Appeal gave an exposition of what is meant by using a subpoena for the purpose of discovery. Moffitt P said: "The essential feature of discovery in this connection … is that the person to whom the subpoena is addressed will have to make a judgment as to which of his documents relate to issues between the parties. It is oppressive to place upon a stranger the obligation to form a judgment as to what is relevant to the issue joined in a proceeding, to which he is not a party. …a subpoena can only properly be used for the production of documents described in particular or general terms which does not involve the making of such a judgment. It does not follow, however, that because the party who issues a subpoena is unaware of the precise description of a particular document, or whether a particular document or documents is in the possession of the witness, or even whether it exists, or is unaware of its contents, that the subpoena, or even a subpoena in general terms, amounts to the use of the subpoena for the purpose of 'discovery'." In my understanding, even though the words in a subpoena are general and may require some decision by the recipient going further than simply recognising that the document is the one described, the use of a general description is not oppressive unless it requires the recipient to form a judgment about relevance to issues, or about some other matter which is so complex or difficult as to be oppressive. A call to an employer for all documents relating to the employment of and wages paid to the plaintiff during a stated period involves forming some judgment, but the exercise is probably not difficult, and can be fulfilled by getting out the personnel file and wages records. The question is, what is reasonable, and involves an appraisal of the task imposed.

21 There are limits to this. Once the requisitions in a subpoena stray into an expression like "all documents relating to" the ground is becoming a little shaky, but it is not necessarily quicksand. A subpoena may be oppressive, and may be set aside for that reason, if the exercise it requires the recipient to perform is simply too large and elaborate, even if it does not involve any real difficulty in the exercise of judgment and making decisions. There are reasonable limits. To take an example from *Small's* case, a call for all files relating to falls from electric trains extending to back 10 or 11 years could not survive the challenge.

22 However what is required is a challenge. By and large recipients of subpoenas which are excessive do not respond by applying to the Court to set them aside; the usual response is more along the lines of making some kind of attempt at compliance, putting the onus on the person who issued the subpoena to ask the Court to compel further effort; and if the subpoena is vulnerable, the party issuing it is unlikely to do this.

23 In *Southern Pacific Hotel Services Inc v. Southern Pacific Hotel Corporation Ltd* [1984] 1 NSWLR 710 at 719-720 Clarke J made a restatement of the requirements of reasonable particularity and what constitutes an oppressive subpoena and said: "If a court is called upon to rule that a subpoena is an abuse of process … it will need to carry out an exercise of judgment upon the particular facts in each case, including but not limited to the terms of the subpoena, bearing in mind the need to balance the reasonableness of the burden imposed upon the recipient and the invasion of his private rights with the public interest in the due administration of justice and, in particular, that all material relevant to the

issues be available to the parties to enable them to advance their respective cases. There is, in every case, a clash between these competing interests and whilst the balancing exercise … must be carried out, it is the latter interest [due administration of justice] which is predominant. If the needs of justice require or could require that a stranger be obliged to carry out a very burdensome task in the collection, transportation and production of a large number of documents, then a subpoena calling upon the stranger to produce those documents will be upheld."

24 In my opinion the net result of this is that it would be very difficult to say confidently, on the basis only of the terms of a subpoena, that it would be set aside. To some degree this may help to explain the general habit of compliance.

25 There is a conflict of authorities about whether a party, as well as the recipient of the subpoena, can apply to the Court for an order setting it aside on grounds of oppression and of lack of reasonably particularity. Pt.37 r.8 of *Supreme Court Rules* 1970 *and O 27 r 9 of the Federal Court Rules* give standing to "…any person having a sufficient interest…" and New South Wales authorities favour the view that a party can buy in to the controversy. Other states have other practices.

26 If the subpoena does not fail the test of reasonable particularity and is not oppressive, there is a further important control on its usefulness. It is not enough to compel a stranger to produce documents to the Court; little is achieved unless the party issuing the subpoena can also inspect the documents, and do so in advance of the hearing. Although earlier case law suggested that the documents must be produced to the Court before the question of allowing or withholding inspection can be embarked on, a qualification has crept in and this is not always treated as essential to produce the documents before debating inspection. (see *NSW Commissioner of Police v. Tuxford* [2002] NSWCA 139 at [21 & 22]). At this point another important control also depends very largely on whether the stranger takes an initiative. It is quite common for strangers to produce documents to the Court which appear remarkably important to them, yet make no objection to inspection by the parties. In part this attitude may be justified by reliance on controls on the use of information obtained under the doctrine in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; the information may not be used for purposes other than the conduct of the proceedings, although this control ceases when the information is put into evidence. Even if there is no objection there is still room for the Judge to impose control on inspection on his or her own initiative; the limited grounds for this were referred to by Moffitt P in *Waind* at p383: "There may be good reason why he may, or indeed should, refuse inspection of irrelevant material of a private nature, concerning a party to the litigation, or, concerning some other person who is neither a party nor the witness." One sentence in Moffitt P's judgment at 383 has not taken root in the practice; his Honour said: "Indeed, no doubt, [the Judge] will normally defer inspection by a party who has not issued a subpoena until his opponent has an opportunity to use the documents in cross-examination". The practice does not accord with this statement. Where inspection of documents is allowed it is almost always allowed to all parties, unless there is some limit arising from client legal privilege, or from a claim of confidentiality. If access is restricted there is a need to give notice to the party or parties on whom the restriction is imposed.

27 As explained by Moffitt P the law has a choice between restricting the Judge to allowing access to documents only to enable them to be tendered in evidence, or to allowing access to enable parties to ascertain facts in the documents. Moffitt P said at 385: "The crucial question in relation to the exercise of the discretion to permit inspection in the second step is whether the documents have apparent relevance to the issues." And "Once the judge has that opinion, inspection will normally be allowed, notwithstanding that the document is not admissible as it stands, and notwithstanding that the party seeking inspection has not given any undertaking to tender it, or use it in cross-examination." In other cases Moffit P's test has been given the name "legitimate forensic purpose". See *Maddison v. Goldrick* [1976] 1 NSWLR 651 at 666 and *R v. Saleam* (1989) 16 NSWLR 14.

28 The effect of these changes in practice since 1938 has qualified the general statement, often found in authorities, that a subpoena cannot be used for the purpose of obtaining discovery from a third party. To a limited extent production and inspection of a third party's documents can be compelled for the purpose of ascertaining information relevant to litigation.

29 The essence of the Subpoena Industry is compliance. Relatively few strangers served with subpoenas, even very extensive subpoenas, actually make applications to have them set aside or modified. They make some accommodation with the party who serve the subpoena; or they just comply and send in their bills. Client legal privilege, whether of a party to the litigation or of some other person, is a frequent source of objection to inspection; otherwise the extent of compliance is remarkable. Solicitors who conduct litigation are aware of the large scale of effort and attendance required by the current practice. It is very common that, quite early in litigation, many subpoenas for production are

issued, and a large burden of attendance and expense is incurred as documents are inspected in the Exhibits office and copies are obtained. This large field of activity has grown out of what was, early in my legal experience, a small incidental part of legal practice.

30 It should be noticed that Pt.37 r.2(2) of the *Supreme Court Rules* 1970 requires leave to make a subpoena returnable before the hearing of proceedings. ***(****Under O 27 r 6 of the Federal Court Rules, leave is required to use subpoenas. Leave may be given generally. The return date will usually be fixed as a term of the giving of leave. If no return date is so fixed, subpoenas may be made returnable at 9.30 am on any Wednesday before the Registrar.)* It is for this reason that it is so common in direction hearings to ask for an appointment for return of subpoenas; when the Judge or the Registrar makes such an appointment it is treated as leave to issue as many subpoenas as one chooses returnable at the appointment. If the Judge or the Registrar does not give leave, leave can still be obtained in the Registry where leave is given on undertakings which include an undertaking to inform other parties that subpoenas have been issued and that they also have the opportunity to issue subpoenas. A minor battleground is the question of whether this undertaking requires the other parties to be informed of the names of the persons subpoenaed. Some argue that they are not obliged to tell their opponents to whom the subpoenas are directed, only that they have been issued. I do not know whether that this battle has been resolved. It is however open to the opponent to appear at the return of subpoenas and find out to whom the subpoenas were directed; so I do not think that there can be any ground for keeping secret, or for not disclosing on request, the identity of the persons to whom subpoenas are directed. It is worth noticing Pt.37 r.11 which enables the party issuing the subpoena and the recipient to make arrangements to modify the time for production. They do not need a Court order to do this.

31 Contests over subpoenas have become an interlocutory battleground in Supreme Court *and Federal Court* litigation. Formerly fashionable disputes over discovery interrogatories and particulars seemed to have faded away. Registrars sit four days a week for the return of subpoenas, and are kept busy with contests about production of documents. In most cases the parties to the litigation are those who engage in the contests; however often where there is some association between the stranger subpoenaed and a party to the litigation, the stranger takes the initiative to attack the subpoena. Except in circumstances like that few strangers would wish to engage in disputes and incur the risk of costs. Claims based on client legal privilege are a fairly common subject of argument. Occasionally there are claims to public interest immunity: for example, *Cassaniti v. McEntee* [2000] NSWSC 1202. Otherwise most attacks on subpoenas are based on the ground that the subpoena is oppressive in some way. A subpoena can be oppressive because it imposes an unreasonable burden, does not call for documents with reasonable particularity, or calls for too many documents or too much effort. A subpoena can be oppressive because of the nature of the task it imposes; if to an unreasonable degree it requires exercise of judgment and making decisions about relevance by the stranger. It may be set aside because it is a fishing expedition: for example, *Travel Compensation Fund v Blair* [2002] NSWSC 1228, *Cotie v Cox* [2003] NSWSC 4. In cases like these the requisitions in the subpoena and the evidence put forward by the stranger about the practical difficulty of complying simply have to be sorted through, and the Court has to reach a view on whether or not the call is reasonable.

32 Many disputes are about access to and inspection of documents. The “legitimate forensic purpose” test is applied, and it is plainly very dependent on the facts and circumstances of the particular case. Sometimes the Judge may inspect the documents himself or herself, without showing them to other parties, to form a view about whether there is some legitimate forensic purpose in allowing inspection. It is often contended that a subpoena is oppressive because of the commercial or other confidential nature of the information. Claims of this kind must also be dealt with by applying the broad legitimate forensic purpose test to the instant facts, again sometimes with inspection by the presiding Judge. There is as I mentioned earlier an obligation restricting parties to use information gained through interlocutory process only for the conduct of the proceedings; but naturally enough many persons whose private documents are subpoenaed do not have much confidence in this restriction. It is very difficult to prove who leaked information, and as we all know, we are living in a period when public morality about respecting other people’s private information and confidences is at a very low ebb. The Court often responds to claims of confidence by taking special measures to restrict access to and inspection of documents to named lawyers, or named executives of a litigant, on the basis of written undertakings relating to and limiting the use of the material. See for example *Wilson v State of New South Wales* [2003] NSWSC 805. It is not common for Courts to simply refuse inspection on the ground that the information is confidential, if the claim to inspect the document passes the legitimate forensic purpose test.

33 Another claim of oppression to which Courts have yielded is the claim that a person who is himself or herself an expert and has a body of expertise in his or her head should not be compelled by subpoenas to attend and give evidence. Solicitors who collected bodies of expert or useful opinion relating to a particular class of business are not compelled to produce their documents for the use of

another solicitor to conduct litigation in which the expert solicitors are not engaged. On the other hand a client whose expert solicitor had terminated the retainer was allowed to compel production of the solicitor's collection of documents recording expertise relating to the subject matter of his lawsuit. See *ZN v Australian Red Cross Society* [2002] NSWSC 697.

34 First instance judgments on questions arising out of challenges to subpoenas find their way into the Court's bank of judgments at the rate of about 8 or 10 a year, usually in variations of the subjects I have mentioned. If you find yourself in a contest over a subpoena it would be useful to browse through the first-instance judgments of the last two or three years and get a feeling for the way the tests are actually applied. It is rare for these problems to find their way to the Court of Appeal, although in *Tuxford* the Court of Appeal considered a District Court subpoena for production of documents on an application for certiorari. This decision is significant for showing just how industrious and misguided people who draft subpoenas can be. The litigation arose out of a claim for damages by police officers arising out of their treatment in various ways by more senior officers. The subpoena called for a production by the Commissioner of Police of documents in 66 numbered paragraphs with many subparagraphs identifying persons in the police service who might have documents and the offices where the documents might be located. The calls were related to a number of different police operations. There were calls for all documents, the originals and all copies, relating to a particular subject matter, and evidence given by the Commissioner estimated that there would be over a million documents and that hundreds of police officers might hold copies. It appears from the judgment of the Court of Appeal that there was no showing that there was a legitimate forensic purpose for such extensive calls. The Court of Appeal said: "[17] No attempt was made, either in the District Court or in this Court, to justify the demand for the production of all of the copies of these documents, and on this ground alone, given the numbers of documents involved, and the fact that they are or may be located in so many places, means that the subpoena was oppressive."

