Therapeutic privilege and the extension of the intervention beyond that to which the patient had consented

The issue of therapeutic privilege arose in two cases – one serving before the *Tribunal Fédéral Suisse* and the other before the *Reichsgericht* – where the patients had consented to the removal of a tumour but the subsequent surgical interventions were extended beyond that for which the patients had given consent. In the first of these cases, the patient was not informed of the diagnosis of cancer and in the second, of the suspicion of cancer.

In the Swiss case[49] the patient consented to the removal of a tumour at the base of his colon but in the course of the operation the doctor decided to remove the patient's colon and a part of his small intestine. The patient-plaintiff averred that if he had been duly informed of the established diagnosis and the extent of the operation planned, he would have postponed the operation in order first to consult a number of specialists.

The court confirmed that in terms of Swiss doctrine, the doctor was in principle under a duty to inform the patient of the nature of his or her illness, and of the foreseeable consequences of the proposed treatment and the consequences of forgoing therapy.[50] However, the duty to inform does not extend to information that would only alarm the patient, and, consequently, would prejudice the patient's physical or psychological condition, or would compromise the success of the treatment.[51] The object of medical science entails the conservation and the restoration of health and the doctor's duty to inform may be limited so as not to violate such object.[52]

The court held that an ominous or fatal prognosis – such as often accompanies a diagnosis of cancer – can be withheld from the patient, but must in principle be disclosed to his or her near relations. The doctor ought to assess the risks attached to a full disclosure and limit the information so as to be compatible with the patient's physical and psychological state.[53] *In casu*, the defendant had informed the patient's doctor and spouse of the diagnosis. They knew the patient and his reactions much better than he did and dissuaded the doctor from revealing the diagnosis to the plaintiff.[54] From the reports furnished to the defendant by the plaintiff's doctor, it appeared that the plaintiff had consulted the latter on a number of occasions because he had been depressed, had professional worries and feared that he had a stomach ulcer. The patient's doctor was of the opinion that the plaintiff was not psychologically in a condition to bear the disclosure of the diagnosis. The court concluded that, in these circumstances, the defendant could not be expected to ignore this advice and to

[49] *ATF* 105 II 284.
[50] At 287.
[51] *Ibid.*
[52] At 288.
[53] *Ibid.*
[54] At 288–289.

furnish information for which the plaintiff had not asked when the patient was duly informed of the existence of a tumour and of the necessity of its resection.[55]

This judgment fails to address the question why the doctor did not inform the patient of the possible extent of the operation. To my mind, there is nothing to be said for the doctor's decision not to inform the patient of the possible extent of the operation. Certainly, such a radical resection of the small intestine and colon cannot be kept secret for very long. Is it not to be expected that, once the patient discovers such a disturbing *fait accompli*, he or she will start inquiring into the reason for such a vastly extended resection? And would such inquiry not ultimately lead the patient to discover the diagnosis? This case illustrates just how difficult it can be to truly guard the patient from disturbing information.

The *Reichsgericht* approached the issue of therapeutic privilege quite differently in the other case under discussion. In this case[56] the patient consented to the doctor's proposal of the removal of a lump in her right breast by way of incision. In the course of the operation, the doctor found sufficient reason to believe that the lump was cancerous, whereupon he removed the entire right breast. Only when the dressings were removed, which was done a considerable period of time after the operation, did the patient discover that her breast had been amputated. The pathological examination of a piece of the removed lump established that it was not malignant.

The patient's claim for damages and compensation was brought on the basis that the defendant-doctor had performed this drastic operation without her knowledge and against her will. She averred that, in the circumstances, the intervention was not necessary, and that had the defendant proceeded with the necessary care, he would have known this.

The defendant alleged that he had suspected breast cancer before the intervention. The plaintiff was at that stage still deeply touched by her mother's recent death of breast cancer and he did not want to upset her with the news that she might also be suffering from breast cancer. The defendant alleged that, in the course of the operation, he found more evidence that the growth was cancerous. He believed at the time that it was necessary to remove the entire breast in order to save the plaintiff's life.

The court granted that in a case of this nature, it may be difficult or even impossible to obtain the patient's consent to an intervention which the doctor considers to be necessary without at the same time suggesting to the patient that he or she might be suffering from cancer. Although this may be highly undesirable for the doctor, the patient's right to self-determination is so fundamental and is based on such well-founded considerations that it must nevertheless prevail against the reservations expressed. Obviously, the doctor

[55] At 289.
[56] *RG* 8.3.1940 *III* 117/39 *RGZ* 163 129.

will try to protect the patient from harmful anxiety, will even lead the patient to a hopeful assessment of his or her condition, and will not needlessly draw the patient's attention to all the bad consequences that the disease might bring about. However, the overriding principle remains: the doctor must ensure that the patient has a clear and accurate idea of the nature and consequences of the intervention (even though he or she need not be acquainted with all the details) and that the patient actually consents prior to the intervention. The court took the view that the patient must be informed even if disclosure of the information that is necessary to obtain an informed consent leads to the depression of the patient's mood or a deterioration of his or her general condition.[57]

Information needed to convince patient of need for follow-up

Sometimes disclosure of a diagnosis or of the suspicion of a particular diagnosis is necessary to convince the patient of the need to undergo treatment or further diagnostic interventions, or to have his or her health monitored. This is illustrated by the following two cases, one Japanese and one German.

In *Makino v The Red Cross Hospital*,[58] the patient was not informed of the preliminary diagnosis of cholecystic cancer but was told, rather euphemistically, that her cholecystis was swollen.[59] Further tests were necessary to arrive at a final diagnosis. For these, Makino had to be hospitalised, but believing that a gallstone operation could be put off[60] and facing other pressing personal commitments, she decided not to go back to the hospital. About three months after her last consultation, her health deteriorated drastically. She was hospitalised and received aggressive treatment but died six months later. Makino's family brought an action claiming that timely disclosure of the cancer diagnosis would have impelled her to seek immediate treatment and could have saved her life.[61] The district court held that the doctor had not breached his duty to inform the patient. The court took into consideration the psychological blow the patient would supposedly sustain upon being told of the suspicion, together with the prevailing medical practice of not informing patients of a diagnosis of cancer, and the fact that the doctor had warned the patient twice of the necessity of

[57]At 137–138. *Contra* P Bockelmann *Strafrecht des Arztes* (1968) 62.

[58]Nagoya District Court 1325 HANJI 103. See N Higuchi 'The patient's right to know of a cancer diagnosis: a comparison of Japanese paternalism and American self-determination' (1992) *Washburn Law Journal* (1992) 458–461; RB Leflar 'Informed consent and patients' rights in Japan' (1996) 33 *Houston LR* 52–54; RB Leflar 'The cautious acceptance of informed consent in Japan' (1997) 16 *Medicine and Law* 711–712; TS Elwyn, MD Fetters, DW Gorenflo & T Tsuda 'Cancer disclosure in Japan: historical comparisons, current practices' (1998) 46 *Social Science and Medicine* 1151 at 1152; ND Kristof 'When doctor won't tell cancer patient the truth' *New York Times* 25 February 1995 p 4; D Brahams 'Right to know in Japan' (1989) 2 *The Lancet* 173.

[59]At 107. See Higuchi n 58 above at 459.

[60]Leflar (1996) n 58 at 52–53; Leflar (1997) n 58 at 711; Brahams n 58 above at 173.

[61]Leflar (1996) n 58 above at 53; Leflar (1997) n 58 above at 711.

hospitalisation.[62] The court's decision was affirmed by the Nagoya High Court[63] and the Supreme Court of Japan.[64]

In contrast to this judgment, the *Bundesgerichtshof* in Germany affirmed that a patient must be informed of a diagnosis if that is necessary in order to persuade the patient to undergo follow-up tests, even if such information were to upset the patient. In this case,[65] the plaintiff's left eye was surgically removed in second defendant's hospital. First defendant (the patient's ophthalmologist) was informed that the histological examination of the removed eye established the diagnosis of a high grade non-Hodgkin lymphoma. In view of the patient's psychological instability, first defendant withheld this information from the patient, but informed the latter's wife and father. The patient was never asked to undergo further examinations or check-ups. Three years later, the plaintiff again showed up at the second defendant's hospital complaining of problems with his right eye. A computer tomogram showed a malignant growth. The plaintiff claimed that the failure to inform him had led to metastasis and to serious damage to the right eye.

The *Bundesgerichtshof* held in favour of the plaintiff and rejected the defendants' contention that they relieved themselves of the duty to inform by breaking the news to the patient's family.[66] The unfounded contention raised by first defendant that, because of his 'psychological instability' the plaintiff would not be able to cope with the disclosure of a cancer diagnosis, did not entitle the first defendant to inform the patient's wife and father but not the plaintiff himself. The court held that first defendant had to inform the patient of the need to undergo further tests.

If the plaintiff were to appear doubtful of such need, he had to emphasise the necessity of undergoing such tests and the dangers of neglecting to undergo them.[67] If attempts to obtain the patient's cooperation without informing him of the nature and seriousness of his condition prove unsuccessful, the doctor must inform him.

This is a sober approach that allows the doctor much needed leeway in minimising the negative impact of unfavourable information without foredating the patient's right to know. It also leaves the doctor some room in deciding when to share the potentially harmful information.

[62] *Ibid.*
[63] Nagoya High Court 1373 HANJI 68.
[64] Supreme Court (Petty Bench) 1530 HANJI 53.
[65] *BGH* 25.4.1989 *VI ZR* 175/88 *BGHZ* 107 222.
[66] At 226–227.
[67] *Ibid.*

Damages even in the absence of a loss of a chance of recovery?

It should be clear by now that the withholding of information from a seriously ill patient may prevent the patient from seeking appropriate care. Even so, it may be very difficult for the patient to prove that he or she suffered harm as a result of the doctor's failure to inform him or her of the diagnosis. In *Laferrière v Lawson,*[68] a surgeon failed to inform his patient that the lump he removed from her breast was cancerous. The Supreme Court of Canada refused to award damages to the patient for the 'loss of a chance' of recovery since the causal relationship between the doctor's fault and the patient's death could not be established on a balance of probabilities. Even though the patient was unlikely to survive her illness, her estate was awarded damages for the psychological distress she suffered as a result of the fact that she was unaware of her true situation and thus deprived of the possibility of pursuing active treatment in the hope of obtaining a remission.

THE SIGNIFICANCE OF THE KNOWLEDGE OF AN UNFAVOURABLE DIAGNOSIS OR PROGNOSIS FOR PATIENT SELF-DETERMINATION

Convincing authority exists for the opinion that if a patient can only be convinced of the necessity of undergoing a test or treatment by being given an indication of the nature and meaning of the disease from which he/she is suffering, the doctor may not shy away from this duty,[69] even in the case of a grave illness.[70] The knowledge of impending death has great significance for patient self-determination.[71] It is important for the doctor carefully to consider whether, in each particular case, the disclosure of the truth is necessary to enable the patient to make decisions.[72] Non-disclosure may deny the patient the opportunity to make end-of-life decisions and of exercising control over what remains of his/her life.[73]

THE IMPORTANCE OF PROPER TIMING OF DISCLOSURE

Although in the case of terminal illness there is usually no urgency in matters of disclosure (apart from disclosure of information necessary for urgent treatment which is seldom necessary),[74] it must be kept in mind that the closer

[68][1991] 1 SCR 541.

[69]Van Oosten n 29 above at 59.

[70]See Laum n 6 above at 922, 924; GH Schlund '14 Grundsätze zur Risikoaufklärung durch den Arzt' (1994) 42 *Hals-, Nasen-, Ohren-Heilkunde* 143.

[71]See *eg* NB Cummings 'Ethical issues and the breast cancer patient' (1994) 118 *Archives of Pathology and Laboratory Medicine* 1077 at 1080; Freedman n 77 above at 573, 574. Scanlon & Fleming n 74 above at 982 demonstrate that truthful information about diagnosis and prognosis enables the patient to express his/her preferences in respect of the palliative care and nutrition he/she should receive during the advanced stages of his/her illness.

[72]See Brenner n 6 above at 38; Gordon & Daugherty n 13 above at 143.

[73]Krisman-Scott n 8 above at 47.

[74]F Carnerie 'Crises and informed consent: analysis of a law-medicine malocclusion' (1986) 12 *American J of Law and Medicine* 89–90; J Lynn 'Choices of curative and palliative care for cancer patients' (1986) 36 *CA – A Cancer J for Clinicians* 100 at 101; C Scanlon & C Fleming 'Ethical issues in caring for the patient with advanced cancer' (1989) 24 *Nursing Clinics of North America* 977 at 982.

one is to death the more likely one is to be aware of the realities of dying. On the other hand, one is also more likely to be incompetent or subject to duress, either because of the effects of the illness or the mental strain involved in expecting death.[75] Thus, the timing of disclosure can indeed be instrumental in maximising the exercise of patient autonomy.[76] It is important to engage, from the outset, in open communication that heeds the patient's readiness to learn bad news. This would enable the dying patient time to digest information in small doses, to make decisions concerning treatment, cessation of treatment, pain management,[77] financial affairs and personal affairs. It would also enable the patient to draft an advance directive or a will whilst fully competent and to name a surrogate decision-maker.

THE EMOTIONAL DIFFICULTIES SURROUNDING OPEN COMMUNICATION AND PERSONAL FACTORS PREDISPOSING DOCTORS TOWARDS WITHHOLDING INFORMATION

According to some studies the doctor's own emotional reluctance, embarrassment, fears, uneasiness and anxieties to confront the patient with grim diagnoses and risks often provide the motive for non-disclosure.[78] It would seem logical, therefore, to expect the unwillingness to make proper disclosures to increase with the grimness of the information.[79] It goes without saying that dealing with the dying can emotionally be a very taxing experience, and that having to break the news of terminal illness presents doctors with one of the most difficult tasks

[75]MH Shapiro & RG Spece *Cases, materials and problems on bioethics and law* (1981) 695–696. *Cf* Lynn n 74 above at 101; Scanlon & Fleming n 74 above at 978–979, 982.
[76]See *eg* Lynn n 74 above at 101; Scanlon & Fleming n 74 above at 978–979, 982.
[77]*Cf* B Freedman 'Offering truth: one ethical approach to the uninformed cancer patient' (1993) 153 *Archives of Internal Medicine* 572 at 573. The patient may opt to leave these decisions to the doctor. See Lynn n 74 above at 101. *Contra* Brenner n 6 above at 38.
[78]JH Loge, S Kaasa & K Hytten 'Disclosing the cancer diagnosis: the patients' experience' (1997) 33 *European J of Cancer* 878 at 881; A Meisel 'The "exceptions" to the informed consent doctrine: striking a balance between competing values in medical decisionmaking' 1979 *Wisconsin L R* 413 at 460–461, 469; A Meisel & M Kuczewski 'Legal and ethical myths about informed consent' (1996) 156 *Archives of Internal Medicine* 2521 at 2525; Carnerie n 74 above at 82; ES Glass 'Restructuring informed consent: legal therapy for the doctor-patient relationship' (1970) 79 *Yale LJ* 1533 at 1566; MJ Mulvaney 'The therapeutic privilege: defense in an informed consent action' (1996) 42 *Medical Trial Technique Quarterly* 63 at 80–81; P Mosconi, BE Meyerowitz, MC Liberati & A Liberati 'Disclosure of breast cancer diagnosis: patient and physician reports' (1991) 2 *Annals of Oncology* 273; Higgs 'On telling patients the truth' in TL Beauchamp & L Walters (eds) *Contemporary issues in bioethics* (4ed 1994) 137 at 140; J Fletcher 'Medical diagnosis: our right to know the truth' in TL Beauchamp & S Perlin (eds) *Ethical issues in death and dying* (1978) 146 at 151; RM Green 'Truth telling in medical care' in MD Hiller (ed) *Medical ethics and the law: implications for public policy* (1981) 183 at 185–187; AM Capron 'Informed consent in catastrophic disease research and treatment' (1974) 123 *U of Pennsylvania L R* 340 at 388–390; R Weir 'Truthtelling in medicine' in S Gorovitz, R Macklin, AL Jameton, JM O'Connor & S Sherwin (eds) *Moral problems in medicine* (2ed 1983) 202 at 207; L Moutsopoulos 'Truth-telling to patients' (1984) 3 *Medicine and Law* 237 at 241; RJ Goldberg 'Disclosure of information to adult cancer patients: issues and update' (1984) 2 *J of Clinical Oncology* 948 at 950; J Gillan 'The right to know. The nurse's role in informing patients' (1994) 90 *Nursing Times* 46; PR Myerscough (ed) *Talking with patients: a basic clinical skill* (1989) 60–61.
[79]*Cf* MR Pfeffer 'Ethics and the oncologist' (1993) 12 *Medicine and Law* 235 at 236.

in respect of their duty to inform.[80] It is not surprising to learn that, in this context, some of those who avow to the principle of truth-telling do not practise what they preach.[81]

There are certain personal factors that may predispose doctors towards withholding information from a fatally ill patient. It is important for decision-makers to recognise such personal factors in order to prevent these from interfering with objective decision-making.[82] One such factor is the doctor's own fear of death.[83] Some researchers have found a significantly higher fear of death among doctors compared with other groups.[84] Veatch[85] asserts that if an individual has a high or low fear of death and then asks himself or herself what the impact of disclosure of terminal illness would be on another, he or she may systematically misjudge the impact by appealing primarily to his or her own high or low fear of death.[86]

Another such factor – and, in my opinion, a more important one – is the doctor's fear of therapeutic failure.[87] A number of authors have argued that to the doctor who is committed to life, a patient's death, even if inevitable, represents failure.[88] It is said that terminal illness and dying patients symbolise doctors' helplessness and the limits of their skills.[89] Green[90] points out that among the medical specialists dealing with cancer, those able to provide effective treatment

[80]R Buckman *How to break bad news: a guide for health care professionals* (1992) 29–39 discusses certain factors (social attitudes to dying and patient fears of dying) that make the task of informing the dying more difficult. See also Loge n 78 above at 881.

