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UNDERSTANDING CONTRACT LAW THROUGH AUSTRALIAN LEGAL HISTORY: WHATEVER HAPPENED TO ASSUMPSIT IN NSW?[1]

By Geoff Lindsay SC

INTRODUCTION

1. ñAssumpsitò is alive and well, living under an assumed name; mostly ñContractò, sometimes ñRestitutionò (nee ñQuasi-Contractò). Itôs a cloak and dagger world for ñAssumpsitò, living with a truth that barely speaks its name: Common Law ñforms of actionò are not entirely dead.

2. Of course, all depends on what is meant by a ñform of actionò. On that inquiry hangs layers of meaning. At one level, it might mean nothing more than an obsolete writ once, but no longer, used to commence legal proceedings in England. More often, though, it might be taken to mean a residue of substantive law principles that were once invoked by the issue of a particular writ for the commencement of proceedings in one or another of the English Courts of Common Law: the Court of Kingôs Bench, the Court of Common Pleas and the Court of Exchequer. On the whole, perhaps, a modern mindset is more comfortable

[1] This Paper is a work in progress, an attempt to focus light on the development of contract law in Australia; the Common Law system of ñissue pleadingò retained in New South Wales longer than in England and other Australian jurisdictions that embraced Equityôs ñfact pleadingò system in conjunction with the joint administration of Law and Equity in a *Judicature Act* system; and the importance of court practice and procedure in the development of substantive law. Attention is drawn to two public lectures of note scheduled for later this year. The first is a lecture by JP Bryson QC (formerly of the NSW Court of Appeal and the Equity Division of the Supreme Court of New South Wales) on the ñHistory of Pleading in New South Walesò. It will be held on 24 August 2011 under the sponsorship of the Francis Forbes Society for Australian Legal History, the NSW Bar Association and the Seldon Society. The second lecture will be presented by Associate Professor Shaunnagh Dorsett of the University of Technology, Sydney, in November 2011 as this yearôs annual Forbes Lecture. It will focus on the operation of Rules of Court in early New South Wales and New Zealand.

describing this second meaning by reference to the expression ñcause of actionò[2].

3. Modern contract law in Anglo-Australian jurisprudence evolved, largely but not exclusively, from actions at Law in assumpsit, debt and covenant as the English legal system abandoned (first) restrictions on the joinder, and pleading, of causes of action in the several Courts that then administered the Common Law in England subject to archaic jurisdictional limitations and (secondly) the separate administration of those Common Law jurisdictions, as well as other forms of jurisdiction, including (but not limited to) Equity[3]. The old ñforms of actionò at Law dissolved as the common law system of ñissue pleadingò (designed to facilitate the identification of an issue, or a small number of issues, for determination by a jury) faded away, with an increasing emphasis on the provision of particulars of allegations to be made at trial and, then, with the adoption of an Equity style of pleading all material facts (ñfact pleadingò) in support of a claim following enactment of the *Judicature Acts* of 1873 and 1875[4].

4. Those procedural changes ultimately led to the demise in civil proceedings of the traditional common law mode of trial by judge and jury. That development was accompanied by the rise of the historical alternative to a jury trial, a hearing by a judge sitting alone (albeit, possibly, with the assistance of other officers available on a reference out of part of a dispute) as traditionally occurred in the administration of the Equity jurisdiction.

5. Collectively, these developments were accompanied by a shift from a practice-based system of legal education to a university-based system; a related evolution of legal literature from the practice books of legal practitioners to academic works infused with an aspiration for a ñscientificò treatment of subject areas and statements of law in terms of general principle[5]; and a growing expectation that dispute resolution procedures should be accompanied by a formal statement of reasons for any form of adjudication, coupled with the availability of avenues for appeal.

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[2] A useful, practical exposition of the Forms of Action from a modern perspective can be found in the entry for ñActionò in Volume 1 of the 1st edition of *Halsbury's Laws of England*, published in 1907: see, especially, paragraphs 49-80 on pages 31-51. Compare the entry for ñContractò in Volume 7, published in 1909. The exposition of English Legal history by WJV Windeyer in *Lectures on Legal History* (Law Book Co, Sydney, 2nd ed (revised), 1957) has the virtue that the author was a senior member of the NSW Bar. See chapters XIII, XIV, XXXII-XXXVI.

[3] *The Oxford History of the Laws of England* (Oxford University Press, 2010), Vol. XII, *1812-1914 Private Law*, ñPart Two: Contractò by Michael Lobban), pp. 313-322.

[4] For a brief account of events surrounding enactment of the *Judicature Acts*, see Enid Campbell, *Rules of Court: A Study of Rule Making Powers and Procedures* (Law Book Co, Sydney, 1985), ch. 1, esp. pp. 1-14.

[5] AWB Simpson, ñThe Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literatureò (1981) 48 *The University of Chicago Law Review* 632 at 662-664, reprinted as ch. 12 in Simpsonôs *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, London, 1987); *The Oxford History of the Laws of England,* Vol. XII, pp. 300-313.

6. The influence of changes in legal process on the thought patterns of lawyers and communities they served is easily overlooked in light of academic analyses of the development of modern contract law under the influence of a ñwill theoryò derived from European jurists and a tendency to explain the law in terms of sociology[6]. Professor Michael Lobban has recently expressed scepticism about the proposition that 19th century contract law can be explained in terms of a ñwill theoryò, rather than a pragmatic development of the law, appealing to principles derived from a Roman law tradition, but fitting them into a framework derived from the Common Law forms of action[7]. This is consistent with well known aphorisms of Sir Henry Maine and FW Maitland. Maine wrote that, ñ[so] great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedureò[8]. Maitland spoke of the forms of action, having been buried, still ruling us from our graves[9].

7. The transformation of contract law in the 19th and 20th centuries can, perhaps, be used as an illustration of a shift in mindset about systems of classification of legal thought (or, to use a currently fashionable term, taxonomy) arising from changes in legal procedure.

8. In recent times debates on this topic have focussed largely upon the relationship between the Common Law and Equity jurisdictions, and whether or not they have been, or should be, ñfusedò as a result of their administration in a single court system akin to that identified with the English *Judicature Acts*.

9. Those debates have tended to focus on whether ñEquityò should be regarded as a separate field of study. New South Wales is seen as a battlefield for competing contentions in those debates because it held out, for 100 years after England and other Australian jurisdictions, in opposition to the introduction of a Judicature Act system.

10. The other side of the New South Wales equation is its commitment (until the 1960s, as the State was moving to the introduction of a Judicature Act system) to Common Law modes of pleading, trial and thought.

11. An understanding of the New South Wales experience requires an appreciation of the unique importance of trial by jury in its history and the practical means by which pragmatically minded New South Wales lawyers administered the Common Law (and Equity) jurisdictions. Because of their Colonyôs origins as a convict settlement, colonists of

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[6] PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979), pp. 212-216 and 405-408; JW Carter, E Peden and GJ Tolhurst, *Contract Law in Australia* (Lexis Nexis, Sydney, 5th ed, 2007), ch. 1, esp. paras. [1.10]-[1.13].
[7] *Oxford History of the Laws of England*, Vol. XXII, pp. 310, 313 and 322.
[8] *Early Law and Custom* (1883), p. 389.
[9] *The Forms of Action at Common Law* (1968 reprint), Lecture I (p. 1).

New South Wales had to fight for trial by jury as a civil right that came to them, only in stages, with a democratic legislature[10]. It might be for that reason, as well as an initial distaste in the judges of the Supreme Court of New South Wales for Equity work[11] and the subsequent establishment of a strong Equity tradition in the Law Faculty of Sydney University, that NSW set its face against the adoption of a *Judicature Act* system.

12. A study of development of the law of contract in New South Wales may throw new light on old controversies. This is especially so if one bears in mind that: (a) first, the practice of law in New South Wales was never, exactly, the same as in England because of differences in institutional imperatives and local conditions; (b) secondly, there was, perhaps, a greater reliance in New South Wales on practice books than on English court culture and case law; and (c) thirdly, care needs to be taken against assuming too readily that a ñform of actionò at law in England had the same resonance as a ñform of actionò at law in New South Wales.

13. An exploration of these questions has utility for modern Australian legal practice because:

    (a) an exploration of the historical foundations of contract law in the Common Law forms of action highlights the respective fields of influence on the law of contract of concepts of:

        (i) an agreement or a promise given for consideration (associated, generally, with an action in assumpsit and, where a plaintiff has fully performed his or her side of a bargain, an action in debt or an action in indebitatus assumpsit)[12].

        (ii) an obligation to pay money arising from the dictates of justice; notably, the prevention of unjust enrichment where a defendant has received property or services, otherwise than by way of gift, at the expense of the plaintiff and detains the benefit of what he or she has received without recompense

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[10] David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early NSW* (Cambridge University Press, 1991); Ian Barker, *Sorely Tried: Democracy and Trial by Jury in NSW* (Forbes Society, Sydney, 2003); JM Bennett, ñThe Establishment of Jury Trial in NSWò (1959-1961) 3 *Sydney Law Review* 463.

[11] ML Smith, ñThe Early Years of Equity in the Supreme Court of New South Walesò (1998) 72 ALJ 799.

[12] Whether the predominant feature of a cause of action in assumpsit at the beginning of the 19th century was the element of ñagreementò or the element of ñconsiderationò is not self evident. However, one explanation for the course of developments in that century is that there was a shift in emphasis from ñconsiderationò to ñagreementò: *Oxford History of the Laws of England,* Vol. XII, pp. 315-317.

(associated with an action in debt or an action in indebitatus assumpsit)[13].

(iii) a formal declaration of facts, or promises, by which a defendant agrees to be bound, whether or not that declaration is supported by consideration, by reason of and evidenced by the solemn form of the declaration (associated with an action in covenant)[14].

(b) the same, or associated, inquiries into the history of the Common Law forms of action can highlight conceptual interrelationships between:

(i) contract and tort; eg, in similarities between an action in debt (for recovery of money wrongfully detained) and an action in detinue (for recovery of chattels wrongfully detained).

(ii) contract and property; eg, where a right of action in contract (including debt) is viewed as a form of property (albeit one unable to be assigned at Common Law without compliance with a statutory procedure[15] or the intervention of Equity).

