HANDBOOK

OF

COMMON-LAW PLEADING

BY BENJAMIN J. SHIPMAN

THIRD EDITION

BY

HENRY WINTHROP BALLANTINE
PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA

ST. PAUL
WEST PUBLISHING CO.
1923

PREFACE TO THIRD EDITION

In this edition, the text has been freely revised and added to, especially in the chapters relating to forms of action, to incorporate the results of historical scholarship of writers like Ames, Pollock and Maitland, Holdsworth, and Street. The arrangement of the text has been materially changed to adapt the order of treatment to the needs of the student. Chapter I gives a brief survey of the proceedings in an action in order that the student may better understand the cases he studies and see the connection of common-law pleading with other parts of the action. The notes have been amplified to include citations of law review articles as well as of cases from leading casebooks and important recent cases from the common-law states.

Illustrative forms, given in the appendix of the second edition, have been put into the body of the text for more convenient reference.

HENRY WINTHROP BALLANTINE.

UNIVERSITY OF MINNESOTA LAW SCHOOL, 1923.

PREFACE TO FIRST EDITION

In the following pages, the writer has endeavored to state, as clearly and concisely as possible, such of the rules and principles of common-law pleading as are still recognized and applied in this country, omitting such of those found in the old English system as have become obsolete in practice, except where, as in the case of special pleading, they are the foundation of the method now in use, and giving due prominence to those rules whose principles are most noticeably applied in pleading under the codes. Whether the common-law rules are to be taken as directly followed in the latter, aside from the formalities prescribed in the practice acts, or whether the rules and principles of code pleading are to be considered as derived simply and only from the statute, the fact remains that a knowledge of the common-law system cannot fail to be of advantage, if, indeed, it is not an essential, to a thorough understanding of both code and equity pleading. It has been the observation and experience of the writer, not only that such knowledge enables a lawyer to frame his pleadings under the latter systems with greater ease and accuracy, but that, especially in code pleading, doubts as to the necessity or propriety of particular allegations, where the statute is silent or obscure in its directions, can generally be easily disposed of by an understanding of the reason of the common-law rule in similar cases. A lawyer who enters upon the active practice of his profession with no other guide than what the codes prescribe is but poorly qualified for attaining the important result of placing the statement of a complicated and important case before the court in a logical and concise form.

The arrangement of the book is mainly that of Mr. Stephen, and the rules given are those found in his admirable work. The first chapter, giving a general view of the principles and essentials of the different common-law actions, is designed for comparison with those rules; and the second, with the view of enabling the student to form, at the outset, a definite and connected idea of what may take place in the regular course of a trial, and not as giving a course of procedure which is strictly followed in any one state. The third chapter, covering the subject of Parties, has necessarily been confined to a limited space, for the reason that more than an outline of the principal rules

was found inadvisable, and the succeeding chapters, covering the rules of pleading, have been limited to a statement of the rules themselves, both as given by Mr. Stephen and as embodied in propositions explaining or amplifying them, with such further explanation of the reason or principle of each as seemed necessary. The authorities given are cited both in support of the text and for the purpose of illustration, many of them being already used in the law schools for the latter purpose.

St. Paul, Minn., August 14, 1894.

TABLE OF CONTENTS

INTRODUCTION

(Pages 1–14)

CHAPTER I

OUTLINE OF PROCEEDINGS IN AN ACTION

Section		Page
1.	Scope of Procedure	15
2.	Jurisdiction of Courts	15–17
3.	Process—The Original Writ	17–20
4.	Service—Personal and Constructive	21–24
5.	The Appearance	24–25
6.	Pleadings	25–27
7.	The Declaration of the Plaintiff	27
8–9.	The Demurrer	28
10.	Dilatory Pleas	29
11–12.	Pleas in Bar	30
13–14.	The Replication and Subsequent Pleadings	31
15.	Production of Issues	32–33
16.	The Method of Trial of the Issues	33–35
17.	Right to Open and Close	35–36
18.	Methods of Production of Evidence	36–37
19.	Burden of Proof	37–40
20.	Examination of Witnesses	41–42
21.	The Arguments, or Summing Up	42–43
22.	The Charge of the Court	43–44
23.	Deliberations of the Jury	45
24.	The Verdict	45–47
25.	The Judgment	47–50
26.	Writs of Execution	50–53