35 This was a recurrence of broadly similar events which I have seen a number of times over the past few decades in which a subpoena is drafted in terms which make its calls as extensive as possible, limited only by the imagination of the person drafting it, apparently without advertence to the fact that the Court exercises control over inventing enormous tasks and imposing them on the opponent. The Court of Appeal's judgment repeated and endorsed a number of propositions essentially based on *Small's* case and stated the law in what are, for New South Wales, classic terms, including endorsement of the legitimate forensic purpose test. The Court of Appeal referred to the test stated in *Small's* case that a party is not entitled to issue a subpoena for the purpose of fishing, meaning endeavouring not to obtain evidence to support the party's case but to discover whether the party had a case at all, or to discover the nature of the opponent's case. The Court of Appeal treated the wide-ranging call extending to 66 paragraphs as not requiring consideration in detailed paragraph by paragraph. The Court of Appeal removed the application to set aside the subpoena into the Court of Appeal and quashed the subpoena. In doing so they adhered to the classic law on setting aside subpoenas.

36 I will close with a short Latin lesson. "Subpoena" is an English word and its plural is "subpoenas." As a plural, "subpoenae" is not Latin, English or any other language, not even (for Googlers) Klingon or Elmer Fudd. Before 1972 a subpoena to attend was called *Subpoena Ad Test,* which was short for *ad testificandum,* meaning "to give evidence," and a subpoena to produce documents was called *Subpoena Duces Tecum,* which means "bring with you." This may help you when reading old law reports, but there is no need to use the old names any more.

Print Page Close Window

Caveats Against Dealings under the Real Property Act 1900

CAVEATS AGAINST DEALINGS UNDER THE REAL PROPERTY ACT 1900
Justice John Bryson 29 March 2003 (revised)

I am not going to give a complete or well-connected account of the law about caveats. I am going to express some discontents which I feel, as it would be as well that you know that I am not happy about the subject.

There is a lot to be learnt from carefully reading through
(1) Part 7A of the Real Property Act 1900, and
(2) The standard printed caveat form with all the notes printed in it.

The primary operation of a caveat against dealings is stated in s.74H. While a caveat remains in force the Registrar must not, except with the written consent of the caveator record in the register any dealing prohibited by the caveat. What a caveat can be based on is indicated by subs.74F – "Any person who, by virtue of any unregistered dealing or by devolution of law or otherwise, claims to be entitled to a legal or equitable estate or interest in land … ."

A caveat operates in some ways like an injunction; but it operates more powerfully than an injunction; it prevents the transfer of title to a registered interest. The legislative purpose is to provide means to keep the title in its present state while disputes or claims about unregistered interests are fought out.

Another result achieved by a caveat is that it notifies anyone who makes a search of the register and finds the caveat that there is a claim to the interest stated in the caveat. More than that, it gives constructive notice of the claim to anyone who, if he behaved reasonably in his own interests, should search the title. So a caveat can operate in a way which could be called Provisional Registration of the unregistered interest. It is not a legislative purpose expressed in Torrens legislation that a caveat should operate in this way; this operation is a consequence of Courts of Equity absorbing the caveat system into their thinking, particularly their thinking about the influence of notice and constructive notice on equitable interests, and on resolving the competition between equitable interests. It is not only the caveats that actually are lodged and what could have been found out from searching them that enter into a decision about competing equitable interests: not lodging a caveat when there is an opportunity to do so may have an adverse effect on a claim to priority of one equitable interest over another if not lodging the caveat led a person who searched the register and would have found the caveat and learnt what was in it if there had been one, acted to his detriment in some way in which he would not have acted if he had known of the interest claimed. The place of lodging or not lodging a caveat in competitions of priorities of equitable interests is not a subject with which the Torrens legislation expressly deals, except in incidental ways.

The original objects of Torrens legislation included pushing all disputes about equitable interests and other registered interests away from registered title and into the courts, to be fought over by the parties and decided in a forum where outstanding equitable interests do not affect the certainty of title registration. In this scheme of things, caveats are not the permanent or long-term answer to anything. They hold the status quo and give the person claiming an interest an opportunity to establish the interest he claims. The conduct of caveators in litigation seems to show that many caveators and their legal advisors have a different view of a caveat; instead of seeing a caveat as a first step in a course of events directed to establishing whether or not the interest claimed in the caveat really exists, and establishing it in the only realistic way by bringing proceedings in the court, caveators sometimes seem to see themselves as in a position to create an obstruction, and to achieve their ends by holding on firmly until they are removed. This kind of behaviour is something which the caveat mechanism enables people to engage in; but it is not an approach which the courts admire, or endorse. A caveat is not, in the view of the judge, an opportunity to create maximum inconvenience and difficulty with the object of getting paid to withdraw it. A sense that there is leverage and that the trouble being created is much greater than protection of the claim requires is adverse to obtaining a favourable decision.

At one time in the distant past the only course by which a caveat could be removed by a process which started with a lapsing notice was initiated by lodging for registration a dealing, registration of which the caveat forbad. As a purchaser was unlikely to pay his money and take a transfer while he still had to go through that process, the process was not used very often. You can still do this: s.74I. The means of

removing a caveat in the absence of a competing dealing, and the only means, was to apply to the court for an order for its removal. To one like me who did conveyancing work under this former system and later practised at the Bar under it, the present system under s.74J in which there can be a lapsing notice even without a competing dealing is a very considerable law reform. The registered proprietor does not have to proceed in this way: he can apply to the Court straight away: see s.74MA. The time when the registered proprietor needs to establish whether or not there is anything in the claim in a caveat is before he enters into a contract to sell his property, not after, so he initiates the lapsing procedure. Then the Registrar-General sends a notice to the caveator. The caveator has 21 days to apply to the Court for an extension of a caveat; otherwise it will lapse: see subs. 74J(2). You have to do everything before lapse, including persuading the Judge to make the order, taking out the order and lodging an office copy with the Registrar-General.

It is here that the strange stories which try the patience of the judiciary really begin. Surprisingly often counsel initiating an application to extend the caveat tell me that their client does not know exactly when the notice of lapse was received. How a person receiving a notice of such importance could restrain himself from immediately writing a note on the notice recording the date on which he got it, and signing the note, is beyond my understanding. I have to believe although I cannot comprehend that there are people in the world who do not make such notes, because it happens so often. Of all the things that you should have when you apply for an extension of the time available for you to do something, you should certainly equip yourself with an understanding and a clear story about how much time already is available to do it.

Another story that judges are recurringly told is that there was some delay in actually finding out about the lapsing notice because the address to which the notice was sent was an address with which the caveator does not have a particularly close connection. Service and the address for service on the caveator are dealt with in s.74N. In a similar way I do not understand why a person who is making a serious claim, and impeding the rights of another person who owns some property, would not think through the effectiveness of the arrangements made for him to hear about a challenge. The address of the house where one used to live, or of an accountant one used to retain, or of a solicitor who is dead is not a good thing to quote when you yourself have an interest in hearing and finding out that your claim is under challenge. There are variations on these, such as misstating the address, giving the address of one solicitor but losing contact with the solicitor, and the stories can go on; the Judge is not very impressed with any of them as the difficulty has to be weighed against the difficulty for the registered proprietor created by the caveat.

But the crown of all the troubles is making the application at or near the end of the available period. It is very rare for an application to extend a caveat to be made promptly. When 21 days are available, making the application by day 18 is, as applications go, spectacular. To me this does not reflect an adequate sense or understanding of the importance of one's own claim, or of the difficulty it has imposed on the registered proprietor. An attempt to keep one's caveat and one's claim alive is something to which, it seems to me in the abstract, a caveator would attend with alacrity if he sincerely believed in the claim. That is not what usually happens. When someone initiates an application to extend the caveat I usually hear a lame tale of inattention and a poor explanation of the passage of time. I do not want to know that the caveator was in Monte Carlo; if you go overseas you should leave someone in charge of your affairs. I do not want to know that the caveator's favourite solicitor was in Monte Carlo; there is another good solicitor next door; see him, and see him straight away. If you are going to use up any of the limited time available to you, use it purposefully and efficiently to try to arrange matters with the registered proprietor, and if at all possible, settle your dispute; but do not neglect to make a timely application to the court. The unfortunate suspicion you wish to avoid creating is that you are pursuing Fabian strategy and delaying progress, and that obstructing the registered proprietor is part of your object. It is easy to give this impression.

Hanging over all caveat applications, although not always articulated, is the question: "If you think you have a good claim, why have you not sued to establish it, and when and how are you going to?" A caveator should come forward with a concrete answer to the question before anyone has time to ask it. Debating the caveat and not the interest claimed looks like exploiting the process, and so does not clearly stating what the claim is and suing to establish it with alacrity.

What then is a timely application? There is little use in making an application on the last available day before the caveat lapses, or on the day before that. There is a statutory requirement to give notice to the registered proprietor before you make the application. See s.74K and dwell on subs.(3):
(3) Unless the Supreme Court has made an order dispensing with service, it may not hear an application made under subsection (1) unless it is satisfied that all interested parties disclosed by the notice which gave rise to the application have been served with copies of the application before the hearing.

The court cannot waive or ignore this. The court can dispense with service of the notice, but that cannot be done simply to overcome a difficulty created by the caveator's inattention. Dispensing with service is a measure taken where actual service of notice is for some practical reason impossible, or is being evaded. The fact that you have not made proper use of the time available to give notice and bring your application is not a reason why you should get an extension of caveat without giving notice. "All interested parties" could include some mortgagees, or other persons with registered interests, as well as the registered proprietor.

The consequences of not getting an extension, or of allowing a caveat to lapse, are serious because you cannot just lodge another one unless you get the leave of the Court. If you do the Registrar-General will treat it as of no effect. See s.74O.

So if your caveat is really important, you must respond with alacrity to a notice of lapse. You must think straight away about affidavits, counsel and court. Don't hesitate, litigate! Of course, if your caveat is not really important, but was just a pawn in some manoeuvre, you do not need to bother.

There was a marked shift in the Court's response to belated applications in *Wonderland Business Park v. Hartford Lane* [2001] NSWSC 86. The caveator received the lapsing notice on 2 February 2001 and applied ex parte on 23 February 2001 for extension of the caveat. No explanation at all was given on affidavit for not making the application in due time. There was no opportunity of course to issue and serve the Summons, even on short notice, before the Court decided whether to extend the caveat. So the plaintiff did not get an extension, and was left to try what it could do by way of applying, at the return of the Summons, four days later, for an injunction, or for leave to lodge further caveat. In the mean time however the existing caveat lapsed and the registered proprietor was left deliciously free to deal with its own property, not a situation about which the court would feel much concern.

At about the same time, on 22 February 2001 in *Discount Corporation v. Ireland* [2001] NSWSC 81 a lapsing notice was served on 1 February, the application was made ex parte on 21 February, and the Judge was not prepared to make an ex parte extension.

The word should have gone around quickly. A note about this appeared in the April 2001 issue of the Australian Law Journal, 75 ALJ 226; and from the judicial point of view that should have been the end of last minute applications. However it has not been. On 27 April 2001 in *Malouf v. O'Donohoe* [2001] NSWSC 335 Young CJ in Eq took the forbearing course of allowing the caveat to lapse without extension, but giving leave, ex parte, to lodge an identical caveat on condition that it was to be withdrawn on the return day unless the court extended the period. This should have been understood to be an unusual indulgence in the early days of the spread of professional advertence to the implications of s.74K, but it has not been. When I sat as Duty Judge for two weeks in March 2003 there were several applications for extension of caveat, made ex parte and on the last or second last available day, without any real attention being given to the need to give notice of the application. These did not get a sympathetic hearing, although they got varying outcomes, and some achieved modest success in various forms, depending on what evidence they had to show about the strength of the underlying claim.

I would like to spread an understanding, based on published judgments, that the judicial mood is that the Equity Bench does not find late applications interesting, and is not disposed to be helpful. A real claim of justice supported by strong and clear evidence of a prima facie claim to an interest in the land may get some concession, such as leave to lodge another caveat for a few days; but the sands are running out.

I turn to talk about what a caveat can do. A caveat can claim an interest in land; see s.74F. There are a number of permutations in s.74F, but at the centre is a requirement that a caveat claim an interest in land. As you should know, King Charles made a very good law which said that an interest in land has to be put in writing. If a caveat has any real claim on attention it will refer to an instrument in writing; the printed form says that it should. The judge will ask: where is the instrument? Where is the stamp? A caveat is not a good vehicle for advancing some claim which is not distinctly established by a written instrument, but is beyond the shadowy boundary between equitable interests in land and mere equities such as claims to set aside transactions on the ground of undue influence, mistake, claims for rectification, and other claims which are not so much a claims that an equitable interest already exists as claims that, if a Court of Equity looks at some complex facts, it ought to decide that the plaintiff should be given an interest. What you need to advance a claim like that is not a caveat; you need to commence your proceedings straight away, without delay, claim what you want to claim and apply for an interlocutory injunction to restrain dealings. In effect a caveat operates as an interlocutory injunction

which the caveator grants to himself. In fact it has more powerful operation than an injunction, because it even prevents a transfer of title by registration by a registered proprietor who is prepared to disobey an injunction. If a caveat is to be extended the court considers much the same matters as fall to be considered on a claim for an interlocutory injunction. The strength of the plaintiff's prima facie case and the balance of convenience are prominent subjects for consideration. Another subject for consideration is the protection given to the registered proprietor for any loss caused by maintaining the caveat if it should turn out that the registered proprietor should not have been impeded in that way. Caveators and those who represent them do not seem to have much perception of the risk of paying damages under s.74P if a caveat is maintained. This risk ought to be borne in mind when engaging in some manoeuvre of which a caveat is part. It may well have some influence on the decision of a judge on an application to extend a caveat; just as the Judge will consider whether an interlocutory injunction can be supported by an undertaking as to damages, and whether if the damage happens the undertaking is likely to be complied with, the Judge may well consider how much reality there is in the protection available to the registered proprietor. This is a proper subject for counsel for the registered proprietor to bring under consideration; if the caveator has no money and no prospect of paying any damages, the Judge will not necessarily refuse protection for that reason; but it is something that the Judge ought to know.