(iii) the Common Law and Equity; eg, where a right to recover damages at Law is inadequate to do justice between parties, thereby grounding the intervention of Equity in the form of an order for specific performance or an injunctive order to keep a contracting party to his or her bargain[16].

(c) by gaining an appreciation of how Common Law rights of action, and equitable remedies, may operate together, insights can be had to calls by the High Court of Australia for novel propositions of law to be tested against ñestablished categories of liabilityò[17] and a need for ñcoherenceò in the law, upholding contractual principles and holding parties to

[13] A convenient exposition of the concepts of ñdebtò and ñindebitatus assumpsitò, in the context of the statutory expression ñdebt or liquidated demandò, can be found in *Alexander v Ajax Insurance Co. Ltd* [1956] VLR 436 at 443-445.
[14] *Manton v Parabolic Pty Ltd* [1985] 2 NSWLR 361 at 366-369 demonstrates that the formal requirements of deeds have been simplified by judicial decision and legislation.
[15] *Conveyancing Act*, 1919 (NSW), s. 12
[16] The idea (championed by OW Holmes Jnr in *The Common Law* (Little Brown and Co, Boston, 1881)) that a contract is but a promise to perform or to pay compensation at the election of the defendant is unsustainable to the extent that equitable remedies are available: *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 574-575; *Tabcorp Holdings Limited v Bowen Investments Pty Limited* (2009) 236 CLR 272 at [13].
[17] *Bofinger v Kingsway Group Limited* (200) 239 CLR 269 at [90]-[91].

their contracts[18] without too readily imposing fiduciary obligations on parties to commercial arrangements[19].

(d) an understanding of how, and why, the Common Law action of indebitatus assumpsit arose from the intersection of the action of assumpsit and the action of debt following *Slade's Case*[20] is necessary to an understanding of both differences between ñcontractòand ñquasi contractòand why the High Court (in *Pavey & Matthews Pty Limited v Paul*[21]*,* in moving from an ñimplied intention based theoryòof the law to a ñrule based theoryòof the law, rebadged the ñlaw of quasi-contractòas ñthe law of restitutionò

(e) the pause given by the High Court, in *Lumbers v W Cook Builders Pty Limited (In Liq)*[22]*,* to more generalised conceptual modes of reasoning recalls Australian lawyers back to the causes of action once called ñquasi-contractò and, in particular, may highlight the importance of familiarity with the elements of traditional ñcommon money countsò

(f) if attention is given in a pleading to the elements of a Common Law cause of action, as was required in the system of ñissue pleadingòthat accompanied the Common Law forms of action, some of the difficulties associated with the Equity style of ñfact pleadingòassociated with a *Judicature Act* system ï prolixity, obscurity, expense and delay ï might be minimised, if not avoided.

(g) In an environment in which there may be a growing divergence between the law of England (under the gravitational pull of the Roman Law tradition of Europe) and the law of Australia (set fully free from the formal gravitational pull of English law by the Australian and Imperial *Australia Acts* of 1986), it is necessary for Australian lawyers to take stock of what is essential, common and idiosyncratic about experiences of law in England and Australia.

14. Clues as to the nature and scope of the contractual forms of action might be had from their etymology (via Latin and Law French):

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[18] Eg, *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 at [35]-[50] and *Equuscorp Pty Limited v HGT Investments Pty Limited* (2004) 218 CLR 472 at [33]-[36].
[19] *Friend v Brooker* (2009) 239 CLR 129 at [84]-[86].
[20] (1602) 76 ER 1074; Baker and Milsom, *Sources of English Legal History: Private Law to 1750* (Oxford University Press, 2nd ed, 2010), pp. 460-479.
[21] (1987) 162 CLR 221.
[22] (2008) 232 CLR 635 at [85].

(a) The word ñassumpsitò(from the Latin *assumo*, ñto take up, acceptò) means he/she/it ñundertook or acceptedò an obligation, a concept close to the concepts of ñagreementò and ñpromiseò

(b) The word ñdebtò(from the Latin *debeo*, ñto oweò) carries the connotation of an obligation associated with the word ñoughtò

(c) The expression ñindebitatus assumpsitòmeans ñhaving been indebted, he/she/it undertook or acceptedò an obligation .

(d) The word ñcovenantò(from the Latin, *convenio,* ñto come to an agreementò) connotes a ñcoming togetherò in agreement.

15. This paper is not an excursus in English legal history beyond an acknowledgement of the foundations of Australian law in English law. Much has been written of the historical development of the modern law of contract in English law[23] and of the Old English forms of action[24].

16. How English law evolved, under the cover of writs issued by Royal authority, remains foundational to a deep understanding of how Australians of earlier generations thought. The separate and connected histories of the writs of trespass, debt and covenant ï and how an action in trespass morphed into actions in trespass ñon the caseò, giving rise to the modern law of contract and tort ï are especially significant. ñAssumpsitòwas a form of trespass on the case.

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[23] For a general review of the history of the law of contract in England, see: Chapter 27 (a large part of which was written by AWB Simpson) in NC Sneddon and MP Ellinghaus, *Chesire and Fifoot's Law of Contract* (Lexis Nexis, 9th Aust. ed., 2008); Sir John Bakerôs *An Introduction to English Legal History* (Butterworths Lexis Nexis, London, 4th ed, 2002); *The Oxford History of the Laws of England* (Oxford University Press, 2010), Vol. XII, *1820-1914, Private* Law, Part Two: Contract by Michael Lobban; and Baker and Milsom, *Sources of English Legal History: Private Law to 1750* (Oxford University Press, 2nd ed, 2010). A paper which traces the influence of Equity (and ecclesiastical law) jurisprudence on the development of modern contract law is PW Young, ñEquity, Contract and Conscienceò, being ch. 12 in Simone Degeling and James Edelman (ed), *Equity in Commercial Law* (Law Book Co, Sydney, 2005). It is, in part, informed by WT Barbour, *History of Contract in Early English Equity* (Clarendon Press, Oxford, 1914). Other commonly cited works include AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, Oxford, 1987); SJ Stoljar, *A History of Contract at Common Law* (ANU Press, Canberra, 1975); PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979); OW Holmes, *The Common Law* (Little Brown & Co., Boston, 1881), Lectures VII-IX; TFT Plucknett, *A Concise History of the Common Law* (Butterworth & Co, London, 5th ed, 1956), Part IV; RM Jackson, *The History of Quasi-Contract in English Law* (Cambridge University Press, 1936); PH Winfield, *The Law of Quasi-Contracts* (Sweet and Maxwell, London, 1952); AKR Kiralfy, *Potter's Historical Introduction to English Law and its Institutions* (Sweet and Maxwell, London, 4th ed, 1958), pp. 446-480; SFC Milsom, *Historical Foundations of the Common Law* (Butterworths, London, 2nd ed, 1981); DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999); Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004), ch. 5, esp. pp. 184-224.

[24] The classic account remains FW Maitland, *The Forms of Action at Common Law: A Course of Lectures* (Cambridge University Press, 1968; First published, with *Equity*, in 1909 and separately in 1936).

17. However, the focus on this paper is on the development of Australian law, not the law of England. That focus is underpinned by a call for the development of a doctrinal history of the law of contract in Australia. It begins with recognition that any such work of history is likely to require a starting point substantially different from one (such as the Norman Conquest of 1066 or the reigns of Edward I and Henry II) necessary for an exposition of English legal history.

18. A natural starting point for an exposition of Australian legal history ï even if there is a reaching back to earlier events later in the process ï is a consideration of the nature and expression English law at the ñtimeò at which (or, more accurately perhaps, during the formative period in which) English law was ñreceivedòï by which we really mean selectively applied by those responsible for the administration of law ï in the Colony of New South Wales.

19. Identification of English law the subject of ñreceptionò presents different challenges depending on whether the law was or was not in the form of legislation. Imperial statutes lent themselves, even if with a degree of uncertainty, to the application of a legislatively deemed ñdate of receptionò,[25] and (subject to Imperial constraints such as embodied in the *Colonial Laws Validity Act*, 1865 (Imp)) express repeal or amendment[26]. Consideration of the ñreceptionòof unenacted law, made or declared by judges in the determination of litigation after the event, is attended by greater uncertainty[27]. On the whole, ñcontract lawòfalls into this category.

20. Another, related problem in the analysis of any doctrinal history based on the analysis of judge-made law is that there is often no clear distinction between what, for convenience, might be described as ñsubstantive lawòand the ñadjectival lawòserving its application in courts of law. Court ñpractice and procedureòcan have a large effect on the identification, statement and resolution of a legal question and, accordingly, the development of a conceptual framework (doctrines) used for guidance in other and future cases.

21. Given the remoteness of the Colony of New South Wales from the Westminster courts whose deliberations embodied ñEnglish lawò, the need for colonists to rely on the written word and cultural imperatives in their conceptualisation and application of ñEnglish lawò(especially in the absence of legally qualified personnel in the early days of the Colony), the approach adopted in this paper towards identification of ñEnglish lawòthe subject of reception is to focus upon English texts

[25] In the case of New South Wales, 25 July 1828 by virtue of s. 24 of the *Australian Courts Act* 1828 (Imp), 9 Geo. IV c. 83.
[26] As occurred, in an exercise of statute law revision recommended by the Law Reform Commission of New South Wales, in the *Imperial Acts Application Act*, 1969 (NSW).
[27] Alex C Castles, *An Australian Legal History* (Law Book Co., Sydney, 1982), ch. 17.

known to be available in the Colony of New South Wales in or about the years 1788-1824. Reference is made, in particular, to:

(a) the fifth and last (1822) edition of Sir John Comynsô *A Digest of the Laws of England.*

(b) the ninth (1783) edition of Sir William Blackstoneôs *Commentaries on the Laws of England*.

(c) the 1810 edition of Sir Thomas Edlyne Tomlinsô *Law Dictionary*, based upon an earlier *Law Dictionary* published (in several editions) by Giles Jacob.

(d) the seventh (1817) edition of Sir Francis Bullerôs *An Introduction to the Law Relative to Trials at Nisi Prius,* known colloquially as *Buller's Trials at Nisi Prius*.

22. Extracts from each of those texts are set out in the Appendix to the paper in the hope of providing an insight into how ñcontract lawò was perceived before the emergence of ñmodern contract lawò during the course of the 19th century[28]. The word ñcontractò appears to have started out as an ñinforming ideaòï a connecting linkï between forms of action based on agreement. In the course of the century that generalised idea took centre stage and the forms of action (particularly assumpsit) receded from view[29].

