THE FIRST REPORT

OF

The Commissioners,

APPOINTED BY THE GENERAL ASSEMBLY OF MARYLAND

TO REVISE, SIMPLIFY AND ABRIDGE

The Rules of Practice, Pleadings, &c.

IN THE COURTS OF THE STATE.

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1855.

To the Honorable,

The General Assembly of Maryland:

The Commissioners, appointed by the General Assembly in pursuance of the provision in the new Constitution, "to revise, simplify and abridge the rules of practice, pleadings, forms of conveyancing and proceedings of the Courts of this State," respectfully submit the following

REPORT:

The Commissioners have given the utmost attention to the matters embraced in the wide field of duty assigned them. It is the mechanism by which the law is administered, and not the law itself, which has been committed to us for revision and amendment.—And there is not, within the realm of human affairs, a more important task, or one, which, if badly performed, would produce consequences more injurious to society.

Before we enter upon the consideration of the modes of procedure by which justice is administered, it will be profitable to advert to the judicial tribunals of the State in which they are used.

By the new Constitution, the judicial power is vested in a Court of Appeals; in Circuit Courts and Orphans' Courts for the Counties; in a Court of Common Pleas, a Superior Court, an Orphans' Court, a Criminal Court, and a Chancery Court which has been established by the Legislature, for the City of Baltimore; and in Justices of the Peace.

N. B. This Report has been revised and improved since it was presented to the General Assembly at the Session of 1854.

The Court of Appeals has a general appellate jurisdiction, both in law and equity, over all appeals from the different Courts of the State. The Circuit Courts have original jurisdiction, both in law and equity, over all suits civil and criminal, arising in their respective Counties, and over appeals from the Orphans' Courts, and from Justices of the Peace. The Court of Common Pleas, for the City of Baltimore, has Common law jurisdiction in all suits, where the debt or damage claimed is over one hundred and does not exceed five hundred dollars; and over appeals from Justices of the Peace, and applications for the benefit of the insolvent laws. The Superior Court of Baltimore City has jurisdiction over all suits, where the debt or damage claimed exceeds five hundred dollars; and concurrently with the Chancery Court, over all cases of equity within the limits of the City. The Criminal Court of Baltimore has general criminal jurisdiction. The Orphans' Courts have general jurisdiction over testamentary matters, and over other matters specially given by statutes.

It is to revise, simplify and abridge the practice, pleadings and proceedings of all these various Courts, in all the branches of their jurisdictions, that we have been commissioned. In order to do this, it is manifest that the whole body of law and of equity, in its administration, must be considered. It cannot be determined whether a better system of procedure, than the present, can be devised without a knowledge and profound consideration of the body of law and equity which is to be administered. The means cannot

be understood or reformed without a knowledge of the purposes to be accomplished. These purposes involve all the rights and obligations, which arise out of the infinitely diversified actions of men, that are regulated by law or by the principles of equity.

In this Report, we shall confine our views to the proceedings in civil actions at law, commencing with the original writ and ending with the judgment.—This is the most important part of the work confided to us; and must be made the basis of all law reform. It embraces the whole course of proceedings in civil suits in all the Courts of law of the State, except the Orphans' Courts. It comprehends the system of pleading, in connection with the initiatory process and with the subsequent proceedings of trial and judgment. It was deemed by us more expedient for purposes of practice, to present the simplified system of pleading in these practical connections, than in a more abstract and independent form. This Report, therefore, though intended especially to present the system of pleading as simplified by us, embraces a part of what comes within the domain of practice.

All special proceedings adapted to particular classes of cases, and the great body of the practice in the Courts of law which we have revised, will be presented in another Report. And the other parts of our work will be presented in separate Reports.—So that each branch of our work may be considered separately, and may stand upon its own respective merits. In no other mode, could so complex a subject be as well examined, and as cautiously and intel-

ligently considered, by those who are to pass judgment on our work.

Before we proceed to consider the special subject of this report, we propose to offer some general considerations upon the subject of law reform.

THE GENERAL SUBJECT OF LAW REFORM.

It is not necessary to argue so plain a proposition as, that every society must be governed by laws. However imperfect and rude it may be in its earlier outlines, law, in some form or other, is the indispensable condition of all society and government. And the laws, from the diversity of the social relations and the various exigencies of business, must be so numerous and so complex, as to require a distinct profession to study and to expound them. Jurisprudence, after all possible simplifications, must still be a vast and intricate system, requiring the laborious and discriminating study of many years, to master its doctrines. Nothing can be more absurd than the notion, that a code of laws and a system of Courts adequate to the exigencies of justice can be devised, which will not require a learned bench and a learned bar to administer them. We shall therefore argue the questions, which may arise in the course of our discussion, upon the assumption, that we must have in the future, as we have had in the past, a bar learned in jurisprudence, to advise clients of the law and to conduct legal proceedings, and Courts, with judges skilled in the science and practice of law, to decide causes.

Law reform touches so near the vitals of the body politic, and is destined to become of such extensive

scope in both our State and national jurisprudence, that it seems to be incumbent upon us, to discuss the fundamental questions, which lie at the basis of that part of the subject which has been committed to us, —*the principles of law procedure.* It seems to us, that most of the law reforms, which have been attempted in this country, have been performed with too little reference to general views of juridical polity. We therefore purpose to open a discussion, which may, in future, direct investigation into profounder considerations.

In reforming the modes of law-procedure, we have but two examples to follow, the Common law of England, and the Civil law of Ancient Rome. These two systems of law, as far as their administrative principles and forms of procedure are concerned, are the opposites of each other. They are, therefore, the alternatives between which we must choose, with more or less approximation to the one or the other.

In the administration of justice, the principle which marks the primary distinction between the Common law and the Civil, is the relative obligatory force under them, of precedent or former decisions. Under the Common law, former decisions control the Court unconditionally. It is deemed an indispensable requisite of law, that there should be a fixed rule of decision, in order that the rights and property of the community may be stable and certain, and not involved in perpetual doubts and controversies. Under the Civil law, the principle is different. Former decisions have not a fixed and certain operation, but are

considered as merely governing the particular case, without absolutely fixing the principle involved in it. When a similar case occurs, the judge may decide it according to his own views of the law, or according to the opinion of some eminent jurist who may chance to have great influence at the time. This is the principle of judicial judgment no less in the modern, than it was in the Imperial Roman Civil law tribunals.

It is this primary difference in the principles of practice, under the two systems of law, which gives the Common law its great superiority over the Civil law, as a practical jurisprudence regulating the affairs of society. It has the great advantage of producing certainty in regard to all rights and obligations which are regulated by law. But above all, it controls the arbitrary discretion of judges, and puts the case beyond the reach of the temporary feelings and the prejudices or the peculiar opinions of the judge.

This principle, of the imperative force of former decisions, has also an important bearing on the principles of interpreting the law. In the Common law the principles of interpretation are fixed and certain. Rules of interpretation were early adopted and have never been departed from. Others, from time to time, have been added, but when once introduced into practice, they become precedents.

But it is far otherwise in the Civil law. Different schools of interpretation have existed in countries where it is administered, called respectively, the historical and the philosophical. And the law is subject to all the fluctuation in practice which grows out

of their different principles of interpretation. By these different principles of interpretation, and by the principle that former decisions may be disregarded, much certainty in the law is lost; so that often the decision of the plainest case, unless it depend solely upon some fundamental positive rule, can hardly be confidently foretold.

This difference in the administrative principles of the Common and the Civil law, is intimately connected with their different modes of procedure, and with the different degrees of respect paid to forms. Under the Common law, forms are as sacred as the principles which they embody. They are precedents. Indeed, practically, under the Common law, form is substance. Because, the precise form itself is made a precedent and thereby the certainty of the principle which it embodies is fixed. If the form itself be a precedent, there can be no dispute as to the principle which it involves. The new case must conform to it; and if it conforms to it, its import is certain.

Now, the great instrument, by which certainty has been given to precedents in the Common law, and all the various forms maintained, is Special Pleading. This is the mainspring and the regulative force of the whole machinery of the Common law. From the original writ to the judgment, every thing is in specific, undeviating forms. There can be no dispute as to the precise import of every step in the procedure; and all this accuracy and certainty is maintained by special pleading. And when the decision is made, no matter how loosely the opinion of the Court may be

expressed, the pleadings in the case give definiteness to the point or points decided, and preserve them forever as a precedent for future judges to follow.

We come, therefore, to the central point of our investigation—*the nature of special pleading*. We will indicate its nature, and contrast it with the Civil law mode of pleading; as by the contrast, the nature of both can be best understood, and their comparative merits determined.

The object of judicial proceedings is to ascertain, and to decide upon, disputes between parties. In order to do this, it is indispensable that the point or points in controversy be evolved and distinctly presented for decision. The Common and the Civil law have different modes for accomplishing this purpose. The rules of Common law pleading are designed to develop and present the precise point in dispute *upon the record itself*, without requiring any action on the part of the Court for the purpose. The parties are required to plead alternately, until their allegations terminate in a single material issue, either of law or of fact, the decision of which will dispose of the cause.

By the Civil law, the parties are not required to plead, in such a way, as to evolve upon the record, by the allegations themselves, the point in dispute; but, are permitted to set forth all the facts, which constitute the cause of action or the defence, at large; the questions of law not being separated from the questions of fact, as they are in the Common law pleadings: but the whole case is presented in gross to

the Court for its determination. Under this system, the Court has the labor of reviewing the complex allegations of both parties and methodising them and evolving the real points on which the controversy turns.

When the Court of Chancery, in England, began to take judicial cognizance of disputes between parties, it adopted the Civil law mode of procedure. This Court assumed to eschew the strict and technical rules of the Common law, and to proceed upon the broad equities of the cause; and therefore naturally required the statement of the facts at large. As the mode of trial by jury did not pertain to this Court, the inconvenience of mingling questions of law and of fact was not felt; as they were both decided by the Court and therefore, needed not to be separated on the record, as in Courts of law, where they are to be decided by different tribunals. And besides, the chancellor could take all the time required for the examination of the questions of law and of fact involved in the allegations. There is, therefore, nothing in the organization of the Court of Chancery, and the same may be said of the Admiralty Courts, which forbids the use of the Civil law mode of pleading.

But this mode of pleading is not applicable to Common law Courts. In these Courts, questions of law are determined by the Court, while questions of fact are determined by the jury. It is therefore convenient at least, that these questions which are to be determined by different tribunals, should be separated upon the record, before the case is presented for tri-

al. The real points, about which the parties differ, cannot be so easily evolved from the complicated mass of facts, in the hurry of a trial, as they can be, by pleadings carefully framed before-hand, by learned lawyers, in accordance with rules which require all issues to be single and certain, and to be stated upon the record itself. And surely, it will facilitate the due administration of justice, to have the record of every case dis-encumbered of all extraneous matters, and of every thing irrelevant and immaterial, and nothing but the naked point in dispute, whether of law or of fact, presented distinctly to the Court and the jury; as is done by special pleading! The system of rules, by which this result is attained in the common law pleadings, is complex and artificial. When skilfully applied, they always attain the end desired, but when, through ignorance or mistake, or sometimes by design, an issue is formed or a point presented which does not involve the merits of the cause, a decision is made contrary to the justice and equity of the cause. This is the chief vice of the system; and at different epochs in the history of the law, by its being dwelt upon too much from some temporary cause, it has created strong prejudice against the entire system. The system itself provides a remedy for the evil, by, what is called, repleader. But this has proved to be not sufficient; and two great remedies against the evil have been furnished by the Legislature and the Courts,—one by liberal amendments, and the other, by general pleadings, under which the parties are allowed the widest scope in proving facts which do not appear upon the record.

This last remedy is productive of far worse evils, than those which it was designed to correct. It, in fact, saps the foundation of the whole system of special pleading. A notable instance of this is to be found in the action of Assumpsit with the mutations which it has undergone in the history of the law of procedure. In the old Common law, it was an action on the case for a special damage for a non-feasance. But in Slade's case in 4th. Coke's Reports, general damages for the non-performance of a contract was determined to be a sufficient cause to sustain the action. And at last, the remedy by Assumpsit, as in the action for money had and received, has acquired the scope of a bill in equity. Now, under the general issue of *non assumpsit*, all defences, even such as are equitable, can be given in evidence. It thus loses its Common law character entirely, and assumes the character of the actions which were introduced into the Civil law by the Roman Prætors. And though it is applied to a very plain class of cases, it has, at times, been productive of very evil consequences in the administration of the law. Especially was this the case, at an early period after its introduction into practice, in the trial of commercial causes. The law and the facts were disposed of together under the general issue; and there was nothing afterwards, to show what really was the principle of law which governed the verdict. Mr. Justice Buller speaking of the period to which we allude, (which was prior to the time of Lord Mansfield,) says: "Before that period, we find, that in Courts of law, all the evi-

dence in mercantile cases was thrown together; they were left generally to the jury and they produced no established principle."

But the genius of Lord Mansfield rose above the embarrassments of this defective course of proceeding. In his statement of the case to the jury, he expatiated upon the rules and principles of law applicable to the case, and left it to them, to apply the rules and principles to the facts given in evidence. So that, notwithstanding the generality of the pleadings and the verdict, the legal ground of the verdict might be ascertained. But still, unless the case were reported with the instructions of the Court, the grounds of the decision could not be known, beyond the Court, and would rest there merely in memory, for future cases. Lord Mansfield resorted to a still further device to obviate the evil of general pleadings. When any great difficulty in point of law occurred, he advised the counsel to consent to a special case, so that the law might be deliberately argued and recorded for a precedent to guide the opinions of future judges. Though therefore,the profound learning and extraordinary juridical genius of Lord Mansfield enabled him to rise above the narrow policy of the old law of the Custom of Merchants, and, as it were, to create anew the commercial law of England, he did it as much by the change in the course of proceeding, making it special, which he introduced, as by the addition of more enlarged principles to jurisprudence.

The great evil of general pleadings, which we have just illustrated, is at this day so obvious, that they

are now almost universally repudiated. But the substitute which has been proposed, of detailed statements in the language of common parlance, after the manner of the Civil law Courts, is perhaps even worse. In the State of New York, where this mode has been adopted, a learned judge, in a recent case, thus speaks of the working of the system in practice: "Pleadings are stuffed full of all sorts of immaterial averments, leading to great prolixity and expense, producing many issues instead of a single one, giving rise to issues wholly immaterial, increasing the difficulties of trial, and often causing suits to be determined upon points quite foreign to the real matter in dispute, and it is high time the evil practice was checked."

After showing that an immaterial issue had been formed in the very case before the Court, the judge proceeds: "It is true, the Court might save the plaintiffs from the utter loss of their demand, by awarding a repleader, and giving judgment *non obstante veredicto*, but that would not be done without subjecting them to the costs of the suit. In the mean time, the Court has had the trouble of trying an entirely immaterial issue, and of granting relief from the consequences of it afterwards."

In this case, it is seen, that the Court tried an *immaterial issue*, which those, who declaim against special pleading, maintain is the vice peculiar only to that system. The truth is, that in these detailed statements, immaterial issues will be formed at the trial, much oftener than they could be in a system of

properly regulated special pleading. The forming of immaterial issues is of course the greatest evil in judicial proceedings; because all the trouble and expense of a trial is incurred, and yet nothing is decided.

And it cannot be denied, that where these loose detailed statements are permitted, the exact point in dispute will often be left in so much doubt, that the evidence must be latitudinous and vague, and many topics be introduced which have nothing to do with the real points in dispute. This must lead to the frequent use of bills of exception, which cause so much delay in judicial proceedings. Because, where all sorts of defences can be given in evidence, as under the issues formed by these general statements, bills of exception will be more frequently used than under a system of special pleading where the points in dispute are single and plain. This is too manifest, to require discussion. For the greater the variety of evidence which can be given in, under the issue, the greater the chances of objection to its admissibility. And thus delays and expense, which are produced by bills of exception, would be greatly multiplied.

There is no part of the practice of the law, more important than that which relates to the admission and rejection of evidence. For it matters not how clearly a system of jurisprudence may define rights and obligations, if in judicial investigations, improper evidence is admitted, and proper evidence is rejected, there can be no security. A system of pleading should be framed with reference to this point, making the issues simple, so that the relevancy of evidence

can be easily seen. The Common law is greatly superior to the Civil law on this point. Lord Campbell, though a great admirer of the Civil law, when speaking of the principles of the Common law which regulate the admission and rejection of evidence, is constrained to say: "These place the English law, for once, above the Civil law itself, which notwithstanding its general exquisite good sense, is here arbitrary and capricious." This must be the case, wherever pleadings are such as to form indefinite issues. The more precise the issue, the more clearly will the relevancy or irrelevancy of evidence appear; and the more easily can its admission or rejection be properly determined. "For trials, (says Lord Bacon,) no law ever took a stricter course that evidence should not be perplexed, nor juries inveigled, than the Common law of England; or on the other side, never law took a stricter or more precise course with juries, that they should give a direct verdict." Nothing is more important than a distinct theory or law of evidence. Without it, there can be no certainty in administrative justice. Now, all this precision is accomplished by the admirably contrived machinery, of special pleading, for separating questions of law from questions of fact, and for bringing a suit to the real point on which it ought to be determined. It has been said, that the whole English Government is but a contrivance to bring twelve men into the jury box. Jury trial is, therefore, in connection with the Court, the great end of government; and special pleading is the great instrument by which that peculiar form of judicature

is made efficient. It presents the precise points to be determined; and thereby indicates the character of the evidence required: which is all, that any contrivance can accomplish.

It is thus seen, how special pleading gives certainty to trials at law; making the questions to be decided precise; the admission and rejection of evidence definite; and retaining on the record, after the trial, precision in every step, from the summons to the judgment. So that it can be known, what was in dispute, what was proved, and what was adjudged.

In order to show still further, the defects of the Civil law procedure, we will examine the Civil law doctrine of Actions; as Actions are intimately connected with pleading, and must impart their defects to the whole course of judicial procedure.

It seems to be supposed, by those who have not studied the Civil law, that it has little or no technicality. This is a great mistake. The Civil law doctrine of Actions is full of technical distinctions. We will therefore advert to the subject, for the purpose of giving some insight into the complex and artificial character of this part of the Roman Civil law.

The primary division of Actions in the Civil law, is into real and personal, but in a far different sense from the meaning which the words *real* and *personal* convey in the Common law. A personal action in the Civil law is always for a claim upon contract, or for a mal-feasance. Real actions are for some corporeal thing, when there is no obligation. This division of actions is very much perplexed in its infinite

applications, and leads to great confusion. It is also complicated by a second division of actions, into those which are brought for recovering the thing in dispute, or for damages only, or for the thing and damages both; and still further, by a third division of actions for single, double, triple or quadruple value of the thing in litigation; and further yet by a fourth division of actions into those of good faith, and those of strict right; and yet still further, by a fifth and a sixth division. These divisions are based upon the subject-matters of the actions. But there is another division of all these actions, founded upon the sources from which they are derived. They are divided into those which are derived from the law, and those which are derived from the authority of the Prætor. In this division, they may be called Civil law actions and Prætorian actions. The Civil law actions pertain more to strict right, the Prætorian, to equitable right.

It will be obvious, at once, to the sagacity of the practical lawyer, that these many divisions of actions founded upon difference in subject-matter, must often create great difficulty in determining a choice between several actions. This is particularly the case with the Prætorian actions. Many of their conditions are not certain definite facts which can be expressed in specific words: but are mere equitable circumstances which can only be described in general terms; consequently, the respective scopes of the actions are left extremely uncertain; and this inevitably produces difficulty in choosing the proper action for a particular

case. For example: in the fifth section of the seventh title of the fourth book of Justinian's Institutes, this difficulty will at once appear to result from what is there said: "It is nevertheless not to be doubted, but that he who has made a contract with a slave at the command of the master of that slave, and is entitled either to the action *institoria* or *exercitoria*, is also entitled to the action *de peculio* and *de in rem verso:* but it would be highly imprudent in any party to relinquish an action, by which he could most easily recover his whole demand, and by recurring to another, reduce himself to the difficulty of proving that the money he lent to the slave was turned to the use of the master, or that the slave is possessed of a *peculium* sufficient to answer the whole debt. He also, to whom the action *tributoria* is given, is equally entitled to the action *de peculio*, and *de in rem verso;* but it is expedient, in some cases to use the one, and in some cases the other: yet, it is frequently most expedient to use the action *tributoria;* because, in this, the condition of the master is not principally regarded; that is, there is no previous deduction made of what is due to him, his title being esteemed in the same light with that of other creditors: but, in the action *de peculio*, the debt due to the master is first deducted, and he is condemned only to distribute the remainder among the creditors. Again, in some cases, it may be more convenient to commence a suit by the action *de peculio* because it affects the whole *peculium* whereas the action *tributoria* regards only so much of it as has been made use of in traffic; and it is possible that a

slave may have trafficed only with a third, a fourth, or some very small part, and that the rest, consisting of lands, slaves or money, is put at interest. Upon the whole, therefore, it greatly behooves every man to choose that remedy which may be most beneficial to him; but if the creditor of a slave can prove a conversion to the use of the master of that slave, he ought most certainly to commence his suit by the action *de in rem verso*."

There is no instance in the common law actions, where there are as many alternatives of choice in selecting the proper remedy for a given case; and consequently so many chances of selecting the wrong one. We cite this instance from the Civil law, though it is an extreme one, to show the practical difficulties which result from the artificial distinctions of its doctrine of Actions.

And some of the Prætorian actions are based upon pure fictions, where the plaintiff is permitted to allege what is not true, and the false allegation is made the ground of the action, and cannot be contradicted by the defendant. An example of this may be found in the 18th title of the 2nd book of Justinian's Institutes: "In as much as parents often disinherit their children without cause or omit to mention them in their testaments, it has therefore been introduced, as law, that children, who have been unjustly disinherited or unjustly omitted in the testaments of their parents may complain, that such testaments are inofficious, under color,that their parents were not of sane mind, when they made them: but, in these cases it is

not averred to be strictly true, that the testator was really mad or disordered in his senses but it is urged as a mere fiction only: for the testament is acknowledged to have been well-made, and the only exception to it is, that the testament is not consistent with the duty of a parent. For if a testator was really not in his senses at the time of making his testament, it is certainly null."

There is no fiction in the Common law, more extravagant than this. It is but one of many, which, interwoven through the civil law doctrine of actions, make it extremely artificial and technical, and difficult to be practised.

And by the third division of actions, by which single, double, triple or quadruple damages, according to the nature of the case, is given, the greatest diversity of distinctions is created that have no parallel in the Common law. And in these actions, there is a far greater commingling of civil and penal justice, puting punishment into the hands of individuals, than obtains in the common law action of trespass, which indicates the barbarity of the age when this boasted Roman jurisprudence was established.

The Civil law doctrine of Actions is, in fact, so full of distinctions, and many of them are so subtle and others so remote from the ordinary course of thought, that it seems almost impossible that they can be observed in judicial practice. And it is certain, that a system of pleading, so nearly conformed to the principles of common logic and the natural course of thought, as the common law pleading, cannot, by pos-

sibility, be devised to carry into effect the civil law actions. It is therefore impossible, that the same precision and certainty can be introduced generally into the administration of the Civil law, which obtains in the Common law.

What we have thus far said of the doctrine of Actions, applies to the Roman civil law as it appears in the Pandects and Institutes of Justinian. If we go back to an earlier period of the Roman law, we find that the doctrine of Actions was far more technical and strict, than in the period which we have examined. The Middle law, as it has been called, which was posterior to the twelve tables, and prior to the Imperial Constitutions, abounded in forms and technicality. After the office of the Prætor was established, (A. U. C. 387,) the functions of the Judge became more and more separated from that of determining the truth of facts. A sort of jury, called *selecti judices*, selected at first from the Senatorial order, but afterwards, by the rogation of C. Gracchus (A. U. C. 630,) from the Equestrian, was established, who decided upon the facts under the instructions, as to the law, of the Prætor. This form of judicature was productive of great improvement in the law; and the precision of statement which it required to present the real point for decision, to the *selecti judices*, caused a technical mode of law procedure to grow up. The Actions of law of this period required the strictest conformity to the very words of the law. The twelve tables gave a remedy in general terms against a trespasser for cutting the *trees* of another.

The word *trees* (*arbores,*) was understood, as a general name; and yet, in an action for a trespass to a vineyard, the allegation being *vines* (vites,) instead of *trees* (arbores,) it was held bad.

The consequence of this strict adherence to mere words was, that the forms of pleading fell into odium; and the Abutian and Julian laws abolished them, and substituted forms of a more convenient kind. But these latter forms were or became strict and technical also; and Cicero, in his oration for Muræna, ridicules them, and exhibits examples to justify his satire. The forms introduced by these laws continued to be used, until in the first part of the fourth century of the Christian era, they were abolished by the Rescript of the Emperor Constantine to Marcellinus. The Rescript is couched in these reprehensive but picturesque words: "*Juris formulæ, aucupatione syllabarum insidiantes, cunctorum actibus, radicitus amputentur:*"—which are thus imperfectly Englished: "Let the forms of the law, ensnaring by the fowling of syllables, be cut up by the roots, by the acts of all!"

But after all the changes in the Roman law by Justinian, the doctrine of Actions, as we have shown, continued to be very complex and artificial. And the Actions continued to define and limit the rights of redress as effectually as the original writs of the Common law ever did. And the law of Actions and the rules of their application in different cases continued to be as difficult as ever they were in the Common law; and with the great disadvantage of not having, like the Common law, a system of accurate special

pleading, to conduct, in precise forms, the course of judicial procedure.

Having compared the Common law system of Pleading with that of the Civil law, and shown the superiority of the former, we will next examine the question of the influence of the Civil law upon the progress of the Common law, in order to exhibit the juridical principles of the Common law, and to show the limitations of judicial discretion. This is an important point in an investigation connected with the reform of Pleadings and practice and general law procedure. For the juridical principles, which determine the limitations of judicial discretion, are that which gives stability and certainty to jurisprudence, as a system of practical justice. We feel therefore, that however difficult these investigations may be to the unprofessional reader, they are necessary to a proper and adequate discussion of the great subject of law-reform.

It must not be inferred from what we have argued, that we undervalue any influence which the Civil law may have exerted in liberalizing any too narrow principles of the Common law, in that long sweep of ages, through which they both have governed the affairs of men. This is not the point of our objection. We are not objecting to the influence of the Civil law upon the principles of the Common law as a system of jurisprudence. We will state our opinions upon this point, in the sequel. But we are objecting to its influence upon the peculiar mechanism and course of procedure by which the Common

law administers justice. We must be careful in this enquiry not to confound, what Sir Henry Spelman calls, "the course and frame of justice," with the principles of justice themselves; nor what Lord Coke calls, "the frame and ordinary course of the Common law," with the Common law itself. We wish "the frame and ordinary course of the Common law" to be preserved: and it is to this point, that our argument has been addressed.

But when we turn to the other question, and enquire, what influence has the Civil law exerted upon the principles of the Common law as a system of jurisprudence, we think, that it will be found, that this influence has been greatly overrated by some of the ablest Common law writers of the present century. Mr. Justice Story, it seems to us, has been extravagant in his estimate of the influence for good, which the Civil law has exerted, and is likely to exert in the future, upon the Common law. His mind leaned essentially towards equity in the administration of justice; and therefore it was, that the free theoretical discussions of the continental writers on jurisprudence, so captivated his judgment. "Where (asks he,) shall we find such ample general principles to guide us in new and difficult cases, as in that venerable deposite of the learning and labors of the ancient world, the Institutes and Pandects of Justinian? The whole continental jurisprudence rests upon this foundation of Roman wisdom; and the English Common law, churlish and harsh as was its feudal education, has condescended silently to borrow

many of its best principles from this enlightened code. The law of contracts and personalty, of trusts and legacies, and charities, in England, has been formed into life by the soft solicitudes and devotion of her neglected professors of the Civil law. There is no country on earth, which has more to gain than ours, by the thorough study of foreign jurisprudence." This was spoken to the Suffolk Bar in 1821. And in 1843, in a lecture before the Law School at Cambridge, speaking of Mr. Attorney General Legare, who had just died, he said: "I have indeed looked to him with great fondness of expectation. I had looked to see him accomplish what he was so fitted to do—what, I know, was the darling object of his pure ambition—to engraft the Civil law upon the jurisprudence of this country, and thereby expand the Common law to greater usefulness and a wider adaptation to the progress of society."

In proof of what Mr. Justice Story said before the Suffolk Bar, he cites from 12 Modern Reports 482, this declaration of Lord Holt: "And this is the reason of the Civil law, in this case, which though I am loth to quote, yet in as much as the laws of all nations are doubtless raised out of the ruins of the Civil law, as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the Civil law, and therefore grounded upon the same reason in many things." This is certainly very loosely spoken. For in no sense whatever, and with no approximation to the truth of history, can it be said, that the En-

glish government sprung out of the ruins of the Roman Empire. The Roman power was withdrawn from England several centuries before the fall of the Empire. And it was after the Roman power was withdrawn, that the Anglo-Saxons invaded the island, and begun to lay the foundation of those institutions which were firmly established and somewhat developed, while the Roman Empire was still in existence, and which have in fourteen centuries been developed into the present English Government and laws.

It was during the time of the Britons, that the Romans held sway in England. In the year 449 of our era, the Anglo-Saxon invaders came down upon the island, and continued, for a century, to pour in, in immense multitudes. And while the Roman Empire was still in existence, their language, their customs and their national character prevailed over the provinces which they had seized; and the English language, and the English laws and Government have been developed out of their language and their customs and institutions. "To our Anglo-Saxon ancestors (says Lord Campbell,) not only are we indebted for our language, and for the foundation of almost all the towns and villages in England, but for our political institutions; and to them we may trace the origin of whatever has most benefitted and distinguished us as a nation." The laws of England have emanated from the spirit and the manners of the Anglo-Saxon people; and the Government has resulted from the machinery employed to carry the laws into effect. "Parliament in its present form, (says

Sir F. Palgrave,) and with the functions now severally vested in King, Lords and Commons, is entirely founded upon the legal constitution by which it was preceded; and the authorities exercised by the aristocratical and popular branches of the Legislature have arisen from the ancient distribution of the forms of remedial and coercive justice." The English Constitution is developed out of an Anglo-Saxon germ, from which it differs no more than the oak does from the plant, which first emerges from the acorn. The English Government at no period of its history, has resembled the Imperial Government of Rome. The two governments have always presented the broadest contrast. Not one principle in the whole edifice of the English government has been taken from the ruins of the Roman Empire. No two polities ever differed more widely.

And when we scrutinize the other portion of the remark of Lord Holt—*that the principles of the Common law are borrowed from the Civil law*—it will be found to contain but little truth. The Civil law bears about the same affinity to the Common law, that the Latin language does to the English language. The Latin language has contributed something to the stock of English words, and influenced in some degree the development of the language, but when compared as an element of the English language, with the original Saxon, it is lost in the boundless profusion of the latter. The Spanish and French languages may with more propriety be said to have sprung out of the Latin language; and the Spanish

and French governments to have sprung out of the ruins of the Roman Empire. The fundamental principles of their laws have been borrowed from the Roman Civil law. But as the English language has not sprung out of the Latin language, so have not the principles of the Common law been borrowed from the Civil law. Indeed, the smallness of the influence which the Civil law has exerted upon the Common law is exceedingly remarkable. In all the various revolutions, with their dark and dreary scenes of violence and bloodshed, through which England has passed, the people have clung to their ancient laws, with a devotion almost miraculous.

