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Preface

This Working Paper has been prepared within the Commission and is circulated with the object of eliciting comment and criticism, expressed either in writing or in discussion with a member of the Commission.

It has been considered by all members of the Commission, which will make its report after consideration of the Working Paper and of any comments and criticisms received.

In making its report, the Commission will assume, unless otherwise advised, that any contributor of comment or criticism has no objection to the Commission quoting or referring to it, in whole or in part, or attributing it to him.

Comments and criticisms should be addressed to Mr. F. McEvoy, Secretary of the Commission, at its officers, 16th Level, Goodsell Building, 8-12 Chifley Square, Sydney, New South Wales, 2000. Telephone 20355 ext. 7213.

Summary of Proposals and Terms of Reference

In this working paper we propose certain changes in procedure relating to civil actions in the Supreme Court and District Court. The changes relates to

(a) **Common Law Pleadings**. In most actions at common law the parties must file and serve pleadings, the plaintiff setting out his claim and the defendant his answer to the claim. We recommend that in all non-jury actions the parties be allowed to proceed to trial without formal pleadings. We suggest an alternative procedure.

(b) **Scott Schedules**. In building, engineering and other similar technical cases involving large numbers of disputed items a plaintiff in the District Court is required to file a schedule in a form setting out particulars of the various items the subject of the dispute and showing the nature of that dispute. We recommend that the District Court practice be extended and that it be adopted in the Supreme Court.

The proposals are made in relation to the following terms of reference

"To review the procedures used and remedies available in the civil and criminal courts, including the enforcement of judgements and orders; in doing so, to have regard for the functions of the Rule Committee of the Supreme Court, other rule making authorities, and of the Criminal Law Committee; and to consider what reforms should be made for the more convenient cheap and efficient disposal of legal matters which now come or might be brought before the courts."

Common Law Pleadings

Part 1: Introduction

1.1 **The Nature and Objectives of Pleadings**. Pleadings are the statements in legal form which set out shortly the plaintiff's claim, the defendant's answer to that claim and where this is relevant, the plaintiff's reply to that answer.

In the Common Law Division of the Supreme Court the pleadings commence with the plaintiff's "statement of claim" which is answered by the defendant's "defence".[1] In the majority of cases this concluded the pleading since a joinder of issue by the plaintiff with the defendant's defence is implied if there is no reply to the statement of claim.[2]

In the District Court the corresponding pleadings are called an "ordinary statement of claim" or, if the claim is for a debt or liquidated sum of money, a "statement of liquidated claim" and a "notice of grounds of defence".[3]

Pleadings are generally claimed to have one main objective and two subsidiary objectives. The main objective is to define the issues.[4]Subsidiary objectives are to give to each of the parties notice of the cases intended to be set up by the other and to provide a permanent record of the issues decided.[5]

1.2 **Are Pleadings Achieving These Objectives?** Prior to preparing this proposal a random survey was made of pleadings filed in the Common Law Division of the Supreme Court. In practically none of the pleadings examined could it be said that an issue, rather than a multiplicity of issues, was produced.

The typical "running down" case commenced with a statement of claim which was reasonably precise except in relation to the allegations of negligence which were generally framed so widely as to be of little assistance in formulating any issue. The defence effectively put in issue all of the allegations in the statement of claim (including allegations not essential to the success of the claim) a distinction being usually drawn between matters apparently genuinely in dispute (which were denied) and other matters (which were "not admitted"). Contributory negligence was commonly pleaded (sometimes quite inappropriately) and again the particulars were framed in extravagant terms.

The "industrial accident" statement of claim was also usually framed in reasonably precise language except as regards particulars of negligence and breaches of statutory duty. The only allegation however which was commonly not traversed, either by denial or non-admission, was the incorporation of the defendant company.

Statements of claim in other types of actions for tort, such as occupiers' liability claims and claims for damages for conversion, trespass, nuisance and defamation were subject to similar defects in that they frequently contained extravagant claims and non-essential matter. Defences to these effectively put in issue all of the plaintiffs allegations.

Statements of claim in contract cases frequently employed the common money counts and were usually unintelligible unless amended by further statements of claim filed pursuant to notices to plead the facts.[6] The defences to these in some cases traversed only the matters apparently in dispute; in others the defence denied some matters and did not admit the remainder[7] thus putting all the plaintiff's allegations in issue.

The survey confirmed the opinions we had formed as a result of our professional experience, namely that pleadings

(a) are not defining the issues;
(b) do not adequately inform the parties of the nature of the cases they will have to meet;[8] and
(c) provide unsatisfactory records of the issues decided.[9]

FOOTNOTES

1. S.C. Forms 5, 9.
2. S.C. Act Fourth Schedule Part 15 r. 21.
3. D.C. Forms 8, 9, and 21.
4. "As the object of all pleading or judicial allegation is to ascertain the subject for decision, so the main object of that system of pleading established in the common law of England, is to ascertain it by the production of an issue" (Stephen on Pleading (1866) p.122).
5. Bullen and Leake 10th edn. p.1.
6. S.C.R. Part 15 r. 12(4) - D.C.R. Part 9 r.8.
7. The defences to these claims were verified in accordance with the rules where the claim was a liquidated one. Where the verification was of some matter in dispute the affidavit had some point. The situation was otherwise however, where the affidavit was merely verifying the truth of the fact of non admission.
8. Even when supplemented by particulars, discovery and inspection, interrogatories and notices to admit, a Scott-type Schedule or pre-trial conference or summons for directions is often necessary to ascertain the true nature of the case intended to be set up at the hearing.
9. Neither the extravagant claims nor the non-essential matter frequently contained in pleadings are intended to be the subject of a finding on a general verdict.