23. Exactly when ñmodern contract lawò might be taken to have emerged fully formed might be the subject of debate in itself. However, if a particular time needs to be nominated for that event, it might be found in or about the 1870s. (Sir) Frederick Pollockôs *Principles of Contract at Law and in Equity* was first published in 1876. (Sir) William Reynell Ansonôs *Principles of the Law of Agency in its Relation to Contract* was first published in 1879. In the United States, Professor CC Langdellôs *A Selection of Cases on the Law of Contracts* was published in 1871, his *Summary of the Law of Contracts* was published in 1880 and Holmesô *The Common Law* was published in 1881.

[28] Other snapshots of how the English legal system operated at the time of foundation of NSW are available in the paper of Sir FD Mackinnon (later Lord Justice Mackinnon of the English Court of Appeal) entitled ñThe Law and Lawyersò, being ch. XXV in AS Turberville (ed), *Johnson's England: An Account of the Life & Manners of his Age (*Clarendon Press, Oxford, 1933), Vol. 2; and James Oldham, *English Common Law in the Age of Manisfield* (University of North Carolina Press, 2004). Reference might also be made to the Council of Legal Educationôs *A Century of Law Reform: Twelve Lectures on the Changes in the Law of England during the Nineteenth Century* (McMillan & Co, London, 1901), although it does not address contract law.

[29] Whether there is any parallel must be considered doubtful; but, in contemplating the future development of the law of restitution, one cannot overlook the possibility that ñunjust enrichmentò ï another ñinforming ideaòï might prove to be more influential than its present status suggests.

24. Because any consideration of the development of contract law in New South Wales must engage with the fact that New South Wales did not adopt a *Judicature Act* system of court administration until 1972,[30] reference needs to be made to the influence upon the practice of law in New South Wales, during the century preceding that date, of the third (1868) edition of Edward Bullen and SM Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law*, the last edition of that influential text published before enactment of the *Judicature Acts* of in England. Its exposition of ñCounts in Actions on Contractsòin chapter II (especially pages 35-54 and 58-63) might be thought to be worthy of occasional reference (eg, in connection with ñcommon money countsò) even in the current day. It is accessible on the internet[31].

25. In an era in which the shine has been taken off *Judicature Act* systems by concerns about abuses of process associated with adoption of Equityôs ñfact pleadingòstyle of process, and concerns about ñaccess to justiceògiving rise to a proliferation of ñalternative dispute resolution proceduresòand a ñcase managementòtheory of judicial administration, there may be an element of nostalgia in play when praise is directed towards the system of ñissue pleadingòassociated with Common Law forms of action and the determination of civil disputes by jury trials.

26. Nevertheless, at least in some areas of the law (including, it is suggested, the law of restitution so far as it may be derived from or be related to common money counts), there may be some merit in the advice given to counsel by Ralph Sutton in his work of practical history, *Personal Actions at Common Law*:[32]

> *"… it is still possible to make use of the old formulae [associated with the forms of action at Law], and if you can fit the facts laid before you in your instructions into one of them, you may feel fairly confident that if the facts are true – as you must assume for the purposes of your opinion that they are – you will be successful; but if you cannot, the strong probabilities are that you will fail. In any case it tends to accuracy of thought to attempt to frame your case with the precision of a lawyer rather than to transcribe your instructions, breaking them up into numbered paragraphs as you do so, and describing the result as a statement of claim or defence, as the case may be. The legal difficulties will have to be faced at some time; it is advisable therefore to face them at the outset, and there is no better means of finding out exactly where the strength or weakness of your case lies, than by going back to the old system and ascertaining in what way it would have been necessary to formulate your case under it".*

[30] More precisely, upon the commencement of the *Supreme Court Act* 1970 (NSW) on 1 July 1972.
[31] http://books.google.com.au/books?id=y2FAAAAAYAAJ&printsec=frontcover&dq#v=onepage&q&f=false
[32] Butterworth and Co, London, 1929, p. 13.

27. That advice remains good counsel, although it cannot be taken too literally in light of developments in substantive law between the days when ñforms of actionò were in their prime and today. An example of that relates to the concept of ñconsiderationò. Sometimes in earlier days analysed in terms of a ñbenefit conferredò on a promisor or a ñdetriment sufferedò by a promisee, under the ñbargain theory of contractò prevailing in modern Australian law, ñconsiderationò has the character of a ñpriceò given in return for a promise or a *quid pro quo*: *Beaton v McDivitt* (1987) 13 NSWLR 162 at 181-182 (per McHugh JA), citing *Australian Woollen Mills Pty Limited v Commonwealth* (1954) 92 CLR 424 at 456-457.

A CHANGE IN MINDSET

28. When the current generation of lawyers practising in New South Wales thinks of the law of contract what comes to mind, or perhaps is passed over as an assumption, is a definition of a ñcontractò in abstract terms. Particular definitions might vary but, in essence, a contract is perceived as a legally binding agreement between two or more parties (or a set of legally binding promises made by one party or more to another party or parties); and the circularity involved in a lawyer defining a contract in terms of something ñlegally bindingò is passed over by an enumeration of features (such as consideration in support of a promise) descriptive of a contract.

29. These types of definition might be thought of as ñconceptualò because they are abstract; ñrelationalò because they focus on a connection or relationship between parties; or ñtransactionalò because the connection between the parties, in the subject-matter of their agreement or promises, is a transaction of some form of business (not necessarily commercial in character). What each of these characterisations has in common is that its focus of attention is not a court action. It has nothing of the appearance of a ñcause of actionò.

30. The current generation of practising lawyer does not generally think of a contract in terms of a ñcourt actionò, although the idea that there may be a ñcause of actionò in ñcontractò is familiar enough. On the other hand, anybody who spends any time at all thinking about the law of contact is likely to be dangerously close to litigation of one sort or another.

31. If a member of the current generation were to define a contract in terms of a ñcourt actionò the result might be something like this: ñIn proceedings to enforce a contract a plaintiff must ordinarily prove that, in consideration of it doing or promising to do something, the defendant agreed with it (perhaps, but not necessarily, by a process of offer and acceptance)to perform a promise sought to be enforced. If put in issue, it must also prove that the agreement was made by parties of full capacity (with an intention to create legal relations); that requirements of form (if any), such as a requirement for writing, have been

established; that there was no mistake by the parties as to the identity or existence of the contracting parties or of the subject matter of the contract; and that the terms of the contract were agreed to with a certainty sufficient to justify enforcement.

32. Under the influence of text books tailored for use in academic discourse or the education of law students at universities, the current generation of lawyers has fallen out of the habit of defining legal concepts in terms of the legal proceedings (ñactionsò at law or ñsuitsò in equity, as they were traditionally thought of) necessary to enforce them.

33. The ñformsò of action of the old English Courts of Common Law (the Court of Kingôs Bench, the Court of Common Pleas and the Court of Exchequer) were ingrained in the imagination of the community, as well as the legal profession, they served.

HISTORICAL CONTEXT FOR THE DEVELOPMENT OF LAW IN NSW

34. At the time New South Wales was first settled by the British in 1788, English law was about to commence a fundamental transformation in several respects:

    (a) The literature of the law began to evolve from ñLegal Digestsò and ñLaw Dictionariesò (comprising alphabetically arranged collections of disparate entries summarising cases, legislation, legal procedures or related concepts) into text books or similar treatises (comprising a ñscientificò analysis of principles said to underlie a particular subject matter).

    (b) In line with that evolution, lawyers began to think ñscientificallyò, in terms of generalised statements of principle, instead of by reference simply the elements of a court action.

    (c) Sir William Blackstoneôs *Commentaries on the Laws of England* (first published, between 1765-1769, as a student text) began to be felt throughout the British Diaspora, especially in America. The eighth edition, the last to be published in the lifetime of the author (1723-1780), was published in 1778. By 1854, 74 years after his death, another 15 editions had been published. The editions most commonly cited are the first (reprinted in 1979 with an introduction by AWB Simpson) and the ninth (published in 1783 with editorial notes prepared by Richard Burn and incorporating corrections by the author).

(d) Building on foundations laid by his predecessors as Lord Chancellor (particularly, Lord Nottingham between 1673-1683, Lord Hardwicke between 1736-1756, and Lord Thurlow between 1778-1783 and 1783-1792), Lord Eldon (as Lord Chancellor between 1801-1806 and 1807-1827) systemised the principles governing an exercise of Equity jurisdiction.

(e) Jeremy Bentham (1748-1832), a law reformer with a preference for written law over unwritten conventions, was beginning his career. It influenced the course of reforms in judicial administration that commenced in earnest shortly after his death. His pamphlet, *A Plea for the Constitution*[33] influenced the constitutional development of New South Wales.

35. At the same time as these developments, Britainôs ñSecond Empireò (after the loss of its American colonies) was being reorganised during, and in the aftermath of, the French Revolution and the Napoleonic Wars. The Colonial Office, as it became, only devolved from the War Office in the decades following 1812, during which time it had to build almost from scratch the beaurocratic means to administer diverse colonies at a distance (largely under the influence of (Sir) James Stephen)[34]; judicial work of the Privy Council was reformed, with a statutory framework, only in 1833; and the Privy Council only began effectively to tighten its grip on colonial judge-made law towards the end of the 19th century (as evidenced, in a NSW context, by *Trimble v Hill* (1879) 5 App Cas 342 at 344-345 and *Cooper v Stuart* (1889) 14 App Cas 286 at 291-292). As Anglo-Australians were building a nation in the 19th century, their British compatriots were building an Empire in which the rule of law featured as a prominent element.

36. Although we might take 1788 as our initial point of reference, legal uncertainty attending the establishment of NSW as a ñconvict settlementòdid not begin to be resolved until 1824, with the establishment of the Supreme Court of NSW in the form which, today, is preserved by section 22 of the *Supreme Court Act* 1970 (NSW). The Court was established by a proclamation, known as the *Third Charter of Justice*, issued pursuant to an Act of the Imperial Parliament known colloquially as the *New South Wales Act,* 1823. It was reinforced by what is now known, by virtue of the *Short Titles Act* 1896 (Imp), as the *Australian Courts Act*, 1828 (Imp).