Though the historical criticism of the present century enables us to walk in a much broader and a much clearer light, than those who have preceded us, in the investigation of the subject, still it is a matter of the greatest difficulty to determine the degree of influence which the Civil law has exerted upon the Common law. It is often said, that the Civil law was introduced into England by the Romans, upon the invasion by Julius Cæsar. But that was a very different law, from the system of jurisprudence which was fashioned and completed by Justinian more than two centuries after the termination of the Roman power in England. And this earlier Roman law was entirely supplanted by the institutions and customs of the Anglo-Saxons. So that to estimate the influence of the Civil law upon the Common law, we must come down to a later period than the time of the Roman rule in Britain, which terminated before the middle of the fifth century.

It may safely be affirmed, that the Civil law made no appreciable impression upon the Common law, earlier than the middle of the twelfth century, when amidst the general revival of its study over Europe, it was first taught at Oxford by Vacarius. But its influence, even at this period, was exerted in such a way as to make but little change in the rude jurisprudence of the country. Doubtless, cases in the Common law Courts were sometimes determined by principles of Roman jurisprudence. But this could not have been frequent; because cases, to which the principles of the Civil law could be applied, must have been not of frequent occurrence, most of them being of a feudal nature. The treatises on the law, written during this period, indicate the measure of the influence of the Civil law upon the jurisprudence of the times. The treatise of Glanville "on the laws and customs of the Kingdom of England," which was written in 1198, shows clearly that the author had studied Justinian's Institutes, but at the same time, it says: "Every decision is governed by the laws of the realm, and by those customs which, founded on reason in their origin, have for a long time been established." This work is still of authority on some points, and contains various processes that were in use in England, until the law reforms under William 4th. a few years ago. And the treatise of Bracton "on the Laws and Customs of England," which was written nearly a century later, between the years 1262-67, though it shows that the author had drank deeply at the fountains of Roman jurisprudence, yet never in-

troduces the Roman Civil law as authority, but only by way of illustration.

This brings our inquiry to the reign of Edward 1st, who has been called the English Justinian. In the beginning of his reign the foundations of English jurisprudence were re-laid. A school of Common law had been established. The Clergy no longer monopolized all judicial knowledge. Laymen had gradually formed themselves into societies called "Inns of Court," where they devoted their lives to the study of the common law. Edward selected his judges from this body of professional men. And now were the principles of English jurisprudence and modes of procedure systematized and improved; and the Courts for the administration of justice, as they have subsisted for nearly six centuries, were framed, and established. It may be said, the Common law now flourished anew. Judges trained in the studies of the English law presided in the Courts. And the statutes, passed during the reign, for reforming the law, were framed with reference to Magna Charta and the Common law modes of procedure. Anglo-Saxon influences were reviving with that power, which, in the long course of ages, has overcome all foreign obstacles.

In the latter half of the fifteenth century, the Common law received a new force from the celebrated treatise of Sir John Fortescue in praise of the laws of England, which was written to counteract the attempt of the Duke of Suffolk to introduce the Civil law. Nothing can evince more clearly, the spirit of

freedom which the Common law cultivates, than this remarkable treatise, while it shows the strong attachment of Englishmen to their laws. This brings us to the reigns of Elizabeth and James 1st.

The character of English law, as well as of English philosophy, and English literature, was fixed forever, during what has been called the Elizabethan period of British history. That was the climacteric transition period of English civilization. The great lawyers, who fixed the land marks of English jurisprudence at that time, utterly repudiated the Civil law, as inapplicable to English polity. "And for your majesty's laws of England, (says Bacon,) I could say much of their dignity, and somewhat of their defect: but they cannot but excel the Civil law in fitness for the Government; for the Civil law was *"non hos quæsitum munus in usus;"* it was not made for the countries which it governeth." Lord Coke, by his Reports and his Institutes, laid that broader foundation for the Common law which the exigencies of society, in the era which was then opening, required. And Lord Bacon, by his celebrated Ordinances in Chancery, gave that basis and that direction to Equity practice, which has preserved it, as a separate jurisdiction, to the present time, limiting its scope; "for (says Bacon,) the chancery is ordained to supply the law, and not to subvert the law;" and at the same time, making equity *a system of rules applicable to classes of cases determined by precedent*, that "men shall see that no particular turn or end leads me, but a general rule." From that period to the present

time, the Common law and Equity, though they have expanded with the vast extension of commerce, have held on in the direction then given.

What has been thus far said upon the point under consideration, would hardly be denied by any one conversant with the subject.

It is upon the growth of the commercial law as a part of the law of England, that the influence of the Civil law is generally most insisted on. And the origin of the commercial law in England is assigned, by those whose views we are about to examine, to a very late period,—much later than the time down to which we have already traced the history of the law. "It has often been said, (says Mr. Justice Story,) that the law merchant is a part of the Common law of England; and my Lord Coke has spoken of it in this manner in his Institutes; though it would be somewhat difficult to find out what part of the law merchant, as we now understand it, existed at that period. If the expression, that the *lex mercatoria* is a part of the Common law, be anything more than an idle boast, it can mean only, that the general structure of the Common law is such, that without any positive act of the Legislature, it perpetually admits of an incorporation of those principles and practices, which are from time to time established among merchants, and which, from their convenience, policy, and consonance with the general system, are proper to be recognized by judicial tribunals. In this sense, the expression is perfectly correct; in any other sense, it has a tendency to mislead."

It seems to us, that this stricture of Mr. Justice Story is much more calculated to mislead, when taken with the general tenor of his remarks on the point in question, than the doctrine of Lord Coke. The remark of Lord Coke is entirely true. The law merchant, (as it existed in his day, not as it has been since developed,) was then, and had been long before, a part of the Common law of England. From the earliest period of English history, the law merchant was administered in the Courts of Pipowders held in Fairs and Markets. In the Mirror of Justices, a work written during the reign of Edward 1st or 2nd, and which Lord Coke says contains "the whole Frame of the ancient Common laws" as they existed before the conquest, it is said that from day to day speedy justice is done to strangers in Fairs and Markets as of Pipowders, according to the Law of Merchants. And in the 33rd chap. of Fortescue's "De Laudibus Legum Angliæ" it is said, that "in the Courts of certain Liberties in England, they proceed by the *Law of Merchants* touching contracts between merchant and merchant beyond the seas." And Mr. Selden, in a learned note to this work of Fortescue's, speaking of the law, as administered in these Courts, says, that the rule was equity and good conscience rather than strict law,—in other words, the custom of Merchants was the law. In these Courts there was also no trial by jury. Still, the law and the course of procedure were strictly parts of the Common law in the meaning of Lord Coke, and in the true sense of English jurisprudence, which is com-

posed of *lex et consuetudo.* And this law merchant rested upon *consuetudo* (custom); and when brought into Westminster Hall would be recognized there as a part of the Common law of the realm.

These special jurisdictions finally fell into disuse, and the Courts at Westminster began to administer the law merchant, between all classes of litigants.

Lord Coke was therefore correct in what he said, and Mr. Justice Story's strictures when examined will be seen to have been very loosely spoken. When he says "it would be somewhat difficult to find out what part of the law merchant, as we now understand it, existed at that period," he certainly gives an import to Lord Coke's declaration which is not only not justifiable, but not intelligent, to wit, that Lord Coke meant to say, that the law merchant, as developed at the present time, was a part of the Common law, of his time.

Let us then see how this law merchant, of which Lord Coke speaks, has been expanded into the commercial law of this day. We have seen, that the fundamental principle of the old law merchant was *equity and good conscience*, and not strict right. This is the fundamental principle of the commercial law of the eighteenth and nineteeth centuries. Here then, is, at once, a doctrinal affiliation between them, that connects them in unity of system. We will therefore endeavor to indicate how usage has gradually developed the one into the other, according to the strict juridical principles of the Common law.

It will not be denied by us, that the commercial

law grew up, on the continent of Europe under Civil law institutions, much sooner than it did in England. But in what way did it originate? It will not be pretended, that it is to be found in the Imperial law of ancient Rome. It is the product of modern commerce. It is a collection of the commercial principles and usages, which the experience of merchants has found the wisest and most convenient in the necessities of trade. These principles and usages have been adopted amongst all modern nations. France, by her Ordinances of 1673 and 1681, first gave system to these commercial principles and usages. But they were not the mere municipal regulations of trade in France. They were the regulations of universal trade. Commerce belongs to the world: therefore its law is international. It is true, that the Common law, for a long time after more liberal views prevailed on the Continent, adhered to a narrow and technical mode of expounding contracts, and a narrow and inefficient mode of enforcing them. But we will show, that it was by its own recognized inherent principles, that it burst from these technical trammels into a freer doctrine. It was not by directly engrafting upon the Common law the commercial jurisprudence of other nations, that a more liberal mode of interpreting contracts and of enforcing them was introduced into English jurisprudence. It had always been the doctrine of the Courts at Westminster, as we have shown, that the law merchant was a part of the Common law of the realm. This was based upon the fundamental principle, that every custom is the

law of the business which it regulates. As then, the old law merchant expanded with the extension and variations of commerce, it still rested upon the original principle of custom which made it a part of the Common law. English merchants became familiar with foreign usages and adopted them, from convenience, into their transactions. These usages soon became general and grew into the customary law of trade. When the usage was thus established, the Common law, by its own fundamental principle of recognizing custom as law, was compelled to admit it as a part of the law of the land. In the nineteenth year of James 1st, *(1622)* in Vanheath vs. Turner, Lord Hobart said, "the custom of Merchants is a part of the common law of the realm, of which the courts ought to take notice; and if any doubt arise to them about their custom they may send for the merchants to know their custom." This is an instance of the mode in which the commercial law has found its way into the Courts at Westminster. And eighty-two years later, in the case of Buller vs. Crisp, in the 2nd year of Queen Anne (6 Mod. R. 29) Lord Holt said: "I remember when actions upon *inland bills* of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor; the defendant's counsel would put them to prove the custom." Here, the way in which the commercial law has grown up in England is still more clearly seen. And in this case of Buller vs. Crisp it will be seen, that Lord Holt consulted merchants out of Court, as to their

custom, before he made his decision. "He had desired (said Lord Holt,) to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course; and that they had told him, it was frequent with them to make such notes [promissory notes] and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years." In this case, Lord Holt referred to no jurisprudence to guide his decision,—he looked not to the Roman Civil law, (though we have seen from his declaration, quoted by Justice Story, that he had a high estimate of it,) for light in the judicial path: but he consulted merchants as to their custom.

With Lord Holt commences a new era,—the commercial era it may be called,—of the law of England. He was the first Chief Justice of England, after the revolution of 1688, under William and Mary, and continued such until 1710 in the reign of Queen Anne. When he was appointed Chief Justice, "It was doubted (says Lord Campbell, the present Chief Justice of England,) whether any one could draw, accept, or endorse a bill of exchange except a merchant?—whether notice of the dishonor of a bill was necessary to charge the drawer or endorser?—whether an endorser was liable except on default of the drawer?—whether there was any distinction between foreign and inland bills?—whether interest was recoverable on dishonored bills? and whether a promissory note, payable to order, was transferable by en-

dorsement?" By a long series of decisions, and by an act of parliament which he suggested, he framed the code by which negotiable securities are regulated nearly as it exists at the present day. We have already pointed out the method by which he effected this improvement in the law. He had the greatest admiration for the Common law, and he moulded the old system of jurisprudence to the new wants of society, without removing the ancient landmarks. In the case of Newton vs. Richards, 1st Salk R. 296, he said, that precedents prevailed with him more than the reason of the thing. And it was fortunate for English jurisprudence, that at the opening of its modern era there was such a judge to keep it on the old foundations. "Familiar (says Lord Campbell,) with the practice of the Court as any clerk,—acquainted with the rules of special pleading as if he had spent all his days and nights in drawing declarations and demurrers,—versed in the subtleties of the law of real property as if he had confined his attention to conveyancing,—and as a commercial lawyer much in advance of any of his contemporaries,—he ever reasoned logically,—appearing at the same time instinctively acquainted with all the feelings of the human heart, and versed by experience in the ways of mankind."

The Common law has within itself an inherent force of expansion and progressiveness. It consists of elementary principles capable of indefinite development, in their applications to the ever varying and increasing exigencies of society. There are certain

fundamental maxims belonging to it, which are never departed from. These are the immutable basis of the system. There are other maxims which are astricted by modifications and exceptions to prevent manifest injury. It is emphatically a practical system. It ever breaks from the shackles of theory and technicality when justice demands it. Its whole history, written both in its practice and its science, manifests this truth. For a time, the ancient practice and rules may resist the equitable demands of the new exigencies of commerce; but whenever the new exigencies show themselves to be permanent interests in the progress of society, English jurisprudence has always found, within its acknowledged frame of justice, means of providing for the new rights and obligations which have sprung from the ever widening sphere of civilization. The method of its progress is simple and plain. When a case is brought into a court of justice, the first question which emerges from the facts should be, whether there is any statute providing for it? If none: then, it is inquired whether there be any clear principle of Common law, which directly fixes the rights and obligations of the parties? If the answer be again in the negative: then springs up the inquiry, whether there be any principle of the Common law, which by analogy or parity of reason, ought to govern it? If from neither of these sources, a principle of judgment for the case can be educed, it is recognized as a new case, and the principles of natural justice are applied to its solution. But if these do not, on account of any tech-

nical or other difficulty, ascertain the rights and liabilities of these parties, then by the immutable juridical principles of the Common law founded upon the jealous limitation of judicial discretion, if Equity cannot relieve, the case must fail, and provision can only be made by statute, for future cases of like nature. It matters not how any other jurisprudence may have disposed of the question, unless upon one of the principles which we have stated the case can be adjudged, it must fail of relief. Upon these great cardinal principles, and upon none other, has the Common law ever based its practice and developed it science.

And the system of pleading, also, has within itself the principle of expansion and adaptive progress. It is true, that at times, in the history of the law, the reverence for precedent has become so strong, that original writs have had the effect not only of defining, but of limiting rights of action; and no case has been considered as within the scope of judicial remedy, but such as the language of some known writ would embrace. This seems to have been the feeling, if not the fixed opinion of the profession, at the time the Statute of Westminster the second was passed. This Statute gave to the law the great equitable action on the case, which has been moulded by judicial ingenuity, so as to embrace even the mere equitable rights which have grown up under the principles of commercial law, that the modern exigencies of trade have added to the ancient common law of contracts. Since the passage of this statute, the principle of Common law remedies has been as expansive

as the rights and obligations of commerce. And the principles of Common law pleading have been found fully adequate to the new era of the law.

We will now show, by examples, how the law, both in its principles of jurisprudence and its modes of procedure, has expanded to meet the exigencies of society: and also the limitation upon judicial discretion in adding to the law.

At one period in the history of the law, upon a contract to deliver, at a certain price, twenty bushels of wheat every year, during the life of the party, no action would lie for any breach of the annual delivery, until the party was dead; for the action of debt, which was then the sole remedy upon such contracts, did not lie for any breach, until all the days were past, that is, until the agreement was ended by the death of the party. This limitation of the action of debt, was founded upon the principle of the Common law, that only one action ought to be brought upon a single contract; and to sustain an action for the non-delivery of each instalment of wheat would be, it was thought, to make the contract divisible. But the manifest intention of the parties to such a contract made it clear, that each quantity of wheat was due, to the party to whom it was to be delivered, at the time stipulated for its delivery. Here then was a manifest injury, by the non-delivery, founded upon the *natural justice* applicable to the case, a principle which the Common law recognized. The Courts, therefore, strove to find out whether, upon the recognized principles of Common law procedure, there

was not a remedy for this right or injury? They found it in the principles and analogies of the action on the case. They devised the action of trespass on the case, now well known by the name of Indebitatus Assumpsit. By this action the party recovered damages for the breach of the promise. At first, the action was founded upon a special damage for the nonfeasance; as in the case of Norwood vs. Reed in Plowden 180. But at last, in the forty-fourth year of the reign of Elizabeth, in Slade's case in 4th. Coke's Reports, to which we have already referred for another purpose, it was maintained, that general damages for the non-performance of a contract without showing any special injury, was a good cause of action. The door of remedial justice was thus opened wider, to embrace the rights of natural equity arising out of the breach of contracts. But in the exigencies of commerce, the remedy by Indebitatus Assumpsit was found not to be wide enough yet to meet cases of sheer justice. For example, cases occurred, in which money in the hands of one person belonged in conscience and equity to another: but he refused to pay it over. Where the money had been lent to be repaid: there, the promise express or implied would sustain the action. But in cases where the money was claimed by the holder, the question was, how could the money be recovered? The Courts decided, that upon principles of natural justice, the money ought to be recovered; and that, upon the analogies of the law in actions on the case, it could be recovered, and that the proper form of action was In-

debitatus Assumpsit, for money had and received to the use of the party entitled to it.

Here it is seen, that the English law, both in its principles of jurisprudence and its modes of procedure, has expanded with the advance of the exigencies of commerce; and that the progress has been made, in conformity with what Lord Coke calls, "the frame and ordinary course of the Common law."

With the analysis of the history and practice of the Common law before our eyes, which has just been given, we can intelligently estimate the influence, which it is said the Civil law has exerted in leading the Common law out of the bondage of narrow technicalities. We cannot refrain, because we think it will be serviceable, from saying, that most of what has been written upon this subject, is superficial and so indefinite, as evidently not to have been the deduction of well considered thought. That the Civil law has influenced the Common law in the settlement of doctrines, it would be idle to dispute. An example of this is the celebrated decision of Lord Holt in Coggs vs. Bernard, where the Civil law of bailment was engrafted on the Common law. But the very frequency with which this instance is cited by the advocates of the Civil law, shows that it is the most striking, if it is not the almost solitary instance of an actual *engrafting* of the Civil law upon the Common law, by the judge-law-making power. At the time of that decision, the English law was almost a blank as to the law of bailments, and when the case came before the Court, Lord Holt thought that the doctrine of

bailments, which natural justice would dictate, had been well propounded by the Civil law, and therefore he used the language and distinctions of that law. This was perfectly legitimate, but at the same time it is extremely hazardous as an example to be followed by judges, lest they remove the ancient landmarks of the Common law, and gradually introduce, in the lapse of time, a different frame of justice.

But the manner, in which the Civil law has chiefly influenced the development of the Common law, is shown by what Lord Bacon says in his "Readings on the Statute of Uses." "For the inception and progression of uses, I have, for a precedent in them, (says he,) searched other laws, because States and Commonwealths have common accidents; and I find, in the Civil law, that that which cometh nearest in name to the use is nothing like in matter, which is *usus fructus;* for *usus fructus et dominium* is, with them, as with us, particular tenancy and inheritance. But that which resembleth the use most is *fidei commissio*, and therefore you shall find, in Justinian, lib. 2, that they had a form in testaments, to give inheritance to one to the use of another, *Hæredem constituo Caium; rogo autem te, Caie, ut hæreditatem restituas Scio.* And the text of the civilians saith, that for a great time, if the heir did not as he was required, *cestuy que use* had no remedy, at all, until, about the time of Augustus Cæsar, there grew in custom a flattering form of trust, for they penned it thus: *Rogo te per salutem Augusti*, or *per fortunam Augusti, &c.* * * * * Whereupon, within the space of a hundred

years, these trusts did spring and speed so fast, as they were forced to have a particular chancellor only for uses, who was called *prætor fidei-commissarius;* and not long after, the inconvenience of them being found, they resorted unto a remedy much like unto this statute." Here Bacon, in expounding the Statute of Uses, which had then been passed about sixty-four years, resorts to the Civil law, "because states and commonwealths have common accidents," to see whether it contained any thing analogous. He found that there was a similar grievance in the administration of the ancient Roman law, "and that they had resorted unto a remedy much like unto this Statute." In most of the instances, in which the Civil law has been consulted, it produced no more influence in developing the Common law, than it did in the exposition of Lord Bacon; which as he afterwards says "was merely to set forth a precedent of them [uses] in other laws." And he concludes this part of the subject by saying, that the Common law gave a remedy in chancery, by rules of conscience, over uses, and that the remedy in law was by statute. He does not pretend to say, that the doctrines were in any way derived from the Civil law. He resorted to the Civil law merely for illustration.

Our view of the subject under investigation is still further illustrated by what Bacon says in the Preface to his "Maxims of Law." "Whereas (says he,) some of these rules have a concurrence with the Civil Roman law, and some others, a diversity, and many times an opposition, such grounds which are common

to our law and theirs, I have not affected to disguise into other words than the civilians use, to the end they might seem invented by me, and not borrowed or translated from them: no, but I took hold of it as a matter of great authority and majesty, to see and consider the concordance between the laws penned and as it were dictated verbatim by the same reason. On the other side, the diversities between the Civil Roman rules of law and ours, happening either when there is such an indifference of reason so equally balanced, as the one law embraceth one course, and the other the contrary, and both just, after either is once positive and certain, or where the laws vary in regard of accommodating the law to different considerations of estate, I have not omitted to set down." In this extract, it is seen, that Lord Bacon says, that the concordance of some of the principles of the Common with some of the Civil law does not result from the fact, that they were borrowed from the Civil law, but because they were "penned and as it were dictated verbatim by the same reason." And can it be conceived, that two great systems of laws could by possibility hold no principles in common? It is exceedingly marvellous, that there should be as great a difference between the Common and Civil law as there is; when both are systems of rules designed to accomplish the administration of justice amongst men.

We have reserved until now, as the most appropriate place in the order of our investigation, the consideration of what Lord Mansfield did for jurisprudence, and how far the Civil law influenced his

decisions. He belongs to the era of the English law, that begins with Lord Holt. We therefore will now return, with the benefit of the intervening exposition, to our historical analysis of the law as it was improved by that eminent magistrate.

No English judge ever attained such supreme ascendency as Lord Mansfield. He presided in the Court of King's Bench from 1756 to 1787, above thirty years, yet in all this time, there were only two cases in which his opinion was not unanimously adopted by the very able judges who sat on the bench with him; and of the many thousand judgments which he pronounced, two only were reversed; and still more extraordinary! in all this time, there never was a bill of exceptions tendered to his direction. These facts alone are sufficient to prove, that Lord Mansfield was not that innovator which some have tried to make the world believe. We will endeavor to give his exact relation to the progress of English jurisprudence.

He was more profoundly read in the Roman Civil law, and in the jurisprudence of the continental nations, than any judge who ever sat on an English bench. He was also a finished classical scholar, a master of the elegant literature of his own country, thoroughly read in ancient and modern history, and singularly familiar with the ethical writers of antiquity and of subsequent times. It might well be anticipated, that a judge thus accomplished would not be likely to consider jurisprudence an unimproving science. And he did think far otherwise.

At no period had England opened so wide a field for the display of the abilities of a great judge. The crown had become master of extensive colonies in every quarter of the globe, and many of them were conditioned by circumstances, which would vary the application of juridical principles. No principles had as yet been established in regard to the laws to be administered in colonies so variously circumstanced, or respecting the manner in which these laws might be altered. His profound knowledge of the Roman Civil law, as well as of English law, and his familiarity with the juridical writers of France, Germany, Holland and Italy, afforded Lord Mansfield such a range of legal thought, and presented to his mind such an infinite diversity of the applications of legal principles to combinations of circumstances, as to give him, perhaps, the most various legal reason of any judge who ever administered law to civilized man. This diversity of legal culture and his familiarity with ethical writers qualified him pre-eminently for the administration of law in the various judicial fields which had then come under the judicature of England. With a masterly discrimination he distinguished the laws applicable to the different classes of colonies under the crown, and improved this branch of jurisprudence, by basing it upon great ethical principles.

But it is not this portion of the labors of Lord Mansfield which is particularly connected with our inquiry into the juridical principles of the Common law, which limit judicial discretion, in making addi-

tions to jurisprudence. It is what he did for commercial law, that illustrates our inquiry.

Lord Holt, as we have shown, had built up the law of negotiable securities, nearly as it exists at this day. He had also settled several questions in the law of insurance. But it was left for Lord Mansfield to develop the law of insurance. Though questions of insurance had been for near a century the subject of Common law jurisdiction, when Lord Mansfield in 1756 became Chief Justice of the King's Bench, there were then not thirty adjudged cases upon matters of insurance to be found; "and those cases (says Mr. Park,) which are reported are loose notes mostly of trials at *nisi prius*, containing a short opinion of a single judge, and very often no opinion at all, but merely a general verdict."

From this state of the law, it is seen, that Lord Mansfield had no established rules to trammel his judgment. He had an unoccupied field before him. He had only to determine what was just and expedient, in the cases which came before the Court. And how far the Civil law influenced his judgments, may be seen from the following declaration of Lord Campbell: "In no instance did he ever attempt to substitute the rules and maxims of the latter [Civil law] for the former [Common law] where they are at variance. He made ample use of the compilation of Justinian and of the commentaries upon it, but only for a supply of principles to guide him upon questions unsettled by prior decisions in England. He derived similar assistance from the law of nations,

and from the modern continental codes. But while he grafted new shoots of great value on the barren branches of the Saxon juridical tree, he never injured its roots and he allowed this vigorous stock to bear the native and racy fruits for which it had been justly renowned." Though what Lord Campbell says in this extract is true, yet there are some pernicious tendencies which the study of the Civil law and its kindred jurisprudence exerted on the mind of Lord Mansfield, that are manifested in his judicial life. Though he admired the peculiar juridical system of England, and the Common law modes of procedure, and especially the peculiar machinery by which the Common law separates law from fact in the trial of causes, yet from the speculative character of the jurisprudence upon which his mind was accustomed to dwell, he acquired a strong tendency to disregard former decisions, and make the principles laid down by his predecessors bend to the necessities of a changing social system. The jurisprudence which he built up has a prætorian spirit—a tendency to make rules bend to the circumstances of the case. He was as much influenced in his judgments by mere ethical writers, as by those upon jurisprudence. Indeed, he considered law and ethics so near akin, as to constitute but one science; and therefore he called Socrates, "the great lawyer of antiquity, since the first principles of law were derived from his philosophy." His decisions therefore are much like ethical treatises. Cicero was a great authority with him; and in one of his most important decisions upon insurance,

he gives a definition from Cicero's Offices, of the concealment which would avoid a contract in favor of the party who had been misled. And the broad basis of equity which he gives to his judgments continually raises the question, *whether under all the circumstances of the case?* and gives to the circumstances a special legal import which often encroaches hard upon the province of the jury.

It is the peculiar wisdom of the Common law, that it decides causes, according to the known rules and ancient customs of the realm approved by judicial decision for many successions of ages; and not according to that plausible maxim *secundum æquum et bonum*, which Lord Mansfield was too much inclined to follow, but which is in reality the rule of arbitrary discretion. This maxim takes the administration of justice back to the infancy of States, before there was any law, and all disputes were, from necessity decided by the rule of equity. But to set it up as a rule, after laws are established, is to unravel and gradually destroy that exquisite texture of justice and expediency, called law, which has been wrought, by the wisdom of lawyers and Statesmen through many centuries, to meet the exigencies of human justice. It was this maxim that, through the instrumentality of the Prætor, in fact abrogated all that was really Roman in the Civil law, and effaced from it, the majestic image of the Roman people. To call the compilations of Justinian, *Roman* law, is to call that Roman, which has no more of the spirit of Rome, than the slaves of Byzantium have of the spirit of the noble

people of the Aventine. They are the law of an imperial despotism.

But Lord Mansfield never, for a moment, thought of changing what Lord Coke calls "the frame and ordinary course of the Common law." In the case of Robinson vs. Bayley he gives his sanction to special pleading in these words: "The substantial rules of pleading are founded in strong sense and in the soundest and closest logic; and so appear when well understood and explained; though by being misunderstood and misapplied they are often made use of as instruments of chicane." And Lord Campbell thus speaks to this point: "it is well known that Lord Mansfield, instead of preferring prætorian process, by which law and fact were decided by a single judge, sincerely praised the Common law in so far as it separates law from fact, referring law to four judges, and fact to twelve jurymen; and he himself often declared that he never passed his time more satisfactorily or agreeably, than in trying mercantile causes by a special jury of merchants at Guildhall."

Having now examined the question of the influence of the Civil law upon the progress of the Common law in order to vindicate the "frame and ordinary course of the Common law," and at the same time to show the juridical principle which limits the discretion of judges in adding to the law to meet the exigencies of new cases, we propose now, to say a word upon the Roman Civil law as a system of jurisprudence, with a view of showing the difference between it and the Common law, in regard to the respect paid to former decisions.

The little respect paid to former decisions, under the Civil law, resulted chiefly from the influence which the opinions of a class of lawyers had, by imperial sanction, under the empire, while the body of the law was forming. "The Roman law, (says Justinian's Institutes,) is divided like the Grecian into written and unwritten. The written comprehends the laws, the plebiscites, the decrees of the Senate, the constitutions of princes, the edicts of magistrates and the answers of the sages of the law." The answers of the sages of the law, to whom it was permitted by the Emperor to make law, *prudentes quibus permissum est jura condere*, (Gaius 1. 7.) controlled the decisions of Judges. "They were called *jurisconsults* (says Justinian's Institutes,) and their opinions obtained so great an authority, that it was not in the power of a Judge to recede from them." Their opinions partook of the Emperor's prerogative, and had a force independent of their intrinsic reasonableness. But as these answers of the jurisconsults, in the course of time, became extremely contradictory, Valentinian the third, passed the celebrated citation-law, by which exclusive authority was given to the writings of Papinian, Paulus, Gaius, Ulpian and Modestenus, and in case of an equality of opposite opinions, the opinion of Papinian was to prevail, if he had expressed any opinion on the subject, if not, the matter was left to the decision of the Judge. And even after the enactment of this citation-law, the opinions of the majority were to govern without regard to their intrinsic reasonableness. But as juris-

consults still existed, the same difficulty was still occurring, and the individual opinion of any eminent jurist would still control the decisions of Judges.—And when Justinian came to make his compilations, he formed both his Institutes and his Pandects from the writings of jurisconsults.

Now the Common law has always wholly repudiated any authority but the judgments of Courts deliberately given in causes argued and decided. "For (says Lord Coke in the Preface to his 9th Report,) it is one amongst others of the great honors of the Common law, that cases of great difficulty are never adjudged or resolved *in tenebris* or *sub silentio suppressis rationibus:* but in open Court, and there, upon solemn and elaborate arguments, first at the Bar, by the counsel learned of either party, (and if the case depend in the Court of Common Pleas, then by sergeants at law only*);* and after at the Bench, by the Judges, where they argue (the puisne judge beginning and so ascending) seriatim, upon certain days openly and purposely prefixed, declaring at large the authorities, reasons and causes of their judgments and resolutions in every such particular case,(*habet enim nescio quid energiæ viva vox*)*:* a reverend and honorable proceeding in law, a grateful satisfaction to the parties and a great instruction and direction to the attentive and studious hearers." Nothing less elaborately, learnedly and cautiously considered, than such a judgment of a whole Court, has a legitimate place in the Common law. By such solemn adjudications, has that great system of jurisprudence been built up.

