CHAPTER I

INADEQUACY OF PLEADING AS BASIS OF PREPARATION FOR TRIAL

Common Law Pleading

Written pleadings formed the traditional basis of preparation for trial in courts of common law. The chief objective of common law pleading was the production of a single issue which might be tried by the jury. The facts of the controversy were supposed to be narrowed down to a single issue from the respective allegations of the parties. The plaintiff was required to plead his case according to its legal effect and, therefore, could not plead evidence but only the ultimate facts upon which his claim rested. When the facts had thus been stated by the pleader, the opposite party was required to deny specifically each allegation which he wished to controvert at the trial. All the well-pleaded facts not denied by the adverse party were deemed to be admitted. This device, applied to the alternate pleadings, was supposed in the end to produce a single controverted point or issue, but a great number of highly technical rules were required to make it effective. As has been said, "refinements of pleading grew up on the court's passive willingness to let issues emerge out of the allegations recited

1 Stephen on Pleading, 341.
to it by contending pleaders in antiphonal rivalry, and the stilted form which written pleading eventually assumed was born of the tradition of care with which every statement in one's opponent's pleading had to be met to the court's satisfaction without disclosing to that opponent too much of one's own case."

It is doubtful whether common law pleading ever afforded an adequate basis of preparation for trial. In any event there were two factors at work which ultimately destroyed to a large extent whatever degree of efficiency the system formerly had. Clear statements of the facts of the case in the plaintiff's pleadings gave way to fictitious and vague allegations which were couched in antiquated terminology. The plaintiff was more concerned with invoking the judicial process by incantation of the precise ritual than he was in reciting the facts of the case. The defendant, too, was allowed to conceal his true position under the guise of an easy formula, the general issue. The general issue was used not only for the purpose of denying everything in the opposite pleading, whether really controverted or not, but also for the purpose of enabling the party pleading it to prove matters not suggested on the face of the pleading.

Especially did use of the general issue work havoc with the system of special pleading. This was the oldest form of traverse, which Stephen describes as "an appropriate plea fixed by ancient usage as the proper mode of traversing the declaration, in cases where the defendant means to deny the whole or the principal part of its allegations." Its effect had always been to put a summary close to the pleadings, thus, as Stephen says, "narrowing very considerably the application of the greater and more
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subtle part of the science of special pleading," and making it impossible for the pleadings to perform their theoretical function of disclosing the real points in dispute between the parties. Both the courts and the legislature encouraged its use. An act passed in 1650 provided that the general issue might be pleaded in any case whatsoever and though, as Holdsworth has pointed out, "this sweeping change did not outlive the period of the commonwealth, a number of statutes were passed in the Seventeenth and Eighteenth Centuries, expressly allowing the general issue to be pleaded in certain actions in which it would not otherwise have been applicable." Blackstone has pointed out exactly why the general issue, after that date, was increasingly used: "formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a special plea; which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defense and to keep the law and fact distinct. And it is an invariable rule, that every defense, which cannot be thus specially pleaded, may be given in evidence, upon the general issue at the trial. But, the science of special pleading, having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves everything open, the fact, the law, and the equity of the case, and have allowed special matter to be given in evidence at the trial."  

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4 Acts and Ordinances of the Interregnum (Firth and Bait) II, 443, 444; an Act of Bot. 23, 1650, cited by Holdsworth's History of English Law, IX, 321, note 3.  
5 Id.  
6 Blackstone's Commentaries, III, 305.
Upon the passage of the Statute of Anne in 1705, it became the fashion for defendants to add the general issue even when they filed special pleas of confession and avoidance. This had the effect of preventing the operation of the rule of implied admission by failure to deny. The practice was justified on the ground that it saved the defendant from the risk of a judgment non obstante where the pleadings raised a technically immaterial issue. Such men as Runnington advocated an even greater use of the general issue. "Nothing," he said, "would more prevent 'the many miscarriages of causes,' or more promote the ends of justice, than to enact that the defendant shall in all actions, on giving previous notice of his intended defense to the plaintiffs, be permitted to plead the general issue, and give the merits of his case in evidence." This was the policy which was adopted, with the exception that the defendant was not required to give "notice of his intended defense." Whereas formerly nothing could be shown under the general issue except that which went to dispute the truth of facts stated in the declaration, it became customary to allow also matters which merely avoided liability. To a declaration of indebitatus assumpsit, for instance, it became possible, as Brougham pointed out in 1821, to set up no less than eight different defenses under a plea of the general issue of non assumpsit. These were a denial of the contract, payment, usury, gaming, infancy, accord and satisfaction, release, and coverture. Use of the general issue prevented the disclosure of the real