The Court looks at the substance of the claim. The whole caveat process is procedural and ancillary. The main conflict is somewhere else – not in whether or not a caveat can be maintained, but in whether or not the interest claimed actually exists and should be enforced. If there is an elaborate dispute about the caveat the Court will develop a sense that the controversy has gone off the rails.

In former days the claims made in caveats were examined with some technicality, but that is no longer appropriate having regard to s.74L. It is still appropriate however to address the substance of the plaintiff's claim. This not only goes to what is in the document which creates the alleged interest in land; the Judge is also interested in the value of the plaintiff's claim, and in the impact of the caveat on the registered proprietor's interest. At this point I will say how amazing it is what people will agree to give charges over their land for. People sign agreements with builders which have the effect of giving the builder a charge over the land on which the property is being built for any claim which the builder might ever make; sometimes they give the builder a charge over all land owned by the building owner. I do not understand what can be in the minds of people who agree to retain mortgage brokers and sign a document giving the mortgage broker a charge over all their property; but they do. In *Narui Gold Coast Pty Ltd v. Charles Harrison Pty Ltd* [2003] NSWSC 35 the vendor had agreed in a contract of sale to this: "35.1 The Vendor hereby agrees to grant the Purchaser a charge over real property of which it is registered proprietor to secure the Purchaser's rights to any indemnity or indemnities which the Purchaser has or becomes entitled to under this contract." This appears to give, immediately, a charge over all land whatever of which the vendor was registered proprietor, whether or not any right to an indemnity had accrued. In any event, the caveat had to be maintained because an argument to that effect had substance. This proves, I would think, that people will sign anything. A written document creating a perfectly good, unarguable charge over a huge amount of land will not necessarily lead the Judge to allow a caveat to continue over the whole of the property. The Judge is interested in how much the claim realistically is, and will consider limiting the land restricted to enough money to secure it; or requiring the caveator to accept a charge over a fund of money paid into court or held by solicitors, instead of any charge over land. You can expect to find some sensitivity against excessive use of caveats as more than security but as measures of coercion.

A curious development has been that people have begun to give written agreements not so much as an agreement to create an interest in land, such as a charge or other security interest, but an agreement that some other person may lodge a caveat. I believe that this is what is known in Logic as a Pure Referent. What is wrong with this is that an agreement allowing a caveat to be lodged is not one of the things for which s.74F authorises a caveat to be lodged. There are variations of this; an agreement in clear words to grant a charge or other interests accompanied by an agreement that a caveat may be lodged is not hard to understand, but if the only thing dealt with is the agreement to lodge a caveat, the caveator depends on finding some implication that there was an intention to create a caveatable interest in land. There have been variations; in some cases the registered proprietor has actually signed the caveat, not always in an appropriate place. A series of cases about odd situations like these begins with *Troncone v. Aliperti* (1994) 6BPR 13291. A recent example was *Thu Ha Nguyen v. Larry Quock Huy On* [2003] NSWSC 50 (17 February 2003). The emergence of this approach expresses an attitude in which a caveat is an end in itself and a security, not a means of enforcing some other right. I do not think that a human mind could invent the idea of security consisting only of an agreement that a caveat may be lodged, unless it had already formed patterns of thought around the use of caveats for obstruction and pressure, rather than ancillary to establishing rights.

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Print Page Close Window

Easements ordered by the Court - s.88K of the Conveyancing Act 1919.

Easements ordered by the Court – s.88K of the Conveyancing Act 1919.
Justice John Bryson 11 October 2002
Paper delivered at 2002 Environmental Law Conference.

1. Although there can be many kinds of easements, those most usually encountered relate to rights of way or access for defined purposes. Under the Common Law there is no reasonable-need exception to the right of the owner of land to exclude entry by others, and no exception for ephemeral trespasses. Boundaries are absolute. City development to the boundaries requires use temporarily of space owned by someone else. Even an ephemeral event such as passage of a crane jib and load from the truck in the street over a corner of the neighbour's land, it may be many metres above his roof, to a rising construction site is a trespass; and so are momentary passages beyond the boundary as windows or cladding are fixed to the outer surface, and the projection of formwork, essential under Work Safety legislation, beyond the boundary while structure is erected up to the boundary. The common law left the developer to deal with his neighbour and make the best bargain he could to obtain licence to carry out short term or ephemeral operations; the neighbour was in a position to levy a toll or to charge whatever he could for his permission, with no legal control over what he might demand, and no regard to whether the invasion caused him any economic loss or injury, or whether he had any other opportunity to collect payment for use of his space. The neighbour could refuse to co-operate for any reason he liked: dislike of the new development, personal animosity and settling old scores, or whatever reason he thought good enough.
2. The neighbour could expect to obtain an injunction to restrain trespasses if they were likely to continue, and attempts by courts to use the discretion to grant or withhold an injunction as an opportunity to regulate access and determine the appropriate toll were not successful. The court does not have power to licence a trespass, so that if the court attempted to control the situation by withholding an injunction on terms that an amount be paid as compensation for the trespass as determined by the court, the neighbour who failed to obtain an injunction could still resist invasions in other ways, for example by imposing barriers, or tearing down formwork and throwing it back over the boundary. There was no real protection for the developer in making an agreement with the neighbour and obtaining a contractual right to access, as Australian courts would not enforce a contractual right of entry by injunction (*Cowell v. Rosehill Racecourse Co.* (1937) 56 CLR 605. English courts take a different view). Developers were left to rely on negotiations and diplomacy, and some did not find this easy; their habits were formed in a different direction and they tended to press on with operations anyway and grapple with the neighbour's injunction claim when it came. Some neighbours had just been given a lesson in obstructive behaviour by the developer himself when the neighbour built his own building. Litigation usually arose at the worst time for the economics of a development project. For an illustration of the difficulties for builders in the old state of affairs see my judgment in *Bendall Pty Ltd v. Mirvac Project Pty Ltd* (1991) 23 NSWLR 465.
3. There are now 3 pieces of legislation which completely change the scene. The first was s.88K of the Conveyancing Act 1919, which came into effect on 15 December 1995. Copy attached. There has been a steady flow of applications under s.88K to the Equity Division; about 30 or 40 of them. Some dealt with temporary access during construction. Others dealt with permanent rights of way, and with permanent rights to drainage or utility services. Typically applications relating to permanent access seek to legitimate long term but anomalous usage. It is unlikely that Equity judges would, within the confines of s.88K, be ready to make large alterations to property rights.
4. The second legislative intervention was the Access to Neighbouring Land Act 2000, which commenced on 1 January 2001. This enables Local Courts to make orders permitting access to adjoining land for the purpose of carrying out work on the applicant's own land, or for carrying out work on utility services on adjoining land. As far as I know there have been no reported cases on this legislation. Applications for access orders are made to the Local Court with appeal on questions of law to the Land and Environment Court. This legislation addresses temporary access. Most applications for access for the purpose of carrying out building work or development will be made under this relatively simpler procedure, so that it is likely that the Equity Division will hear somewhat less of s.88K from now on. This Act is directed to access for a number of purposes, not just building and development work – see s.12. Disputed applications relating to scaffolding or other temporary works or access during building operations have sometimes become the means of ventilating bad neighbourly relations. Availability of procedure in the Local Court should reduce incentive to approach access questions in the confrontational style, to seek to levy large tolls or to refuse co-operation.
5. The third legislative intervention is the new s.40 of the Land and Environment Court Act 1979, contained in Schd.1 to the Land and Environment Court Amendment Bill 2002, which passed through Parliament on 25 September and was assented to on 2 October 2002. Copy of s.40 is attached. This

gives the Land and Environment Court generally similar powers to powers under s.88K; clearly s.88K was the drafting model. There is nothing in the nature of cross-vesting of jurisdiction or reducing the jurisdiction of the Supreme Court. Subsection 40(1) means that the Land and Environment Court can only act in very limited circumstances, where it has determined to grant development consent on an appeal. The application may not be made unless and until the LEC has determined to grant development consent on the appeal; it will not be possible to consider the question whether the development consent should be granted and the question whether the easement should be imposed in the same hearing or otherwise concurrently. Section 40 contains some procedural provisions not found in s.88K. Under subs.(3) jurisdiction is exercisable only by a Judge. Under subs.(4) the Court is required to notify the owner of the land affected and (subs.(5)) consider any objection. This will create difficulties where, as has occasionally happened under s.88K, the owner of the land cannot be located; in that case the best course is to apply to the Supreme Court.

6. Some attention needs to be given to identifying the appropriate defendants to an application under s.88K. The owner of the burdened land obviously must be a defendant if the owner can be identified. Each other person with a registered interest, such as a mortgagee or lessee, should ordinarily be a defendant because that person's compensation must be considered by the Court. (However the Court may not require a person who consents, or has made an agreement on compensation, to be joined as a defendant). In s.40 subs.(4) and (5) deal with notification to owners and consideration of their objections. There may be other persons interested in the servient land, such as mortgagees and lessees, whose interests should be considered.

7. Applications for easements are unlikely to be simple or routine applications. There have to be reasonable attempts to obtain the easement – all reasonable attempts – so the proceedings cannot be opened by serving a Summons with an early return date. The situation does not lend itself to urgent handling. The structure of s.88K points to the principal issues. These are:

(1) Reasonably Necessary – whether the easement is reasonably necessary for the effective use or development of the benefited land – subs.88K(1)

(2) Discretion – the impact of making the order on the burdened land, its owner or other persons is not mentioned but is relevant because the power is discretionary – subs 88K(1).

(3) Public Interest – the Court must be satisfied that use of the land in accordance with the easement will not be inconsistent with the public interest – subs.88K(2)(a).

(4) Adequately Compensated – the Court must be satisfied that the persons interested in the burdened land can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement – subs.88K(2)(b). Power to order payment of compensation appears in subs.88K(4).

(5) Reasonable Attempts – all reasonable attempts have been made to obtain the easement but have been unsuccessful – subs.88K(2)(c).

(6) Form of Order – The plaintiff must bring forward a form of order defining the easement with particulars – subs.88K(3) and subs.88(1). The order is to provide for payment of compensation (to persons who may or may not all be parties).

8. I will review, on the basis of the cases known to me, the way in which these issues have been approached and problems which they have exposed. Section 88K authorises the compulsory imposition of an easement; diminution of property rights, and not in favour of the public but for the owner of other property rights. The court is careful to act within the limits of its powers, and no less careful when asked to alter property rights. This affects the court's approach to the Reasonably Necessary issue and the Discretion issue, which are frequently contested. The proposed easement has to be reasonably necessary, not absolutely necessary. The necessity has to be sufficient to outweigh the proprietary rights of the servient owner, and to outweigh any disadvantages created by imposing the easement. In an early case, *Tregoyd Gardens Pty Ltd v. Jervis* (1997) 8BPR 97688 Hamilton J referred to the need for firm proofs of reasonable necessity. Hamilton J described subs.(1) as the governing subsection. Hamilton J approached reasonable necessity as a factual matter and appraised the alternatives to an easement which had been referred to in evidence. In *Hanny v. Lewis* (1999) 9BPR [97782] Conv.R 55879 Young J referred to the need to bear in mind that "… the court should not lightly interfere with the property rights of the defendants." There are similar references in most judgments under s.88K. This does not mean however that the court overstates the test of reasonable necessity.