The opinion of no lawyer, however profound, has a place in the system of the Common law. And this great and wise principle of the Common law is never lost sight of. When Lord Coke wrote his Commentaries upon certain statutes of England, from Magna Charta to Henry 8th, which are called his 2d Institutes, he did not give his personal opinions of their meaning, but gave the judicial interpretations of them which had been made. In the conclusion of the Preface to the 2d Institutes, he says: "Upon the text of the Civil law there be so many glosses and interpretations, and again upon those so many commentaries and all these written by Doctors of equal degree and authority, and therein, so many diversities of opinions, as they rather increase than resolve doubts and uncertainties, and the professors of that noble science say, That it is like a sea full of waves. The difference then between those glosses and commentaries, and this which we publish, is, that their glosses and commentaries are written by Doctors, which be advocates, and so in a great manner private interpretations. And our expositions or commentaries upon Magna Charta and other Statutes are resolutions of Judges in Courts of Justice in judicial courses of proceeding, either related and reported in our books or extant in judicial records, or in both, and therefore being collected together shall (as we conceive,) produce certainty, the mother and nurse of repose and quietness." Such is the doctrine of the Common law. Nothing but the solemn voice of the law itself, speaking through its constituted tribunals, is of any juridical authority.

And if we come down to the present times, we find in the Civil law, as administered on the Continent of Europe, the same uncertainty and fluctuation of doctrine which results from the little respect paid to precedent. The commentaries of the Doctors, who have succeeded to the jurisconsults, are as various as the diversity of human judgment can make them. The late Mr. Attorney General Legare, with all his predilections for the Civil law, says: "One who was initiated in this study, as we happened to be, under the old plan of the 18th century, with Heineccius for a guide, will find himself, in the schools of the present day, in almost another world —new doctrines, new history, new methods, new text-books, and above all, new views and a new spirit." This diversity of doctrine in the schools descends into the Courts to perplex and bewilder the administration of justice. Let any one who wishes to examine a specimen of this perplexity in regard to a fundamental classification, which the civilians make of laws, into personal statutes and real statutes, refer to the opinion of the supreme Court of Louisiana, by Mr. Justice Porter, in Saul vs. His creditors, in 17 Martin's Reports. After referring to the jurists of the different European countries, who have treated of this distinction, he says: "the moment we attempt to discover from these writers what statutes are real, and what personal, the most extraordinary confusion is presented. Their definitions often differ, and when they agree in their definitions, they dispute as to their application." And Mr. Justice

Story in his "Conflict of Laws," when speaking of the Civilians who have treated of the subject of his able work, says: "The Civilians of continental Europe have examined the subject in many of its bearings with a more comprehensive philosophy, if not with a more enlightened spirit. Their works, however, abound with theoretical distinctions which serve little other purpose than to provoke idle discussions, and metaphysical subtleties which perplex, if they do not confound the inquirer. * * * * * Precedents, too, have not, either in the Courts of continental Europe, or in the juridical discussion of eminent jurists the same force and authority, which we, who live under the influence of the Common law, are accustomed to attribute to them; and it is unavoidable that many differences of opinion should exist among them, even in relation to leading principles." Such is the fluctuating wind of doctrine, with which the judicial mind is liable to veer, under Civil law institutions.

How august is the authority of English law, reposing, as it does, upon the solemn decisions of Courts which have administered justice in the very same hall for seven hundred and fifty-four years! In vain may we search the history of nations, for a parallel to this stability of human justice amidst the fluctuating vicissitudes of empire. It is this stability of law, ruling over the prerogative of the crown and administering equal justice to the high and the low, through so many centuries, that vindicates "the frame and ordinary course of the Common law" to the consideration of the present times.

It is manifest from this analysis, that if, in our law-reforms, we should abandon special pleading and the distinctive administrative principles of the Common law, we should thereby lessen the value and force of precedents, and introduce a practice into our law, that is entirely repugnant to the whole genius of Common law Institutions, which have ever striven, with extreme solicitude, to introduce certainty into the law, and to limit the discretion of Judges by hemming them around with the authority of former decisions.

We have thus far discussed law-reform, as purely a legal and juridicial question; we now propose to discuss it as a political one. For law and its peculiar modes of administration are so intimately connected with forms of government, that any discussion of law-reform in America, at this particular epoch in our history, when we are beginning to readjust our institutions, would be very inadequate, which did not consider the subject in its political relations.

It is impossible for any one, at first thought, to discern the profound importance of an attempt to change the modes of administering law. It would scarcely be supposed, that thereby, our political constitutions and our forms of government might, in the long course of its consequences, be undermined and gradually overthrown. But such is the truth. For if there be one political principle more certain than any other, it is, that our political constitutions and forms of government depend for their existence upon our peculiar modes of administering justice.

In the law-reforms of ancient Rome, the very same question was discussed, which we are about to consider,—*the political importance of particular forms of legal procedure.* As soon as the Republic was overthrown, and the Empire established, by Augustus, changes in the law begun to be contemplated. And two schools of law-reformers arose, one school in favor of adhering to the strict technical forms of the law under the Republic, and the other in favor of substituting for them simple and general forms, more accommodated, as they said, to the larger equity, the more ample justice of the jurisprudence required by the enlightened spirit of the age. At the head of the Republican school stood Labeo, and at the head of the other stood Capito. Both were eminent lawyers: but the first, though in favor of liberalizing the principles of the old jurisprudence, was utterly averse from changing the strict technical forms of procedure; as he believed they afforded the only protection to the liberties and rights of the citizen. Capito, on the contrary, a time-serving adherent of the new order of things, maintained that the forms of legal procedure as well as the jurisprudence itself must be changed to suit the spirit of progress. The controversy between these schools of lawyers lasted nearly a century; the imperial party gaining ground all the while, until the emperor Hadrian, by the Perpetual Edict, exercised uncontrolled legislative authority and fixed forever the character of the imperial jurisprudence. From this Epoch, the Civil law and its procedure assumed that Prætorian form and spirit, which

was consummated in the Code and Pandects and Institutes of Justinian. The old forms of law procedure of the Republic and the respect for precedent, which had grown up when there was a sort of jury trial and law was an emanation from the manners and the spirit of the people, gave way to the more simple forms of the Empire. And thus was consummated, what has generally been considered an advance in jurisprudence. But in this judgment, things wholly different have been confounded: the machinery for carrying law into effect has been confounded with the law itself. There is no doubt that the law itself, in some respects, was improved under the Empire: but there should be as little doubt, that the mode of procedure was changed, from one suited to the liberty of the people, to one suited to arbitrary power, by enlarging the discretion of judges.

The march, which the Civil law has made over the continental European nations, has carried its forms of procedure with it; and it cannot be pretended, that either liberty or property has been as well protected in these countries as in England. The people of these countries are of the same race with those of England, and had originally the same Institutions. "When we peruse, (says Sir F. Palgrave,) the annals of the Teutonic nations, the epithet Teutonic being used in its widest sense, the first impression which we receive, results from the identity of the ancient laws and modes of government which prevailed amongst them. Like their various languages, which are in truth but dialects of our mother-tongue, so

their laws are but modifications of one primeval code. In all their wanderings from their parent home, the Teutons bore with them that law, which was their birth-right and their privilege; and even now we can mark the era when the same principles and doctrines were recognised at Upsula and at Toledo, in Lombardy and in England. But descending the stream of time, the tokens of relationship diminish, and at length disappear. Amongst the cognate races on the continent of Europe, political freedom was effaced by the improvement of society: England alone has witnessed the concurrent development of liberty and civilization. From whatever causes it may have originated, a beneficial impulse was given by the Anglo-Saxon and Anglo-Norman governments, to the Courts of justice, which, though emanating from the crown, were interposed between the sovereign and his subjects in such a manner, as to tend towards a limited monarchy. And if this tendency had not continued and increased, the share of authority possessed by the people or their representatives would have been as feebly established here, as in other countries, which starting from the same point, proceeded in a less fortunate career. Deprived of the security afforded by the institutions which became the strongholds of liberty, and the stations of defence from which the patriot could not be dislodged, the Parliament of England, like the Cortes of Spain or the States-General of France, would long since have declined into inefficiency and extinction."

It was the Civil law of Imperial Rome which grad-

ually extinguished the Teutonic institutions on the continent of Europe. The fundamental text of the Institutes is, "The will of the prince has the force of law." This became the fundamental doctrine of the governments of Continental Europe. And the juridical principles and the modes of procedure introduced by the Civil law, made it efficient in practice. The palatial Courts, to which appeals lay from all inferior tribunals, enabled the prince to control the whole administration of justice. The prerogative of the Crown could not therefore be resisted, by the Courts, as it has been, at all important junctures, by the Courts of England. It is the law and the law only, which can successfully resist the encroachments of despotism. In the absence of defined laws and an independent judiciary to enforce them, the only check upon arbitrary power is popular insurrection.

But in England the victory has been gained by the Teutonic laws and institutions; and they constitute the basis of that freedom which has so long distinguished the Anglo-Saxon race. Soon after the Civil law was introduced into England, Glanville published his "Treatise on the Laws and Customs of the Kingdom of England," and introduced, rather clandestinely, into the preface, the despotic text of the Civil law. His words are these: "The English laws, although not written, may without impropriety be termed *laws*. Indeed, we adopt the maxim, 'That which pleases the prince has the force of law.'" This was about the year 1188, in the reign of Henry 2d. But in the reign of John, in the first half of the 13th

century the strong affection for Anglo-Saxon laws and institutions began to manifest itself in the nation. The Normans, having conquered the country, long regarded all of Saxon blood as Helots. But, now that the Kings of England had lost their continental possessions, and intercourse with the continent had lessened, the nobles of Norman descent began to consider themselves as Englishmen, and there was a rapid fusion of the Saxons and Normans into one people. And King John was compelled by the Barons to sign Magna Charta proclaiming the great fundamental principles of Anglo-Saxon law. Soon afterwards, the representative system of Government composed of democracy combined with monarchy and aristocracy was established, which has served as a model for our form of government and that of all nations who aspire after freedom. At this epoch, Bracton wrote his work "on the laws and customs of England;" but he departed from the celebrated text of the Civil law, which had been introduced by Glanville, and asserted the supremacy of the law over the King's will. His words are: *Rex non debet esse sub homine sed sub Deo et lege.* This work was afterwards translated by Houard, an eminent Norman lawyer, and he avowedly suppressed that passage, as too inconsistent with French constitutional law to be circulated in France. Such was the difference, in the principles of constitutional law, at this early period, in England and on the Continent.

Mr. De Lolme, in his work on the constitution of England, speaking of the fact, that English lawyers

attribute the liberty the English people enjoy, to their having rejected the Roman law, says: "But even though they had admitted those laws, the same circumstances, that have enabled them to reject the whole, would have likewise enabled them to reject those parts which might not have suited them; and they would have seen, that it is very possible to receive the decisions of the Civil law on subjects of the *servitutes urbanæ et rusticæ*, without adopting its principles with respect to the power of the Emperors." This is very plausible, but it is not sustained by history. Mr. De Lolme did not see, that the danger does not lie so much in adopting the doctrines of the Civil law, as in adopting its juridical principles and peculiar modes of procedure, which we have discussed so much at large, showing their pernicious tendency. And if the Civil law had been introduced into England, before the Common law procedure was in some degree of completeness, the Civil law procedure with its juridical principles would have gradually found their way into practice. Because the same circumstances, which would have let the one in, would have permitted the introduction of the other also. And again: when a foreign law is introduced into a country, it is always that part which relates to *meum* and *tuum* which has the first and readiest access. All that relates to personal or political rights is regarded with jealousy. But when any portion of a system of jurisprudence is introduced into a country which has not arrived at that state of civilization when a system of its own is established, the whole is apt to be regarded as the rules

of determination in cases which the domestic law does not reach. This has been the case with the introduction of the Civil law all over the continent of Europe. It was introduced in this way into France. "The wisdom of the proprietary laws of Rome (says Stephen, in his 'Lectures on the History of France,') and the equity of much even of her penal laws, afforded at once an apology and a disguise for the silent introduction into France of much also of her political law. Yet it was a law which had been moulded into its later forms in an Oriental seraglio, and which was fit only for the government of a debased and servile population. The inherent powers of the French crown were assumed by the King, and asserted by the judges, to be co-ordinate with those of the Byzantine Diadem. As the Emperor of the East had been accustomed to issue rescripts at his pleasure, so it was maintained, cautiously at first, but confidently at length, that the King of France was also entitled, in the exercise of his royal authority, to make such enactments as he might think necessary." And it is well known that the Emperor Frederick Barbarossa about the year 1158 began to patronize the Doctors of the Civil law with a view to enlarge his prerogative. But the maxims of the Civil law relative to the powers of the Emperor could not find a direct admittance into the tribunals of Germany. As, however, the Civil law in all that relates to *meum* and *tuum*, was superior to the rude maxims of Germany, this portion of the law was first introduced; and through the influence of the Universities, established, from

time to time, the Civil law, within imperfectly defined limits, became the common law of Germany, and the Emperors came to be called the successors of the Cæsars, and the Civil law to be regarded as an Imperial Common law binding upon all Christendom. And, notwithstanding the extreme jealousy of the English nation which compelled the Kings after the Norman conquest so often to renew the declaration to maintain the Anglo-Saxon laws, the introduction of the slavish maxims of the Civil law was with difficulty resisted. It will be remembered, that James 1st claimed the right to try causes in his own person free from all appeal; and had to be told by Lord Coke: "No King since the conquest has assumed to himself to give judgment in any cause whatever, which concerned the administration of justice within the realm. * * * * * * You are not learned in the laws of this your realm of England, and I crave leave to remind your majesty that causes which concern the life or inheritance, or goods or fortunes of your subjects are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it." For this boldness, Coke was dismissed from the office of Chief Justice. But still the law triumphed over the crown.

The English people were not, in the order of providence, to follow the inferior civilization of ancient Rome. Will it be pretended, that there is anything in the history of the people of the Aventine contend-

ing, through centuries, for the rights of Roman citizens, however glorious, comparable with the glory of the Saxons fighting under their Norman Lords for a full participation in the constitutional rights of Englishmen? Where is the Roman Magna Charta? Can anything in Roman constitutional law compare with that noble declaration of English liberty where the humblest man is equally protected with the noble, proclaimed by the Barons of England and sanctioned by a subdued King? All that are named as the rights of a Roman citizen are but the feeble conceptions of a people who felt more than they perceived; while what is called English liberty is written in letters of light on every page of English history, and is not only clearly understood by every Englishman, but is so blended with his feelings and his thoughts, that he could not become a slave, unless the Creator of man should reverse that providential decree by which different races of men have in succession wrought revolutions in society and changed the frames of government, until in their order, the Anglo-Saxons have become the soldiers of liberty to carry the highest freedom over a dominion which the future veils.

The agitation of law-reform involves the very same conflict in this country, which for so many centuries has been waged in Europe, between the Teutonic institutions and laws and the institutions and laws of Imperial Rome. Everywhere an effort is making to introduce into practice, the procedure of the Civil law; and to abolish the distinctive character of the procedure of the Common law.

There come times in the history of nations, when they feel energies gathering within them, for a new onward movement in the career of progress. They then feel a need to give some account to themselves of the peculiar polity on which they have been borne along upon the advancing wave of time, in order that in refitting their institutions for the new era which appears to be opening before them, they may build according to the ancient models which have hitherto weathered national disasters. Nationality is not determined more by peculiarity of race, than it is by the character of the institutions under which a people are developed. Our ancestors brought with them to their new theatre of action the laws and institutions of the Anglo-Saxon race; and though men have immigrated here, from all nations, they have been assimilated to the Anglo-Saxon, and the Anglo-Saxon language and laws and institutions are the national heritage, given to us by providence to be preserved and developed. Our forefathers manifested the same ardent love for the Common law and its modes of procedure, which had always been the distinguishing feature of English patriotism. When difficulties grew up between them and their mother country, they acted, as their race had always acted before them—interposed the Common law as the shield of their liberties. When the united Colonies met in Congress in 1774, they claimed the Common law of England as a branch of those "indubitable rights and liberties to which the respective colonies are entitled." And since the revolution, the same

zeal for the Common law, both in the State and National governments has been the national characteristic. "We live in the midst of the Common law, (says Du Ponceau,) we inhale it at every breath, imbibe it at every pore; we meet with it when we wake and when we lay down to sleep, when we travel, and when we stay at home; and it is interwoven with the very idioms that we speak; and we cannot learn another system of laws without learning at the same time another language."

The view of the subject, which we are presenting, is sustained by Dr. Lieber in his very able work "On Civil Liberty." "Continental jurists, (says he,) when they compare the Civil law with the Common law, always commit this error, that they merely compare the contents of the two great systems of law; whilst they invariably forget to add to the comparison this difference, that the Civil law, where it now exists, has been introduced as a dead and foreign law; it is a matter of learned study, of antiquity; while Common law is a living, vigorous law of a living people. It is this that constitutes more than half its excellence; and though we should have brought from England all else, our liberty, had we adopted the Civil law, would have had a very precarious existence. Judge Story relates, "as perfectly well authenticated, that President (John) Adams, when he was Vice-President of the United States, and Blount's conspiracy was before the Senate, and the question whether the Common law was to be adopted, was discussed before that body, emphatically exclaimed, when all looked at him for his

opinion as that of a great lawyer, that if he had ever imagined that the Common law had not by the revolution become the law of the United States under the government, he never would have drawn his sword in the contest. So dear to him were the great privileges which that law recognised and enforced."

Amidst the conflicting doctrines which must arise from the commingling of so many peoples in this country, unless minds, capable of discriminating the peculiar doctrines of the Common law, shall vindicate their superiority, they may in time be superseded by a law which is the basis of most of the despotic rule in continental Europe. We are the Anglo-Saxon race on a grander theatre. We are developing those tendencies of English institutions, which manifested themselves during the Commonwealth. Our political and social institutions are organized on higher conceptions of the greatness of humanity, than those of England. In the course of history, English civilization is a transition stage, with a stronger element of institutional polity and personal independence, between the Civilization of Continental Europe and Continental America. And as we have the grandest political organization that the world has ever witnessed, so does the course of history point out for us the most glorious destiny. We persuade ourselves that there will be continuous progress in civilization, brought about, not by a blind law of necessity, still less, by the pretended forecast of statesmen, but by providential design wrought out by the agency of human institutions. The pressure of an overruling providence upon the

course of human affairs is much greater than any of us feel. Its effects are seen in the course of history. And the political reformer ought to be able to discern the indications of providence and to fashion human institutions accordingly.

All institutions are historical, that is, are connected with the past. Considerations, which in a previous stage of society produce certain forms of institutions, pass away, but the forms are still found in subsequent stages of civilization indispensible to the interests of social happiness and freedom. The form of our State and our National governments is based on the model of the English government. The considerations which framed the English government were monarchical, aristocratic and popular, rendering King, Lords, and Commons necessary parts of the constitution. But though our governments are founded solely upon popular considerations, yet the model of the English government, with a single executive and two branches of Legislature, is found indispensible to freedom. The continuance of the same form of institution through successive stages of civilization is the great organic law of human polity. During the American revolution, there grew up a party in every State, who, ignorant of this great political truth, opposed the notion that our State constitutions should be conformed to the English model. No less a person than Dr. Franklin was of this party. And through his influence, in a great measure, Pennsylvania adopted a government of a single legislative Assembly. When he went to Paris, he took with him

the different American constitutions. Mr. Turgot to whom he showed them, disregarding, as Dr. Franklin had done, the voice of history, (which is philosophy teaching by example,) approved that of Pennsylvania, and condemned those framed after the English Constitution. In a letter to Dr. Price of England, Mr. Turgot says: "I am not satisfied with the constitutions which have hitherto been formed for the different States of America. By most of them, the customs of England are imitated without any particular motive. Instead of collecting all authority into one centre, that of the nation, they established different bodies, a body of Representatives, a Council, and a Governor, because there is in England, a House of Commons, a House of Lords and a King. They endeavor to balance these different powers, as if this equilibrium, which in England may be a necessary check to the enormous influence of royalty, could be of any use in republics founded upon the equality of all the citizens, and as if establishing different orders of men was not a source of divisions and disputes." This notion of a single National Assembly began to gain ground so rapidly in America, that the elder Adams in order to counteract it, in the beginning of the year 1787, published his "Defence of the American Constitutions." In the September of the same year, the National Convention changed the Federal Constitution from the single Assembly of the Confederacy, to a government framed after the English model. Pennsylvania changed her government also; and all the States and Territories of this vast confederacy

have now governments framed on the plan of the English. By this form of government our liberties have been preserved and strengthened; and we have grasped under it, an empire stretching over zones and bounded only by oceans, throughout which law and order reign. The notion that human institutions can be created anew for an improved state of society, upon what are called principles of social science, without regard to old organizations, is a doctrine of sheer despotism. The notion is founded upon an entirely false philosophy of history. The organic character of social progress is wholly ignored by it.

There is a common and perennial law identical in its spirit, but modified by the circumstances of its application, running through the whole history of the Anglo-Saxon race, that moulds, for the race wherever found, a form of government that establishes the same peculiar polity, which, it would almost seem, is destined, in the sweep of ages, to be inaugurated in confraternities of Republics stretching over the earth and governing universal man. No one, who knows how the feelings, the opinions and all that characterises the race, are interwoven by thousands of ties with their laws and institutions, could ever wish to sever them, by teaching the race another system of laws. Nothing can be of more importance, than to keep the historical consciousness of a great race unbroken, so that in looking back over the great deeds of thought and action in their past history, their souls may swell in emulous aspirations for greatness in the future. Our race must preserve and foster its historical recol-

lections, if it is to fulfil its noble mission of spreading freedom over the world. It must look back, with no less pride to Magna Charta, than to "the tongue with which Shakespeare spake."

But though the laws and institutions, which we have inherited from our ancestors, are to be regarded with reverence, they must not be considered perfect: their defects must be corrected, their unjust provisions cut off, while their great principles are made to expand, and mould themselves to the new exigencies of commerce and civilization. But to model our laws and juridical institutions, after the Civil law, would, in time be subversive of our national character, would rend the spiritual chain which connects us with our forefathers, and would reduce us from a mighty original race, developing its own distinctive civilization, in the highest forms of free thought and free action, to one developing its energies in the obsolete forms of a past civilization, produced by a people inferior to ourselves, and standing behind us in the providential order of history.

We cannot persuade ourselves that Roman jurisprudence is the oracle of universal justice, established in the order of providence for the government of the world, as some seem to think. History has its eras, and never repeats itself. Its eras all differ from each other. And there is a progressive expansion in its advancing movement up the course of time. And the principle of advance, in each era, originates in the peculiar institutions and opinions of the people, who lead civilization through that era. The Anglo-

Saxons lead civilization through this era, and their institutions and opinions are the mainspring of the advance which this era is making in conquering the physical world, and spreading freedom over the earth. Let us not then, upon any arbitrary theoretical notions deduced from a misunderstanding of history and of providence, mutilate "the frame and ordinary course of the common law," and engraft upon it the exotic branches of a foreign jurisprudence. The Common law has improved from age to age, by its own inherent force. It has swept on its course, breaking through all obstacles, and leaving behind, in its old channels, the feudal system with its hard exactions, and is daily receiving into its ever widening expanse, more and more of that pure stream of equity, which flows fast by the oracle of natural justice. It is to this oracle, that our law is to listen for new doctrines to meet the exigencies of advancing civilization; and as far as foreign writers of the school of the Civil law have discussed these responses of Natural Justice, we may profit by their intelligence. The writings of foreign jurists can be used as illustrative of doctrines, but never as determinative of the decisions of our courts. "For there are in nature (says Bacon,) certain fountains of justice whence all Civil laws are derived, but as streams; and like as waters do take tinctures and tastes from the soils through which they run, so do Civil laws vary according to the regions and governments whence they are planted, though they proceed from the same fountains."

The great importance of the questions involved in

the foregoing discussion, and the difference of opinion entertained by the ablest lawyers in regard to them, seemed to demand of us the exposition which we have given. And there are epochs in the economy of the moral world which require cardinal principles to be reclaimed, vindicated and expounded, in order to infuse their spirit anew into humanity.

We are fully sensible of the inadequacy of a discussion, in a few paragraphs, of questions, which it would require volumes to elucidate. We have merely aimed to point out the course of inquiry, and to note the points to be observed and considered. As the light of the smallest torch is sometimes useful, we feel the less diffidence in setting up ours in so intricate a path.

We are now prepared to proceed to the consideration of the more special subject of this Report,—the system of Pleading as it now exists, and as it has been simplified by us.

COMMON LAW PLEADING.

In the first part of this report, we compared the Common law system of pleading with that of the Civil law, in order to show its superiority and the necessity of retaining it in our Courts of law. We will now examine it for the purpose of pointing out its defects, preliminary to showing how we have endeavored to remedy them.

Though, from the earliest ages, as the year-books and all the oldest law treatises show, English lawyers paid chief attention to the mode of law procedure, it was during the reign of Edward 1st, that pleading

first begun to assume anything of the form of a science; and still it was to be found only in the scattered precedents of adjudged cases. In the reign of Charles 2d, a collection of adjudged points in pleading, classed, without skill, in alphabetical order, was published under the title of "Doctrina Placitandi." This extensive collection became the store-house from which pleaders procured precedents. At a late period, between 1772-77, Chief Baron Comyns, in that work of unparalleled labor and consummate ability, his "Digest of the laws of England," under the title "Pleader," gave to the profession, a more systematic compilation of authorities upon the subject of pleading. This was a great advance beyond any previous work. Mr. Sergeant Williams next published his masterly notes on pleading in his edition of Saunders' Reports. But as yet, no scientific treatise upon the subject had appeared. At last, in 1808, Mr. Chitty published his elaborate and discriminating work, presenting the doctrines of pleading in a systematic form. Next appeared the work of Mr. Stephen, which did more to simplify the system of pleading, and to light up its intricacies, than any other work. Such is the history of the epochs in the growth of the system of pleading. Other works of ability and learning upon the subject have been written in England and in this country, but they have not advanced the science of pleading beyond the point where Mr. Stephen left it.

Every art, as it improves, and enlarges its scope, invents forms and methods by which its principles are

more easily understood and its purposes facilitated. This has been the case with pleading, until it has become the most complex system of logic ever used in practical affairs. Yet not one of its principles has been deduced from abstract considerations, but all have been evolved from actual experience in the trial of causes. Its most abstract principle is therefore practical. And although, when contemplated abstractly and separated from the peculiar judicial institutions with which it is connected, it appears artificial and needlessly complex and subtle, yet when the peculiar organization of the judicial institutions in which it is used as an instrument of administering justice is considered, it is at once seen to be in its substantial forms and principles admirably adapted to its great purpose. It must be admitted to be the greatest of all juridical inventions. And its chief excellence consists in its substantial forms. The very mode of their invention shows their practical efficiency. The same modes and circumstances of right and injury recurred so often in judicial inquiries, that the same forms of allegation were found to suit, and thus they became established as precedents. If it were possible, that a set form of expression could be devised for every matter either of claim or of defence—to invent them would be the greatest achievement of juridical skill. But as this is impossible, new forms must be invented, as new cases arise, in accordance with the principles of those already established. The principles of the forms, therefore, have to be studied; and thus, the theory of pleading emerges from its practical neces-

sities. Its theory becomes indispensable to its practice. In this way, its theory and its practice have grown up together.

It has always been the reproach of the English law that, in its administration, it is too prone to sacrafice principle to precedent. And it cannot be denied that it has less of principle, and more of detail than almost any other national jurisprudence. But this theoretic defect is in a great degree its practical excellence. The English law has grown out of the business of the people; and therefore it has not that scientific unity which a system of laws framed and promulgated by a law-giver might have. The fact however, that the English law has been less cultivated as a science, and more as a special practice, makes it more difficult to reform and simplify it. And it also renders it especially difficult to construct a consistent and self-connected system of pleading, applicable to its diverse parts.

The system of pleading partakes largely of the unscientific character of the law with which it has grown up. It is full of anomalies and exceptions and incongruities. It is impossible therefore, to reform and simplify it, without a minute and comprehensive consideration of the system in its parts and in its totality, and also, of the historical circumstances in which its parts have grown up, and of the purposes in the administration of the law, which each principle and device was intended to accomplish. And it is equally necessary to examine, both in its theory and in its practice, the whole body of the law which the sys-

tem of pleading is designed as a means of administering. Without such a survey, any attempt to simplify pleading, would be entirely haphazard; and could not but end in an impracticable blunder. It will, for the same reasons, require the most accurate scrutiny on the part of those who have to judge of the merits or demerits of the work which we have prepared. A proper judgment can be formed only by retracing our footsteps over the arduous and intricate road, and noticing what we have left standing, and what we have abolished, what we have changed, and what we have substituted; and then looking at the whole body of the law, and considering the ends to be accomplished by a system of pleading, judge which is the more efficient instrument for administering the law, the system of pleading as it stood before or as simplified by us. We will endeavor to retrace our steps over this road.

In order therefore, to show how we have reformed and simplified pleading, it is necessary to place distinctly before the mind, what is the great object of pleading; because then, it can be seen whether we have thrown off all rules which hinder or do not tend to effectuate that object; and devised and added others where they were wanting.

The primary object of pleading has already been explained in our discussion of the general subject of law reform. All its rules should tend to present distinctly before the Court and the jury the precise points in dispute; and these rules should be as little artificial as possible.

The system of Common law pleading, as we have delineated it in the first part of this report, is a natural system. Considered with reference to its abstract principle, it will be found, to be the natural logical process which the mind is necessitated, by the very laws of thought, to pursue in the analysis and evolution of any question whatever. The plaintiff states his cause of action. The defendant is then placed in the ordinary logical dilemma, of either denying, or confessing and avoiding, the plaintiff's case. And the plaintiff is then in the same dilemma. And so alternately, through every stage of pleading. Now this is the ordinary logical operation which the mind is necessitated to pursue in every subject of investigation. There is no other mode of proceeding possible. Any system to be correct, must be what this is substantially. The rules of pleading, therefore, are the regulative principles, which the experience of Courts have found the most efficient and convenient, for conducting the logical process of stating a cause of action and the defences, in the business of disputes at law. Pleading as a written science is the statement, in their proper order and relations, of the rules which the mind must employ in the business of litigation whether it is conscious of it or not.

Besides rules, Pleading, as a practical art, is constituted of forms, which are the authoritative modes in which the allegations of the alternate pleadings are stated. It is these forms, which are precedents, that give to the system of pleading its practical efficiency. Without fixed forms, the application of the

rules of pleading would be exceedingly precarious. Indeed, we consider well contrived authoritative forms, as the consummate excellence in every department of legal practice. As Conveyancing is nothing without forms, so is Pleading nothing without them. Forms are the only contrivance for precision, certainty and facility. "The forms of pleading are not, (says Mr. Justice Story,) as some may rashly suppose, mere trivial forms; they not unfrequently involve the essence of the defence; and the discipline, which is acquired by a minute attention to their structure, is so far from being labor lost, that it, probably more than all other employments, leads the student to that close and systematical logic, by which success in the profession is almost always secured. Of the great lawyers and Judges of the English forum one can scarcely be named who was not distinguished by uncommon depth of learning in this branch of the law; and many have risen to celebrity solely by their attainments in it. * * * * * Special pleading contains the quintessence of the law, and no man ever mastered it, who was not by that means made a profound lawyer."