Part 2: The History of Pleadings

2.1 In attempting to discover the reasons for the failure of pleadings to achieve their objectives we considered briefly the historical background of modern pleading.

2.2 **Origin**. Originally all pleadings were delivered orally. The procedure is described thus

> "The writ by which the action was commenced used to be brought into court with the sheriff's return on it, and the plaintiff's counsel, after it had been read, proceeded to expand the charge contained in it, in a connected story, by adding time, place and other circumstances. Thus, if the writ mentioned the cause of action to be trespass, the plaintiff's counsel stated where, when and how the trespass was committed and what special damage had resulted from it ...This statement was called the count from the French conte, a tale or story. The defendant's counsel, on his part, stated the defence with similar precision, and this was called the plea. The plaintiff's counsel replied; the defendant's if necessary, rejoined; and so on until they had come to a contradiction either in law or fact. If either conceived that the last pleading of the opposite side was untrue in fact, he positively denied it, and then was said 'to take issue with it'... thus was an issue produced either of fact or law. If of law it was decided by the court; if of fact, tried in most cases, by a jury.
>
> While the proceedings were going on, the officer of the court sat at the feet of the judges, entering them on a parchment roll of record. When the pleadings were only in process of being entered on it, it was called 'the plea roll', when the issue had been joined and entered on it, it was called 'the issue roll', and when the judgement had been recorded on it, it was called 'the judgement roll'...[10]

2.3 **Formulation of issues**. Thus the true issue or issues would be presented to the court for decision.

> "... when all objections to the writ and process had been disposed of, and when the parties were fairly before the court, the debate between the opposing counsel, carried on subject to the advice or the rulings of the judge, allowed the parties considerable latitude in pleading to the issue. Suggested pleas will, after a little discussion, be seen to be untenable; a proposition to demur will, after a few remarks by the judge, be obviously the wrong move. The counsel feel their way towards an issue which each can accept and allow to be enrolled."[11]

2.4 **The beginning of written pleadings**. The system of oral pleadings was contemporaneous with a society where writing was uncommon and where it was usual to make claims publicly. As the ability to read and write became more common, as litigation increased and causes became more complicated,

> "the system of viva voce pleading was found inconvenient, and instead of pronouncing the pleadings aloud, they were drawn on paper and filed in the office of the court or delivered between the parties. The judges heard nothing about them until issue or demurrer."[12]

The abandonment of the practice of oral pleading meant that the procedure was no longer under the supervision of a judge. The pleading began as before with a count - if the action was a real action. If it was a personal action then the pleading began with a declaration and this latter term became commonly used when referring either to real or personal actions, the term "count" being retained to mean a claim in the declaration. In the declaration the plaintiff stated the nature and quality of his case which the defendant learned for the first time (the writ of summons not containing any mention of the cause of action as the original writ formerly did)[13] . The defendant filed a demurrer if he claimed that the declaration did not disclose a case sufficient on the merits or, if he could not dispute that the declaration was on the face of it good in substance, his course was to answer it by matter of fact and he did this by filling a plea. Eventually the parties were made to come to issue in the same manner as when formerly opposed to each other in verbal altercation at the bar of the court.

2.5 **The Development of strict pleading**. The system of written pleadings thus described gradually developed an area of technical expertise which became more and more complex. Clerks specially trained in

the offices of the prothonotaries called special pleaders were employed to formulate the case according to minute and technical rules and the skilful construction of pleadings became the subject of much legal learning.[14] Initially, the objective of raising a single issue was achieved, since a defendant was only allowed to raise a single issue in his pleas. This meant however, that he could not deny other allegations with which he in fact disagreed. The system also became unbearably rigid and technical. Mistakes which under the earlier system of oral pleadings could be overcome or glossed over in court were fatal under the system of written pleading. The development of the various forms of action produced differences both in the writ by which they were begun and in the mesne process upon that writ. From the 14th century onwards, the kind of pleas open to the parties also differed. There was a mass of detailed rules to be observed.[15]

2.6 **Relaxation of strict rules**. The technicalities associated with the common law system of pleading have of course been largely overcome by legislation and rules of court. Amendments to pleadings are now also freely granted by the court.[16] Every advance in the direction of relaxation has however partly defeated the main objective of pleadings - to define the issues. Thus, the common law rule allowing the use of the plea of the general issue and obviating the necessity for special pleading raised a general denial.[17] By 4 Anne c.16 s.4 (1705) a defendant, with the leave of the court was allowed to plead several pleas, and subsequent legislation enable several pleas to be pleaded without leave. The result was that instead of a precise issue, we had on the one hand a number of general allegations made by the plaintiff framed as widely as possible and on the other a series of general denials by the defendant. As Cotton, L.J. said;

> "The old (i.e. pre-Judicature Act) System of pleading at common law was to conceal as much as possible what was going to be proved at the trial".[18]

2.7 **The Judicature Acts**. If this statement implied that the Judicature system of pleading would achieve a significant improvement then it displayed an unfounded optimism. The judicature Acts abolished the old names and forms and many of the fine points the delight of old common law pleaders but they did not bring in a system of pleading which defined the issues. Indeed as early as 1880 a Committee on Procedure presided over by Lord Coleridge C.J., was so dissatisfied with pleadings then being drawn that it concluded "as a general rule, the questions in controversy between litigants may be ascertained without pleadings". The Committee accordingly recommended that no pleadings should be delivered in any action except with the leave of the court.[19]

2.8 **Attempted improvements**. Between 1880 and 1950 attempts to improve pleadings were legion. Their lack of success is however illustrated by these criticisms of "modern pleadings" made in 1953 by the Evershed Committee. The Committee found -

