

A Reader's Guide to Pre-Modern Procedure

David L. Noll

One of the oddest features of legal education in the United States is the gulf between the “civil procedure” taught in the first-year civil procedure course and the “civil procedure” students encounter elsewhere in the 1L curriculum. Every year, new law students learn how civil cases are litigated by studying the simplified procedural system established by the 1938 Federal Rules of Civil Procedure.¹ At the same time, students learn contracts, property, and torts from cases like *Byrne v. Boadle*,² which were decided under procedural systems that have gone the way of the dodo.

Without an understanding of the old procedural systems, however, the reader can be left in the position of a *Game of Thrones* novice who stumbles into a chat room filled with George R.R. Martin fanatics. As characters and procedural devices whiz past, the reader is left wondering which details matter, and which don't.

In an effort to help readers who find themselves in this position, this essay introduces the forms of civil procedure used in those cases (“pre-modern” procedure, for convenience). Pre-modern procedure is easier to understand if one has something to compare it to, so I begin with an overview of modern civil procedure. I then introduce the central concepts and terminology of pre-modern civil procedure, and close with an example.

I. Modern Civil Procedure in a Nutshell

Most 1L civil procedure courses are organized around the Federal Rules of Civil Procedure. The Federal Rules were promulgated in 1938, are used in

David L. Noll is an Assistant Professor of Law at Rutgers School of Law–Newark; david.noll@rutgers.edu. He thanks John Leubsdorf for insightful advice on English legal history, Jessica A. Clarke, William H.J. Hubbard, and Kate O'Neill for comments on prior drafts, and Joshua J. Smith for outstanding research assistance, and gratefully acknowledges financial support of the William S. Powers Research Fund.

1. See Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 435-36 (1998) (describing how the Federal Rules came to dominate the first-year civil procedure course in U.S. law schools). The Federal Rules' dominance is not, however, total. For a casebook with unusually strong coverage of state procedure, see GEOFFREY C. HAZARD JR. ET AL., *CASES AND MATERIALS ON PLEADING AND PROCEDURE* (11th ed. 2015). See also Dave Hoffman, *An Argument Against the Traditional Structure of the Civil Procedure Course*, CONCURRING OPINIONS (Feb. 26, 2012), <http://concurringopinions.com/archives/2012/02/an-argument-against-the-traditional-structure-of-the-civil-procedure-course.html>.
2. *Byrne v. Boadle*, (1863) 159 Eng. Rep. 299 (Exchequer) (held: nonsuit error where evidence supported inference that defendant acted negligently, notwithstanding absence of direct evidence of negligence).

federal district courts across the nation, and serve as a model for most states' procedure systems.³ Thus, understanding the Federal Rules goes a long way toward understanding U.S. civil procedure in general.

The Federal Rules' basic approach might be described as, "eh, let the trial judge work it out."⁴ Through a series of pretrial checkpoints, the Rules seek to sharpen the focus of a case and weed out cases where the *plaintiff* (the party seeking to change the status quo) can't prevail. Throughout the litigation process, the trial judge has wide discretion over the way the case is litigated.⁵

It's easiest to understand this through an example. Suppose that plaintiff Catelyn Stark sues defendant Cersei Lannister for a tort—say, the wrongful death of her husband, Ned. The first stage of proceedings under the Federal Rules focuses on the documents that Stark and Lannister file at the beginning of the case. Stark will file a *complaint*, which tells the court the relief she wants and usually identifies the law that authorizes that relief.⁶ Lannister will respond by filing either a *motion to dismiss* (governed by Rule 12) or an *answer* (governed by Rule 8).

The motion to dismiss permits the defendant to challenge the legal theory (or theories) that the plaintiff's complaint invokes. For example, if the state where Stark sued didn't recognize a cause of action for wrongful death, Lannister's motion to dismiss would point out that fact and argue that even if the facts alleged in Stark's complaint are true, the case has to be dismissed.⁷ Under the Supreme Court's recent controversial decisions in *Twombly*⁸ and *Iqbal*,⁹ a motion to dismiss also permits the court to dismiss a claim if the *facts* alleged in the complaint don't show a "plausible" entitlement to relief. In essence, these decisions hold that a complaint's factual allegations (as opposed to legal boilerplate, arguments, and inferences drawn from the facts) must show a reasonable probability the defendant violated the law.¹⁰ Thus, if Stark's complaint alleged only that Ned had recently died, and didn't provide any factual details suggesting that Lannister was responsible for his death, the complaint might be dismissed for failure to plead a *plausible* wrongful death claim.