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[33] The full title of the pamphlet (reproduced in the *Historical Records of Australia*) was ñ*A Plea for the Constitution: Shewing the enormities committed, to the oppression of British subjects, innocent as well as guilty; in breach of Magna Charta, the Petition of Right, the Habeas Corpus Act, and the Bill of Rights. As likewise of the several Transportation Acts, in and by the design, foundation, and government of the penal colony of New South Wales".*

[34] Paul Knaplund, *James Stephen and The British Colonial System, 1813-1847* (University of Wisconsin Press, 1953), ch. 3, 9 and 10.

37. In the spirit of the times, such legislation was enacted to operate only for a limited period of time (incorporating what would now be described as a ñsunset clauseò) and, thereafter, extended from time to time. The 19th century was a time of reform, advanced pragmatically but under the guise of ñscientific principlesò, at many levels.

ENGLISH LAW THE SUBJECT OF "RECEPTION" IN NSW

38. An assumption underlying this Paper is that insights can be obtained about the processes of thought of the administrators of ñlawò in early colonial New South Wales by examination of the types of (English) legal texts available to them to inform their thinking.

39. That assumption is strengthened by the fact that, for many years, the government of the Colony was without any legally trained person in its ranks. The first *lawyer* to be appointed as the Colonyôs Judge Advocate was Richard Dore (1749-1800), an Attorney whose short period in office (between 1798-1800) was marked by disputes with the Governor (John Hunter (1737-1821)) and a felt need for the assistance of ñpractical law-booksò. On 12 September 1798 he wrote to the British Government requesting that he be sent basic office supplies (essentially paper) to enable business to be transacted. He also wrote:

> ***"Some practical law-books will also be necessary for my information in general matters of business, particularly such as relate to the official duties of a proctor, attorney, notary public, &c., civil magistracy, and a general system of professional instructions, in which the practical points are more my object than any theoretical essays, and a continuation of the statutes at large down to the latest period."***[35]

40. The legal profession arrived in New South Wales, in fits and starts, between 1798 and1824. During that time the Colony had to make do with whatever ñlegal learningò was available, including (famously) the services of the ñconvict attorneyò George Crossley (1749-1823). Before the arrival of Francis Forbes (1784-1841) and the establishment in 1824 of the Supreme Court of which he was Chief Justice, the Colonyôs legal establishment made do with the services of Ellis Bent (1783-1815) as Judge-Advocate; his brother Jeffrey Hart Bent (1781-1852), a judge who rarely sat; Barron Field (1786-1846), a more attendant judge whose conservatism extended to opposition to trial by jury and a legislative assembly for the Colony; and Judge Advocate John Wylde (1781-1859), who also briefly served as a judge to fill a gap created by Fieldôs departure from the Colony before Forbesô arrival.

[35] Letter dated 12 September 1798 by Judge-Advocate Dore to Under Secretary King: *Historical Records of New South Wales*, Vol. 3, p. 483.

41. Although a common assumption in the Colony from the outset was that, insofar as law was required to be applied, legal decisions would be informed by English law[36], that assumption was always qualified by pragmatism conditioned by local conditions.

42. Whatever formula was, from time to time, used to describe the applicability of English law to the Colony, it was always accompanied by a similar qualification:

(a) Sir William Blackstoneôs famous summary of the law, distinguishing between colonies acquired by conquest and those established by settlement of uninhabited country (neither of which descriptions comfortably explained New South Wales), was heavily qualified: *"If an uninhabited country be discovered and planted by English subjects, all English laws then in being, which are the birth-right of every subject, are immediately there in force"*. But that statement must, he said, *"be understood with very many and very great restrictions. Such colonies carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony…. What shall be admitted and what rejected, at what times, and at what restrictions, must, in case of dispute, be decided in the first instance by [the colony's] own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new modelled and reformed by the general superintending power of the legislature in the mother-country."*[37]

(b) Both the *New South Wales Act*, 1823 (Imp) and the Rules of Court made following establishment of the Supreme Court in 1824 pursuant to that Act accommodated the necessity to adapt law and legal processes to local conditions:

(i) Amongst other provisions of the Act conferring jurisdiction on the Court, s. 2 conferred jurisdiction on it by reference to the English Courts of Kingôs Bench, Common Pleas and Exchequer ñin all cases whatsoeverò. Section 6 authorised the Chief Justice (with two assessors) to decide issues of fact (implicitly without a jury) in any actions at law brought in the Court. And section 17 made provision for the Letters Patent establishing the Supreme Court or any Order in Council to authorise and empower the judges of the Court ñto make and prescribe such rules

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[36] Commissoiner JT Biggeôs *Report on the Judicial Establishments of NSW and Van Dieman's Land* (1823) included the observation (at page 6) that ñ[the] mode of trying a cause in the Supreme Court [over which Field J presided] differs very little from the course that is pursued in the courts of Englandò. See Enid Campbell, ñThe Royal Prerogative to Create Colonial Courtsò (1964) 4 *Sydney Law Review* 343 at 369-370.

[37] *Blackstone's Commentaries, Vol. 1, p. 107 (1st and 9th edns)*

and orders touching and concerningé the forms and manner of proceeding, the practice and pleadings upon all indictments, informations, actions, suits and other matters to be therein broughté ò

(ii) In accordance with s. 17 of the Act, a rule-making power was invested in the Chief Justice by a Royal Order in Council of 19 October 1824. The Order included an instruction that rules made pursuant to that power strive for simplicity, endeavour to promote economy and expedition in the dispatch of court business, and avoid all unnecessary dilatory forms of proceeding[38].

(iii) The first Rules and Orders of the Supreme Court (sometimes called ñForbesôRulesò) took effect (as to Rules 1-8) from 22 June 1825 and (as to the balance) from 9 September 1826. Rule 1 adopted *"[the] respective rules and orders, forms, and manner of practice, and of proceeding"* in the English courts *"so far as the circumstances and condition of [the Colony] shall require and admit,"*. Rule 10 provided that *"[every] action at law* [é commenced in the Court] *shall be entered in a short manner, setting forth the form of action, and the nature of the process which may be required in a book, to be kept in the office of the Supreme Court for such purpose, and called the 'Clerk's Book' and shall be signed by the plaintiff in the action, or by his lawful attorney".* Rule 21 provided that *"[in] any action at law…, the plaintiff may, in the place and stead of a declaration, file an account of the particulars of his demand, in all cases where such particulars are required by the practice of the Court of King's Bench at Westminster; and such particulars shall be subject to the same rules, as are observed in reference to the form and qualities of particulars of demand by the said Court of King's Bench; and, in all other cases, the plaintiff may file a short declaration, setting forth, in a plain, simple and compendious manner, the true cause for which the plaintiff brings his action, and particularly avoiding all superfluous forms and unnecessary matter"*. Rule 23 provided for defendants in an action at law to file a plea, demurrer or defence to the action within a limited time. Rule 24 provided that, *"[as] often as the nature of the defence, intended to be relied on, will admit of a general denial of the plaintiff's cause of action, the defendant in such action may, instead of a special plea, plead the general issue, and file notice of the special matter upon which he intends to insist in*

[38] Enid Campbell, *Rules of Court: A Study of Rule-Making Powers and Procedures* (Law Book Co, Sydney, 1985), pp. 22-23.

evidence, conforming 'as nearly as may be, to the like form and requisites, and … the same rules, as are made and observed in reference to notices of set-off by the Court of King's Bench', subject to a proviso permitting the judge at trial to grant dispensations". Rule 26 provided that *"[in] all cases where, from the nature of any action, the general form of declaring or pleading, hereinbefore directed, may be sufficient to maintain or defend such action, and shall be so signified by the Judge before whom the same shall be tried, no more or higher costs shall be allowed, than would have been allowed in case the general form of pleading, ordered by these rules, had been observed."* Rule 57 provided that *"[the] foregoing rules and orders, being made for the convenience of parties in the ordinary course of proceeding in the [Supreme Court], and with a view to promote economy and dispatch, by avoiding all unnecessary and vexatious forms, in the spirit of such view, and in furtherance thereof, the court may, from time to time, dispense with any particular rule that may be attended with inconvenience or hardship to either of the parties, and may make such special order, in any particular case, or in any stage of the proceedings, as shall be within the power of the court, and may facilitate the ends of justice".*

(c) Section 24 of the *Australian Courts Act* 1828 (Imp) which, in light of uncertainty as to the status of New South Wales for the purpose of the principles summarised by Blackstone, provided for 25 July 1828 to be the date of reception of English law within the Colony was in the following terms: *"… all laws and statutes in force within the Realm of England at the time of passing of this Act, (not being inconsistent herewith, or with any Charter or Letters Patent or Order in Council which may be issued in pursuance hereof) shall be applied in the administration of justice in the courts of New South Wales…, so far as the same can be applied within the said [Colony]; and as often as any doubt shall arise as to the application of any such laws or statutes in the said [Colony], it shall be lawful for the [Governor of the Colony] by and with the advice of the [Legislative Council of the Colony], by ordinances to be made by [it] for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such [Colony] and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said [Colony] as may be deemed expedient in that behalf: Provided always that in the meantime, and before any such ordinances shall be actually made, it shall be the duty of the [Supreme Court], as often as any such doubts shall arise upon the trial of any information or action, or upon any other proceeding before*

[it], to adjudge and decide as to the application of any such law or statutes in the said [Colony]."

(d) In its restatement of the Blackstoneôs summary of the law in *Cooper v Stuart* (1889) 14 App Cas 286 at 291-292, and in its application of Blackstonian principles to the unwritten common law as well as statute law, the Privy Council wrote the following: *"The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done, the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute. The often-quoted observations of Sir William Blackstone (1 Comm. 107) appear to their Lordships to have a direct bearing upon the present case… Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant [settled, uninhabited Colony to which English laws were the birthright of every English subject]. If the learned author had written at a later date he would probably have added that, as the population, wealth, and commerce of the Colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it; and that the power of remodelling its laws belongs also to the colonial legislature".*

43. Passing over (without any disrespect to modern sensibilities) the Privy Councilôs characterisation of New South Wales as ña tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexedòto Britain, the point of present emphasis is that any application of English law as ñthe law of New South Walesòrequired an assessment of local conditions.

44. The difficulties sometimes inherent in making any such assessment were ultimately addressed by the *Imperial Acts Application Act,* 1969 (NSW). By that time Australian courts, having initially acquiesced in their subjection to English judge-made law under supervision of the Privy Council and in deference to other English courts, were becoming restive.