Rules of pleading are but the conditions of thought, to which the contending alternate statements of the plaintiff and the defendant must conform in order to be definite and complete, expressed in precepts. And forms of pleading are but the modes in which the alternate contending statements must be exhibited, in order to be definite and complete. Now, the knowledge of these rules and forms must greatly con-

duce to the great end of forensic procedure, of presenting the true subject of litigation definitely to the proper tribunal for decision. The mind cannot, as well, conform to the conditions of accurate thought spontaneously, as by being directed reflectively by regulative rules. To suppose that the process of litigation can be conducted better, without rules and fixed forms, is to falsify the whole history of the human mind. The logical faculty is given to men so sparingly, that institutional logical discipline has always been found necessary to exercise and develop this faculty; and rules and formulas for performing the processes of investigation correctly have been found indispensable aids in all subjects of human thought. There is not a single science that has made the least progress without the aid of disciplinary and inventive formulas. The rules and forms of pleading must therefore be eminently auxiliary to the mind in the analysis which is required in the investigation and preparation of a cause for trial, as well as, for stating the results of that analysis in the alternate allegations on the record. And the help of the rules and forms enables the Court, in the hurry and bustle of a trial, to see through the cause, to sift and assort the materials of which it is constituted, better than any other possible device. "Though the absence of legal forms and pleading (says Lingard in his "History of England,") may casually insure a prompt and equitable decision, it is difficult without their aid, to oppose the arts of intrigue and falsehood, or the influence of passion or prejudice." This remark is

made by Lingard in the early portion of his history, where he is reviewing the administration of justice, before any strict course of law procedure, with its fixed rules and forms, had been established. He saw how impossible it was, for the Courts to get at the naked truth of a cause, where the parties, impelled by self-interest, were endeavoring to disguise and decieve, without fixed rules and forms so devised as to compel the parties to state the intrinsic facts of the dispute in definite issues on the record.

And as many rules as are necessary to effect the purposes of litigation should be comprehended in the system of pleading. Many seem to think, that the fewer rules there are, the better. This would be true, if the fewer rules would answer all the exigencies of judicial administration. But if they cannot, then the delay and confusion of exigencies, occurring when there is no rule to govern, must ensue. The chief reason, for the notion that *the fewer rules the better*, is that then, the system is more easily understood and practised. This can be said of every science and art whatever. If you strike out half of its principles, the remainder can be more easily learned, than the whole could have been. But in practice, the whole would still be found necessary to the exigencies of business. But the question of convenience to lawyers in acquiring a knowledge of the system is entirely subordinate to the importance to the public in having a well-defined and complete system of rules by which the law is to administered with certainty and facility. The public interests are not to be hazarded in so im-

portant a matter as the administration of justice, because incompetent members of the bar are interested in having only a few rules of pleading. We must have as many as are necessary for the due administration of justice. There never yet has been a system which had a rule for every difficulty. Courts have continually to devise new ones, and add them to the system of pleading, to govern similar cases in future. This has been the way in which the whole system of pleading has been built up. And it is a fact easily proved, that wherever an attempt has been made to administer law upon a few rules of pleading and practice, very soon an unwieldy and confused mass of rules has been, from necessity, added by the Courts, until all certainty was lost in the multiplicity of unsystematic details.

In constructing the system of pleading there have been times, when the love of art has taken the place of practical considerations. Pleading has come to be pursued for its own sake, and the nice devices of the system, considered merely as an abstract art, have become all in all to the enamored pleader, without any thought of its being an instrument of administrative justice. In this way, those elaborate refinements which encumber the system and embarrass its practical efficiency have been engrafted upon it. Its formal rules have been invented in this way. There are two classes of rules which constitute the system of pleading: rules which relate to substance, and rules which relate to form. The rules which relate to form are more numerous, than those which relate

to substance. And it has been the just reproach of the system, that it has a strong tendency to decide causes upon points of mere form. This is a great evil, and should be remedied. If it be possible, a suitor should never be turned out of Court for mere defect in form. We have therefore striven to effect this object, and have, as will be shown at the proper places, thrown off a great number of rules, which relate to form; and have, in this way, greatly diminished the difficulty of understanding the system; while we have, we hope, rendered it a more effective means of judicial administration.

But *form* holds so important a place in Common law pleadings, that it is necessary that we should have a precise idea of its meaning, in order to understand the difference between the rules which relate to form, and rules which relate to substance. The opinion entertained upon the subject generally, is very confused and indefinite. We will therefore endeavor to analyse and define what is meant by form in the Common law.

The broadest distinction of form, is that of its contrast with substance. And such it is, in its abstract sense. But we are not dealing with abstractions. We are entirely within the province of concrete and practical matters. And here, there is, as a general fact, no such thing as form without substance, or substance without form. But still, the system of Common law pleading does contain a form which has no substance, that is, a form *which is wholly independent of the merits of a cause of action or of a defence.* In the lan-

guage of pleading then, substance means merits, and therefore, there can be a form without substance, that is, without *merits*. The form then, which does not relate to *merits* is called technical form, and all the statements in pleading of this character, are said to be *purely formal*, that is, *independent of the merits of the cause*.

By reference to the statutes, which have from the earliest times been passed to remedy the evils of adherence to mere technical forms, it will be found, that the distinction is between *form* and *merits*, as we have indicated. These statutes make the distinction between defects in the "very right of the cause and the matter in law appearing on the pleadings," and "formal defects, imperfections, omissions, defaults in form, and lack of form." The form which does not embody the merits of the cause might be disregarded in pleading, and, except upon special demurrer, the pleading would still be good.

But there are what may be called forms of substance, which necessarily result from the differences in causes of action. Different causes of action must of course be stated in different words. And as different facts constitute different causes of action or defences, so do the different words in which they are necessarily expressed, constitute different forms of pleading. All facts which are essential to a cause of action or defence must be set forth in the pleadings and stated in an intelligible and issuable form capable of trial. And one certain combination and order of particular words must express the cause of action or

defence more accurately, than any other. These words then are the best form in which the matter can be expressed; and they should be a precedent for all similar cases. For certainly, it is more convenient to use such forms than to let each pleader state his case in his own imperfect way. Such form as this cannot but be retained to some extent; because all the facts which are necessary to constitute the cause of action must be set forth in the declaration,and the statement of them must approximate more or less to the best mode of statement. Substantial forms, which we have shown to be so useful, must therefore be retained in pleading. Mere technical form we have abolished; as will appear at the proper place.

All through the books on pleading, doctrines are taught, which assume that it is legitimate for counsel to take advantage of each other in the development of a cause, and to present the subject in dispute, not in its naked truth, but in such guise as will make most for their respective clients. We have endeavored to eliminate from pleading every principle upon which any such doctrines can be founded. Pleading should in no degree, be considered as an art for the display of forensic ingenuity in winning causes by trick, but exclusively as a system of rules for securing the decision of every cause solely upon its merits. There is nothing which tends more to deaden the sense of justice and of truth in the minds of men, than the notion that judicial proceedings are founded upon rules that admit, in their application, of trick by which a just cause may be lost. It makes men

feel that the administration of justice is a game in which dishonest artifices are tolerated by law. And thus, the principles of dishonesty descend from the very seats of justice, to be diffused amongst the community. A Court ought, both in the principles of its proceedings and in the whole demeanor of the Bench, the Bar, and the officers, not only to be, but to *appear to be*, a sanctuary of justice, where neither artifice in the proceedings, nor passion, nor prejudice, nor partiality, nor any improper motive in those connected with the administration of the law, can have the least influence. This purpose we have endeavored to aid by our reforms. We have sought to feel, that there is no separate interest in any individual or in any portion of the community: but that all the officers, from the highest to the lowest, connected with the administration of the law, as well as every individual in the community both citizen and stranger are equally interested in a pure administration of justice.

We have thus shown that the system of Common law pleading is a natural system, composed of the rules, which have been found, by experience, best adapted for regulating the respective statements of the litigating parties, and ascertaining the real points for decision; that it is necessarily composed of many rules; that from the very nature of things, it must contain what is called substantial forms: and lastly that its rules do not necessarily lead to chicane and trick, but that they can be so amended as to prevent any thing of the sort. In a word, that it is a system of wise business rules and forms, whose defects are

not inherent in the system, but result from the same cause as the defects in all other human inventions—the inability of man to make anything perfect.

Having now disabused the mind of certain errors in regard to the supposed fundamental vices of the system of special pleading, we are prepared to enter upon the examination of the system as it now stands, and show how we have reformed it.

THE SPECIAL SUBJECT OF THE REPORT.

We come now to the special subject of the Report. We have vindicated at large, the policy of retaining the "frame and ordinary course of the Common law," and especially its peculiar mode of pleading. We have also exhibited the character of the Common law mode of pleading, without any attempt to disguise its faults; but, on the contrary, we have stated distinctly what those faults are. It remains for us now, to show what changes we propose to make in the system, in order to rectify these faults; and at the same time, to give our reasons, founded upon practical views of the subject, for these changes.

As pleadings are so intimately connected with the preliminary proceedings which take place in Actions at law before the pleadings begin, we have thought it advisable, on account of its practical advantages, to consider the two subjects together; and commence with the original writ, and show how we have simplified the whole course of procedure down to the judgment inclusive; so that every step in an Action at law can be seen, in the order, in which they occur

in practice; and the system of procedure as simplified can be compared, step by step, with what it was before. And thus, we shall have too, a Code of procedure, with every Rule and every Form standing in the exact order in which they occur in practice.

What we are about to recommend and explain will be found embodied in Rules and Forms, in the Recommendations appended to this Report. We beg therefore, that reference will be made to the recommendations as we proceed.

ORIGINAL WRITS.

First then, of the mode of begining an Action at law.

The judicial means by which a defendant is called on, or brought in, to answer to the complaint of the plaintiff is called an Original Writ. Before the establishment of the New Constitution, there were two of these in use in Maryland in personal Actions. 1. The Summons; 2. The Capias.

The Summons commands the Sheriff to notify the defendant, to appear in Court on a certain day, to answer the complaint of the plaintiff.

The Capias commands the Sheriff to take the body of the defendant, and have him before the Court, on a certain day, to answer the complaint of the plaintiff.

These were the two modes by which defendants were informed of an action having been brought against them at law, before the new Constitution went into effect. By the new Constitution, imprisonment

for debt has been abolished, and thereby the original Writ of Capias, which commands the Sheriff to take the body of the defendant, is abrogated. The only remedy therefore now allowed by the Constitution for bringing an action at law to bear upon a defendant, is the writ of Summons, which, as we have shown, merely notifies the Defendant to appear in Court to answer the complaint of the plaintiff. The disuse of the Capias has wrought a great change in the practice of the law. The whole doctrine of bail in Civil actions with the practice founded upon it is entirely done away. The practice, connected with the initiatory process, is thereby much simplified.

THE WRIT OF SUMMONS.

In order to carry out, by legislation, the necessary effect on legal process of the provision in the Constitution abolishing imprisonment for debt, the General Assembly at the session of 1852 passed an act (Ch. 76 sec. 1,) making the summons the only "process to compel the appearance of defendants," in actions at law. The words of the Act are these: "That in all civil suits or actions at law in the several Courts of this State, the process to compel the appearance of defendants shall be a *summons* instead of the *capias ad respondendum* formerly used; and such summons shall state the purpose for which the party is summoned, in the manner in which it was heretofore stated in the capias." Such is the law as it now stands.

We wish to call especial attention to these words—"*Such summons shall state the purpose for which the*

party is summoned in the manner in which it was heretofore stated in the Capias." This requirement has an important bearing on the whole course of procedure in actions at law down to the judgment inclusive. We will therefore expound its import in practice.

Actions at law arise either out of some contract or some injury; causes of action, therefore, are classed under two heads, those of contract and those of injury. Each of these classes embraces many different causes of action. Out of this grow what are called Forms of Action. Each cause of action is expressed in peculiar set words. These words constitute the Form of action, while the thing signified by them constitutes the Cause of action. Now it so happens, that these set words which constitute the Form of action, do not give any definite insight into the Cause of action. In other words, the thing signified by the words used is so vague, as to amount to no available information as to what a suit has really been brought for. For example, a writ calls on the defendant, "*to answer in a plea of trespass on the case.*" All the information which the writ contains as to the cause of action is contained in these words. And what do they mean? Almost any thing. They may mean injuries which consist of a non-feasance or omission; or of actual or implied negligence; or injuries committed by fraud or deceit; or injuries to property of the plaintiff's in the defendant's possession; or injuries to reversionary interests; or injuries to reputation and other incorporeal rights; or injuries affect-

ing the domestic relations; or injuries effected by the abuse of a valid process of law; or injuries effected without a direct interference with the plaintiff's person or property; or all injuries for which there is no other remedy. The words "*plea of trespass on the case*" may mean any of these various causes of action. They therefore convey no definite information to the defendant of what he is sued for.

And while the Forms of action, of which we have given an example, are entirely useless, they produce the chief embarrassments and delays in the proceedings in an action. Most of the technical objections in pleading originate directly or remotely in the Forms of action. And to show how idle are many of the distinctions, on which a difference in the Form of action is based, we will refer to that between the action on the case, of which we have spoken, and the action of trespass. The criterion of distinction is, that the one is for an injury produced by immediate force, and the other for an injury produced by remote consequences of an act. If the defendant threw a log in the street, and it fell on the plaintiff and broke his arm, trespass would be the remedy; but if the plaintiff fell over the log and broke his arm, the remedy would be case. And superadded to the folly of this distinction even when it is broadest, it sometimes is so exceedingly subtle, as to be lost to all perception.

Now the formal difference between these two actions consists in the insertion or omission of the words "*with force and arms.*" If the plaintiff has his arm broken in the way first mentioned, he must use in the

writ these words, or he will fail in his action; and if he have it broken in the way last mentioned, he must leave these words out, or he will fail in his action.

Now the clause of the Act of Assembly, which we have quoted, means nothing more than that the sets of words denoting the formal difference between actions shall be inserted in the summons.

We propose as our first amendment that these formal words be left out of the Summons; and that the Summons, in all cases, shall merely notify the defendant to answer an action at the suit of the plaintiff. The declaration will then inform him what the cause of action is, as it does now. There will be great advantage in this; as innumerable unmeaning technicalities will be thereby got rid of, which never can be, as long as this senseless doctrine of forms of action is retained. There is not a step in the whole course of procedure, even the judgment itself, that is not embarrassed in some degree by the forms of action; as we will show as we progress in this investigation. The practice of using forms of action in Maryland was always a blunder. In England it originated in a sensible way. An original writ, showing the real *cause* of action, issued there in the first instance and informed the defendant for what he was sued. The Capias, containing the mere *form* of action to correspond with the original writ, then issued to bring the defendant into Court. In Maryland the original writ was never used; but only the capias which does not set forth the *cause* of action, but only the *form*, and

consequently, as we have shown, gives no information as to the real cause of action.

The Act of Assembly 1852, Ch. 177, sec. 1., amongst other things, enacts that "writs may be amended from one form of action to another, where the ends of justice require it, and any amendment may be made at any time before the jury retire to make up their verdict." Forms of action did mean something, however indefinite, before this Act; but since, they may be mere masks hiding the real cause of action. It surely comports better with justice to have no forms of action at all, than to make them delusive, as this Act does. And besides, this Act does not relieve pleading of one single one of the technical embarrassments dependent upon forms of action. As soon as an action should be changed from one form to another, all the technicalities of this other would remain to embarrass litigation. So that at best it would be but jumping out of one mire into another.

We therefore recommend one general form of writ for every personal action, and that it shall not be necessary to mention any form or cause of action in the writ. The effect of this recommendation will be further considered when we come to speak of the joinder of causes of action.

The writ of Summons, of course, is to be issued by the Clerk of the Court as heretofore. It is to contain merely the names of the parties; the day and place when and where it is to be returned; and it is to be tested by the Judge, and signed and sealed by the Clerk of the Court, and dated on the day on which

it shall be issued. We recommend that it be not tested, as heretofore, of the first day of the Court, but of the day on which it is issued; as we wish all fictions to be disused. Thus, there will be but one date to the writ, as in the form which we have given in the Recommendations at the end of this Report.

Before the writ is issued, we recommend that the Plaintiff or his attorney deliver to the Clerk of the Court a Memorandum in writing of the Action to be brought, of which we have given a form. This we think a good precaution to prevent mistakes and disputes, between Plaintiffs and the Clerk. And besides, the Clerk ought to have a written authority for what he does.

The writ is to be renewable as heretofore. And the returns to a Writ of Summons are to be "Summoned," or "Cannot be found," or "Is dead," or as the case may be. And the Sheriff's endorsement is to be sufficient evidence of the fact returned.

The service of a Writ is to be personal as heretofore. And where there are several defendants and some appear, and others do not, who have been Summoned, the plaintiff may declare against all and proceed as if all had appeared. And we recommend that a defendant may appear at any time before judgment; subject to conditions which will be seen stated in the Recommendations appended to this Report.

We recommend that the mode of appearance shall be by the Defendant or his Attorney, delivering a Memorandum in writing to the Clerk, the form of which we have given. This will be an authority to

the Clerk to enter the Appearance. We wish that every act done by the Clerk, in and out of open Court, shall have an undisputed authority for it. And the forms in their practical order, which we have recommended, will greatly assist the young practitioner of the law. By looking through the rules and forms which we recommend, he will see every step that is to be taken in an action, as well as the rule by which it is governed, and the form in which it is to be done.

These few recommendations embrace every thing relating to the initiatory process in all personal actions except Replevin. It will be seen at once, even by those who are not lawyers but who have frequented Courts of law, that our Recommendations are much more simple and plain, as well as more effective in practice, than the law as it is now.

THE WRIT OF REPLEVIN.

We next consider the Action of Replevin. In this Action we recommend many changes. The first which we will note is, that when the property sought to be replevied is returned "eloigned," the Plaintiff may renew the writ or shall declare only for damages. And that he shall not as heretofore issue an *alias* or *pluries* writ of Replevin, or a *Capias in Withernam*. And we further recommend that when a defendant or defendants resides or reside in another or other jurisdiction or jurisdictions in the State from that in which the goods are, that the Clerk of the Court whence the writ is issued shall, upon suggestion

in writing, either at the time of issuing the writ or upon the return of it, send a notice to be served on such defendant or defendants. And this notice is to be renewable like a writ of Summons.

In order to carry into effect these changes we have given in our Recommendations all the forms and all the rules necessary for the purpose. These changes will greatly simplify the proceedings in Replevin. And the young practitioner can see every step that is to be taken in such an action. We have given also a more simple form of Writ of Replevin. We have left out the recital of the Replevin-bond which is given in the writ now in use. The rules for the appearance of the Defendant or Defendants in the Writ of Replevin are the same in spirit which we have recommended in cases of the Writ of Summons. They will be seen amongst our Recommendations.

These Recommendations take us over the whole ground of the process in personal actions. As the law now is, it is one of the most complex and subtle titles, requiring long study and large practical experience to master its principles and its details. All those perplexing questions, about the choice of the writ, that shall be issued in a given case, are entirely excluded from practice. The only question which can arise is whether a Summons or a Replevin shall be issued. And about this there never can, of course, be any mistake. Because any one will know that a Replevin is only for the specific recovery of personal property, and by the Act 1825, Ch. 65, for the recovery of an Apprentice. If the action is not for such a purpose it must be a Summons.

JOINDER OF PARTIES.

The defendant having appeared to the writ of Summons, the next step in the proceedings is the delivery by the respective parties of the statements of their grounds of action and of defence, which are called the pleadings. But before we enter upon this part of the subject we will consider the present state of the law relative to the Joinder of Parties.

This is a portion of the law which is often attended with much delay and embarrassment in practice. The rules are so various as to be not easily remembered. "In actions on contract the omission of a party as plaintiff who ought to be joined, or the joinder of a party who ought not to be joined, may be fatal to the action; so the joinder of a person as defendant who ought not to be joined is likewise fatal; whilst the omission of a party as defendant who ought to be joined can only be taken advantage of by a plea in abatement. In actions of tort, a joinder of a party who ought not to be plaintiff is fatal, whilst the non-joinder of a party, who ought to be a co-plaintiff, can only be taken advantage of by a plea in abatement, and in such cases the joinder of persons who are not liable as defendants only entitles them to an acquital, and the non-joinder of persons jointly liable is of no consequence." These rules often defeat justice, both directly and indirectly.

We therefore propose that, at any time before the trial of an action, any person not joined as Plaintiff may be so joined, or any person joined as Plaintiff

may be struck out, by the order of the Court; and that such amendments in the proceedings may be made as shall be necessary.

We also propose, when it shall appear at the trial of any action that there has been a mis-joinder of Plaintiffs, or that some person not joined as Plaintiff ought to have been joined, that the defect may be amended as a variance.

In all cases where a plea in abatement of non-joinder of a person as Plaintiff shall be pleaded, we propose that the Plaintiff be at liberty to add the name of such person named in the plea; and that the Defendant plead *de novo.*

The conditions and limitations with which we propose these amendments of the law, will be seen by reference to the Recommendations at the end of this report.

We propose also, that in any action brought by a husband where his wife is necessarily joined with him, he may be at liberty to add thereto, claims in his own right; and in case separate actions be brought for such claims, they may be consolidated. And if either Plaintiff die, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate. This change of the law will prevent a multitude of suits and unnecessary expenses.

This concludes the subject of the non-joinder and mis-joinder of Plaintiffs. We have recommended the same principles that we have advised for Plaintiffs, to be applied to the non-joinder and mis-joinder of Defendants; as will be seen by reference to the rules

embodying our Recommendations. In both cases our Recommendations are, in substance, that such defects in proceedings be amended in the speediest and least formal way consistent with justice to the parties to the suit, equal regard being had to the interests of Plaintiff and Defendant.

JOINDER OF CAUSES OF ACTION.

We come now to a very important part of the doctrine of law procedure. We mean that which relates to the joinder of causes of action. In discussing the doctrine of the *forms of action*, we have said, that it affected the whole course of the proceedings in a suit. We have now arrived at a point in our inquiry, where this assertion can be verified. The doctrine of the forms of action creates difficulties in two ways; first in the misapplication of the wrong form of action to a particular case, and secondly, in the mis-joinder of forms of action. We have recommended that forms of action be abolished. If this be done, of course, all the difficulties which ensue from misapplying forms of action to particular cases will be excluded from law procedure. And this will be a great advantage gained in practice. But still, the doctrine of the joinder of *causes of action* will constitute an important part of the general doctrine of law procedure.

The question then arises, shall we retain the present rules as to the joinder of causes of action? For though we abolish *forms of action*, still we may re-

tain the rules as to the joinder of *causes of action*, which sprung out of the doctrine as to the forms of action. For the supposal of forms of action is, that they are founded upon substantial distinctions which prevent incongruous and dissimilar causes of action from being inconveniently mixed together in the same suit. If this be true, then it will follow, that we must retain the present rules relative to the joinder of causes of action. But it is not true, that the doctrine of the different forms of action prevents dissimilar and incongruous causes of action from being joined in the same suit. Causes the most dissimilar may now be joined. The British Common law Commissioners in speaking on this subject say: "The Plaintiff may join in one action a claim on a promissory note, on a breach of promise of marriage, and a complaint of negligence against an Attorney; in a second he may join a claim for criminal conversation with trespass to his person, his land or his goods; in a third he may sue for the seduction of his daughter, infringing his patent, and for negligently driving over and slandering him; because in all these cases the form of action is the same. The joinder of incongruous causes of action therefore may now occur. We believe it is impossible to lay down general rules by which it could be prevented without great mischief; and that plaintiffs may be safely trusted in this matter. A plaintiff is not likely to damage his claim for criminal conversation by adding a claim which may divert attention to a question of whether he is entitled to the price of goods sold, or other incongruous matters."

We concur in these views of the British Commissioners; and recommend that causes of action of whatever kind, provided they be by and against the same Parties and in the same rights, may be joined in the same suit: but that this shall not extend to Replevin and Ejectment. We except these two actions; because they are proceedings *in rem*, one for the specific recovery of personal property, and the other, of real property. They therefore require specific judgments. And this makes a natural division of causes of action into those for the recovery of money whether due on contract or for wrong; and that for the recovery of personal property; and that for the recovery of real property. The distinctions on which this division is made, it is impossible to mistake. They are founded in the nature of things. Therefore in practice no evil can grow out of the division.

But in reference to the non-joinder or mis-joinder of the first class of actions the greatest embarrassments occur, which ought to be done away, if possible, provided no evil ensue. And we think that none can ensue. We propose to leave it optional with a Plaintiff to join any causes of action in the same suit, except Replevin and Ejectment. Because it is not to be presumed that he will embarrass himself by joining incongruous matters. But if he should do so, we further recommend that the Court shall have power to prevent the evil, by ordering the issues on the different causes of action to be tried separately; as will be more fully seen by the rule embodying our recommendation on the subject.

OF PLEADING.

We come now to the most important as well as the most difficult part of our task. There is no lawyer, however great his abilities and large his experience, who might not feel a just diffidence in attempting to reform a juridical invention which has been used for centuries as the chief instrument in the administration of justice amongst a people the most renowned for their devotion to law and order of any in the history of man. We have, therefore, given a degree of consideration to this part of our task commensurate with its importance and its difficulties. We have traced back, in the actual practice of the Courts, the use of the Common law pleadings from the present time up to the Year Books; and have noted the difference in the precision and certainty with which the law has been administered, in ages when the principles of pleading were imperfectly developed, and its forms but partially constructed, and the ages when the system, with its principles and its forms, as it now stands, has been employed in unraveling the subjects of litigation. And it has impressed us, not a little, to see the great advantages of the modern practice, since special pleading assumed the scope and the compass of a system. We have, therefore, labored on this branch of law-reform in no sympathy with that spirit which broods in sapient contemplation over the ruins of the great institutions, that centuries of experience have proved to be well adapted to the purposes of human society. But, suppressing with the

cold hand of reason the impulses of innovation, which the sympathies of the age in which we live, kindle in our bosoms, we have laid hold on that experience, which has lasted through so many ages, as to seem to have the approbation of providence; and we have reformed, without destroying. In the changes which we have made, and they are great, we have followed no other guide than experience in actual practice. We have wholly eschewed all theoretical views founded upon speculative considerations, which we have always found to be as ignorant as they are specious and pretentious. We have not made a change, which, it seems to us, the experience of Courts has not shown to be wise; and neither have we retained any thing which has not the sanction of the same authority. Therefore, in what we have retained, as well as in what we have changed, it seems to us, we have the sanction of experience in the actual administration of the law.

The first part of our Recommendations on Pleading embraces the fundamental principles and the general frame-work of the whole system, which constitute it that peculiar contrivance by which a special issue, either of law or of fact, is always formed and presented, for determination, to one of the tribunals of which a Common law judicial institution is composed, the Court or Jury. We have expounded so elaborately our views of the importance of this feature of the Common law pleadings, that it must have been already anticipated, that we would preserve it as the cardinal characteristic of whatever we might propose in sim-

plification of the system. We have accordingly, as will be seen by reference to our Recommendations, laid down, as the basis of the whole system of pleading, a fundamental rule embodying the principle, that, *The Pleadings shall be so conducted as to evolve upon the record, by the effect of the allegations themselves, the questions of law and of fact disputed between the parties, and present them as the subject matter agreed upon for decision.* The Courts will thus have before their eyes continually the fundamental rule of the whole system, to guide their judgment in moderating and controling the contending statements of claim and defence through the whole series of alternate allegations.

We next state in our Recommendations the rules which carry into effect the foregoing principle of bringing the parties to an issue.

The first of these rules, upon which all the rest repose, is, *The plaintiff shall first state his cause of action in a Declaration. After the Declaration, the parties shall, at each stage, demur or plead by way of traverse or by way of confession and avoidance. And in case a party does neither, but confesses the right of the adverse party, or says nothing, the Court shall give judgment for the adverse party.*

This general rule connects the foregoing fundamental rule with all the subsequent rules of the whole system, and makes them auxiliary to its purpose of forming an issue in law or fact for determination.

Next come the rules relative to the general frame-work of special pleading. This frame-work consists of the Declaration, the Demurrer, the Traverse, and

the Confession and Avoidance. The preceding general rule makes it imperative on the Defendant, after the Plaintiff has stated his claim, to object to it by one or other of three modes of defence. And whichever he uses will lead to the formation of a distinct issue according to the fundamental rule of the whole system. The Demurrer will form an issue in law. The Traverse will form an issue in fact; and so will the Confession and Avoidance. The first will be decided by the Court, the last two, by the Jury.

Thus it is seen, that whatever course is taken in pleading, the parties are under the guidance of its fundamental principle of forming an issue. This they are compelled to do, or judgment will be given against the party declining to do so.

Having thus shown how the principle, of forming an issue, is embraced in the frame-work of pleading, we will now proceed to examine this frame-work in the order of its parts.

The Declaration, in the order of practice, would first come under consideration. But we are induced by the advantages of exposition which it will give, to postpone its consideration to a subsequent part of this report. The same reason has induced us to place the rules relating to it, in a subsequent part of our Recommendations. This will be more fully expounded when we come to consider the Declaration and its rules.

We will therefore, in accordance with the order of our Recommendations, begin with the Demurrer.

OF DEMURRER.

We have retained the Demurrer, but have confined its scope to matters of substance. Mere matter of form is no longer to be subject of Demurrer. This we think will be attended with no difficulties in practice; because we have abolished all those technical forms to which it was heretofore applicable. And we have given the Courts such ample power of amendment, as to enable them to compel the parties to plead in such a way as to conform to those principles of *substantial form* which we have expounded in a previous part of this report. There will therefore be no use for demurrer for mere form. And the practical advantages will be manifold, in getting rid of the delays and perplexities heretofore attendant upon demurrers for defects in form.

But while we have abolished demurrer for form, we have made the demurrer for substance, special. Heretofore, a general demurrer, which specified nothing, but merely stated that the pleading was insufficient in law, was all that was required to reach defects in substance in a pleading. We propose to change this and make the party demurring state in what particular the pleading is defective in substance. It is true, that in some instances, it will happen, that the general statement may be as specific as the case will admit of. In order not to be embarrassed by such cases, we recommend that the party demurring, shall first state that the pleading is bad in substance; and then state some question of law involving the

point which he intends to argue on the demurrer. This form will suit all cases and obviate every difficulty as to precision in statement of the cause of demurrer. We have given the form in our Recommendations.

That this mode of demurring specially for matter of substance, is an improvement on the method of general demurrer is manifest from the very reasons which the books on pleading give for the use of a general demurrer. "Where a general demurrer (says Mr. Stephen,) is plainly sufficient, it is more usually adopted in practice: because the effect of the special form being to apprise the opposite party more distinctly of the nature of the objection, it is attended with the inconvenience of enabling him to prepare to maintain his pleading in argument, or of leading him to apply the earlier to amend." Now, surely no ambuscades nor masked batteries ought to be allowed in proceedings devised for the administration of justice. We therefore, in accordance with the principles of juridical policy which we maintain in our general discussion on law-reform, recommend the special demurrer for matters of substance.

OF PLEADING OVER WITHOUT DEMURRER.

We will now consider the effect of pleading over without demurring.

We have proposed two rules on the subject which we think will answer all the exigencies of the case.

