A FEW WORDS ON THE LAW, AS IT WAS: AS IT IS: AS IT OUGHT TO BE: WITH SPECIAL REFERENCE TO COUNTY COURTS SUITS, AND ACTIONS AT LAW

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W. FINLASON

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COUNTY COURTS SUITS,

AND

ACTIONS AT LAW.

BY W. FINLASON,
OF THE MIDDLE TEMPLE, ESQ., SPECIAL PLEADER,
Author of "Leading Cases on Pleading."

"Let us go back to first principles; to common sense and *truth*."
LORD CHIEF BARON – *Court of Exchequer, May 27.*

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A FEW WORDS ON THE LAW,

&c. &c.

"By far the heaviest items in bills of costs, are those which relate to the *proofs*; and particularly to *witnesses*."—*Report of Common Law Commissioners.*

"The law" has long been proverbial for expense, uncertainty, and delay. An action has become abhorred: pleading, so much a by-*word*, that anything particularly shuffling is summarily stamped as "a piece of special pleading."

For three centuries it has been sought in some way or other to "roll away the reproach;" but that it has not been in the right way is clear, for in the reign of Queen Victoria remedies are being proposed for an evil, recognised under Queen Elizabeth, and lamented under Queen Anne. A new County Courts system, the *charm* of which seems to be that it is utterly *unlike* that of actions at law, has at last been set up; and people, carried away by the idea of cheap justice, content to find they have a jurisdiction with no pleadings and small costs, and ignorant that, of old, it was worked with *more* justice and less expense, by the *aid* of pleadings, clamour for its extension. Thus under the new County Court system, so utterly unlike its original, the time seems approaching when, relapsed into primitive barbarism, Sir F. Thesiger and Sir F. Kelly may be seen going down to the Hall, each with his "suite" of witnesses, to talk out a cause, like parties at a *piepowdre* court.

Anxious to prevent the consummation, the new Lord Chief Justice is to commence his career with more "New Rules." The Attorney-General brings in another bill for more amendments of the law. Mr. Cockburn moves for a committee to see if it *can* be amended. Meanwhile the evil increases and the "scandals of the law" are denounced with indiscriminating indignation.

All this could scarcely be if the course of law worked *justice*. But it does *not*. And why? Because it is not worked by *truth*.

Was it always so? No. There was a time when an action at law almost *infallibly* worked justice. And why? Because it was worked by truth.

To do justice the truth must be found; and it cannot be but by truthful means. Falsehood cannot elicit truth, nor further justice.

That the truth may be *known*, it must be told. And our ancestors made the parties in an action *tell* the truth: "the truth, the whole truth, and nothing but the truth." That was the *secret* of their system. We have lost it. And hence, to a great extent, it may be said, that with us "Truth fails; justice has perished out of the land."

But though the system was *simple*, it was *skilful* to be *truthful*. As Lord Coke said of law in general, "it was founded on *reason*; yet not *every man's* reason; but *right* reason:" the reason of reflective minds careful for the truth. The reason of irreflective and ignorant persons might lead them to say "Since what you want is the truth, the shorter the course the better; for the sooner you will get at it: just let the parties tell their story, and the truth will speedily appear." This is the system of the County Courts as they are now; not as they were of old. But, *whose* story? Parties suing and being sued are sure to differ; or there could be no dispute. So there would be *two* stories to be told. And it could not be known, *when* told, which was true. Each would be *part* of the truth; but both together would not be the "*whole* truth;" for they would vary. And it could not be known whether *either* party knew the whole truth: or *which* of them.

And *how* should the stories be told. Both together? as usual in the County Courts now. That would be barbarism; and was *deemed* barbarism a thousand years ago: although we are now relapsing into it, so that too often a *suit* becomes a *squabble*. Indeed, this, unchecked, would be too shocking even for the present day; and *some* seem-

liness is sought after. That there should be *one story at a time* is the next conclusion, not worth much, however, without another, that the first story should be told *in time* to be answered: which it could not be unless told *before* it had to be answered. This of course involves a written "plaint." Here is the *germ* of pleading. And *so* far, even the County Court system has gone towards a judicial character. There positively are "plaints," so that the party *sued* knows before he comes into court what is the story of the party suing: but as, though the story told may be quite true, the party sued may "put it to the proof," the "plaint" is, to *justice*, of very little value. It certainly has *this* use: it lets the party sued have *some* notion of what he is sued *about*, so that he cannot suppose it is about his *buying* a horse and find it is about his *selling* one. As, however, the party suing has to *prove* the story he tells, his plaint should show not only a story *true*, but a story *proveable*. What is true, however may not be *proveable*. And the party sued may *know* it to be true, but *hope* it may not be proveable. And if he have no real answer to it, and be not honest enough to say so, he will of course deny it, and as the phrase is "put plaintiff to the proof of it," and the proof might fail. And then *justice* would fail. And so it does fail very often. And so it *must* fail so long as there is unchecked power of "putting to the proof" what is true.