CHAPTER II

DEVELOPMENT OF FORMS OF ACTION

27.	Dependence of Right upon Remedy	54–57
28.	Original Writs	57–59
29.	Power to Issue New Varieties Limited	59–60
30.	History of Forms of Action is History of Substantive Law	60–61
31.	Classification of Actions	62

Section		Page
32.	Real Actions	62–64
33.	Mixed Actions	64
34.	Personal Actions	65

CHAPTER III

THE ACTION OF TRESPASS

35.	Scope of Trespass	66–67
36.	The Wrongful Act	67–75
37.	The Plaintiff's Right or Title in Trespass	75–82

CHAPTER IV

ACTION ON THE CASE

38.	Scope of Action on the Case	83–84
39.	Distinctions between Trespass and Case—Defendant's Act	85–93
40.	Plaintiff's Right	93
41.	Various Wrongs for Which Remedy is Case	93–97

CHAPTER V

ACTION OF TROVER

42.	Scope of Trover	98–99
43.	What Kinds of Property may be Converted	99–101
44.	Right and Title of the Plaintiff	101–107
45.	Wrongful Act of Conversion	107–113

CHAPTER VI

THE ACTIONS OF DETINUE AND REPLEVIN

46.	Scope of Action of Detinue	114–117
47.	Plaintiff's Right in Detinue	117–118
48.	The Wrongful Detention	118–119
49.	Scope of Action of Replevin	120–124
50.	Plaintiff's Right in Replevin	124–128
51.	Taking or Detention by Defendant	128–131

CHAPTER VII

ACTIONS OF DEBT, COVENANT, AND ACCOUNT

52–53.	Scope of Action of Debt	132–138
54.	Certainty of Amount Due	138–141
55.	Scope of Action of Covenant	141–143
56.	Scope of Action of Account	144–147

CHAPTER VIII

ACTION OF ASSUMPSIT (SPECIAL AND GENERAL)

Section		Page
57–58.	Scope of Special Assumpsit	148–152
59–60.	Scope of General Assumpsit	153–160
61.	Varieties of Common Counts	160–167
62.	Contracts of Record and Statutory Liabilities	168–169

CHAPTER IX

EJECTMENT AND THE REAL ACTIONS

63.	The Ancient Real Actions	170–173
64–65.	Scope of Ejectment	173–183
66.	Essential Allegations in Ejectment	183
67.	The Title of the Plaintiff	184
68.	The Ouster	185
69.	The Damages	185–186
70.	Trespass for Mesne Profits	186
71.	The Title of the Plaintiff	186–187
72.	The Ejectment	187
73.	The Damages	187–188
74.	Forcible Entry and Detainer	188–189
75.	Forms of Declaration in Ejectment	190–191

CHAPTER X

THE DECLARATION IN GENERAL—TORT ACTIONS

76.	Formal Parts of Declaration	192–195
77.	Statement of Cause of Action	196–200
78–79.	Several Counts in Same Declaration	200–201
80.	Joinder of Different Causes of Action	201–203
81.	Different Versions of the Same Cause of Action	203–206
82.	Conformance to Process	206–208
83.	Essential Allegations in Tort Actions	208
84.	Essential Allegations in Trespass	209
85–87.	Right of Plaintiff	209–210
88.	The Wrongful Act of Defendant	210–211
89.	The Damages	211
90.	Forms of Declaration in Trespass	211–213
91–92.	Essential Allegations in Case	214–215
93–94.	The Breach of Duty	216–217
95.	Anticipating Defenses in Case	217–218
96.	Essentials in Slander and Libel	219–221
97.	In Deceit	221–222
97a.	In Malicious Prosecution	222
98.	The Damages	223
99.	Forms of Declaration in Case	223–227

Section		Page
100.	Essential Allegations in Trover	227-228
101.	The Conversion	229
101a.	The Damages	229-230
102.	Form of Declaration in Trover	230-231
103-104.	Essential Allegations in Detinue	231-232
105.	The Detention	232
106.	The Damages	232-233
107.	Form of Declaration in Detinue	233
108.	Essential Allegations in Replevin	233
109.	The Right of Plaintiff to Certain Goods	234-235
110.	The Wrongful Act	235-236
111.	The Damages	236
112.	Form of Declaration in Replevin	237