[81]See *eg* SL Faria & L Souhami 'Communication with the cancer patient: information and truth in Brazil' (1997) 809 *Annals of the New York Academy of Sciences* 163 at 168.

[82]See RB Jones 'Life-threatening illness in families' in CA Garfield (ed) *Stress and survival: the emotional realities of life-threatening illness* (1979) 353 at 361; GA Shady 'Death anxiety and care of the terminally ill: a review of the clinical literature' (1976) 17 *Canadian Psychological R* 137–142; R Schulz & D Aderman 'How medical staff copes with dying patients: a critical review' (1976) 7 *Omega* 11–21. *Cf* Goldberg n 78 above at 953.

[83]See *eg* Buckman n 80 above at 27–28; Green n 78 above at 186. Some psychologists have theorised that the fear of death may be partly responsible for providing the motivation to be a health care professional – Schulz & Aderman n 82 above at 12.

[84]Schulz & Aderman n 82 above; H Feifel, S Hanson, R Jones & L Edwards 'Physicians consider death' *Proceedings of the 75th Annual Convention of the American Psychological Association* (1967) 201 at 201–202; LA Bugen 'Emotions: their presence and impact upon the helping role' in CA Garfield *Stress and survival: the emotional realities of life-threatening illness* (1979) 138 at 140.

[85]RM Veatch *Case studies in medical ethics* (1977) 144. *Cf* RM Veatch 'Truth telling' in WT Reich (ed) *Encyclopedia of bioethics*(1978) 1677–1682. Moutsopoulos n 78 above at 241 fully agrees with Veatch.

[86]See also Bugen n 84 above at 141–142. Bugen found that doctors' anxiety directly affects their perception, and that perception may in turn affect the way they respond to the patient. Bugen remarks that doctors' perceptions and behaviour toward a person with a life-threatening illness may reflect their own discomfort and not that of the patient. Also interesting is Bauer's report on his experience with doctors suffering from cancer – see Brenner n 6 above at 36–37.

[87]See Buckman n 80 above at 21.

[88]M Mannes *Last rights* (1973) 32; Green n 78 above at 185–186; Buckman n 80 above at 21; Myerscough n 78 above at 66–67.

[89]Green n 78 above at 185–186; Carnerie n 74 above at 82.

[90]Green n 78 above at 185–186.

(eg dermatologists) report a much higher willingness to reveal the truth. This, he says, lends support to the claim that medical truth-telling is more strongly related to the doctor's own sense of competence than to the patient's immediate reaction.[91]

FUTILITY OF ATTEMPTS TO SHIELD FATALLY ILL PATIENTS FROM THE TRUTH

Attempts to shield fatally ill patients from the truth are very likely to be futile. Most seriously ill and dying patients appear to know how sick they really are.[92] Various studies have found that a high percentage of terminally ill patients who had not been informed, nevertheless knew or had a high degree of suspicion of their diagnosis and/or that they were going to die.[93]

POSSIBLE NEGATIVE CONSEQUENCES OF NON-DISCLOSURE

Because of the likelihood of the futility of attempts to shield fatally ill patient from the truth, there is considerable potential for distrust and psychological suffering arising from non-disclosure of the seriousness of the illness.[94] Moreover, patients who are surrounded by medical staff or family members denying their state of serious illness often find themselves in a situation where they collaborate in maintaining the denial of truth in order to spare others the seemingly unbearable knowledge of their own awareness of the truth.[95]

[91]See WT Fitts & IS Ravdin 'What Philadelphia physicians tell patients with cancer' (1953) 153 *J of the American Medical Association* 901 at 902. *Cf* Carnerie n 74 above at 82.

[92]RC Erickson & BJ Hyerstay 'The dying patient and the double-bind hypothesis' in CA Garfield (ed) *Stress and survival: the emotional realities of life-threatening illness* (1979) 298 at 299; Green n 78 above at 188–189; A Surbone & A Flanagin 'Truth telling to the patient' (1992) 268 *J of the American Medical Association* 1661; J Katz & AM Capron *Catastrophic diseases: who decides what?* (1975) 102; BC Meyer 'Truth and the physician' in TL Beauchamp & S Perlin (eds) *Ethical issues in death and dying* (1978) 156 at 158–159; F Rosner 'Emotional care of cancer patient' (1974) 74 *New York State J of Medicine* 1467 at 1469; Freedman n 77 above at 573; Pfeffer n 79 above at 236; CC Lund 'The doctor, the patient, and the truth' (1946) 19 *Tennessee L R* 344 at 347–348; Doyle 'Talking to the dying patient' in PR Myerscough (ed) *Talking with patients: a basic clinical skill* (1989) 108 at 109; Editorial 'On telling dying patients the truth' (1982) 8 *J of Medical Ethics* 115; Faria & Souhami n 81 above at 168; Dickerson n 2 above at 336.

[93]See, *eg* C Centeno-Cortés & JM Núñez-Olarte 'Questioning diagnosis disclosure in terminal cancer patients: a prospective study evaluating patients' responses' (1994) 8 *Palliative Medicine* 39; C Seale 'Communication and awareness of death: a study of a random sample of dying people' (1991) 32 *Social Science and Medicine* 943; M Ryan 'Ethics and the patient with cancer' (1979) 2 *British Medical J* 480.

[94]See *eg* M Reich & L Mekaoui 'La conspiration du silence en cancérologie: une situation á ne pas négliger' (2003) 90 *Bulletin du Cancer* 181; LJ Fallowfield, VA Jenkins & HA Beveridge 'Truth may hurt but deceit hurts more: communication in palliative care' (2002) 16 *Palliative Medicine* 297.

[95]*Cf eg* American Academy of Pediatrics: Committee on Pediatric AIDS 'Disclosure of illness status to children and adolescents with HIV infection' (1999) 103 *Pediatrics* 164 at 165. See also Doyle n 92 above at 111–112; Krisman-Scott n 8 above at 47.

Pemberton[96] sketches the very sad denouement of this drama:

> When the stage has been set by distrust and denial of the personal right to know the truth, all participants play their assigned roles through to the end, and the patient usually lives and dies in isolation and loneliness ... By withholding the truth the doctor and family think they are being kind. The terrible irony of this situation is that the patient, who has the greatest need for their love and concern, is left in loneliness and isolation through their kindness.[97]

Although the practice of deception is not restricted to any particular age group,[98] children appear to be particularly vulnerable.[99] Like adults, seriously ill or dying children are usually aware of how sick they really are,[100] but their perceptiveness is often underestimated.[101] Research has shown that attempts to protect children from knowledge of terminal illness and death are often futile.[102]

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[96]Pemberton 'Diagnosis: CA – should we tell the truth?' (1972) *Bulletin of the American College of Surgeons* 8 at 12. *Cf* I Lichter *Communication in cancer care* (1987) 138; JT Maher & *eg* Pask 'When truth hurts ...' in DM Adams & EJ Deveau (eds) *Beyond the innocence of childhood* vol 2 *Helping children and adolescents cope with life-threatening illness and dying* (1995) 267 at 276; Seale n 93 above at 951.

[97]*Cf* American Academy of Pediatrics: Committee on Pediatric AIDS n 95 at 165; Freedman n 77 at 573, 574. See also Surbone & Flanagin n 92 at 1661; JF Hermann 'Psychosocial support: interventions for the physician' (1985) 12 *Seminars in Oncology* 466 at 469; W Ruddick 'Hope and deception' (1999) 13 *Bioethics* 343 at 345, 346, 356. The patient may have many concerns that can never be shared unless an atmosphere of honesty is created – see Hermann 468. *Cf* Doyle n 92 at 109–110 who mentions a number of these concerns.

[98]See *eg* K Atkinson 'Professional nurse study. Informing older patients of a terminal illness' (2000) 15 *Professional Nurse* 343; Reich & Mekaoui n 94 at 181.

[99]See GM Koocher 'Foreword' in DJ Bearison & RK Mulhern *Pediatric psychooncology : psychological perspectives on children with cancer* (1994) ix. AE Evans & S Edin 'If a child must die ...' (1968) 278 *The New England J of Medicine* 138 argued in favour of 'benign lying' to dying children. Also Türkel n 4 at 93; Welz n 1 308–309.

[100]J Vernick & M Karon 'Who's afraid of death on a leukemia ward?' (1965) 109 *American J of Diseases of Children* 393 at 394; CM Binger, AR Ablin, RC Feuerstein, JH Kushner, S Zoger & C Mikkelsen 'Childhood leukemia: emotional impact on patient and family' (1969) 280 *The New England J of Medicine* 414 at 415; JJ Spinetta 'The dying child's awareness of death: a review' (1974) 81 *Psychological Bulletin* 256; DM Adams & EJ Deveau *Coping with childhood cancer* (1984) 16–18; JJ Spinetta *Disease-related communication* (1980) 257–258; S Sanger 'Honesty and sensitivity in managing emotional problems of the child with cancer' in C Pocheldy (ed) *Pediatric cancer therapy* (1979) 275 at 278; Green n 78 at 188, 190; Meyer n 92 at 158–159; BF Last 'Reacties bij kind en gezin' in H Behrendt (ed) *Kinderen en kanker* (1987) 136 at 139–140; M Parker & D Mauger *Kinderen met kanker* (1981) 71; Goldberg n 78 at 953.

[101]CH Flanagan 'Children with cancer in group therapy' in JE Schowalter, PR Patterson, M Tallmer, AH Kutscher, SW Gullo & D Peretz *The Child and Death* (1983) 266 at 289–290; Maher & Pask n 96 at 275–276; LA Slavin, JE O'Malley, GP Koocher & DJ Foster 'Communication of the cancer diagnosis to pediatric patients: impact on long-term adjustment' (1982) 139 *American J of Psychiatry* 179; Goldberg n 78 at 948. CA Garfield 'A child dies' in CA Garfield (ed) *Stress and survival: the emotional realities of life-threatening illness* (1979) 314 shows that children rely more heavily on non-verbal information. A child often detects discrepancies between verbal and non-verbal messages, leading to confusion which is far more likely to torment the child than the truth.

[102]KJ Doka 'The cruel paradox: children who are living with life-threatening illnesses' in CA Corr & DM Corr (eds) *Handbook of childhood death and bereavement* (1996) 89 at 96–97; Binger *et al* n 100 at 414; Spinetta n 100 at 256; CE Claflin & OA Barbarin 'Does "telling" less protect more? Relationships among age, information disclosure, and what children with cancer see and feel' (1991) 16 *J of Pediatric Psychology* 169.

Attempts to protect the child from the truth may inhibit the child from seeking support, affect interaction with others, hinder proper communication, create additional anxiety, impair trust, complicate the child's response to the crisis, lead to loneliness and deprive the child of the opportunity to come to terms with inescapable reality.[103] Withholding information may even impact negatively on the child survivor's long-term psychosocial adjustment.[104] As survival rates for paediatric cancer patients increase, the long-term psychosocial adjustment of survivors should be a concern. Research by Slavin *et al* suggests that honesty and openness with paediatric cancer patients can be advocated out of a practical concern about the mental health of those patients who will ultimately survive the disease, as well as out of a humanitarian concern about the feelings of isolation, guilty fantasies and unexpressed fears that have been found among seriously ill children.[105]

Apart from its potential to affect the patient negatively, non-disclosure may lead to tension between health care providers.[106] A doctor's decision not to inform a patient may place other health care workers such as medical consultants, nurses and social workers in a position where they find it difficult to discharge their functions.[107]

INADEQUATE OR INAPPROPRIATE MEDICAL CARE RESULTING FROM NON-DISCLOSURE

There is some evidence that the failure to disclose the diagnosis of a terminal illness to patients may directly result in inadequate medical care. For instance, a patient may be denied adequate pain relief[108] or chemotherapy.[109] Non-disclosure can also lead to a situation where nursing staff find it difficult to lie to the patient and start to avoid the patient.[110]

Conversely, creating unrealistic expectations may result in the administering of unnecessary treatment and its accompanying unpleasant, and even harrowing, side-effects.[111] Say for instance the doctor is confronted with informing a cancer

[103]Doka n 102 above at 97. *Cf* Lichter n 96 above at 125; Binger *et al* n 100 above at 415–416; Meyer n 92 above at 158; Goldberg n 78 above at 953.
[104]Slavin *et al* n 101 above at 179.
[105]Slavin *et al* n 101 above at 179.
[106]Freedman n 77 above at 576.
[107]Freedman n 77 above at 572; Dickerson n 2 above at 345. A number of authors have raised the issue of the ethical dilemma faced by the nurse who knows that the doctor withheld the truth from (or deceived) a patient – see *eg* D Evans 'An ethical dilemma: the dishonest doctor' (1995) 30 *Nursing Forum* 5; JA Erlen 'Should the nurse participate in planned deception?' (1995) 14 *Orthopaedic Nursing* 62; Gillan n 78 above at 46.
[108]Freedman n 77 above at 573–574 (patient denied morphine since it was felt that the use thereof would lead her to conclude that her situation was grave).
[109]Freedman n 77 above at 574 (family of patient suffering from advanced but treatable blood cancer insisting that patient not receive chemotherapy in order to spare her the knowledge of her disease). See also LC Coetzee 'A critical evaluation of the therapeutic privilege in medical law: some comparative perspectives' (2003) 36 *CILSA* fn 10 and accompanying text.
[110]Gillan n 78 above at 46–47.
[111]Ruddick n 97 above at 356.

patient who has only a minimal chance of cure, or one to whom only palliative treatment can be offered. In an attempt to nurture the patient's hope of cure, the doctor carefully paints the patient's outlook in unrealistically rosy hues. Inherent in this approach is the danger that the oncologist may feel obliged to offer the patient chemotherapy when, in fact, it would be of only marginal effect, if of any effect at all.[112]

KEEPING HOPE ALIVE

It is often argued that informing patients of a grim outlook will destroy their hope.[113] Although to some – those who see the breaking of a grim diagnosis or prognosis as a 'death sentence', or describe it as 'cruel' or 'inhumane'[114] – the preservation of hope is an end in itself, others see it as a factor that may positively influence the patient's prognosis, or that may influence the patient to comply with treatment, or that may contribute to the avoidance of relapse.[115] However, there is also evidence that studies claiming a positive association between pychosocial factors (such as hopefulness) and survival should be approached with caution.[116] It has been found, for instance, that in the case of certain patients with advanced, high-risk malignant diseases, the inherent biology of the disease alone determines the prognosis, overriding the potentially mitigating influence of psychosocial factors.[117] If this should be the case, there would be little room for the argument against disclosure based on the patient's best medical interest where the patient is diagnosed with an advanced, high-risk malignant disease.