3. See, e.g., Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1842 (2014).
4. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure In Historical Perspective*, 135 U. PA. L. REV. 909, 962-63 (1987).
5. See The Bar & Grill Singers, *The District Judge Song*, https://www.youtube.com/watch?v=7_n2Dnz38y4 ("I'm a federal judge and I'm smarter than you—for all my life. I can do whatever I want to do—for all my life." (to the tune of "Happy Together")).
6. *But see* Johnson v. City of Shelby, 135 S. Ct. 346 (2014).
7. See, e.g., R.J.R. Servs., Inc. v. Aetna Cas. & Sur. Co., 895 F.2d 279, 281 (7th Cir.1989).
8. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
9. Ashcroft v. Iqbal, 556 U.S. 662 (2009).
10. See David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 134-35 (2010).

Once the court deals with any motions to dismiss, Lannister will file an answer that responds to the complaint's allegations one by one. The answer can also introduce theories, called *affirmative defenses*, that show why Stark can't recover even if the allegations of the complaint are true.¹¹ For example, Lannister might allege that, although she killed Stark, she was justified in doing so because he posed an imminent danger to public order.

After the answer is filed, the parties exchange documents, answer written questions posed by attorneys, and sit for depositions—meetings in which an attorney takes the testimony of a witness under oath. This process is called *discovery* and is governed by Rules 26 through 37. Its goal is to provide both sides with all the evidence relevant to the case and permit them to settle without having to go to trial.¹²

When discovery finishes, Lannister¹³ will move for *summary judgment*. Under Rule 56, the court may dismiss Stark's wrongful death claim if Stark can't point to evidence that could be used to prove the claim at trial.¹⁴ Summary judgment may also be granted where a reasonable jury couldn't rule in Stark's favor based on the evidence developed in discovery¹⁵—for example, if a videotape demonstrated beyond question that Lannister wasn't responsible for Ned's death.¹⁶

When the parties have put on their evidence, the court may award *judgment as a matter of law* if there is only one way the jury could reasonably resolve the case.¹⁷ When judgment is entered, the losing side has the right to appeal under 28 U.S.C. § 1291. If the trial court's judgment is not disturbed, it cuts off further litigation between the parties that arises out of the same “transaction or occurrence.”¹⁸

Of course, there's more to civil procedure than the Federal Rules. But while subjects such as *Erie* and jurisdiction consume lots of time in the 1L procedure course, they're not relevant here, because they rarely come up in the historical cases that appear elsewhere in the 1L curriculum.

II. Pre-Modern Civil Procedure

Thus we come to the main subject. What are the strange procedural devices that litter 1L casebooks like dead characters in a George R.R. Martin novel?

11. See Fed. R. Civ. P. 12(b).

12. See *Hickman v. Taylor*, 329 U.S. 495, 506-07 (1947).

13. Usually. See Samuel Issacharoff & George Loewenstein, *Second Thoughts about Summary Judgment*, 100 YALE L.J. 73, 92 (1990) (pointing out that summary judgment is a “defendant's motion”).

14. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

15. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

16. See *Scott v. Harris*, 550 U.S. 372 (2007).

17. See FED. R. CIV. P. 50(a).

18. Fed. R. Civ. P. 13(a). See also Restatement (Second) of Judgments § 17 (1982).

A. Law vs. Equity

The first thing to know is that there were not one but two procedural systems used prior to the creation of modern procedural systems: “common law” procedure and “equity” procedure. The reason has to do with the historical development of the English courts.

In the Middle Ages, the king exercised all the judicial and executive powers of government—and some legislative powers as well.¹⁹ There was no formal process for asking the king to resolve a dispute, so citizens who needed the state’s assistance appeared at royal court and petitioned for relief.