CHAPTER XI

THE DECLARATION IN CONTRACT ACTIONS

113-114.	Prima Facie Case in Contract Actions	238-239
115.	Essential Allegations in Special Assumpsit	239-246
116-117.	Performance and Fulfillment of Conditions	246-249
118.	Conditions Subsequent and Provisos	249-251
119.	The Breach	251-252
120.	The Damages	253
121-122.	Essential Allegations in General Assumpsit or Common Counts	254-255
123.	Statement of an Executed Consideration	255-258
124.	The Promise	258
125.	The Breach	258-259
126.	The Damages	259
127.	Forms of Declaration in Assumpsit, Special and General	259-263
128.	Necessary Allegations in Debt	263
129-132.	The Statement	263-267
133.	The Breach	267-268
134.	The Damages	268
135.	Forms of Declaration in Debt	268-270
136.	Necessary Allegations in Covenant	270
137-138.	The Execution of the Covenant and its Terms	271-272
139.	The Breach	272
140.	The Damages	273
141.	Form of Declaration in Covenant	273-274
142.	Essential Allegations in Account or Account Render	274
143.	The Statement	275
144.	The Breach	276
145.	The Damages	276

CHAPTER XII

DEMURRER, AIDER, AND AMENDMENT

Section		Page
146-147.	Nature and Office of the Demurrer	277-279
148-150.	Form of Demurrer	279-281
151.	Effect of Demurrer—As an Admission	282-283
152.	As Opening the Record	284-287
153-155.	Judgment on Demurrer	287-288
156.	Joinder in Demurrer—Forms	288-290
157.	Pleading Over Without Demurrer	290-291
158-160.	Aider by Pleading Over	291-292
161.	Formal Defects Cured by Statute	292-293
162.	Election to Demur or Plead	293-294
163.	Amendment	294-297

CHAPTER XIII

DEFENSIVE PLEADINGS AND SCOPE OF GENERAL ISSUE IN DIFFERENT ACTIONS

164.	Functions and Objects of Pleading	298-299
165.	Parties Must Demur or Plead	299
166.	Traverse or Confession and Avoidance	299-301
167.	Forms of Traverse	301-302
168.	The Common or Specific Traverse	303
169.	The General Issue—Its Nature and Use	304-307
170.	Scope of General Issue in Trespass	307-309
171.	Confession and Avoidance in Trespass	309-310
172.	Forms of Pleas in Trespass	310-311
173.	Scope of General Issue in the Action on the Case	312-314
174.	Affirmative Pleas and Specific Denials in Case	314-315
175.	Form of the General Issue in Case or Trover	315
176.	Scope of General Issue—In Trover	315-316
177.	In Detinue	316-317
178.	In Replevin	318-319
179.	Forms of General Issue in Replevin	319
180.	Special Traverse and Affirmative Defenses in Replevin	320-321
181.	Form of Avowry and Cognizance Combined	321-322
182.	Scope of General Issue in Special Assumpsit	322-326
183.	In General Assumpsit	326-327
184.	In Debt on Simple Contracts and Statutes	327-328
185.	In Debt on Specialty	328-329
186.	In Debt on Judgments	330-331
187.	In Covenant	331-332
188.	In Ejectment	333-334
189.	Comparison of Scope of Different General Issues	334-335

CHAPTER XIV

THE DIFFERENT VARIETIES OF SPECIAL PLEAS

Section		Page
190–195.	The Special Traverse	337–346
196.	Form of Declaration and Special Traverse Thereto	346–348
197–199.	Pleas in Confession and Avoidance	348–350
00.	Giving Color	350
201.	Implied Color	350
202.	Express Color	351–355
203.	Form of Plea in Confession and Avoidance	355
204.	Pleadings in Estoppel	356
205.	Admission by Failure to Deny	357
206.	Protestation	358–359
207.	Notice Under the General Issue	359–360
208.	Plea Puis Darrein Continuance	360–362
209–210.	Set-Off and Recoupment	362–365

