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FORMS OF ACTION.

The origin of Forms of Action is to be traced to the Roman law. It will be curious and instructive to recur to the history of the subject, in its connection with that system. Among other deficiencies remarkable in the Code of the Twelve Tables, was an entire omission of regulations concerning the manner in which the laws were to be enforced. It is obvious that the proceedings in every court of justice must be conducted according to some fixed and invariable rules of practice; yet the laws of the Decemvirs were altogether silent on this subject, and the advantages which the patricians derived from the omission may warrant the inference that their silence was not involuntary. The common forms of law were made a matter of religion; and the people, always obedient to the voice of superstition, were easily persuaded that certain solemn ceremonies were indispensable to the administration of justice. The college of pontiffs, in conjunction with the jurisconsults, had the exclusive direction of these ceremonies—they were technically called *actiones legum*. Like the *dies fasti* and *nefasti*, they were kept a profound secret from the community at large, so that, though the letter of the law was open to the inspection of every citizen, it was impossible for any one to avail himself of it in the courts without the aid of the initiated. This

violation of justice, gross and evident as it was, continued for a long time to hold its ground, supported by the religious veneration of the whole people, as well as by the political influence of the patricians. The secret was carefully kept, and the *actiones* long remained a profitable mystery to those who had invented them. A fortunate circumstance, however, at length effected the subversion of the whole system. One Cneius Flavius Cæcus, the son of a freedman, had been employed as the secretary of Appius Claudius, to transcribe a collection of the *actiones* which his master had made, and either at the instigation of the patrician, who might wish to ingratiate himself with the plebeians, or more probably without his knowledge, published his manuscript. The plebeians appear to have been fully aware of the value of the knowledge they had acquired. Flavius was loaded with honors, and the code which he had made public was ever afterwards known by the appellation of *Jus Civile Flavianum*. Yet it is remarkable that notwithstanding their estimation of the privilege they had gained, by being admitted to a knowledge of all the mysteries of practical jurisprudence, and notwithstanding that, soon after the office of Sovereign Pontiff was thrown open to them, yet they allowed the patricians to invent a new system of forms, and the wheels of justice became clogged with other obstacles. Still it seems that as the secrets of law had not ceased to be considered secrets of religion, the vulgar were always excluded from a participation in the knowledge of them. It has been supposed on the authority of a passage in Cicero, in his Oration *Pro Muræna*, that the new code of legal forms was written in a sort of cipher, expressly invented for the purpose. He says that upon the publication of Flavius, the jurisconsults, angry because they feared that by the promulgation of the *dies fasti et nefasti*, and of the calendar, law proceedings might be carried on without them—*notas quasdam composuerunt, ut omnibus in rebus ipsi interessent*—*invented certain marks*, that their assistance might still be necessary in all legal business. However this may be, about a century after the publication of the *Jus Flavianum*, the whole system was again brought to light, and that by a patrician. Sextus Ælius was the author of this second publication.

The publicity given to the *actiones* did away, to a great extent, the injustice of the whole system. The signification of the term *actio* was, however, materially changed in later times, so that the forms of legal procedure, which bear the same name in the compilation of Justinian, are not to be confounded with those of the *Jus Flavianum*, or of the *Jus Œlianum*. The difference is attributable to the ascendency acquired by the Prætorian law; to the frequent innovations that took place in the legislature; to the change that was gradually operated in the spirit and character of the civil jurisprudence; and finally to the total subversion of the groundwork on which the whole fabric had been erected—the national religion.

The *actiones* were at first, as their name in some measure implies, certain forms symbolically expressed by outward or corporeal signs. These were as various as the different legal *acts* to which they gave validity. Thus the well-known forms employed in the emancipation of children or of slaves—the purchase-money weighed—the blow struck by the father—were legal *actions* which were not performed as mere matter of ceremony, but because the neglect of them would have invalidated the manumission. In the same manner, the delivery of an iron ring in the celebration of nuptials, was an *action* absolutely necessary to constitute a legal marriage. Numerous instances might be quoted of ceremonies frequently mentioned by classic authors, which it is usual to regard as ceremonies only, but which, in reality, had a much more imperious claim to be generally observed. In most cases, it was necessary to pronounce some appointed sentence at the time of performing the action. Every one recollects the animated picture given by Horace of the manner in which a witness was secured. The words "*Licet Antestari?*" were necessary to constitute the act a legal one; nor (at one period at least) would the action have been complete without the ceremony of touching the witness by the ear. The word *memento* was afterwards to be pronounced by the suitor. So intimate, indeed, was the connection between the formal words to be spoken, and the action to be performed, that the appellation *actio legis* is supposed to have arisen from the

original actions having been adapted to the very letter of the old laws.