Around the 13th century, the first courts of law evolved out of the king’s council. Instead of resolving disputes on a case-by-case basis, the king’s clerks would issue a *writ* (or order) in the name of the king that directed a court to resolve a dispute in a particular way. For example, the “writ of right” directed the court to determine the owner of real estate by supervising a “trial by battle” between the competing claimants.²⁰ Writs were customized to petitioners’ specific problems at first, but became standardized over time. As described below, the writs came to define a case’s “form of action,” which defined the kind of procedure the court would use, the kind of evidence the plaintiff had to present to recover, and the remedies the courts would award.²¹

Despite the creation of the law courts, citizens continued to petition the king for assistance in cases that weren’t covered by an established writ. Meanwhile Parliament, jealous of its own authority, restricted the king’s authority to issue new writs.²² The king authorized his chancellor to resolve the leftover petitions that weren’t covered by an established writ. This eventually led to the creation of an alternate court system, the *courts of equity*, for cases where the courts of law couldn’t provide an adequate remedy. In the courts of equity, cases were tried by the chancellor or master of rolls, not a judge and jury.

19. See FREDERIC WILLIAM MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND xxv (1908). Cf. MONTY PYTHON AND THE HOLY GRAIL (Michael White Prods. 1975) (“[King Arthur:] The Lady of the Lake, her arm clad in the purest shimmering samite held aloft Excalibur from the bosom of the water, signifying by divine providence that I, Arthur, was to carry Excalibur. *That is why I am your king.*”).

20. The procedure is not quite as impressive as its name suggests. A party could “generally delay the action for a year and a day by betaking himself to his bed.” FREDERIC WILLIAM MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 21 (1936). Nevertheless, “care was taken to see that his excuse was not too unreal. Four knights were sent to visit him, to ascertain whether he had *malum transiens* or a *languor*—which was what he needed—after consideration of whether they found him *vagantem per rura* or ‘in bed as befits a man making such excuse, unbooted, unbreeched and ungirt, or even naked which is more.’” *Id.*

21. See *infra* text accompanying note 28. For a helpful general survey of the common law writs and forms of action, see BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING (Henry Winthrop Ballantine ed., 3d ed. 1923).

22. See *id.* at 60.

When reading an old opinion, it's easy to tell whether the case was decided by a court of law or court of equity. The first clue is the decision-maker. As noted, cases at law were decided by a judge and jury whereas equity cases were decided by the chancellor or master of rolls. The second clue is the name of the court. The two main common law courts were the King's Bench and the Court of Common Pleas. The two main courts of equity were the Court of Exchequer and Chancery, a name that continues to be used in Delaware.²³

The last clue to the kind of court is the *remedy* the court awarded. The prototypical remedy in an action at common law is money damages. Equity courts generally awarded *injunctive* relief—*i.e.*, they ordered a party to do something or stop doing something.

All of these courts heard cases in London. But judges periodically would hear cases throughout England and Wales, in sittings known as *assizes*.²⁴ If a difficult question of law arose, it might be referred to the collected judges of a court who would hear it *en banc*, *i.e.*, sitting together as a full court.²⁵ Especially difficult questions were sometimes heard by the twelve judges of the King's Bench, Court of Exchequer, and Court of Common Pleas sitting in a kind of super *en banc* proceeding.²⁶

B. Common Law Procedure

With the difference between law and equity in mind, we can turn to the procedural terminology used in old cases. Common law procedure is defined by three features, each of which generated its own terminology.²⁷

1. *The writ system.* The first feature of common law procedure is the writ system. As noted above, a common law case began when the plaintiff obtained a writ from the king's clerks that directed the defendant to appear and authorized a court to hear the case. The writ the plaintiff obtained determined the case's *form of action*—essentially, a bundle of custom and precedent that defined the applicable substantive law, the procedure the court would follow, the kind of evidence the plaintiff had to produce to prevail, and the remedies the court could award if it found that the defendant violated the plaintiff's rights.

23. At some points in its history, the Court of Exchequer also exercised jurisdiction over common law cases. See 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 238-40 (1922). Thus when dealing with cases from this court, other clues should be examined to confirm that the case arose in equity.

24. For a vivid description of the assizes, see CHARLES C. COTTU, ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN ENGLAND; AND THE SPIRIT OF THE ENGLISH GOVERNMENT 43 (1822): "The judges . . . enter the town with bells ringing and trumpets playing, preceded by the sheriff's men, to the number of twelve or twenty, in full dress, armed with javelins. The trumpeters and javelin-men remain in attendance on them during the time of their stay, and escort them every day to the assize-hall, and back again to their apartments."

25. 3 WILLIAM BLACKSTONE, COMMENTARIES *55-56.