Some are convinced that, in almost every case, it is possible to confront patients with the truth, even if he or she is suffering from incurable cancer, without depriving the patient of hope.[118] Maintaining optimism within the context of realism can be achieved by being honest, compassionate and life affirming, and by avoiding pessimism.[119] The doctor can, for instance, relate the probability outcome to the patient whilst at the same time making it clear that, although

[112]Pfeffer n 79 above at 236–237; Ruddick n 97 above at 345, 354.
[113]RB Purtilo & AM Haddad *Health professional and patient interaction* (5ed 1996) 363. See *eg Arato v Avedon supra* n 38 above at 600–601; Welz n 1 above at 320; Laum n 6 above at 921–922; Gillan n 78 above at 46–47; Dickerson n 2 above at 338; A Begley & B Blackwood 'Truth-telling versus hope: a dilemma in practice' (2000) 6 *International J of Nursing Practice* 26. It has been claimed that hopelessness may lead to death – see A Reitelmann *Die ärztliche Aufklärungspflicht und ihre Begrenzung* (1965) 33–34.
[114]LJ Blackhall, G Frank, S Murphy & V Michel 'Bioethics in a different tongue: the case of truth-telling' 78 (2001) *J of Urban Health* 59 found that some ethnic groups may consider truth-telling as cruel and even harmful to patients whereas others may view it as empowering.
[115]Ruddick n 97 above at 344. See, *eg* S Greer, T Morris & KW Pettingale 'Psychological response to breast cancer: effect on outcome' (1979) 2 *Lancet* 785 who found that a fighting spirit and optimism were associated with recurrence-free survival in malignant disease.
[116]BR Cassileth, EJ Lusk, DS Miller, LL Brown & C Miller 'Psychosocial correlates of survival in advanced malignant disease?' (1985) 312 *The New England J of Medicine* 1551 at 1555.
[117]*Ibid.*
[118]Pfeffer n 79 above at 236. *Cf* F Dekkers *Patiëntenrecht en patiëntenbeleid* (1981) 78.
[119]WS Schain 'Physician-patient communication about breast cancer: a challenge for the 1990's' (1990) 70 *Surgical Clinics of North America* 917 at 931.

statistics provide us with information about the prognosis of certain classes of patients, there is no certainty about the outcome for any given patient.

CONCLUSION

Debates on the issue of truth-telling to the seriously or terminally ill patient have been with us for a very long time. Until recently, however, there was no clear requirement in our law that a patient be informed of a diagnosis. This position has changed. Evidence of the growing realisation of the importance of the knowledge of one's health status for patient self-determination is to be found in the National Health Act which now requires health care providers to inform patients of their health status. However, the concerns that the truth may hurt, present ever since the days of Hippocrates, are still echoed in the exception to this rule provided for in the Act. The introduction of a therapeutic privilege ensures that doctors are relieved from the legal-ethical duty to inform the patient of his or her health status where fulfilment of the duty would imply a breach of their medico-ethical duty not to harm. There are many reasons why this exception to the general rule of disclosure should be severely restricted and some of these reasons were discussed in the present contribution.

The approach taken in the National Health Act is one that implies a weighing up of interests. Whilst it is often obvious that the patient may suffer some harm upon disclosure, it is not always immediately apparent that the withholding of information may also negatively affect the patient. This point was emphasised with reference to the available literature. In this context, the following remarks are apposite:[120]

> It is indisputable that most people suffer anguish when they learn that they have a fatal disease which is likely to kill them. Far less obvious is that such information causes more harm than good, for against the anguish must be set such benefits as: relief of uncertainty (many such people already suspect that something is seriously wrong); the possibility of informed reflection and discussion about the likely course of events; the opportunity to take stock, mend bridges, make farewells, arrange affairs and even help family and friends to come to terms with their loved one's impending death; the avoidance of the extensive web of deceit in which an initially limited medical (or family) decision to deceive often results – deceit which may supplant a lifetime's mutual trust; and finally the amelioration of the process of dying which honest preparation for death may achieve.

It has been contended that it is not so much a question of whether information that holds potential prejudice for the patient should be divulged, but of how the information is to be communicated, or better still, to be shared.[121] This approach

[120]Editorial n 92 above at 115.

[121]D Giesen & I Fahrenhorst 'Civil liability arising from medical care – principles and trends' (1984) *International Legal Practitioner* 80 at 84. *Cf* Faria & Souhami n 81 above at 170–171; JT Newton & T Fiske 'Breaking bad news: a guide for dental healthcare professionals' (1999) *British Dental J* 278; Purtilo & Haddad n 113 above at 366; Capron n 78 above at 390–391; Buckman n 80 above at 11; Pfeffer n 79 above at 236; FFW van Oosten 'HIV infection, blood

to the issue of truth-telling is also reflected in the Promotion of Access to Information Act. In terms of this approach, it is the doctor's responsibility to devise ways and means of breaking bad news to patients without causing them undue harm.[122] Overcoming the problem of avoiding harm through disclosure does not necessarily demand the withholding of information, but rather calls for the development of a duty to inform patients carefully and tactfully.[123] Finally, I want to raise the question whether there is any sound reason for the difference in approach between the National Health Act and the Promotion of Access to Information Act, and whether a uniform approach along the lines of the one taken in the latter would not be preferable.

tests and informed consent' in JJ Joubert (ed) *Essays in honour of SA Strauss* (1995) 281 at 310; D Giesen *Arzthaftungsrecht: die zivilrechtliche Haftung aus medizinischer Behandlung in der Bundesrepublik Deutschland, in Österreich und der Schweiz* (3ed 1990) 165–166; *BGH* 16.1.1959 *VI ZR* 179/57 *BGHZ* 29 176 184. See also G Holland 'Now we tell – but how well?' (1989) 7 *J of Clinical Oncology* 557; Goldberg n 78 above at 951; Scanlon & Fleming n 74 above at 978.

[122] *Cf BGH* 16.1.1959 *VI ZR* 179/57 *BGHZ* 29 176 184.

[123] W Sommer 'Comparison of informed consent in English and German law' (1986) 5 *Medicine and Law* 353 at 358; CH Montange 'Informed consent and the dying patient' (1974) 83 *The Yale LJ* 1633 at 1655; PC Hébert 'Truth-telling in clinical practice' (1994) 40 *Canadian Family Physician* 2105 at 2108. See also Higgs n 78 above at 140–141. *Cf* also D Giesen & J Hayes 'The patient's right to know – a comparative view' (1992) 21 *Anglo-American L R* 101 at 117.

The development of *ficta confessio* as a principle of pleading in South African civil procedural law

JA Faris[*]

TRIBUTE

Professor Snyman has been a life-long colleague. In fact, he has been present during every stage of my academic development. Although we specialise in very different fields of law, it has always been possible as the younger colleague to consult with Prof Snyman on a variety of matters, both personal and professional. I have invariably been impressed by his judicious responses, deep analytical insight and incisive knowledge of the law, especially in his own field. In personal terms, Prof Snyman represents for me the epitome of a lawyer-gentleman, a model of a concerned family man and, in addition, a disciplined and dedicated musician.

INTRODUCTORY REMARKS

Tracing the historical foundations of the principle of *ficta confessio* as it occurs in South African civil procedural law is possibly a futile exercise. Based on an Olympian view of civil procedure, the emphasis is on *how* and *why* certain rules of modern practice have developed and not on the *manner* in which the rules are or ought to be applied. The pressure and pragmatism of court practice leaves little time for ruminating about the origin and historical development of the rules of pleading, let alone the intrinsic nature of the system within which these rules function. The theory of procedure is distant from the exigencies of practice yet this in itself is not uncommon. There is always tension between science and art – the composer and the musician, the choreographer and the dancer, the inventor and the mechanic, the proceduralist and the practitioner. This article therefore broaches civil procedure in its science-form in contrast to its art-form.

At the outset a variance in terminology ought to be noted. In Anglo-American parlance, the principle of *ficta confessio* is known as the constructive admission, the deemed admission, the implied admission or the admission by non-denial. In different jurisdictions, each of these terms might have their own nuances but, on the whole, they express an enduring principle of pleading immanent in all major systems of Anglo-American civil procedure embodied in the rule that an allegation of fact in a pleading which is not denied is deemed to be admitted.

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As part of the family of Anglo-American civil procedural law, in South Africa the principle of *ficta confessio* is identified in rule 22(3) of the Uniform Rules of Court, which is stated as follows:

> Every allegation of fact contained in the combined summons or declaration which is not stated in the plea to be denied or not to be admitted, shall be deemed to be admitted ...

The expressed wording of rule 22(3) indicates that in our system of pleading, *ficta confessio* is identified as the deemed admission.[1]

Two side notes are necessary before commencing to the main body of the work. The first is procedural in nature; the second seeks to establish whether Roman-Dutch procedure in any manner contributes to the development of the principle of *ficta confessio* in our system of pleading.

First, rule 22(3) represents the culmination of an ancient line of development of *ficta confessio*. Initially, the correlation between rule 22(3) and *ficta confessio* as it functioned within the classical system of common-law pleading is extremely diffused. Association with the classical pleading mechanism from the perspective of the contemporary system is at the most notional. The reason is mainly that in classical common-law pleading *ficta confessio* operated as a means of ensuring singleness of pleading and enforcing the rule against duplicity within the general framework of the formulary system. *Ficta confessio* of the classical period starts to loose its prominence as the system of pleading is modified and eventually reformed. As the general system moves toward the demise of the forms of action and hence the diminishing need for safeguarding singleness of pleading, *ficta confessio* in its classical form is progressively integrated into the developing system of fact-pleading where it serves among other rules of pleading to promote specificity in pleading. The progression is one of doctrinal association to procedural recognition of *ficta confessio* as it is expressed in rule 22(3).

[1]Daniels *Beck's The theory and principles of pleading in civil actions* (6ed 2002) 77–78; Van Winsen, Celliers & Loots *Herbstein and Van Winsens' The civil practice of the Superior Courts of South Africa (now the High Courts and Supreme Court of Appeal)* (4 ed 1997) 463. Rule 22(3) is soundly based on a procedural fiction. The deeming of an allegation that is neither denied or not admitted, to be admitted, assigns the procedural consequences of a formal admission to the allegation concerned although in reality an admission was not employed as a mode of response. As in the case of a formal admission, the deemed admission is therefore regarded as being an unambiguous acknowledgement of a factual allegation made by the opposite party. In effect, a party is estopped from raising anything to the contrary to that which has been admitted either formally or by operation of fiction: Daniels above at 77–80; Pretorius *Burgerlike prosesreg in die landdroshowe vol 1* (1986) 498–499; Van Winsen, Celliers & Loots above at 363–364. For the deemed admission as applied in magistrates' courts pleading, see the Magistrates' Courts Rules rule 19(10), which provides as follows: 'Every allegation of fact by the plaintiff which is inconsistent with the plea shall be presumed to be denied and every other allegation shall be taken to be admitted.'

Second, because of its colonial past, the South African legal system is influenced by both English law and the law of Holland, as the latter had received Roman law of the Justinian period into its domestic system of Germanic law.[2] Consequently, it is necessary to determine whether Roman-Dutch procedure influenced the development of *ficta confessio* in our contemporary system of pleading. Perhaps the answer is a foregone conclusion, but it is nevertheless important to treat the matter briefly for the sake of clarity and completeness.

This line of enquiry of necessity must take into consideration the fundamental differences between the mode of pleading in both the classic Continental and common-law systems. The differences are pronounced as is evident from the following concise appraisal:

> From the ancient Germanic law came the rule that, in allegation, the party admits what he does not deny; from the Roman, the oppositive rule, namely, that nothing is admitted save what is expressly admitted.[3]

In the broadest terms, the distinction is between the negative system of common-law pleading and the admissive mode of pleading in Continental procedure.

Under the general system of Romano-canonical law, the positional procedure was developed by which a party was compelled to respond explicitly to a specifically formulated set of facts.[4] Central to this mode of proceeding was the putting of propositions.[5] A proposition was an allegation prefaced by the word '*pono*' or 'I propound' to which an adversary was compelled to answer either '*credo*' or '*non-credo*'. Any qualified response such as: '*non-credo ut ponitur*' was therefore not permitted. The purpose of this process was to determine with great precision which of the propositions, framed on the basis of the pleadings exchanged prior to *litis contestatio*, had been admitted or not admitted. Those propositions which had been admitted were regarded as proved and those that were not admitted formed the basis of the proof-articles which were in the nature of interrogatories and put to proof by witnesses at the hearing in a

[2]See Hahlo and Khan *The South African legal system and its background* (1968) 580–586. The situation is succinctly express by the following metaphor at 585: 'Like a jewel in a brooch, the Roman-Dutch law in South Africa today glitters in a setting that was made in England.'

[3]Millar 'Some comparative aspects of civil pleading under Anglo-American and Continental systems' 1926 *American Bar Association Journal* 405.

[4]See Engelmann *A History of continental civil procedure* (1969) 471–474 480–481; Millar 'The mechanism of fact discovery: a study in comparative civil procedure' 1932 *North Western University LR* 261 268–273.

[5]The constraints of this article permit only a brief description of the positional procedure, which is based on the clear description given by Huber *Hedendaegse rechtsgeleertheyt* 5.24 (1686) as translated by Gane *Huber's Jurisprudence of my time vol 2* (1939). See also Damhouder *Praxis rerum civilium* ch 152–154 (1567).

manner similar to those described above in relation to the propounding of propositions.[6]

Huber describes the principle of *ficta confessio* within the context of this particular mode of pleading:

> If no answer at all is given or an irrelevant one, the proposition is taken to be admitted, unless the question was foreign to the case, or contrary to law and good morals; then it may be said that there is no obligation to answer it at this stage.[7]

The principle of *ficta confessio* is evident in this text. The production of issue was achieved not by admission or denial as at common law, but by admission or non-admission. Therefore, the fiction operated to remedy a refusal to respond by deeming the proposition concerned to be admitted, but in a manner that differs fundamentally from common-law pleading as is evident from the following text:

> If the opponent does not appear to answer the articles, then he is accused of contumacy, and a fresh citation asked for. If he still does not appear, he is accused of a second contumacy, on exhibiting proof of which the accuser may make petition on the roll that *the articles shall be deemed to be admitted.*[8] (own italics)

Although the principle of *ficta confessio* was recognised in Roman-Dutch procedure, it was not applied in plenary form. The application of the principle of *ficta confessio* was dependent upon an act of contumacy and subject to judicial control.[9] Unlike its operation under rule 22(3), in the Roman-Dutch procedure *ficta confessio* was not applied as an autonomous principle of pleading. For this reason, the enquiry into the development of *ficta confessio* focuses on its common-law origins, commencing with the classical system of common-law pleading.