> (a) that statements of claim tend to prolixity including matters of history etc;
> (b) that in some classes of cases eg. 'running down' actions, the pleadings follow set forms and are useless;
> (c) that defences make common the practice of putting every alleged matter of fact in issue without regard to common sense or reality;
> (d) that ... matters of law, though they may surprise the other party, are not commonly pleaded;
> (e) that generally, pleadings being formal in style have the effect of creating a kind of ritual in which the litigant himself is involved, to his own pecuniary loss.[20]

More recently the Winn Committee on Personal Injuries Litigation[21] dealing with pleadings in road accident litigation reported:

> "the statement of claim ... tends to be a shoddy product. Far too many pleadings follow a stock form of which the dominant characteristic is that no cause of collision known to practitioners is omitted. In this type of litigation superfluity and irrelevance are rampant vices ..."[22] and "We have no hesitation in saying it is in defences that the current practice of pleading calls for its harshest criticism. One of the most experienced Queens Bench Masters told us that at present 'The defence is a blot on our procedure ... The chief defect of our system' , he avers 'is that a defendant is permitted to make wide denials.'[23]

The criticisms could as easily be made of pleadings in "running down" cases in New South Wales courts.

FOOTNOTES

10. Smith's "Elementary view of the Proceedings in an Action at Law" p.31 cited in Nims on Pre-Trial, pages 6 & 7.
11. Holdsworth "History of English Law", Vol. III, p.635.
12. Nims p.7.
13. See Stephen p.31
14. See Holdsworth, Vol. III , pp. 651.
15. See Holdsworth, Vol. IX, pp. 309-316.
16. Nevertheless even in modern times the reports continue to contain illustrations of cases lost as a result of pleading defects. See the examples given in the article "The Present Importance of Pleading" by Master Jacob, Vol.13, Current Legal Problems, p.171.
17. Now abolished by Part 16 Rule 27.
18. *Spedding v. Fitzpatrick,* 38 Ch. D. 410 at 414.
19. See 25 Sol. Jnl p.911. This recommendation resulted in a rule, made in 1897, which however was ineffective since the Court granted leave in virtually every case and the rule was eventually revoked in 1933.
20. Cmnd. 8878 (1953) p.42. The Committee recommended (p.32) a procedure whereby, in appropriate cases, the parties should be encouraged to go to trial without pleadings and the recommendation was embodied in a new Order - Order 14B. This was replaced by a simplified version in 1962 - Order 17 r.21 which has its counterpart in New South Wales in S.C.R. Part. 15 r.2. This rule provides that the Court may on the application of a party, order that proceedings be tried without pleadings or without further pleadings. As we understand it, the procedure is utilised mainly in commercial matters.
21. Cmnd. 3691 (1968).
22. Para. 254.
23. Para. 266.

Part 3: The Future of Pleadings

3.1 Why then have pleadings failed in their objectives? Is it because there has been too much relaxation of the formal requirements? Can the fault be attributed to laxity on the part of the profession - or the courts?

3.2 **The Adversary system**. The reason given by Professor Sunderland is none of these but the adversary system itself. Pointing out that common law procedure required that each party state his own case and that "the judges were in no way concerned with what the parties put forward" he said:

> "The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleaders' allegations and denials. They might rest upon the soundest evidence, or they might rest upon nothing at all. The parties could assert or deny whatever they chose. But whether the pleadings represented fact or fancy was something with which the rules of pleading had nothing to do. That was a matter to be dealt with at the trial, not at a preliminary stage."[24]

3.3 **The onus of proof**. It is perhaps no longer true to say that judges are "in no way concerned with what the parties put forward". However since the onus of proof rests upon the party who makes an allegation, there is considerable pressure to avoid making that task any easier by admission. Indeed experienced solicitors appearing before the Winn Committee asserted "emphatically and in some cases emotionally" that defendants should be allowed to traverse allegations of fact by general denial or non admission because of the onus of proof.[25]

Their assertions have judicial support, for example Lord Evershed, M.R:

> "I think a defendant - whether he is an underwriter or any other kind of defendant - is entitled to say by way of defence, 'I require this case to be strictly proved, and admit nothing'."[26]

3.4 **The possibility of future improvement**. Whether or not we accept this view, the onus of proof and the adversary system seem to us to explain the difficulty - perhaps futility - of attempting to improve pleadings. A return to the rigidity of the 17th century is unthinkable. Intermediate attempts "to tighten up" the requirements are likely to be met by evasion; and directions from the bench aimed at such evasive practices will probably produce only marginal or temporary improvement.[27]

3.5 **Possible abolition or replacement**. To conclude, as we have done, that common law pleadings are not fulfilling any of their objectives raises the question of their possible abolition. Such a proposal as we have already pointed out is not novel - but it is likely to meet opposition in view of the widely held belief that pleadings are essential in any case involving decisions on important issues of fact. Such a belief would however appear to ignore the experience of the criminal courts. Probably the most difficult decisions on the most important issues of fact dealt with our courts involving as they do the liberty of the subject, occur in criminal trials where there are no pleadings.

We believe that pleadings should be abolished or rather replaced if a more satisfactory substitute is available. Since the statement of claims is an originating process it would need to be replaced by another originating process. In the Supreme Court the other originating process presently existing is of course summons.[28]

FOOTNOTES

24. Sunderland "Theory and Practice of Pre-trial" 21 Judicature 125.
25. The Winn Committee did not accede to this view and attempted, like others before them to find ways to counteract it. The Committee thought that the requirements of the Rules were sufficiently specific to provide an adequate code and regarded it as essential that "the Judges should take it upon themselves to terminate" the system of pleadings which concealed what was going to be proved at the trial (para. 242). However the report later notes the assertion of defendant's solicitors - "that defendants when called upon

to plead do not even know whether the alleged accident occurred or at least are unaware how or why it occurred or whether the plaintiff's allegations, or any of them are true" (para. 260).