26. See, e.g., King v. Brasier, (1779) 168 Eng. Rep. 202; 1 Leach 199, 200.

27. See Subrin, *supra* note 4, at 914.

To appreciate the difference between a writ and a form of action, think of a baseball game. When the umpire proclaims, “Play ball!” at the beginning of the game, he directs the players to play a game of baseball. The *rules* that govern that game—its “form of action,” if you like—are not defined by the umpire’s direction to “Play ball!” but by the Major League Baseball rulebook, custom, and precedent. So too with writs and forms of action. Whereas a writ was the formal order that directed the case to go forward, the form of action was the body of law, precedent, and custom that defined how the litigants were to play the “game” picked out by the writ.²⁸

Much of the confusing terminology in historical cases has to do with the form of action at issue, which, as noted, followed from the writ that the plaintiff obtained. Because Parliament had limited the king’s authority to issue new writs, a crucial question for the parties and the judge was whether an existing writ could be stretched to accommodate a novel fact pattern. For example, there was no cause of action for wrongful death at common law. Thus, in Stark’s lawsuit against Lannister, a judicial decision might focus on whether an action for wrongful death could be maintained through an action for “trespass”—the common law cause of action for injuries directly caused by the wrongful act of another.²⁹ Common law courts devoted enormous energy to such questions, often reasoning in a style reminiscent of Monty Python’s Flying Circus.³⁰

28. Maitland described the distinction as follows:

Let it be granted that one man has been wronged by another; the first thing that he or his advisers have to consider is what form of action he shall bring. It is not enough that in some way or another he should compel his adversary to appear in court [through the appropriate writ] . . . [A] “form of action” has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment. But further to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents.

MAITLAND, *supra* note 20, at 1.

29. See *Baker v. Bolton*, (1808) 170 Eng. Rep. 1033 (K.B.).
30. Compare *Scott v. Shepard*, (1773) 96 Eng. Rep. 525, 526 (K.B.) (“[Defendant] is the person, who, in the present case, gave the mischievous faculty to the squib [a small firework, which was lit and thrown into a market]. No new power of doing mischief was communicated to [the squib] by Willis or Ryal [who picked up the squib and threw it away in self-defense]. It is like the case of a mad ox turned loose in a crowd.”), with *MONTY PYTHON AND THE HOLY GRAIL*, *supra* note 19:
- Sir Bedevere: Tell me. What do you do with witches?
Peasant 1: Burn them.
Sir Bedevere: And what do you burn, apart from witches?
Peasant 1: More witches.
Peasant 2: Wood. . . .
Sir Bedevere: Does wood sink in water?
Peasant 1: No, no, it floats! It floats! . . .
Sir Bedevere: . . . Exactly. So, logically . . .
Peasant 1: If she weighed the same as a duck—she’s made of wood.
Sir Bedevere: And therefore. . .
Peasant 2: ...A witch!

Appendix I lists eleven forms of action at common law. Because the form of action identified the theory of the case, the evidentiary showing that the plaintiff had to make to recover, and the remedy the court could award, identifying the form of action at issue in an old case will generally make the case easier to understand. For example, if the court identifies the case as one of “general assumpsit,” we know that plaintiff is seeking to recover damages for the breach of a promise. The court’s analysis will probably focus on whether there is an enforceable contractual obligation, whether the defendant performed satisfactorily, or another issue that comes up in contract disputes.

2. *The pleading system.* The second feature of common law procedure was its elaborate pleading system. The common law pleading system sought to limit the number of issues in a case.³¹ Ideally, the exchange of pleadings would narrow the case to a single question that could either be decided by the court or put to a jury.

The basic moves in common law pleading are familiar from modern civil procedure, but the terminology is different. For example, in Stark’s suit against Lannister, Stark would begin by filing a *declaration*—the equivalent of a complaint—that expanded on the original writ she obtained from the royal court with details such as the time and place of injury. Lannister would respond by making a *plea* that challenged either the legal basis for the suit or the facts alleged in Stark’s declaration.

A plea known as the *demurrer* (the second syllable rhymes with “fur,” not “cure”) performed a function similar to the modern motion to dismiss. It allowed the defendant to argue that the plaintiff was not entitled to relief even if the allegations in the declaration were true.³² Thus, assuming a jurisdiction followed the old common law rule denying recovery for wrongful death, Lannister could obtain dismissal of Stark’s wrongful death suit through a demurrer which pointed out that, even if she killed Ned Stark, that fact did not support liability in tort.