The first is, that where the declaration is defective in substance, and the defendant pleads over, and his plea supplies, by express statement, the defect in the declaration, such defect shall be cured. Thus in an action of trespass for taking a hook, where the plaintiff omitted to allege, in the declaration, that it was *his* hook, or even that it was in his possession, and the defendant pleaded a matter in confession and avoidance justifying his taking the hook out of the *plaintiff's hand*—the Court, on motion in arrest of judgment, held that as the plea itself showed that the hook was in the possession of the plaintiff, the objection, which would otherwise have been fatal, was cured. In this case, it appeared clearly to the Court, from the pleadings, that the plaintiff was entitled to recover. But the rule should be confined to an express statement in the plea of the fact omitted, and not extended to an implied statement of the fact. And it must too be confined in its scope to a mere omission of some fact or facts, otherwise the rule would trench upon the rule, that a plaintiff must recover upon the ground stated in his declaration, and not upon another disclosed by the defendant's plea, which will be considered in the sequel.

The other rule, which we propose on the point under consideration, is, that when the issue joined necessarily required, on the trial, proof of facts omitted or imperfectly stated, the defect shall be cured by the verdict. We deem this a good rule; because it seems futile, to object, after trial, to an omission in the statement of a cause of action, when the cause

of action has been found by a jury upon proof of it. But this rule is to be applied with caution. It lies so nearly upon the boundary between expediency and inexpediency, as to require circumspection on the part of the Courts in interpreting and applying it to cases.

OF TRAVERSE.

The part of the frame-work of pleading, next to be considered, is the Traverse or Denial. This is by far the most important part of the system; because of its more frequent use than any other, and the great difficulty which has been found in all eras of the law in developing its principles, and forming rules for its practical guidance. We propose great changes in this part of pleading. In the present system there are a great many forms of Traverse or Denial, called General Issues, and also a Special Traverse with an *absque hoc*. We propose to abolish all these forms of Traverse and substitute only two forms in their places.

Our reasons for this recommendation are these. The General Issues, instead of being alike in their scope, as the common name would import, are extremely diverse. Under some of them almost any legal or equitable defence may be given in evidence. They merely deny liability; and any thing which shows no liability can be offered in evidence. This abrogates the fundamental distinction between pleas by way of Traverse or Denial, and pleas by way of Confession and Avoidance, which the system of plead-

ing is theoretically studious to preserve, because the exigencies of fair trial require it, and yet in these general issues it is equally prone practically to disregard. In the most comprehensive general issues, while the plea is in denial, the evidence may be in confession and avoidance. Thus, the proof does not conform to the issue, as it ought always to do, to insure, in the long run, fair trials without surprise to either party. And besides this evil, as the general issues differ in comprehensiveness, a great many questions as to the admissibility of evidence thereby arise in practice. Under some general issues any defence, as we have said, can be given in evidence. But others are narrower, and others still more so, until the form of the issue from being nothing, because it admits every thing to be proved, becomes every thing, because it admits scarcely any thing to be proved. This certainly is an evil, producing anomalies in doctrine which ever lead not only to irregularities but to uncertainties in practice. And another evil is, that, under these general issues, but little may be known to either party of the real question in dispute. They leave the plaintiff entirely in the dark as to many matters which may be set up in answer to his case. The plaintiff is thus exposed to defeat, from causes, which, if he had known them, would have induced him to give up his claim, and have saved himself the vexation and expense of a trial. This ought never to happen. And though it may not happen very often, it happens often enough, to make it an evil.

We will now proceed to give our reasons for abolishing the Special Traverse with an *absque hoc*.

The great object of pleading, as we have all along labored to show, is to bring the parties, as soon as practicable, to a definite issue upon a question that involves the whole matter in controversy. In order to do this, the Courts, who have built up the system of special pleading for the purpose, have found it expedient to hold the parties to a strict way of stating their allegations, so that the allegations of one party shall be answered directly by the other, without leaving the sense to be collected from inference or argument. The Courts have, therefore, established it as a fundamental rule, that every affirmative in pleading shall be answered by an express and *direct* denial. On this ground, is based the rule against what is called *argumentativeness*. This rule excludes all *indirect* denials.

But the purposes of justice have been found to require, that, sometimes, matter which is merely an *indirect* denial of the adverse allegations should be pleaded specially. It is sometimes important, that the special matter of the defence relied on, should be stated in the plea, in order that the plaintiff may have the privilege of demurring to it, if he thinks it insufficient in law as a defence, without the delay, expense and trouble of raising the question of law upon the same special matter when brought out by the defendant in evidence upon a trial of the facts before a jury. It was to accomplish this purpose, without violating the rule against argumentativeness,

that this peculiar species of plea was invented. The plea contains two substantial parts, viz: an Inducement, and an Absque hoc. The Inducement contains the special matter which is an *indirect* denial of the plaintiff's case. The Absque hoc contains a *direct* denial of the plaintiff's case, and is added to the other, to conform to the rule against argumentativeness. As then, this special matter is pleaded merely to enable the plaintiff to demur to it, he cannot plead to it, and if he does not choose to demur, he must reply to the Absque hoc, by repeating the allegations of the declaration which that barbarous formula denied.

This is the most technical and subtle plea known to the system of special pleading. Very few pleaders have understood it. But its purpose is an important one; as it will sometimes save expense and trouble, and facilitate the settlement of a cause. It has too the important office of enabling the parties to withdraw the question of law from the Jury and to give it to the Court, where the question of law arises upon the defence.

We will now proceed to consider what we propose to substitute for the General Issues; and then, we will consider what we propose to substitute for the Special Traverse.

OF DIRECT TRAVERSE.

We propose to substitute in the place of the General Issues a Direct Traverse or Denial of precisely the same import as that now known in Common law

pleading as a Common Traverse. The Common Traverse, however, always contradicts *in the terms of the allegations traversed.* We do not propose that the Direct Traverse shall always contradict *in the terms of the allegations traversed;* because this would often lead to prolixity. But whenever it is convenient to do so, it should be done, in order to avoid the danger of gradually lapsing into too great generality of denial, and sliding back into the General Issues.

We propose therefore, that the Direct Traverse shall import a contradiction in the terms of the allegations denied. By this form of denial, the evidence will be plainly conformed to the issue; and the anomalies, relative to the admissibility of evidence under the General Issues, will be removed from the system of pleading. No evidence on the part of the defendant, but such as contradicts the allegations of the plaintiff, can be adduced. Matter of excuse or justification, or of discharge or release, will be excluded. The evidence will correspond with the form of the plea.

A rule, 45, embodying this proposal will be found amongst our Recommendations.

We also propose, under the head of Direct Traverse to make it imperative on a plaintiff, in any action for injury to person or character or property, when matter of excuse or justification is pleaded by the defendant, to deny in his replication the excuse or justification pleaded in the words of the excuse or justification; as is now done when the defendant's plea consists either of matter of *title* or *interest*, or

authority of law, or *authority in fact* derived from the plaintiff, or matter of record. By this change, we get rid of the anomalous replication *de injuria* and reduce pleadings in cases of this kind to the common standard. There is no reason, in the nature of the thing nor in the necessities of logic, that there should be a peculiar form of replication in such a case. It should therefore, as well for the sake of system, as for convenience in practice, be abolished.

A rule, 46, containing this proposal will be found amongst our Recommendations. It requires the plaintiff to deny in the words of the excuse, or to the like effect.

OF INDIRECT TRAVERSE.

We come now to what we propose to substitute for the Special Traverse with an *absque hoc*. It will be well to refer to what we have said, of the purpose for which this plea was devised. It was to enable the defendant to plead the special matter which constitutes his defence, in order that the plaintiff may know what it is, and may, if he thinks it not sufficient in law, demur to it, and draw away the question of law from the jury, and perhaps have the case disposed of without the expense and trouble of a trial by jury. And it is also conducive to a fair trial of a cause, that all special defences should be pleaded, so that the plaintiff may be prepared to meet the case and not be taken by surprise. It is for these practical advantages that we propose that the *indirect* denial shall be retained in practice. But as

the law now stands, such special defences, as amount to an *indirect* denial, cannot be pleaded except in the barbarous form of a Special Traverse with an *absque hoc*. Because unless the *absque hoc* be added to the special matter, the plea will be argumentative, and therefore bad. And this form of plea is so subtle and technical that but few pleaders ever pretend to use it, and the consequence is, that these special defences are generally withheld from the pleadings, and are given in evidence, often to the surprise of the plaintiff. But we have devised a mode of pleading an *indirect* denial without any of the technicalities with which it is now encumbered. It is true that the plea which we propose violates the rule against argumentativeness. But this is not a valid objection. The object of this rule is to compel the parties to come to issue. It supposes, that if *indirect* denials be allowed, the parties may plead on indefinitely, and never come to an issue. But we avoid this difficulty by proposing that when an *indirect* denial is pleaded, if the Plaintiff do not demur to it as insufficient in substance, he shall deny its allegations *directly* or else plead some matter of excuse or justification or of discharge. By either of which replications an issue will be formed. And that this mode of pleading is practicable, the present state of the law relating to Special Traverses shows. For, if the direct denial called the *absque hoc*, which is always appended to the special matter, be defective, it is allowable now to plead to the special matter either by direct denial or by confession and avoidance, which is what we propose.

We have embodied these recommendations in two rules, 47, 48, under the head of Indirect Traverse. The first rule proposes that all defences, except a direct denial, shall be pleaded specially. The second rule directs the mode of replying to an indirect denial.

Under this head, we have proposed a special rule, 49, for the purpose of excluding from the system of pleading the evils of the two general issues, *Non Assumpsit* and *Non est Factum*. It is true we have proposed by rule 44, that the general issues shall not be used. But this does not exclude from pleading all the evils incident to these two general issues. For we must, from the very nature of the subject matters of litigation, have pleas identical or equivalent in terms, with these two general issues; and accordingly, we have framed, amongst our Forms, such pleas, namely, "*That he did not promise as alleged*;" "*That the alleged deed is not his deed.*"

Now, these pleas or particular forms of negation, cannot but have the same scopes of the general issues, with which they are identical in terms. Because the scopes of the general issues are imparted to them by the principles of law which regulate their respective subject matters. Unless, therefore, these principles of law be changed, the same forms of negation must have the same scopes. For example: it is a principle of law relative to the subject-matter of the plea, *That he did not promise as alleged*, that a *promise* must be *implied* wherever there is an existing debt or liability. The plea, then, must be construed to import a denial of a debt or liability,

though, in form, it only denies a promise. Any evidence, therefore, showing a debt or liability can be adduced under this plea by the plaintiff, and any evidence rebutting it, can be adduced by the defendant. Unless, therefore, we change the principle of law, *That an existing debt or liability implies a promise*, the scope of the plea or particular form of negation must be the same, as that of the general issue, *Non Assumpsit*. The principle of law cannot be changed without producing confusion. We must, therefore, remedy the evil, through a change in the mode of pleading.

We are considering the general issue of *Non Assumpsit* only as it applies to *implied promises*. It may therefore, be thought, that the rule 53, which recommends that the statement of promises in the Indebitatus counts, shall be omitted; and the general rules which we have proposed for stating the causes of action; and the particular Forms of declaration, which we have framed (from 1 to 12 inclusive) to suit cases, where we now declare upon implied promises; and the plea, *That he never was indebted as alleged*, which we have substited for *Non Assumpsit*, in such cases, will obviate all the difficulties, in the present pleadings and rules of evidence, in cases of implied promises. But this is not so. The import of the plea, *That he never was indebted as alleged*, is such that any matter, which tends to show that there never was any *legal* obligation or liability,—such as fraud, infancy, coverture, lunacy and other like matters, can be given in evidence under it. It is, therefore, necessary to es-

tablish a rule requiring these matters to be pleaded especially.

The rules of pleading and evidence, which have grown out of the doctrine of *implied* promises, have been extended, by the Courts, to express promises; and a defendant is allowed, under the general issue, *Non Assumpsit*, when denying an express promise, the same latitude of evidence, as in cases of implied promises. The plea denying express promises must still be, "*That he did not promise as alleged.*" We have limited the scope of this plea, by requiring by rule 50, all matters in confession and avoidance to be pleaded specially. But, as any matter, such as duress and other like matters, which shows that there never was any *valid* promise, though there was a promise in fact, may, under the principles of pleading and evidence which we have been considering, be given in evidence, under this plea, it is necessary to institute a rule requiring them to be specially pleaded, just as in cases of implied promises.

We deem it unnecessary to enter into an exposition of the principles of law regulating its subject-matter, to show that the plea, "*That the alleged deed is not his deed,*" which we have amongst our Forms, must have the same scope, with the general issue, *Non est Factum*, unless it be limited by some express rule. It is sufficient to say, that any matter showing that the deed was void, or that it was delivered as an escrow, could be given in evidence under it, as completely as they could under the general issue, for which it is substituted.

In order, therefore, to draw out these defences of duress, lunacy, infancy, coverture and other like matters, into the pleadings, it is necessary to have a special rule requiring them to be specially pleaded. We accordingly have recommended such a rule.

Besides the general advantages of this rule, we gain uniformity. Under the plea of *Non Assumpsit*, matters, which show the contract to be void or voidable, can be given in evidence, while under the plea of *Non est Factum*, matters, which show the deed to be void, can be given in evidence, while such as show it to be voidable only, must be pleaded. By our rule both must be pleaded, under either of the substituted pleas.

OF CONFESSION AND AVOIDANCE.

The next subject which we will consider is pleas of justification and excuse, and of discharge and release, called pleas by way of confession and avoidance. As we have so reformed pleadings, by the Recommendations which we have been presenting, as to make the evidence conform to the form of the issue, matters of confession and avoidance cannot be given in evidence under the issue formed by a traverse. It is, therefore, necessary that they be pleaded specially. We have accordingly proposed a rule that such defences be pleaded, as they ought always to be from the inherent necessities of fair trial, and not be given in evidence where the form of the issue would indicate that the facts were denied, and not justified.

And besides, as justification, or excuse, is a conclusion of law which results from a given state of facts, that state of facts should be set forth in the pleadings that the Court may see whether they constitute such defence. And by the mode of pleading such defences specially, the adverse party has the same privilege of demurring to them, as he has to the special facts in an indirect traverse. And thus the views which we have expressed and argued, in regard to the propriety of pleading special defences, are fully embraced in our Recommendations.

In the law, in regard to pleas in confession and avoidance, there is a fiction called "Express Color." By this fiction, a plea which is in reality not a plea in confession and avoidance, is clothed in the garb of one. And in this guise it is introduced, where according to the substantial rules of pleading it could not be, but for this fiction. This form of plea was, like the Special Traverse, invented for the purpose of bringing the legal questions involved in the facts of the defence in the instances in which it is used, before the Court and withdrawing them from the jury.

We propose to abolish Express Color as well as all other fictions.

We have now passed in review the entire framework or machinery of special pleading. This machinery consists of the Declaration, the Demurrer, the Pleas of Traverse and the Plea of Confession and Avoidance. In our examination, we have not shunned any subtlety, however complex or attenuated,

that belongs to the subject. We have expounded, at large, that most ingenious of all the subtle contrivances of the ancient pleaders, the Special Traverse. We have done this, because it was designed to subserve an important purpose in the administration of law. And as we proposed to ourselves, to offer a substitute for it, based upon the principles which lie at its foundation, we felt that we could not do this, without showing its real character. For there is not a form, in the whole system of special pleading, that has not been devised to meet some often recurring exigency of justice. It is true, the ignorant ridicule Special Pleading; because bad workmen always complain of their tools, in order to hide their own want of skill. But those, who have a truly legal reason, cannot but admire the cautious niceties of its forms to ensure justice to suitors seeking redress in the temple of the law. For, though useless forms should be discouraged, it were a reproach to the law, to suppose that it encouraged no forms at all.

With this view of the subject, which we have enforced in so many ways in the course of this investigation, we felt ourselves called upon, by our duties as official reformers of the law of procedure, to examine cautiously but thoroughly into its true character in order to reform and not destroy. This view of our duty must be our apology for any seemingly too subtle and technical discussions into which we have entered, in a report to an unprofessional body like a legislative assembly.

Bespeaking therefore the indulgence of those,

whose duty it is to consider this report, we will now proceed to another branch of our subject.

RULES FOR FRAMING PLEADINGS.

It remains to consider the rules for framing the respective pleadings, that constitute the machinery of administrative justice, which we have exhibited as simplified by us.

The Demurrer is so simple in its form—its office being merely to raise some question of law—that it is unnecessary to say any thing more in regard to it than has already been said. We have given both the rules and the form by and in which it must always be constructed. The pleader, who is to use it, is, of course, supposed to be acquainted with the question of law which he purposes to raise by it. If so, he can have no difficulty in stating the question in the form which we have recommended.

The other pleadings, as they always embody statements of facts, are more difficult of construction, than the Demurrer; and consequently they require a large number of rules relative to the various combinations of facts which constitute causes of action and defences. Because the rules of pleading must be moulded according to the nature of the objects which they regulate; and in proportion to the diversity of these objects, must the rules be numerous and multiform; and the number of the rules only displays the more clearly the unity of the principle which pervades the whole. But still the rules are not as numerous as

might at first thought be supposed. For the logical conditions of all the possible combinations, which causes of action and defences can assume, are comparatively few, and can be stated in a few rules. These rules we will now consider.

The grand primary purpose, which all the machinery of pleading is designed to accomplish, as we have shown, is to bring the parties to an issue which involves the merits of the cause. All the rules, therefore, for the construction of the different pleadings have the same primary object. This is their purpose, and this is their sole scope. They direct the pleader, in whatever he does, in such a way as to accomplish this primary purpose of the whole scheme of pleadings. This must be kept constantly in view while considering the rules which we are about to recommend.

We have all along, at proper stages in our investigations, shown that useless formal technicalities are the cardinal vice of the system of Common law procedure. This then is the great evil to be remedied. We have shown how we have pruned off all forms from causes of action, and simplified the matter by having the same original writ for all personal actions except Replevin. We have shown too how we have simplified the process of Replevin, as well as made it more efficient in practice by meeting contingencies which are not provided for in the law as it now stands. And then, we showed how we have simplified the rules as to the joinder of parties; and still more important! we have so changed the doctrine of the

joinder of causes of action, as to disembarass the system of pleading, by this single device, of difficulties which alone, we think, would render our work of value in the administration of justice, if we had done nothing more.

It is now time to show how we have simplified pleadings.

In treating of what we termed the machinery of pleading, it has already been seen that we have greatly simplified the System. All the general issues, with the perplexities in practice produced by their differences in comprehensiveness, have been abolished; and so has the Special Traverse with its fine-woven cobwebs of doctrine; and also that perplexing fiction called "Express Color." But still there is much to be shown of what we have done towards simplifying pleadings. This will disclose itself more and more as we proceed, until we reach the *Forms* which we recommend. A comparison of these with those now in use will make what we have done manifest to direct inspection. But it should not be supposed that *simplicity in the forms* is all that has been attained. The system of doctrine has been rendered simple by abolishing anomalies and incongruities, and making uniform the admissibility of evidence so far as it is dependent on the forms of issues.

With these interlocutory remarks, which are thrown in, at this stage of our Report, to cast light back on what has already been recommended, in order that it may be reflected forwards on what is yet to be con-

sidered, so that a connection may be seen between the whole, and the light of a sort of logical perspective be shed from the several parts, down the whole line of thought, we will now proceed to consider the rules which we propose for the construction of the different pleadings, which we have recommended as substitutes for those now in use.

There are certain rules that apply to all pleadings from the declaration to the end of the series. These, to prevent repetition, as well as for the sake of the greater light of systematic views, shall be considered first; then, those which relate exclusively to the Declaration; next, those which apply to the pleadings subsequent to the Declaration. Under these three heads all the fundamental rules are embraced. Other rules, which are merely auxiliary, will afterwards be discussed under appropriate heads. And finally, the *Forms*, which we recommend, will be considered under the light which the whole discussion will have shed over them.

OF PLEADINGS IN GENERAL.

The first rule, 52, under this head, declares of what material, pleadings shall be constructed:—That facts, and facts only, are the proper material of pleadings: That arguments and inferences, and matter of law or of evidence, or of which the Court takes notice *ex officio*, are not material proper to be stated in a pleading. This is the broad basis upon which all other rules repose.

The next rule, 53, sweeps away an immense mass of matter that is now stuffed into pleadings: Statements; which are not required to be proved under the system, because they do not pertain to the merits of a cause, but are purely formal, and yet as the law now is, if they be left out of a pleading it is thereby liable to special demurrer for defect. Among these, are promises, in Indebitatus counts, which we have considered under what we have said of rule 49. This is another instance, in which it can be seen how our Recommendations abolish mere technical form.

The next three rules, 54, 55, 56, prevent a pleading from being obscure in its meaning, and also from being vitiated by superfluous matter.

The next, 57, is an important rule. It gives the Court the most ample power over amendments. In order that there shall be no doubt, as to the power of the Court over tricky pleadings, we propose that the Court shall have the power, in all cases of mere colorable or pretended amendments, and of all frivolous or vexatious pleadings, to set them aside. We wish this provision to be construed in its most ample meaning, so as to accomplish the purpose of putting the amendment of such pleadings under the unlimited control of the Court.

The next two rules, 58 and 59, make an important change in Pleadings. As the law now stands, if a

plaintiff sue on a deed to which he is a party and which is in his possession, he must make profert of it, that is, aver that he brings the deed into Court; and if the adverse party wishes to adduce any part of the deed before the Court, he must crave oyer, that is, pray to have it read. The whole deed, no matter how long and how unnecessary, is then set forth, and becomes a part of the pleading of the party who sues upon it. No such practice obtains in regard to writings not under seal. There is no reason why the two kinds of writings should be placed upon a different footing. If policy does not require it for the one class of writings it cannot for the other. It encumbers the pleadings with unnecessary matter and gives them a clumsy and useless form. We propose therefore to abolish profert and oyer, and permit a party pleading, in answer to any pleading in which a document is mentioned, to set out either the whole or any part of it as fair trial may require.

As by our Recommendation, 36, "no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer," profert of any document is thereby rendered unnecessary; as not making profert could only be objected to by special demurrer. But the rules, which we now propose, are necessary in order to direct how to plead when any document is mentioned or referred to.

We next, 60, propose that when any thing is alleged to have been done, that is shall be meant to have

been done in the mode required by law. This saves the necessity of putting useless statements into a pleading. This and some other changes for which we have proposed specific rules, are perhaps in effect accomplished by the abolition of demurrers for mere form: but we have, out of abundant caution, considered it most prudent to propose express rules upon the several cases.

Where the right of a party pleading depends upon the performance of conditions precedent, he ought to be at liberty to aver performance of such conditions generally; and the opposite party should be required to specify what condition precedent has not been performed. This would bring the parties speedily to an issue upon the merits of the cause. As the law now is, the defendant can deny every allegation of performance, even when he knows the conditions have been performed. We propose to abolish the rule as it now is, and to establish one which will compel the parties to rely exclusively upon the merits of the cause; and therefore have devised the rule 61, for the purpose.

The next rule, 62, confines the parties to the respective grounds they take in the declaration and the plea. This is the basis of the rule which requires the parties to come to an issue.

The next rule, 63, proposes that where any matter,

though properly coming from the other party, is essential to the apparent right of the party pleading, it shall be alleged by him at once.

The next rule, 64, bears upon the mere form of pleadings. It makes form entirely subordinate to substance; so that disputes at law shall be exclusively about matter of substance, and not of form.

The rule, 65, proposes to obviate a difficulty, in getting at the merits of a cause, from the strictness of the rule which requires the proof to correspond with the allegations. As the law now stands, in the instance to which the rule under consideration applies, the rule is extended beyond substance to mere form. A plaintiff may sometimes allege a greater title or estate than is necessary to sustain his cause of action; and though this is apparent on the pleadings, still if the defendant denies the title or estate to the full extent, the plaintiff must fail if his title or estate should not be proved to be as great as alleged, though he has a good cause of action sufficiently apparent on the pleadings. And a defendant is sometimes put in a similar predicament by alleging more in his plea than is necessary. We propose to change the law in this respect. It is however probable, that the evil can hardly ever occur in the system of pleading as simplified by us.

The other rules, 66, 67, 68, 69, under this head

are so obvious in their import, that we will leave them to expound themselves.

We have now concluded the consideration of the rules which apply to all pleadings. We will next consider the rules which apply to the Declaration.

OF THE DECLARATION.

The Declaration is the first step in pleading; and the chronological order would have required us to consider it first. But we found it important, to postpone its consideration until this stage of the inquiry; and to place its rules after those which apply to all pleadings, in order to prevent repetition.

The rules which we have just considered bear so fully upon the declaration that there are but few rules which relate to it exclusively.

The first rule, 70, requires that the Plaintiff shall recover only in respect of the ground of action stated in the Declaration and not in respect of another disclosed by the defendant's plea. This is the law now. It may perhaps seem to some to conflict with the first rule, 42, relative to the effect of pleading over without demurring. But it does not. That rule merely applies to the curing of a defect in the Declaration; as will be seen by turning back to what has been said in regard to it.

The next rule, 71, which relates to the Declaration is, that when the Plaintiff claims a right which is derogatory from the general law, or is founded upon an exception of any kind, that this character of his claim shall be explicitly set forth in his declaration. The object of the rule is to make the Plaintiff disclose the real character of his claim, at once, and to bring the parties speedily to an issue upon the merits. It is true that cases of the kind to which the rule points will seldom occur in practice. But they do sometimes occur, and have generally been attended with embarrassment in the pleadings, owing to the Plaintiff stating his case in his declaration in a general way, instead of specifying it as an exception. An instance of the kind is where a Plaintiff claims an exclusive right by prescription of fishing in an arm of the sea. The Plaintiff brings an action of trespass for fishing in his fishery. The Defendant pleads that the place is an arm of the sea in which every subject has a right to fish. Then the Plaintiff in his replication for the first time discloses his claim as an exclusive prescriptive right. We wish to circumvent all such prolonged and vexatious pleading. They always lead to much difficulty as to what the rejoinder should be.

The next rule, 72, is similar in purpose to the one just considered. It requires that in all actions on bonds with conditions, the Plaintiff shall notice the conditions and allege the breaches in the declaration.

As the law is now, great prolixity and confusion is sometimes the result of pleadings on bonds with conditions. In debt on a bond conditioned for the performance of an award, if the Defendant pleads that no award was made, the Plaintiff is required not only to reply that an award was made, which is a full answer to the plea, but he must also state a breach of the award. The rule which we propose will cut the pleadings short at the plea; as the Plaintiff will be compelled to state the breach of the award in the declaration.

The next rule, 73, proposes a short and plain mode of pleading in Libel and Slander. The mode of pleading in these cases is so peculiar, as to require a separate rule to be proposed for its simplification. Where the words used are not actionable in themselves but derive their slanderous and libelous meaning from extrinsic facts, it is now necessary to state these extrinsic facts in an introductory part of the declaration. The mode of doing this is, first, to state the facts in reference to which the words were spoken or written; secondly, to show that the words were published of and concerning such facts; thirdly, to connect the words with such previous facts. This is effected by technical forms called colloquiums and inuendoes. We propose that it shall be sufficient to state in what particular defamatory sense the words were used, and if it be proved to the satisfaction of the jury that the words were used in that sense, it shall be sufficient.

OF COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS.

We next, 74, propose the forms of the Commencement and the Conclusion of a Declaration. It will be seen by reference to them, amongst our Recommendations, that they are very simple. After the Commencement, in the form we have given, the cause of action will be stated in the modes which will be found in the Forms of Pleading, which we have given at the end of our Recommendations, and the Conclusion will be in the form we propose. This will be the whole structure of a declaration. No statement can possibly be more simple and more in accordance with the ordinary modes of thought, and yet give a fuller disclosure of the real cause of action. It is in striking contrast with the Form of declaration now is use.

OF PLEADINGS SUBSEQUENT TO THE DECLARATION.

The first rule, 75, under this head, which we propose, defines the scope of pleadings subsequent to the declaration. They must be an answer to the whole of what is adversely alleged. And the second rule, 76, is a consequence of the first. When a plea is not a full answer to the declaration, the plaintiff shall have judgment for what is not answered. And the third rule, 77, merely carries out still further the provision of the first. Matter not answered shall be considered as confessed.

The law is now somewhat different from what the second rule, 76, proposes. If a plea *professes* to answer the whole declaration, and does not, it is by the present rules of pleading a nullity: on the principle, that what is bad in part is bad altogether. We think that the law can be changed, with advantage, to what is proposed in our Recommendation. Let judgment be given for what is not answered, whether the plea professes to answer it or not.

The third rule, 77, makes also an important change in the effect of pleading. As the law now stands, if a party does not wish facts which he does not traverse, to be taken, as admitted by him, in another suit that may grow out of the same transaction, *he protests*, as it is termed, as to those facts—which is a *sham* denial made merely to save him from the implied confession of the facts not traversed, if another suit should be instituted, in case the present one should go in his favor. We propose to get rid of what is called *protestation* by the simple and just rule, that if the issue should be found in favor of the party traversing, the facts not traversed shall not be considered as admitted for another suit. The protestation accomplishes this end. But why have such a senseless form, when the end can be attained by a simple rule, without any form for the purpose being put into the pleading?

The next rule, 78, is the law now. And so of the next two rules, 79 and 80.

The next rule, 81, embodies the law very nearly as it now stands. The concluding part, which makes a general denial or a denial, that the whole sum of money is not due, mean that no part of it is due, makes a change of importance in practice. For there are many cases in the books where the pleadings had to be amended because of the difficulty created by this general mode of denial.

The next rule, 82, is of kindred import. Its design, like others which we have proposed, is to remedy the evil of pleading too broadly, and thereby letting the real issue slip through the alternate pleadings. It compels a party, who is to answer a pleading, which is too broad, to plead in such a way as to narrow the pleading of his adversary, by denying it in a way that will enable him to sustain himself, if he really have a cause of action but less general than the one stated. This evil, it is hoped, will hardly ever occur in practice with the rules for specific statement which we have proposed, but if it should occur, it is well to have a rule to meet it.

The next rule, 83, grows out of the same difficulty with the preceding. It proposes that where the Plaintiff tenders such a traverse to the Defendent's plea, as to enable himself to recover without proving his right, the pleading shall be amended. It will perhaps be a little startling, to even the most experienced lawyer, that the exigencies of justice should be thought to require such a rule. But there have

been cases, where judgments have been given for a Plaintiff, though he had proved no right in himself; owing to the issue formed by the pleadings being too broad. As for instance, in an action of trespass for fishing in the plaintiff's fishery, the defendant pleads that *all* persons have the right to fish in it, and the plaintiff replies that *all* persons have not the right. Upon such an issue the plaintiff would recover by showing, that it was the separate right of any person; and his own right might not come into controversy at all. Just such a case as this, was argued several times in the Exchequer Chamber in England, before the Court could bring themselves to reverse the judgment. Though the Court did at last say in their judgment, that "from the moment it appeared, that upon the pleadings the plaintiff might have recovered a verdict in an action of trespass, without having either possession or right, it seemed very difficult to support the judgment." This case shows what a cunning device is sometimes required to insure justice against the arts of sophistry.

The next rule, 84, proposes to change the law, so as to prevent suits from being ended, from an error in pleading called a discontinuance. As the law now is, if a defendant's plea does not answer the whole of the declaration, the plaintiff may have judgment for the part not answered; and demur or reply to the plea as to the part that is answered. But if instead of taking judgment for the part of his declara-

tion not answered, he should demur or reply to the plea, the action will in contemplation of law be discontinued. Such a consequence, it seems to us, ought to be prevented.

