

“ One of the most important questions which has presented itself in the course of our inquiries is, whether it is expedient to continue to any, and to what extent, the use of that kind of Plea denominated the *General Issue*? under this plea, which is in its shape a summary form of denial of the allegations in the Declaration, or some principal part of them, a Defendant is at present allowed in certain actions, to put the Plaintiff to the proof of every thing alleged in the Declaration; and in some, not only to do this, but at the same time to prove in his own defence almost any kind of matter in confession and avoidance, that is, matter which admitting the truth of the Plaintiff's allegations, tend to repel or obviate their effect. On the other hand, there are some kinds of action in which, if the defence consists of any matter in confession and avoidance, it must be specially pleaded, and cannot be admitted in proof under the General Issue; and there are others in which, properly speaking, there is no General Issue, and in which all the pleading may be considered as special.

“ That the present state of the Practice on this subject requires alteration, seems to be universally felt; but with respect to the *kind* of alteration required, the views taken by different persons are suprisingly dissimilar: one set of opinions pointing to the restriction of the General Issue; and another, to its wider application, and to a correspondent extinguishment of Special Pleading. It will be found, however, on reference to the written communications addressed to us, that there is a decided preponderance of authority in favor of the former course; and we do not hesitate to declare our own strong conviction, that it is the right one, and that its adoption would be attended with highly beneficial results.

“ We conceive that considerable misapprehension popularly prevails upon the subject of *Special Pleading*. That system was characterized, no doubt, at former periods of our legal history, by a tendency to prolix and tautologous allegation, an excessive subtlety, and an overstrained observance of form; and notwithstanding material modern improvements, it still exhibits too much of the same qualities. These its disadvantages are prominent, and well understood; its recommendations are, perhaps, less obvious, but when explained, cannot fail to be recognized as of far superior weight.

“ Special Pleading, considered in its principle, is a valuable forensic invention, peculiar to the Common Law of England, by the effect of which, the precise point in controversy between the parties is developed, and presented in a shape fit for decision. If that point is found to consist of matter of fact, the parties are thus apprized of the exact nature of the question to be decided by the Jury, and are enabled to prepare their proofs with proportionate precision. If, on the other hand, it turns out to be matter of Law, they have the means of immediately obtaining the decision of the cause, without the expense and trouble of a Trial by Demurrer,—that is, by referring the legal question, so evolved, to the determination of the Judges. But where, instead of Special Pleading, the General Issue is used, and under it, the Defendant is allowed to bring forward matters in confession and avoidance, these benefits are lost. Consisting, as the Plea does, of a mere summary denial of the case stated by the Plaintiff, and giving no notice of any defensive allegation on which the Defendant means to rely, it sends the whole case, on either side, to trial, without distinguishing the Fact from the Law, and without defining the
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