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[6]See generally, Huber n 5 above at 5.24.2–3 8–10 14–15 18–19 21; Gane n 5 above at 265–268.

[7]Huber n 5 above at 5.24.20; Gane n 5 above at 268.

[8]Huber n 5 above at 5.24.25; Gane n 5 above at 268. Huber n 5 above at 5.24.26 notes that in the inferior courts three contumacies were necessary before the proof-articles were deemed to be admitted. See also 5.24.27 where Huber relates that in the case of the Mennonites, who refused to take the oath, that 'all the articles are taken as admitted to their prejudice', unless an opponent waived the taking of the oath.

[9]By way of example, Huber n 5 above at 5.24.28 refers to a decision given in 1643 in the case of *Polman v Coumans*. In this particular matter, the plaintiff had twice put his propositions to which the defendant had failed to respond in each instance and the articles were deemed to be admitted. The defendant however managed to obtain relief but for a second time was barred for his contumacy and the articles were taken to be admitted.

THE CLASSICAL COMMON-LAW SYSTEM

Doctrinally, rule 22(3) may be identified with a singular rule of common-law pleading which expressed in its archaic form, was articulated as: 'Every pleading is taken to confess such traversable matter alleged on the other side, as it does not traverse.'[10]

The main object of this rule was ' ... to reduce the controversy to a single material issue decisive of the case'.[11] This principle was literally applied: if a defendant could raise several defences he was obliged to elect only one of these, upon which his case would then rest.[12]

In practical terms this meant that a pleader was entitled to traverse only a single issue alleged by an adversary and all the other issues were deemed to be admitted. Hence the rule which evolved against duplicity[13] in pleading. Stephen tersely sums up the situation according to the practice of that period:

> ... (in) an action on an indenture of covenant, the plea of release, as it does not traverse the indenture is taken to admit its execution; and the replication of duress, on the same principle, is an admission of the execution of the release...[14]

The principle of *ficta confessio* as it was applied in the classical common-law system of pleading may be further identified by reference to two selected cases taken from the common-law record that illustrate the manner in which *ficta confessio* was applied in the setting of the practice of the time. The case of *Blake v West*[15] was based on an action for *replevin*,[16] in this particular instance the

[10]Koffler & Reppy *A handbook of common law pleading* (1969) 465–466; Stephen *A treatise on the principles of pleading in civil actions* (1860) 181; Sutton *Personal actions at common law* (1929) 178.

[11]Koffler & Reppy n 10 above at 475.

[12]For the theory and principles relating to the production of a single issue, see Koffler & Reppy n 10 above at 475–477; Stephen n 10 above at 117–126; Sutton n 10 above at 157–158. See also Pollock & Maitland *The history of English law before the time of Edward I vol 1* (2 ed 1968) 615–616 which contains the following remark alluding to the inception of this principle: 'The curious rule which in later days will confine a man to a single "plea in bar" appears already in Bracton, justified by the remark that a litigant must not use two staves to defend himself with all.' For a light-hearted yet instructive satire on to the incongruous results arising from the literal application of the rule on the singleness of pleading, see Holdsworth *The history of English law vol 9* (3 ed 1966) appendix 2, especially at 423–426.

[13]See, further, Koffler & Reppy n 10 above at 475–477 480–484; Sutton n 10 above at 158–161. See also Reeves *The history of English law from the time of the Saxons to the end of the reign of Phillip and Mary vol 3* (1787; 1969 reprint) 438 in which the rule against duplicity is succinctly summarised: ' ... neither would they [the courts] allow one [a plea] that contained a multiplicity of matters, to each of which a distinct answer ought to be made: such was called a double plea. Thus where bastardy was pleaded as to one act, and joint tenancy to the other, this plea was held double, because bastardy went to both.'

[14]Stephen n 10 above at 182.

[15]1 Ld Raym 504; 91 Eng Rep 1236. See also appendix 1.

[16]*Replevin* means 'a redelivery to the owner of the pledge or thing taken in distress.': Wharton *The Law Lexicon* (3ed 1864) 792. The action of *replevin* at common law was the process whereby the owner of chattels obtained the redelivery of these chattels which had wrongfully been distrained, normally in satisfaction of rent allegedly due and unpaid, upon the owner

taking of two cows in distress[17] *damage feasant*.[18] The cattle were distrained in a place called Downfield. The defendant[19] avowed[20] that the *locus in quo*[21] pertained to two acres called Marsh-Acre in Downfield and two acres called Stretfield in Downfield. He further avowed that he was the rightful owner of these two *erven*[22] and that he took one cow on each of these *erven damage feasant*. The plaintiff then raised a plea in bar[23] that 'the defendant took two cows in Downfield, and traverses the taking in Marsh-Acre and Stretfield in Downfield'. In phrasing the plea in this manner, counsel for the plaintiff was preparing in advance a strategy which could be used if an unfavourable verdict was given by the jury. Furthermore, the fact that the plea traversed 'the taking in Marsh-Acre and Stretfield in Downfield' could in terms of this strategy be

giving sufficient security for the rent or chattels and the costs of the action, and undertaking that he would pursue the action against the *destrainer* to determine the latter's right to distrain: Walker *The Oxford companion to law* (1980) 1059. See also Koffler & Reppy n 10 above at 253–254; Sutton n 10 above at 66–716.

[17]*Distraint* refers to the seizure of goods taken by means of distress: Walker n 16 above at 365. In turn, *distress* signifies a summary remedy by which a *distrainer* could, without legal process, take possession of the personal chattels of another and hold them to compel the performance of a duty, the satisfaction of a debt or demand or the payment of damages caused by the trespass of cattle; the latter form of distress was known as *distress damage feasant*: Walker n 16 above at 365. See also Koffler & Reppy n 10 above at 254 note 3; Wharton n 16 above at 288–289.

[18]*Damage feasant* means the damage done on a person's land by the trespass of another's animals or fowls which justified the distraint or impounding of same until their owner had paid damages for the damage done; the remedy was abolished in 1971: Walker n 16 above at 332; Wharton n 16 above at 251.

[19]In contemporary terms, the word 'defendant' is a suitable equivalent for the word 'avowant' used in the report: see, further, n 20 below.

[20]The words *avow, avowant, avowry* and a plea in bar or peremptory plea have a technical meaning in relation to the action for *replevin*. Koffler & Reppy n 10 above at 500 succinctly explain the technicalities involved: 'Where the defendant desired to justify his taking as landlord, or on behalf of someone else from whom he derived his right to distrain, he pleaded what was known as an Avowry, which justified the taking of the goods in his own right, or Cognizance, under which he claimed the goods or chattels in the right or on behalf of another. The usual grounds were the taking on Distress Warrant for rent in arrear, or taking under Legal Process, such pleas avowed or acknowledged the seizure of the goods or chattels in question and set forth the facts of a tenancy and arrearage in rent, and concluded by demanding a return of the seized property. The Avowry or Cognizance thus admits that the plaintiff is the owner of the goods, and alleges a right to take or detain them as security for rent alleged to be due. Such a Plea was in the nature of a Cross-Declaration, and hence the plaintiff's Next Plea was not a Replication but a Plea in Bar, after which followed the Replication, Rejoinder, etc., the ordinary name of each Stage of Pleading being thus postponed one step further than in an ordinary action.' See also Stephen n 10 above at 169 note (p); Sutton n 10 above at 91–94; Wharton n 16 above at 792–794.

[21]Locus in quo lit the place in which; a standard phrase used in pleadings to indicate the place where the alleged alienation of rights had occurred; in an action for *replevin* the place where the taking was alleged to have occurred was a material issue in this action: Wharton n 16 above at 551; Stephen n 10 above at 161; Sutton n 10 above at 93.

[22]That is, in the words used in the report 'seised of them in fee'; see Walker n 16 above at 463 1127.

[23]See n 20 above.

later interpreted as a plea in *prisel in auter lieu*[24] which was a specific plea in abatement used only for the purposes of an action of *replevin*, the ground for abatement being that the taking had occurred in a place other than that averred. Issue was joined on the plaintiff's plea and the jury gave a verdict for the defendant. At this stage Lord Raymond,[25] the reporter, states that counsel for the plaintiff moved for the arrest of judgment[26] since 'the issue was immaterial', the reason being that the plaintiff had 'traversed the taking in two places' (which it was contended should be considered as a *plea in prisel in alter lieu*) but in so doing had not traversed the *damage feasant*. On these grounds counsel argued that, although the verdict was for the defendant, the defendant had no title to the two cows which in terms of the verdict were to be returned to him, 'because the *damage feasant* is not found'. To this the court responded *sed non allocatur*, signifying that it was not in agreement with counsel. Contrary to the contentions of plaintiff's counsel, the court held that the *damage feasant* was admitted by the issue of taking and that the two cows were therefore taken *damage feasant*. In brief, because the plaintiff had not traversed the allegation of *damage feasant* in the defendant's avowry,[27] the *damage feasant* was thereby regarded as being admitted, hence giving title to the defendant and confirming the verdict of the jury. From a contemporary point of view it is difficult to identify the principle of *ficta confessio* since it is ensconced in the technical legal usage of the time.

Yet another example of the application of the principle of *ficta confessio* is to be found in the case of *Hudson v Jones*.[28] Once more the principle of *ficta confessio* is not expressly evident but is obscured by the legal technicalities of that period. This is particularly so in *Hudson*. As in the case of *Blake*, *Hudson* is based on an action of replevin.[29] Both cases therefore share the same form of action. However, since under the English formulary system substance and procedure were intermingled in a specific form of action, *Blake* and *Hudson* may be distinguished on grounds that might seem peculiar in contemporary terms. In *Blake, ficta confessio* is applied for purely procedural purposes since the court's decision turned upon this point: by traversing the single issue of the defendant's taking of the cattle at a specific place, the issue of *damage feasant* could not and was not traversed and was held to be therefore admitted. However, in *Hudson* the principle of *ficta confessio* was used to sustain singleness of pleading in regard to a principle of substantive law *viz* that upon

[24] *Prisel in auter lieu* lit a taking in another place; refers to a plea in abatement used only in actions in *replevin*: English *A dictionary of words and phrases in ancient and modern law* (1987) 641.

[25] Lord Raymond, like his father, was also a judge and so too, as his father had done, compiled common-law reports; his reports cover the period 1694–1732: Walker n 16 above at 1035. Because the year of this report is 1699, the reporter is Lord Raymond and not his father.

[26] Arrest of judgment refers to the instance in which judgment was withheld on the ground that there was some error appearing on the face of the record which vitiated the proceedings: Stephen n 10 above at 87; Wharton n 16 above at 80.

[27] See n 20 above.

[28] 1 Salk 90; 91 Eng Rep 84. See also appendix 2.

[29] See n 16 above.

joining of issue on a defence of *non concessit*, an attornment need not be given in evidence but must be pleaded.

Hudson may be reconstructed as follows:[30] Hudson was the plaintiff and being an action for replevin it may be presumed that Jones had distrained certain goods or chattels belonging to Hudson. Jones, the defendant, is specifically referred to in the report as the avowant.[31] The term 'avowant' would indicate that Jones had title to the land upon which, it is stated in the report, a grant of reversion[32] for life had been made on the estate to Hudson. In all probability the action was instigated by Hudson's failure to pay the rent due. As the avowant, the pleading that Jones would have used was known as an avowry.[33] Accordingly, in his avowry Jones would have admitted that he took Hudson's chattels in distress[34] but, in terms of the given facts, would have avowed that he had made a grant of reversion for life to the plaintiff in consideration of the payment of rent, to which terms of the grant – *ad quam quidem concessionem* – the plaintiff did attorn.[35] To the avowry the plaintiff responded, in the customary manner with regard to an action for replevin, by means of a plea in bar.[36] In this plea Hudson raised the defence of *non concessit*[37] with regard to the grant of reversion; it may be presumed that he had not traversed the issue of attornment which was raised in the avowry. The latter is confirmed by the fact that the issue before the court was ' ... whether the want of attornment might be given in evidence upon this issue. Counsel on both sides argued whether it was necessary to plead attornment in an instance where issue had been joined on a defence of *non concessit*. Counsel for the plaintiff contended that the defence of *non concessit* challenged the effect and operation of the deed concerned and that if the deed was ineffectual it was therefore void, the implication being that in such circumstances attornment would be unnecessary. Counsel for the defendant argued that in specifically pleading to a grant of reversion a plaintiff must always traverse the attornment. The court held that, although evidence of attornment need not be given upon a plea of *non concessit,* the attornment itself

[30]On account of the pithy style of reporting during this period, interpolation has been necessary; hopefully any misconstrual of this case will be excused.
[31]See n 20 above.
[32]*Reversion* refers to the interest in land arising by operation of law whenever the owner of an estate grants to another a particular estate for a specified period but does not dispose of the whole of his interest; the reversion is the interest the owner has during the duration of the particular interest: Walker n 16 above at 1069; Wharton n 16 above at 804–805.
[33]See n 20 above.
[34]See n 17 above.
[35]*Attornment* means the agreement of the owner of an estate in land to become the tenant of one who has acquired the estate next in reversion; prior to 1709 an *attornment* was necessary to complete the grant of a reversion, whether it was by express deed or implied in law: Walker n 16 above at 94; Wharton n 16 above at 91.
[36]See n 20 above.
[37]*Non concessit* lit he did not grant; a plea of a stranger denying that a deed or patent was granted as alleged, thereby bringing into issue the title of the grantor as well as the operation of the deed: English n 24 above at 570; Wharton n 16 above at 632.

must be pleaded. In the words of the reporter, the court reached this conclusion on the following grounds:

> And the reason of their opinion was, because it [*ie* the attornment] is traversable, and whatever is traversable, and not traversed is admitted, and the grant is perfect as far as the grantor can perfect it.

To summarise: It is probable on the face of it that Hudson could have elected to pursue one of two defences namely, that of *non concessit* thereby challenging the validity of the deed granting the reversion or alternatively, the want of attornment with regard to the grant of reversion. Had he chosen the latter it is likely that he could have challenged the validity of the deed by showing the want of attornment. However, he relied upon the first-mentioned defence and in so doing was prevented by the rules relating to the singleness of pleading from raising a plea that traversed the attornment. The court did not uphold this defence and therefore judgment was given for the defendant because by not having traversed the attornment it was deemed to have been admitted by the plaintiff. Accordingly, the grant of reversion was valid since the substantive element of attornment was fulfilled by operation of a fiction that is because the attornment was taken to have been admitted.

Blake and *Hudson* are two of many cases off the common-law record that indicate that *ficta confessio* was applied in classical common-law procedure in its plenary form so as to promote the production of a single issue. However, in order to indicate fully the extent to which *ficta confessio* pervaded common-law pleading reference needs to be to made to what was know as 'protestation'.[38]

[38]For the sake of completeness, apart from protestation, the subsidiary rules relating to the operation of *ficta confessio* ought to be stated briefly in order to establish the ambit and procedural consequences of *ficta confessio*. Stephen in n 10 at 468 sets out these rules as follows (a) the rule relating to *ficta confessio* did not apply to those matters which were not traversable; and (b) the admission obtained upon the operation of the principle of *ficta confessio* bound the related party thereto although a contrary verdict had been given by a jury. The case of *Dominus Rex v Bishop of Chester, Pierce and Cook* 2 Salk 560; 91 Eng Rep 472 illustrates the first rule. An *action quare impedit* (a real possessory action to try, among others, a disputed title to an advowson) was brought in regard to an advowson (refers to the right of patronage to a church or benefice, the right being incorporeal and capable of being inherited) granted by the King. One of the issues in contention, heard upon a writ of error, was whether the advowson in question was granted in the 12th or 13th year of the reign of Elizabeth I. In this regard the court at 561;473 held: 'That which is not material or traversable is not admitted nor confessed when it is alleged, and not traversed.' The case of *Wilcox v The Servant of Sir Fuller Skipwith* 2 Mod 4; 86 Eng Rep 908 is an example of the application of the second rule. The cause related to an action for replevin (see n 16 above). The defendant in his avowry justified the taking of cattle as a heriot due upon every alienation without notice (in relation to feudal law, a heriot referred to the right of the lord of the manor, as the king's tenant-in-chief, to take a tenant's best beast or other chattel on the tenant's death; in later law, the heriot became an incident of freehold tenure, eventually evolving into a form of rent, heriot custom being a payment due under copyhold tenure on alienation of the holding or on death). The plaintiff in his plea in bar (see n 20 above) denied that the heriot was due in these terms, whereupon issue was joined. The defendant in his avowry had alleged that the rent due amounted to 12s 14d and the plaintiff in his plea had admitted same. The matter was put to

Protestation was an independent pleading mechanism, also known as a plea in protestation or *protestando*, which developed in order to counteract the consequences arising from the operation of the principle of *ficta confessio* in the system. Moreover, protestation exemplifies the interaction between the rule against duplicity[39] in pleading and the application of the principle of *ficta confessio*.

