PLEADING.*

In every orderly system of justice a trial should be preceded by some formulation of the question in dispute between the parties. An intelligent presentation of the case requires that each party be informed of his adversary's contentions. Before the court can proceed to judgment it must be informed of the nature of the plaintiff's claim and the defendant's defense. At common law the presentation of these facts constitutes the art of pleading, a part of procedure or remedial law.

Most controversies that end in a suit at law are first presented by the disputants in the form of a confused mass of facts, relevant and irrevelant, and to arrive at the true point for discussion and decision it is necessary in some manner to decide on and extract the basic point in dispute. This is particularly necessary in systems where the finding of the facts is delegated to a person or persons other than the magistrate before whom the proceedings are instituted. So it was at one famous period of the Roman law when the magistrate (*prætor*), after hearing the claims of both parties, drew up a brief document (*formula*), containing instructions to the official referee or arbiter (*judex*), as to the points in dispute and the decision to be rendered in accordance with the facts as proved. Under modern continental systems whose procedure is modeled on later Roman law, and the Canon law, where facts and law are both for the judge, the parties are usually allowed to make their statements at length with no view to arriving at the precise question to be adjudicated. These statements are then examined and sifted by counsel or judge and the nature of the controversy determined. The method of the English common law, on the other hand, is to compel the parties, in advance of the trial, by alternate allegations so to plead as to develop some single point affirmed on the one side and denied on the other, and to agree upon this question as the one that should determine the cause. The point so selected for

*Introductory note to a selection of cases on pleading.

decision is called the *issue*, the *exitus* or outcome of the pleadings.[1]

The obscure beginnings of this system must be looked for in the remote past when man's conception of a trial was limited to ordeals and oaths. The plaintiff with his *secta* made his plaint, the defendant made denial and the court gave judgment by awarding to one or the other party the right of going to the proof in one of the ways known to the law.[2] In Anglo-Saxon and early Norman times the plaintiff stated his case on oath in the words prescribed by ancient usage. Legal process was an innovation upon the right of private redress and no greater benefit could be obtained by seeking the assistance of a court than the law expressly conferred; the defendant could take advantage of the slightest flaw or misrecital of his opponent.[3] The oath-formulas have the rhythmical quality and alliteration characteristic of Anglo-Saxon poetry, a trait common in the early laws of the Teutonic nations. Thus in an action to recover a debt the plaintiff would say, "In the name of the living God, as I money demand, so have I lack of that which B promised me when I mine to him sold." The defendant would meet this accusation by a denial of its truth. "In the name of the living God, I owe not to A scatt or shilling, or penny or penny's worth; but I have discharged him to all that I owed him, so far as our verbal contracts were at first."[4] As a rule the only answer open to the defendant was a flat denial, a downright no (*thwertutnay*), and when in later law other defences were permitted to be pleaded they were still prefaced by words of denial, the formal "defence" which in some jurisdictions still constitutes the introductory phrase of the defendant's plea.[5]

[1] Stephen on Pleading, (9 Ed.) 125.

[2] 2 Pollock and Maitland, Hist. 599; 2 Holdsworth, Hist. 153.

[3] Bigelow, History of Procedure 246. "A punctilious regard for formalities is required of the swearer. If a wrong word is used, the oath 'bursts' and the adversary wins. In the twelfth century such elaborate forms of asservation had been devised that, rather than attempt them, men would take their chance at the hot iron." 2 Pollock & Maitland, Hist. 598.

[4] Thorpe, Ancient Laws, Vol. I, p. 183.

[5] 2 Pollock & Maitland, Hist. 608; 2 Holdsworth, Hist. 94; Gould on Pleading (Will's Ed.) 593; 3 Blackstone, Comm. 296.