26. *Regina Fur Coy Ltd. v. Bossom* (1958) 2 Llds Rep. 425 @ 428.

27. Pre-trial procedures in the United States are based upon an acknowledgment of the fact that pleadings will not present to the court the real issues in dispute between the parties. Nims. Pre-trial p.10.

28. In the District Court the alternative originating process is an "application" (D.C.R. Part 5 Div. 3). There seems to be no reason why, for the sake of uniformity an "application" could not be styled a "summons".

Part 4: Proceedings By Summons

4.1 **History of summons**. The invention of the originating summons is credited[29] to Edward Fry the author of "Specific Performances" who was a member of the judges' rule committee in 1883 when the Judicature rules were recast. A simple form of procedure had however been introduced in England in 1852, (adopted in NSW in 1853) allowing a person seeking specified forms of equitable relief to commence a suit by applying to a Judge in chambers.[30] The 1883 rules merely formally acknowledged the term "originating summons" and enlarged the ambit of the procedure which was designed to overcome the delay and expense involved in the old mode of commencing a suit in Chancery and was used "for the purpose of quickly determining simple points".[31]

In N.S.W. the Equity Act 1880 repealed the earlier 1853 Act and there was no provision for the originating summons until 1900.[32] The Fourth Schedule to the Equity Act 1901 set out the types of proceedings in Equity which might be commenced by originating summons,[33] the scope of the process being subsequently enlarged by amendments to or enactments of Rules.[34]

4.3 **Present use of Summons**. The Supreme Court Act 1970 Fourth Schedule deals with commencement of proceedings by summons in Part 5. Proceedings may be commenced either by statement of claim or by summons except as provided by Part 4 which inter alia, excludes the summons as an originating process:-

> "2. (1) ...
>
> (a) where a claim is made by the plaintiff for any relief or remedy for any tort;
> (b) where a claim made by the plaintiff is based on an allegation of fraud;
> (c) where a claim is made by the plaintiff for damages for breach of duty ... and
> (d) where a claim is made by the plaintiff for damages for breach of promise of marriage.

The effect is again to enlarge the ambit of the procedure. Most proceedings in the Equity Division are now commenced by summons - usually pursuant to rule 4A of Part 5.

4.4 **The procedure**. This rule, (4A) provides for a date for hearing (obtained from the registry on filing) to be stated in the summons. On the return date the court hears and determines the matter or, if it is not altogether disposed of, makes a further date for hearing. The court may order that the proceedings continue on pleadings but frequently orders that affidavit (see Part 36 r.3) supplemented by oral evidence where necessary. (The leave of the court is needed to present evidence in chief otherwise than by affidavit - r.3 (2)). Statements on information and belief are admissible where undue delay or hardship would otherwise be caused and where the deponent or witness gives the source and ground of the information (Part 36 r.4).

4.5 **The District Court "Application"**. In the District Court an "application" is the originating process for any proceedings other than an action or an appeal (Part 5 r.8). The approved form is called a "notice of application" and like the Supreme Court Rule 4A summons it states the orders that will be sought at the hearing the date and place of which is stated in the notice (part 47 r.2(2) and Form 14). Evidence is by affidavit (Part 28 r.3) and the procedure generally is similar to that in the Supreme Court with some important differences.[35]

4.6 **Common law proceedings by summons**. Most of the common law proceedings in the Supreme Court and all common law actions in the District Court must be commenced by statement of claim.[36] The question arises whether anything is to be gained by relaxing the rules so as to allow all or some of these to be commenced by summons.

4.7 **The Evershed Report**. The suggestion is not novel. The Evershed Committee reporting in 1953 considered a possible extension of the originating summons procedure as part of a "new approach" to limit the issues and substitute a more economical means of proof.[37] The Committee emphasised the

advantage of "giving to the Court control of the case" at an early stage and "enabling the Court to exert itself towards a limitation or definition of the issues. The problem (according to the Committee) was however to define in some workable way the class of actions in which it is appropriate, for in inappropriate cases there may be a waste of time and waste of costs which would not have been incurred had the action been tried by the ordinary process." In the result, the Committee proposed an extended use of the originating summons procedure applying to all actions *other than* ...

> "(b) actions in which the plaintiffs claim is for libel, slander, malicious prosecution, fraud, false imprisonment, seduction or breach of promise of marriage;
> (c) ... actions in which the plaintiff's claim is for personal injuries."[38]

The exclusion of these actions comprising most actions in the Queens Bench Division was recommended in the context of the Committee's further recommendation for the institution of a new procedure by writ in that Division analagous to the Chancery originating summons under which the plaintiff might apply, after appearance by the defendant, for trial without pleadings.[39] We have already referred to this.[40] The recommendation had significance in English where the plaintiff still commences the action by writ and the defendant files his appearance. The plaintiff has therefore filed no pleadings when he makes an application for a trial without pleadings.

4.8 **Comparison with New South Wales**. Under the New South Wales procedure for trial without pleadings (S.C.R. Part 15) the plaintiff has already filed his statement of claim when he makes his application and there is therefore nothing to be gained by his applying to absolve the defendant from filing his statement of defence. In claims for damages for personal injuries in the Supreme Court a schedule must now be filed[41] which for practical purposes supersedes the statement of claim and statement of defence. The result is similar to a general order directing the parties to prepare a statement of issues which is commonly made when pleadings are dispensed with.[42]

4.9 **Recommendation**. We would therefore propose permitting all non jury actions in either the Supreme Court or District Court to be commenced by summons. In the Supreme Court this would in effect be an extension of the summons procedure to running down cases.[43] In the District Court there are also many contract cases heard without a jury.