In a classic phrase attributed to Sir Edward Coke, protestation is defined as 'the exclusion of a conclusion'.[40] To the contemporary mind this does not make much sense. A definition which is a little less obscure is given by Serjeant Williams in a note to the case of *Holdipp v Ottway*:[41]

> A protestation is defined to be, a saving to the party who takes it from being concluded by any matter alleged or objected against him on the other side, *upon which he cannot take issue*.[42] (own italics)

To elaborate upon this definition: Protestation was used in a pleading in an instance where the pleader was ensnared by the rule that pleadings must not be double and by the rule that every pleading is taken to admit such traversable matter as it does not traverse.[43] Consequently, if a pleader wished to retain the right to contest in future litigation those issues which had been admitted because they had not been traversed, he would make a declaration incidental to the main pleadings protesting that the issue not so traversed is untrue.[44] The effect of a protestation was not to release the issues in an existing suit from being admitted

a jury for a special verdict. Among other matters, the jury found that the rent due amounted to 3s ld. Argument on the findings of the special verdict were put to the court. However, only the contentions of the defendant's counsel are reported. One of the arguments raised by the defendant's counsel was based upon the variance between the amount of the rent stated in the avowry and that found to be due by the jury in its special verdict. In this respect, he contended that both the plaintiff and defendant in their pleadings had admitted that 12s 14p was the amount of the rent outstanding and in this regard stated: 'It is a rule in law [ie common law], that what the parties have agreed in pleading shall be admitted, though the jury find otherwise.' The view was upheld by the court on the principle that ' ... what is agreed in pleading, though the jury find contrary, the Court is not to regard. Both these cases illustrate the subsidiary rules which evolved to circumscribe and determine the effect of the application of the principle of *ficta confessio* within the classical system of common law pleading.

[39]See n 13 above.

[40]See, further, text to n 46 below.

[41]2 Wms Saund 102; 85 Eng Rep 802.

[42]See Note 1 at 103;803. For a detailed description of the various rules applicable to protestation in common-law pleading during its classical period, see the remainder of Note 1 at 803-806. *Holdipp* was reported by Edmund Saunders who was called to the bar in 1664 and in 1683 was appointed Chief Justice of the King's Bench. His reputation stands on his volume of reports of King's Bench cases covering the years 1666-1672. Later editions of his reports were edited and annotated by Serjeant Williams (1799 and 1809) and by EV Williams (1824 and 1845), hence these reports are referred to as the 'Williams' Saunders' reports: Walker n 16 above at 1103. Note 1 to the *Holdipp* case may therefore be ascribed to Serjeant Williams because this Note deals with protestation during the classical period of common-law procedure.

[43]See Koffler & Reppy n 10 above at 484; Sutton n 10 above at 178.

[44]See Koffler & Reppy n 10 above at 466.

because they had not been traversed, but was rather to prevent such admissions from being 'concluded' against him for the purposes of future litigation.[45] The passage below, taken from Blackstone, is lengthy yet functional for it succinctly explains protestation in the general context of the system of classical common-law pleading:

> Every plea must be simple, entire, connected and confined to one single point; it must never be entangled with a variety of distinct independent answers to the same matter; ... Yet it frequently is expedient to plead in such a manner, as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied. And this may be done by what is called *protestation*; whereby the party interposes an oblique allegation or denial of some fact, protesting (by the gerund, *protestando*) that such a matter does or does not exist; and at the same time avoiding a direct affirmation or denial. Sir Edward Coke hath defined a protestation (in the pithy dialect of that age) to be 'an exclusion of a conclusion.' For the use of it is, to save the party from being concluded with respect to some fact of circumstance, which cannot be directly affirmed or denied without falling into duplicity of pleading; and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted.[46]

The case of *Young v Rudd*[47] illustrates how protestation was applied in practice. The action was one of *indebitatus assumpsit*[48] for goods sold and delivered, the object of the dispute being a beaver hat. Responding to the 'promises in the declaration', the defendant traversed same stating that 'he gave and delivered unto the plaintiff a beaver-hat in satisfaction and discharge of the said several promises in the declaration; and that the plaintiff then and there had, and accepted the hat in full satisfaction and discharge of the promises'. Upon this the defendant joined issue signified in the report by the term '& hoc &' which in the old Latin form of pleading represented the words: *de hoc ponit se per patriam* – meaning 'and of this he puts himself upon the country', which indicated that he had tendered the issue to a jury for its verdict.[49] The plaintiff, Young, by replication traversed the contention that he had accepted the beaver hat in satisfaction and discharge of the promises stated in the declaration and upon this he joined issue *hoc petit quod inquiratur per patriam* – meaning 'and this he prays may be inquired by the country', signifying that he had put this single issue to the jury for a verdict.[50] The plaintiff by means of his replication had no option but to tender issue to the jury on the single issue that he had accepted the beaver hat in full and final settlement of the promises stated in the declaration; he was bound by the rules of pleading to traverse only a single issue. Yet it is evident that there was a second issue which the defendant had raised in his plea

[45]See Koffler & Reppy n 10 above at 466–467.
[46]Blackstone *Commentaries on the Laws of England* (3ed 1869) 311–312.
[47]Carthew 347; 90 Eng Rep 803. See also appendix 3.
[48]*Indebitatus assumpsit* lit being indebted, he undertook; the equivalent of the common-law action for debt: Walker n 16 above at 607; Wharton n 16 above at 446.
[49]Blackstone n 46 above at 313.
[50]*Idem.*

namely, that the defendant *gave* the hat to the plaintiff; the plaintiff also wished to contest this issue. However, had the plaintiff in his replication also traversed this second issue, he would have infringed the rule against duplicity in pleading. On the other hand, by not traversing this latter issue it would have been taken to be admitted. In order to prevent his pleading from being double and to avoid being bound by the said admission for the purposes of any future litigation, in the words of the report:

> The plaintiff replied *protestando*, that the defendant never gave him [the plaintiff] any such hat in satisfaction and discharge of the said promises ...

Pleading in protestation does not directly deal with the application of the principle of *ficta confessio* but it does show the extent to which this principle had been integrated in the classical common-law system of pleading. Reeves in his *History of the English Law*[51] describes the incidence of protestation during the period from the reign of Henry VI (1422–1461) to that of Edward IV (1461–1483), thus showing that the principle of *ficta confessio* had been established in an early stage of the development of common-law pleading, for *ficta confessio* was a first principle without which protestation could not have existed.

During the classical period of common-law pleading, a vague doctrinal association between rule 22(3) and *ficta confessio* as it was applied during this period is evident. Procedurally, it is impossible to draw a comparison between the ancient and modern forms of *ficta confessio* since in the ancient system of pleading litigants were confined to pleading the single issue that was maintained by application of *ficta confessio*. As such, the principle of *ficta confessio* upheld the rule against duplicity. The underlying premises of classical common-law pleading are therefore antithetical to those of our contemporary system in which the deemed admission as embodied in rule 22(3) is applied.

THE MODIFIED SYSTEMS OF COMMON-LAW PLEADING

Eighteenth century modification

The year 1705 marks a significant stage in the development of common-law pleading. Under the Statute of Jeofails[52] of that year[53] the mode of classical common-law pleading was altered. Prior to the commencement of this statute, multiple pleas to the issues raised in the declaration were not permitted; the principle of *ficta confessio* operated to admit every issue except that single issue

[51] See n 13 above at 437. The reign of Edward IV was interrupted from October 1470–April 1471 when Henry VI was restored to the throne during this brief period.

[52] *Jeofail* derived from the Anglo-Norman phrase *j'ay faillé* lit 'I have made a mistake'; refers to the expression of a pleader who had realised that he had made a mistake in his oral allegations during the period when pleadings were still oral, and sought leave to amend: Walker n 16 above at 662–663; Wharton n 16 above at 480. See also Stephen n 10 above at 87 note (e); Sutton n 10 above at 119–120.

[53] 4 Anne c 16.

which a pleader elected to traverse. The importance of the statute is that it sanctioned multiple pleas in the following terms:

> ... it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in *replevin*, in any court of record, with the leave of the same Court, to plead as many several matters thereto as he shall think necessary for his defense.[54]

A defendant was therefore entitled, with the permission of the court, to plead as many several issues as he regarded as being necessary for his defence subject to the limitation of the pre-existing rule which required that a defendant could not raise a plea and a demur[55] simultaneously. The statute distinctly favoured the defendant. Its wording indicates that pleading severally in replication by the plaintiff was not permitted (except in the case of replevin by means of a plea in bar[56]) nor in the case of any other subsequent pleadings. In this latter regard the singleness of pleading was maintained. A defendant was thus permitted to respond to each issue, not in a single plea upon which his case would rest as was previously the situation, but in several and distinctly separate pleas.[57] Moreover, every one of the defendant's pleas was treated independently as if pleaded alone; each plea stood on its own merits and could not be used by a defendant to prove another plea neither could a plaintiff use one plea to disprove another of the same multiple series of pleas. However, for the purpose of trial, the several pleas concerned were heard simultaneously.[58]

[54]Koffler & Reppy n 10 above at 477.

[55]*Demurrer* is described by Koffler & Reppy n 10 above at 384–385 as follows: 'If the Allegations of the Pleading Party are legally insufficient upon their face to sustain the cause of action alleged or to Constitute a Defense, as the case may be, Objection may be taken by demurrer. A demurrer will lie for insufficiency either in substance or in form. And since a demurrer does not deny the facts which are alleged in the pleading to which it is interposed, they stand admitted, with the result that the only question remaining is one as to their sufficiency in law.' See also Walker n 16 above at 350–351; Wharton n 16 above at 272–274.

[56]In *replevin* the plaintiff's replication to the defendant's avowry or cognisance was in effect a plea in bar and named such since the defendant's pleading was in the nature of a cross-declaration to the plaintiff's declaration, the latter being regarded as merely a matter of form. See, further, n 20 above.

[57]See Sutton n 10 above at 161–162.

[58]See generally Koffler & Reppy n 10 above at 477–480. For an example of the new mode of pleading and the application of the principle of *ficta confessio* under this dispensation, see *Henry Grills v Mary Mannel* Willes 378; 125 Eng Rep 1223. For the sake of convenience, only the essential part of the judgment (380; 1225) which relates to the sufficiency of the first of several pleas is cited verbatim: 'And we are of the opinion that the first plea is bad ... [B]ecause the plaintiff has denied that he was seised in fee by virtue of the lease and the release, though he has in effect admitted it before. For in his plea he has not denied, not even by way of *protestando*, that M Mannel was seised in fee at the time of the making of the lease and release; and though he has denied it in his second plea, that will make no alternation, it being a known rule and never controverted that one plea cannot be taken in to help or destroy another, but every plea must stand or fall by itself. And as he has admitted in his plea that Mary (Mannel) was seised in fee, and that being so seised she made a lease and release to the plaintiff and his heirs, the necessary consequence of that is that he must be seised in fee by virtue of such lease and release ... .'

Accordingly, under this dispensation the effect of the principle of *ficta confessio* was confined to the particular plea to which it related and could not be used to intrude upon issues raised in any other plea of the same series.[59] However, the conventional application of *ficta cofessio* was retained in regard to the replication and subsequent pleadings. Moreover, the application of the principle of *ficta confessio* was also influence by the increased prominence given to the general issue.[60] Under the modified system of pleading that permitted the use of multiple pleas there was an obvious inducement for a defendant to plead the general issue along with any other plea(s) which contained his actual defence(s). The effect of the general issue was to shift the onus of proof back to the plaintiff, thereby effectively obstructing the operation of the principle of *ficta confessio*.[61]

Although these modifications sought to introduce some procedural flexibility into the system, the rules of pleading were still basically directed at the production of a single issue. Accordingly, it is evident that the application of the principle of *ficta confessio* during this period cannot be harmonised with the operation of rule 22(3).

Nineteenth century modification

Introduction

On account of the insistent demand to reform,[62] the early part of the 19th century saw moves in this direction. Of the numerous statutes passed which modified the system, only two have any bearing on the principle of *ficta confessio*. First is the Civil Procedure Act of 1833,[63] its provisions being more fully applied in the Rules which came into operation in the Hilary Term of 1834, commonly known as the Hilary Rules;[64] the second is the Common Law Procedure Act of 1852.[65] The provisions of these statutes as well as the Hilary Rules did not deal directly with the application of principle of *ficta confessio*; modifications in this regard were incidental to the changes effected by the legislation concerned.

[59]Millar '*Ficta confessio* as a principle of allegation in Anglo-American civil procedure' 1928 *North West University LR* 215 220–222.

[60]*General issue* is described by Koffler & Reppy n 10 above at 457 as follows: 'The General Issue is a Denial of the Legal Conclusion sought to be drawn from the Declaration. It denies by a General Form of expression the defendant's liability, and enables the defendant to contest, without specific averments of the Defense to be asserted, most of the Allegations which the plaintiff may be required to prove in order to sustain his action, and in some actions to raise also Affirmative Defenses. It fails to perform the Functions of Pleading, either in giving Notice or in reducing the case to Specific Issues.' See also Sutton n 10 above at 162–168; Walker n 16 above at 515; Wharton n 16 above at 398.

[61]See Koffler & Reppy n 10 above at 477–478; Millar n 59 above at 222.

[62]See Sutherland 'The English struggle for procedural reform' 1926 *Harvard LR* 725–748.

[63]3 & 4 William IV c 42.

[64]For the text of the Hilary Rules, see 2 C & M 1–30; 149 Eng Rep 651–663.

[65]15 & 16 Vict c 76.

The Hilary Rules, 1834

In broad outline, the purpose of the Hilary Rules was to restrict the use of the general issue and extend the system of special pleading.[66] For instance, in regard to an action for debt on speciality or on covenant,[67] the plea of *non est factum* which was the form of the general issue in regard to both these actions, was prohibited except if it operated as a specific factual denial of the deed; all other defences had to be specially pleaded including matters which rendered the deed void or voidable.[68] This example illustrates the manner in which the Rules dealt with the general issue in regard to numerous other forms of action. The effect of the Hilary Rules on the application of the principle of *ficta confessio* was therefore incidental. By inhibiting the function of the general issue and thereby forcing an issue to be specially pleaded, the scope for the application of the principle was extended. Examples extracted from the common-law reports dating from time of the inception the Hilary Rules in 1834 to the commencement of the Common Law Procedure Act in 1852, show that the principle of *ficta confessio* was adhered to and applied in the same manner as during the classical period of common-law pleading, subject to the modified rules of pleading introduced under the Hilary Rules. These sample cases from the beginning, middle and end of this period are *Jones v Brown*,[69] *King v Norman*[70] and *Richard Hewitt v MacQuire*[71] dated 1835, 1847 and 1851, respectively.