Another plea, the *confession and avoidance*, functioned similarly to a modern affirmative defense.³³ Through this plea, Lannister could raise the argument that, even if she killed Ned, she was justified in doing so. The *traverse* functioned like a modern answer and provided an opportunity for the defendant to contest the declaration’s factual allegations.³⁴ Thus, Lannister’s traverse might contend that Ned died of natural causes, or that if someone cut off his head, it wasn’t a Lannister.

Common law pleading differs most conspicuously from modern pleading in what happened after the first round of papers was exchanged. Instead of launching into discovery, Stark would respond with another pleading (the

31. See SHIPMAN, *supra* note 21, at 8.

32. See *id.* at 28.

33. See *id.* at 30.

34. See *id.* at 25.

replication), to which Lannister would respond with another (the *rejoinder*), and so on. Through technical pleading rules, most of the potential issues in the case would be eliminated at the pleading stage, rather than being contested in later proceedings. The objective was to narrow the case to a single issue of law or fact that could be decided by a judge (if the issue was one of law) or jury (if the issue was one of fact).³⁵ Many issues that would today be resolved later in litigation—who did what when, the appropriate theory of liability, the extent of damages, etc.—would, at common law, be decided on the basis of the pleadings.

3. *Trial and appeal.* After the pleadings closed, any legal questions that remained would be decided by the court. Factual issues on which “issue was joined” would be decided by a jury. (Discovery was unavailable, and summary judgment was not introduced until 1855.³⁶)

The first-level trial court often was called the *nisi prius* court. After the parties put on their evidence, the defendant could move for a *nonsuit* or *directed verdict*.³⁷ Attorneys thought of the nonsuit as a demurrer directed at the trial evidence. Just as Lannister’s demurrer would have argued that Stark was not entitled to relief based on the facts alleged in the declaration because the jurisdiction did not recognize liability for wrongful death, her motion for nonsuit would have argued that Stark couldn’t recover based on the evidence introduced at trial. When there was only one reasonable outcome, the directed verdict device allowed the judge to dictate the jury’s verdict. For example, if all the witnesses testified that it was a Tully and not a Lannister who killed Ned, the judge would direct a verdict for Lannister.

If the jury returned a verdict in favor of Lannister, Stark could move for a judgment *non obstante verdict* (JNOV)—literally, “judgment notwithstanding the verdict.”³⁸ Even though the parties had presented evidence, this motion was based on the pleadings. It permitted Stark to ask for judgment based on a feature of the pleadings that emerged during trial, notwithstanding the jury’s verdict for Lannister. The corresponding defense-side motion was the motion for *arrest of judgment*.³⁹ All of these devices—the nonsuit, directed verdict, JNOV, and motion for arrest of judgment—have been consolidated in the modern motion for judgment as a matter of law.⁴⁰

After the *nisi prius* court entered judgment, the losing party could appeal. Parliament took an active role defining appellate courts’ jurisdiction throughout the 17th, 18th, and 19th centuries, so the forum in which an appeal

35. See Subrin, *supra* note 4, at 916.

36. See generally 5 AM. JUR. TRIALS: SUMMARY JUDGMENT PRACTICE § 3 (2014).

37. See Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 458 (2013).

38. See *id.* at 516.

39. *Id.*

40. See Fed. R. Civ. P. 50.

was heard varied over time.⁴¹ In general, appeal began by bringing an issue before the court *en banc*—i.e., before all of the judges of the court—and may have continued in an intermediate appellate court. A party who lost in an intermediate appellate court could pursue a further appeal to the House of Lords (the upper house of Parliament) in cases of exceptional importance.⁴²

The appellate process began when the losing side obtained a writ addressed to the lower court. The appellate court would typically issue a *rule nisi*, an order that directed the party who won in the trial court to explain why the judgment should not be reversed or set aside.⁴³ When the appellate court gave its decision, the rule nisi would be *discharged* if the party who won in the trial court (the appellee) successfully defended the judgment, or a *rule absolute* would issue, which converted the rule nisi into the appellate court's permanent ruling. A rule absolute reflected the appellate court's decision that the trial court had erred in some respect, and that the outcome should be reversed or the case returned to the trial court for further proceedings.