The next three rules, 85, 86 and 87, embody the law as it now is; except that what is to be accomplished in the last of the three, by *motion*, is now attained by demurrer.

We propose a remedy in the next rule, 88, for a difficulty for which there is none now. Its import is too obvious to need much explanation. It may happen, because it has happened, that in a pleading there shall be two affirmatives which do not impliedly negative each other. In such a case, there is now, no rule for the solution of the difficulty. We propose that the party to plead next shall deny the last affirmative, and that the first shall be a nullity.

The rule which we are now about to consider, 89, is very important.

It certainly comports with every notion of justice, that the parties to an action should be at liberty, to place before the tribunal which is to decide upon their disputes, all the grounds upon which they can fairly rest their claim or defence. But then it is clear to all who have experience in judicial investigations,

that some limit should be put upon the liberty to plead or reply several matters whether of fact or law. These seemingly conflicting views of the matter have much embarrassed the Courts at different eras of the administration of the law. To devise a rule, which will afford sufficient liberty to the parties of presenting all the grounds of their claim or defence, without allowing them a license which they can abuse, is more difficult than the mere amateur lawyer, who knows law only in the books, is likely to appreciate. We have, therefore, devoted much consideration to the matter and have determined that the most expedient course is, to give the fullest liberty to the parties subject to the discretionary control of the Court. The discretionary control of the Court is better than any fixed rule of limit; because a fixed rule must in some cases operate unjustly. Whereas, if the Court be wise, its discretion in controling the liberty of the parties will never work injustice. A rule, in such a case, cannot by possibility anticipate and provide for every contingency: but a wise discretion can provide for it when it does arise. And to prevent the discretion of the Court from being exercised arbitrarily, we have so devised the rule which we propose, as to limit the discretion of the Court by the affidavit of the parties. And then again, we have checked the parties, not only by their oaths but by the superaddition of costs. So nice are the balancing of motives, when we come to contrive devices to secure a proper administration of justice in human

tribunals, where the tribunals themselves are subject to like passions with the litigants.

By the pleading rules established in England in 1834, plaintiffs and defendants were respectively confined to but one statement of their cause of action and defence, however complicated might be the facts out of which they arise, or doubtful the construction to be put upon them. The effect of this strictness was found in practice so unfavorable to justice, that the Common law Commissioners, in their Report in 1851, recommended that the discretion of the Court be substituted for the rules of 1834. And Parliament, in its general Statute on practice and pleadings, adopted the recommendation of the Commissioners. And thus the law has been brought back to the policy of the Statute of 4th and 5th Anne. ch. 16 sec. 4. Before that Statute, a defendant could plead only one defence to the Plaintiff's claim, no matter how many valid legal defences he had. But as the rule was found, in experience, to operate injustice, the Statute of Anne gave the defendant the liberty to plead several pleas to the same claim or complaint, "with leave of the Court." This continued to be the law, until 1834, when the ancient strictness was restored to practice. But experience of its injustice has restored the policy of the Statute of Anne, of leaving it in the discretion of the Court, whether several pleas should be pleaded to the same claim or complaint or not, and has extended the principle beyond the plea, to which the Statute of Anne confined it, to all subsequent pleadings. We propose the policy to be adopted

which has thus been vindicated by experience in different ages of the law.

We come next to rule 90, by which we have swept away, from all pleadings subsequent to the Declaration, a mass of technical forms, which correspond to those which our Recommendations, already considered, have pruned off from the initiatory process and the declaration.

And by rule 91, we further abolish the technical forms of pleas, and propose a form of plea which is so simple as to meet, it seems to us, the fullest demands of a common sense system of law procedure.

And we still further, in rules 92 and 93, strip off mere technical form, by enabling a party, to plead any defence, which may arise after the commencement of the action, or after the last pleading, without any other form, than that, which the substance of such pleadings must necessarily have in the language which expresses them the most obviously.

By rules 94, 95 and 96, we propose that in all actions, except those into which some degree of criminality enters, (which are enumerated,) the defendant, or one or more of several defendants, shall be at liberty to pay into Court, a sum of money by way of compensation or amends; and the plaintiff shall ei-

ther accept or reject the sum so paid in. And in case he shall reject the sum, and the jury shall find that it is sufficient, the defendant shall have judgment, and his costs of suit. And a proper form of plea is proposed for the case.

We have thought that it is important to encourage a settlement of cases without trial; and this rule has been devised for that purpose. It considers equally the rights of plaintiff and defendant. If the plaintiff do not accept the sum of money pleaded as sufficient, he runs the risk of losing his demand altogether. This will make him pause before he risks a trial. And as the defendant is precluded from denying the claim of the plaintiff, if he pleads a sum in satisfaction, so far as the matter to which it is pleaded is concerned, it is not to be supposed that he will make such an offer except in cases where justice requires it. We therefore think our Recommendation is discreet; and does justice to both parties, and is sufficiently encouraging to a settlement without trial.

We have excluded certain cases which involve an injury to the plaintiff's feelings, as not properly within the justice of such a rule. Because, we think that in such cases a plaintiff ought to be hindered by no rule in having ample justice done to him. If he brings such an action on slight grounds, the defendant cannot be damnified. Therefore, when he has a just cause, he ought to have that free course of redress which will deter men from outrages upon their neighbors. This is our view of those civil suits which savor of penal justice. And accordingly we propose to

make them exceptions to the rules under consideration.

There are certain causes of action which may be considered to partake of the character both of breaches of contract and of wrongs. It may therefore sometimes be doubtful whether the plea should treat the declaration as framed for a breach of contract, or for a wrong. We therefore propose by rule 97, that the plea shall not be defective in form which ever way it is framed.

There are certain pleas, which are distributive in their character, that is, can be applied to more matters than those to which they are expressly pleaded. We propose by rule 98, that in such cases, they shall be applied to all or so much of the causes of action as they can be applied to; and that the verdict shall adjust the cause accordingly between the Plaintiff and Defendant.

By the next rule, 99, we propose a simple form of plea which will amount to a direct denial of the substance of a plea or any subsequent pleading, and a joinder of issue thereon.

The next rule, 100, compels a party, in case of a direct denial merely to add a joinder of issue.

The next rule, 101, is similar in its purpose with the preceding. Wherever the defendant cannot take any other issue, without a departure, than the one formed by his plea, the plaintiff may cut the pleadings short at once, by adding a joinder of issue for the defendant.

Rules 102 and 103, relate to defects in pleading; and sufficiently explain their own import.

Rule 104, is intended to dispense with the practice of the Defendant's verifying, by affidavit or affirmation, the plea of *non est factum;* and of an heir, executor or administrator being required to obtain leave of the Court to plead such a plea: as required by the Act of 1785, Ch. 80, sec. 3. It is true, we have abolished all general issues; and therefore, there is no such plea, under the new system, as that contemplated in the Act. Yet as we have a plea in the same form of negation, it is well to have the rule under consideration, to prevent disputes, as to the effect of abolishing general issues on the Act 1785, Ch. 80, sec. 3.

The rule is not intended to dispense with the requirement of the Statute 4th Ann, Ch. 16, that the truth of all dilatory pleas be proved by affidavit.

OF NEW ASSIGNMENT.

A defendant sometimes intentionally, and sometimes by accident, so pleads, as to evade the plain-

tiff's cause of action as it is set forth in the declaration. It then becomes necessary, for the plaintiff to restate his cause of action with more particularity. This is called *new assigning*.

In adjusting the rules necessary to prevent the evil growing out of such a case, regard must he had to the obvious importance of compelling a plaintiff so to disclose his case in his declaration, as to prevent a defendant from evading it by his plea, and also, so to restrict the defendant, if he should do it, in his pleadings to the new assignment, as to prevent him from doing the same thing again, and also to make him come to issue speedily.

The three rules, under this head, have been devised to effect the policy of these views. But it is hoped that the rules of pleading which we have devised for pleadings in general will obviate the necessity in practice for new assignments.

RULES WHICH MAKE THE ISSUE A CERTAIN ONE.

We have considered fully the general rules for framing the machinery of pleading. We now will consider others which are merely auxiliary in making the issue certain. The rules which we have considered, do, of course, contribute to the same result: but still, these auxiliary rules are necessary, to point more specifically to certain matters of which pleadings are composed, that could not be well stated in the more general rules which we have considered.

OF NAMES OF PERSONS.

The first class of these rules relates to the names of persons, whether parties to an action or only mentioned in a pleading. It is of course indispensable to all just legal procedure that the parties, meant to be affected by it, should be designated so as to be identified as the proper persons. At the same time, it is expedient, that the mere misnomer of a person, whether party to the action or not, should not be entirely fatal to an action; provided the person intended to be reached by the process is actually reached, and it can be made so to appear to the Court. And it is further expedient, that all errors of misnomer be corrected in the speediest and least expensive mode consistent with justice. We have devised three rules, intended to carry into effect these views, which are amongst our Recommendations.

OF TIME.

In rule 53, which we have already considered, it is proposed that time, when it is not material, need not be stated in any pleading. This rule, therefore, applies to time, only when it is immaterial. It, therefore, remains to provide some rule for the statement of time when it is material. In order to designate time accurately it is indispensable to state it in three divisions. The year, the month and the day must be particularized. And when an act is continuous, its duration must be added to the statement. The rule we propose embodies this view of the subject.

OF PLACE.

The rule, 53, also does away with the statement of place when it is immaterial. We propose, therefore, that when it is descriptive of the subject matter of the action and forms part of the substance of the issue, that it shall be stated. No rule, as to the mode in which place shall be made certain in description, can be given like that applied to time. Because place is multifarious, and not simple like time.

OF QUALITY OR KIND.

When property is involved, in any degree, in a suit, it is necessary to designate it. The first legal designation is *real* or *personal*. But this is not sufficient to identify it. It must be so described as to distinguish it from all other real or personal property.

As regards personal property, this is done by specifying its kind. We have, therefore, in our Recommendations, used the word *kind* as more appropriate than the word *quality* which the law uses; the word *quality* being commonly used to signify degree of excellence, and not specific difference as it is required to signify in this instance. As the distinctions of kind are matter of common and not legal designation the exigencies of pleading need no other rule on the subject, than that personal property shall be described by its kind, as *wheat, rye, household furniture, &c.*

But real property requires to be described in a different mode. Its place or location is its fundamental

element of designation. It can be accurately designated only by artificial or imaginary lines separating it from all other real property. But, as in actions for injuries to real property, it is oftener the mere fact of the injury or the title, than the lines, which comes into dispute, it is expedient that the plaintiff should not be confined to a description by courses and distances, but be permitted to use other easier modes of description when he pleases to do so. And accordingly the law has always allowed it. But then the plaintiff may, in his declaration, describe the property by the general name of *his close*. This indefiniteness of description, upon the plea of *liberum tenementum* being pleaded by the defendant, compels the plaintiff to new assign, as it is called, and describe the property more accurately. This circuity and the consequent delays, ought to be prevented, by compelling the plaintiff to describe the property in the declaration so as to identify it. The Act of Assembly, 1852, Ch. 177, sec. 10, was, perhaps, intended to remedy this evil: but the section is so inaccurately worded as to be of doubtful import, as has been proved in practice in cases coming within our own experience. We therefore recommend that the plaintiff be required so to describe the property in his declaration as to identify it. The rule which we have proposed is so worded as to embrace injuries to chattels as well as to other interests in land or real property. For though, in law, chattel interests in lands are considered personal property, yet their nature is real,

and therefore, they must come under the rule for describing real property.

OF QUANTITY AND VALUE.

By rule 53, it is not necessary to state quantity or value when they are immaterial. But when they are material they of course must be stated. Like time, quantity and value can be measured, and therefore must be stated with reference to certain known standards, in order to make them certain. We propose a rule which embraces this principle.

We also propose that a verdict shall not be for a larger quantity or value than is alleged. This is the law now, and is founded, we think, on good policy.

OF TITLE.

There are many different degrees of right in property, personal and real. Each of these degrees of right can be injured. When therefore an action is brought for an injury to any right in property, it is not necessary to disclose any fuller title than will sustain the right which it is alleged has been injured. The plaintiff may have a mere title of possession, and the injury complained of may be, that the defendant broke and entered the close, which is an injury to the possession for which the law will give damages. In an action for such an injury it is only necessary for the plaintiff to state a title of possession. So of personal property, if the interest of the plaintiff be absolute as owner, or only special as a carrier or finder,

for any injury to the property it is only necessary to allege title of possession. It is obvious that justice does not, in either case, require the plaintiff to disclose any more title than is necessary to show the right which has been injured.

So, a person may be responsible to another in respect of property, personal or real. In such a case, it is only necessary to allege title in the defendant sufficient to show liability. Justice requires nothing more.

By rule 65, which we have considered under the head "Of Pleadings in general," we have proposed that if a plaintiff shall allege a greater title than is necessary to sustain his cause of action, he shall not be compelled to prove more than is necessary to sustain it. It is now seen, that the rule is founded upon principles of justice and fair trial. Because if justice does not require him, as we have just shown it does not, to state any more title than is necessary to sustain his action, if he should erroneously do so, he ought not to lose his action on that account. That rule and those which we propose under the head which we are now considering, are accordant in principle, and are intended to accomplish one and the same object.

It seems there is an exception to the doctrine that it is sufficient to allege mere title of possession against a wrong doer. In Replevin for cattle taken damage feasant, if the defendant plead that he is possessed of a messuage and entitled to common of pasture as appurtenant thereto, and that he took the cattle damage

feasant, such mere allegation of possession will not be sufficient. He must allege a larger title to the messuage and common of pasture. There is no reason of expediency for such a doctrinal exception. If the defendant had brought an action of trespass for the very same damage, which he pleads the cattle were committing, the allegation of mere title of possession would have been sufficient to sustain his action. We therefore propose a rule abolishing this exception. Perhaps such a case cannot occur in Maryland.

When a person entitled to a right of way or other incorporeal hereditament, as it is called, over the land of another, in respect of his possession of another piece of land, sues for any injury to such right of way, or other incorporeal hereditament, he is allowed, in his declaration, merely to declare upon his possession of his land, and that by reason thereof, he has the right of way. This is all he is required to state of his title, no matter what it be. But if he should be sued by the person over whose land the way runs, for a trespass, and he should justify under his right of way, he is compelled, in his plea, to state his title to his land, in respect of which the right is claimed; and also the particular ground of his right, as whether it be claimed by grant, by prescription, by express reservation, or by some other mode. This renders the pleadings on the part of a defendant various and difficult. Now, there can be nothing in the nature of things requiring the right to be stated more precisely in a plea than in a declaration. If the general statement in the declaration gives sufficient description of

the right, why will it not do the same in a plea? The title, no matter what it be, is involved, in a denial of the injury coupled with the general statement in the declaration. Then, if the same general statement of the right be set-forth in a plea, and it be denied in the replication, why will it not involve the title too? Of course it will. Pleadings then, in suits relative to incorporeal rights will be greatly simplified, if we make the same general description of the right, which is allowed in declarations, answer for pleas also. Because, not only will the same form of statement answer for declarations and pleas, but one general form will answer for the plea, no matter whether the right be by grant, prescription or otherwise. We therefore have proposed a rule, 119, by which these views are carried into practice in our simplified pleadings.

OF DERIVATION OF TITLE.

In actions concerning property, there are two things to be stated, the title itself, and the derivation or commencement of title. If the title be an absolute one as a fee simple, it is not necessary to state a commencement of it. But if the title be less than a fee simple, it is necessary, as the law now stands, to state the commencement.

We propose that it shall not be necessary to allege the commencement of a particular, any more than of a superior estate, unless it is essential to the merits of the cause.

But when a party claims by inheritance, he shall allege how he is heir, because the merits of the cause are involved in such an allegation.

And where a party claims by conveyance, he may, as the law is now, state the conveyance according to its legal effect. In this we propose that the law remain as it is.

RULES WHICH MAKE THE ISSUE A SINGLE ONE.

Singleness in pleading is of two kinds. First, that which permits only one pleading at each stage of a cause. Second, that which permits only one ground of claim or answer in the same pleading. The first kind of singleness we do not think is required by the demands of fair trial. We have therefore, already, recommended that a party be permitted to join as many causes of action and to plead as may defences or replies as he chooses, subject to the control of the Court.

But the second kind of singleness, which does not permit more than one distinct cause of action or answer in the same pleading, we think, is required by the exigencies of fair trial. The entire purpose of pleading to an issue—to have a definite point before the jury—would be defeated, if the issue were to be constituted of several independent questions. We therefore propose that each cause of action, and each defence and each reply be stated in a separate paragraph and be numbered. And in case a pleading

shall be constructed in violation of this Recommendation, that the Court or the Judge shall have power to correct it at the cost of the party so pleading.

We have now presented all the rules which we recommend for the construction of the pleadings as simplified. All these rules conduce to form pleadings which end in single issues involving the merits of the cause. This, we have shown, throughout the whole report, is the sole end of the Common law pleadings; and the great end to be accomplished to secure a proper administration of justice. All our reforms have been directed towards the attainment of this end more speedily and certainly than is now done.

OF JUDGMENT.

As we have abolished all forms of action, so that debt and damages may be joined in the same declaration, in order to make this effectual, we propose that when a plaintiff recovers a sum of money, the amount to which he is entitled be awarded to him by the judgment generally, without any distinction being therein made whether such sum is recovered by way of debt or damages.

We further propose, that all judgments shall be merely a statement, in common language, of the award of the Court without regard to the forms of action heretofore existing.

By these Recommendations, all technical form, from the original writ to the judgment, is pruned from the system of pleading and practice. The whole

judicial dispute must be exclusively about the merits of a cause.

JUDGMENT *NON OBSTANTE VEREDICTO.*

Though a judgment against a verdict can hardly ever be required, yet we have thought it advisable to embody in a rule the condition on which such a judgment can be rendered.

REPLEADER.

Though repleader, we hope, can never be required under the simplified pleadings, we have proposed a rule to meet such a contingency.

ABATEMENT.

Pleas in Abatement occur in an action before Pleas in *bar*. But as they are seldom used in practice, we deferred the consideration of them, until after we had considered the other more common and important pleadings in an action. These pleas do not deny the right of action itself, but allege some fact, showing that the particular action ought not to be enforced; and at the same time they enable the plaintiff to institute a proper action, or as the books state it, give him a better writ.

There is no part of special pleading more subtle than the doctrine of Pleas in Abatement. If matter which goes in *bar* be pleaded with a commencement

and conclusion in *abatement*, it is a plea in abatement; if it only *conclude* in abatement, it is a plea in bar; if a plea containing matter in *abatement* concludes in *bar*, it is a plea in bar; if a plea beginning in *bar* contains matter in *abatement* and concludes in abatement, it is a plea in *bar*.

There are also difficulties in determining when the plea shall only *conclude* with a prayer of judgment; and when it shall both commence and conclude with a prayer of judgment; and also when the prayer of judgment shall be of the writ only, and when of the writ and the declaration. And there are many other equally frivolous subtleties relative to the form of Pleas in Abatement.

We therefore propose that the formal part of Pleas in Abatement be disused; and that the substance of such pleas be pleaded without any prayer of judgment, or formal commencement and conclusion. We also propose to abolish prayer of oyer in such pleas. This will release this portion of pleading from its vexatious subtleties.

We also propose, that in a plea for the non-joinder of defendants, it shall be necessary to allege not only that the persons not joined are living, but also, that they are residing in the county or city where the suit is brought.

These proposals are embodied in our Recommendations under this head.

MOTIONS.

Defects in form may occur, in the pleadings proposed by us, that may need to be amended. We have therefore, in the rules which relate to form, recommended that defects in form be amended upon motion. We now therefore propose, that all motions, required by the rules proposed by us, be in writing, and that they assign reasons; but that no particular form be required for such a paper.

GENERAL PROVISIONAL RULES.

As it is impossible to ascertain all the possible exigencies of administrative justice, rules cannot be prescribed for all cases of practice. We therefore propose, that, when any matter of pleading does not come within the rules which we have recommended, nor within some rule now in practice not inconsistent with our Recommendations, it shall be provided for upon the analogies of the rules which we have recommended. The pleader can frame the pleading to suit his case; and the Court can, upon motion, determine whether it be correctly framed.

We propose that all laws as far as inconsistent with our Recommendations be repealed. But we recommend, that the laws and usages of this State relating to pleading, practice and proceedings in civil actions, as far as they are not inconsistent with the rules proposed by us, and operate in aid of our Recommendations or supply omissions, be continued in force.

FORMS OF PLEADINGS.

We have thought it provident, to furnish forms of the most usual pleadings, constructed according to the rules which we have recommended. After the minute exposition of those rules and the elaborate general discussion of the principles of the Common law pleadings which we have presented, it can hardly be necessary to remark upon the character of the Forms of Pleadings which we have prescribed.

It will be observed, that the first twelve declarations state the cause of action in the same form, "for money payable by —— to —— for." It is convenient when a set phrase will clearly express a general idea in regard to many different causes of action, to employ it. It allows the pleadings to be put into a more simple and succinct form; and especially when several different causes of action are joined in the same declaration. It will be seen, that all the twelve different causes of action can be joined in the same declaration, by merely employing these words in the statement of the first cause of action. This saves trouble and expense. And besides, the declaration is more easily scanned and understood, than when a different set, of words denoting liability, is employed in stating each cause of action.

But as great as this advantage is, in framing and also in understanding the declaration itself, a still greater and more important advantage is gained, by being thereby enabled to frame a plea in one general form which will answer all the twelve causes of ac-

tion joined in the declaration. By this structure of the declaration, the first plea which we have given, "That he never was indebted as alleged," answers all the twelve causes of action distinctly by a direct denial; and in entire conformity to the principles and rules of pleading which we have recommended. We have proposed, that the Direct Traverse or Denial shall import a denial in the words of the allegations denied. This denial therefore must be so construed. We have said that in order to avoid prolixity it will be better sometimes, not to deny in the words of the allegations traversed. The plea under consideration is an instance of the kind, and it can be used without the least danger of giving it the generality of the general issue in debt on simple contract, *nil debet*. The general issue, *nil debet*, involves a double construction, *that he never owed the debt*, or *that he has paid it*. And thus, by this general issue, the distinction between a traverse and a confession and avoidance is abrogated. Because *nil debet*, (*does not owe*,) is adapted to any kind of defence that tends to deny an *existing debt*. Therefore, not only a defence denying an original indebtedness, but the defences of release, satisfaction, arbitrament and many others are applicable to such a plea. But the plea which we propose does not admit of a double construction. It throws the defence back to the original indebtedness; and consequently neither payment nor any thing in confession and avoidance can be given in evidence under the issue formed by it. The denial is in such a form as not to let in testimony of matters subsequent to the original indebtedness.

All the other declarations and pleas and other pleadings, which we have prescribed, are so obviously in conformity to the rules which we have recommended, that it would be superfluous to comment on their structures. We therefore merely refer to them, for their simplicity in comparison with the old forms.

In the employment of language in our work, we have studiously used the language of the law; because this language is familiar to the Bench and the Bar, and in a great measure, to the people. And its homely terseness goes more readily to the understandings of those, who frequent Courts of justice on business, than the more polished diction of modern thought. And besides, a change in the language of the law would produce confusion even with the profession, and could lead to no practical advantage even after the substituted language came to be understood. A change in language has a great show of reform: but that is all.

The consideration of the action of Ejectment, on account of its importance and its special character, will be presented in a special report.

Since the session of 1854, when this Report was laid over, by the General Assembly, for want of time to act upon so important a measure, we have reviewed the whole subject of which it treats, and have striven to find out the defects of its Recommendations, and have, we believe, improved them by emendations,

excisions, substitutions and additions. We have in this, as in all our other Reports, kept constantly in mind, the high purpose of our work—the improvement of the administration of justice;—and endeavoring to elevate ourselves to the height of our duty, have labored with an assiduity that never faltered in the midst of difficulties so various and often so opposite, that wisdom was hardly more needed than boldness, to pursue a determinate path. We feel assured, that a thorough reform of law-procedure requires a patience in examination and a minuteness and comprehensiveness of consideration, of which not even the most experienced practitioner of the law can form an adequate notion, unless he has himself been engaged in the work. Besides the multiplicity of details to be brought under definite general rules there is an interdependence, of parts often anomalous and founded on no uniform policy, but so long established, as to have moulded the principles of jurisprudence themselves and therefore incapable of being torn away without mutilating the body of the law itself, that has to be adjusted and maintained in the simplified modes and forms. An example of this is found in what we have done to extricate pleadings from the vices of the general issue of *Non Assumpsit*. We had to extract the principles of law, which regulate the matters of litigation, to which this plea applies, and to frame declarations and pleas in such modes as to leave these principles untouched, while we obviated the vices of the plea, as far as it could be done in this way; and then to institute a positive rule

requiring matters to be pleaded, which these principles of law would still suffer, notwithstanding the new declarations and pleas, to be given in evidence, under the form of negation in *Non Assumpsit*, which the nature of the subjects of litigation make it necessary to retain. Pleading, therefore, the difficulties of our task for the imperfections of our work, we submit this, our First Report, to the Honorable, the General Assembly of Maryland.

WILLIAM PRICE,
SAMUEL TYLER,
FREDERICK STONE.

January, 1855.

NOTE. As, in the division of labor, this Report has been prepared by Mr. Tyler, he is more especially responsible for its doctrines, its reasonings, and its Recommendations.

RECOMMENDATIONS MADE IN THE FOREGOING

REPORT.

CHAPTER 1st.

TITLE FIRST.

OF ORIGINAL WRITS.

1. All personal Actions, except Replevin, brought in any Court of Law in this State, shall be commenced by Writ of Summons; and the said Writ shall be issued by the clerks of the said Courts respectively, directed to the Sheriff or other proper officer.

2. It shall not be necessary to mention any Form or Cause of Action in any Writ of Summons.

3. Every Writ of Summons shall contain the name or names of the Plaintiff or Plaintiffs, and of the Defendant or Defendants; and shall state the day and the place when and where the Defendant or Defendants is or are to appear to answer the Action; and shall bear date on the day on which the same shall be issued; and shall be tested in the name of the Judge

of the Court from which it shall issue; and shall be signed, and sealed with the seal of the Court, by the Clerk thereof.

4. The Writ of Summons shall be in the following form:

"——— County (*or City*) to wit:

State of Maryland to the Sheriff (*or other proper officer*) of ——— greeting:

You are hereby commanded to summon (*here insert the name or names of the Defendant or Defendants*) of ——— (*County or City*) to appear before the (*here insert the name of the Court*) to be held at (*here insert the name of the place*) in and for (*here insert the name of the County or City*) on the ——— day of ——— next, to answer an Action at the suit of (*here insert the name of the Plaintiff or Plaintiffs.*)

And have you then, and there, this Writ. Witness, the Honorable ——— Judge of the said Court, the —— day of ——— in the year &c.

(Signed)

———, Clerk."

5. Before the issuing of any Writ of Summons, the Plaintiff or Plaintiffs, or his, her, its or their Attorney, shall deliver a Memorandum in writing according to the following form, or to the like effect:

"A Plaintiff against C. B., } E. S. Clerk of the
or
against C. B. and D. E. } Issue in this case.

Brought the —— day of ——— 18—

(Signed) ———"

Such Memorandum to be delivered to the Clerk of the Court, and to be dated on the day of the delivery thereof, and signed by the Plaintiff or Plaintiffs, or his, her, its or their Attorney.

6. If any Defendant or Defendants named in any Writ of Summons shall not have been served therewith, by the return day of the Writ, such Writ may be renewed, at any time before the next term of the Court, and be returnable to the same, and may be so renewed and returnable again to succeeding terms, as long as may be necessary; and a Writ of Summons so renewed shall remain in force and be available to prevent the operation of any Statute whereby the time for the commencement of the Action may be limited, and for all other purposes, from the date of the issuing the original Writ of Summons.

7. The Sheriff or other person serving the Writ of Summons, shall endorse on the same "Summoned" or "Can not be found" or "Is dead" or as the case may be. And such endorsement shall be sufficient evidence of the fact endorsed.

8. The service of the Writ of Summons shall be as heretofore personal.

9. In any Action brought against two or more Defendants, if one or more of such Defendants, only, shall appear, and another or others of them shall not appear: provided the Writ of Summons has been served upon such as do not appear, it shall be lawful for the Plaintiff or Plaintiffs to declare against all of the Defendants, and proceed as if they all had appeared.

10. A Defendant or Defendants may appear at any time before judgment; and if he, she, or they appear after the time specified in the Writ of Summons, he, she or they shall, after notice of such appearance to the Plaintiff or Plaintiffs, or his, her or their Attorney, as the case may be, be in the same position as to Pleadings and other proceedings in the Action, as if he, she, or they had appeared in time: provided always, that a Defendant, appearing after the return day in the Writ, shall not be entitled to any further time for pleading or any other proceeding, than if he had appeared within the appointed time.

11. The mode of Appearance to every Writ of Summons, shall be by delivering a Memorandum in writing according to the following form, or to the like effect:

"A Plaintiff against C. B., or against C. B. and another, or against C. B. and others. } The Defendant C. B. appears in person, or S. T., Attorney for C. B., appears for him.

(Signed) _____"

Such Memorandum to be delivered to the Clerk of the Court, and to be dated on the day of the delivery thereof, and signed by the Defendant or Defendants, or his, her, its or their Attorney.

12. In any case where the Defendant has been summoned, and does not appear by the return day of the writ, the Plaintiff may proceed as if he, she, or it had appeared.

13. The Action of Replevin shall be brought for the specific recovery of personal property, and for damages for the detention of the same; and in case of the property being eloigned, for damages only, and costs.

14. The Writ of Replevin shall specify the particular goods and chattels to be replevied, and shall contain the name or names of the Plaintiff or Plaintiffs, and of the Defendant or Defendants; and shall contain a Summons for the Defendant or Defendants to appear before the Court, and shall state the time and the place for such appearance; and shall bear date

on the day on which it shall be issued; and shall be tested in the name of the Judge of the Court from which it shall issue; and shall be signed, and sealed with the seal of the Court, by the Clerk thereof.

15. The Writ of Replevin shall be in the following form:

"——— County (*or City*) to wit:

State of Maryland to the Sheriff (*or other proper officer*) of ——— greeting:

You are hereby commanded to replevy and deliver to (*here insert the name of the Plaintiff or Plaintiffs*) the following goods and chattels (*here insert them*) which a certain (*here insert the name or names of the Defendant or Defendants*) of —— County (*or City*) unjustly withholds from the said Plaintiff or Plaintiffs, and to summon the said (*Defendant or Defendants*) to appear before the (*here insert the name of the Court*) to be held at (*here insert the place*) in and for (*here insert the County or City*) on the —— day of ——— next to answer an action at the suit of (*here insert the name or names of the Plaintiff or Plaintiffs.*)

And have you then and there this writ.

Witness the Honorable ——— Judge of the said Court, the —— day of ——— in the year, &c.

(Signed)

——— Clerk."

16. It shall not be necessary, for the Plaintiff or Plaintiffs in an Action of Replevin, to deliver to the Clerk of the Court a Memorandum in writing, as is required to be done before the issuing of a Writ of Summons, but the Writ of Replevin shall be issued by the Clerk of the Court, upon a proper Bond being delivered to him, and the other pre-requisites of the law, if any, complied with.