4.10 **Procedure in the Supreme Court.** (i) The plaintiff would have the option (as at present) of using either a summons stating an appointment for hearing in accordance with r.4A (Part 5) or a summons for a hearing to be appointed in accordance with r.4B. The hearing date[44] stated in the r.4A summons would however be only the date of a preliminary hearing - we suggest that it be the date for the hearing for directions.[45] The r.4B procedure would be the more suitable procedure in cases where the plaintiff is unable to forecast when he will be ready such as where his injuries are not static.[46]

(ii) To minimise costs at the early stage we would suggest that the plaintiff should be encouraged to file only one affidavit with the summons and that the defendant should reply with a single affidavit - use being made of the "information and belief" technique to state all the material facts and to put in issue the matters truly in dispute.

(iii) Prior to the directions hearing the parties would be required to prepare and file the schedule as now provided[47] and in addition would be required to file and serve affidavits by the respective solicitors annexing copies of medical reports.[48] These reports would be accepted as prima facie evidence of the facts and opinions stated in the reports (subject to the right to have the medical practitioner called for cross examination).

(iv) Unless the court otherwise ordered[49] the evidence in chief of all witness would be by affidavit. Photostats of hospital clinic notes, police accident reports, letters from employers re loss of wages, accounts and receipts for out-of-pocket expenses (or alternatively a list with originals exhibited) annexed to affidavits would be prima facie evidence of the facts stated therein.

(v) In the usual type of case the court would no doubt want to hear the plaintiff give oral evidence to supplement the affidavit filed by him and the defendant would wish to cross-examine the plaintiff. In cases where matters of fact were genuinely in dispute deponents would be given notice to attend for cross-examination. Some deponents would not be required to be present,[50] but the directions Judge or trial Judge might require a medical practitioner to attend to explain or elaborate his report.

4.11 **Procedure in the District Court**. (i) We propose that the return date for the summons (or application if the name of the originating process is retailed for the new procedure) should be the call-over day in those places where a call-over is conducted (D.C.R. Part 24) and in other places the return date would be the date for hearing.

(ii) If the return date is a distant one we would suggest that the parties should initially file only one affidavit each.

(iii) Prior to the call over (or the hearing date) where there is no call over the parties would be required to file and serve all affidavits as in the Supreme Court.

(iv) Affidavit evidence would be supplemented by oral evidence at the hearing and deponents whose evidence was challenged would be required to attend and be cross-examined.

(v) A time should be prescribed pursuant to s. 78 within which a party may file a requisition for a jury in those cases where he has that right (we suggest 14 days after service of the summons). Since the plaintiff would not have commenced by summons if he required a jury trial it would usually be the defendant who would exercise this right and the plaintiff would then be required to file and serve a statement of claim and the action would continue on pleadings.

FOOTNOTES

29. By Sir William Holdsworth - History of English Law V.15 p.317.
30. Chancery Procedure Act 1852 (15 & 16 Vic. c.86) ss. 45, 47 - Equity Procedure Amendment Act 1853 (17 Vic. No.7) ss. 34, 36.
31. See In re Holloway ex parte Pallister 1894 2 Q.B. @ 166 et seq.
32. The Supreme Court Procedure Act 1900, ss.10, 12 repealed and re-enacted by Equity Act 1901 ss.2(1), 22(2), 94(2) and Fourth Schedule.
33. These can be shortly stated as questions of account or administration of an estate, of foreclosure or redemption of mortgages, as between the vendor and purchaser of real or leasehold estate, of the construction of a deed, will or other written instrument.
34. In 1931 immediate injunction and the immediate appointment of receivers were added, in 1946 Testator's Family Maintenance etc. Act applications (by rules made under that Act) and in 1966 provision was made for commencement by originating summons of a suit for a declaration of right.
35. There is for example no provision for the court to order that the proceedings continue on pleadings and Part 6 r.6 provides that costs shall not be awarded except by order of the Court.
36. Since they are actions in tort S.C.R. Part 4 r.2.
37. Cmnd. 8878 (1953) pp. 30 - 31.
38. See appendix IV, Cmnd. 8878 (1953) P. 358.
39. Appendix V, p.361.
40. See footnote 20. The Current English rule is O.17 r.21.
41. Practice Note No. 7 - taking effect from 3rd March 1975.
42. Either under the english rule O.18 r.21 or our S.C.R. Part 15 r.2 (2).
43. Non jury actions which are at present commenced by summons in the Common Law Division of the Supreme Court include claims for compensation under the Land and Valuation Court 1921, claims under the Transport Act 1930 and procedures under the Auctioneers and Agents Act 1941 - See Part 77. The main reason for excluding jury actions is our belief that proof by affidavit would be generally considered as an unsuitable procedure in such actions. We are not sure that such an attitude is justified. In civil law countries the court, comprising Judges and lay members (the jury) is supplied with a brief containing statements of witnesses (not unlike the material in affidavits) which is read before the trial. However further research on the subject should be carried out - and perhaps a controlled experiment conducted before including jury actions in this suggestion.

44. Fixed by the Court, or if not fixed by the Court obtained by the plaintiff from the registry - r.4A (2).
45. Practice Note No.7 1974.
46. If the summons procedure became the normal means of instituting running down cases, on present figures this would require fixing the return day for some 75 matters for each week. It would be a matter for administration (perhaps aided by the pre-trial experience) to decide whether there should be a regular return day (such as Friday in equity) or whether return days should be spread over the week. It would also be a matter for decision in the light of pre-trial experience to decide whether the return should be before the Master or a Judge.
47. Practice Note No. 7
48. This would comply with the provisions contained in Part 36 r.13A. The present practice requires merely exchange of copies of the report not less than 3 days before the date of the directions hearing.
49. See Part 36 r.3. Application would be made to the directions Judge supported by evidence - (for example evidence that the person refuses to swear an affidavit).
50. For example, a defendant insurance company would be unlikely to give notice to attend for cross-examination in relation to a person whose evidence had been investigated and found correct.