C. Equity Procedure

Because the 1938 Federal Rules of Procedure were modeled on the equity procedure system, procedure in old equity cases is easier to follow than procedure in cases at common law.⁴⁴ An equity case was initiated through a *bill* (like a complaint) that described the *petitioner's* (i.e., *plaintiff's*) predicament at length.⁴⁵ The *respondent* (defendant) would file a *demurrer* (like a motion to dismiss), a challenge to the legal sufficiency of the bill, or an *answer*, a response to the bill's factual allegations.⁴⁶

A central difference between common law and equity procedure was the evidence upon which cases were decided. Evidence in equity generally took the form of documents such as affidavits. Even when evidence started out as oral testimony, it would be reduced to writing.

Perhaps more important, the parties could collect evidence through a process that resembled modern discovery.⁴⁷ The chancellor or master of rolls would make rulings as evidence became available, and order additional discovery if he thought more information was necessary to resolve an issue.

41. See 1 HOLDSWORTH, *supra* note 23, at 370-76.

42. See *id.* at 186-87.

43. See SHIPMAN, *supra* note 21, at 47.

44. For a useful general survey of proceedings in equity, with a focus on equity procedure in the United States, see BENJAMIN J. SHIPMAN, *HANDBOOK OF THE LAW OF EQUITY PLEADING* (1897).

45. See *id.* at 63-65.

46. See *id.* at 92, 94.

47. See Subrin, *supra* note 4, at 919-20.

The ensuing proceedings sometimes lasted for decades, as famously described in Charles Dickens' *Bleak House*.⁴⁸

Eventually, the chancellor would enter a *decree* that set out his decision. Juries were not used in equity, a distinction preserved in the Seventh Amendment to the U.S. Constitution, which limits the right to a jury trial to suits at common law.⁴⁹

Until the 19th century, Chancery had only two judges, the chancellor and the master of rolls.⁵⁰ A losing litigant could appeal from the latter to the former. In cases decided by the chancellor, a litigant could only ask him to reconsider his decision or seek review in the House of Lords.

III. A Case Study

Having introduced the basic features of pre-modern procedure, I close with a case study that illustrates the value of understanding it. I take as my example *Byrne v. Boadle*, which introduced the idea of *res ipsa loquitur* to Anglo-American law.⁵¹

As every 1L student learns, negligence means taking a risk that is unreasonable under the circumstances. The question in *Byrne* was whether a jury could infer negligence simply from the way the plaintiff had been injured.

The plaintiff Byrne was walking down the street when he was struck in the head by a flour barrel that fell from a second-floor window of the defendant's shop. Because he had been clobbered by a flour barrel, Byrne understandably could not testify about what was happening in the shop prior to the accident. Other witnesses confirmed that a flour barrel had fallen from the shop window. But, like Byrne, they couldn't provide details about what was happening in the defendant's shop before the barrel fell. As such, the jury didn't hear any direct evidence that the defendant's employees had been working carelessly. For all the plaintiff and his witnesses knew, the defendant's employees were working as carefully as brain surgeons.

After both sides' witnesses testified, the defendant argued "there was no evidence of negligence for the jury" and the trial judge agreed. The

48. "This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit." CHARLES DICKENS, *BLEAK HOUSE* 3 (1853).

49. See U.S. CONST. amend. VII ("In suits *at common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." (emphasis added)).

50. See HOLDSWORTH, *supra* note 23, at 232-33.

51. *Byrne v. Boadle*, (1863) 159 Eng. Rep. 299 (Exchequer).

judge “nonsuited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with 50l. damages, the amount assessed by the jury.”⁵² In other words, the judge dismissed the plaintiff’s claim but gave him leave (permission) to ask the Court of Exchequer to award him £50. The ensuing appeal turned on a procedural question: Had Byrne presented enough evidence for the jury to conclude that the defendant’s employees had been negligent?

Byrne obtained a rule nisi directing Boadle to show cause why the judgment should not be reversed. The Court of Exchequer concluded that under the circumstances, the injury “spoke for itself:” *res ipsa loquitur*. The Court of Exchequer therefore converted the rule nisi into a rule absolute and reversed the trial court’s decision denying any relief to Mr. Byrne. Pursuant to the Court of Exchequer’s order, the unfortunate Mr. Byrne recovered his fifty pounds.