17. The mode of Appearance to a Writ of Replevin by the Defendant or Defendants, shall be by delivering a Memorandum in writing to the Clerk of the Court, like the one required for appearing to the Writ of Summons.

18. In all actions of Replevin, if the Defendant or Defendants shall be returned "Summoned" and shall not appear in person or by Attorney, on or before the fourth day of the term, next succeeding that to which such return shall be made, the Court shall be authorized and required, on motion, to enter up judgment for the Plaintiff or Plaintiffs for the property replevied, and for damages in the discretion of the Court, upon satisfactory proof of any, and costs; which judgment shall be as valid and effectual, as any judgment rendered on the verdict of a jury.

19. The sheriff or other person serving the writ of Replevin shall endorse on the same "Replevied

and delivered" or "Eloigned" as a return to that part of the Writ which directs the Replevin; and on the part of the Writ which directs the Defendant or Defendants to be summoned, the same returns as on the Writ of Summons; and such endorsements shall be sufficient evidence of the facts endorsed.

20. In case of the return by the Sheriff of "Eloigned" to any Writ of Replevin, the Writ may be renewed in the same manner as the Writ of Summons; and no *alias* or *pluries* Writ of Replevin, or *Capias in Withernam* shall hereafter be used. And upon the renewal or renewals of such Writ of Replevin the Bond upon which the first Writ was issued shall be responsible.

21. If, in any action of Replevin the Defendant or Defendants or one or more of them shall reside in a different jurisdiction or jurisdictions in the State from that in which the goods and chattels to be replevied are, there shall, at the time the Writ of Replevin is issued, or upon the return of the same, be a notice or notices is writing sent through the Post Office, by the Clerk of the Court from which the Writ issues, to the Sheriff or Sheriffs of the County or Counties or City in which the Defendant or Defendants reside, to be served upon the Defendant or Defendants notifying him, her, it or them that such writ has been issued; and it shall be returnable on the same day with the Writ, when it is issued simultaneously with

it, but returnable at the next term, when it is issued upon the return of the Writ.

22. The Notice required by the preceding rule shall be as follows:

"———County (*or City*—to wit:

State of Maryland, to the Sheriff (*or other proper officer*) of——— greeting:

You are hereby commanded to notify (*here insert the name or names of the Defendant or Defendants to be notified*) that (*here insert the name or names of the Plaintiff or Plaintiffs*) has or have sued out a Writ of Replevin from (*here insert the name of the Court*) against certain goods and chattels in the County (*or City*) aforesaid, which the said (*here insert the name or names of the Plaintiff or Plaintiffs*) says the said (*here insert the name or names of the Defendant or Defendants to be notified, and also the name or names of those, if any, who reside in the County or City where the goods and chattels are,*) withholds or withhold from him, her or them; and that he, she or they appear before the said Court to be held at (*here insert the place*) on the—— day of ———next to answer said suit.

And return you then and there, this notice.

Witness the Honorable———Judge of the said Court, the——day of ———in the year, &c.

(Signed)

———Clerk."

23. Before the issuing of any Notice in an Action of Replevin, the Plaintiff or Plaintiffs, or his, her, its or their Attorney shall deliver a Memorandum in writing according to the following form or to the like effect:

"In the Action of Replevin brought by (*here insert the name or names of the Plaintiff or Plaintiffs*) against (*here insert the name or names of the Defendant or Defendants*) A. B. (*or A. B. and C. D. &c.*) Defendant (*or Defendants*) resides in (*here insert the County or City.*)

Give him, her, it or them, notice of the Action.

Delivered the —— day of ———— 18

(Signed)

To E. S., Clerk, &c.

Such Memorandum to be delivered to the Clerk of the Court, and to be dated on the day of the delivery thereof, and signed by the Plaintiff or Plaintiffs, or his, her, its or their Attorney.

24. And in case the Defendant or Defendants so residing in a different jurisdiction shall be returned "Notified," and shall not appear in person or by Attorney on or before the fourth day of the term next succeeding that to which such return shall be made, the Court shall be authorized and required, on motion to enter up judgment for the Plaintiff or Plaintiffs for the property replevied and for damages in the discretion of the Court, upon satisfactory proof of

any, and costs; which judgment shall be as valid and effectual as any judgment rendered on the verdict of a Jury.

25. And such Notice to a Defendant or Defendants, residing in a different jurisdiction, shall, upon a return of "Cannot be found," be renewable, in the same manner as a Writ of Summons, against any defendant not served therewith.

CHAPTER 1ST.

TITLE SECOND.

JOINDER OF PARTIES TO ACTIONS.

ARTICLE 1ST.

JOINDER OF PLAINTIFFS.

26. It shall and may be lawful for the Court, at any time before the trial of a cause, to order that any person or persons, not joined as Plaintiff or Plaintiffs in such cause, shall be so joined, or that any person or persons, originally joined as Plaintiff or Plaintiffs, shall be struck out from such cause, if it shall appear to the Court that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid, consent, either in person or by writing under his, her or their hands, to be so joined, or that the person or persons to be struck out as aforesaid, were originally introduced without his, her or their consent, or that such person or persons consent

in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings, (if any,) postponement of trial, and otherwise, as the Court shall think proper; and when any such amendment shall have been made, the liability of any person or persons who shall have been added as Co-plaintiff or Co-plaintiffs shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in the cause.

27. In case it shall appear at the trial of any action, that there has been a misjoinder of Plaintiffs, or that some person or persons not joined as Plaintiff or Plaintiffs ought to have been so joined, such misjoinder or non-joinder may be amended as a variance at the trial, if it shall appear to the Court that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent either in person or by writing, under his, her or their hands, to be so joined, or that the person or persons, to be struck out as aforesaid, were originally introduced without his, her or their consent, or that such person or persons consent in manner aforesaid to be so struck out, and such amendment shall be made upon such terms as the Court shall think proper; and when any such amendment shall have been made, the liability of any person or persons, who shall have been added as Co-plaintiff or Co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if

such person or persons had been originally joined in such action.

28. In all cases where a plea in abatement of non-joinder of a person or persons as Co-plaintiff or Co-plaintiffs shall be pleaded, the Plaintiff shall be at liberty without any order of the Court, to amend the writ and other proceedings before plea, by adding the name or names of the person or persons named in such plea, and proceed in the action without any further appearance, on payment of the costs of, and occasioned by such amendment only, and in such case, the Defendant shall be at liberty to plead *de novo*.

29. In any action brought by a man and his wife, in respect of which she is necessarily joined as Co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right; and separate actions brought in respect of such claims may be consolidated, if the Court shall think fit; provided, that in the case of the death of either Plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate.

ARTICLE 2ND.

JOINDER OF DEFENDANTS.

30. It shall and may be lawful for the Court in the case of the joinder of too many Defendants in any action on contract, at any time before the trial of such

cause, to order the name or names of one or more of such Defendants to be struck out, if it shall appear to such Court that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the Court by whom such amendment is made shall think proper: and in case it shall appear at the trial of any action on contract, that there has been a misjoinder of Defendants, such misjoinder may be amended, as a variance at the trial, in like manner as the misjoinder of Plaintiffs has been before directed to be amended, and upon such terms as the Court shall think proper.

31. In any action on contract where the non-joinder of any person or persons as a Co-defendant or Co-defendants has been pleaded in abatement, the Plaintiff shall be at liberty, without any order, to amend the writ of Summons and the Declaration by adding the name or names of the person or persons named in such plea of abatement as joint contractors, and to serve the amended Writ upon the person or persons so named in such plea in abatement, and to proceed against the original Defendant or Defendants, and the person or persons so named in such plea in abatement: provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement and the Plaintiff, be considered for all purposes as the commencement of the action.

32. In all cases after such plea in abatement and amendment, if it shall appear upon the trial of the action that the person or persons, so named in such plea in abatement, was or were jointly liable with the original Defendant or Defendants, and resided in the county or city where the action is brought, the original Defendant or Defendants shall be entitled as against the Plaintiff to the costs of such plea in abatement and amendment: but if at such trial it shall appear that the original Defendant or any of the original Defendants is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, or does or do not reside in the county or city where the action is brought, the Plaintiff shall nevertheless be entitled to judgment against the other Defendant or Defendants who shall appear to be liable; and every Defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the Plaintiff, who shall be allowed the same, together with the cost of the plea in abatement and amendment, as costs in the case against the original Defendant or Defendants who shall have so pleaded in abatement the non-joinder of such person: provided that any such Defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the Defendants named by him in such plea in abatement, and of their residence in the County or City where the action is brought.

CHAPTER 1ST.

TITLE THIRD.

JOINDER OF CAUSES OF ACTION.

33. Causes of Action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit; but this shall not extend to Replevin or Ejectment: but the Court shall have power to prevent the trial of different causes of action together, if in the opinion of the Court, such trial would be inexpedient; and in such case, the Court may, when the case comes up for trial, or before, direct separate cases to be docketed, and separate trials to be had, in their order of priority, either immediately or at such time or times as the Court shall deem most equitable and just.

CHAPTER 2ND.

GENERAL RULES OF PLEADING APPLICABLE TO ALL CASES.

FUNDAMENTAL RULE.

34. The Pleadings shall be so conducted, as to evolve upon the record by the effect of the allegations themselves, the questions of law and of fact disputed between the parties, and present them as the subject matter agreed upon for decision.

TITLE FIRST.

RULES WHICH BRING THE PARTIES TO AN ISSUE.

GENERAL RULE.

35. The Plaintiff shall first state his cause of action in a Declaration. After the Declaration, the parties shall, at each stage, demur, or plead by way of traverse, or by way of confession and avoidance. And in case a party does neither, but confesses the right of the adverse party or says nothing, the Court shall give judgment for the adverse party.

ARTICLE 1st.

OF DEMURRER.

36. Either party may object by Demurrer to the Pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be. But no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer, nor for the violation of any rule hereinafter prescribed which relates only to form, unless specially provided for.

37. Every Demurrer shall particularly express the causes of the same, not in general terms, but in a

specific statement of some point of law showing in what respect the pleading is insufficient in substance. And the form of a Demurrer shall be as follows, or to the like effect:

"The Defendant (*or Plaintiff*) by his Attorney (*or in Person*) says that the Declaration (*or Plea, &c.*) is bad in substance;"

and some substantial matter of law intended to be argued showing the defect in the pleading shall then be stated; and if any Demurrer without such statement or with a frivolous statement shall be filed, it may be set aside by the Court, and judgment may be entered up for want of a plea.

38. The Form of a Joinder in Demurrer shall be as follows or to the like effect:

"The Plaintiff *(or Defendant)* says that the Declaration (*or Plea, &c.*) is good in substance."

39. Every Demurrer shall be taken as a confession of all the facts pleaded without regard to form.

40. When issue is joined on Demurrer, at any stage of the cause, the Court shall consider the allegations through the whole series of pleadings, and give judgment according as the very right of the cause and matter in law shall appear unto it, without

regarding any imperfection, omission, defect in, or lack of form, for the party who on the whole appears to be entitled to it. And no judgment shall be arrested, stayed or reversed for any such imperfection, omission, defect in or lack of form.

41. There shall not be a Demurrer upon a Demurrer.

OF THE EFFECT OF PLEADING OVER WITHOUT DEMURRER.

42. If a declaration be defective in substance, and the defendant pleads over; and the plea supplies, by express statement of fact, but not otherwise, the defect in the declaration, such defect shall be thereby cured.

43. Where there is any imperfection, or omission whatever, in any pleading, which would be a fatal objection on Demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so imperfectly stated, or omitted, such imperfection or omission shall be cured by the verdict.

ARTICLE 2ND.

OF TRAVERSE.

44. There shall be only two forms of Traverse, viz: a Direct Traverse, and an Indirect Traverse.

The General Issues, and the Replication *de injuria*, and the formal Traverse with an *absque hoc* shall not be used.

OF DIRECT TRAVERSE.

45. A Direct Traverse shall consist of a direct denial of the facts alleged by the opposite party; and it shall always be expressed in the negative, unless opposed to a precedent negative, then it may be expressed in the affirmative.

46. Where, to any action for injury to person or character, or property, any matter of excuse or justification is pleaded, the plaintiff shall, in the Replication, deny it in the words of the excuse or justification or to the like effect, or may plead some special defence.

OF INDIRECT TRAVERSE.

47. All defences, except a direct denial of the facts alleged, shall be pleaded specially.

48. Whenever a defendant shall plead special facts which deny indirectly the facts alleged by the plaintiff, if the plaintiff do not demur, he shall in the replication, either deny directly the special facts so pleaded, or plead some matter by way of confession

and avoidance, and in either case the defendant shall join issue.

49. Any defence, showing that a parol contract or deed sued on, is void or voidable, or the fact that the alleged deed was delivered to a third person as an escrow, shall be pleaded specially.

ARTICLE 3RD.

OF CONFESSION AND AVOIDANCE.

50. Any ground of defence, that admits the facts alleged in the Declaration or in any other pleading, but avoids their legal effect, by some matter of justification or excuse, or of discharge or release, shall be specially pleaded.

51. The fiction of Express Color shall not be allowable.

ARTICLE 4TH.

OF PLEADINGS IN GENERAL.

52. Whatever facts are necessary to constitute the ground of Action, Defence, or Reply, as the case may be, shall be stated in the Pleading and nothing more; and facts only shall be stated, and not arguments, or inferences, or matter of law, or of evidence, or of which the Court takes notice *ex officio*.

53. All statements which need not be proved, such as the statement of Time, Quantity, Quality, and Value, where these are immaterial; the statement of losing and finding, and Bailment, in Actions for goods, or their value; the statement of Acts of Trespass having been committed with force and arms, and against the peace, dignity and government of the State of Maryland; the statement of taking in Actions of Replevin, the statement of Promises which need not be proved, or promises in Indebitatus counts, and mutual promises to perform agreements; and all statements of a like kind, shall be omitted.

54. An allegation shall not have two intendments: but it shall state one point distinctly, so that the adverse party may know on what to join issue. And if an allegation shall have two intendments, it shall, upon motion, be considered by the Court as a nullity.

55. Where there are material allegations in a pleading, that are repugnant to each other, the first in order shall be considered the proper one, and all others inconsistent with it, shall be rejected, even though the pleading be thereby left without an allegation of some material fact.

56. No superfluous allegation, whether it be consistent or *inconsistent* with the necessary and material allegations, nor any impertinent allegation shall vitiate a pleading.

57. If any Pleading be so framed as to prejudice, embarrass or delay the fair trial of the action, the opposite party may move the Court to strike out or amend such pleading, and the Court shall make such order respecting the same, and also respecting the costs, as the Court shall see fit.

58. It shall not be necessary to make Profert of any Deed or other document mentioned or relied on in any pleading; and if Profert shall be made, it shall not entitle the opposite party to crave Oyer of or set out upon Oyer such deed, or other document.

59. A Party pleading, in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole, or such part thereof, as may be material, and the matter, so set out, shall be deemed and taken to be part of the Pleading in which it is set out.

60. Where in a Pleading, any thing is alleged generally to have been done, it shall be considered as meaning legally done, and, by the proper instrument of writing where one is required, without stating how or in what manner it was done.

61. It shall be lawful for the Plaintiff or Defendant in any action, to aver performance of conditions precedent generally, and the opposite party shall not

deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest.

62. Parties shall be respectively confined to the grounds both of fact and of law which they take in the declaration and the plea, and shall not resort to another in any subsequent pleading.

63. A Pleading should not anticipate the answer of the opposite party. It is sufficient that each pleading contain facts which constitute a good, *prima facie* claim or defence, or reply, without reference to possible objections not yet urged. But where the matter is such, that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, there it ought to be affirmed or denied in the first instance, though it may be such as would otherwise properly form the subject of objection on the other side.

64. The Form of pleading shall in no case whatever control its substance. Matter, though alleged in the form of inducement, if it be of the substance of the cause, may be pleaded to. And so, in all like instances.

65. If the plaintiff allege a greater title or estate than is necessary to sustain his cause of action and it be traversed to the full extent, he shall not be com-

pelled to prove more than is necessary to sustain his action. And if a defendant puts into his plea more than is needed for his defence, he shall not be compelled to prove more than is needed for his defence.

66. When a pleading can be taken two ways it shall be taken in that which is most against the party pleading it.

67. Every Pleading shall be in writing, and signed either by the party or his Attorney.

68. Every Declaration and other Pleading shall be entitled of the proper Court.

69. Whenever any rule of Pleading contained in this code shall specify in terms, only one or more species, as Declaration, Plea, or any other, yet if in its nature and scope the rule be applicable to other pleadings also, it shall be taken to apply to all to which it is applicable.

ARTICLE 5TH.

OF THE DECLARATION.

70. A Plaintiff shall recover only in respect of the ground of action stated in his declaration, and not in respect of another disclosed by the Defendant's plea.

71. Whenever a Plaintiff claims a right derogatory from the general law, or when his claim is founded upon an exception of any kind, he shall set forth such claim or such exception particularly in his declaration.

72. In all actions on bonds with conditions, the Plaintiff shall in the declaration notice the conditions, and allege the breach or breaches relied on.

73. In all actions of Libel and Slander, the Plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment, to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged Libel or Slander; and where the words, or matter set forth, with or without the alleged meaning, show a cause of action, the Declaration shall be sufficient.

OF COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS.

74. Every Declaration shall commence as follows, or to the like effect:

"——— County *(or City)* A. B. by S. T. his Attorney (*or in Person, as the case may be*) sues C. D. for, (*here state the cause of action;*)"

And shall conclude as follows, or to the like effect:

"And the Plaintiff claims $——" *(or if the action is brought to recover specific goods,)* "the Plaintiff claims a return of the said goods or their value, and $——, for their detention."

ARTICLE 6TH.

OF PLEADINGS SUBSEQUENT TO THE DECLARATION.

75. Every Pleading must be an answer to the whole of what is adversely alleged; but where there are several allegations, each of which is essential to the support of the Pleading, the opposite party may traverse one, or more of them, as he pleases.

76. Whenever a plea does not answer the whole Declaration, whether it professes to do so or not, the Plaintiff may have judgment, as by *nil dicit*, against the Defendant, in respect of what is not answered.

77. Every pleading shall be considered as confessing such traversable matters alleged on the other side, as it does not traverse; but facts not traversed shall not be taken as admitted for any other action between the same parties, if the present issue be found for the person traversing.

78. A pleading shall not be considered as admitting the sufficiency in law, of the facts adversely alleged.

79. A traverse must not be taken upon matter of law; but where a mere legal inference is stated in a pleading, and the opposite party wishes to deny it, his course shall be, to demur. But where an allegation is mixed of law and fact, it may be traversed.

80. A traverse must not be taken upon matter not alleged; but it may be taken upon matter, which though not expressly alleged, is necessarily implied.

81. Where a part of the facts stated constitute a cause of action or a defence, the part must be denied as well as the whole; and if the part be proved it will be sufficient. And where a sum of money is alleged to be due, the denial must be that no part of it is due; and a general denial or a denial that the whole sum is not due, shall be taken to mean that no part of the sum is due.

82. Where an allegation, less general than the one set forth in a Pleading, would constitute a cause of action, or a defence, or a reply, the Defendant or Plaintiff shall not deny it generally, but shall so plead as to deny any cause of action or defence in the case.

83. Whenever the traverse tendered by a Plaintiff to the Defendant's plea is such as will enable the Plaintiff to recover, without proving his right, it shall upon motion be amended by the Court.

84. Whenever a plea does not answer the whole declaration, and the Plaintiff demurs to it, without entering judgment for that part of his Declaration, which is not answered by the plea, the action shall not thereby be discontinued, but the demurrer shall apply to the plea, in the same manner, as if judgment had been entered for the part of the declaration not answered.

85. It shall not be allowable, both to plead and demur to the same matter: but if the Demurrer be overruled, then the party shall be allowed to withdraw the Demurrer and to plead.

86. All questions of law, unless raised by demurrer, shall fall under the decision of the Jury in the issue in fact, subject to the direction of the Court, upon a prayer for that purpose.

87. When a party pleads, it must be either by way of traverse, or of confession and avoidance; and if the pleading amounts to neither of these modes of answer, it shall, upon motion, be set aside.

88. Wherever in pleading, there shall be two affirmatives which do not impliedly negative each other, the next pleading to be pleaded shall deny the last affirmative; and the other shall go for nothing.

89. The Plaintiff in any action may plead, in answer to the Plea or any 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 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; provided that the party so pleading or his Attorney, makes affidavit, if required by the Court, to the effect, that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid, by way of confession and avoidance, are respectively true in substance and in fact. And the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues.

90. In a Plea or subsequent pleading it shall not be necessary to use any allegation of *Actionem non*, or *Actionem ulterius non*, or *Onerari non*, or to the like effect, or any Prayer of Judgment, nor shall it be necessary in any Replication or subsequent Pleading, to

use any allegation of *Precludi non*, or to the like effect, or any Prayer of Judgment.

91. No formal Defence shall be required in a Plea, or Avowry, or Cognizance, and it shall commence as follows, or to the like effect:

"The Defendant by ——— his Attorney (*or in person, as the case may be*) says that (*here state First Defence.*)"

and it shall not be necessary to state in a second or other Plea, or Avowry, or Cognizance, that it is pleaded by leave of the Court, or according to the form of the Statute, or of the Act of Assembly, or to that effect; but every such Plea, Avowry or Cognizance shall be written in a separate paragraph, and numbered, and shall commence as follows or to the like effect:

"And for a Second (*&c.*) Plea the Defendant says that (*here state second* (*&c.*) *Defence;*"

or if pleaded to part only, then as follows, or to the like effect:

"And for a second (*&c.*) Plea to (*stating to what it is pleaded*) the Defendant says that," &c.

and no formal Conclusion shall be necessary to any Plea, Avowry, Cognizance, or other Subsequent Pleading.

92 Any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal Commencement or Conclusion; and any Plea, which does not state, whether the defence therein set up, arose before or after Action, shall be deemed to be a Plea of matter arising before action.

93. Any defence which may arise after the last pleading, in any case, may be pleaded with an allegation that the matter has arisen since the last pleading.

94. It shall be lawful for the defendant, or for one or more of several defendants in all actions (except Actions for Assault and Battery, false Imprisonment, Libel, Slander, Malicious Arrest or Prosecution, Criminal Conversation, or debauching of the Plaintiff's daughter or servant,) to pay into Court a sum of money by way of compensation or amends; and the money shall be paid to the Clerk, subject to the order of the Court, and the Clerk shall give a receipt for it upon the back of the plea, and the said sum shall be paid out to the Plaintiff or his Attorney, upon a written authority from the Plaintiff on demand.

95. When money is paid into Court, such payment shall be pleaded as near as may be, in the following form:

"The Defendant by ——— his Attorney (*or in person, &c,*) (*if pleaded to part, say, as to* $—— *Parcel of the money claimed*) brings into Court the sum of $—— and says that the said sum is enough to satisfy the claim of the Plaintiff in respect of the matter herein pleaded to."

96. The Plaintiff, after the delivery of a Plea of Payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of Action or of the matter in respect of which it has been paid in, and he shall be at liberty in such case to have his costs taxed and if they be not immediately paid, he shall have judgment for the costs so taxed: Or, the Plaintiff may reply that the sum paid into Court is not enough to satisfy the claim of the Plaintiff in respect of the matter to which the plea is pleaded; and, in the event of an issue thereon being found for the Defendant, the defendant shall be entitled to judgment and his costs of suit.

97. Wherever there may arise a doubt whether the cause of action is of the nature of a breach of contract or of a wrong, the Court shall give the defendant the benefit of the doubt; and any Plea in such case, which shall be good in substance, shall not be objectionable on the ground of its treating the Declaration, either as framed for a breach of contract or for a wrong.

98. Pleas of Payment and Set-off and all other Pleadings, capable of being construed distributively, shall be taken distributively, and if issue is taken thereon, and so much thereof, as shall be sufficient answer to part of the causes of action proved, shall be found true by the Jury, a verdict shall pass for the Defendant in respect of so much of the causes of action as shall be answered, and for the Plaintiff in respect of so much of the causes of action as shall not be so answered.

99. Either party may plead, in answer to the Plea or Subsequent Pleading of his adversary, that he joins issue thereon, which Joinder of Issue may be as follows, or to the like effect:

"The Plaintiff joins issue upon the Defendant's 1st. &c., (*specifying what or what part*) Plea;"

"The Defendant joins issue upon the Plaintiff's Replication to the 1st. &c., (*specifying what*) Plea;"

And such Form of Joinder of Issue shall be deemed to be a direct Denial of the Substance of the Plea or other Subsequent Pleading, and an issue thereon.

100. Whenever any particular fact is selected and directly denied, as well as where all the facts are directly denied, by any pleading, the party to plead next, shall merely add a joinder of issue.

101. Whenever a Defendant cannot take any new or other issue in his rejoinder, than the matter he has pleaded, without a departure from his plea, or where the issue on the rejoinder would be the same in substance, as on the plea, the Plaintiff shall, in his Replication, plead that he joins issue on the Defendant's plea, and may add a joinder of issue for the Defendant.

102. If a traverse be taken upon an immaterial allegation, that is, on matter which is either irrelavent or insufficient in law, or matter which is only introductory or explanatory, or matter of aggravation, the opposite party may have judgment as for want of a plea.

103. No more of an allegation shall be traversed, than is material. The circumstances, which though forming a part of the allegation, are immaterial to the merits of the action, must not be traversed, and if traversed, the traverse shall upon motion be corrected, the party so traversing paying costs.

104. It shall not be necessary for the defendant to verify the truth of any plea, except dilatory pleas, by affidavit or affirmation; nor being heir, executor or administrator, to obtain leave of the Court, to put in a plea denying that the alleged deed, in the suit, is not the deed of the ancestor, testator or intestate.

ARTICLE 7TH.

OF NEW ASSIGNMENT.

105. Where the Defendant pleads an evasive plea, either as to the whole or a part of the cause of action set forth in the Declaration, the Plaintiff may avoid the effect of such Plea, by restating his cause of action with more particularity, consistently however with the more general statement set forth in the Declaration.

106. One New Assignment only shall be pleaded to any number of Pleas to the same cause of action; and such new assignment shall be consistent with and confined by the particulars, if any, delivered in the action, and shall state that the Plaintiff proceeds for causes of action different from all those which the Pleas profess to justify, or for an excess over and above what the defences set up in such pleas justify, or both.

107. No Plea, which has already been pleaded to the Declaration, shall be pleaded to such new Assignment, except a Plea in direct denial, unless by leave of the Court; and such leave shall only be granted, upon satisfactory proof that the repetition of such Plea is essential to a trial upon the merits.

TITLE SECOND.

RULES WHICH MAKE THE ISSUE A CERTAIN ONE.

ARTICLE 1st.

OF NAMES OF PERSONS.

108. The Declaration as well as the Summons shall set forth accurately the Christian names and Surnames of both parties, and the Christian names and Surnames of persons not parties to the action: but where the name of a person, not a party to the action, shall not be known, an allegation of the fact shall be sufficient.

109. Wherever a party shall be sued by a wrong Christian name or Surname, or both, upon affidavit or other proof to the satisfaction of the Court, at any time before trial, that the writ or process has been served upon the person intended to be sued, the Court shall, upon motion, direct any writ, declaration or other pleading, or any entry, to be amended, by inserting therein, the true name of the party, on such terms as the Court shall deem fit.

110. A mistake in the name either of a party to the action, or of a person not a party to the action, may be objected to as a variance, at the trial.

ARTICLE 2ND.

OF TIME.

111. When Time forms a material point in the merits of a cause, the day, month and year, or when there is a continuous act, the period of its duration, must be alleged, and proved as laid. When time is not material, it need not be mentioned, and if mentioned, need not be proved.

ARTICLE 3RD.

OF PLACE.

112. It shall be necessary to allege a place only when it is descriptive of the subject matter of the action, and forms a part of the substance of the issue; and it must be proved as laid.

ARTICLE 4TH.

OF QUALITY OR KIND.

113. In actions for injuries to goods and chattels, their kind or species shall be alleged in the declaration, and must be proved as laid.

114. In actions for breaking the plaintiff's close, or for any injury to real property, the plaintiff shall describe the property, and when the injury is to an incorporeal hereditament, shall describe the property in

respect of which the right is claimed, (as well as the right itself,) in his declaration, either by the name by which the property is patented, or by its abuttals, or by its courses and distances, or by any name which it has acquired by reputation, or by some other description certain enough to identify it.

ARTICLE 5TH.

OF QUANTITY AND VALUE.

115. Where quantity forms a part of the substance of the issue, it must be alleged, and specified with reference to the ordinary measures of extent, weight or capacity. And where value forms a part of the substance of the issue, it must be alleged, and specified by the current coin of the United States.

116. A verdict shall not be for a larger quantity or value than is alleged.

ARTICLE 6TH.

OF TITLE.

117. When, in pleading, any right or authority is set up in respect of property, personal or real, some title to that property must be alleged in the party, or in some other person from whom he derives his authority. And if a party be charged with any liability

in respect of property, personal or real, his title to that property must be alleged, and proved as laid.

118. In no case shall it be necessary to allege title more particularly than is sufficient to show the right or authority claimed, or the liability charged.

119. In the action of Replevin, for Cattle taken damage feasant, it shall be sufficient for the Defendant to allege mere title of possession.

120. In an action for breaking the Plaintiff's close, when the Defendant justifies under a right of way or other incorporeal right over or in the Plaintiff's close, it shall not be necessary for the Defendant, in his plea, to set forth his full title to another close in respect of which he claims such right, nor to set forth the particular ground of his right: but he may plead generally that he was possessed of his close, and had the right claimed, for the more convenient occupation of the close; as a plaintiff is allowed to do in his declaration, when sueing for an injury to such incorporeal rights.

ARTICLE 7TH.

OF DERIVATION OF TITLE.

121. It shall not be necessary to allege the commencement of either a particular or of a superior estate, unless it be essential to the merits of the cause.

122. Where a party claims by inheritance, either by immediate or mediate descent, he shall allege how he is heir, as son, nephew, or otherwise.

123. Where a party claims by conveyance, he may state it according to its legal effect or name.

TITLE THIRD.

RULES WHICH MAKE THE ISSUE A SINGLE ONE.

124. Any number of facts constituting one cause of action, or one defence, or one reply, or any other pleading, may be combined: but each cause of action, and each defence, and each reply, shall be stated in a separate paragraph, and shall be numbered.

125. If each cause of action, or each defence, or each reply, or other pleading shall not be stated in a separate paragraph and numbered, the Court, or the Judge, at any time after such pleading is filed, and before it is pleaded to, may, upon suggestion in writing filed in the cause, stating such defect in the pleading, and a copy of the suggestion being served upon the party so pleading defectively or his attorney, order the defective pleading to be corrected at the costs of the party so pleading defectively. But if the opposite party plead to such defective pleading, such formal defect shall thereby be cured.

TITLE FOURTH.

OF JUDGMENT.

126. Whenever judgment is to be given, whether the issue be in law or in fact, and whether the cause has proceeded to issue or not, and whether there has been a verdict or not, the Court shall examine the sufficiency in law of all the allegations through the whole series of pleadings and adjudge for the plaintiff or defendant, according to the legal right as it may on the whole series of pleadings appear.