7 Anne, ch. 16, sec. 4. This statute also diminished the possibility of reducing the controversy to a single point since it allowed the defendant to plead as many several pleas as should be necessary to his defense.
9 Ex parte Pearce (1885) 80 Ala. 195.
10 Holdsworth's History of English Law, IX, 322.
11 Reppy, "The Hilary Rules and Their Effect," 6 N. Y. Univ. L. Rev. 95, 111.
12 Cited in Holdsworth, op. cit. IX, 323, note 4.
points at issue. Especially was this true of such actions as trespass on the case, trover, and ejectment, for in these actions the declaration itself was already marked by an all too great generality of statement. The situation became so intolerable in the early part of the Nineteenth Century that reforms in pleading were adopted in the form of the Rules of Hilary Term 1834. The principal effect of these rules was to "restrict drastically the scope of the general issue." The reform, however, did not prove satisfactory. The effect of the Hilary Rules has been accurately estimated thus, upon the basis of a survey of cases decided in the ensuing twelve years: "Under the common law system the matter was bad enough with a pleading question decided in every sixth case. But under a Hilary rules it was worse. Every fourth case decided a question on the pleadings. Pleadings ran riot."  

The confusion occasioned by the attempt to make written pleadings the chief, if not the only, basis of preparation for trial at common law was tersely stated by Bentham when he said: "General pleading conveys no information, but there is an end to it; if any information is conveyed by pleading, it is by special pleading, but there is no end to it." The mistake of the common law system of procedure in the final analysis was that written pleadings were supposed to do what they were inherently incapable of doing. Instead of recognizing the limitations of pleadings as a fixed basis for litigation and supplementing them by other devices, pleadings were made increasingly complicated and technical in an attempt to force them to produce impossible results.

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14 Holdsworth's History of English Law, IX, 324; Reppy, "The Hilary Rules and Their Effect," 6 N. Y. Univ. L. Rev. 95 ff.
15 Whittier, Notice Pleading, 31 Harv. L. Rev. 507. Id.
16 Rationale of Judicial Evidence, Works VII, 274.
Pleading in courts of chancery performed a quite different function from pleadings in courts of common law. There was no formal trial with witnesses in equity until a comparatively recent date. Pleadings were supposed to present the facts of the case to the court in so complete a fashion that the court would be able to render its decision thereon. The pleader set forth detailed statements of the evidence in support of his case. A bill in equity consequently was a very lengthy and elaborate affair. Indeed as Story has said: "Equity pleading has now become a science of great complexity, and a refined species of logic, which requires great talents to master in all its various distinctions and subtle contrivances." A bill consisted of nine parts, the most important of which, as far as disclosure of the facts of the case was concerned, were the stating part and the interrogating part. The stating part was supposed to contain a full narrative of the facts and circumstances of the plaintiff's case. The interrogating part of the bill contained questions addressed to the defendant. The defendant's answer was supposed to bring forward such other facts and circumstances as might be considered essential to his defense, as well as to make full response to the interrogatories contained in the bill. A defense by answer in equity always meant an affirmative defense. Defense by denial was not necessary because, unlike the practice of common law, there was no constructive admission by failure to deny.

The later reform of pleading by the codes, it has been said, owed much to equity pleading. Even so, equity

17 Langdell, Summary of Equity Pleading, sec. 57.
18 Story, Equity Pleading (7th Ed.) sec. 13.
19 Id. sec. 27. Langdell, Summary of Equity Pleading, sec. 56.
20 Story, Equity Pleading (7th ed.) sec. 849; Great Britain Chancery Commission Report (1852) 6.
21 Langdell, Summary of Equity Pleading, sec. 79.
22 Clark on Code Pleading, 13.
pleadings were not intended to prepare a case for a formal trial with witnesses. They were intended to disclose all of the evidence of the case rather than to reduce the controversy to such a form as would make a trial with witnesses practicable.