45. The intellectual processes that led to the abolition of Australian appeals to the Privy Council, and to the ñlegal independenceò conferred upon Australia by proclamation of the *Australia Acts* of the Commonwealth and Imperial Parliaments in 1986, began no later than with the decision of the High Court in *Parker v The Queen* (1963) 111 CLR 610 at 632-633. On that occasion, the Court declined to follow a decision of the House of Lords. With the abolition of Privy Council appeals, the High Court became the final arbiter of Australian law and, in *Cook v Cook* (1986) 162 CLR 376 at 390 and 394, it determined that Australian courts, no longer bound by English authority, should treat that authority as persuasive rather than binding.

46. Even without those later developments, the highly qualified terms in which English law was ñreceivedò as law in New South Wales might be thought to call into question any attempt to attribute an exact equivalence to a ñform of actionò at common law in England and a ñform of actionò at law in New South Wales. The extent to which legal processes in New South Wales were uninhibited by English impedimenta was significant enough to counsel caution.

47. The need for caution is all the greater when one moves from an examination of ñblack letter lawò analyses to a review of the law in operation. The currently accepted wisdom of legal historians in Australia, as in other parts of the world influenced by British law, is that the law in operation operated with greater flexibility than a formal statement of the law at any particular time might suggest. In short, one has to be conscious of differences between ñformalò and ñinformalò law.

48. The process of recovering early NSW case law commenced by Professor Bruce Kercher at Macquarie University is continuing with work presently being undertaken by Brent Salter (Co-Editor, with Professor Kercher, of the *Kercher Reports*[39]) and Dr Lisa Ford. They are currently compiling cases, relating to the period between 1827 and 1862, to bridge the gap in published NSW Law Reports between *The Kercher Reports* (covering the years 1788-1827) and the *Legge Reports* (which, in substance, cover the period commencing in 1862).

[39] Published by the Francis Forbes Society for Australian Legal History in 2009.

THE AVAILABILITY OF LEGAL TEXTS IN EARLY NSW

49. A deficiency in the historical record of Australian legal history is the absence of any bibliography listing the legal texts available to the inhabitants of early New South Wales. Such a list remains to be reconstructed from primary records.

50. We can, however, be reasonably confident that from the earliest days of the British settlement in Sydney, those responsible for the administration of the law in the Colony had access to an edition of each of *Blackstone's Commentaries, Jacob's Law Dictionary* (which Tomlin revised) and Buller's *Trials at Nisi Prius.*

51. Our confidence in that is based upon the fact that the Colony's first Deputy Judge Advocate, David Collins (a non-lawyer) had those books, and others, issued to him before he sailed to Botany Bay. We know that from a written request made by Thomas Hibbins to Governor Hunter in anticipation of his travelling to Norfolk Island as a Deputy Judge-Advocate. On 30 November 1795 he wrote to the Governor in the following terms (with emphasis added):[40]

> **"Sir,**
>
> **I am informed by Captain Collins that he was supplied by Government, when he first came out as Judge-Advocate of New South Wales, [with] a number of law-books to assist him in the discharge of his public duty, a list of which I take the liberty to subjoin, and hope the same allowance and indulgence will also be granted to me. I observe, upon a perusal of the Patent authorizing the convention of a Court of Judicature at Sydney, which Captain Collins has been so kind as to show me, that a Court of Civil Jurisdiction, as well as Criminal, is thereby ordained and directed to be held, and which provision, I suppose, will be also contained in the Patent for Norfolk Island, to which Court is given power to hold plea of, and to hear and determine in a summary way all pleas concerning lands, houses, tenements, and hereditaments, and all manner of interest therein, and all pleas of debt, account, or other contracts, trespasses, and all manner of other personal pleas whatsoever, and farther ordains and grants to the said Court power to grant probates of will, and administration of the personal estates of intestates dying within such place or settlement. Though not wholly unprovided with books, yet I could not make it convenient before I left England to purchase the statutes at large, and a few other excellent and necessary law-books which I ought not to be without, and which no doubt I shall have as much occasion to refer to in Norfolk Island as Captain Collins has at Sydney.**
>
> **List of Law-books supplied to the Judge-Advocate of New South Wales.**

[40] *Historical Records of New South Wales*, Vol. 2, pp. 339-340. Hibbins's request for law books, conveyed by this letter, was not met: KJ Cable, "Thomas Hibbins (1762-1816)", (1966) 1 *ADB* 536.

The Statutes at large, Addington's Penal Statutes, Hale's Historia Placitorum Corona, Hawkins's Historia Placitorum Corona, Foster's Reports and Discourses upon Crown Law, Crown Circuit Companion, Jacob's Law Dictionary, Blackstone's Commentaries, Burn's Justice, Reeve's History of the English Law, One Year's Sessions Papers.

I humbly request that the last editions may be transmitted to me, and that instead of Burn's Justice and the Crown Circuit Companion, which are two amongst those I have already, I may be supplied with the books subjoined, viz.:-

The Crown Circuit Assistant, Svo.; Wood's Conveyancing, or some other eminent author on that subject; Impey's Practice in the Court of King's Bench, and Buller's Nisi Prius.

Subjecting, however, the whole of this list to such alterations as his Majesty's Judge-Advocate-General, or any other of his principal law officers, if consulted, might deem proper to advise.

I am, &c.,

T. HIBBINS."

52. We can also be reasonably confident that *Comyns' Digest* was available in the Colony because of references to it in the writings of judges of the NSW Supreme Court. An example of that usage is in the Opinions of Forbes CJ, Stephen and Dowling JJ on the Applicability of Criminal Laws published in *Dowling's Select Cases:* (1828) N.S.W. Sel. Cas. (Dowling) 181 at 184 (12 April 1828).

53. Scattered references in *Dowling's Select Cases* can be found to both *Blackstone's Commentaries*[41] and Buller's *Trials at Nisi Prius*[42].

ADAPTABILITY OF ENGLISH LAW TO LOCAL NSW CONDITIONS

54. Although "forms of action" in the old English Courts of Common Law were hedged about with procedural impediments that, to a modern Australian mind, appear odd, many of those impediments were progressively removed as the 19th century edged closer to the *Judicature Acts*.

55. Although the jurisdiction of the Supreme Court of New South Wales upon its establishment was defined by reference, inter alia, to the jurisdiction of the English Courts of Common Law[43], several factors point towards greater flexibility of action in the colonial Court that was possible in England. First, the Supreme Court of New South Wales was a single court, not three or more competing courts. Secondly, because there was but one court there was, from the outset, a uniformity in the form, and control, of court process unattained in the

[41] TD Castle and Bruce Kercher (ed), *Dowling's Select Cases 1828 to 1844* (Forbes Society, Sydney, 2005), pp. 36-37, 138, 140, 151, 177, 182, 185, 187, 188, 199, 262, 270, 272, 532, 554, 639, 649, 653, 736, 970 and 980.

[42] *Dowling's Select Cases,* pp. 46, 100, 234 and 493.

[43] Section 2 of the *New South Wales Act*, 1823 (Imp), 4 Geo. IV, c. 96, reproduced in JM Bennett and AC Castles, *A Source Book of Australian Legal History* (Law Book Co, Sydney, 1979), pp. 42-53.

English Courts of Common Law until enactment of the *Uniformity of Process Act,* 1832 (UK) and the *Common Law Procedure Act,* 1852 (UK). Thirdly, procedural limitations affecting the conduct of actions in the English Courts did not necessarily apply in New South Wales, whether the source of those limitations reflected legal fictions deployed by the English Courts against one another as historical competitors or not. Fourthly, upon its establishment the Supreme Court of New South Wales had but one judge (the Chief Justice, Francis Forbes) and, moreover, only the prospect of a traditional trial by jury, necessitating judicial consideration of questions of fact as well as questions of law. Fifthly, until the appointment of judges more formalistic than he was naturally inclined to be, Forbes CJ was able to entertain actions under rules of court substantially more informal than anything governing actions at law in England.

56. From the time of its establishment, the Supreme Court of New South Wales was accordingly able to view the ñforms of actionò at common law as embodying substantive legal principles without substantial procedural constraints. They were not merely procedural forms in a NSW context.

57. Recognition of that fact is, perhaps, necessary to a full understanding of, first, Forbesôperception that his court had no immediate need of a Chancery side (when, in 1827, he wrote, *"In an early stage of society there is comparatively but little occasion for resorting to a Court of Equity"*) and, secondly, New South Walesôearly embrace of English legislation recognising that actions at law could be commenced without any need to stay within the confines of a single form of action.

58. With colonial informality, the common law actions of debt, assumpsit and covenant generally serviced the ñcontractual lawòneeds of colonial society. Within that framework, some of the ideas later associated with ñleading casesòdrawn from English law reports might be found to have been anticipated, independently, by colonial judges proceeding pragmatically. An example of that may be the anticipation of *Hadley v Baxendale* (1854) 9 Ex 341, by Forbes CJ, in *Girard v Biddulph* (1834)[44].

59. The fact that many disputes were able to be resolved within the framework of an action for debt (in an unsophisticated economy in which goods and labour were exchanged for a promise of money in a sum certain) reinforces that point: Bruce Kercher *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict NSW* (Federation Press, Sydney, 1996).

[44] Bruce Kercher, ñColonial Contracts and Expectation Damages: Girard v Bidulph, New South Wales Supreme Court, 1834ò (2001) 1 *Macquarie Law Journal* 129.

60. Based on a study of the minutes of the Court of Civil Jurisdiction[45] Professor Kercher has estimated that, between 1810 ï 1814, civil litigation in the Colony was dominated by debt recovery actions to the extent that 94% of cases were brought to enforce debts; the most common ñnon-debtò cases concerned succession on death, land, breach of commercial agreements or promises, and trover[46].

61. Having started business with the informality attending a small society, and all the advantages and disadvantages of distance from the centre of Imperial government, early colonial courts were able to proceed with that degree of informality with which they were (often according to the personality of serving judges) most comfortable.

62. It may be a mistake to bring to mind the much criticised ñforms of actionò at common law spoken of in the context of English Legal History when analysing the content and operation of ñforms of actionò as administered in the Supreme Court of NSW.