There was never any sudden change from the ancient to the modern formulæ; "a gradual progress from the one to the other may be traced from the pre-Norman through the Norman period to the time of Edward the First, when the modern forms of action may be considered to have assumed their definite shape." [6] The chief modifying influences were the employment of professional lawyers as pleaders and the introduction and development of trial by jury. Indeed it was largely on account of the peculiar characteristics of the jury trial that common law pleading developed as it did and survived to our own day. By the time of Bracton [7] the defendant was permitted, under the influence of the Romano-canonical procedure, to offer *exceptions* which before long developed into the dilatory pleas and special pleas in bar of the common law; but the manner of pleading was very imperfect and the pleaders were frequently guilty of faults that would have shocked their successors. Argumentativeness and duplicity were common errors, but the rule that confines a party to a single plea appears already in Bracton. From the reign of Edward I the year books contain many cases on pleading which show that the rules were constantly growing stricter and more technical. It was, however, during the last twenty years of the reign of Henry V and the reign of Edward IV that the art was brought to perfection; it was the fashionable study [8] and the chief subject of debate in the reports. "Almost everything substantial in pleading," says Reeves, "which was practiced from this time down to the present was settled by judicial determinations in the reigns of these kings. The precedents of this period became ever after the standards of good pleading, and the rules and maxims of pleading now settled, have governed ever since in our courts." [9]

[6] Bigelow, History of Procedure, 247.

[7] Bracton 187-b; Stephen on Pleading (9 Ed.), appendix note 35; 2 Pollock & Maitland, Hist. 613.

[8] Littleton says: "And know my son, that it is one of the most honorable, laudable and profitable things in our law, to have the science of good pleading in actions real and personal; and, therefore, I counsel you especially to employ your courage and care to learn this." Litt. Ten., Sec. 534.

[9] 3 Reeves' History of English Law (Finlason's Ed.), 578, 620. The only important change until the eighteenth century was the statute of 27 Eliz. Ch. 5, Sec. 1, which provided that defects in form could be taken advantage of only on special demurrer.

But the same learned author adds:

"It cannot be denied that the pleaders of these times give in to much refinement, raising debates about verbal formalities as points of the greatest moment; and such was the humor of the age that this captiousness was not discountenanced by the bench. When the philosophy of the times was a war of words, it is not to be wondered that a learned profession should pay too great a regard to laborious trifles. The calamity has been that after other branches of knowledge took a more liberal turn, the minutiæ of pleading continued still to be respected with a sort of religious deference."

The reason that common law pleading continued to differ so widely from other systems will probably be found in the manner in which the old conception of a trial was adapted to the jury system. Under the former the altercations of the parties led up to one of the ancient methods of proof.

"The jury became almost the only mode of proof at a time when these old ideas were still prevalent; and consequently the jury was regarded as settling the matter in the same final and unscrutable manner as compurgation, battle or ordeal. Just as in the older law, all these rules must be put in motion and strictly obeyed by the parties at their own risk, so now the parties must put in motion the complicated machinery of process, and define by their own pleadings with painful and literal accuracy the issue to be tried." [10]

The pleadings were oral and delivered either by the party himself or his advocate, and many of the fundamental rules of the art grew out of this method of settling the issue by a discussion at the bar under the superintendence of the court. The most casual inspection of the year books will show that this led to greater freedom in the development of a theory of the case than prevailed in later times. Suggested pleas were, after a brief discussion, found inadvisable, a demurrer was suggested and withdrawn, counsel felt their way toward an issue that each could accept. When this was agreed upon the proceedings were entered by an official on a parchment roll, called the record. From time to time additional minutes of the remaining incidents of the

[10] 3 Holdsworth, Hist. 474.

cause were added and, when complete the record was preserved as a perpetual memorial of the transactions which it comprised.