**Code Pleading**

Reforms in pleading under the codes of practice which have been adopted in many of the United States have not rendered pleadings a sufficient and satisfactory basis of preparation for trial. It is true that some changes have been made in the direction of a more complete disclosure of the facts in dispute. Draftsmen of the first codes recognized that common law pleading too often contained formal and general statements which did not distinctly set forth the pleader's case. Accordingly the codes required that parties *plead the facts*, not the evidential facts but the material operative facts.\(^\text{23}\) The codifiers considered the requirement that the actual facts be pleaded in simple and concise language to be "the key of the reform" which they were proposing.\(^\text{24}\) While the defendant is not allowed to make a general denial of all of the allegations of the complaint in a few code jurisdictions which require that every allegation of the complaint be specifically denied, the more usual rule under the codes is to allow general denials.\(^\text{25}\)

Some of the same factors which made common law pleading ineffective as a means of disclosing the facts in issue are to be seen at work under the code practice. Even though a pleader is faced with the requirement that he plead the facts on which he relies, he often copies his complaint direct from a previously approved form. Simple and concise statements of the actual facts gradually

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\(^{23}\) Id. 150.  
\(^{24}\) First Report, New York Commissioners on Practice and Pleading (1848) 137.  
\(^{25}\) Clark on Code Pleading, 392.
have given way to statements couched in the language of form books. The complaint used in one negligence action, for example, could, with slight changes of wording, be used with equal propriety in a dozen similar cases. A comparatively small portion of the facts involved are disclosed by the pleadings. The defendant, too, can conceal his real position by use of the general denial. By denying "each and every allegation" of the complaint, he gives no indication as to what statements he will actually contest at the trial. Even in the few code jurisdictions in which it is required that denials be specific rather than general, lawyers often make a literal denial of every allegation, thus effecting what is in reality a general denial. The final result is that code pleadings do not afford a satisfactory solution of the problems of pre-trial practice. There is needed some additional device or devices for the clarification of issues and for the elimination of fake claims.

Reformed English Pleading

Pleadings are no longer regarded as the primary basis of preparation for trial under the reformed English procedure. Rather pleadings are regarded as mere forecasts of the points in dispute and are supplemented by discovery and various pre-trial administrative devices. Reforms under the Judicature Acts of 1873 and 1875 were predicated upon the view that it is impossible to expect written pleadings alone to provide a sufficient means of pre-trial practice. Pleadings may be dispensed with entirely in many types of actions. Every action is commenced by a writ of summons. The plaintiff must endorse on the writ the general nature of the claim upon which he sues. It is not necessary that he set forth the precise ground of complaint or the precise remedy or

26 Annual Practice (1932) Order II.
relief to which he considers himself entitled. In actions to recover a debt or liquidated claim and in actions to recover possession of land or possession of specific chattel, the plaintiff may specially endorse the writ with a short and concise statement of his claim, and this is all the pleading there is in the action. Even in cases in which the plaintiff endorses the writ generally rather than specially it is not always necessary for the parties to file pleadings. Since 1897 the question as to whether pleadings are necessary in an action and the time within which such pleadings must be filed is a matter for the master to decide. In each individual case the matter is presented to the master on a preliminary reference known as the hearing on summons for directions.

When pleadings are required they consist of a short and concise statement of the material facts upon which the party relies. The Judicature Acts required that: "Statements shall be as brief as the nature of the case will admit and every pleading shall contain as concise as may be, a statement of the material facts on which the party pleading relies, but not the evidence upon which they are to be proved." The present rules provide that: "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defense, as the case may be, but not the evidence upon which they are to be proved." General denials are not and never have been allowed under the reformed English practice. The present rules provide that allegations of fact in a pleading if not denied specifically or by necessary implication are taken to be admitted.

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27 Id. Order III.
28 Id. Order III, rule 6.
29 Rosenbaum, Rule-making Authority in the English Supreme Court, 54.
30 Annual Practice (1932) Order XIX, rule 4.
31 Hepburn, Development of Code Pleading, sec. 297.
32 Annual Practice (1932) Order XIX, rule 13.
Pleadings have been simplified by these reforms in England and some of the faults which existed under the common law system and under the equity system, respectively, have been corrected. But even so, pleadings are not supposed to perform the full function of disclosing and sifting the facts of the case before trial. They have been supplemented by other procedural devices which make possible a more thorough preparation for trial.