63. At this point, the following observations of Sir William Deane in *Pavey & Matthews Pty Limited v Paul* (1987) 162 CLR 221 at 252 might be noticed (with emphasis added):

> **"The impression has sometimes been conveyed by colourful phraseology that the retention of the old forms of action in New South Wales until 1970, when they were abolished by the belated introduction of the Judicature Act system of pleading, meant that the administration of civil justice in that State had lagged behind the nineteenth century. Such an impression bears little relationship to the reality. Whatever may have been the comparative advantages and disadvantages of the formal system of pleading and the formal separation of law and equity (see, e.g., Sir Owen Dixon, "Concerning Judicial Method", *Australian Law Journal,* vol. 26 (1956), 468, at pp. 469-470), the substantive common law developed in New South Wales with little real hindrance from the continued observance of them. In a situation where causes of action could be joined, where it had become unnecessary to specify the particular form of action adopted or to plead the fictional promise in an action of assumpsit and where "the same conveniences as to final judgment and t he assessment of damages [were] extended to all causes of action to which they can be applied" (see Bullen & Leake, *Precedents of Pleadings*, 3rd ed (1868), p. 36; *Common Law Procedure Act* 1853 (NSW) ss. 3, 37, 45, 85, 86, 87; *Common Law Procedure Act* 1899 (NSW) ss. 5, 49, 129, 130, 131), any real point in distinguishing in the ordinary case between a common indebitatus assumpsit count had become largely forgotten. Indeed, the notion that an**

[45] The Court of Civil Jurisdiction was established by Letters Patent dated 2 April 1787 known as the *First Charter of Justice* and operated in the Colony from its foundation in 1788 until (by Letters Patent dated 4 February 1814 known as the *Second Charter of Justice)* there was established a ñSupreme Courtò that operated until 1824.

[46] Bruce Kercher, ñCommerce and the Development of Contract Law in Early New South Walesò (1991) 9 *Law and History Review* 269 at 272.

action on a common indebitatus count for a reasonable remuneration was not an action to recover as a debt the actual liquidated amount payable but was an action for breach of some unmentioned fictional assumpsit or promise to pay it would have sounded as bizarre in the ears of a practising New South Wales lawyer at the time *Horton v. Jones* [No. 1] (1934) 34 SR (NSW) 359 at 367-368 was decided as in the ears of a practising lawyer in a jurisdiction where the old forms of action had been formally interred"[47].

64. Of the references to the *Common Law Procedure Acts* made by Deane J, it is sufficient for present purposes to refer to ss. 3, 37 and 45 of the 1853 Act (respectively reproduced in ss. 5, 49 and 58 of the 1899 Act), including their marginal notations:

> *"3. No form or cause of action to be mentioned in Writ. It shall not be necessary to mention any form or cause of action in any writ of summons or in any notice of writ or summons issued under the authority of this Act.*
>
> *37. Different causes of action may be joined but separate trials may be ordered. Causes of action of whatever kind provided they be by and against the same parties and in the same rights may be joined in the same suit but this shall not extend to replivin or ejectment…*
>
> *45. Fictitious and needless averments not to be made. All statements which need not be proved such as the statement of time quantity quality and value where these things are immaterial the statement of losing and finding and bailment in actions for goods or their value the statement of acts of trespass having been committed with force and arms and against the peace of our Lady the Queen the statement of promises which need not be proved as promises in indebitatus counts and mutual promises to perform agreements and all statements of a like kind shall be omitted [from pleadings]".*

65. These provisions were based upon an English template: The *Common Law Procedure Act,* 1852 (UK), ss. 3, 41 and 49 respectively. That template governed Common Law actions in the Supreme Court of New South Wales until 1972, upon the commencement of the *Supreme Court Act*, 1970 (NSW) and the consequential repeal of the *Common Law Procedure Act,* 1899 (NSW).

[47] For ease of reference, this quotation has been reproduced as incorporating the title of ñBullen & Leakeò and the citation of Jordan CJôs judgment in *Horton v Jones* [No. 1] to which Deane J was referring.

66. A precursor to the effective operation of the template was the existence of a common form of originating process, something available in New South Wales from inception. In pre-*Judicature Act* England that was achieved by s. 1 of the *Uniformity of Process Act*, 1832 (UK), 2 Will. IV c. 39, which provided a common form of Writ of Summons (set out in schedule 1 to the Act) for all personal actions in each of the old Courts of Common Law. That form, although uniform across courts, required the plaintiff to identify one of the known forms of action (principally, Debt, Detinue, Covenant, Account, Trespass, Case, Trover, Assumpsit and Replevin)[48].

67. The procedure for commencement of all personal actions at Common Law by a single form of "Writ of Summons" was re-enacted in England in s. 2 of the *Common Law Procedure Act* 1852 (UK), the substance of which was reproduced in s. 2 of the *Common Law Procedure Act,* 1853 (NSW).

68. In 1932 Fifoot (then a Lecturer at Oxford, not yet a Professor of Law) described s. 3 of the 1852 Act as a "simple, almost naïve, declaration" that caused "the writ" to cease to be the vital element in Common Law procedure; allowed "[the] completion of a common form [to replace] that nice discrimination between rival writs which had been for five hundred years the major part of counsel's learning"; "rendered inevitable the destruction of the forms of action"; and led the way to the *Judicature Acts*[49]. Fifoot's predisposition was towards characterisation of the pre-*Judicature Act* system of judicial administration in England as "absurd", "scandalous" and "ridiculous", but it was accompanied by an insistence that the effect of the *Judicature Acts* was not to abolish the distinction between Law and Equity[50].

69. Fifoot did not consider whether the *Judicature Act* system might in time, if not necessarily, lead to the demise of trial by jury or whether "fact pleading" associated with an Equity mode of trial before a judge sitting alone (as has been a hallmark of *Judicature Act* systems in England and Australia) might not lead to abuses of process of which modern law reformers now speak. To that extent at least, the time might have arrived when a reappraisal of the New South Wales experience before 1972 might be productive of fresh insights.

70. At a technical level, the effect of the *Common Law Procedure Acts* was to grant (or, in the case of New South Wales, at least to confirm) a dispensation from technical requirements for the pleading of Common Law actions that formerly constrained plaintiffs in the English Courts of Common Law. They did not, in any sense, "abolish" any underlying principles of "substantive" law invoked by the commencement of a particular form of action.

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[48] FW Maitland, *The Forms of Action at Common Law (1968 reprint), pp .6-7.*

[49] CHS Fifoot, *English Law and its Background* (G Bell and Sons Limited, London, 1932), pp. 160-162.

[50] *English Law and its Background*, pp. 13-16.

71. The fact that that the English *Common Law Procedure* Act of 1852 was adopted in New South Wales might of itself, but does not necessarily, suggest that there was a need for such legislation in the Colony. However, given that the Supreme Court had long enjoyed control over its own processes, such (if any) formality as might have attended to those process would, in any event, have been the produce of local choice.

72. Equally a matter of local choice was the refusal of New South Wales to follow the English path leading to the *Judicature Acts* of 1873 and 1875 and beyond.

73. As a consequence, in terms of legal practice, pre-*Judicature Act* English practice books remained in demand in New South Wales. In particular, the third (1868) edition of Bullen and Leake[51], and the seventh (1866) edition of Stephen, *A Treatise on the Principles of Pleading in Civil Actions: Comprising a Summary Account of the Whole Proceedings in a Suit at Law*[52]. Those editions, in each case, were the last published before the commencement of the Judicature Acts.

74. They were not the only practice books available to the Common Law Bar in NSW. One of the gems held by the Library of the NSW Bar Association is a copy of CE Pilcher's *The Common Law Procedure Acts, 1853 and 1857, and other Statutes and Enactments relating to the Practice of the Supreme Court of New South Wales in its Common Law Jurisdiction, together with the Common Law Rules, and the English Rules of Practice adopted thereby, with Notes*[53] from the personal library of GH Reid QC (1845-1918), a member of the NSW Bar (from 1879), a Premier of New South Wales (in the 1890s) and a Prime Minister of Australia (in 1904-1905). Pilcher (1844-1916) became a leader of the NSW Bar, taking silk in 1887.

75. It was not until the 20th century that Australia began to generate its own legal texts. Writing in *The Jubilee Book of the Law School of the University of Sydney, 1890-1940*[54] Sir David Ferguson (a former Judge of the Supreme Court of NSW) described the haphazard method of legal research before the establishment of the Law School in 1890, proceeding from research of English Law to research of New South Wales law as a next step[55]. It was not until 1914 that the Law School introduced a system of supplying students in advance with typed or printed notes of lectures to be given[56].

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[51] http://books.google.com.au/books?id=y2FAAAAAYAAJ&printsec=frontcover&dq#v=onepage&q&f=false

[52] (Stevens & Sons, H Sweet, & W Maxwell, London).

[53] John Sands, Sydney, 1881.

[54] Sydney, 1940; edited by Sir Thomas Bavin, a former Premier of New South Wales and Judge of the Supreme Court of NSW.

[55] Pages 1-4.

[56] *The Jubilee Book*, p. 14.

76. On the whole though, there appears to have been an element of complacency about the relationship between Australian and English law, and the state of the law of contract in New South Wales, before World War II. Writing on the topic ñContracts, Mercantile Law and Tortsòfor *The Jubilee Book*, Bernard Sugerman (later a President of the NSW Court of Appeal) wrote this (with emphasis added):[57]

> *" To write a complete history of the law of New South Wales in these subjects for the last fifty years would amount to writing a history of these branches of English law for that period. The accomplishment of such a task in a bare three thousand words would require the skill of a Maitland. The present writer is grateful that he is not called upon to attempt it. For the present article, like others of this series, is designed to sketch only the development of the law in New South Wales by the decisions of the courts, and the enactments of the legislature, of that State….*
>
> *In the general law of contracts, it is difficult to point to any outstanding local decisions during our period. True it is that a great number of cases have been decided and reported and of these many have gone on appeal to the High Court and the Judicial Committee. But for the most part they are concerned with typical questions such as are constantly arising in practice; for instance, whether as a result of certain negotiations there is a concluded contract, or whether a particular transaction falls within the fourth section of the Statute of Frauds. Decisions of this class are of great interest and value to the profession (except, perhaps, where they are reported in such numbers as to give rise to the danger of obscuring of principle with detail) but fall outside the scope of this review.*
>
> *It is no doubt true that certain portions of the law of contract may require recasting to cope adequately with modern mercantile practice, e.g, certain rules as to consideration and the position of persons not parties to a contract. The principles of the general law of contracts are, however, in large part too well settled to permit of such changes without the intervention of the legislature. The Law Revision Committee in England has, indeed, recommended far-reaching alteration of the law in regard to, inter alia, consideration, requirements of writing, and the position of third parties. But Parliament has not acted upon these recommendations with the same promptitude as in the case of most other recommendations of the same body; possibly it has been felt that the recommendations affect the law too fundamentally to be carried out in their entirety. The settled state of the principles applicable to many types of case which commonly arise in practice explains the absence of notable decisions.*

[57] Pages 202-204.