CHAPTER XV

REPLICATIONS

211.	Varieties of Replication	366
212.	Replication De Injuria	367–369
213.	Form of Plea and of Replication Thereto	369–370
214.	New Assignment	370–374
215.	Form of New Assignment	374–375
216.	Formal Parts of Replication	375–376
217–219.	Departure	376–381

CHAPTER XVI

DILATORY PLEAS

220.	Nature of Dilatory Pleas	382–383
221–222.	Order of Dilatory Pleas	383–384
223.	Pleas to the Jurisdiction	385–386
224.	Form of Plea to the Jurisdiction and Venue	387
225.	Pleas in Abatement	388–392
226.	Nonjoinder or Misjoinder of Parties Plaintiff in Contract	393–394
227.	Nonjoinder or Misjoinder of Parties Defendant in Contract	395–397
228.	Joinder of Parties in Tort Actions	397–399
229.	Requisites of Pleas in Abatement	399–400
230.	Pleas in Suspension	400–401
231.	Judgment on Dilatory Plea	401–402
232.	Forms of Pleas in Abatement	402–403
233.	Formal Commencement and Conclusion	404–405
234.	Imparlance	405–406

CHAPTER XVII

GENERAL RULES RELATING TO PLEAS

Section		Page
235.	Argumentative Pleas	407–409
236.	Pleas Amounting to General Issue	410–414
237.	Partial Defenses	414–416
238.	Pleading Bad in Part is Bad Altogether	416–417
239.	Several Defenses	417–424
240–241.	Plea and Demurrer	425
242.	Duplicity in Pleas	425–426
243.	Immaterial Matter	426–427
244.	Matter Ill Pleaded	427–428
245.	Matters Forming Connected Proposition	428–430
246.	Protestation	431
247.	General Requisites of Traverse	431–435
248.	Materiality of the Traverse	436–437
249.	Selection of Issuable Proposition	437–438
250.	Denial of the Essentials Only	438–441
251.	Negatives and Affirmatives Pregnant	442–444
252.	Formal Commencement and Conclusion	444–446
253–254.	Tender of Issue	446–448
255.	Joinder of Issue	449

CHAPTER XVIII

RULES AS TO ALLEGING PLACE, TIME, TITLE, AND OTHER COMMON MATTERS

256–257.	Place or Venue	450
258.	Local and Transitory Actions	451–454
259–260.	Local Facts—Venue in Pleadings Subsequent to the Declaration	455
261.	Consequences of Mistake or Omission	455–456
262.	Time	456–457
263.	When the Time Must be Truly Stated	457–458
264.	When Time Need Not be Truly Stated	458–459
265.	Time to be Alleged in the Plea	459–460
266.	Time of Continuing Acts	460
267.	Description of Property	460–463
268.	Names of Persons	463
269.	Persons Other Than Parties	463–464
270–271.	Parties to the Action	465–467
272–274.	Showing Title	467–471
275.	Alleging Derivation of Title	471
276.	Estates in Fee Simple	471–472
277.	Particular Estates	473
278.	Title by Inheritance	474
279.	Title by Alienation or Conveyance	474

Section		Page
280.	Manner of Pleading Conveyance	474
281.	Written Conveyance	475
282.	Where a Party Alleges Title in His Adversary	476
283.	What is a Sufficient Allegation of Liability	476–477
284.	Proof of Title as Alleged	478
285.	Estoppel of Adverse Party	478–479
286.	Showing as to Authority	479–480
287–288.	Profert of Deeds	481–482
289.	Demand of Oyer	482–484
290.	Writings Pleaded According to Legal Effect	484–486
291–293.	Damages—General and Special	487–489