9. In *117 York Street Pty Ltd v. Proprietor Strata Plan 16123* (1998) 43 NSWLR 504 at 508-509 Hodgson CJ in Eq stated:

In my opinion: (1) the proposed easement must be reasonably necessary either for all *reasonable uses or developments of the land, or else for some one or more proposed uses or developments which are (at least)* reasonable *as compared with the possible alternative uses and developments; and (2) in order that an easement be reasonably necessary for a use or development, that use or development* with *the easement must be (at least) substantially preferable to the use or development* without *the easement.*

10. These tests are not highly concrete, but what they express will probably be followed and applied. His Honour also said "… what is reasonably necessary is use or development of the land itself, not the

enjoyment of the land by any of the persons who, for the time being, are the proprietors." Personal tastes of the applicant have no weight.
11. In *Hanny v. Lewis* Young J said "… the Act does not require that there be absolute necessity, as with an easement of necessity, but the need must go beyond merely desirability …" and "It is to be noted that what is reasonably necessary is use or development of the land itself, not the enjoyment of the land by any of the persons who, for the time being, are the proprietors."
12. Several applications have been lost on the reasonable necessity issue. See *O'Mara v. Gascoigne*, *Gratton v. Simpson* [1998] 9BPR [97741], *Hanny v. Lewis*. The discretionary ground was acted on in *O'Mara v. Gascoigne* [1996] 9BPR [97718]. The considerations acted on appear also to have been relevant to the reasonable necessity issue; see 16358. The impact of the proposed easement on the use and value of the servient land was a discretionary consideration addressed in *Blulock Pty Ltd v. Majic* [2002] NSW ConvR 56102.
13. The claim of reasonable necessity may be related to a particular development for which development consent has not yet been obtained; the order under s.88K may be conditional on obtaining consent; this happened in *117 York Street.* Naturally enough there is often a close relation between conditions of a development consent and the need to obtain an easement. It may be necessary to impose detailed controls on the manner in which the work is carried out. This may be done by incorporating appropriate conditions in the easement itself, or by requiring undertakings or imposing terms in the court's order. Foster AJ required undertakings in *King v. Carr-Grreg* [2002] NSWSC 379. However an application under s.40 will be closely related to the consent which the LEC has just granted on appeal. It seems unfortunate that s.40 will not enable consideration of development consent and the easement to be closely integrated.
14. I have not identified any case which has turned on the Public Interest issue, although it has been referred to several times. Public Interest would be involved if a proposed use or development was illegal. Public interest was debated in relation to fire safety and health of occupants in *Katakouzinos v. Roufir* [1999] 9BPR [97796]. Public Interest could be involved if the proposed easement would sterilize the servient land by preventing it from being used or developed or by seriously compromising its use or development. There is a public interest in land being used in an effectual way and not sterilized; this is reflected in the provisions of s.88K overall. Public interest in use of both dominant land and servient land seems to be referred to by 88K(2)(a); however there are conflicting dicta. In *117 York Street* Hodgson CJ in Eq said that subs.88K(2)(a) referred to the dominant land; this differed from Windeyer J in *Goodwin v. Yee Holdings Pty Ltd* (1997) 8BPR 15795 who referred to the servient land. No case has turned on the distinction, and it seems well possible that the reference is to both. The question will become important when a substantial argument about public interest is presented.
15. Adequately Compensated is the second major issue. Compensation questions have not usually involved very large amounts. They often pass without detailed consideration of the valuing principles involved, although it is usual to produce a valuer's report. Arguments about compensation can get out of hand. In *117 York Street* a five day hearing led to an order for $23,000. Without s.88K the servient owner could be expected to negotiate for what the traffic would bear, for however much the dominant owner would pay for an easement rather than give up his ideas about use of his own land. This can be characterised as levying tolls, or rent-seeking. The issue under s.88K is completely different. In *117 York Street* one argument was that the loss of the bargaining position which the servient owner would have had if s.88K had not been enacted was a disadvantage which should be compensated for; the Court rejected this argument, and rejected a claim based on the reduced cost to the plaintiff of working with the crane the easement would authorise instead of an internally located crane. It is necessary to identify any loss or other disadvantage that would arise from imposition of the easement, and then to address how that loss or disadvantage can be adequately compensated for. Temporary easements to allow access, or the passage of cranes through airspace during building work, may not in the future be dealt with under s.88K or s.40, but if they are, compensation may require more than just assessment and payment of a lump sum. Adequate compensation may require provision of insurance, or of a fund or performance bond to make sure that if risks are realised the damage can be paid for. I have not encountered any detailed consideration other than assessment of a lump sum. In principle it seems possible that there may be a need to provide for compensation to be paid in the future for loss or disadvantage which is contingent on future events.
16. Special circumstances in which compensation is not payable, referred to in subs.88K(4), were considered in *Wengaran Pty Ltd v. Byron Shire Council* [1999] 9BPR [97768]. Special circumstances are not elements in determination of quantum; they are reasons why the quantum should not be paid. Young J did not define special circumstances and a definition does not seem possible, but in relation to what was put forward in that case his Honour's decision was based on the view that the defendant was not blameworthy and there were not special circumstances. Young J was of the view that "the compensation is not a substitute for the price that could have been exacted if the section did not exist: *SJC Construction Co. Ltd v. Sutton London Borough Council* [1975] 29 P&CR 322 at 326, a decision of the English Court of Appeal."
17. Young J said (p16989) to the effect that ordinarily the compensation will be:
(a) Diminished value of the affected land.

(b) Associated costs caused to the owner;
(c) Compensation for insecurity, loss of amenities, such as loss of peace and quiet; and
(d) Compensating advantages if any are to be deducted.
This table was followed and applied in *Mitchell v. Boutagy* [2001] 118 LG ERA 249 at 256. Austin J reviewed the legal principles in case law to date on compensation; 256 to 258. Among other things he said "It is well-established that the loss or disadvantage for which compensation is provided in s.88K does not include the loss of the bargaining position that the owner of the servient tenement would have had if s.88K had not been enacted …".
18. Reasonable Attempts. The principal issue in the first case under s.88K, *Coles Myer NSW v. Dymocks Book Arcade* (1996) 7BPR [97585] was Reasonable Attempts. Simos J showed that in his view it was not necessary for the plaintiff to show willingness to meet any demand which was not exorbitant or to show that failure of negotiation was caused by the intransigence of the defendant, or that the plaintiff had shown willingness to negotiate exhaustively to consensus, or that the court should have regard to everything that the plaintiff could possibly have done to achieve consensus. Simos J's view was that the court should consider what had happened in the negotiation and then make a judgment on the basis of the whole of the circumstances of the case as to whether or not the court was satisfied that the plaintiff had made all reasonable attempts to obtain the easement. When finding the facts he said that as the date of commencement of the proceedings "… it was extremely unlikely that consensus would be reached in the foreseeable future in respect of all those differences …" and this was the key finding. Since then appraisal of the plaintiff's reasonable attempts has not usually been a prominent issue in s.88K applications.
19. Applications under s.88K have exposed various incidental problems. Depending on its terms, express or implied, an easement may entitle the dominant owner to carry out works on the servient land, with a need to apply for some consent for those works, and to obtain the authority of the servient owner to make the application. In *117 York Street* an obligation to give a consent for a development application was made a term of the easement.
20. *In Re Permanent Trustee Australia* (1997) 8BPR [97659] an easement was claimed to erect fire stairs over Queens Lane, a City laneway for which there was no identifiable owner; the last owner identifiable in the General Register of Deeds was a long-vanished bank which received the land in 1843. The court ordered the easement and accepted an undertaking to pay adequate compensation to the owner of the burdened land, and any owner who ever emerges was given leave to apply. This kind of problem has recurred: *Kent Street Pty Ltd v. Council of the City of Sydney* [2001] 10 BPR [97889]. The unidentifiable owner of the lane is not the only person to be considered; other persons having registered easements over the lane may be entitled to notice under s.40(4).
21. *In Hanny v. Lewis* (1998) 9BPR [97702] the plaintiff had a right of foot way which could only be used by erecting stairs or building an inclinator; Young J did not regard the inclinator as reasonably necessary. He also said "It is in the public's interest that land-locked land be utilised" and "In almost every case the court would expect some monetary offer to be made …".
22. *Marshall v. Wollongong City Council* [2000] 10 BPR [97836] had some unusual aspects. The plaintiff's housing lot had frontage to a plan road which was too steep to be usable. The plaintiff sought a right of way over a strip of land which had actually been used for access for over 50 years. The land was zoned 6(a) Public Recreation, and was community land so the Council had no power to dispose of it. This limited the Reasonable Attempts issue because it was not possible for the Council to grant the easement sought. The limits in s.s45 and 46 of the Local Government Act 1993 on the powers of the Council to deal with land did not limit powers of court under s.88K; but they were an important consideration. I ordered the easement, in effect ratifying access which had actually been used for over 50 years, but I tried to discourage the idea that pieces of park land can readily be made available for grant of easements to assist development projects.
23. Costs. Subsection 88K(5) makes a special provision about costs, echoed in subs.40(8). This creates a position markedly different to the general discretionary power to order costs under s.76 of the Supreme Court Act 1970. Where easements and restrictive covenants are modified under s.89 of the Conveyancing Act 1919 the practice has been strongly in favour of ordering plaintiffs to pay the costs of other parties. Under s.88K a defendant can say there is a statutory right to an order for costs, which a plaintiff must displace. Even where defendants have fought long and hard without success they have almost always recovered costs orders. The way the case was conducted led to a qualified costs order in *Goodwin.* In *117 York Street* Hodgson CJ in Eq. said "… unless one can characterise the defendant's conduct as unreasonable, and in particular as unreasonably bringing about legal costs or increased legal costs, then the prima facie result contemplated by the statute would follow." Short of active misconduct by defendants, plaintiffs can expect to have to pay the costs of all parties. It would be difficult to show that the defendant acted unreasonably in resisting the application: the defendant is always seeking to uphold his legal rights.

CONVEYANCING ACT 1900 – S.88K

88K Power of Court to create easements

(1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.

(2) Such an order may be made only if the Court is satisfied that:

(a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and

(b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900* can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and

(c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

(3) The Court is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88 (1) (a)–(d) as are appropriate and is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23. The terms may limit the times at which the easement applies.

(4) The Court is to provide in the order for payment by the applicant to specified persons of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case.

(5) The costs of the proceedings are payable by the applicant, subject to any order of the Court to the contrary.

(6) Such an easement may be:

(a) released by the owner of the land having the benefit of it, or

(b) modified by a deed made between the owner of the land having the benefit of it and the persons for the time being having the burden of it or (in the case of land under the provisions of the *Real Property Act 1900*) by a dealing in the form approved under that Act giving effect to the modification.

(7) An easement imposed under this section, a release of such an easement or any modification of such an easement by a deed or dealing takes effect:

(a) if the land burdened is under the *Real Property Act 1900*, when the Registrar-General registers a dealing in the form approved under that Act setting out particulars of the easement, or of the release or modification, by making such recordings in the Register kept under that Act as the Registrar-General considers appropriate, or

(b) in any other case, when a minute of the order imposing the easement or the deed of release or modification is registered in the General Register of Deeds.

(8) An easement imposed under this section has effect (for the purposes of this Act and the *Real Property Act 1900*) as if it was contained in a deed.

(9) Nothing in this section prevents such an easement from being extinguished or modified under section 89 by the Court.

LAND AND ENVIRONMENT COURT ACT

[10] Section 40

Omit the section. Insert instead:

40 Additional powers of Court-provision of easements

(1) If the Court has determined to grant development consent on an appeal under section 97 of the Environmental Planning and Assessment Act 1979, the appellant may apply to the Court for an order imposing an easement over land.

(2) The Court, on application under subsection (1), may make an order imposing an easement over land if it is satisfied that:

(a) the easement is reasonably necessary for the development to have effect in accordance with the consent, and

(b) use of the land having the benefit of the easement will not be inconsistent with the public interest, and

(c) the owner of the land to be burdened by the easement can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and

(d) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

(3) The jurisdiction of the Court to make an order under this section is exercisable only by a Judge, whether or not sitting alone.

(4) Before making an order under this section, the Court must notify the owner of the land affected by the proposed easement (other than an owner who is a party to the proceedings before the Court), and the owner of any land on which it may be necessary for works to be carried out in connection with the easement (other than such a party), of the proposed easement or works, or both.

(5) An owner of land affected by the proposed easement and an owner of land on which it may be necessary for works to be carried out in connection with the easement:

(a) may object to the proposed easement or works, and

(b) is entitled to appear before the Court in support of the objection.

The Court must consider each objection.

(6) The Court:

(a) is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88 (1) (a)-(d) of the Conveyancing Act 1919 as are appropriate, and

(b) is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23 of the Conveyancing Act 1919.

The terms may limit the times at which the easement applies.

(7) The Court is to provide in the order for payment by the applicant for the order to such persons as the Court specifies of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case.

(8) The costs of the proceedings, in so far as they relate to an order sought or made under this section, are payable by the applicant for the order, subject to any order of the Court to the contrary.

(9) An easement imposed under this section:

(a) may be released by the owner of the land having the benefit of it, or

(b) may be modified by a deed made between the owner of the land having the benefit of it and the persons for the time being having the burden of it (or in the case of land under the provisions of the Real Property Act 1900) by a dealing in the form approved under that Act giving effect to the modification.

(10) An easement imposed under this section, a release of such an easement or any modification of such an easement by a deed or dealing takes effect:

(a) if the land burdened is under the Real Property Act 1900, when the Registrar-General registers a dealing in the form approved under that Act setting out particulars of the easement, or of the release or modification, by making such recordings in the Register kept under that Act as the Registrar-General considers appropriate, or

(b) in any other case, when a minute of the order imposing the easement, or the deed of release or modification, is registered in the General Register of Deeds.

(11) An easement imposed under this section has effect (for the purposes of the Conveyancing Act 1919 and the Real Property Act 1900) as if it were contained in a deed.

(12) Nothing in this section prevents such an easement from being extinguished or modified under section 89 of the Conveyancing Act 1919.

(13) In this section, ***owner*** of land includes a person having an estate or interest in the land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the Real Property Act 1900.

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Henry II and the English Common Law

Lecture:
Henry II and the English Common Law.
Justice John Bryson.
Plantagenet Society of Australia. 20 July 2002.

The personality of Henry II, his great energy and aptitude, the length of his reign and the success of his kingship have made him the subject of fascinated attention for eight centuries, usually revolving around his conflicts with the church and with Thomas Beckett, the close associate and Chancellor whom he caused to become Archbishop of Canterbury, followed by years of severe conflict which the king did not foresee and a tragic outcome for which he has largely escaped historical responsibility. King Henry has also claimed attention because of the breadth of his dominions and powers, the energy with which he maintained them, and the conflicts in his personal life with Queen Eleanor and with his sons. I am not concerned so much to speak about his personality and political career as to depict something of the law of England as it was in his time, and of the impact he made on it, and to point to some threads of connection between the law of his time and the continuous development of the English Courts of Common Law and of the Common Law under their care. Uninterrupted threads of development can be seen from his time to our own and from England to the law in Australia, and undercurrents of continuity lie beneath unrecognisable transformations in the form and function of institutions over centuries.