The order of pleading at common law was as follows: When the parties had appeared, the plaintiff stated his case in the first pleading called the *declaration* (*count, tale, narratio*). To this the defendant could either *demur* or *plead*. A demurrer admitted the facts, for purposes of argument, and contended that the declaration was insufficient to constitute a cause of action. Of pleas there were several kinds the most important being *dilatory pleas* and *pleas in bar*. Dilatory pleas were those which offered a temporary objection to the proceedings without discussing the merits of the case, such as pleas to the jurisdiction of the court, or pleas in abatement, attacking the regularity of the writ or declaration or settling up the disability of one of the parties. Pleas in bar went to the merits of the case. They might be in the form of a *traverse*, which was a denial of the truth of the opponent's allegations in whole or part, or in *confession and avoidance*, that is admitting the facts charged but setting up new facts, either by way of discharge or in excuse, or justification, in avoidance of liability. The plaintiff might then demur to the plea, as insufficient in law, or answer it by a traverse or in confession and avoidance in what was called the *replication*. In the same manner the subsequent pleadings were conducted (*rejoinder, surrejoinder, rebutter, surrebutter*), until the parties arrived at an issue of law or fact. The issue when reached was formally tendered and accepted; if of law it was decided by the court, if of fact by a jury. The system looks reasonable, but was distorted by curious sophistries and fictions, characteristic of medieval pedantry, intended to entangle one's adversary in an issue of law and so take the case from the jury—the "lay gents" as they were called. As to when and how the change took place from oral to written pleading little that is certain is known; the statements of the historians are conjectures merely.[11] No doubt as the

[11] Gilbert, Origins of the King's Bench 315; 3 Reeves, History (Finlason Ed.) 293; 3 Holdsworth, Hist. 487. The latter cites Y. B. 38 Hen. VI, 31 pl. 13, as the first reference to a paper pleading he has discovered.

rules of pleading became more formal and technical verbal pleading became increasingly difficult. It is believed that the practice was adopted of making a tentative entry of the pleadings on the roll in advance of arguments. As this method of proceeding was attended with some difficulties the system was changed, not later than the reign of Elizabeth so that written memoranda of the pleadings were prepared and exchanged by the attorneys for the parties and later transcribed to the parchment roll. The change seems to be coincident with the growing practice of proving by witnesses the facts stated in the pleadings, which tended to shift from counsel the responsibility for the truth of pleas offered by him. In time the art of pleading separated itself from the art of advocacy. The attorney obtained the facts from his client and prepared the pleadings in consultation with an expert called a special pleader, while the serjeant or barrister conducted the case in court, arguing the issues of law or trying the issues of fact before the jury.

"It is difficult," says Holdsworth, "to give the right weight both to the deductions of logical reasoning and to the incoherence of facts—to be logical without becoming a slave to logical abstractions." [12] The theory of pleading was that every dispute between man and man might, when resolved into its elements, be shown to spring from a single point of fact or law as to which the parties were at variance. Human relations are not so simple as this, particularly in a developed commercial community. In a modern lawsuit based on complicated transactions, the ritual of the single issue could not be performed without excluding from the case elements necessary to do complete justice. The first divergence from theory came at an early date when the plaintiff was permitted to join in one suit several distinct causes of action of the same nature by several counts in one declaration.[13] This practice was so extended that it became usual, particularly in assumpsit and actions on the case, to set forth the plaintiff's single

[12] 2 Holdsworth, Hist. 500.

[13] Buckmere's Case, 8 Coke 86-a (1609); Comyn's Digest, Actions (G); Bacon's Abridgement, Pleas B-3; Gould on Pleading (Will's Ed.) 393.