[66]See Holdsworth 'The new rules of pleading of the Hilary Term, 1834' 1923 *Cambridge LJ* 261–278 especially at 270–273. See also Baker *An introduction to English legal history* (2 ed 1979) 78–79; Sutton n 10 above at 162–168.

[67]See First General Rules and Regulations II.1, in 2 C & M 21; 149 Eng Dep 659.

[68]*Debt on speciality* refers to an action based on a debt relating to outstanding payment in lieu of, for instance, rental upon a lease or the payment of a mortgage bond, the claim being founded on a sealed instrument; *covenant*, as its name implies, refers to the action for damages for breach of contract under a sealed instrument. Although these actions differed from each other on finer points of substance, they shared certain common requirements. Prior to the Hilary Rules, under the general issue the form of defence for both was *non est factum* which encompassed a denial of the execution and validity of the deed. The general issue in both these instances operated to deny the execution of the deed or to show that the deed was void in law on the grounds of, inter alia, execution of the deed by a married woman or by erasure. However, matters which rendered the deed voidable, such as infancy or duress, had to be specially pleaded, normally affirmatively (*ie* by confession and avoidance). As stated in the text, under the Hilary Rules, the defence *non est factum* was confined to a factual denial of the execution of the deed and all other matters which rendered the deed either void or voidable had to be specially pleaded. See, further, Koffler & Reppy n 10 above at 503–504 505–507; Sutton n 10 above at 47–48 162–164.

[69]1 Bing (NC) 484; 131 Eng Rep 1204.

[70]4 KB 884; 136 Eng Rep 757.

[71]7 Ex 82; 155 Eng Rep 80.

In *Jones v Brown* the action was one of trespass[72] for the breaking and entry upon the plaintiff's close[73] and taking his goods. Judgment by default was given against the defendants in regard to breaking and entering the close. In respect of the taking of the goods, the defendants pleaded not guilty on the grounds that the goods were not the goods of the plaintiff. In a third plea, by confession and avoidance,[74] the defendants confirmed that they had taken the plaintiff's goods but alleged that this had been done lawfully in their capacity as assignees to one Metcalf, who they alleged had been declared bankrupt. The plaintiff by means of a replication joined issue on the first two pleas. In response to the third plea, being an affirmative defence given in confession and avoidance, the plaintiff in his replication contended that the goods mentioned in the declaration were not the goods of the assignees in the manner as alleged in the plea, but that these goods belonged to the plaintiff. At the trial, the plaintiff led evidence to show that Metcalf was carrying on business with the approval of the assignees and that the goods in question had been transferred to him *bona fide* and being so in possession of the goods the defendants had seized same. Defendants' counsel called no witnesses but declared the transfer to have been fraudulent. At this point, the court directed the jury to establish whether Metcalf was trading with the consent of his assignees and whether the transfer of goods to the plaintiff was *bona fide.* Plaintiff's counsel interposed and contended that the verdict should be given for his client because the defendants had no proof of title unless they gave some evidence that they were Metcalf's assignees. The judge overruled the objection, contending that it had come too late and that because the plaintiff had only traversed the defendants' allegation that they had a right to the goods, the plaintiff had thereby admitted the allegation that the defendants were Metcalf's assignees. Verdict was given for the defendants, the jury being satisfied that the transfer of goods to the plaintiff had been fraudulent. The plaintiff obtained a rule *nisi* for a new trial. The rule was discharged by Tindall CJ (Park J, Vaughan J and Bosanquet J concurring). The court's analysis of the facts is set out in the following passage taken from the judgment:

[72] *Trespass* refers to the ancient form of action dated to medieval English law; originally it was applied in instances in which the defendant under the king's writ was called upon to show cause in regard to damage done to the plaintiff and in breach of the king's peace. Later, the original writ was extended to include actions on case which related to, for instance, a breach of a statute which caused damage to a plaintiff; trespass and case were later clearly distinguished, trespass being applied only for direct and immediate injuries. See, further, Walker n 16 above at 1237–1238; Wharton n 16 above at 912.

[73] *Close* refers to a piece of land separated from other land and enclosed by a bank or a hedge; the unjustified entry upon another person's close was known as trespass for breaking a man's close or technically, trespass *quare clausum fregit*: Walker n 16 above at 232; Wharton n 16 above at 185.

[74] The word 'verification' as it appears in the report at the end of the description of the defendants' plea signifies that the plea had concluded with a *common verification*; every pleading subsequent to the declaration which introduced any new matter had to end in a verification thereby indicating that issue had not been joined *eg* a plea in confession and avoidance, which introduced an affirmative allegation. See, further, Sutton n 10 above at 86–87.

> The third plea contains several matters which were capable of being denied, and which, if not denied, show title in the assignees. But it is contended on behalf of the Plaintiff that, having taken issue on a single allegation, he is not to be considered as having therefore admitted all the other allegations of the plea, and that the Defendants ought to establish by proof the truth of those other allegations. I think however, that this is not the result of such a state of the pleadings; but, on the contrary, that, as the Plaintiff, who might have denied all the allegations, has singled out only one to put in issue, he must be taken, for the purpose of this cause, to have admitted the rest.[75]

In these terms. Tindall CJ concluded:

> I think that the Plaintiff, having omitted to contest the Defendants' title at the proper season, cannot now object that it was not supported by evidence at the trial. The rule must be discharged.[76]

The *Jones* case shows a distinct bias on the part of the court in favour of maintaining the rule relating to the singleness of pleading, thereby strictly upholding the principle of *ficta confessio*. However, in *King v Norman* the tendency is to treat this matter with more discretion.

In an action for debt on a bond, the plaintiff in *King v Norman* contended that the defendant was indebted to him in the sum of £500 on the grounds that he had stood surety for the defendant and his associate, Strachan, who were both tax collectors and that as surety he had been compelled to pay the receiver-general the said amount of £500, since Strachan had failed to pay to the receiver-general certain taxes collected. The pleadings were conducted in the following manner. The defendant in his plea, by confession and avoidance,[77] admitted the deed and conditions therein, as had been stated in oyer,[78] but contended that the plaintiff had in no manner suffered any loss as a result of any of the conditions contained in the deed. In his replication, plaintiff alleged that as surety he had been compelled by the receiver-general to pay the sum of £500 and that neither Strachan nor the defendant had reimbursed him. The defendant replied in his rejoinder that the plaintiff was in no manner compelled to have paid the receiver-general the sum of money stated in the replication and that 'the plaintiff of his own wrong paid the same', thereby 'concluding to the country'[79] indicating that he (the defendant) had joined issue. At the trial no evidence was led as to the actual receipt of the money by Strachan, but it was admitted that he had not paid over the money to the receiver-general. It was proved though that the plaintiff had, as surety, paid the amount of £500 to the receiver-general

[75] 488; 1205.
[76] 489; 1206.
[77] See n 74 above.
[78] *Oyer*, the counterpart of *profert*. In an instance where a deed formed the basis of an action or defence and was alleged in a pleading, the party claiming or defending thereunder had to disclose the deed by *profert*; *oyer* was the demand of the other party to have the deed read in an open court and the deed was included as part of the record: Koffler & Reppy n 10 above at 125–126 368–369; see, also, Sutton n 10 above at 102–103.
[79] See, further, n 49 above.

under a judge's order to which he had submitted. However, the defendant's counsel contended that the plaintiff was only entitled to nominal damages in the absence of proof of any specific sum having come to Strachan as tax collector. The court awarded damages to the full amount of £500, being of the opinion that the sum of £500 had been admitted upon the record. In the context of the case as a whole, it seems that the court regarded the sum of £500 to have been admitted because this allegation had not been traversed by the defendant in his rejoinder. Defendant's counsel obtained a rule *nisi* for a new trial. In the ensuing argument the central issue was whether the sum of £500 was traversable or not. The judgment per Boltman J (Maule J and Creswell J concurring) was based on the conventional application of the principle of *ficta confessio*. Judgment was founded on the following:

> It is an established rule of pleading, that, by pleading over, every traversable allegation which is not traversed is admitted, as is said in *Hudson v Jones* (1 Salk. 90); but what is not material or traversable, is not admitted or confessed, when it is alleged, and not traversed: *Rex v The Bishop of Chester* (2 Salk. 560, 1 Lord Raym. 292).[80]

The court then analysed the facts: It was material to the success of the plaintiff's action that he showed that an amount of money had been received by Strachan but that the amount received was not material because 'whether it was 51 or 500 which he had received, the bond was equally forfeited'. However, the plaintiff contended that there was a positive allegation that Strachan had received an amount in excess of £500 and that the defendant was entitled to have traversed this allegation. Consequently, it was essential to establish ' ... what the defendant has admitted, by omitting to traverse the allegation.' On the authority of *The King v The Bishop of Chester*[81] a pleader was not considered to have 'admitted anything but what is materially alleged'.[82] On the facts, it was the court's opinion that even if the defendant had specifically traversed the allegation that over £500 had been received by Strachan, it would have been sufficient for the plaintiff to have substantially proved that only an amount of money had been received by Strachan since this was the material issue, the specific amount being immaterial. In the pithy language of the time the court concluded:

> ... and it is impossible, we think, to contend that a party admits more by omitting to traverse an allegation, than an opposite party would have been compelled to prove, in order to sustain the issue, if it had been traversed.[83]

The rule was accordingly confirmed.

[80]895: 762.
[81]2 Salk 560; 91 Eng Rep 472.
[82]See, further, n 38 above.
[83]897; 762–763.

Hewitt v MacQuire is yet another example of the strict application of the principle of *ficta confessio.* This case also illustrates the extent to which the principle was still integrated with the technicality of pleading. The action was one of trespass[84] for breaking and entering the plaintiff's house and taking his goods. The salient facts are evident from the exchange of pleadings. In his plea the defendant, a bailiff, admitted the seizure of the plaintiff's goods but excused such seizure on the grounds that, upon judgment being entered for a certain Sir Isham, a writ of *fieri facias*[85] was issued, whereupon the sheriff delivered a warrant to the defendant to have it executed against the plaintiff's goods. The plaintiff responded with what was known as a replication *de injuria*, in this instance being a specific form of such replication, namely, the *de injuria absque residuo causae.* This is signified in the words of the report: ' ... the defendant ... of his own wrong, and without residue of the cause in the plea alleged ...'. The *de injuria* was only permitted at the replication stage of the pleadings, usually in actions for trespass, and in instances where the defendant had tendered an excuse for the alleged wrong; in its form it consisted of an introduction or inducement re-affirming the wrong stated in the declaration followed by a denial of all that had been previously alleged.[86] The form of the replication *de injuria* is evident in the report: the plaintiff in his inducement stated the facts contained in his declaration relating to the trespass and then in the mode of the *de injuria* contested the defendant's trespass *ie* the plaintiff admitted 'the existence of the writ and warrant but alleges that the defendant of his own wrong, and without residue of the cause, committed the trespass; that is, although he held the warrant, he was not justified in entering under the warrant'.[87] With regard to what occurred at the trial, it should be noted that the plaintiff had not under this form of the replication traversed the validity of the warrant but had instead, in his inducement, admitted the warrant and was therefore in a precarious situation. It is evident that the defendant had traversed the declaration by means of a plea in confession and avoidance because the reporter notes a common verification[88] at the end of the plea. The plaintiff had been caught in a pincher movement: he had to determine whether the defendant's affirmative allegation was given in justification or in excuse of the alleged trespass. If the plaintiff had decided that it was the former, he could have responded in his replication by confession and avoidance, that is, he could have admitted the existence of the warrant but avoided it by affirmatively alleging that the assignment of the

[84]See n 72 above.

[85]*Fieri facias* lit cause it to be done, abbv *fi fa*; a mode of execution of judgment under a writ of *fi fa* for the seizure and sale of a defendant's goods and chattels to satisfy the judgment: Walker n 16 above at 448 470; Wharton n 16 above at 367 470 367.

[86]See Koffler & Reppy n 10 above at 520–522; Sutton n 10 above at 90–91; Wharton n 16 above at 269. The common form was known as the replication *de iniuria sua propria absque tali causa* meaning that the defendant 'of his own wrong, and without any such cause', motive or excuse, committed the matters alleged in the plea. In the present case a different form of the *de injuria* was used, being the replication *de injuria absque residuo causa* whereby only part of the plea is admitted *ie* without the rest of the cause alleged: see, further, Black *Black's law dictionary* (4 ed1978) 481. See also *Crogate's Case* 8 Co Rep 666; 77 Eng Rep 574.

[87]See 84; 866 *per* Platt B.

[88]See n 74 above.

warrant was invalid, thereby forcing the defendant in his rejoinder to raise the issue of the validity of the warrant. However, if the defendant's affirmative allegation was not in justification but rather in excuse, the plaintiff's replication in confession and avoidance would have been bad and subject to a special demurrer[89] raised by the defendant. It is probable that the defendant foresaw this and, wishing to avoid the issue of the validity of the warrant, phrased the affirmative allegation in his plea as an excuse thereby entrapping the plaintiff into admitting the warrant by means of the replication *de injuria.* Not having expressly traversed the warrant, the plaintiff at the trial contended that the assignment of the warrant from the sheriff to the defendant was invalid. The court overruled this contention, stating that the warrant had been admitted in the plaintiff's pleadings. The jury gave a verdict for the defendant, whereupon the plaintiff moved for a new trial on the grounds of misdirection. The matter was heard by the court of Exchequer and the law barons[90] refused the rule on the grounds that, in the absence of proof to the contrary, there was evidence to suggest that the defendant had entered the plaintiff's dwelling under the authority of the warrant.

The Hilary Rules did not directly effect any alteration in the application of the principle of *ficta confessio*. This is borne out by *Jones*, *King* and *Hewitt*. These examples show that the classical common-law application of the principle remained intact. However, this should not create the impression that the application of *ficta confessio* was unaffected by the modified rules of pleading. On account of the procedural changes effected under the Hilary Rules, a re-evaluation of the principle of *ficta confessio* did occur.

In so far as the principle of *ficta confessio* was concerned, two modifications of the system should be considered. Firstly, the Hilary Rules placed emphasis on special pleading because facts relating to matters which had previously been pleaded under the general issue had to be specifically pleaded, thereby enhancing the principle of *ficta confessio.*[91] This focused attention on admissions on the record. Secondly, protestation was abolished in the following terms:

> No protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions as if a protestation had been made.[92]

At first glance there seems to be no direct correlation between, firstly, special pleading and admissions on the record nor secondly, between the latter and the abolition of protestation. However, in regard to the first, the modification of the

[89]See *Croate's Case* n 86 above at note (B) at 576; see also Wharton n 16 above at 269.
[90]The abbreviation 'B' as it appears in the report after the names of the judges represents the word 'baron'; dating from approximately the 12th century, the judges of the court of Exchequer were known as the lord chief baron and barons of the Exchequer: Walker n 16 above at 104 114 115.
[91]See, further, text to n 66 above and further.
[92]First General Rules and Regulations rule 12; see 2 C & M 18; 149 Eng Rep 658.

mode of pleading in regard to *assumpsit*[93] will be used as an example. The second is based on differing views arising out of the interpretation of the specific rule which abolished protestation, that is, whether, in the case of the principle of *ficta confessio* being applicable, the rule operated only to prevent a fact from being afterwards raised in the same suit or that it was not conclusive in regard to the truth of that fact in any other subsequent litigation between the parties.[94]

There were a number of decisions which dealt with these related matters. However, three have been selected because they share the same form of action, that is, *assumpsit*, and are based on fundamentally the same set of facts; they also show a divergence of opinion between the court of Exchequer and the court of Queen's Bench. Most important of all, against the background of *Jones*, *King* and *Hewett*, these cases illustrate the state of pleading for the purposes of further comparison with the provisions of rule 22(3). In all three cases the facts were as follows: the defendants in their respective pleas to the declarations concerned contended that the bill of exchange in each instance had been given for illegal purposes and without consideration; the plaintiffs by replication contended that good consideration had been given. On a motion for a new trial, the respective defendants argued that the plaintiff by traversing only the consideration had admitted the illegality, thereby impeaching the consideration.