It is perilous to point to a particular time or event as the point when some institution began. It is always possible to find something which was there earlier and to say that what took place was a development of it. Henry II can be given large credit for the development of a royal court staffed by professional judges and functioning throughout England in regular circuits. He also had a large part in making trial by jury one of the institutions of the common law. He promoted the continued existence of properly staffed courts which were not assembled to meet the needs of a particular controversy but functioned as a regular part of the government of the country, and by doing so he promoted the development of the common law of England. However it cannot be said that he invented these institutions.

King William and his Normans in conquering England claimed to be acting as of right, with a show of legitimacy for William's claim to be the ruler of England, supported by a commission from the Pope, and while their conquest was extremely disruptive of English society, it was the Normans' claim that it was not, and that local institutions were continued.

I will give a speculation on what arrangements may have existed for government in a Germanic war band as they swept across the frontier which the Romans had held for centuries, defeated the unpaid and dispirited legionaries and settled themselves in the territory of the empire, not thinking that they had destroyed the world of government and prosperity, but supposing that even though they behaved as they did, they could enter it and share its benefits. What a disappointment! The war band may not have had a king, but it can be supposed that they gathered around a leader, or a few leaders of strong arm and nimble wit, in a band composed of about a hundred warriors. If there are more than that the organisation is incoherent, fewer and no-one takes any notice of you. As a speculation, bands like these formed the Angles, Saxons and Jutes who conquered England and settled in it; a band or hundred found its own district, and many hundreds joined together formed a small kingdom under the headship of a king, or of an under-king or subregulus. By processes which are no longer known, England came to be divided into shires and hundreds; each shire having been, at least in theory, at one time a small kingdom or having been cut up out of one. To shear or cut up is one of the etymologies offered for "shire", although not favoured by the Oxford English Dictionary.

By the time of the Conquest much of England was divided into shires and counties which were continuing political entities and had existed for centuries, and conducted much of their own government, under the control of a Royal officer, the reeve or sheriff. In many ways the county governed itself; the men of the county assembled fairly frequently, twice or perhaps four times a year, and under the presidency and activity of the sheriff collected taxes, placated the king's demands and resolved disputes; as far as there was a court, the county, that is the assembly of the men of the county under the presidency of the sheriff, was the court. Each shire had its own folk-ways, traditional rules, customs and liberties. Law was not uniform and there were no institutional processes which worked for uniformity throughout England. Kent had markedly different law on entitlement to land on the death of its owner to other counties. Some districts including some boroughs had a different system

again. The eastern counties which had been settled by Danes had different customary law to shires where English settlement had taken place much earlier.

The county was not the only court. The men of each Hundred formed a court, a smaller version of the County Court. The king could impose justice when so minded, and he decided what was just before so doing, but it is unlikely that there was much consciousness of a line between royal justice and politics. Many other institutions administered justice; custom, past royal grants and asserted royal grants in the distant past created many instances when local magnates or local bodies exercised powers to punish offenders and redress wrongs. Many magnates and many towns and districts had liberties, that is, powers to punish, for example murderers caught red-handed, or thieves caught with stolen property on their persons, and they acted without anything which we could recognise as a trial or hearing. According to the old English law, the outcome of most criminal cases in the county court, and in any other of the courts which claimed power over criminal cases was to ascertain and require the payment of the appropriate compensation, which could be an extremely complex affair, based on laws and scales of compensation which originated in Anglo-Saxon times, very various, local, and highly dependent on circumstances. When the compensation was ascertained it was to be paid; if it was not paid, the accused would be enslaved, hanged or mutilated. There were few certainties about criminal justice.

It was a Norman claim that they continued English law as it was at the time of King Edward's death. In 1072 a sitting of three days of the County Court at Penenden Heath in Kent heard many disputes about land ownership between Bishop Odo, Earl of Kent and Archbishop Lanfranc, both Normans. The assembly met for several days of debate in which, in some way in which we cannot clearly see, the rights in question were argued out or reasoned out. People who were said to know the law were brought from great distances to contribute to the debate. Bishop Geoffrey of Coutances was appointed by the King to preside.

The Normans brought with them and imposed an institution largely new, interpreted and named in retrospect as feudalism. The perception that there was a feudal system and that it was imposed with the Conquest is a perception formed centuries later. To the conquering Normans nothing was more natural than that English nobles who resisted them should forfeit their land, and that William should grant it again to people on whom he could rely. William was the rightful ruler and English owners who resisted him were rebels and outlaws. The process of conquest was not completed at Hastings and continued for some years; not all English noblemen who held land forfeited their land; but most of them did. After a generation there were very few of them left, and for practical purposes all persons of wealth power and influence were Normans or as they referred to themselves, French. Although this is not exactly what happened, the legal theory of the Normans was that with the Conquest William had become the owner of all land in England and that he granted it out to his own tenants in chief, who were in a bond of faith with him. His tenants in chief entered into feudal bonds with him supported by oaths on sacred relics, by which the tenant in chief became William's man, swore fealty to him, received a grant of land and promised to render service to the king. The advantage to the king was that he had a loyal follower who had an interest in the peace and prosperity of the land granted, and had an obligation to provide service to the king, assisting the king to fight his wars and maintain his kingship. The most usual service was knight service, the duty of the landholder to serve the king, arrayed as a knight, when the king required his services. The obligation was not limited to the personal service of the landholder himself. William had about 180 tenants in chief and each of these owed the service of an established number of knights, sometimes as many as 100 and sometimes one or two or some small number, usually in multiples of five, depending on what military force the land granted could be expected to support.

In later times services of other kinds became common, such as acting as the king's chamberlain or as his marshal, or taking some other high responsibility in the kingdom, or humbler services, as an example of humility, providing a sergeant for the whores of the king's army, Pimp Tenure, or nominal services, providing a horseshoe or rose annually, or a peppercorn. But in the age of the Conquest what the king required was armed knights, not the graces of life, and a grant of land for knight service meant what it said. In a part of England which was relatively peaceful a tenant in chief could get on with managing his manors, maintaining his knights and his family, and living off his property; but the closer a manor was to dangerous territory such as Yorkshire, Scotland or Wales, the more continuous would be the need to be in arms and to fight. A landowner must maintain knights to accompany him and to perform his service. In the earliest days the knights maintained were horse soldiers of practically no means and no great dignity; and the word "knight" comes from an English word which referred to a young retainer. Most of them must have been violent savages lacking grace or wealth, rapacious, dangerous to be near and poor company to anyone who was not very much like them. The summit of the ambitions of a landless knight was to gain recognition for success in conflict and be rewarded perhaps by a grant of land, perhaps by marriage to an heiress or widow; widows were plentiful. A more

realistic ambition would be to survive his next conflict and steal something valuable. The Latin word for knight, 'miles' meaning soldier, is a clear indication of what a knight was. The age of chivalry still had not happened, if it ever happened. Conflicts were frequent, with the Scots, with the Welsh and within England. There were rebellions, and the North of England was a recurring scene of savage conflict.

King William granted land to or accepted direct feudal relationship with about 180 tenants in chief. The size and value of the holdings of tenants in chief varied greatly. The greater tenants in chief usually held land in a number of parcels, scattered widely in different parts of England. Many also had fiefs in Normandy; kings of England were often Dukes of Normandy although there was no necessary connection and at times they were separated. The larger holdings were sometimes called Honours, sometimes Baronies. To own one was to be committed to ceaseless activity to manage one's property and defend it in a tumultuous society where borders were ill-defined, border fighting was continual, rebellions happened recurringly and there were sudden conflicts in association with successions to the crown. There was some logic in having widely separated manors, some in relatively peaceful areas. To get the economic benefit and to protect them, the owner was committed to travel. In particular the king was committed to travel around his dominions to use the resources of his own scattered manors, and to exert his presence and power. Two or three times a year the king would display himself at an assembly of the powerful, wear his crown in public and attend to public business. On these occasions, and no doubt on any occasion when access to him could be gained, claims would be made for the exercise of his power to redress wrongs and achieve justice.

In the logic of feudalism, the person to whom the king has granted land, who has entered into a bond of homage and fealty, is the only person who can own that land; if that person rebels or dies, the king has no tenant and can keep the land or dispose of it. This logic never worked in all practicality. In the logic of feudalism, land could not be sold: the feudal bond between feoffee and lord was personal. But sales took place, in the form of surrender to the king and regrant to the buyer; so the king was a party to the sale, and his participation was purchased with some advantage to him. Or sales took place as purely personal arrangements: if the purchaser was challenged he called on his vendor to warrant his title, as to the rest of the world the vendor was still the owner. Tenants in chief who rebelled or committed other crimes against the king ended their feudal bond and forfeited their land; the king could retake it if he had the power. Many tenants in chief forfeited their estates through rebellion or unfaithful behaviour; a powerful man faced many conflicts, particularly if he held land in several different kingdoms, or held land in England and in Normandy at a time when they had different rulers. But Norman barons, like other people, wish to have their lands available after their deaths to provide for their widows and daughters and to descend to their sons. If society is to function and loyalty is to be gained, this wish has to be granted. The logic of feudalism could not prevail, and it was the custom, or the law, or something in between, that the king had to accept the heir of his deceased tenant in chief if the heir would also do homage, swear fealty and make a large payment, called a relief, to be accepted as the new tenant in chief. Where the son and heir was a minor, or where the deceased left a widow or daughters, they were in the king's wardship, the king would care or make provision to care for the minor, collect the revenue, and when he reached a suitable age, collect a relief and admit him as the new tenant in chief; or would arrange for the marriage of the widow, or arrange for daughters who were heirs to be married to some person who could be relied on as tenant in chief. A claim that an heir has rights which the king must recognise is a challenge to the king's own interests; he wants the land to be held by someone capable of fighting for him, not by the tenth possessor of a foolish face. Laws identifying heirs and their rights grew slowly, and the succession to the crown in Norman times illustrates that there were not settled rules identifying with certainty who the heir was, or dealing with such cases as where a man is survived by daughters, but has a brother, or has a nephew who is the son of a deceased brother; and so forth.

King William provided himself with entitlements to the service of about 6,000 knights. As the knights were to serve for 60 days, (but later 40 days) each year, this gave him an entitlement to raise a large force for a few months, averaging out at about 1,000 knights all the time. But knights, like everyone else got old, got sick, or did not want to fight again, and were open to financial arrangements in lieu of service. Soon arrangements appeared for paying money instead of actually rendering knight service; paying scutage or shield tax instead of actually serving under arms, and paying castle-guard instead of garrison duty. In one way or another many entitlements which could be expressed in money accrued to a Norman king. He needed officers to collect these, principally his sheriffs in every shire. He needed an administration to keep track and to see to enforcement of his rights.

The system for administering justice functioned in different spheres. One was the continuation of the old system in which the counties administered themselves and the assembly of the county was a court of justice as well as the means of self-government. The county is a court; disputes present themselves there and they get resolved under the presidency of the sheriff at the meetings at the county town several times per year. Such was the theory, although disruptions were frequent and many disputes

must have been resolved by local politics rather than any attempt at the justice. Another was the profusion of local liberties, jurisdiction vested in local lords or boroughs. The rights of the king, particularly in what we call the feudal system, do not fit easily within the county administration. The king could not attend County meetings and submit his rights to the judgment of the men of the shire: not with hope of success. The king needs officers and a system of administration of his own if his rights are to mean anything. In the logic of feudalism the king and his tenants in chief are a court; he is entitled to the service and support of each tenant in chief, in fighting his wars and enforcing his will, and also in giving him counsel and assistance in many matters, including deciding disputes. The king with such of his magnates and high officers as he chooses to associate with him in the process are a court for decision of disputes about entitlements to lands held of him, or about obligations arising out of them; recording and enforcing forfeitures caused by rebellion and crime, and allocating inheritances. These are functions which a feudal king could not avoid and could not leave to the courts which continued from before the Conquest.

The king also necessarily was involved in some criminal law. Local authorities could be relied on to pursue thieves and murderers, and to hang them on trees where their conduct was flagrant; it was also open to private persons to prosecute criminal cases by a process called Appeal; but some crimes specially touched the king himself. Crimes by tenants in chief which broke the feudal bond and resulted in escheat, in which a fief fell back to the king, must be punished by the king. Then too, some areas were specially within the king's protection; the verge, meaning the area of a few miles around where the king actually was at the time, was protected by his authority and crimes within it, of whatever kind and by whomever, were punished by royal power; they were within the king's peace. As time passed the king's peace was extended further. It was extended early to all the main roads of England, and with the growing effectiveness of royal judicial power it was extended to all parts of England. A very early extension was to all Normans; if someone was found dead any criminal business arising out of the death was left to the shire to deal with; but it was early established that it was an obligation of the local community to prove that the deceased was an Englishman, meaning not a Norman or as the Normans said, not a Frenchman, and it was the responsibility of the local community to swear to this; to make a Presentment of Englishry.