CHAPTER XIX

GENERAL RULES AS TO MANNER OF PLEADING

294.	Statements to be Positive	491
295.	Matters of Evidence and Ultimate Facts	492–494
296.	Conclusions of Law and Ultimate Facts	494–497
297–298.	Certainty in General	497–500
299–300.	When General Mode of Pleading Proper	501–502
301–302.	Where General Pleading is Sufficient	502–503
303–304.	What Particularity is Generally Required	503–504
305.	Facts in Knowledge of Adversary	504–505
306.	Inducement or Aggravation	505–506
307–308.	Acts Regulated by Statute	507–508
309.	What May be Omitted—Matters Judicially Noticed	508–510
310–311.	Matters in Anticipation	510–512
312–313.	Matters Implied	512–513
314–315.	Matters Presumed	513
316.	Surplusage	514–515
317.	Descriptive Averments	515–517
318.	Repugnancy	517–518
319–320.	Ambiguity or Doubt	518–519
321.	Pleadings in Alternative	519–520
322–323.	Duplicity in General	521
324.	Inducement	522
325.	Consequences of Duplicity	522–523
326.	Pleadings to be True	523–524
327.	Conformance to Customary Forms	524–525

CHAPTER XX

OBJECTIONS TO DEFECTS DURING OR AFTER TRIAL

328–329.	Demurrer to Evidence	526–527
330–331.	Motion in Arrest of Judgment	527–530
332.	Aider by Verdict	531–533

Section		Page
333.	Judgment Non Obstante Veredicto	533–534
334.	Repleader	534–535
335–336.	Review by New Trial	535–537
337–338.	Review on Writ of Error and Appeal	537–539
339.	Bills of Exceptions	540–541
340.	Writ of Certiorari	541–542
341.	Writ of Prohibition	542–543

APPENDIX A

Extracts from the Rules of Civil Procedure, Bulletin XIV of the American Judicature Society, 1919 544–555

APPENDIX B

A Chart of Illinois Defensive Pleading 556–571

TABLE OF CASES CITED

(Page 573)

INDEX

(Page 619)

BIBLIOGRAPHY

List of Authorities Bearing on the Study of Common-Law Pleading and Forms of Action

Abbott, Austin. Brief on Pleading in Civil Cases. Two volumes, Rochester, 1904.

Ames, James Barr. A selection of Cases on Pleading. First edition, Cambridge, 1875. Second edition, Cambridge, 1905.

Ames, James Barr. Lectures on Legal History. Cambridge, 1913.

Anstey, John. Pleader's Guide. 1826.

Archbold, John F. Digest of Pleading. Second edition, London, 1826.

Bacon, Matthew. Abridgment of the Law, Pleas. First edition, 1736. Fifth edition, 1797.

Bohun. Institutio Legalis. Fourth edition, London, 1732.

Browne. Actions at Law, 1844. (Law library.)

Chitty, Joseph. Treatise on Pleading and Parties to Actions, with Precedents and Forms. London, 1808. Sixteenth American edition, by J. C. Perkins, Springfield, 1876.

Comyn, Sir John. Digest of Laws of England, title "Pleader." London, 1772–77. Fifth edition, London, 1822.

Cook, W. W., and Hinton, E. W. Cases on Pleading at Common Law. (Part I, Common-Law Actions, Chicago, 1920.)

Day, John C. The Common-Law Procedure Acts (1852, 1854, 1860). Fourth edition, London, 1872.

Deans, R. Storry. The Student's Legal History. Fourth edition, London, 1921.

Dicey, A. V. Parties to an Action.

Doctrina Placitandi (in the reign of Charles II). A collection of adjudged points on pleading, classified in alphabetical order. (1677.)

Encyclopedia of Pleading and Practice. Northport, L. I., N. Y. 1895–1902. Twenty-two volumes.

Finlason, W. F. Leading Cases on Pleading and Parties. London, 1847.

Fitzherbert, Sir Anthony. Natura Brevium. 1566.

Gilbert, Sir Geoffrey, Lord Chief Baron. History and Practice of Civil Actions. Third edition, Dublin, 1792.

Gould, James. Treatise on the Principles of Pleadings in Civil Actions. First edition 1832. Sixth edition by A. P. Will, Albany, 1909.

Hartshorne. Courts and Procedure, England and New Jersey. Soney & Sage, Newark, N. J., 1905.

Heard, Franklin F. Principles of Civil Pleading. Boston, 1880.

Hepburn, Chas. M. The Historical Development of Code Pleading. Cincinnati, 1897.

———. II Select Essays, Anglo-American Legal History, 643–690.