The custom of conducting legal transactions by means of corporeal signs probably owed its origin, among the Romans as among the Jews and many modern nations, to the unfrequent use of writing. It is one that has invariably been found to decline in proportion as civilization and refinement have advanced. Witness, for example, the practice that has gradually gained ground in England of neglecting the old forms or actions that were necessary for the conveyance of real property. This is one instance out of a hundred. However, the inconvenience and awkwardness of corporeal actions, which have generally been the reason of their falling into disuse, were not the only motives for their suppression at Rome. The original inventors of these conventional signs had made them so complex, and had enforced the observance of them so strictly, that it became almost impossible to conduct a suit, through all its stages, without the omission of some *action*, which, however puerile in itself, was absolutely essential to the success of the cause. The slightest error was fatal; and the combinations of different symbols at length became so various and so intricate, that some errors the most experienced lawyers might often find themselves unable to avoid. This being the case, it was agreed to abolish the whole system of signs, and to supply their place by verbal formulæ. This was accomplished by the Œbutian and Julian laws.

The principal improvement that the abolition of the original actions introduced into the judicial proceedings, was a more liberal construction of errors, and a less rigid adherence to the minutiæ of the legal forms. A collection of formulæ or writs was always at hand, to be consulted by every citizen; and there was no species of injury, or no kind of claim, but could be redressed or prosecuted by means of precedents adapted to it. As the positive provisions of the legislature could not with propriety be openly transgressed, indirect means were found to elude them. Fictions of law, similar to those of which the English courts offer so many examples, were allowed; and it became usual in doubtful

cases, for litigants to employ two different actions, with a proviso that they were to abide by the right one. Such expedients as these were, however, unnecessary after the reign of Constantine, who almost entirely destroyed the efficacy of the legal *formulæ*. Thenceforward judicial proceedings became more simple, and consequently better understood. The word *actio*, it is true, still remained, but it has been already remarked that it had entirely lost its primitive signification: Burke's Laws of Rome 121, &c.

Let us turn to a brief examination of the History of the Common Law of England, in regard to Forms of Action. I entertain no doubt that they owe their origin in part to the feudal system, and in part to the influence of the Roman laws. While the laws and policy of England were in what may be termed its forming state, the chancellors were ecclesiastics, and to them was intrusted the power by the issuing of the original writ, of vesting in the King's Court jurisdiction of any particular case. These ecclesiastics were, to some extent, educated in the forms and principles of the civil law. Besides which, "when the Anglo-Saxons first settled in England, their law, like that of the Britons, was entirely oral and traditionary. It was a common law existing as the common law of England still exists in customs, whether local or national, recorded in the memory of the judges, and published by the practice of the tribunal. Before the introduction of Christianity, the northern nations annexed the functions of the judge to the sacerdotal office, and some of the traditions of the law can be curiously elucidated by the fables of ancient superstition and mythology:" Palgrave 42. "The Teutons attached the greatest importance to their technical forms and proceedings. Of these, the most numerous are preserved in the Codes of the Norwegians, though some of great singularity are extant amongst the Anglo-Saxon customs. Every act by which an obligation was incurred, by which civil rights were acquired or created, which constituted a stage in the suit, or was connected with its process, required to be enounced in the phraseology, and accompanied by the rites, which immemorial tradition had provided. The plaint or appeal preferred to the court, the betrothal of the maiden, the legitima-

tion of the child, the manumission of the slave, all had their peculiar forms, and with the nicety which afterwards characterized the Anglo-Norman law, the variance of a word or the lapse of a syllable annulled the entire proceeding. . . . Practice and experience could alone teach these forms: the important knowledge was not generally diffused amongst the people, and the law was concealed with jealousy from the profane multitude by the wise and powerful 'Lawmen:'" Id. 148.