The tenants in chief were not the only persons to own land in fee. A tenant in chief could himself grant land, to someone who gave him obligations of homage and fealty and undertook to perform services as part of his feudal bond. Each mesne lord who granted land by subinfeudation encumbered himself with the administration of the rights he had created, with the need to hold a court to deal with surrenders, regrants, forfeitures and disputes, and with the right to the attendance and participation of his own feoffees in the business of his court. By sharing in a decision they shared in responsibility for it and in a way gave a guarantee that it would be enforced. A tenant in chief with an obligation to provide, say, the service of five knights might subinfeudate land to a tenant of his own who undertook an obligation to provide the service of one knight; not indeed to provide it to the intermediate or mesne lord, but to provide that service to the king. English feudalism did not give anyone but the king the right to knight service. With passage of time the complexities became great. There could be, say, three or four levels of subinfeudation. Services may be different at different stages. At the bottom might be a tenant in common socage, who is not obliged to render military service, but is obliged to make payments to someone higher up, who uses the payments, among other things to meet an obligation to provide knight service. For some the obligation may be to provide the service of half a knight or some other fraction; land subject to the service of two knights may have descended to three daughters, each of whom may be obliged to provide a fraction of a knight. Someone down the chain may have died without heirs, leaving his interest to escheat to the mesne lord, or if he rebelled, to escheat to the king. The king may come to be the owner of a piece of land with feudal obligations to one of his own tenants. Obligations may have been divided up into fractions among many people who held parts of the land out of which the obligation issued; one may pay his share but find distress levied on his goods when someone else did not. By the time of Edward I two centuries after the Conquest, the feudal system was becoming incoherent, further creation of feudal relationships was stopped and land could simply be assigned. There was no such law in Scotland, where subinfeudation continued until recent days. When inflation came, much later in the Middle Ages, obligations measured in money became nominal and were forgotten.

Below these 180 tenants in chief and the feoffees who held from them was the world of ordinary people, difficult to number, but perhaps one million of them. In the countryside most people lived on manors and were tied to them by their villein status. Land within manors was held in a system of grants, surrenders, rights of succession, rights of dower and customary entitlements administered by the lord of the manor, or by his steward, in a court of his own, and under laws and customs special to each manor. Not for centuries after King Henry did the common law and its courts give any protection the manorial rights of villeins. Everybody had to be within the law; otherwise he was an outlaw. To be within the law, one had to be an accepted member of the household of a magnate who was

responsible for one's good behaviour, or an accepted member of a vill, or of an incorporated city or borough, of which there were at first very few. It was the yearly duty of the sheriff to attend each vill, or to send a deputy, summon the inhabitants and obtain a report on oath of the persons who lived there and of their being accepted members and law-abiding. This was the View of Frankpledge. The vill had responsibility for misdeeds by its members and for crimes and untoward events within its territory and could be punished collectively, by fines or otherwise. Almost all inhabitants of the countryside, if they did not own land in fee, were villeins, with inherited obligations of service which they could not escape. Cities and boroughs had special and direct relationships with the King; they had been given privileges by him, actually or in theory, at some past time and owed him special obligations of payment or service which were defined by the grant.

Beside all this existed a parallel world of government, the Church, with its own powerful men, archbishops, bishops and abbots, an array of churches, abbeys and manors, and a hierarchy at the head of which was the Pope far away in Rome. All had rights and revenues of their own, and a claim to stand apart from temporal rulers in the exercise of authority over every person, including kings themselves. The claims of the Church were very wide, and extended to claims that its clergy should be exempt from the power of kings and other authorities, including the power to punish crimes. Abbeys and Episcopal sees held much land, some of it Free Alms, without obligations of service such as knight service, but much of it Lay Fee, and subject to whatever obligations were attached to it when the Church acquired it.

For a Norman king it was not enough to have the service of 6,000 knights. Maintenance of the king's interests and his revenue required that the king have officers of his own and means of establishing information about his rights and enforcing them. In addition to armed force and personal authority the king had three things available to him; he had officers whom he appointed, including his familiares, his official family which attended him whenever he went, and his sheriffs in each shire (and some may have had several shires at once); he had the knights, who were present throughout the country and owed him homage and faith for their land and who had a strong interest in the success of the regime; and he had the local inhabitants who had lively fears of God and of their Norman rulers and could be summoned and required to swear to the truth of local affairs. Putting these resources together, King William required the compilation in 1087 of the Domesday book, a huge assemblage of information, most of which was directly or indirectly about rights of the king, assembled by commissions of trusted officials and knights who required the local inhabitants to swear to the state of the rights which had existed in the reign of Edward the Confessor. Collection of information in this way on the oath of persons in each locality, referred to as an inquisition, can be seen as an early form of establishment of facts by the finding of a jury; this however, is not a completely accurate or comprehensive account of what took place, and there is not a direct connection with what later became jury trial.

I illustrate the Domesday Book and its processes with some extracts. The first is the introductory words of the Return from the inquisition in Cambridgeshire.

Here is written down the inquisition of the lands [of Cambridgeshire] as made by the king's barons. namely, by the oath of the sheriff of the shire; of all the barons, their Frenchmen, and the whole hundred [court]; of the priest, the reeve, and six villeins of each vill. Then [is set down] how the manor is called, who held it in the time of King Edward, who holds it now, how many hides there are, how many ploughs in demesne, how many ploughs of the men, how many men, how many villeins, how many cotters, how many serfs, how many freemen, how many sokemen, how much woods, how much meadow, how many pastures, how many mills, how many fish-ponds, how much has been added or taken away, how much it was worth altogether and how much now, and how much each freeman or sokeman had or has there. All this [information is given] three times over: namely, in the time of King Edward, when King William gave it out, and how it is now – and whether more can be had [from it] than is being had.

The Return lists the names of the representatives of each Hundred who swore to the facts in the Return.

The second extract is some of the information about the manor of Leominster, which fell in to King William when Queen Edith, the widow of Edward the Confessor, died.

The land of the king. . . . The king holds Leominster. Queen Edith held it. . . . In this manor . . . there were 80 hides, and in demesne 30 ploughs. In it were 8 reeves, 8 beadles, 8 ridingmen, 238 villeins, 75 bordars, and 82 serfs and bondwomen. These together had 230 ploughs. The villeins ploughed 140 acres of the lord's land and sowed it with their own seed grain, and by custom they paid £11. 52d. The ridingmen paid 14s.4d. and 3 sesters of honey; and there were eight mills [with an income] of 73s. and 30 sticks of eels. The wood rendered 24s. besides pannage. Now in this manor the king has in

demesne 60 hides and 29 ploughs; and 6 priests, 6 ridingmen, 7 reeves, 7 beadles, 224 villeins, 81 bordars, and 25 serfs and bondwomen. Among them all they have 201 ploughs. They plough and sow with their own grain 125 acres, and by custom they pay £7. 14s. 8½d.; also 17s. [worth] of fish, 8s. of salt, and 65s. of honey. In it are eight mills [with an income] of 108s. and 100 sticks of eels less 10. A wood 6 leagues long and 3 leagues wide renders 22s. Of these shillings 5 are paid for buying wood at Droitwich, and thence are obtained 30 mitts of salt. Each villein possessing ten pigs gives one pig for pannage. From woodland brought under cultivation come 17s. 4d. An eyrie of hawks is there. . . . Altogether this revenue, except the eels, is computed at £23. 2s. This manor is at farm for £60 in addition to the maintenance of the nuns. The county says that, if it were freed [of that obligation], this manor would be worth six score, that is to say, £120.

These excerpts give a brief glimpse of a society which was not governed only or even largely by power and force. Elaborate schemes of definition of rights existed, everyone expected to get right and justice, and often they did; but with huge exceptions arising from the generally disordered state of the kingdom. If people were to receive justice according to what they expected it was necessary that there be internal peace and order, but very frequently there were not. A common point of reference was the state of affairs in the time of King Edward the Confessor, particularly on the last day of his life.

The Conqueror apportioned Normandy to his first son Robert and England to his second son William Rufus; this apportionment was made good by determined action of Rufus, who held his kingdom against several rebellions, and later received Normandy as mortgagee in possession when his elder brother went crusading. Rufus distinguished himself by military capacity, rapacity for money and habits of careless blasphemy and disrespect for the church. He governed Normandy better than Robert had. On Rufus' sudden death while hunting, his younger brother Henry, who was a member of the hunting party, seized power in England and established himself by astute measures, including marrying an English princess, and addressed conflict with his elder brother Robert, who had claims both to England and to Normandy. Henry I was hardly challenged in England and in 1106 conquered Normandy. He reigned for 35 years with, on the whole, internal peace and with great competence in government, one aspect being his ability to recognise competent officers and promote them to high places, however humble their origins. His long reign provided stability and institutionalisation of means of enforcing the financial rights of the crown through a government department called the Exchequer. He also began the institutionalisation of his court and made the beginnings of continuity in the service of justices and their circuits throughout the country to hear cases in which the royal power was involved. As judicial records of this period have not survived, we do not have a complete picture of what took place but depend on references which remain in other sources of which preservation of a complete and accurate record was not the main purpose. What we know of judicial business in this period depends on references in chronicles, abbey records or other incidental references. Accounting for revenue in the Exchequer was the occasion for determination of disputes by officers of the Exchequer and the beginnings of one of the courts of common law, the Court of Exchequer, which existed in later centuries. By chance the Pipe Roll recording the exchequer records of 1131 has survived. I set out a small part of it to illustrate what it records.

Lincolnshire. … And the same sheriff renders account of Im. of gold for the weavers' gild of Lincoln. In the treasury £6 in place of Im. of gold. And he is quit. … Lucy, countess of Chester, renders account of £266. 13s. 4d. for the land of her father. In the treasury £166. 13s. 6d. And she owes £100; also 500m. of silver that she need not take a husband inside five years. And the same countess renders account of 45m. of silver for the same agreement, to be given to whom the king pleases. To the queen 20m. of silver. And she owes 25m. of silver. And the same lady owes 100m. of silver that she may hold justice in her court among her own men. ... The burgesses of Lincoln render account of 200m. of silver and 4m. of gold that they may hold the city of the king in chief. … Lambert Fitz-Peter renders account of one palfrey for the land of his father. In the treasury 30s. in place of one palfrey. And he is quit. …
It seems that Lucy inherited estates in Lincolnshire from her father the Earl of Chester and paid a large relief for the land, so that she would be accepted as the heir, and an even larger sum to be free for five years from the king's right to give her in marriage. Perhaps she found someone of her own choosing in the five years; if she did, she would have to persuade the king to give her in marriage to the man she chose. The revenue opportunities are clear enough.

In the time of Henry I the King's court and royal justice began to assume some regularity. The power was essentially the King's, and he with magnates and officers, usually several barons and prelates, would hear the litigation of the magnates of the kingdom and give judgment on them. He would sometimes send an officer to preside in a county court, for a session of the court or perhaps for a particular controversy. The law to be applied cannot have been precise or readily ascertainable, as those who could know English law were the freeholders attending the county court, who knew the local customs and local history, while the king and his officers can hardly have known them and for some generations would have not have been able to speak English. The King's Court had the power to call

up litigation from other courts to hear and determine it. Many landowners, abbeys or other bodies claimed local jurisdiction and actually exercised it, in cases defined by tradition, custom and by shadowy royal grants from long past times. The closest institution to a continuous royal court with professional staff was the Exchequer, where royal officers held two sessions each year at which sheriffs and other persons with obligations to account to the King for collecting his revenue had the task of explaining what they had done, justifying their accounts and producing and paying in what was due. The royal officers who presided in the Exchequer and decided whatever disputes arose there came to be drawn on when the king sent justices to make journeys throughout the kingdom to hear lawsuits, or to preside at particular county courts.

Later in the century the reign of Henry I became another reference point for a period of stability back to which arguments and claims of right could refer. Henry I was not uniformly successful and in particular could not gain acceptance by his Baronage for his succession by his daughter Matilda or Maud, with her husband Geoffrey of Anjou who would be King and Duke of Normandy with her, but was not acceptable to the Normans as his county Anjou had long been their rival and enemy. Henry's nephew Stephen was able to establish himself as king, precipitating the Anarchy, 19 years of conflict in England and Normandy, in which Stephen on the whole prevailed in England, but did not appropriately exercise the royal power over its barons, while Geoffrey of Anjou conquered Normandy and became its duke. Matilda and her half brother campaigned in England for almost 10 years; and when they were defeated her son Henry began invasions and raids into England, supported by Geoffrey and showing great military ability from the age of 14 onwards. The conflict was resolved by an arrangement in which Henry, who succeeded as Duke of Normandy when he was about 18, would become king of England after Stephen, and Stephen fulfilled this arrangement by dying about a year later. Henry had already accumulated wide lands in Normandy and Anjou, and even more extensive lands in Aquitaine in right of his wife Eleanor whom the French king had imprudently divorced. Henry II became king of England in as favourable a state as could be imagined, 21 years of age, with a proven record of success in war, and already Duke of Normandy with wide lands and great wealth. As a true Norman his life was a long chapter of conflict, in England, conflict with the Scots, in Ireland, as ever with the Welsh, conflict in his lands in France, and as his sons grew, conflict with them.

Some of the sources of disorder of the Eleventh Century had abated: the new Norman landowners had been settled for three or four generations, and there was some improvement in economic prosperity. The knights, or many of them, were more settled; and some had some education. For knights who liked fighting there was still plenty available; but life was developing some graces, some knights could read and participate in the arts of government, attention could be given to ceremony in such things as conferring knighthood, and formal heraldry began to develop. With the accession of Henry II comes a turning in the history of England, away from the period of Conquest and its resulting upheavals towards a new period when the manner of governing England became relatively settled, although not without many more upheavals. Henry II is counted by later ages as the first of the Plantagenet kings, the reference being to his father's coat of arms, which displayed the broom plant. It seems however that the surname Plantagenet came to be used for the family about two centuries later and if Henry had been asked for his surname he would have replied in French to the effect that his name was "of Anjou". He was king for about 35 years, and brought high personal ability, intense energy and competence to the task. His times were not calm or peaceful. The reigns of his sons Richard and John form a continuity of a kind with his, with continuity of institutions and of some of the officers of state, coming to a turning point when in 1217 John died and was succeeded by his son at the age of nine, and his son's protectors confirmed the Great Charter, and opened a new chapter in English history when rights and claims in which the Charter, with more or less justification, entered the political lexicon. To some degree the Charter can be understood as a record of the discontent of the magnates with King John and his government.