Holdsworth, W. S. History of English Law. Boston, 1908.

Hughes, William T. Procedure, Its Theory and Practice. Two volumes. Chicago, 1905.

Keen, James F. Cases on Pleading. St. Paul, Minn., 1908.

Keigwin, Charles A. Precedents of Pleading at Common Law, with annotations. Washington, 1910.

Lawes, Edward. Elementary Treatise on Pleading. London, 1806. First American, from first London, edition, Portsmouth, N. H., 1808.

———. Practical Treatise on Pleading, 1810.

Liber Placitandi. A book of Special Pleadings containing Precedents. 1674.

Lilly, John. A collection of Modern Entries or Select Pleadings in the Court of King's Bench and Common Pleas and Exchequer. Two volumes. Sixth edition, Dublin, 1792.

Lloyd, Wm. H. Cases on Civil Procedure (annotated). Indianapolis, 1915.

McKelvey, John J. Principles of Common-Law Pleading. First edition, New York, 1894. Second edition, New York, 1917.

Maitland, Frederick W. Equity and the Forms of Action at Common Law. Cambridge, 1910.

Mansel, George B. Treatise on Law of Demurrer, 1828.

Martin, Alexander. Civil Procedure at Common Law. St. Paul, 1905.

Millar, Robert W. Common-Law Pleading. Chicago, 1914.

Odgers, W. Blake. Principles of Pleading and Practice in Civil Actions in the High Court of Justice. First edition, 1891. Seventh edition, London, 1912.

Perry, R. Ross. Common-Law Pleading. Boston, 1897.

Placitorum Abbrevatio. Contains extracts from the records from Richard I to Edward II, inclusive.

Pollock and Maitland. History of English Law. Two volumes. Cambridge, 1895.

Pomeroy, John Norton. Code Remedies. Remedies and Remedial Rights by the Civil Action. Fourth edition, by T. A. Bogle, Boston, 1904.

Puterbaugh, Sabin D. Common-Law Pleading and Practice in Illinois. Ninth edition by L. D. Puterbaugh, Chicago, 1917.

Rastell, William. Entries (printed 1596). Precedents in use in time of Henry VI and down through reign of Henry VIII. Declarations, pleas and records at length. V Reeves, History of English Law, 485.

Reeves, J. History of English Law. First edition, 2 vols., 1784. Second edition, 4 vols., 1787. Finlason edition, 5 vols., 1869.

Report of the Common-Law Commissioners. Appointed in 1850, to inquire into the process, practice, and system of pleading of the Superior Courts of Law at Westminster.

Saunders, John S. Law of Pleading and Practice in Civil Actions. Fifth American edition, Philadelphia, 1851.

Saunders, Sir Edmund. Reports, Notes by Serjeant John Williams. In two vols. 1799. (See Wallace, Reporters, p. 338.) 85 Eng. Rep. Reprint.

The reports of Chief Justice Saunders are the great repository of cases involving points of special pleading, eighteenth to twenty-fourth years of Charles II. They contain the pleadings, as well as the arguments of counsel, and the judgments of the Court. Kent, Com. 485; II Campbell, Lives of Chief Justices (3d Ed.) p. 318. Williams' Edition of Saunders is almost a new work of itself. Kent, Com. 486.

Scott, Austin W. Cases on Civil Procedure. Cambridge, 1915.

———. Fundamentals of Procedure in Actions at Law. New York, 1922.

Sellon, Sergeant. Practice. London, 1798.

Shinn, Roswell. Treatise on Pleading and Practice. Michigan. Chicago, 1892.

———. Treatise on Pleading and Practice. Illinois. Two volumes. Chicago, 1896.

Shipp, E. Richard, and Daish, John B. Cases Illustrating Common-Law Pleading. Chicago, 1903.

Smith, J. W. Action at Law. Eleventh edition, London, 1873.

Standard Encyclopedia of Procedure. 26 volumes. A. P. Will, Editor. Los Angeles. Chicago, 1911.

Stephen, Henry J. First edition 1824. Edited by James De Witt Andrews, Chicago, 1901.

———. Samuel Tyler, from second London edition. 1827.