It is certain that at a very early period, specific forms of action were provided by the law of England for such injuries as had then most usually occurred. The ancient forms of action were termed *brevia formata*, and were collected in a book called *Registrum Brevium*. "I have," says Lord COKE (8 Rep. Pref.), "a register of our writs, originally written in the reign of King Henry II. (in whose time GLANVILLE wrote), containing the original writs, which were long before the Conquest, as in the said Preface to the third part appeareth; and yet also remaining in force, &c., which is the best book yet extant of the common law, and so ancient as the beginning whereof cannot be showed." The compilation of this very ancient book has been ascribed to RALPH DE HINGHAM, Chief Justice in the reign of Edward I. It was printed as early as 1531, and its authority in former times was very great. At common law, also, though no forms could be found in the Register adapted to the nature of the plaintiff's case, yet he was at liberty to bring a special action on his own case, and writs were framed accordingly which were termed *magistralia;* but as the officers of the court were found reluctant in new cases to frame the proper remedy, the legislature thought fit to enforce the the common law, and it was enacted by statute Westm. 2 (13 Edw. I.), "that if it shall fortune in the chancery, that in one case a writ is found, and in like case, falling under like law and requiring like remedy, is found none, the clerks in chancery shall agree in making the writ, or adjourn the plaintiffs until the next Parliament, and that the cases be written in which they cannot agree, and that they shall refer such cases until the next Parliament; and by consent of men learned in the law, a writ shall be made, lest it might happen after, that the

court should long time fail to minister justice unto complainants." To this statute the great encouragement and frequency of actions on the case is attributed. It has, however, been observed that it by no means follows, that because in cases unprovided for by the Register, the statute of Westm. 2, directs an action on the case to be framed, that such action did not subsist at common law.

Notwithstanding these provisions, it was once thought that the circumstance of an action being of the first impression and unprecedented, constituted a conclusive objection against it; but this notion no longer prevails, for it is an established maxim of the common law, that wherever there is a legal right, there is also a legal remedy; and Lord Chief Justice PRATT, in answer to the objection of novelty, said that he wished never to hear it urged again, for torts are infinitely various, not limited or confined, for there is nothing in nature that may not be an instrument of mischief, and the special action on the case was introduced because the law will not suffer an injury without affording a remedy, and there must be new facts in every special action on the case; and in the case of *Paisley* vs. *Freeman*, 3 T. R. 63, Mr. J. ASHHURST observed, that where cases are new in their *principle*, it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the *instance*, and the only question is upon the application of a principle recognised by law—to such new case it will be just as competent to courts of justice to apply the acknowledged principle to any case which may arise two centuries hence, as it was two centuries ago. However the novelty of an action may frequently be fairly urged as a strong *presumptive* argument against it, more particularly where the *right*, which is the foundation of the action, is admitted, but the mode of relief is the only matter in controversy.

When the prescribed form of action is to be found in the Register, the proceeding should not materially vary from it, unless in those cases where another form of action has long been sanctioned by usage; for the courts have considered it of the greatest importance to observe the boundaries of the different ac-

tions, not only in respect of their being most logically framed, and best adapted to the nature of each particular case, but also in order that causes may not be brought into court confusedly and immethodically, and that the record may at once clearly ascertain the matter in dispute: 1 Chit. on Plead. 86.

It might be curious to trace the history of forms of actions in the English law. Many of the ancient forms, especially of real actions, are practically obsolete, from the introduction of simpler remedies, and from the extension of the jurisdiction of chancery. Nevertheless, time has gradually impressed important modifications on all existing forms.

In Pennsylvania it has been established by repeated decisions of the Supreme Court, that all common law actions, which have not been abolished by the legislature, are in force here precisely as they are in England: *Barnet* vs. *Ihrie*, 17 S. & R. 211.

