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perhaps, to such unmitigated contempt, as the principles and practice of pleading. "This mischievous mess," says Mr. Mill, "which exists in defiance and mockery of reason, English lawyers inform us, is a strict, and pure, and beautiful exemplification of the rules of logic. This is a common language of theirs. It is a language which clearly demonstrates the state of their minds. All that they see in the system of pleading is the mode of performing it. What they know of logic is little more than the name."[1]

To such ribaldry as this, there is no manner of reply which well-bred persons can employ; but we will endeavour to wipe away some part of the reproach, by departing widely from that method of defence which is commonly adopted by the profession. We shall not seek to intrench ourselves in technicality; we shall not assume the necessity of any particular forms; but descend at once from the vantage ground of precedent and authority, and meet our adversaries on principles of abstract jurisprudence; and we undertake to shew, with as much brevity as possible, that, though overloaded by perverted ingenuity with much that taste and reason would reject, English pleading is founded upon principles as sound as any that reformers can contrive. We shall expose its faults as freely as we shall claim credit for its advantages. Yet we are convinced that the expence, delay, and uncertainty complained of, are attributable to the relaxation, and not to the strictness, of our rules; and that our best exertions should be directed to restore, instead of superseding or extending them. This, indeed, is Mr. Brougham's opinion, and the following observations will afford an illustration of his views. He, however, commenced at a point, to which we should not feel ourselves quite justified in proceeding. He gave our ancestors credit for sense, a commodity most commonly denied them; and took for granted the soundness of the foundations of the system, whilst numerous innovators are for demolishing the whole. We therefore shall begin the investigation at a somewhat earlier stage; for we have seen, as yet, no commentary on the writer from whom we just now quoted, nor on

[1] Supplement to the Encycl. Brit. Art. Jurisprudence.

those who have followed in his train. All that we can venture to assume is the expediency of ascertaining beforehand the nature of the matter in dispute; and it is surely too obvious for denial, that, if parties were to proceed to trial without any warning but a summons to the court, without any species of preliminary arrangement, delay, uncertainty, and confusion would result. In such a case the plaintiff's range of proof would be unlimited; the defendant might be equally diffuse; unacquainted with the precise subject of contention, the judge could form no check upon their wanderings; and neither party could be prepared for explanation or reply.

We are agreed then as to the necessity of some sort of pleading, and shall hardly differ as to what are its proper objects; for that system is undeniably the best, which brings the parties most speedily to issue on a point material to their difference, which allows no statements but such as are absolutely necessary to the developement of the question, which conveys the fullest information with regard to the proofs required, and provides that these shall be as few as possible; and, above all, which accurately distinguishes the nature of the points in difference, and refers each to its peculiar jurisdiction; without which, the benefits of a decision must terminate with the suitor who procured it, as no precedent could be relied on as a guide, if fact and law were confounded in the judgment.

By what means these objects are attainable, and what progress towards them our practitioners have made, are the subjects for discussion here, and will perhaps be most easily explained by contrasting the present system with those already tried and those suggested for adoption; and, in the first place, we shall notice a peculiarity which distinguishes our course of proceeding from that of every other judicature.

With us, the allegations of parties are so restrained as to lead spontaneously, as it were, and without the interference of the court, to the production of an issue; whilst, in every other system, a comparative laxity of assertion is permitted, each party states his case at large, and, when all the circumstances of the dispute are fully developed, the pleadings are reviewed by the judge, who selects the material points and frames the the necessary issues. The rule chiefly instrumental in pro-

ducing the effect we speak of is, technically expressed, the following; "That after the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance;"[1] the meaning of which will be best explained, and the working best shewn, by an example.

If A. for instance, were to complain of B., he would set out in writing the grounds of his demand, to which B. would be called upon to reply in one of three ways:—by objecting to the sufficiency in point of law of the facts alleged, (i. e. by demurring); by denying the truth of the complaint, (i. e. pleading by way of traverse); or, admitting its sufficiency and truth, by stating facts, which prevent the circumstances relied upon by A. from having the effect attributed to them, (which is termed pleading by confession and avoidance.) If the first course, that of demurring or objecting to the legal sufficiency of the complaint, is chosen, the objecting party is taken to admit the facts, the dispute becomes altogether a question of law, and judgment is given for him in whose favour that question is decided, without requiring any evidence to circumstances. If, according to the second method of proceeding, B. denies or traverses the charge or any essential part of it, the parties are immediately at issue, and a time is fixed for determining the case by proof. But if, declining both of these methods, the defendant confesses the complaint and alleges a new line of circumstances in answer, as, that after the debt became due it was released to him by A.; then a change takes place in the position of the parties, and A. is called upon in turn to deny the truth or legal competency of the defence, or to allege other facts subversive of the effect of those set out by B.; as, in answer to the defence of a release, that such release was extorted by violence; upon which B. is called upon as before to demur, traverse, or state fresh matter; and thus the disputation proceeds, till either some essential circumstance is affirmed on one side and denied upon the other, or till the parties mutually admitting the assertions of each other, are at issue as to the legal effect of some one of the pleadings; a conjuncture which in most cases very speedily arrives, and cannot indeed be long protracted by the utmost

[1] Stephen on Pleading, 157.

ingenuity of a disputant.[1] Details of circumstances must occasionally be prolix, as we can neither circumscribe their actual combinations, nor ascertain, beforehand and without a knowledge of the evidence, to what extent an allegation is diffuse; but it is quite impossible to wander from the point or to become illogical without immediate exposure, whilst the rule exemplified above prevails. This, however, it is unnecessary to press; as those whose censures we are most anxious to examine admit the merits of the mode we have described, but deny our courts the praise of following it. They mistake the exception for the rule; they know that a great deal of prolixity has crept in; that various anomalies are discernible; that legal forms appear preposterous to those who are ignorant of the history of our courts; and gladly availing themselves of the facilities for imposition afforded by the intricacies of the inquiry, and often possibly deceived themselves, a certain class of writers have thought proper to inform the public that a whole profession is in league against it, resolved on fostering a practice which has not the semblance of a principle to rest on, but is vague, confused, and contradictory throughout. Here, however, they shall speak for themselves, and we trust the reader will pardon the length of the extract in consideration of the weight of the authority.

"What is desirable in the operations of the first stage is, 1*st*, That the affirmations and negations with respect to the facts should be true; and 2*dly*, That the facts themselves should be such as really to have the quality ascribed to them. For the first of these purposes, all the securities, which the nature of the case admits of, should be taken, for the veracity of the parties. There is the same sort of reason that the parties should speak truly, as that the witnesses should speak truly. They should speak, therefore, under all the sanctions and penalties of a witness. They cannot, indeed, in many cases, swear to the existence or non-existence of the fact; which may not have been within their cognizance. But they can always swear to the state of their belief with respect to it. For the second of the above purposes, namely, that it may be known whether the facts affirmed and denied are such as to possess the quality ascribed to them, two things are necessary; the first is, that all in-

[1] A departure takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another. This is fatal.