127. In all actions where the Plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages.

128. The form of all judgments shall be merely a statement, in common language, of the award of the Court, without regard to the forms of action heretofore existing.

JUDGMENT *NON OBSTANTE VEREDICTO.*

129. Whenever the plea is such as to show to the Court, that the Defendant is not entitled to recover upon the merits, and the issue joined thereon be

found for the defendant, judgment shall be given for the Plaintiff *non obstante veredicto.*

TITLE FIFTH.

REPLEADER.

130. Wherever the issue joined and tried shall be an immaterial one, the Court shall award a Repleader; and the parties shall begin to replead at the first fault which produced the immaterial issue. And the pleadings in such case, shall be in the forms hereinbefore prescribed for pleadings in general; and shall be substituted for the defective pleadings.

TITLE SIXTH.

ABATEMENT.

131. It shall not be necessary to use any prayer of judgment in any Plea in Abatement. Nor shall it be necessary, in any Plea in Abatement to crave oyer of any instrument of writing on which the suit is brought, nor to insert it in the Plea.

132. No formal Defence, and no formal Conclusion shall be required in Pleas in Abatement. They shall commence in the Form hereinbefore prescribed for Pleas in bar, or to the like effect.

133. In a Plea in Abatement for the non-joinder of

a co-defendant or co-defendants, it shall be necessary to allege, and to prove, that the persons mentioned as not joined, are still living and are residing in the County in which the suit is brought, or the City of Baltimore, if the suit be brought there.

134. All defects in Pleas in Abatement shall be corrected, upon motion, as in other pleadings under this code.

TITLE SEVENTH.

MOTIONS.

135. Every motion required by this code shall be in writing, and shall assign reasons: but no particular form shall be necessary.

TITLE EIGHTH.

GENERAL PROVISIONAL RULES.

136. Any matter of Pleading, which shall not come within the special provisions of this code, and for which, there is not now some rule, which does not conflict with the principles and rules of this code, shall be provided for upon the analogies of the provisions which seem to bear most upon the matter; and of this the Court shall Judge, whenever any such Pleadings shall have been framed in a cause, and the question is raised by motion. And if the Court shall determine such pleading to be erroneously framed, it

shall have it corrected; and in such case the costs of the amendment shall be in the discretion of the Court.

137. All laws so far as they are inconsistent with the provisions of this Code are hereby repealed. The laws and usages of this State relating to pleading, practice and proceedings in civil actions, so far as they are not inconsistent with the provisions of this Code, and as far as the same may operate in aid of those provisions, or to supply any omitted case, are hereby continued in force.

CHAPTER 3RD.

FORMS OF PLEADINGS.

138. The Forms of Pleadings which follow, shall be sufficient; and those and the like Forms may be used, with such modifications as may be necessary to meet the facts of the case: but nothing herein contained shall render it erroneous or irregular to depart from the letter of such Forms, so long as substance is expressed without prolixity.

COMMENCEMENTS OF DECLARATIONS.

(*Venue.*) "A. B., by S. T., his Attorney, (*or in Person, as the case may be,*) sues C. D. for, (*here state the cause of action.*)"

CONCLUSIONS OF DECLARATIONS.

"And the Plaintiff claims $——" (*or if the action is brought to recover specific goods,*) "the Plaintiff claims a return of the said goods or their value, and $——, for their detention."

STATEMENT OF CAUSES OF ACTION ON CONTRACTS.

I. Money payable by the Defendant to the Plain-

tiff for (*these words, "Money payable, &c.," should precede Money counts like I to XII inclusive, but need only be inserted in the first,)* Goods bargained and sold by the Plaintiff to the Defendant.

II. Work done and Materials provided by the Plaintiff for the Defendant at his request.

III. Money lent by the Plaintiff to the Defendant.

IV. Money paid by the Plaintiff for the Defendant at his request.

V. Money received by the Defendant for the use of the Plaintiff.

VI. Money found to be due from the Defendant to the Plaintiff on accounts stated between them.

VII. A Messuage and Lands sold and conveyed by the Plaintiff to the Defendant.

VIII. The good will of a business of the Plaintiff, sold and given up by the Plaintiff to the Defendant.

IX. The Defendant's use, by the Plaintiff's permission, of Messuages and Lands of the Plaintiff.

X. The hire of (*as the case may be,*) by the Plaintiff let to hire to the Defendant.

XI. Freight for the conveyance by the Plaintiff for the Defendant at his request of Goods in ships.

XII. The Demurrage of a Ship of the Plaintiff kept on Demurrage by the Defendant.

XIII. That the Defendant on the —— day of —— by his Promissory Note, now over-due, promised to pay to the Plaintiff $——— *sixty days* after date, but did not pay the same.

XIV. That one A. on, &c. (*Date,*) by his Promissory Note, now over-due, promised to pay to the Defendant, or order, $—— *Sixty days* after date; and the Defendant endorsed the same to the Plaintiff; and the said Note was duly presented for Payment, and was dishonored, whereof the Defendant had due notice, but did not pay the same.

XV. That the Plaintiff, on &c. (*Date,*) by his Bill of Exchange now over-due, directed to the Defendant, required the Defendant to pay to the Plaintiff $—— *Sixty days* after date; and the Defendant accepted the said Bill, but did not pay the same.

XVI. That the Defendant, on &c. (*Date,*) by his

Bill of Exchange directed to A., required A. to pay to the Plaintiff $—— *Sixty days* after date; and the said Bill was duly presented for Acceptance, and was dishonored, of which the Defendant had due notice, but did not pay the same.

XVII. That the Plaintiff and Defendant agreed to marry one another, and a reasonable time for such Marriage has elapsed, and the Plaintiff has always been ready and willing to marry the Defendant, yet the Defendant has neglected and refused to marry the Plaintiff.

XVIII. That the Plaintiff and Defendant agreed to marry one another on a day now elapsed, and the Plaintiff was ready and willing to marry the Defendant on that day, yet the Defendant neglected and refused to marry the Plaintiff.

XIX. That the Plaintiff and the Defendant agreed by Charter-party that the Plaintiff's Ship, called the "Daniel Webster," should with all convenient speed sail to L., or so near thereto as she could safely get, and that the Defendant should there load her with a full cargo of Coffee, or other lawful Merchandise, which she should carry to B., and there deliver on Payment of Freight $—— per Ton, and that the Defendant should be allowed ten days for loading, and ten days for discharge, and ten days for demurrage,

if required, at $—— per day; and that the Plaintiff did all things necessary on his part to entitle him to have the agreed Cargo loaded on board the said Ship, at L., and that the time for so doing has elapsed, yet the Defendant made default in loading the agreed Cargo.

XX. That the defendant, by warranting a Horse to be then sound and quiet to ride, sold the said Horse to the Plaintiff, yet the said Horse was not then sound and quiet to ride.

XXI. That the Plaintiff let to the Defendant a House, No. 200 Market Street, in the city of Baltimore, for four years to hold from the ——— day of —— A. D. —— at $ —— a year payable quarterly, of which Rent ——— quarters are due and unpaid.

XXII. That the Plaintiff by Deed let to the Defendant a House on Patrick Street, Frederick, in —— county, seven years from the —— day of —— A. D. —— and the Defendant, by the said Deed, covenanted with the Plaintiff well and substantially to repair the said House during the said Term (*according to the covenant;*) yet the said House was during the said Term out of good and substantial Repair.

XXIII. That the Plaintiff and Defendant, by their agreement in writing, referred the matters therein

mentioned to arbitrators; and the arbitrators have made their award in writing, that *the defendant pay the Plaintiff the sum of* $——, which the Defendant has failed to do.

(Where the award is not for the mere payment of money as above, but for the performance of some act by the Defendant, that act must be stated in place of the Italic line; and where the Plaintiff also is to perform some act either precedent or concurrent, a general averment "that he has performed (or is ready to perform) all on his part," after the statement of non-performance by the Defendant, as above, shall be sufficient.)

XXIV. That one W. T. owed the Plaintiff the sum of $——, and the Plaintiff was about to sue him, to recover the same. And in consideration that the Plaintiff would forbear to sue the said W. T., the Defendant agreed to pay the same to the Plaintiff, and the Plaintiff did forbear to sue the said W. T.; and the Defendant has not paid said sum of $——.

XXV. That the Plaintiff purchased of the Defendant *a thousand bushels of wheat* for the sum of fifteen hundred dollars, to be paid for on delivery thereof; and the Defendant promised to deliver the same on the —— day of —— at the Defendant's warehouse in the city of Baltimore; and on said day, the

Plaintiff demanded said wheat at said warehouse, and tendered to the Defendant said sum of fifteen hundred dollars in payment of the same; and the Defendant refused to deliver the said Wheat to the Plaintiff.

FOR WRONGS INDEPENDENT OF CONTRACT.

XXVI. That the Defendant broke and entered certain Land of the Plaintiff, called "The Orchard," in ——— County, and depastured the same with cattle.

XXVII. That the Defendant assaulted and beat the Plaintiff, gave him into the custody of a Constable and caused him to be imprisoned in the Jail of —— County, *(or City.)*

XXVIII. That the Defendant debauched and carnally knew the Plaintiff's wife.

XXIX. That the Defendant converted to his own use, or wrongfully deprived the Plaintiff of the use and possession of the Plaintiff's goods; that is to say, *Wheat, Rye, Household Furniture, (or as the case may be.)*

XXX. That the Plaintiff was possessed of a Mill, called "Linganore Mill," in ——— County, and by

reason thereof, was entitled to the Flow of a stream for working the same, and the Defendant, by cutting the bank of said stream, diverted the water thereof away from the said Mill.

XXXI. That the Plaintiff was possessed of Land, called "Idlewild," in —— County, and was entitled to a way from said land, over the Land of the Defendant, to a public high-way, for himself and his servants, with horses and wagons, to go and return, at all times, at his and their free will, for the more convenient occupation of the said Land of the Plaintiff; and that the Defendant deprived him of the use of said way, in as ample a manner as he was entitled.

XXXII. That the Defendant falsely and maliciously spoke and published of the Plaintiff the words following; that is to say, "he is a Thief;" (*if there be any special damage, here state it with such reasonable particularity as to give notice to the Defendant of the particular injury complained of; for instance,*) whereby the Plaintiff lost his situation of book-keeper in the Bank of Washington.

XXXIII. That Defendant falsely and maliciously printed and published of the Plaintiff in a Newspaper, called "The Examiner," the words following: that is to say, "he foreswore himself," the Defendant meaning thereby that the Plaintiff had been guilty of the crime of perjury.

XXXIV. That the Defendant is a Corporation owning a Railroad between B. and C.; that the Plaintiff was a passenger on said Railroad, and by reason of the insufficiency of an axle of the car in which he was riding, the Plaintiff was hurt; that the Defendant did not use due care in reference to said axle, but the Plaintiff did use due care.

(This form may be varied so as to adapt it to many cases, by merely changing the allegation as to the cause of the accident.)

XXXV. That the Defendant is an incorporated City and is bound to keep its streets in repair; that one of its streets, called —— street, was negligently suffered by the Defendant to be out of repair, whereby the Plaintiff in travelling on said street and using due care was hurt.

XXXVI. That the Defendant hired from the Plaintiff a horse, to ride from Frederick to Hagerstown, and thence back to Frederick, in a proper manner; and the Defendant rode said horse so immoderately that he became lame and injured in value.

COMMENCEMENTS OF PLEAS.

XXXVII. The Defendant, by S. T., his Attorney, (*or in Person,*) says (*here state the substance of the Plea.*)

XXXVIII. And for a second Plea the Defendant says *(here state the second Plea.)*

PLEAS IN ACTIONS ON CONTRACT.

XXXIX. That he never was indebted as alleged. *(This plea is applicable to Declarations like those numbered* i. *to* xii.*)*

XL. That he did not promise as alleged. *(This plea is applicable to Declarations like those numbered* xiii *and* xiv, *and to Declarations on simple promises of any kind.)*

XLI. That he did not accept the said Bill of Exchange as alleged. *(This Plea is applicable to Declarations like that numbered* xv.*)*

XLII. That said Bill of Exchange was not duly presented for acceptance, as alleged. *(This Plea is applicable to Declarations like that numbered* xvi.*)*

XLIII. That he did not agree as alleged. *(This Plea is applicable to Declarations like those numbered* xvii *to* xix.*)*

XLIV. That he did not warrant as alleged. *(This Plea is applicable to Declarations like that numbered* xx.*)*

XLV. That he did not let a house as alleged. (*This Plea is applicable to Declarations like that numbered* xxi.)

XLVI. That the alleged Deed is not his Deed.

XLVII. That at the time of the making of the alleged Deed, the Defendant was *and still is* within twenty one years of age.

XLVIII. That at the time of the making of the alleged Deed the Defendant was and still is the wife of one W. T.

XLIX. That the Defendant was unlawfully imprisoned by the Plaintiff, *and others in collusion with him*, until by duress of imprisonment he made the alleged Deed.

L. That the alleged deed was procured by the fraud of the Plaintiff.

LI. That the Plaintiff threatened the life of the Defendant unless he would make the alleged deed; and that from fear of the threats he made the same.

LII. That after the sealing and delivery of the alleged deed, it was without the consent of the De-

fendant altered, and the words (*insert them,*) were inserted *and substituted* therein, *for the words (insert them.*)

LIII. That the Defendant delivered the alleged deed, to one A. F., as an escrow on condition that (*state the condition,*) then the said A. F. should deliver the alleged deed to the Plaintiff as the deed of the Defendant. And the Plaintiff has not performed the condition.

LIV. That the alleged cause of action did not accrue within —— years (*state the period of limitation applicable to the case,*) before this suit.

LV. That before this action he satisfied and discharged the Plaintiff's claim by payment.

LVI. That the Plaintiff at the commencement of this suit was, and still is indebted to the Defendant in an amount equal to the Plaintiff's claim, for (*insert the cause of set-off as in a Declaration; see Form, ante,*) which amount the Defendant is willing to set-off against the Plaintiff's claim.

LVII. That *after the alleged claims accrued, and before suit,* the Plaintiff, by Deed, released the Defendant therefrom.

LVIII. That at the *Circuit Court for* —— *County* —— *Term* 1854, the Plaintiff recovered judgment against the Defendant for the sum of —— dollars and —— cents, and —— dollars for costs; and that said judgment was rendered on the same cause of action mentioned in the Plaintiff's declaration, and is still a subsisting judgment.

LIX. That he was discharged as an insolvent debtor by the Circuit Court for —— County, (*or Court of Common Pleas for the City of Baltimore,*) on the —— day of ——— 1854, and that the alleged claim accrued before the filing of his petition.

LX. That he applied by Petition as an insolvent debtor to the Circuit Court for ——— County (*or Court of Common Pleas for the City of Baltimore,*) on the —— day of ——— *eighteen hundred and fifty four*, and the proceedings under the Petition are still pending; and that the alleged claim accrued before the filing of his Petition.

139. A Defendant may plead, as in the above Form, that he has applied by Petition as an insolvent debtor to the proper Court, and that the proceedings under his Petition are still pending, and that the alleged claim accrued before the filing of his Petition. And upon proof of the facts so pleaded, judgment shall only be entered subject to the result of the proceedings under the Petition.

PLEAS IN ACTIONS FOR WRONGS INDEPENDENT OF CONTRACT.

LXI. That he did not commit the wrong alleged.

LXII. That he did what is complained of by the Defendant's leave.

LXIII. That the Plaintiff was not entitled to the said way over the Defendant's land as the Plaintiff has alleged.

LXIV. That the Plaintiff first assaulted him; and he committed the alleged assault in his own defence.

LXV. That the Defendant, at the time of the alleged trespass, was possessed of land called, "Idlewild," in ——— County, and was entitled to a way from said land over the land of the Plaintiff, to a public high-way, for himself and his servants with horses and wagons, to go and return at all times, at his and their free will, for the more convenient occupation of the said land of the Defendant; and that the alleged trespass was a use by the Defendant of said way.

REPLICATIONS.

LXVI. The Plaintiff joins issue upon the Defendant's 1st, 2nd, &c. Pleas.

LXVII. The Plaintiff as to the second Plea says (*state the Answer to the Plea as in the following Forms.*)

LXVIII. That the alleged Release is not the Plaintiff's Deed.

LXIX. That the alleged Release was procured by the fraud of the Defendant.

LXX. That the alleged set-off did not accrue within —— years (*state the period of limitation applicable to the case,*) before this suit.

LXXI. That the Plaintiff's claim is upon an account concerning trade between himself and the Defendant, as merchant and merchant.

LXXII. That the Plaintiff was possessed of land called, "Midsummer," in ——— County, whereon the Defendant was trespassing and doing damage, whereupon the Plaintiff requested the Defendant to leave the said land, which the Defendant refused to do; and thereupon the Plaintiff gently laid his lands on the Defendant in order to remove him, doing no more than was necessary for that purpose, which is the alleged First Assault by the Plaintiff.

LXXIII. That the Defendant was not entitled to the said way over the Plaintiff's land as the Defendant has alleged.

LXXIV. That the alleged trespass was not a use by the Defendant of the said way.

LXXV. That the Defendant was not within the age of twenty-one years as alleged.

LXXVI. That the alleged Deed was not delivered as an escrow as alleged.

LXXVII. That the Defendant was not, and is not now, the wife of one W. T. as alleged.

LXVIII. That the Defendant did not make the alleged Deed by duress as alleged.

LXXIX. That the alleged Deed was not procured by the fraud of the Plaintiff.

LXXX. That the Defendant did not commit the alleged Assault in his own defence.

NEW ASSIGNMENT.

LXXXI. The Plaintiff, as to the —— and —— Pleas, says, that he sues not for the Trespasses there-

in admitted, but for Trespasses committed by the Defendant in excess of the alleged rights, and also in other parts of the said land and on other occasions, and for other purposes than those referred to in the said Pleas.

(*If the Plaintiff replies and new assigns, the new Assignment may be as follows:*)

LXXXII. And the Plaintiff, as to the —— and —— Pleas, further says, that he sues not only for the Trespasses in these Pleas admitted, but also for, &c.

(*If the Plaintiff replies and new assigns to some of the Pleas, and new assigns only to the other, the Form may be as follows:*)

LXXXIII. And the Plaintiff, as to the —— and —— Pleas, further says, that he sues not for the Trespasses in the —— Pleas (*the Pleas not replied to,*) admitted, but for the Trespasses in the —— Pleas (*the Pleas replied to,*) admitted, and also for, &c.

PLEAS IN ABATEMENT.

LXXXIV. That the Plaintiff at the time of issuing the Summons in this case, was and still is the wife of one R. B.

LXXXV. That the Plaintiff is within twenty-one

years of age; and has declared by Attorney, when he should have declared, by next friend or guardian.

LXXXVI. That the said contract, in the Declaration mentioned, was made by the Defendant jointly with one W. P., who is still living and is residing in the County (*or the City,*) aforesaid; and was not made by the Defendant alone; and therefore, the said W. P. should have been sued also.

(*This Form shall be sufficient whether the contract be by parol or by deed.*)

FORM OF AFFIDAVIT TO PLEAS IN ABATEMENT, REQUIRED BY THE STATUTE 16 ANNE.

LXXXVII. ——— County,

M. R. (*the Defendant in the cause*) makes oath and says, that the Plea, hereunto annexed, is true in substance and in fact. M. R.

Sworn before ———

FORM OF DECLARATION, WHEN THE SUMMONS IS RETURNED, AS TO SOME OF THE DEFENDANTS, "CANNOT BE FOUND."

LXXXVIII. (*Venue.*) R. G., by S. T., his Attorney (*or in Person,*) sues J. T. and M. B., (but M. B. cannot be found by the Sheriff,) for (*here state the*

cause of action,) and the Plaintiff claims from J. T. (*the person summoned,*) $ ———.

COMMENCEMENTS OF DECLARATIONS, BY PERSONS SUEING IN SPECIAL CHARACTERS.

LXXXIX. (*Venue.*) A. B., Executor of the last will (*or Administrator of the goods, &c.*) of O. H. deceased, by S. T. his Attorney, (*or in Person,*) sues D. E. for (*here state the cause of action.*)

XC. (*Venue.*) C. K., Trustee of O. X., an Insolvent Debtor, by S. T., his Attorney, (*or in Person,*) sues L. P. for (*here state the cause of action.*)

XCI. (*Venue.*) J. T., who is within age, by S. T. his next friend (*or guardian,*) sues W. B. for (*here state the cause of action.*)

XCII. (*Venue.*) G. H., who was the husband of L. K. deceased, formerly L. B., who has survived his said wife, by S. T., his Attorney (*or in Person,*) sues C. P. for (*here state the cause of action.*)

XCIII. (*Venue.*) B. H. and F. W., surviving partners of T. K. and I. M., (*trading under the name of B. H., F. W. & Co.,*) by S. T., their Attorney, (*or in Person,*) sue T. H., surviving partner of M. S. (*trading*

under the name of T. H. and M. S.,) for (*here state the cause of action.*)

(*The words "trading under the name of, &c.," may be omitted, unless the name of the firm be contained in the contract sued on.*)

(*The conclusion of Declarations, by persons sueing in special characters, shall be the same with that of Declarations, by persons sueing in their proper characters.*)

COMMENCEMENTS OF DECLARATIONS BY EXECUTORS & ADMINISTRATORS.

XCIV. (*Venue.*) A. B. Executor of the last will (*or Administrator of the Goods, &c.,*) of O. H. deceased, by S. T. his Attorney, (*or in Person,*) sues D. E. for, (*here state the cause of action.*)

CONCLUSIONS OF DECLARATIONS BY EXECUTORS AND ADMINISTRATORS.

XCV. And the Plaintiff claims $ ——— (*or if the action is brought to recover specific goods,*) the Plaintiff claims a return of the goods or their value, and $ —— for their detention.

STATEMENT OF CAUSES OF ACTION ON CONTRACT BY EXECUTORS AND ADMINISTRATORS.

XCVI. Money payable by the Defendant to the Plaintiff for (*these words, Money payable &c., should precede Money counts like* xcvi. *to* cvii, *inclusive, but need only be inserted in the first,*) Goods bargained and sold by O. H. in his life time to the Defendant.

XCVII. Work done and Materials provided by O. H. in his life time for the Defendant at his request.

XCVIII. Money lent by O. H. in his life time to the Defendant.

XCIX. Money paid by O. H. in his life time for the Defendant at his request.

C. Money received by the Defendant for the use of O. H. in his life time.

CI. Money found to be due from the Defendant to O. H. in his life time, on accounts stated between them.

CII. A Messuage and Lands sold and conveyed by O. H. in his life time to the Defendant.

CIII. The good will of a business of O. H., sold and given up by O. H. in his life time to the Defendant.

CIV. The Defendant's use, by the permission of O. H. in his life time, of Messuages and Lands of O. H.

CV. The hire of (*as the case may be,*) from O. H. in his life time, let to hire to the Defendant.

CVI. Freight for the conveyance by O. H. in his life time for the Defendant at his request of Goods in ships.

CVII. The Demurrage of a ship of O. H. in his life time kept on Demurrage by the Defendant.

CVIII. That the Defendant, on the ——— day of ——— by his Promissory Note, now over-due, promised to pay to O. H. in his life time, $ ——— *sixty days* after date, but has not yet paid the same.

CIX. That one A. on &c. *(Date,)* by his Promissory Note, now over-due, promised to pay to the Defendant, or order, $ ——— , *sixty days* after date; and the Defendant endorsed the same to O. H. in his life time; and the said Note was duly presented

for payment and was dishonored, whereof the Defendant had notice, but has not yet paid the same.

CX. That O. H. in his life time on &c., (*Date,*) by his Bill of Exchange now over due, directed to the Defendant, required the Defendant to pay to O. H. $ ———, *Sixty days* after date; and the Defendant accepted the said Bill, but has not yet paid the same.

CXI. That the Defendant, on &c., (*Date,*) by his Bill of Exchange directed to A., required A. to pay to O. H. in his life time $ ——— *Sixty days* after date; and the said Bill was duly presented for Acceptance and was dishonored, of which the Defendani had due notice, but has not yet paid the same.

CXII. That O. H., in his life time, let to the Defendant a House, No. 200, Market Street, in the city of Baltimore, for four years to hold from —— day of ——— A. D., —— at $ —— a year, payable quarterly, of which rent —— quarters were due, at the time of the death of O. H. and are still due and unpaid.

(*As the foregoing Declarations are for suits against persons in their proper character, the Pleas, already given, can be pleaded to them.*)

COMMENCEMENT OF DECLARATIONS AGAINST EXECUTORS AND ADMINISTRATORS.

CXIII. (*Venue.*) A. B., by his Attorney, (*or in Person, as the case may be,*) sues C. D. Executor of the last will (*or Administrater of the goods, chattels, &c.*) of P. S. deceased, for(*here state the cause of action.*)

CONCLUSIONS OF DECLARATIONS AGAINST EXECUTORS AND ADMINISTRATORS.

CXIV. And the Plaintiff claims $—— (*or if the action be to recover specific goods,*) the Plaintiff claims a return of the said goods or their value, and $—— for their detention.

STATEMENT OF CAUSES OF ACTION ON CONTRACTS, AGAINST EXECUTORS AND ADMINISTRATORS.

CXV. Money payable by the Defendant, to the Plaintiff for (*these words, Money payable, &c., should precede Money counts like* cxv *to* cxxvi *inclusive, but need only be inserted in the first,*) goods bargained and sold by the Plaintiff to P. S. in his life time.

CXVI. Work done and materials provided by the Plaintiff for P. S. in his life time at his request.

CXVII. Money lent by the Plaintiff to P. S. in his life time.

CXVIII. Money paid by the Plaintiff, for P. S, in his life time at his request.

CXIX. Money received by P. S, in his life time for the use of the Plaintiff.

CXX. Money found to be due from P. S, in his life time, to the Plaintiff, on accounts stated between them.

CXXI. A Messuage and Lands sold and conveyed by the Plaintiff to P. S, in his life time.

CXXII. The good will of a business of the Plaintiff sold and given up by the Plaintiff to P. S, in his life time.

CXXIII. The use by P. S, in his life time of Messuages and Lands of the Plaintiff, by the Plaintiff's permission.

CXXIV. The hire of (*as the case may be,*) by P. S, in his life time, let to hire by the Plaintiff to him.

CXXV. Freight for the conveyance by the Plaintiff

for P. S, in his life time at his request of goods in Ships.

CXXVI. The Demurrage of a ship of the Plaintiff kept on Demurrage by P. S. in his life time.

CXXVII. That P. S. in his life time on the —— day of ——— by his Promissory Note, now over-due, promised to pay to the Plaintiff $—— *sixty days* after date, but did not pay the same, in his life time; nor has the Defendant paid the same since the death of P. S.

CXXVIII. That one A. K., or &c. (*date,*) by his Promissory Note, now over-due, promised to pay to P. S. or order, $—— *sixty days* after date; and the said P. S. in his life time endorsed the same to the Plaintiff; and the said Note was duly presented for payment, and was dishonored, whereof the said P. S. had due notice, but did not pay the same in his life time, nor has the Defendant paid the same since the death of P. S.

CXXIX. That the Plaintiff, on &c. (*Date,*) by his Bill of Exchange now over-due, directed to P. S. in his life time, required P. S. to pay to the Plaintiff $—— *sixty days* after date; and P. S. accepted the said Bill, but did not pay the same in his life time, nor has the Defendant paid the same since the death of P. S.

CXXX. That P. S., in his life-time, on &c. (*Date*) by his Bill of Exchange directed to A. K., required A. K. to pay to the Plaintiff $—— *sixty days* after date; and the said Bill was duly presented for Acceptance, and was dishonored, of which P. S. had due notice, but did not pay the same in his life-time, nor has the Defendant paid the same since the death of P. S.

COMMENCEMENT OF PLEAS BY EXECUTORS AND ADMINISTRATORS.

CXXXI. The Defendant, Executor of the last will (*or Administrator of the Goods and chattels,*) of P. S., deceased, by S. T., his Attorney, (*or in Person,*) says, (*here state the substance of the Plea.*)

CXXXII. And for a second Plea the Defendant says, (*here state the second plea.*)

PLEAS IN ACTIONS ON CONTRACT BY EXECUTORS AND ADMINISTRATORS.

CXXXIII. That the said P. S. deceased was never indebted in his life-time as alleged.

CXXXIV. That the said P. S. deceased did not promise in his life-time as alleged.

CXXXV. That the alleged cause of action did not accrue at any time within ——— years before this suit.

CXXXVI. That the Defendant has fully administered the goods and chattels, rights and credits of the said P. S. deceased; and had done so before this suit.

CXXXVII. That before this suit, and after the lapse of one year, from the date of his letters testamentary (*or of Administration,*) the Defendant paid away, in discharge of just claims, all the assets of the said P. S. deceased which had come to his hands; and that more than six months before he so paid, he gave notice to the creditors of P. S. to bring in their claims. And that at the time of such payment, he had no notice or knowledge of the alleged claim; and that since said payment, no further assets have come to his hands.

CXXXVIII. That before this suit and after the lapse of one year from the date of his letters testamentary (*or of administration,*) the Defendant paid away in discharge of just claims a large amount of assets of P. S. deceased; and that more than six months before said payments he gave notice to the creditors of P. S, to bring in their claims. And at the time of said payments he had no notice or knowledge of the

alleged claim. And there are other just debts still due from P. S., of which the Defendant had no notice or knowledge at the time of the said payments; and he has not, and never has had, assets sufficient to pay but a proportion of the alleged claim, regard being had to the debts still due from P. S.

COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS BY EXECUTORS AND ADMINISTRATORS AGAINST EXECUTORS AND ADMINISTRATORS.

CXXXIX. ——— County, A. B., Executor of the last will (*or Administrator of the goods and chattels &c.*) of W. H., deceased, by S. T. his Attorney, (*or in Person,*) sues T. K., Executor of the last will (*or Administrator of the goods and chattels &c.*) of W. K., deceased, for (*here state cause of action.*)

CXL. And the Plaintiff claims $ ——— (*or if the action is brought to recover specific Goods,*) the Plaintiff claims a return of the said Goods or their value, and $ ——, for their detention.

STATEMENT OF CAUSES OF ACTION ON CONTRACT BY EXECUTORS AND ADMINISTRATORS AGAINST EXECUTORS AND ADMINISTRATORS.

CXLI. Money payable by the Defendant to the Plaintiff for (*these words, Money payable &c., should*

precede the Money counts, but need only be inserted in the first,) goods bargained and sold by W. H. in his life-time to W. K. in his life-time.

CLXII. Work done and materials provided by W. H. in his life-time for W. K. in his life-time.

CXLIII. That W. K. in his life-time, on the —— day of —— by his Promissory Note now over-due promised to pay to W. H. in his life-time $——, *sixty days* after date, but did not pay the same; nor has the Defendant paid the same since the death of the said W. K.

CLXIV. That one J. M. on, &c. (*Date,*) by his Promissory Note now over due, promised to pay to W K., or order in his life-time $——, *sixty days* af ter date; and W. K. in his life-time endorsed the same to W. H. in his life-time; and the said Note was duly presented for payment and was dishonored, whereof the said W. K. in his life-time had notice, but did not pay the said note, nor has the said Defendant since the death of the said W. K. paid the same.