Part 5: Incidental Considerations

We have considered:

5.1 **Cross claims**. In the Supreme Court cross-claims include counter claims by defendants against plaintiffs, and third party claims. In the District Court cross-claims and third party claims are dealt with separately[51] and the rules and the forms relate to and are appropriate to actions commenced by statement of claim. Provision would accordingly need to be made in the District Court Rules and Forms for cross-claims and third party claims to actions commenced by summons.

The problems which in theory cross-claims and third party claims may pose in relation to running down cases appear to be minimal in practice. At present if two persons are injured in an accident and each alleges negligence against the other they commence separate proceedings. This is to avoid having a verdict on the cross-claim set off against a verdict for the plaintiff which would entitle only one party to judgement for the differences. Where separate actions are commenced they may each obtain a verdict and judgement which is of course paid by the insurance company. Obviously a similar situation would occur if proceedings were commenced by summons.

If a defendant wishes to claim contribution or indemnity from another defendant or a third party not a defendant then he may file a cross-claim. Since however the Government Insurance Office insures about 96% of the motor vehicles registered in New South Wales[52] this seldom occurs. In the few cases where multiple defendants are insured with different insurers they will probably seek, and the court should make, an order apportioning the verdict without any formal cross-claim being filed. In the rare cases where a defendant seeks contribution or indemnity from a third party not a defendant (and not insured with the same insurer) the Supreme Court should grant leave to cross-claim.[53]

5.2 **Summary Judgement and Order for Judgement**. Under S.C.R. Part 13 on application by the plaintiff the Supreme Court may direct the entry of judgement for damages to be assessed. The procedure would be available to running down actions commenced by summons in the Supreme Court. In the District Court the corresponding procedure is for the plaintiff to file an affidavit of service and for the court to make an order for judgement. This can only be done however in relation to an action commenced by statement of claim.[54] We recommend that this be amended. In the meantime the need for such amendment would not be a serious handicap so long as the District Court list remains up to date enabling the return date for summonses to be fixed for an early date.

5.3 **Payment into Court**. The Supreme Court Rules and District Court Rules both provide for a defendant paying money into Court or filing a security for such money. The procedure would be available to actions commenced by summons.

FOOTNOTES

51. See S.C.R. Part 6 Div. 3 D.C.R. Parts 20 and 21.
52. Figure supplied by Government Insurance Office.
53. In the District Court no leave would be required unless similar provisions to those in Part 6 r.15 were adopted in the District Court.
54. See D.C. Act s.57.

Part 6: Advantages of the Summons

We would hope that three main advantages would derive from use of the summons procedure-

6.1 **Increased prospects of settlement arising from greater reality and precision in the material filed in court and served on the opposing party**. A plaintiff will say in his affidavit what happened - so far as he able to swear it his affidavit will say so. If he cannot personally swear to the matter then he will have to give the source of his information and belief e.g., a solicitor's perusal of the Police Accident report, a medical practitioner, his employer. In contract cases the plaintiff will relate the conversation or annex the documents comprising the contract and the facts of any alleged breach.

In running down cases a defendant's first affidavit will usually deal only with liability. If the defendant insurer fails to get co-operation from his insured then the affidavit will be sworn by the solicitor for the insurer and will be all on information and belief. In contract cases the defendant in his affidavit will be required to deal with the specific matters deposed to by the plaintiff and to state any matter which he puts forward in answer thereto. In all cases each party should have a much better picture of his opponent's case than can be derived from the usual statement of claim and defence. We believe that in most cases the additional knowledge should aid prospects of settlement.[55]

6.2 **Fewer Interlocutory Applications and Orders**. Since the parties will be supplying on affidavit the evidence on which they rely, applications for particulars, for discovery and inspections and for interrogatories should be unnecessary in most cases.

6.3 **Shorter trials**. The evidence in chief of all witnesses will be on affidavit unless the Court otherwise orders.[56] We anticipate that parties and Judges will liberally interpret the words "undue delay or hardship" in S.C.R. Part 36 r.4 (and D.C.R. Part 28 r.5) so that statements on information and belief (provided that the deponent gives the source and ground of his information) will usually be admitted in evidence. Deponents whose evidence is not being challenged will not be called as witnesses. Cross-examination will be curtailed in relation to matters which the cross-examiner can see in amply supported by other evidence. Judges who wish may read the affidavits before the trial.

All of these matters should greatly shorten the trial and save expense.

FOOTNOTES

55. Advocates of the Pre-trial procedure claim the disclosure at pre-trial accomplishes this - see eg. Nims Pre-trial, p. 47.
56. Pursuant to S.C.R. Part 36 r.3 and D.C.R. Part 28 r.3. The definition of "trial" in D.C.R. Part 28 r.1 will require amendment to read ... "trial in an action in which a statement of claim has been filed ..."