Henry's personality and his family conflicts, and most of all his conflicts with the church in the person of Thomas a'Beckett, are the usual focus of attention on his life. I direct my attention elsewhere. Beckett, who had been Henry's chancellor and a layman, became an enthusiastic churchman as soon as Henry imposed him on the church, the first step in his career as a clergyman being his appointment as Archbishop of Canterbury. There were many points of conflict between Henry and the Church in the person of Beckett, principally the power of the King and his court over the Church, its lands and property, and also over its clergy when accused of crimes. During the Anarchy of Stephen little was done by the king to administer justice, and it seems that courts of the Church at times decided disputes on whether lands were owned by the Church or by laymen.

Henry exerted his power and ability in ways which increased his own authority, and increased the power and furthered the continuity of institutions associated with the King: enhanced central power over the existing diffusion of power, and enhanced uniformity of laws over the existing profusion. He did not impose royal will and uniformity of laws, but he enhanced tendencies towards their effective

development. King Henry in 1164 issued a legislative instrument known to history as the Constitutions of Clarendon; according to its terms it was a record and recognition of part of the customs and liberties of his grandfather King Henry and others. It was not an Act of Parliament, as Parliament was still a century away. It declares that it was a recognition, which means something like a verdict or report of an inquiry, made in the presence of the Archbishops, Clergy, Earls, Barons and Magnates of the Realm, and confirmed by promises of the Archbishops and many Bishops that they would be observed. The Constitutions declared many legal rules in terms which gave the King the upper hand over the church, including a declaration that a controversy between laymen and clergymen, and controversies about advowsons or presentations of clergy to churches, were to be decided in the King's court, and a declaration that when clergy were charged with crime they could be tried, or in any event they could, after conviction by a church court, be punished by the king's court. The Constitutions provided for an accusation jury, which seems to be the precursor of the Grand Jury, who were required to state on oath whether a person suspected of crime should go on trial. Appeals to the Pope without the assent of the King were forbidden. The Constitutions stated procedure for trial by what we would, looking backwards, call a jury before the King's Chief Justice of the preliminary question whether land involved in a dispute between a clergyman and a layman is Free Alms, meaning church land, or a lay fee; if the jury said it was Free Alms, the merits of the dispute would go to the bishop's court to decide. This appears to be the beginning of a new form of litigation, an Assize in which an inquisition, which we would call a jury, decided questions about land title. This was the Assize Utrum, meaning "whether"; that is, whether Free Alms or lay fee.

In some legislative act of which we do not have a record Henry made the power of the royal court available to everyone with a dispute about title to freehold land. That is, he made it the business of himself and his court to protect all freehold titles, not only those held directly of the King. Any litigation before a feudal lord could be called up to the King and his court for decision. Any new lawsuit about title to freehold land could be commenced in the royal court, by the Writ of Right. In a striking demonstration of his ascendancy he displaced the rights of feudal lords to decide disputes about lands they had granted by giving litigants the opportunity to bring their claims before the King's Courts. Henry also instituted the Grand Assize, by which disputed rights in such cases were decided by an Assize, an inquisition by twelve knights drawn from the locality where the land was, to decide and state on oath who had the title. This probably occurred late in his reign. There were transforming measures, taking land titles away from the power of the barons into a forum where legal rules and entitlements could have reality. The Grand Assize was the means of trial if the tenant, meaning the defendant, called for it: the demandant had to offer battle so that the defendant might decide to fight him; but it was for the defendant to decide, and actual battles must have been rare. Some instances occur whether the demandant paid the king to have a Grand Assize. The plaintiff – the demandant – had to be prepared to risk that the defendant – the tenant – would elect for combat. However the Grand Assize was seen as a great boon and quickly became the usual method of trial.

The Constitutions of Clarendon, and the uniform upper hand which they gave to the King, set off a decade of conflict with the church in which Henry, further embarrassed by the murder of Beckett, eventually had to yield some, but not all of what was important. The Assize Utrum became a continuing part of the legal scene. The jurisdiction of the Royal Court over clergymen was heavily qualified; what actually emerged was that the clergyman was tried in the royal court and if found guilty was not punished by the royal court but was delivered to the courts of the church for punishment, which could not be punishments of great severity, corporal or capital. This came to be available to clergy only for first offences; then by a curious fiction it eventually became available to most people on their first conviction, the proof that the accused was a clergyman being reduced to the mere pretence of asking him to recite Psalm 51 verse 1, known as the Neck Verse; this however was far in the future.

In 1166 Henry made some more law at Clarendon. Clarendon is not on modern maps; I cannot establish what it was, but it seems that it was a palace or hunting lodge near Salisbury; Henry seems to have done a lot public business there. The Assize of Clarendon of 1166 states that it was made by King Henry with the assent of the Archbishops, Abbots, Earls and Barons of all England. It is openly legislative: it ordains new rules and does not purport to say what have been determined to have been the rules in the time of Henry I. It plainly created the jury of accusation, the Grand Jury in which 12 lawful men from every hundred and four lawful men from each vill are to say on oath to the King's justices and sheriffs whether there is any man accused or publicly known as a robber or murderer or thief in their hundred or vill; or anyone who has harboured them since Henry became king. Anyone so found on oath to be a criminal was to be tried by the ordeal of water, and the trial was to take place before the King in his court and in the presence of his justices, that is, to the exclusion of other and older methods of trial, by the County court or by other private jurisdictions. The Assize goes on at length to make many provisions which reinforced the primacy and effectiveness of royal justice.

The third major piece of legislation for which we have the text was the Assize of Northhampton of 1176.

The Assize detailed many things. It required heirs to pay reliefs and perform other feudal obligations to feudal lords, so the rights of the feudal lord were not only protected by his own court and his own power, but also by the King. It provided for the widow to have her dowry; so she too could sue before the King. It re-enforced royal criminal justice with savage penalties. It stated the rights of heirs of a freeholder to seisin, which I will render, not completely accurately, as possession of the land of a freeholder who died. If the feudal lord denied that the deceased was seised of the property, the King's justices were to obtain a recognition by 12 lawful men as to whether the deceased had seisin. This was the Assize Mort d'Ancestor. The Assize also made provision for Novel Disseisin, meaning recent dispossession of freeholder, to be remedied in the same way. In some way a similar remedy was given for the entitlement to present a new incumbent to a church: this was the Assize of Darraign Presentment. These were the Petty Assizes.

The Assize of Northampton was a far-reaching change in procedural law for disputes about land titles. The Petty Assizes, also called the Possessory Assizes, decided only whether a freeholder had been seised of land when he died, in which case his heir was put in seisin, or whether a freeholder had been disseised, in which case he was put back in seisin. The underlying rights of the matter were not investigated. If the freeholder who died should not have been in possession and was not the true freeholder older procedures for establishing the rights of the matter could be followed. The older procedure was the Writ of Right; the demandant obtained the writ from the King, and the tenant or defendant was called before the King, or the King's Justiciar or his justices, and there the merits of the matter were argued out, in such a way that in many cases the dispute was resolved after a debate about the merits of the parties' cases. It was common for a Final Concord to acknowledge the title of one side and record that a payment had been made to the other side. If the parties did not agree and come to a concord, the method of trial was combat, but as I have said Henry II gave the defendant the option of trial by the Grand Assize. In the last resort land title could be decided by the parties' fighting it out, under the supervision of the king or of his justices, either in person or by their champions. There was a kind of feudal logic in awarding the land to the stronger party, but no justice in any other sense.

The traditional Norman method for the trial of disputes about title to land was trial by combat in the Court of the feudal lord who had granted the title in dispute; if the land was held in chief, the feudal lord was the King, but if it was held of a mesne lord the King and his Court were not, before Henry II, involved. There was also an old and traditional method for settlement of disputes about debts and the other civil claims that could be brought; they were few. In most cases the proper place for such claims to be tried was the County Court. The method of trial was wager of law; complex rules decided which party had the burden of proof or disproof of a claim; that party had to establish his position not only by swearing that his position was true, but also by producing a number of oath-helpers to swear that his oath was reliable. If he failed in this method of proof, he failed in his lawsuit. Claims for debt could be and were disposed of in this way. But before they were disposed of in this way, the court, particularly a royal court, had a close look at what the parties asserted.

Henry's reforms and the Assize of Novel Disseisin and other Possessory Assizes were seen as creating a relatively simple, relatively modern and straightforward intervention in disputes; the effect of a forcible dispossession was reversed and the parties were left to pursue their rights by older and more elaborate methods. As time passed parties lost their taste for methods of trial which involved personal combat, and the Assize of Novel Disseisin came to be the usual means by which disputes about land titles were determined. In later centuries the Petty Assizes also became extremely technical, but that is not part of Henry's history.

Henry's provision of more effective procedure for bringing criminal cases to trial was part of a far-reaching expansion of the intervention of the king and his government in enforcing the criminal law. The old systems continued to exist; where the liberty to act in that way existed, thieves could still be pursued and, if caught with the stolen goods on them, hanged on a nearby tree, as could murderers who were caught red-handed, by the inhabitants of the liberty where the event occurred. By now the King's Peace extended to practically all times and places throughout the kingdom. Although there were few crimes at common law, the King's Peace covered most of the acts of violence which occurred, and the sheriffs or his officers had the means of bringing accused persons before the King's justices and pursuing the accusation.

Royal justice was not however the only means of bringing a criminal case forward. A private prosecution, called an Appeal, although quite unlike a modern appeal, existed in which a person with an interest in the crime could make a public accusation, and the issue if disputed – we can be fairly sure that it was – would be settled by combat. There were many procedural rules and points to argue before the combat took place. A woman who was an appellant or a man over 60 could fight by a champion. To bring an appeal was to initiate a fight to the death, and appeals cannot have been very frequent at any time; when embarked on, they must often have resulted in some settlement or

composition which did not adequately deal with the justice of a crime such as murder. Appeals with the theoretical possibility of trial by combat continued to exist until the 19th century. There are occasional records of combats taking place even as late as Tudor times. Parties fought it out with clubs or sticks with horn tips. Combat also existed in some civil procedures, for which the sticks did not have horned tips. For a person with a real grievance who wished to see a crime punished but did not feel equal to risking his life, there must have seemed great advantages in attempting to set the sheriff in motion to obtain a presentment by a jury and then see the accusation of crime tried before the King's justices.

When tried before the King's justices however there were again primitive methods of determining guilt. The method of trial was by ordeal. Several methods of ordeal are known to us, usually in the form of requiring the accused to hold and carry a piece of hot metal for a few paces, or to place his arm in hot water, then to bind up the wound for some days and see whether it was clean. Everything depended on the way in which the ordeal was administered; participation of the Clergy was required, and control over how hot the elements of the ordeal actually were and how much time was spent chanting prayers and scattering holy water would control the outcome of the ordeal. One of William Rufus' more celebrated blasphemies related to whether the hand of God could truly be seen in an event in which 50 persons whom he felt ought to have been convicted of crimes were all acquitted. When in the reign of King John changes in the law of the Church made it practically impossible to administer the ordeal, the inquisition, in more modern terms trial by jury, was brought into service to determine guilt, on the theory that the accused had consented to trial by jury and had not insisted on his right to be put to the ordeal. The formality was that the accused was asked to plead, and on pleading not guilty was asked "Culprit, how will you be tried." If he then conformed with what was expected of him he said "By God and by my country", "my country" referring to the jury. For centuries it was regarded as indispensable for the effectiveness of the jury trial that the accused should say this. If he would not, he would be placed under heavy weights and pressed until he uttered the phrase, or until he died.

Henry ordained other legislation. Henry instituted an inquest into misconduct of sheriffs who were removed from their offices in 1170, and this served to establish what the duties of sheriffs were and enhance the effectiveness of revenue collection. The Assize of Arms of 1181 regulated many matters relating to knighthood and privileges of knighthood and bearing arms, and the Assize of the Forest of 1184 stated many matters relating to the rights of the king to forests, and to timber and game, and to resist encroachments on forests. These were subjects which generated much litigation, although I cannot deal with them now.

Before Henry II and during his time the Crown did not offer to all its subjects in England any assurance that Royal justice would be available to hear and determine all prosecutions for crime and civil disputes. If the King gave justice it was a matter of grace, not a matter of right. It could be expected that royal justice would be available where the interests of the king were involved, but otherwise the subject had no right to it. There were other institutions to which the aggrieved could resort; they could take their debt claims to the County Court and see matters tried out by wager of law on the oath of a litigant with oath-helpers. For the murder of a near relative they could bring an Appeal and try conclusions by physical force and at the risk of their lives.

To commence litigation was to incur the need to obtain some measure of grace and favour from the King at every stage. To commence a suit the King's writ had to be obtained; it had to be purchased. A Writ was a command in the name of the King to the sheriff to require the defendant to give the plaintiff what he asks, or if he will not to arrange for him to be brought before the King or his justices. Then the plaintiff and the defendant must attend before the King; but the King may not easily be caught up with; he may be in progress to some distant part of England, or he may be fighting in Aquitaine; he may stay there for several years. When the parties do attend, the King may wish to hunt. A rebellion may break out. He may be sick; he may die. He may move to his next manor. The contingency of the whole process is enormous. Then too, the king may appoint justices to hear a particular case; or he may commission justices to hear cases of a particular kind, or at a particular place. He may send justices on a journey – Iter, Eyre – through several counties to hear all cases pending from those counties.