cause of action in various shapes in different counts, so that if he failed in the proof of one count he might succeed on another.[14] The next deviation occurred in 1705 when it was enacted that the defendant, with leave of court, might plead as many several matters as he thought necessary for his defence,[15] thus creating as many issues in a suit as there were pleas filed. After the passage of this act the multiplication of counts and pleas became an unmixed evil; the cost of litigation increased and the case was presented to judge and jury in a complex form productive of confusion and mistrials.[16] Another source of inconvenience was the enlargment of the scope of the *general issue,* a summary form of general denial of the allegations in the declaration. Formerly pleaders had avoided the general issue, but in the eighteenth century a movement set in,—particularly in actions of assumpsit and on the case, by which special matter was allowed to be given in evidence on the trial under the general issue. Consisting of a mere summary denial and giving no notice of the nature of the defence the effect was to send the whole case to trial without distinguishing fact from law and without defining the exact question to be tried. The result was that the parties were obliged to prepare for the proof of every conceivable fact that might bear on the case, resulting in an unnecessary accumulation of proof and, consequently, of expense. The judge also was, in the haste of the trial, compelled to extract from the testimony the questions of law and fact for presentation to the jury. The result was that what was seemingly gained through simplicity of pleading was lost through the confusion resulting from trials without well-defined issues, and motions for new trials multiplied in consequence.[17]

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[14] I Chitty on Pleading (7 Ed.) 424; 3 Blackstone's Commentaries 295.

[15] Act of 4 Anne, Ch. 16, Sec. 4.

[16] G. W. Pepper, Article on Pleading in Amer. & Eng. Enc. of Law (I Ed.), Vol. 18, p. 476.

[17] See extract from report of Common Law Commissioners printed in Stephen on Pleading (9 Ed.); appendix, p. 61. In America general pleading was more freely used than special pleading. To meet the objection that it failed to disclose the matter in dispute the expedient was adopted of requiring the plaintiff to furnish a bill of particulars of his demand and the de-

Such was the state of pleading both in England and the United States during the opening years of the nineteenth century. In both countries it was the subject of much adverse criticism but was stoutly defended by bench and bar. In the American colonies there were few lawyers at first and justice was administered with little formality, but during the course of the eighteenth century, educated lawyers came to the provinces while many American students went to London to study in the Inns of Court.[18] As a result trained lawyers after the Revolution were devotedly attached to the common law, including its procedure; while the intense hostility to the legal profession that prevailed among the people placed the bar on the defensive and made it the jealous guardian of the bad as well as the good features of the old system. On both sides of the Atlantic, nevertheless, the complaints against the prolixity, obscurity and triviality of common law pleading became louder; the demand for reform more and more insistent. In England, beginning in 1828, parliament appointed a series of commissions to inquire into the law of procedure whose recommendations, which fell far short of the suggestions made, found expression in the Rules of Court of Hilary Term, 1834. The chief aim of these rules was to remedy incidental defects in the existing system, principally in restricting the scope of the general issue; their tendency, therefore, was to strengthen the common law system, and their interpretation at the hands of a very able group of judges represents the highest development of this difficult art. As a compromise they fell short of the needs of the time and were to a large extent supplied by the Common Law Procedure Acts, a series of laws enacted between 1852 and 1860.[19] These statutes abolished much of the old verbiage, as well as special demurrers, and made other valuable changes, but were soon superseded by the Judicature Act of 1873, which, with its amendments and the rules of court

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fendant to give notice of the special matters of defense he intended to offer under the general issue.

[18] Warren's History of American Bar, Chaps. 1, 3 and 10.

[19] Hepburn, Development of Code Pleading 177.

adopted in pursuance of its provisions, revolutionized English procedure. By this legislation the courts were reorganized, provision made for the concurrent administration of law and equity, the old forms of distinct actions abolished, and the pleadings further simplified. A statement of claim is substituted for the declaration and the bill in equity; a defense for the plea; a reply for the replication. After the reply no pleading is permitted without leave of court.[20] The most important innovation is the delegation to the courts of the power to alter and annul the rules of procedure and make new rules as experience and changing conditions require, giving greater flexibility to procedure than is possible under direct legislation.[21]