What would be fair or unfair for one side would be so for the other. And if the party *sued* had notice of the story to be told and proved against him, so should the party suing have, of the story (if there were one) to be told in *answer*; so that he might not come down to court confident that his story could not be disputed, and be discomfited by having all sorts of stories set up against it, and every thing to prove instead of *nothing*. This seems common sense; but it is a *stage* of common sense the present County Court system has not yet reached; so that there the party suing has to sue in the dark, not knowing what may be said to his story, except that he may be sure it will be denied; especially if there be no answer to it; so that he is not *safe* unless he go down

to court with a train of witnesses, prepared to prove all about it, and a good deal that has nothing to do with it; for no one can tell what *has* to do with it or with the real matter in dispute (if there be one), until both stories have been told: and if the party sued has none to tell, he will stand stiffly upon proof, especially if he know the story told against him to be true, and suspects that perchance proof may fail on some part of it, which in such case will be exactly the point as to which he will be most *critical*, while it may also be the part of the matter least material, and which he himself knows most about. It would be of small consequence, in cases where such a course would be most certain of success, that the party suing had *notice* that it was to be pursued; while on the other hand the party sued would be *assisted* in it by having beforehand time to search out the points on which proof may be most difficult.

To promote truth, there would be a necessity, therefore, for more than a mere statement of the story to be told on one side or the other. It would be of no use that one party told a true story if the other did not; and the object would be to make *both* tell the truth: each so far as he might know it. It was deemed that each must know *part*, and ought to disclose what he knew. It was foreseen, however, that he who desired not justice would desire to avoid thus disclosing the truth. And that this might easily be by putting a party to the proof of matter which he could not prove either through casual failure of evidence, or because matter more within the knowledge of the other side.

Now the object was attained by making *each party say in turn one thing at a time*. This may seem simple; but was *safe*. Each party in his turn rested his case on what he said. Therefore, of course, neither would say what was not material, if he could say anything better; nor what was false, if he could say anything that was true. This was held good as well of assertion as denial: of the part as well as of the whole. And hence a party could never be put to the proof of more than *one thing*; nor of anything which was *true*, unless it were *material*, and to which it was *impossi-*

ble to give any answer. In other words; a party was never put to the *proof*, except as far as material for the purposes of *truth*. Justice then could scarcely fail for want of *proof*. And, incidentally but inevitably, the pleadings were so short, and the proofs so narrowed, that the expense was inconsiderable, and the proceeding if not swift, was prompt; and what was far better—sure, certain, *safe*, and satisfactory.

It is beautiful to see how this simple system worked. "There is an exquisite subtlety, and the same is unjust;" there is also "*an exact truthfulness;*" and it was the latter which characterized the course of Common Law.

Put into form the system was this: The party *suing*, at the outset of the suit, and each party, at every other stage, stated *some single, substantial, matter of fact*.

Thus was it with the plaintiff's story: as, that the defendant had bought of him a horse for £25, and owed him the price: or had made him a bond for £50: or detained ten bags of his hops: or had entered his garden: or had not kept his covenant to repair a house let to him by plaintiff: or had lost goods, which he had received as a common carrier, according to the custom of the realm: or, that one, according to the custom of merchants, had made a bill of exchange, accepted by defendant, and endorsed it to the plaintiff.

In each of these cases it will be seen, there would be "some single substantial matter of fact:" *i. e.*, there was altogether some matter substantial: and there was not more than one matter which, taken *singly*, would be substantial. To make the matter substantial however, it almost always involved implicitly or expressly some secondary or subordinate circumstances. Thus there must have been in the horse case, a sale before the debt; in the bond, sealing and delivery as well as writing; in the hops case, not merely detention of hops but a detention from plaintiff; or in the house case, a covenant to repair, and a breach of it; or in the carrier case, a delivery of goods to defendant, according to the custom of the realm, and the subsequent loss; in the bill case, a drawing of the bill according to the

custom of merchants, an acceptance of it according to the custom, and an indorsement of it according to the custom. And in some cases this secondary fact or facts would (as the delivery and the loss; the covenant and the breach; the drawing, the acceptance and the indorsement) seem to be separate *facts;* in others (as in the sealing of the bond, the delivery of the goods according to the custom of the realm, and the drawing, acceptance or indorsement according to the custom of merchants) might seem to be, rather, several *incidents* of the same fact,—but still there could only be some single substantial matter; for in no case would there be more than a single matter, which taken *singly* would be substantial. Thus there would be no significance, in the fact, that a horse was sold, unless the sale resulted in a debt: or that a bond was sealed if not delivered; or that hops were detained, if not from plaintiff: or a house not repaired, if there were no covenant to repair it; or goods lost by a person who had not had them as a carrier: or a bill drawn, accepted and indorsed, if not according to the custom: on the other hand, in any case, there must have been *some single* matter which, *singly*, would be *substantial; i. e.* would, in the knowledge of the party sued, give a right of suit, save for something, also in his knowledge, which he could state. This, in the several cases just instanced, would be the debt, the bond, the detention, the covenant, the bailment, the entry, the acceptance, and in each case would be something *single* in point of time: (whatever essential incidents it might have:) and by itself in substance so far sufficient, that it showed, if not denied, at least that there was something to be answered; and that at that stage it could not be known what else *was material*, except by the party sued, who therefore must best be able to state it: while, unless it were proved, it could not be seen if there were anything for him to state. Whereas, with any other facts stated (as, in the case of covenant, the non-repair), it would *not* be so, since it would be useless to deny them unless the previous facts were true, and if true there must