In *Edmund v Groves*[95] the court of Exchequer was the first to give attention to admissions on the record. The controversy was succinctly formulated during argument on a motion for a non-suit brought by the defendant. Alderson B put it to counsel for the defendant: 'The pleadings are not before the jury, but only the issue.' Counsel responded: 'They try the issue only, but they try it with reference to the other facts appearing on the face of the record. It is very desirable that this question should be settled, in order that the parties may know, when they go to trial, whether an allegation admitted on the record is to be taken as a proven fact, with all its consequences, or not.'[96] In refusing the rule, Alderson B made a statement which was to be taken up in subsequent decisions in point:

> An admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on other facts in dispute; but if any inferences are to be drawn by the jury, they

[93]Assumpsit lit he undertook; the form of action which developed out of trespass on case (see n 72 above) based on the allegation that the defendant undertook either expressly or tacitly, to do something and his omission to do so caused harm to the plaintiff's person or property: Walker n 16 above at 89–90; Wharton n 16 above at 87–88.

[94]See, further, comment by EV Williams in note (a) to *Holdipp* at 803-804. For EV Williams, see n 42 above.

[95]2 M & W 642; 150 Eng Rep 914 (1837).

[96]643; 914.

> must have the facts from which such inferences are to be drawn proved like any other facts.[97]

The court of Queen's Bench in *Bingham v Stanley*[98] was given the opportunity to respond. Lord Denman CJ rejected the opinion of Alderson B given in both *Edmunds* and *Bennion*,[99] stating:

> Upon full consideration, we cannot agree with the doctrine thus stated. We think that an admission made in the course of pleading, whether in express terms or by omitting to traverse what has been before alleged, must be taken as an admission for all purposes of the cause, ... provided the allegation so made be material. We find no authority to the contrary; and, indeed, in former times, before the new rules, such admission, in the absence of a protest, estopped the party even in another cause from disputing the fact so admitted.[100]

In *Smith v Martin*[101] it was the turn of the court of Exchequer to take issue with the court of Queen's Bench, once again per Alderson B:

> I must say it seems to me to be unjust and unreasonable to prevent a party, by the rules of pleading, from denying a particular fact, yet call upon the jury to treat that fact as proved. If that be the law, then a double replication is the very essence of justice.[102]

The singleness of pleading and the consequent application of the principle of *ficta confessio* are clearly being called into question.

These cases go deeper than merely relating to the application of the *ficta confessio*. They indicate that the system of pleading was in a state of flux. All three cases have in common the action of *assumpsit* in regard to bills of exchange and promissory notes. Pleading on the action of *assumpsit* was regulated by the Hilary Rules in the following terms:

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[97] 645; 915 (Lord Abinger CB and Bolland B concurring). Although the cause of action did not relate to a bill of exchange, the court of Exchequer confirmed this view in *Bennion v Davison* 3 M & W 179; 150 Eng Rep 1106 (1838) in which, although it was held that immaterial allegations which had not been denied were not admitted by the traversing of another allegation, Alderson B stated at 183; 1108: 'It is clear that this averment, being an immaterial one, was not admitted; but it is not to be taken for granted, that, if it had been material, there was an admission of it as a fact to go to the jury.'

[98] 2 QB 117; 114 Eng Rep 47 (1841).

[99] For *Bennion,* see n 97 above.

[100] 126–127; 50. In *Robins v Maidstone* 4 QB 811; 114 Eng Rep 1103 (1843) at 816; 1105 this view was upheld by Lord Denman though on different grounds.

[101] 9 M & W 304; 152 Eng Rep 129 (1842).

[102] 308; 131 (Lord Abinger CB and Gurney B concurring). Especially in regard to the abolition of protestation, it was held in *Carter v Jones* 13 M & W 136; 153 Eng Rep 57 (1844) at 148; 61 per Alderson B that a plaintiff was entitled to contest an admission on the record made to his prejudice in a previous but related action.

> I.1 In all actions of *assumpsit*, ie except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial of fact of the express contract or promise ...
> 2 In all actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact: ex. gr., the drawing, or making, or indorsing, or accepting or presenting, or notice of dishonour of the bill or note.[103]

The implication of the Rule is that, in instances in which it was averred that a bill or note was void, the issue had to be specially pleaded on specific and factual grounds; the denial of *non assumpsit* under the general issue prior to the Rules which included the issue that an instrument was void, was no longer permitted.[104] To state the matter differently: A defendant could no longer challenge the legality of an instrument by generally denying liability, thereby on the pleadings placing the onus on the plaintiff and then, at the trial, raise the issue of fraud in evidence. The Hilary Rules narrowed the issues in pleading by prescribing that the factual basis relating to the illegality of the instrument had to be specially pleaded. By the same token, because special pleading had been extended, if a defendant's plea contained an affirmative allegation it was incumbent upon the plaintiff to allege by replication that good consideration had been given. Therefore, in the final analysis, the divergence of opinion in *Edmunds*, *Bingham* and *Smith* stems from the adapted mode of pleading under the Hilary Rules which indirectly affected the application of *ficta confessio* and matters incidental thereto.

Both trilogies of cases are functional. *Edmunds*, *Bingham* and *Smith* bring to the fore the unsettled issues caused by uncertainties regarding the interpretation of the Hilary Rules. What they underpin is the modification of the classical mode of pleading under the Hilary Rules, especially in relation to the restriction of the scope of the general issue and the corresponding emphasis on special pleading. The Hilary Rules merely tampered with the classical system of pleading, which basically remained unaltered. This is borne out by *Jones*, *King* and *Hewett*, which indicate that from the commencement of the Hilary Rules in 1834 until the adoption of Civil Procedure Act in 1852, the principle of *ficta confessio* had been applied in the conventional manner and that the mode of pleading the single issue was still practised. In fact, very little had changed because substance was still commingled with procedure since the forms of action had not as yet been abolished. Although there is doctrinal association with the provisions of Rule 22(3), it is still necessary to look beyond the practice and procedure of this period in order to find a congruent historical precedent.

[103]See 2 C & M 20–22;149 Eng Rep 659.
[104]See also n 68 above for application of general issue in regard to debt on specialty and covenant.

The Common Law Procedure Act of 1852

The importance attached to the Judicature Acts of 1873[105] and 1875[106] tends to understate a major reform of the common-law system of pleading which occurred prior to the promulgation of these Acts. As far as common-law procedure is concerned, the Common Law Procedure Acts of 1852,[107] 1854[108] and 1860[109] effected a fundamental reform of the system; the Supreme Court of Judicature Acts, 1873 and 1875 refined and consolidated these reforms. As was the case under the Hilary Rules, no express provisions dealt specifically with the principle of *ficta confessio* although its application was affected by the statutory modification of the system of pleading. Of the three Common Law Procedure Acts mentioned, only the Common Law Procedure Act of 1852 is of importance for present purpose because this statute alone influences the inquiry into the formation of the principle of *ficta confessio* as it relates to rule 22(3).

Two major changes in regard to the mode of pleading influenced the application of the principle of *ficta confessio* during this period.[110] Under the Hilary Rules the classical common-law mode of pleading the single issue was retained, subject to the modification introduced under the Statute of Jeofails of 1705.[111] The provisions of the Common Law Procedure Act of 1852 abolished this antiquated mode of pleading. The change was effected in the following terms:

> A Plaintiff in any Action may, by Leave of the Court or a Judge, plead in answer to the Plea or subsequent Pleading of the Defendant, as many several Matters as he shall think necessary to sustain his Action; and the Defendant in any Action may, by Leave of the Court or a Judge, plead in answer to the Declaration, or other subsequent Pleading of the Plaintiff, as many several Matters as he shall think necessary for his Defence, ...[112]

In isolation this provision could have caused havoc in the system. By abolishing the singleness of pleading the other extreme, a multiplication of issues, could have arisen. This eventuality was foreseen. The Act provided:

> A Defendant may either traverse generally such of the Facts contained in the Declaration as might have been denied by One Plea, or may select and traverse

[105]36 & 37 Vict c 66.
[106]38 & 39 Vict c 77.
[107]15 & 16 Vict c 76.
[108]17 & 18 Vict c 125.
[109]23 & 24 Vict c 126.
[110]For a brief summary of the measures introduced by the Common Law Procedure Acts of 1852, 1854 and 1860, see Sutton n 10 above at 197–200; for a general outline of pleading and procedure under the Common Law Procedure Act of 1952, see Broom & Hadley *Broom's commentaries on the laws of England vol 3* (1869) 338–355; see also Millar n 59 above at 223–24 regarding the effect the provisions of the Common Law Procedure Act of 1852 had upon the operation of principle of *ficta confessio*.
[111]See, further, n 52 above and accompanying text.
[112]Section 81.

> separately any material Allegation in the Declaration, although it might have been included in a general Traverse.[113]

The provisions described so far are confine to the conduct of the defendant in relation to the plaintiff's declaration. This situation is reminiscent of the Statute of Jeofails of 1705 which caused a procedural imbalance in regard to the participative rights of a plaintiff because only a defendant could avail himself of a 'double plea'.[114] The draftsmen obviated this problem in the following manner:

> A Plaintiff shall be at liberty to traverse the whole of any Plea or subsequent Pleading of the Defendant by a general Denial, or, admitting some Part or Parts thereof, to deny all the rest, or to deny any One or more Allegations.[115]

In order to ensure that both parties were placed on an absolutely equal footing it was further provided:

> A Defendant shall be at liberty in like Manner to deny the whole or Part of a Replication or subsequent Pleading of the Plaintiff.[116]

A notable characteristic of these provisions is that they used a vocabulary foreign to the formulary system of pleading. They referred to a 'general denial' and not to the general issue; to pleading 'several matters' and to the traversing of 'facts'. Somewhere there is a missing link which accounts for this altered mode of pleading.

The Act introduced a provision so subtle in its wording that its implications for the process of pleading, and consequently for the application of the principle of *ficta confessio*, tend to be inconspicuous. Section 3 abolished the use of the forms of action for the purposes of pleading.[117] The brevity of this section understates its importance:

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[113]Section 76.
[114]See, further, n 52 above and accompanying text
[115]Section 77.
[116]Section 78.
[117]Sutton n 10 above at 197 states that under the Act: 'Forms of action were abolished and under that act proceedings were started in one uniform manner by a writ which was much the same as the present writ.' Koffler & Reppy n 10 above at 58 point to 1832, under the Uniformity of Process Act 2 Wm IV c 39 of that year, as the start of the gradual demise of the use of the forms of action for the purposes of procedure and in regard to the Act state: 'A second assault upon the Status of the Personal Actions came in 1852 when the Common Law Procedure Act eliminated the requirements that the plaintiff should mention in any Summons any Form or Cause of Action. Even so the Personal Forms of Action as developed at Common Law remained substantially intact.' It should be noted that under s 25 of the Act special endorsements were introduced and that the comprehensive extension of the system of endorsements provided under the Judicature Acts of 1873 and 1875 finally led to the elimination of the forms of action and the intimate interaction between substance and procedure. For present purposes, though, it would suffice to say that s 3 of the Act prohibited the forms of action for the purposes of pleading.

> It shall not be necessary to mention any Form or Cause of Action in any Writ of Summons, or in any Notice of Writ of Summons, issued under the Authority of this Act.

Section 3 did not abolish the forms of action *per se*; it prohibited the use of the forms of action for the purposes of pleading. To state the matter differently: the forms of action still remained as the embodiment of substantive principles, but the process of pleading was no longer restricted to the procedural requirements of a particular form of action. However, because the forms of action no longer constituted the basis of pleading, pleading was founded upon the allegation of facts in relation to the merits of the case[118] in contradistinction with the situation prior to the commencement of the Act in which allegations of fact were formulated as conclusions of law in relation to the specific form of action employed. In a rather unobtrusive manner the Common Law Procedure Act of 1852 took the first tentative step in introducing a system of fact-pleading. Under this new dispensation, the principle of *ficta confessio* was applied within a system in which the mode of pleading had been altered materially.

The new mode of pleading both promoted and derogated from the principle of *ficta confessio*. The provisions of section 81[119] were in direct contrast to the classical mode of pleading: Each party was entitled to plead 'as many several matters' to sustain his action or defence, subject only to judicial control. The principle of *ficta confessio* was no longer maintained in relation to the omission to raise a plea but by the failure to deny a material allegation in the prescribed manner. Sections 76–78, on the other hand, diminished the importance of the principle in the system: the principle was inhibited by the operation of the general denial[120] permitted in the defendant's plea to the declaration as well as in all subsequent pleadings.[121]

Both in principle and practice there are broad similarities between the provisions of rule 22(3) and the model of pleading established under the Common Law Procedure Act of 1852; the principle of *ficta confessio* was applied in regard to those material allegations of fact contained in a previous pleading which had not been denied in a subsequent pleading. However, although the principle and application of the *ficta confessio* can be positively identified under this model in regard to its application under rule 22(3), as yet *ficta confessio* had not been expressly and formally stated as a principle of allegation in any legislative

[118]This is particularly evident from the wording of ss 76–78; s 76 specifically refers to the traversing of 'facts' contained in the declaration.
[119]For s 81, see text to n 112 above.
[120]It should be noted though that under the Common Law Procedure Act of 1852, a general denial was not synonymous with the general issue, because in terms of s 3 of the Act the general issue was divested of any allegation of a substantive nature.
[121]This is also confirmed by s 79 of the Act of 1852 which facilitated a prompt joinder of issue by providing that such joinder could be effected by either party and such joinder was deemed to be a denial of the substance of the plea or other subsequent pleading and an issue thereon and that the plaintiff could add a joinder of issue for the defendant in an instance where the plaintiff's pleading was a denial in part or of the whole of the defendant's pleading.

instrument. Moreover, the general system of pleading was not at this stage sufficiently developed to allow for a complete identification with the provisions of rule 22(3). Recourse must therefore be had to the Supreme Court of Judicature Acts, 1873 and 1875 in this respect.

THE REFORMED SYSTEM

The Judicature Acts of 1873 and 1875[122] are milestones in the history of the administration of justice in England. Civil procedure and, more specifically, pleading is one of the many diverse matters dealt with under these statutes. As far as pleading was concerned, these statutes did not introduce anything novel. Their importance for the purposes of pleading and procedure lies in the fact that both Acts consolidated, refined and improved upon the reforms already accomplished under the Civil Procedure Acts of 1852, 1854 and 1860[123] as well as those under the Chancery Practice Act of 1850[124] and the Chancery Practice Amendment Acts of 1852,[125] 1858[126] and 1860,[127] thereby establishing a unitary system of courts and of procedure.