Part 7: Possible Criticisms and Difficulties

7.1 **Disadvantages according to Master Jacob**. Master Jacob - an ardent supporter of formal pleadings - lists these disadvantages of the originating summons-

> "1. The issues cannot emerge until after the close of the evidence filed by the parties;
> 2. The issues can only be defined by analysing the evidence of the parties, if necessary after the close of the evidence at the trial;
> 3. It is difficult as well as artificial to raise by means of affidavits which are meant to deal with fact only, issues or contentions which are conclusions arising out of the facts as for example, a plea of waiver or of estoppel;
> 4. Issues may be raised at the trial which have not been raised in the affidavit, and so take the opposite party by surprise;
> 5. Discovery on an originating summons cannot be obtained except upon special circumstances being shown;
> 6. Further and better particulars of the allegations in the affidavits cannot be ordered."[57]

7.2 **Our answers to Master Jacob**. We have already dealt with the ineffectiveness of pleadings in defining the issues and avoiding the element of surprise. In relation to running down cases Master Jacob's remarks would, in any event, seem to have little point. In this type of action the issues are usually very obvious and very simple thus-

1. Was the defendant negligent?
2. Was the plaintiff negligent?
3. What damages should be awarded for the injuries sustained?

True, in any type of action the plaintiff should be protected from the surprise of the pregnant negative[58] - but the statement of defence does not do this. The defendant should be protected against a claim by the plaintiff for some item of damage or loss that the defendant has not had the opportunity to investigate - but the pleadings do not so protect him.[59]

By contrast, if the proceedings were by summons the defendant would be required to put his affirmative case on affidavit and the plaintiff would be required to swear to his injuries and disabilities in a tort claim and to his losses in a contract claim.

Discovery (mentioned by Master Jacob) is generally not available in a running down case[60] and would as we have pointed out, be usually unnecessary in a contract case commenced by summons. The Supreme Court Rules Part 33 (setting down for trial) provide for filing and serving of particulars of injuries, out of pocket expenses and loss of earnings[61] but this Part applies to proceedings commenced by summons only "to such extent and with such modifications as the Court may direct." However the requirement for the filing and serving of the Schedule prescribed by Supreme Court Practice Note No.7 (which is deemed to be a sufficient compliance with Part 33 r.8A) would apply to personal injury cases proceedings to trial on summons.

7.3 **Possible difficulties**. We do anticipate some problems, for example-

(i) Many common lawyers firmly believe that disputed issues of fact can only be satisfactorily decided on oral evidence. Affidavit evidence it is said (and with justification) is more the evidence of the legal adviser than the witness. Counsel, and the court, cannot "get the feel of the witness" through an affidavit.

Whilst appreciating some force in these views we do not think the arguments are unanswerable or indeed all one way. Oral evidence in chief is led from a proof of evidence prepared by a legal adviser. If the court needs to evaluate a witness it is not difficult for counsel, or the court, to keep the witness long enough in the witness box to form a judgement of his honesty and accuracy. There are many honest witnesses who cannot do themselves justice in the witness box. An affidavit in such a case may save them from the

consequences of their nervousness or poor memory. Counsel cross-examining on an affidavit will seldom suffer any disadvantage by reason of the affidavit, in unravelling the truth. Indeed he is in one sense better off than where no affidavit has been filed - it is as though he had the witness's proof of evidence which he can compare with the oral version in the witness box.

We believe that such opposition is in a large measure an indication of habit and conservatism. We do not however on that account underrate it.

(ii) It would be difficult to persuade common lawyers to change their habits and adopt the new procedure. Initially at least, we would not suggest that the procedure should be other than optional. An encouragement to use it would therefore be necessary. This is readily available in preferred or accelerated hearing dates when there is, as at present, a considerable delay in the Common Law Division in the Supreme Court. In the District Court there is at present no substantial delay. Full use of the summons procedure in the District Court accordingly may well await its general acceptance in the Supreme Court.

FOOTNOTES

57. Current Legal Problems, Vol.13, p.181.
58. See Winn Committee Report, Cmnd, 3691 (1968) para. 261. The pregnant negative is a traverse which conceals an affirmative case on causation - for example that the defendant's brakes failed. Our rules are the same as the English rule. (See S.C.R. Part 15 r.13 D.C.R. Part 9 r.9).
59. Particulars of personal injuries are required to be filed in the Supreme Court pursuant to r. 8A of Part 33. However these are often so widely drawn as to leave the defendant in doubt as to the real claim.
60. See S.C.R. Part 23 rr.1 and 5.
61. In rule 8A.

Part 8: Recommendation

We recommend that the Supreme Court and District Court Rules be amended to permit non-jury common law actions to be commenced by and proceed on summons.

Scott Schedules

Order 36 rule 1 of the English Rules of the Supreme Court (1965) provides as follows-

> "1. If, in any cause or matter in the Chancery Division or Queen's Bench Division other than a criminal proceeding by the Crown, the Court considers, upon application by any party, that having regard to the nature of the case it is desirable (whether on grounds of expedition, economy or convenience or otherwise) in the interests of one or more of the parties, the Court may, subject to any right to a trial with a jury, order that the cause or matter, or any question or issue of fact arising therein, shall be tried before an official referee, with or without assessors."

Rule 2 of the same Order gives the Court power of its own motion to refer issue of fact, thus-

> "2. In any cause or matter in the Chancery Division or Queens Bench Division, other than a criminal proceeding by the Crown the Court may, subject to any right to a trial with a jury, refer to an official referee for inquiry and report any question or issue of fact arising therein; ..."

Rule 9 provides that an order under rule 1 may with the consent of the parties name the master instead of the referee and that a reference under rule 2 may be made by the judge to a master instead of to an official referee.

Since 1st January, 1972, the office of "official referees" has strictly speaking been abolished, all official referees having, under the Courts Act, 1971, been appointed as Circuit Judges. References in Order 26 to an "official referee" accordingly mean "the Circuit Judge discharging the functions of an official referee" (Courts Act, 1971, s.25 (3)).