It cannot be said, of course, that the law of contracts is finally settled in all its branches. Some fields remain open for exploration. Thus certain aspects of quasi-contract have been recently much considered both by the courts and by learned writers in legal periodicals, and our own courts have recently furnished a somewhat striking illustration of the scope of the action for money had and received – James v. Oxley (61 CLR 433). Another portion of the law which cannot be said to have been reduced to a body of settled principles is that relating to illegal and void contracts; McFarlane v. Daniell (38 SR 337), dealing with severability of consideration, is a recent local decision in this field. It is possible that, even if we cannot expect drastic legislative alterations in the new law of contracts, we may see in the next few years an investigation of these and other subjects such as has been so outstanding in the recent development of the law of torts.

It is probably as much beyond the scope of this review to deal with decisions of the High Court on appeal from States other than New South Wales as it is to deal with decisions in England and other parts of the Empire. Two perhaps may be mentioned: - The Crown v. Clarke (40 CLR 227); settling a famous controversy with respect to the right to claim a reward and Perpetual Executors and Trustees Association of Australia Ltd v. Russell (45 CLR 146), an important decision on the availability of the Statute of Frauds as a defence.

Of legislation affecting the general law of contracts there has been but little during the period under review, apart from mere consolidations of previous legislation.

The Conveyancing Act, 1919-1938, was an act to consolidate and amend the law of property; it affects the general law of contracts in three ways: - (i) by certain novel enactments – novel, at any rate so far as the law of England is concerned – such as the provisions of s. 38 requiring a deed to be signed and attested and enabling the formality of sealing to be dispensed with; (ii) by the recasting in modern form, on the model of the English legislation of 1925, of certain old Statutes, eg., s. 54A re-enacting so much of the fourth section of the Statute of Frauds as relates to contracts for the sale or other disposition of land or any interest in land; and (iii) by the somewhat belated adoption of certain provisions of the Judicature Act, notably the provision as to assignability of choses in action (Conveyancing Act, s. 12).

So far, our legislature has no more acted upon the recommendations of the English Law Revision Committee on the law of contracts (including those which have been adopted by the British Parliament) than it has on those affecting the law of torts…".

77. In the aftermath of World War II the pace of change in New South Wales began to quicken. In the years immediately preceding, and following, enactment of the *Australia Acts* in 1986 (particularly during the Chief Justiceship of Sir Anthony Mason) there was active debate about the role of contract law in the context of ñthe law of obligationsò generally. The process of change initiated during that period paused, and was perhaps turned back, during the Chief Justiceship of Murray Gleeson. Perhaps, in retrospect, what appear now to be periods of ñreformationò and ñcounter-reformationò (to pick up language used by Kirby J in his 2003 *Hamlyn Lectures*) will prove to be simply part of a process of readjustment necessary to accommodate the role of the High Court of Australia as the nationôs ultimate appellate court, no longer constrained by the Privy Council.

78. All of that was well and truly in the future when, in 1961, AF Rath, QC (then Lecturer in pleading in the University of Sydney, and, later, a judge of the Supreme Court of NSW) published a new book on pleading common law actions in New South Wales[58], his Preface paid homage to both Bullen & Leake and Stephen. He described them as having ñthe highest reputation, almost to the point of being regarded as ñauthoritativeò, subject to only to difficulties arising from changes in substantive law and pleading practice. Charles McLelland KC, later a Chief Judge in Equity in New South Wales, had made a similar point in 1951[59].

79. Rathôs book demonstrates the preoccupation of NSW law, practice and procedure at the time of its publication with ñissue pleadingò at Common Law rather than any conceptual, analytical framework of the substantive law predating the English *Judicature Acts*. The bookôs index contained entries for ñassumpsitò, ñcontractò, ñcovenantò and ñindebitatus countsò (not ñdebtò). Discussion of pleas of the ñgeneral issueò included reference to pleas of ñnon indebitatusò and ñnon assumpsitò. Those references, in isolation, might suggest an early 19th century outlook. However, the authorôs pleading precedents were divided between those ñin contractò and those ñin tortò and commentary on precedents was not noticeably constrained by differences in procedure operating in NSW and English case law.

80. As Deane J observed, the adherence to a pre-Judicature Act system of pleading in New South Wales did not carry with it the consequence that the substantive law remained stagnant.

81. Apart from anything else, well into the 20th century, undergraduates studying at the Faculty of Law in the University of Sydney were

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[58] *Principles and Precedents of Pleading in the Supreme Court of New South Wales at Common Law* (Law Book Co, Sydney, 1961).

[59] ñFifty Years of Equity in New South Walesò (1951) 25 ALJ 344 at 351.

dependent, in substantial measure at least, on English texts. One of those was Anson's *Law of Contract*[60].

82. A practical illustration that concepts underlying common law "forms of action" and "modern contract law" were not regarded in New South Wales as incompatible is found in the treatment of those two topics by HV Edwards (a New South Wales solicitor) in his text, *The New South Wales Lawyer: A handbook of the everyday laws of this State for Justices of the Peace, Bankers, Trustees, Executors and men of business in general*[61].

83. In an entry entitled "Actions at Law" and subtitled "Actions at Law Classified", Edwards began by reciting that "[there] are, in this State, two classes of action at common law – personal and mixed". The reference to a "mixed" form of action was a reference to an action in ejectment. With an explanation that "personal actions" were brought to recover personal property or damages for an injury, and that they included claims founded in contract, he set out the following:

> ***"Personal actions* are divided into two classes – actions *ex contractu*, or those founded upon contract; and actions *ex delicto,* or those founded upon tort. A tort is a wrongful act – such as a libel, a trespass, etc.**
>
> ***Actions of contract* are thus subdivided –**
>
> **1. *Actions of covenant,* which are brought to recover damages for the breach of a covenant or promise made by deed or specialty.**
> **2. *Actions of debt,* which are brought to recover debts or sums certain, whether due by specialty or by simple contract – which may be by writing not under seal, or without writing.**
> **3. *Actions of assumpsit*, which lie for recovering debts or damages for the breach of any simple contract; this is a very common form of action, and is brought on sales of goods, promissory notes, services rendered, and many other transactions of everyday occurrence.**
> **4. *Actions upon contracts of record,* which lie for enforcing judgments and recognizances.**
>
> ***Actions of tort* are subdivided into –**
>
> **1. *Actions of trespass,* which lie for injury t o real or personal property or to the person, when accompanied with *actual force.***

[60] Eg, *Calendar of the University of Sydney for the year 1915* (Angus & Robertson, Sydney, 1915), pp. 182-183, which prescribed *Anson* for lectures on a subject entitled "The Law (in force in New South Wales) relating to contracts, mercantile law, torts, crimes and domestic relations". The lectures were said to comprise, inter alia, "An account of the law in force in New South Wales with respect to (1) Contracts generally; (2) Mercantile Law (including Negotiable Instruments, Partnership, Insurance, Carriage and Mercantile Agency); (3) Torts, and obligations arising from civil wrongs at common law…".

[61] William Brooks and Company, Sydney, 2nd ed, 1904, pp. 14-16 and 78-86.

2. *Actions of trespass on the case,* which lie in respect of injury to real or personal property or to the person where the act cause no *immediate* injury, but only by *consequence*, *eg.,* seduction of a man's servant, whereby he loses her services.

3. *Actions of trover and conversion,* which lie for the purpose of trying a disputed right to the possession of goods and chattels; or to recover damages for their wrongful conversion.

4. *Actions of detinue*, which lie where a plaintiff claims the specific recovery of goods and chattels or damages for their detention.

5. *Actions of replevin*, which are brought for the recovery of goods unlawfully taken under colour of distress for rent".

84. Edwards introduced his entries on "Contracts in General" with a footnote expressly acknowledging his obligations to "Sir W. Anson's invaluable treatise on the Law of Contract".

85. Towards the end of the entry he described the "Elements of a Binding Contract", expressly by reference to Anson, as being: (1) A distinct communication by the parties to one another of their intention, ie, an offer and an acceptance of that offer; (2) Evidence that the parties intend to affect their *legal* relations; ie, the contract must be in a certain form or consideration must be present; (3) Capable contracting parties; (4) A genuine consent expressed in the offer and acceptance; and (5) A legal object.

86. Edwards began his extended discussion of contracts with the following observations:

"Contracts in General.

DEFINITION OF CONTRACT.

A "contract" is defined by Sir W. Anson as an "agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others".

Another, but less precise definition, is, "an agreement whereby two or more persons mutually promise, or one of hem only promises to the others or others, to do or not to do some particular act".

Every contract is the result of an offer combined with the unconditional acceptance of that offer; a contract must be under seal *(i.e.,* made by deed), in two cases – according to the general law – viz., first, where there is no consideration given by he one for the acceptance of the other; secondly (with the exceptions hereafter mentioned), a corporation can only be bound by contracts under the corporate seal.

CONTRACTS CLASSIFIED

Contracts may be divided into three classes, viz. contracts of record, contracts under seal, and simple contracts.

1. *Contracts of record* include judgments and recognizances. The former lay an obligation on an unsuccessful party to an action to pay his opponent a sum of money; the latter consist in undertakings to keep the peace, or appear for trial at a Criminal Court.

2. *Deeds* are contracts in writing, or printed, or partly written and partly printed, and which are signed, sealed, and delivered by the parties. No consideration is essential to the validity of a deed.

3. *Simple contracts* are those made by word of mouth, or by a written instrument not under seal, or which may be implied from the conduct or acts of persons.

Certain simple contracts must be in writing, *e.g.,* promissory notes, assignments of copyright, acknowledgements of debts barred under the Statutes of Limitation, and those to the validity of which the Statute of Frauds declares that writing shall be essential.