As royal justice was given as a matter of grace, not as of right, it could be withheld. The King's favour could be granted or withdrawn, and it could be purchased. If the King did not wish to hear a case he did not hear it. If he wished his justices not to hear it this year, or not for two years or not ever, he instructed them accordingly. The King's favour could be purchased; for a payment of money the King might direct the judges not to hear a particular case or to hear it straight away. For another payment of money from the opponent he might send the judges a different direction. Where the course of the court provided for one party to demand an inquisition, in our language a jury, to decide some issue, the king might grant it to another party, not entitled according to law. Records of later times, for we do not have detailed records for Henry II, show parties making offers to the justices of so many marks if the King will summon a jury. When judges did hear a case in the absence of the King, they might refuse to

decide the case before consulting the King. When judicial records begin in 1194, they sometimes refer to postponement of a decision until the King has been consulted; - loquendum cum rege. The records of judicial decisions were kept on parchment made of sheepskin; each skin is called a membrane, and is closely inscribed with records of the principal events in lawsuits. All the membranes for a particular court in a particular term were sewn together in one long roll, and preserved. Records were maintained in this way from 1194 until the 19th century; some millions of sheepskins and many thousands of rolls. Some rolls have perished but a great many still exist and continue to receive the attention of scholars. Occasional quotations in the rolls that do exist of records from earlier than 1194 show that rolls were kept some decades earlier, but have not survived. For some centuries the rolls were stored in a cellar under Westminster Hall. The cellar was called Hell and the clerk in charge was the Clerk of Hell. As the cellar occasionally flooded, some of the rolls were damaged and some were lost.

By the time of Henry II it was usual for the King to have one or two Justiciars who were authorised to act in the place of the King and hear and determine disputes, just as the King himself might. As time passed, the regularity with which other persons were appointed as justices also increased, so that by the end of Henry's reign some royal servants can be identified as the group from whom will be drawn the justices to go to a particular place, to go on an Eyre, to hear and determine suits pending before the King. The Circuits of Justices in counties became regular events, and Eyres in response to disorder became more frequent. His justices include bishops and other clergy; but they also include laymen, apparently about equal numbers. In Henry II's time powerful landowners, earls and barons are no longer given this duty. There seem usually to have been about 10 to 12 justices, sometimes more and sometimes fewer. Their careers can be traced by very painstaking attention to the names of witnesses in charters and to other small details of records; persons who earlier in life were clerks or other assistants to justices sometimes appear later as justices themselves. That is to say, a professional judiciary was emerging. The judges were also given duties which to our minds would be administrative tasks; they were part of the King's official family, people whom he entrusted with high responsibilities. But this altered and they became professional judges, persons of education, scholars, often clergy, but just as often educated laymen, sometimes of relatively humble origins, and possibly (although this is by no means clear) including people who had studied law, necessarily in other systems of law, as at the University of Bologna.

The reign of Henry II saw a great increase of the effectiveness of royal government, the power of the king, and the regularity of the operations of his government. By the end of his reign patterns of regular procedure had become well established. There was a regular course of commencing litigation by a writ, the effect of which was to call the parties to the king's court; literally before the king himself, although parties would usually find themselves before the king's justiciar, or several of his justices exercising the royal power in the name of the king. Sometimes the summons was not to attend before the king wheresoever he may be in England, but to attend before the king's justices at Westminster. Cases which more closely touched the king's interests would usually find their way to the king or the justiciars or justices closely attending on the King; others in which only subjects were involved might well be heard before the justices at Westminster. Provision for some justices to sit at and remain at Westminster appears to begin in 1178. In some undefined way those justices had less authority than the justices attendant on the King; but a decision they gave was the decision of the King's court. From this division grew, in a later age, a clear division between the Court of King's Bench and the Court of Common Pleas.

Henry can be credited then with great parts in two things which are central to the development of English law. One was ascertainment of facts by requiring the facts to be sworn to by inquisitions or juries of law-abiding persons representing the local community, who report on oath to the king's justices on the facts of the case. The wishes of parties and the judges moved towards trial by jury, which eventually came to be practically compulsory as the means of trial. The other development was regularising and professionalising the justices to whom the King entrusted the decision of cases, first and principally cases involving his own rights and interests, but also increasingly the general administration of justice in England. With regularity and professionalism came the development of consistency in law and the means of developing law to meet changing times and institutions; the means for a Common Law, common to all England, to be established.

What I have depicted may seem to make a very primitive and unformed legal system. We do not know of any legal profession apart from the justices and their clerks working in and constituting the King's Court. We do not know of any legal training in the system, apart from working in it; the schools which taught law were in Italy, and taught a different system. Yet we have two textbooks from Henry's time which depict a highly developed functioning legal system. One is Glanvill's Treatise on the Laws and Customs of England. Ranulph de Glanvill is the name of the Chief Justiciar for the later years of Henry II reign; it is unlikely however that he actually was the author of the book. He is first heard of in about 1171, fulfilling various public duties, then in 1174, he is found rendering an account for capture and

ransom of prisoners in the war with the Scots, and he is given the credit for capturing the King of Scotland. In 1176 he is found as a justice of the King's court and a justice in Eyre, and in 1180 he is the Chief Justiciar. He was given high responsibilities, including governing the kingdom when the King was beyond sea, as well as his judicial authority. He held other administrative posts, but on Henry's death he left office and went to the Holy Land with Richard on a Crusade, and there he died. The text in his name begins by describing the procedure in the King's Court and the kinds of cases which come to it. The crimes he lists are Injured Majesty such as causing the death of the king or sedition in the realm or in the army, fraudulently concealing treasure trove, breaking the King's peace, homicide, burning, robbery, rape, falsifying money and similar pleas. The civil pleas which he says are determined only in the King's court are pleas concerning baronies, advowsons of churches, claims for dower and other claims relating to tenants in chief such as duties of performing homage, paying reliefs, breaches of compositions made in the King's Court, villeinage and debts owing by lay persons. This is a very modest list. Further, the King may, if he is so minded, require any claim to freehold land to be brought before his court by a writ of right even if the claim is not by a tenant in chief.

Early in the text Glanvill plunges into great complexities about Essoins, which we would call adjournments. The position appears that most lawsuits soon produced a procedural tussle about compelling the defendant to appear, then another about compelling the defendant to state his defence and finding whether that defence required another person to be summoned to join the lawsuit, a warrantor under title from whom the defendant claimed that his possession was justified. There were many essoins or excuses; they included being required elsewhere in the King's service, being on crusade, being beyond sea, being ill in bed, and falling ill on the journey. The claim to an essoin when first made, and it seems the second time it was made, was accepted, but eventually the third excuse would be investigated by sending knights to ascertain whether the excuse offered was true. Or it might be justified by obtaining a writ from the King to the justices certifying royal service, or in some other way. Essoins seem to have given endless opportunities for procedural excursions, where the court was not necessarily at a fixed place and might be following the king around England, and litigants needed to make lengthy journeys, in the conditions of the 12th century, to reach the King and his justices. Delays must often have protracted litigation until it became impossible to continue. Some difficulties might lead the court to permit or require a party to appear by an attorney, not a reference to a lawyer, but to a person who is to conduct the suit for him. It is not only the parties who must appear, or who may claim essoins; it may also be necessary for the sheriff who summoned the defendant to appear or for the summoners whom the sheriff sent to serve the writ to appear; all of them may have essoins. The instability of the whole procedure was very great.

After 33 chapters, the author reaches the point where both the litigating parties are present in court and the demandant has proceeded to state his claim to the land; the defendant may demand and the court may grant a view of the land, in which the sheriff sends some free and lawful men of the neighbourhood to view the land and testify their view; it would seem that this was to identify the land and report what was going on there and who was in control. That process depended on the cooperation of the sheriff, the selection of viewers, the conduct of the view and their return to the court, and introduced a new series of possible lengthy delays. When the view had been conducted the demandant was then to state his claim before the court concluding with identifying the champion who would duel for him. The defendant might elect to defend himself by the duel or put himself on the Grand Assize; that is to say, obtain what we would now call a jury to determine whether the demandant had the right he claimed. The duel could lead to a forest of technicalities about identifying a champion for each party, dealing with intervening sickness or death of a champion, conduct of the duel, and possible disqualification of the champion for acting for mercenary motives rather than on actual knowledge of the rights of the matter. Loss in the duel involved great marks of disgrace and the imposition of a large fine on the loser, who incurred a reputation for cowardice. If there was in truth no difference between the parties on the facts underlying their claims but they were truly in dispute about the effect of the facts, and about who was entitled to the land on the basis of undisputed facts, it seems that the rights were reasoned out by argument before the justices; or it may be before the inquisition. It does not seem that a duel was a usual outcome; most cases seem to have been composed in some way or other in a less violent manner. The Grand Assize is described with eulogy in Glanvill, and indeed it was a great advance towards a relatively more ordered society and a more rational means of deciding land titles. In time similar means of trial of other kinds of litigation concerning debts or other claims appeared, and old forms of trial by reliance on wager of law and oath-helpers, which in retrospect appear very foolish and unjust, could be avoided.

The conduct of proceedings then, even in accordance with these greatly improved systems, was very protracted, offering many opportunities for delays and excuses, many requirements for further writs and enquiries, and many occasions when the cooperation of the sheriff or some other public officer was required; at every stage, a matter for negotiation. At every stage the cooperation of the King's officers was necessary; at many stages the action of knights or of lawful men of the vicinity was required; many

people not directly involved in the lawsuit were required to turn to and take a serious part in it, and to declare the results of their consideration on oath. Delays were very great and outcomes were very uncertain.

Other kinds of litigation given by Glanvill relate to dower, heirship and inheritance and the law relating to legitimacy, the enforcement of concords and judgments in earlier litigation; the rights to homage, reliefs, services, aids, and enforcement of debts. He also deals with the Assizes of Novel Disseisin and Mort d'Ancestor and various circumstances in which disseisin occurred. He deals relatively shortly with criminal cases, including appeals.

The other legal text from the same age is Dialogus de Scaccario, the Dialogue concerning the Exchequer, composed about 1180, it would seem by one of Henry's justices. He describes, in great detail, proceedings at the Exchequer, which were highly developed and followed strict forms. The basic business there was that the sheriffs and other public officers attended, presented their accounts and explained what they had done to collect moneys due to the King, established the amount payable and paid it over. "Exchequer" referred to a chequered cloth on which counters were moved about to count money. A counter on the square on the first line would represent a certain value; when there were 20 counters in the square, they were replaced by one counter in the next line, representing a score as much as a counter in the first line; and so on; in an age without any command of arithmetic, this was the means of calculating large sums. The Exchequer then took on the character of a court , for disputes arose as to what sheriffs were accountable for and the disputes were decided by the royal officers who presided. The description of proceedings in the Exchequer is very detailed; there was a lower exchequer into which money was paid, and for that purpose the quality of the money was tested, apparently as a matter of course, by melting down samples of the coinage and establishing the quality of the silver in them. There were many officers, some of them knights, some of them clerks, and an usher. Every officer had rights which were fully established by custom, and had customary entitlements to money for what they did. In the upper Exchequer the role of every person was prescribed; clerks to make the records and officers to watch word by word what they wrote down and correct them if need be. High royal officers took part in the business of the Exchequer; the King's Justiciar, the Chancellor, the Constable, and two chamberlains and a marshal. Not all of these would always be present; and there might be other justices present. A second order of officers did the ministerial work; bringing in the tallies and making the calculations. A tally is a curious record, made by carving notches into a piece of wood about six inches long, which recorded an amount of money paid in; then the tally was broken down the middle and half given to the accounting party to bring back when his accounts were finalised and match it with the other half, as the two split halves fitted together. The description given is that a notch representing a thousand pounds has the thickness of a palm; a hundred pounds has the thickness of a thumb, twenty pounds, of an ear, the notch of 1 pound was about a swelling grain of barley, but that of a shilling less, so that a space is cleared out by the cutting and a moderate furrow made there; the penny is marked by the incision being made but no wood being cut away; and the author says "but you should learn all this more conveniently by looking at it than by hearing of it." It sounds like an impossible system, but it lasted until about 1840.

Among the persons mentioned as officers of the Exchequer is Master Thomas called Brunus; this Thomas Brown had earlier had high responsibilities in the Norman kingdom of Sicily but fell out of favour there and was accepted into the service of King Henry. This seems to point to a commonality of methods of government in the Norman kingdom of Sicily with methods in England and in Normandy. The Dialogue instructs the pupil in an exchange of questions between master and pupil in many details about aspects of the law which can produce money for the king, the taxes of scutage, danegeld, penalties for murder, the rights of the king in his forest, the remedies where unauthorised clearing and settlement take place in the forest, the content and use of the Domesday Book, the rights of the Crown in escheats, the duties of sheriffs, the means of enforcement of debts of the crown, and what goods of debtors are not to be sold; a knight is to be left one horse and his armour so that he can serve the king. The king may collect debts due to debtors of the king. The whole Dialogue presents a picture of complexity and mature experience in a context of consciousness of right in which the Crown is highly empowered, but is not expected to be arbitrary.