———. Samuel Williston, Cambridge, 1895.
Professor Samuel Tyler says: "Other works of ability and learning upon the subject have been written, in England and in this country, but they have not advanced the science of pleading beyond the point where Mr. Stephen left it." First Report of Maryland Commissioners (1855) p. 79.

Street, Thomas A. The Foundations of Legal Liability. 3 vols. Northport, Long Island, N. Y., 1906.

Sunderland, Edson R. Cases on Common-Law Pleading. Chicago, 1914.

Tidd, William. Practice of Courts of King's Bench. Two volumes. London, 1803.

Tyler, Samuel. First Report of Maryland Commissioners on Rules of Practice, 1855.

Warren, Samuel. Law Studies. Chapter 21, Special Pleading. Third edition, London, 1863.

Whittier, Clarke B., and Morgan, Edmund M. Cases on Common-Law Pleading. St. Paul, 1916.

Williams, Watkins. Introduction to Pleading and Practice. London, 1857.

COMMON-LAW PLEADING

(THIRD EDITION)

EDITOR'S INTRODUCTION

COMMON-LAW PLEADING AS A SYSTEM

Common-law pleading was the system in use in the three common-law courts of England, the King's Bench, the Common Pleas, and the Exchequer, during some five or six centuries. By the Supreme Court of Judicature Act of 1873, common-law pleading as a system ceased to exist in England, although many of its principles are still observed under the present system prescribed by rules of court.

It is said by Stephen [1] that the common-law system of pleading was first methodically formed and cultivated as a science in the reign of Edward I. From that time the judges began to prescribe and enforce certain rules of statement, which grew up into an entire and connected system of pleading.

In the United States, following the example of New York in 1848, code pleading has been adopted in a majority of the states, but there

[1] Stephen, Pl. (Williston's Ed. 135, 433, note, 28. "The only material authorities on the subject of pleading, of date prior to the reign of Edw. I, are the treatise of Glanville in the time of Henry II, that of Bracton, in the latter end of the reign of Henry III, and the Placitorum Abbreviatio, which contains extracts from the records, from Richard I to Edward II, inclusive. From these authorities it would appear that the manner of pleading was extremely imperfect, and that many of the most important rules of the science were either unknown, or but partially observed in practice, so late as the end of the reign of Henry III. On the other hand, the very earliest reports in the Year-Books (which begin with the reign of Edward II) exhibit proofs that the pleading was by that time in a comparatively perfect state. It is therefore that the author has been led to consider the reign of Edward I as the era at which the manner of allegation may be said to have been first methodically formed and cultivated as a science. With respect to the subsequent history of the science, Mr. Reeves holds that it was in a state of progressive advance till the reigns of Henry VI and Edward IV, when it was 'cultivated with so much industry and skill that it was raised to a sudden perfection in the course of a few years.'" Sir M. Hale, Hist. Com. Law, 173, 176; 3 Reeves, Hist. Eng. Law, 424, 436.

are still a number of states known as common-law states.[2] In the common-law states the old English forms of action and rules of pleading, and the separation of actions at law and suits in equity are retained, although modified to a greater or less extent by local practice acts.[3]

[2] The following states may be classified as common-law states; that is, states in which the common-law system of pleading is in force, except as modified by statute or by court rules: Delaware, District of Columbia, Florida, Illinois, Maine, Maryland, New Hampshire, Rhode Island, Vermont, Virginia, and West Virginia. The following states may perhaps be classified as quasi common-law states: Massachusetts, Mississippi, Michigan, and Tennessee.

[3] *Delaware*—Campbell v. Walker, 1 Boyce (Del.) 580, 76 Atl. 475 (1910). The rules of common-law pleading, as they existed at the time of our independence, excepting as modified by constitution or statutory provisions, constitute the system of pleading employed by the courts of Delaware.

District of Columbia—Pleading and practice in law cases in the District of Columbia are based entirely upon the common law, as it was in England prior to the adoption of the Rules of Hilary Term (1836), 35 New York State Bar Ass'n Rep. 834—O. R. Wilson. The correct forms are sought for in Chitty or any other recognized authority on common-law pleading. Miller v. Ambrose, 35 App. D. C. 75.