In the United States, New York was the first state to destroy the old procedure. A commission appointed by the legislature in pursuance of a requirement of the constitution of 1846 reported the draft of a code of procedure which, in spite of great opposition, was adopted in 1848. This code abolished the distinction between proceedings at law and in equity, adopted a single form of action for the enforcement of all private rights, abolished common law pleading, and provided for the joinder of all parties necessary for the complete determination of the controversy. A new system of pleading was introduced which combined some of the features of pleading at law with that in equity. The first pleading of the plaintiff, was the *complaint*, a concise statement of the cause of action with a demand for judgment. To this the defendant could *demur* for a limited number of substantial reasons. The *answer* might contain either a specific denial of each material allegation of the complaint or a statement of new matter constituting a defence or a counter claim. To the answer, the plaintiff could demur or, if it set up a counter claim reply.[22] The new system was at first regarded with considerable

[20] Rules of Supreme Court, Orders 20, 21, 23; Annual Practice (1917), 371, 375, 419.

[21] Rosenbaum, Rule Making Authority.

[22] In some of the code states no reply is allowed. Gould on Pleading (Will's Ed.) 89, note.

hostility by bench and bar, was interpreted frequently in a narrow spirit and subjected to much amendatory legislation. In 1876 a new code was adopted called the "Code of Civil Procedure" which has met with almost universal disapprobation on account of its vast size and meticulous attention to the most trifling details of procedure. By the Civil Practice Act of 1920 many minor and some substantial changes in practice are introduced, including the abolition of the demurrer.[23]

The New York Code of 1848 had an immediate and extensive influence upon American procedure. Within five years seven states adopted similar codes;[24] and at the present time more than one-half of the states have codes that either re-enact the New York Code in substance, or embody so many of its principles that they may for all practical purposes be said to adhere to code pleading. Other states, without following New York, have by statute remodelled and simplified their procedure,[25] while still others follow the common law system with minor changes. The states may roughly be divided into three classes: code states, common law states, and states having individual statutory systems. It is generally agreed that code procedure in the United States, no matter how well intended, is crude and imperfect, perpetuates many of the faults of the old system, and lacks simplicity and flexibility. A new movement for procedural reform has started which cannot fail to have important results.[26] The general tendency of expert opinion at this time is in favor of the abandonment of the complete practice code enacted by the legislature in favor of a brief practice act dealing only with main outline and general principles of procedure, leaving the details to be settled, developed and improved by rules of court.[27]

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[23] Act of May 21, 1920, Laws 1920, Chap. 925, taking effect April 15, 1921.

[24] Missouri, California, Iowa, Kentucky, Minnesota, Indiana and Ohio.

[25] For example, Massachusetts, Rev. Laws, Ch. 167, *et seq.*; Pennsylvania, Practice Act of 1915, P. L. 483.

[26] See publications of American Judicature Society.

[27] Such is the plan of the New Jersey Practice Act of 1912, Laws, p. 377. Equity pleading and practice in the Federal Courts, and in Pennsylvania is prescribed by rule of court.

Dean Pound [28] has shown that the first principle which those who frame a practice act should have in view "should be to make it unprofitable to raise questions of procedure for any purpose except to develop the merits of the case in full." A prime factor in achieving this result will be to "distinguish between rules intended to secure the orderly dispatch of business" and rules "intended to protect the substantial rights of the parties." Rulings of the former class should be open to attack only for abuse of discretion and nothing should be obtainable through the latter class except a full and fair opportunity to present the case. The court should try the case, not the record, and pleadings should exist not to furnish a necessary formal basis for the judgment, but solely to give notice to the respective parties of the claims, defenses and cross-demands of their adversaries. Order is as indispensable in the administration of justice as in any other form of human activity; law without forms and rules is neither practicable or desirable. But forms tend to become artificial, rules mechanical, as the situation that brought about their adoption changes and new problems arise to which they do not apply. A perfect system is not within the realm of probability. What can be done is to shake off a superstitious regard for forms and apply common sense to such problems as they arise, remembering that the more the courts and counsel are relieved from constant attention to petty points of procedure the more time they will have to devote to the serious consideration of the substantial rights of the parties.

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[28] Practical Program of Procedural Reform, 22 Green Bag 438.