The keys to *Byrne* are the trial judge’s nonsuit and the Court of Exchequer’s reversal of that ruling. The nonsuit expressed the trial judge’s view that the evidence Byrne offered was insufficient to show the defendant’s employees acted negligently. Reversing that ruling, the Court of Exchequer held that the evidence *was* sufficient to conclude that the defendant acted negligently.

Byrne established the legal principle that some injuries show the defendant was negligent based on nothing more than the fact of the injury. When a flour barrel falls from a shop’s second-floor window and clobbers a passer-by, a jury may conclude that the shop’s employees acted negligently even if no one testifies about what the employees were doing prior to the accident. Or to take the modern analogue: When someone who recently had an operation finds a scalpel in her gut, a jury may reasonably conclude that the surgeon was negligent, even if what happened during the surgery is unknown.⁵³

As this example shows, understanding pre-modern procedure makes it easier to understand the development of Anglo-American law. With a little procedural know-how, decisions like *Byrne* make a lot more sense.

52. *Id.*

53. See *Ripley v. Lanzer*, 215 P.3d 1020, 1027 (Wash. Ct. App. 2009).

Appendix

The Eleven Common Law Forms of Action

Although there were many forms of action at common law, most were obsolete by the 19th century. The eleven forms of action listed below are particularly important for understanding cases in the 1L law school curriculum.

ACTION	DESCRIPTION
Trespass	Action for damages directly caused by an unlawful act committed against the person or property of another
Trespass on the Case	Action for damages indirectly caused by the wrongful act of the defendant. Precursor to modern actions for negligence and nuisance.
Trover	Action for damages caused by the conversion (<i>i.e.</i> , theft) of personal property
Detinue	Action to recover personal property
Replevin	Action to recover personal property in which plaintiff, after posting security, is permitted to take the property until the court renders its decision
Ejectment	Action for a person who has been wrongfully ejected from property to recover the property, damages, and costs
Debt	Action to recover a liquidated or certain amount of money
Covenant	Action to recover damages for breach of a contract made under seal
Account	Action to determine and recover the amount that a party in a fiduciary relationship (<i>e.g.</i> , principal/agent, attorney/client) owes to another party in the relationship
Special assumpsit	Action to recover damages caused by defendant's breach of an express contract
General assumpsit	Action to recover damages caused by defendant's breach of an implied contract or promise

Some Popular Writs

“Original” writs were used to initiate a case, direct the sheriff to compel the defendant to appear, and authorize the court to hear the case. For each of the eleven common law forms of action listed in the table above, there was a writ with the same name. When describing a case’s procedural history, courts might identify either the writ or form of action. For example, *Pickle v. Page* stated that a “writ of trespass”—shorthand for trespass on the case—permitted a plaintiff to recover damages “for a parrot, a popinjay, [or] a thrush” that the defendant abducted.⁵⁴ *Pierson v. Post*, a case seeking damages for the defendant’s taking of a fox that the plaintiff had almost captured, described the case as “an action of trespass on the case.”⁵⁵

In addition to the original writs, litigants could petition for “extraordinary” or “prerogative” writs. These were used by courts to control the actions of other parts of government, government officers, and sometimes private individuals. A few of the most common extraordinary writs are listed below. For a complete listing, see the current edition of BLACK’S LAW DICTIONARY.

54. 169 N.E. 650, 651 (N.Y. 1930).

55. 3 Cai. R. 175 (N.Y. 1805).

WRIT	DESCRIPTION
Writ of error/appeal	Writ issued by an appellate court to a lower court, directing that the record be delivered for appellate review
Writ of certiorari	Writ issued by an appellate court, at its discretion, directing that the record be delivered for appellate review. Used today by the U.S. Supreme Court to bring up cases for review from federal circuit courts of appeal and state supreme courts.
Writ of habeas corpus	Writ directing the respondent to “bring forth the body” of a detainee to examine the lawfulness of the detainee’s detention
Writ of mandamus	Writ issued by a court to compel an official to perform an action, usually because the official’s failure to act violates the law
Writ of prohibition	Writ directing lower court or government official to cease acting beyond its lawful jurisdiction
Writ <i>quo warranto</i>	Writ that directs the recipient to show why he or she is entitled to exercise authority she claims to possess, such as the office of mayor or sheriff
Writ of supersedeas	Writ directing a stay of proceedings at law, for example to permit an appeal