The White Book lists the classes of cases which are "official referees' business" as-

(1) Whole trials under rule 1.
(2) Inquiries and reports under rule 2 on questions and issues of fact.
(3) Matters referred by an order or an arbitration agreement under the Arbritration Act, 1950, s.11.[1]

Business before the official referees is allocated in rotation by the rota clerk. The referee thereafter gives such directions as may be necessary for the future conduct of the proceedings as if on a summons for directions. One of the features of such proceedings is an order for the preparation and completion of an Official Referee's Schedule or "Scott Schedule" as it is popularly know (named after a former Official Referee).

The Scott Schedule may take one of a number of forms. Chitty and Jacob's Queen Bench Forms[2] sets out six forms the headings of which illustrate their nature, thus-

1157 - where questions of reasonableness and extras are raised.
1159 - where questions of omissions and extras are raised.
1161 - where defective works and counterclaim are alleged.
1163 - claim for an account of commission.
1165 - dispute account for goods sold and delivered.
1167 - husband and wife disputes as to ownership of goods.

The order in each case requires one party - that is, the party having the onus of proving the issue - to prepare the Schedule in the form attached to the order and to complete the first columns. It is then served on the party's solicitor and the other party is required to complete the next succeeding columns. In forms 1157, 1163 and 1165 the Schedule is then complete. In forms 1159 and 1167 the first party makes further notations on the form and in 1161 gives particulars of his counter-claim. The completed forms are filed with the clerk to the official referee. The final column in each form is reserved for the use of the official referee.

In New South Wales the District Court has been using Scott type Schedules in building, engineering and other similar technical cases involving large numbers of dispute items. The procedure is that by direction of the Judges, the Registrar presiding at the call-over (which takes place some 4 to 6 weeks before hearing date) will refuse to allot a hearing date unless the Schedule has been filed. Parties aggrieved by a refusal to fix a hearing date on matters requiring a Schedule may apply to the Judge and the Judge may give directions. The Schedules are, however, so successful-

(a) in clarifying the issues;
(b) in avoiding confusion at the hearing;
(c) in achieving a settlement of many of the items in dispute (It becomes clear that the difference between parties is often not worth the expense of a contest),

that it is rare that a Judge allows such a trial to proceed without a Scott Schedule.

In the Supreme Court there were 14 “building” cases in 1973. In additional there were 48 actions listed as “breach of contract” and 165 cases not included in the 9 categories listed in the statistical analysis. We are of the opinion that if the dispute in any such case involves a number of items (say 4 or more) and the case is otherwise appropriate, it would be of benefit to the parties and to the Court to prepare and file a Scott type Schedule. Cases which we consider to be appropriate (following the English experience and practice) are cases involving such questions as-

(a) the reasonableness of amounts claimed;
(b) alleged omissions or claimed extras;
(c) alleged defective works or goods;
(d) claims for commission on goods or services;
(e) claims for goods sold and delivered or services rendered.

Common law cases set down for trial are presently being listed before a Judge for directions under Part 26. The directions Judge in “giving such directions for the conduct of the proceedings as appear best adapted for the just, quick and cheap disposal of the proceedings” may, in an appropriate case, direct the filing of a Scott type Schedule. The making of such an order however necessarily involves delay and the expense of a second appearance before the directions Judge. We are sufficiently convinced of the usefulness of the Schedule to suggest that a Practice Note should be issued requiring the preparation and filing of the Schedule before the directions hearing in all appropriate cases.

The District Court practice direction makes use of only one form (a copy of which is annexed). One form instead of six has the advantage of simplicity and since it appears to b e suitable for all cases we recommend its adoption with the minor amendments indicated, designed to make the form applicable to as wide a range of cases as possible.

We are also of the opinion that the directions Judge, as part of his directions for “the just, quick and cheap disposal of the proceedings”, should be able to refer issues and questions to the master not only as in England “for inquiry and report” but for decision. The powers of the Court exercisable by the master already include-

Schedule D.

Part 4.

General.

1. Trial (except with a jury) of proceedings, where the only matters in questions are the amount of damages and costs.
2. Trial (except with a jury) of proceedings where the only matters in question are the value of goods and costs or the amount of damages, the value of goods and costs.
4. Any matter (other than a trial) referred to a master by order of a Judge or the Court Appeal.

We see great advantage in giving the directions Judge power to refer the various factual issues which arise in a typical building (or similar) case to the master and where a decision on those issues will resolve all matters in dispute the directions Judge should be able to refer the trial to the master.

We therefore recommend-

(1) that a Practice Note be issued requiring parties to prepare and file three days before the directions hearing, a Schedule in accordance with Annexure "A" in any contract case where four or more items are in dispute involving such questions as-

(a) the reasonableness of amounts claimed;
(b) alleged omissions or claimed extras;
(c) alleged defective works or goods;
(d) claims for commission on goods or services;
(e) claims for goods sold and delivered or services rendered;

(2) that Part 4 of Schedule D to the Fourth Schedule be amended substituting for items 4-

"4. Any matter (other than a trial with a jury) referred to a master by order of a Judge or the Court of Appeal."

FOOTNOTES

1. Annual Practice 1973 Vol. 1 p. 542.
2. 19th edn. pp. 721 - 731.

Annexure "A"

The Schedule should be prepared in accordance with the following precedent:

Item No. (a)	The Items (a)	Reason for Claim (b)	Amount of Claim (a)	Reasons for Disputing Claim (b)	Sum Allowed (b)	If denied assessed amount (b)	Reply (c)	Decision

(a) These particulars are furnished by the claimant, [that is, the party claiming damages in the claim or cross-action for defective or incomplete work].
(b) These particulars are furnished by the other party.
(c) These particulars are supplied by the claimant. At the same time the claimant prepares, files and serves the Schedule.

Note: The part in square brackets included in the District Court form would need to be excluded to provide for the wider scope of the Schedule.