

“ exact question or questions of fact to be tried. It not unfrequently therefore
“ happens, that the parties are taken by surprise, and find themselves opposed by
“ some unexpected matter of defence or reply, which from the want of timely notice,
“ they are not in due condition to resist.

“ But an effect of more common, and indeed almost invariable occurrence, is the
“ necessary accumulation of proof, and consequently of expense; for as nothing is
“ admitted upon the Pleadings, each party is obliged to prepare himself, as far as it
“ is practicable, with evidence upon all the different points which the nature of the
“ action can by possibility make it incumbent upon him to establish, though many of
“ them may turn out to be undisputed, and many of them may be such as his adver-
“ sary, if compelled to plead specially, would have thought it undesirable to dispute.

“ With respect to matters of Law, the inconvenience experienced, though of a
“ different kind, is not less remarkable; for when points of Law arise upon the
“ General Issue, instead of being developed by way of Demurrer, for adjudication
“ by the full Court in *banc*, they are of necessity left to the decision of the single
“ Judge before whom the cause is tried; and the decision upon his sole authority,
“ deprived as he generally is of the advantage of any previous intimation of the matter
“ to be argued, and unable to refer to Books, is often found to be unsatisfactory and
“ inconclusive. It may even happen (and that is not an unfrequent occurrence) that
“ the controversy under this form of Plea turns *entirely* upon matter of Law, there
“ being no fact really in dispute; and in that case, the mode of decision by Jury is
“ not only defective, but misplaced, and the trial might have been spared altogether,
“ if the parties had proceeded by the way of Special Pleading, and raised the question
“ upon Demurrer.

“ Another ill consequence attendant upon the General Issue is, that as the true
“ point of decision has not been evolved in the Pleading, it becomes the business of
“ the Judge to extract it from the proofs and allegations before him, to sever correctly
“ the Law from the fact of the case, and again, the facts admitted, from those in
“ controversy, and to present the latter in a distinct shape to the Jury for their consi-
“ deration; an analysis which the rapidity and tumult of a trial at *Nisi Prius* renders
“ extremely difficult, and which is often defectively conducted.

“ Of the state of things here explained, it is the natural effect that when the General
“ Issue is pleaded, the trial fails in numerous instances to accomplish the purposes of
“ Justice, or ever to terminate the legal dispute, and is followed by the application of
“ the defeated party to the full Court in *banc* for a new trial. This proceeding involves
“ the necessity of recapitulating, for the information of that Court, the whole of what
“ passed *viva voce* at *Nisi Prius*, of which there is no admissible Report, except that
“ of the presiding Judge, upon whose alleged error in point of Law the application
“ most commonly is founded. The motion for a new trial is for this reason beset
“ with peculiar difficulties; the effect of which is, that it ultimately fails in many cases
“ (as there is reason to apprehend) where in Justice it ought to succeed, and suc-
“ ceeds in many cases where there is in reality no sufficient ground for the application.
“ It may be added, that even when successful, it gives no redress beyond that of
“ awarding a new and expensive inquiry upon the matter of fact; and that with
“ respect to the matters of Law, of which it may involve the discussion, they are less
“ distinctly and less satisfactorily decided, upon the motion for a new trial, than when
“ raised