With regard to pleading in particular, reference must be made to the Rules contained in first schedule to the Judicature Act of 1875. These Rules replaced the original Rules issued under the Judicature Act of 1873.[128] Hence, it is in terms of Order XIX entitled: *Pleading generally*, that the inquiry into the principle of *ficta confessio* is directed. The first formal legislative expression in English procedure of the principle of *ficta confessio* was contained in Order XIX rule 17 in the following terms:

> Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of an opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

Both doctrinally and in substance, the provisions of rule 22(3) may be identified with this rule. Moreover, the same is true in regard to the application of the principle under the general system of pleading so introduced. The mode of pleading was conducted within a system of fact-pleading and characterised by

[122]The Judicature Act of 1875 s 1 provided that the Judicature Act of 1875 was to be construed jointly with the Judicature Act of 1873 and further provided that when construed together with the Judicature Act of 1873 ' ... may be cited as the Supreme Court of Judicature Acts, 1873 and 1875, and this Act may be cited separately as the Supreme Court of Judicature Act, 1875'.
[123]See ns 107, 108 and 109 above.
[124]13 & 14 Vict c 35.
[125]15 & 16 Vict c 86.
[126]21 & 22 Vict c 27.
[127]15 & 16 Vict c 87.
[128]See the Judicature Act of 1875 ss 16 and 33 read with sch 2.

the specificity which was to be brought to pleading.[129] Order XIX rule 4 required

> Every pleading shall contain as concisely as may be a statement of material facts on which the party pleading relies, but not evidence by which they are to be proved, such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation.[130]

However, Order XIX rule 4 along with the rules dealt with below should not be read in isolation. The Judicature Act of 1875 finally abolished the forms of action. There were no provisions which deal directly with this matter. The manner whereby the forms of action were abolished was by means of the introduction of an intricate system of endorsements[131] and special endorsements initiated under the Common Law Procedure Act of 1852[132] and extended under the Judicature Act of 1873.[133] The Judicature Act of 1875 dealt with endorsements extensively and in the minutest detail.[134] Although there were numerous implications in regard to substantive law, in procedural terms what in fact was abolished was the necessity of shaping pleadings in the form of different classes of actions. Within this new procedural dispensation that finally established the system of fact pleading, it was imperative that individual and material allegations of fact were to be specifically pleaded.[135]

In accordance with the mode of fact-pleading, it followed that specificity in pleading should be required. For present purposes, only the following examples will be examined. In terms of Order XIX rule 4 cited above,[136] every material allegation of fact had to be dealt with seriatim. A response by means of a general denial was forbidden under Order XIX rule 20:

> It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth.[137]

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[129]See Jacobs *The reform of civil procedural law and other essays on civil procedure* (1982) 216–217 315–316.

[130]By comparison, see the Uniform Rules rule 18(3)–(4).

[131]An indorsement for the purposes of pleading refers to a writ of summons in a superior court which was and still must be indorsed with a statement of claim made or the remedy or relief sought: Walker n 16 above at 613; Lely *Wharton's law lexicon* (7ed 1883) 405.

[132]See s 25.

[133] See rs 3 7–8 contained in the schedule to the Act.

[134]See Order II r 1 read with Order III rs 1–8 contained in sch 1 to the Act as well as the form of such endorsements contained in appendix A parts 1–2 annexed to sch 1.

135 See Holdsworth n 12 above at 329–330.

[136]For Order XIX rule 4, see text to n 130 above.

[137]The Uniform Rules do not contain a rule equivalent to Order XIX r 20; it is contended that such a rule would in contemporary terms be redundant because specificity in pleading has already been achieved. However, Order XIX r 20 was introduced into the Cape Rules under

The provisions of Order XIX rule 22 required that a party must not answer a pleading evasively:

> When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance ...[138]

Not only did the Rules facilitate specificity in pleading but they also sought to expedite a joinder of issue under Order XIX rule 21:

> Subject to the last preceding Rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to the reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.[139]

Within this altered procedural environment the principle of *ficta confessio*, as embodied in Order XIX rule 17, was retained but assigned a new function. The principle no longer operated to admit by fiction all but one issue in order to achieve the production of a single issue; its purpose was altered to enforce specificity in the pleading of multiple factual allegations and thereby promote the production of issue.

Order XIX rule 17 of the Rules to the Judicature Act of 1875 may finally be identified an apt historical precedent for the contemporary application of rule 22(3). As was the case throughout the development of common-law pleading, the doctrinal association between the two remains distinct. However, of primary significance is that in this instance Order XIX rule 17 is formally stated in a legislative instrument and embodies a definitive and substantive rendering of the deemed admission as it is recognised in South African civil procedure. Furthermore, the affinity between the historical precedent and rule 22(3) is now highly conspicuous since both find placement within a general system of fact-

rule 330(d). As was the case under Order XIX r 20, r 330(d) inhibited the general denial. Beck *The theory and principles of pleading in civil actions* (1ed 1923) at 58 and 59 comments on Cape rule r 330(d) which had been taken up into the Rules of the various provincial division after Union: 'The rule of all courts also provide expressly that a defendant must deal specifically with every allegation of fact which he intends to put in issue. A mere general denial will not be sufficient to destroy or repute particular allegations in the declaration which could be specifically denied ... . The rule abolishes the old practice which permitted a plea of the general issue. The effect of such a plea was held to be a denial of everything not admitted, but as at the present day the converse is the rule and everything not specifically denied is taken to be admitted a general denial cannot be allowed and is liable to be struck out.' The final paragraph of this passage refers to a plea of the general issue. This same passage which appears in Isaacs *Beck's the theory and principles of pleading in civil actions* (5ed 1982) 71 has been retained, probably because of its historical significance.

[138]By comparison, see Uniform Rules r 18(6).

[139]By comparison, see Uniform Rules r 25(3).

pleading. What remains is to trace the manner in which the historical precedent was received into the South African system of pleading.

Ficta confessio: final synthesis

The first definitive formulation in South African civil procedure of the deemed admission was introduced into the Colony of the Cape of Good Hope in 1880 under rule 330(d), as follows:

> It shall not be sufficient for a defendant in his plea in convention, or for a Plaintiff, in his plea in reconvention, to deny generally the facts alleged by the declaration or claim in reconvention, as the case may be; each party must deal specifically with each allegation of fact of which he does not admit the truth, and every allegation of fact contained in the declaration or claim in reconvention and not specifically denied in the plea in convention or plea in reconvention, shall be taken to be admitted.[140]

Rule 330(d) cannot be evaluated in isolation since it formed part of the general reform of the mode of pleading introduced under the amendments to the Cape Rules in 1880. The amendment of the Cape Rules in 1880[141] repealed rules 18 and 19 which were originally promulgated on 2 March 1829;[142] rules 18 and 19 were replaced by rule 330. In contradistinction with repealed rules 18 and 19, rule 330 expressly introduced specificity in pleading. This innovation was based directly upon the Rules to the Judicature Act of 1875.[143] The penultimate and final sentences of rule 330(a) determined the manner in which pleadings were to be framed:

> ... Where the Plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the Defendant relies upon several distinct grounds of defence, set-off, or claim in reconvention.[144]

There is a distinct correlation in this regard with Order XIX rule 9 of the Judicature Rules of 1875.[145] Under rule 330(c) the defensive mode of pleading

[140]See Tennant *Rules, orders etc., touching the forms and manner of proceeding in civil and criminal cases, before the Superior and Inferior Courts of the Colony of the Cape of Good Hope* (5ed 1905) 76–77.
[141]See GN 340 of 26 March 1880. There was no formal expression of the principle of *ficta confessio* in the Cape Rules prior to 1880.
[142]For rs 18 and 19, see Van der Sandt *Rules, orders etc., touching the forms and manner of proceeding in civil and criminal cases, before the Supreme, Circuit, Magistrates' Courts of the Colony of the Cape of Good Hope* (1864) 59–61.
[143]Hereinafter referred to as the Judicature Rules of 1875.
[144]See Tennant n 140 above at 76.
[145]Order XIX r 9 need not be cited because it is contained verbatim in rule 330(a) with the exception that whereas r 330(a) used the term 'claim in reconvention', the English rule used the words 'counter-claim founded upon separate and distinct facts'.

by the defendant *vis-à-vis* the plaintiff's declaration or claim, as is similarly expressed in the Uniform Rules rule 22(2), is set out as follows:

> The Defendant, in his plea or answer, shall admit, deny, or confess and avoid, all the material facts alleged in the declaration or claim of the Plaintiff, and shall clearly and concisely state the material facts on which the defendant relies.[146]

Rule 330(c) had no equivalent in the Judicature Rules of 1875 but was based upon the same wording originally contained in rule 19 published on 2 March 1829.[147] This should not be regarded as any deviation from the Judicature Rules of 1875 because rule 330(c) retained a fundamental principle of common-law pleading, as originally received and modified to suit local circumstances under the Cape Rules of 1829.

To return to the theme of specificity in pleading: Order XIX rule 22[148] is repeated verbatim in rule 330(f):

> When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance ...[149]

In order to limit the proliferation of issues arising from the introduction of a system of fact-pleading, joinder of issue was accelerated. Order XIX rule 21 was stated almost verbatim in rule 330(e) which dealt with joinder of issue.[150] Lastly, rule 330(d) cited above, is an amalgam of Order XIX rules 17 and 20.[151] As was the intention under the Judicature Rules of 1875, the objective of rule 330(d) was to compel specificity in pleading. It is therefore significant that the principle of *ficta confessio* was introduced under rule 330(d), indicating that in the context of the general system of pleading at the Cape, the purpose of the principle of *ficta confessio* was to enforce specificity in pleading so as to expedite a production of issue. It is also evident from the wording of rule 330(d) that the principle of *ficta confessio* was applied without any procedural qualification and was therefore plenary in form. Furthermore, the application of the principle was not subsidiary to any other procedural mechanism and became operative immediately upon a defendant's failure to deny a material allegation of fact contained in the prior pleading.

[146]See Tennant n 140 above at 76.
[147]See Van der Sandt n 142 above at 61.
[148]For Order XIX r 22, see text to n 138 above.
[149]See Tennant n 140 above at 77.
[150]Idem. For the wording of Order XIX r 21, see text to n 139 above.
[151]For Order XIX r 20, see text to n 137 above.

Rule 330(d) was received into the general system of South African civil procedure through its introduction, virtually verbatim, under rule 29 of the Rules of the Orange River Colony and the rule 29 of the Colony of the Transvaal as well as under Order XI rules 32–33 of the Colony of Natal. These rules were retained under the Rules of the various provincial divisions of the Supreme Court established after Union. The final synthesis occurred in 1965 when, under the Uniform Rules of Court issued in that year, the principle of *ficta confessio* contained in the separate Rules of the various provincial divisions was consolidated under rule 22(3).

In this manner, as our contemporary expression of the deemed admission, rule 22(3) takes its place as one of the rules of Anglo-American procedure which, given minor variations, apply the principle of *ficta confessio*.[152] In common with other Anglo-American models, *ficta confessio* under rule 22(3) is applied as an autonomous method of allegation and is therefore plenary in nature within the context of a negative system of fact pleading.[153]

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Appendix 1
Blake v West
1 Ld Raym 504; 91 Eng Rep 1236

Every material allegation upon pleadings, which is not answered, is admitted.

Replevin of two cows. The captain was said to be in a place called Downfield. The defendant avows, for that, that the place where, &c. contains two acres called Marsh-Acre in Downfield, and two acres called Stretfield in Downfield, and that he was seized of them in fee, and took the cows, *viz* one in Marsh-Acre, and the other in Stretfield, damage feasant, &c. The plaintiff pleads in bar, that the defendant took the two cows in Downfield, and traverses the taking in

[152]Australia: Federal Court Rules Order 11 r 13, Australian Capital Territory Order 23 r 13, New South Wales Part 15 r 20(1), Northern Territory r 13.12, Queensland r 166, Southern Australia Order 19 r 11, Tasmania r 250, Victoria r 13.12, Western Australia Order 20 r 14(1); Canada: Ontario r 25.07(6); Ireland: Order 19 r 13; New Zealand: Code of Civil Procedure r 127; United Kingdom: Civil Procedure Rules Part 16 r 16.5(5); United States of America: Federal Rules of Civil Procedure r 8(d).

[153]See *Griqualand West Diamond Mining Co Ltd v London and South African Exploration Co* (1883) 1 Buch App 239; *Rance v Union Mercantile Co Ltd* 1922 AD 312; *Gordon v Tarnou* 1947 3 SA 525 (A); *AA Mutual Insurance Association Ltd v Biddulph* 1976 1 SA 725 (A); *FPS Ltd v Trident Construction (Pty) Ltd* 1989 3 SA 537 (A) 542; *ABSA Bank Ltd v Blumberg & Wilkinson* 1995 4 SA 403 (W); *ABSA Bank Ltd v IW Blumberg* 1997 3 SA 669 (SCA), 1997 2 All SA 307 (A); *Sterling Consumer Products (Pty) Ltd v Cohen* 2000 4 All SA 221 (W); *Pinro Building & Steel Merchants (Edms) Bpk v Yawa* 2003 1 All SA 318 (C) 321; *Daewoo Heavy Industries (SA) Pty Ltd v Banks* 2004 2 All SA 530 (C) 537.

Marsh-Acre and Stretfield in Downfield. And issue thereupon, and verdict for the avowant. And now Mr Carthew moved in arrest of judgment, that the issue was immaterial, because the plaintiff has traversed the taking in the two places, which he understood to be a plea of prisel in auter lieu, but has not taken any notice of the damage feasant; so that though a verdict is for the avowant, yet he has no title to have return, (1237) because the damage feasant is not found, &c. Sed non allocatur. For that is admitted by the issue of the taking, viz if they were taken there, that they were taken there damage feasant.

Appendix 2

Hudson v Jones

1 Salk 90; 91 Eng Rep 84

Upon issue *non concessit*, an attornment need not be given in evidence.

In replevin the avowant made title by grant of a reversion in the *locus in quo* expectant on an estate for life to the plaintiff, unto which reversion there was a rent incident, *ad quam quidem concessionem* the plaintiff (being particular tenant) did attorn: the plaintiff pleaded *non concessit modo & forma*; and the question on trial before Holt CJ was, whether the want of attornment might be given in evidence upon this issue... (85) And being made a point for the resolution of the whole Court, it was urged for the plaintiff, that *upon non concessit* and effect of the grant is put in issue, and a deed, if it be ineffectual, [91] is void: if the grantee dies before attornment, it can never be made good; if a second grant be made, and attornment obtained to that, the first grant is avoided. That upon non feoffavit livery must be proved; *per quod*, &c.

On the other side it was said, that in pleading a grant of a reversion, an attornment is always alleged, but not of a feoffment: and if a feoffment be of a manor, it is neither necessary to allege a livery not an attornment, because it is res integra, and the tenants are supposed to be numerous; yet if the feoffee avow on any particular tenant for rent, &c. he must shew his attornment. Also in pleading a grant of a reversion, the plaintiff must allege a *venue* for the attornment, which shows it was traversable, and that which is traversable, and not traversed, is admitted. To this opinion the Court inclined; but held that want of attornment might be given in evidence, because the operation of the deed is put in issue; and livery differs, for that is the act of the feoffor to complete his feoffment, but this is the act of another, and nothing farther remains on the part of the grantor.

Afterwards the Court held, that an attornment need not be given in evidence upon *non concessit*, though it must be pleaded; and though it must be pleaded,

yet it need not be pleaded with a *venue*, but shall be tried where the land lies, upon which it is supposed to be made as a surrender is. And the reason of their opinion was, because it is traversable, and whatever is traversable, and not traversed, is admitted and the grant is perfect as far as the grantor can perfect it.

Appendix 3
Young v Rudd
Carthew 347; 90 Eng Rep 803

Indebitatus assumpsit for wares sold and delivered.

The defendant pleaded, that after the promises in the declaration mentioned, (viz) on such a day, he gave and delivered unto the plaintiff a bever-hat in satisfaction and discharge of the said several promises in the decla-[348]-ration; and that the plaintiff then and there had, and accepted the said hat in full satisfaction and discharge of the promises, & hoc, &c.

The plaintiff replied protestando, that the defendant never gave him (the plaintiff) any such hat in satisfaction and discharge of the said promises, pro placito dicit that he never accepted a bever-hat in satisfaction and discharge of the said promises, prout, &c. & *hoc petit quod inquiratur per patriam.*

(The rest of the report is not material to the point in issue.)