

**PRINCIPLES OF COMMON-LAW PLEADING;
A BRIEF EXPLANATION OF THE DIFFERENT
FORMS OF COMMON-LAW ACTIONS, AND
A SUMMARY OF THE MOST IMPORTANT
PRINCIPLES OF PLEADING THEREIN, WITH
ILLUSTRATIONS TAKEN FROM THE CASES**

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Principles of common-law pleading; a brief explanation of the different forms of common-law actions, and a summary of the most important principles of pleading therein, with illustrations taken from the cases by John Jay McKelvey

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JOHN JAY MCKELVEY

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P R E F A C E.

THE principles of common-law pleading as they came into our law are worthy of special study. They constitute a subject of interest and importance alike to the lawyer who practices under a modern code system, and to him whose professional activity lies in some State where the old forms, though modified somewhat it may be by occasional statutory enactment or progressive court decision, still prevail.

No code has been able to abolish the principles of common-law pleading because they form the foundation upon which every code must build its own system. A code may call things by different names — as *complaint* for *declaration*, *answer* for *plea* — but the *things* remain the same, and, what is more to the point, the purpose for which the thing is used remains the same. Hence to know how to best make the thing serve its purpose one may still study with profit its origin and its use in the cases recorded in the home of its origin.

It is in fact the same with Pleading as with other subjects. Our whole system of law is the embodiment of the principles of the common law as found in the cases, and to the cases we must ever turn for light either as a direct aid to the administration of justice or as a means of understanding and applying some statutory restatement of principles first established by the courts.

Such enactment has perhaps ambitiously sought to simplify a principle of law by encasing it in exact language, but alas, has only succeeded in adding to the labor of application the task of interpretation, thus increasing the chance of error.

In a democracy such as ours the people are the source of the law, which evolves through the slow process of the decisions of courts and the more rapid process of the enactments of legislatures. When such enactments are confined to the prescribing of new, or the modifying of old rules relating to property or persons, they record and reflect the current state of society and thus serve a very useful purpose; but when they attempt to crystallize into a set form all existing rules governing property and person they merely complicate the situation, to the consternation of the lawyer who now finds himself removed one step further from the enlightening sources of the law and is compelled to take his light, as it were, from the original sources through a statutory screen, not always, be it said, of the clearest transmitting material.

From the earliest beginnings down to the time when our several States, with their separate and differing judicial systems, began to adapt and fit the common law to their respective needs we may study the system of pleading in its development through the cases and the English statutes, with the feeling that our knowledge thus acquired will be an asset of value in any jurisdiction.

To such study the student must add, in order to complete his equipment, a further study of cases and

statutes in the particular jurisdiction where he intends to practice.

It is not the aim of this treatise to carry the student beyond an understanding of the main principles of common-law pleading as they came to us in the beginning, and, except by way of illustration where original principles have been reasserted by modern decisions, little reference is made to modern cases.

The subject of common-law pleading has been treated fully, and in great detail, by Chitty. Other text writers, chief among them Stephen, have treated it less in detail, but more clearly. The works of all of these writers, however, are characterized by a greater fulness than is necessary, or even convenient, for the purposes of the student who expects to practice in this country. What seems to be required is a summary of the main principles of the subject—the principles whose influence is still felt in the various systems of pleading which prevail in the different States, without the mass of technical and local rules which encumbered the old English system. It is this need which the present work is intended, in some small measure, to meet.

The late Professor Ames, of the Harvard Law School, prepared, some years ago, a collection of cases upon the subject, which has been and is used in many Law Schools with satisfactory results. The selection and arrangement of the cases by Professor Ames has been so judicious and effective, and the use of a book, such as his collection of cases, so desirable in connection with a text-book, that I have, in the order of treatment of the principles covered by his cases, followed

in the main his arrangement and adopted the cases selected by him as illustrations. This matter is contained in Part II.

Part I. contains a brief explanation of the different forms of actions, to which the principles set forth in Part II. mainly relate. I know, in my own case, some explanation of this nature would have been a great help to a proper understanding of the cases. If the explanation given shall prove of assistance to any one else, it will have accomplished its purpose.

In conclusion, I wish to say that the present work is put forth only as a guide to the main principles of the subject of civil pleading and a help to the understanding of the cases which illustrate those principles, and in no sense as a complete treatise on the subject. Illustrations taken from the cases have been used to show the application of the principles set forth, and have been referenced for convenience both to Ames' Cases, where contained therein, and to the original reports.

JOHN JAY MCKELVEY.

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