But, with few exceptions, all contracts, not under seal, depend for their validity (apart from writing, where writing is required) upon the presence of "consideration".

Consideration, as defined by the above authority, is "something done, forborne, or suffered by the promisee (or person to whom the promise is made) in respect of the promise".

Consideration must be "valuable" in the eye of the law but besides money and money's worth, which commonly forms the consideration for a contract, it may be some "right or profit, or some forbearance, loss, or responsibility given, suffered, or undertaken by the other."

Marriage is a valuable consideration of the highest order.

Contracts which are implied from the acts or conduct of parties are of every-day occurrence; *e.g.,* A. sends a ton of coals to B.'s house, and B. accepts or uses them. The law then implies a promise on the part of B. to pay A. their fair market value; upon the same footing stand purchases of goods upon credit.

87. Viewed in this light, and together with the standard ñforms of pleadingsò provided for in s. 67 and the Third Schedule of the *Common Law Procedure Act*, 1899 (NSW), any differences in presentation of the substantive law appear to be nothing more or less than compatible, but differently focussed, systems of classification or (to use the popular modern expression) taxonomy. That highlights the importance, and function, of a formulaic approach to the law for pleading purposes.

88. Section 67 of the *Common Law Procedure Act*, 1899 was in the following terms:

> ***"67. The forms of pleading contained in the Third Schedule to this Act shall be sufficient, and those and the like forms may be used with such modifications as may be necessary to meet the facts of the case, but nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms so long as the substance is expressed without prolixity".***

89. The Third Schedule (entitled ñForms of Pleadingsò) set out forms for ñStatements of Causes of Actionò, ñPleasò and ñReplicationsò. Those forms of pleading were divided between actions ñon contractsò and ñactions for wrongs independent of contractò.

90. The forms were designed to facilitate the determination of litigation by the verdict of a jury at a trial in which a single, compendious allegation might be made by a plaintiff and a defendant might plead ñthe general issueò by alleging that ñhe never was indebted as allegedò, ñhe did not promise as allegedò, or ñthe alleged deed is not his deedò, etc. (in a contract case) or that ñhe is not guiltyò (in a tort case).

91. Where (as in the *Judicature Act* system introduced in New South Wales in 1972) an equity style of ñfact pleadingò is used, rather than the old style of ñissue pleadingò to which the forms of action in a jury trial were directed, pleading ñthe general issueò is not permitted.

92. Although there might be some utility in a general review of the Forms of Pleadings set out in the Third Schedule to the 1899 Act, a sufficient indicator of their character is found in the first six ñstatements of causes of actionò on contracts. They related to ñcommon money countsò which can now be found in rule 14.12(1) of the *Uniform Civil Procedure Rules*, 2005 (NSW).

93. The ñcountsò set out in paragraphs 1 to 6 of the Third Schedule comprised the following:

> ***"1. Money payable by the defendant to the plaintiff for … goods bargained and sold by the plaintiff to the defendant.***
> ***2. Work done and materials provided by the plaintiff for the defendant at his request.***
> ***3. Money lent by the plaintiff to the defendant.***
> ***4. Money paid by the plaintiff for the defendant at his request.***
> ***5. Money received by the defendant for the use of the plaintiff.***
> ***6. Money found to be due from the defendant to the plaintiff on accounts stated between them."***[62]

[62] The ongoing importance of a ñrequestò in the Australian law of restitution was underscored in *Lumbers v W Cook Buildings Pty Limited (In Liq)* (2008) 232 CLR 635 at 655, 664-665 and 647. A claim for ñmoney had and receivedò has underpinned claims for the recovery of moneys paid under a

94. The decade taken in New South Wales, leading to the commencement of the *Supreme Court Act,* 1970 (NSW) on 1 July 1972, to introduce a *Judicature Act* system to the State required legislative reform beyond the repeal of the *Common Law Procedure Act*, 1899 (NSW), the *Equity Act*, 1902 (NSW) and other such legislation. The *Imperial Acts Application Act*, 1969 (NSW) and the *Limitation Act*, 1969 (NSW) were enacted as Act Nos. 30 and 31 of 1969 respectively. They were part of a package. Both came into operation on 1 January 1971.

95. The significance of those Acts lies in the fact that, until the commencement of the *Limitation Act,* 1969, the limitation period for most claims in contract in New South Wales were governed by s. 3 of the *Statute of Limitations* (21 Jac. I.c.16), a provision profoundly tied to ñforms of actionò the pleading of which was, in formal terms, unnecessary. It was in the following terms (with emphasis added):

> **"III. Limitation of Personal Actions. And be it further enacted, That all Actions of Trespass *Quare clausum fregit,* all Actions of Trespass, Detinue, Action *fur Trover,* and Replevin for taking away of Goods and Cattle, all Actions of Account, and upon the Case, other than such Accounts as concern the Trade of Merchandize between Merchant and Merchant, their Factors or Servants, all Actions of Debt grounded upon any Lending or Contract without Specialty; all Actions of Debt for Arrearages of Rent, and all Actions of Assault, Menace, Battery, Wounding and Imprisonment, or any of them, which shall be sued or brought at any Time after the End of this present Session of Parliament, shall be commenced and sued within the Time and Limitation hereafter expressed, and not after (that is to say), the said Actions upon the Case (other than for Slander) and the said Actions for Account, and the said Actions for Trespass, Debt, Detinue, and Replevin for Goods or Cattle, and the said Action of Trespass *Quare clausum fregit,* within Three Years next after the End of this present Session of Parliament, or within Six Years next after the Cause of such Actions or Suit, and not after; and the said Actions of Trespass, of Assault, Battery, Wounding, Imprisonment or any of them, within one Year next after the End of this present Session of Parliament, or within four Years next after the Cause of such Actions or Suit, and not after; and the said Actions upon the Case for Words, within one Year after the End of this present Session of Parliament, or within Two Years next after the Words spoken, and not after.**

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mistake (*ANZ Banking Group Limited v Westpac Banking Corporation* (1998) 164 CLR 662; *David Securities Pty Limited v Commonwealth Bank of Australia* (1992) 175 CLR 353) and claims for the recovery of money where there has been a total failure of consideration (*David Securities* at 383; *Baltic Shipping Co v Dillon* (1992) 176 CLR 344; *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516).

96. The word ñassumpsitò is not mentioned, but an action in assumpsit was a form of ñAction upon the Caseò. The reference to ñSpecialtyò is a reference to a deed. Some familiarity with the ñlaw of contractò as expressed before the days of Anson is presumed.

97. It was not only Imperial legislation of this character that governed the limitation of actions in New South Wales. Another of the provisions repealed by the *Limitation Act*, 1969 was s. 39 of the *Supreme Court Act*, 1841 (NSW), 5 Victoria No. 9. Based on a British provision (3 & 4 William IV, c. 42, s. 3), it was in the following terms (with emphasis added):

> **"39. Limitation of certain actions of debt &c. And be it enacted That after the passing of this Act all actions of debt for rent upon any indenture of demise all actions of covenant or debt upon any bond or other specialty and all actions of debt or *scire facias* upon any recognizance and all actions of debt upon any award where the submission is not by specialty or for money levied under any *fieri facias* and all actions for penalties damages or sums given to the party grieved by any law now or hereafter in force in this Colony shall be commenced and sued within the time and limitation hereinafter expressed but not afterwards that is to say the said actions of debt for rent or covenant or debt upon any bond or other specialty and actions of debt or *scire facias* upon recognizance within ten years after the passing of this Act or within twenty years after the cause of such actions the said actions by the party grieved within one year after the passing of this Act or within two years after the cause of such actions and the said other actions within three years after the passing of this Act or within six years after the cause of such actions Provided that nothing herein contained shall extend to any actions given by any Act or Statute where the time for bringing such action is or shall be thereby specially limited.**

98. The repeal of provisions such as these in New South Wales marked steady progress towards the introduction of a *Judicature Act* system. It was in the nature of *Statutes of Limitations* that they embodied references to the conceptual framework of a ñform or cause of actionò at the time of enactment.

99. Australian law owes a large intellectual and cultural debt to English law, reaching back to 1066. Deep insights into how Australians think about law and society can be had by study of English legal history. A foundational Australian case as *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 cannot be fully appreciated without reference to English legal history. That is apparent in the High Courtôs discussion of indigenous land rights as a qualification on the law of real property earlier applied, since no later than *Attorney General v Brown* (1847) 1 Legge 312, based on a feudal concept of land tenure traceable back to the Norman Conquest.

100. However, there may be less need for an historian of Australian law to know about the iconic English contract case of *Slade v Morley* (1602)[63] than there is to know about actions at Law as portrayed in legal texts relied upon, and in judgments delivered by Australian courts, in the 19th century.

101. Historical development of the relationship between an action in assumpsit and an action in debt before establishment of any British legal system in New South Wales is not unimportant ï either for a full understanding of Australian law (especially the law of restitution) or for its own sake ï but whether an understanding of it has ever been necessary for the day-to-day practice of law in New South Wales must, at least, be doubtful.

102. For the most part, one suspects, those charged with the administration of the law (in England or Australia) were, by the 19th century, able to get by, mostly, without any deep reflection on *Slade's Case.* That must have been particularly so in New South Wales, where the jurisdiction of the Supreme Court was from the outset defined by reference to the English Courts of Common Law jointly, and that jurisdiction has since been preserved (currently by s. 22 of the *Supreme Court Act*, 1970 (NSW)).

103. An understanding of the relationship between those Courts in England, *inter se*, is important to an understanding of why, and how, the English moved towards the *Judicature Acts*. Having regard to different institutional imperatives, it is less important in a New South Wales context.

CONCLUSION

104. A study of the Common Law side of the Supreme Court of New South Wales before the commencement of the *Supreme Court Act* 1970 (NSW) in 1972, with particular reference to the law of contract, provides opportunities to explore a unique intersection between law and legal process. Whatever might be the course of future development in Australian law, those opportunities might usefully be taken, first, in the identification of the ñestablished categories of liabilityò from which the High Court has counselled lawyers to proceed and, secondly, in marking out what is distinctive about the Australian experience of law.

[63] (1602) 76 ER 1074; Baker & Milsom, *Sources of English Legal History: Private Law to 1750* (Oxford University Press, 2nd ed, 2010), pp. 460-479.