It is to be observed that in chancery there are no particular forms of action. The equity which the plaintiff sets up is indeed declared upon in his bill, in a certain order and method established by precedent, but there is nothing there to which the power of amendment does not reach. Extensive as is the power of permitting amendments conferred upon our courts by the legislature, it has not as yet reached the case of permitting the form of the action to be amended.

It is an important question, then, whether our system should be changed in this respect?

It is certain that in many cases, the lines which distinguish one form of action from another are very indistinct. The most prudent and well-informed lawyer may occasionally make a mistake. To all but the profession, the law of forms of action is in a great measure a sealed book. The constitutional privilege which every suitor has of conducting his own suit in court, cannot be exercised but at the utmost peril of fatal mistake. Even supposing the mistake ascertained in time to prevent it from being fatal to the cause, the party loses all his time, trouble, and expense, and must commence his action anew. It is not to be denied that this is often fraught with gross injustice. It is usually argued, however,

that such cases of particular hardship ought to be borne for the sake of the advantages which accrue from legal forms; that without form the pursuit of justice would be a confused scramble; the points of controversy would not be ascertained with any precision, and courts would be a scene of indecent personal altercation and prolonged controversy, if the parties were allowed to make their complaints and defences without some system and order. This may all be admitted without yet reaching the marrow of the question. That order and system should exist; that no party should be allowed to prove matter of complaint or defence which he had not first alleged; that the case should be so conducted that the controversy be reduced to certain fixed questions of law or fact, upon which the parties are at issue, and the decision of the tribunal is invoked: these are plain matters, which common sense and experience alike show to be essential to the decent, orderly, and expeditious administration of justice. The same results have, however, always been found attainable in courts of equity, without the trammels of those *forms* of action of which we are speaking.

The true question may be thus stated: Why may not a plaintiff be allowed to summon a defendant to appear in court to answer any complaint which he may exhibit against him; or, if you please, some specific complaint—being a statement of facts—set out in or accompanying the summons? Why should he be required in his summons to give his complaint a specific name—call it an action of trespass, case, debt, or detinue—on the peril that if he makes a mistake in this particular, if he assigns a wrong name to his action, however well founded in law and justice his cause may be, he shall lose it, and be turned out of court in some instances, with the entire and irremediable loss of his claim, and in all with a judgment against him for costs? It is to be observed that, with the exception of perhaps not more than one case in which a fiction is allowed—the action on the case for trover and conversion—our declarations set out merely the grounds of the plaintiff's complaint in technical language, to be sure, but still in a way sufficiently intelligible to a plain mind. If the question at issue involved the existence of lawyers, as a learned profession, it

would be one thing. Experience shows that it does not. No change in the forms and modes of proceedings—no simplification of proofs and pleading, can ever dispense with counsellors and advocates. Law will always be a complicated and difficult science, demanding the lucubrations of many years exclusively devoted to the study of it. The trial of causes in court, the examination of witnesses, and the discussions of the rights of parties, will ever continue to demand men of skill, experience, ingenuity, and eloquence. Thus the profession of the law stands in an impregnable position, and lawyers mistake their true interest in supposing that any system which prevents the administration of justice according to law, by the interposition of essential forms in legal proceedings, tends to their advantage. Men avoid law—they submit to loss rather than invoke its aid, when the necessary fallibility and uncertainty of human judgment, in all cases, is increased by the multiplication of technical questions not bearing upon the real merits of the cause. These considerations appear to us entitled to weight upon the question, whether these technical forms—the necessity of truly classifying a cause of action—in the very first instance, the first step in the suit should not be abolished? We are free to say, however, that it is a very important step, certainly not to be hastily adopted. Fortunately for us, our large and prosperous sister state of New York has adopted, and is now trying the experiment of such a change. A few years will determine whether it can be safely introduced, and whether there are advantages resulting from it which render it worth the trial and the endurance of those partial and temporary inconveniences, which never fail to accompany an entire change of the code of procedure in courts of justice. The history both of the Roman and Common Law on this subject, shows a gradual approximation to such a system,—a system which discards, whenever practicable, mere technical formalities.

It may be observed, in addition, that one great argument in the mouths of those who stand up for the existing forms, is usually drawn from a characteristic of the old system, which may be said practically no longer to be in use. Special pleading, which, as it