Florida—The common-law rules of pleading are in force in Florida except as modified by statute or the rules promulgated by the Supreme Court under statutory authority. Mechanics & Metals Nat. Bank of City of New York v. Angel, 79 Fla. 761, 770, 85 South. 675; Atlantic Coast Line R. Co. v. State, 73 Fla. 609, 74 South. 595.

Illinois—Pitts Sons' Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156. "Illinois is a common-law state. Its pleading and practice are not only derived from the common-law system, but they are in fact that system, modified, however, by some legislation, which still leaves them the nearest approach to the English law of procedure, as it existed before the passage of the Judicature Acts, now remaining anywhere in the world." Chas S. Cutting, in 35 New York State Bar Ass'n Rep. p. 850.

Maine—Maine is essentially a common-law state, and the practice is conducted according to the common law, but important changes have been made by statute to do away with many of the technicalities, such as the distinction between trespass and case. Maine Practice, Raymond Fellows, 35 New York State Bar Ass'n Rep. p. 880; Thomas v. Hall, 116 Me. 140, 100 Atl. 502 (equitable defenses allowed).

Massachusetts.—The Massachusetts Practice Act, based on report of the Commission of 1851, retained the main features of common-law pleading with modifications which made it simpler. The recent Judicature Commission, in their report of 1921, state that they have received no special complaints in regard to its operation. 6 Mass. Law Quarterly 103 (January, 1921); Read v. Smith, 1 Allen (Mass.) 519, 521.

Maryland—The common-law procedure forms the basis of the system now existing in Maryland. The distinctions between forms of action have not been abolished. See valuable survey of Maryland Procedure in Courts of Law, by Wm. L. Rawls, 35 New York State Bar Ass'n Rep. 885.

Michigan—In actions at law Michigan long retained the common-law practice, but in a very much modified and simplified form. D. H. Bull, 35 New York State Bar Ass'n Rep. 897 (1912). By the Michigan Judicature Act of 1915 (Pub. Acts 1915, No. 314) a very conservative statute, further reforms are made, but it fails to consolidate legal and equitable jurisdictions or abolish forms of action. E. R. Sunderland, 14 Mich. Law Rev. 273, 383, 441 551.

Mississippi—In Mississippi no code practice exists, but forms of action are abolished. Equity and law are kept separate. Mississippi Courts, by Edward Mayes, 35 New York State Bar Ass'n Rep. 902.

New Hampshire—In New Hampshire old common-law pleading survives, as reformed by Judge Doe. Practice and Procedure in New Hampshire, S. C. Eastman, 35 New York State Bar Ass'n Rep. 932.

New Jersey—The New Jersey Practice Act of 1912 (Laws 1912, p. 377) made possible the establishment of a system founded, like the English procedure, on rules of court. Prior to that the rules of common-law pleading were generally observed and practitioners relied upon Chitty's Forms. Judicial Procedure of New Jersey, E. Q. Keasbey, 35 New York State Bar Ass'n Rep. 934. The act of 1912 confined itself to actions at law and did not merge law and equity practice.

New Mexico—The common-law and equity systems of pleading and practice prevailed in New Mexico practically unmodified by statute until the year 1897, when the Code of Civil Procedure was adopted.

Pennsylvania—The Pennsylvania Practice Act of 1915 (Pa. St. 1920, §§ 17181–17204) is the last of a long series of steps by which, through acts of assembly and rules of the courts of common pleas, Pennsylvania has abandoned the common-law system of pleading in favor of a modern and simplified form. David W. Amram, Penn. Practice Act 1915, 64 University of Pennsylvania Law Rev. 223, 66 University of Pennsylvania Law Rev. 195.

Rhode Island—In Rhode Island, pleading in law cases is according to the rules of the common law, but equitable defenses may be pleaded. Forms of action are still in use. Rhode Island, Wm. H. Morgan, 35 New York State Bar Ass'n Rep. p. 1006.

Vermont—In Vermont the common-law forms of stating causes of action and defenses are in use, and the earlier editions of Chitty's Pleadings are the standard authority. Statutes have removed some old-time technicalities. Prac. & Proc. in Vermont, G. B. Young, 35 N. Y. State Bar Ass'n Rep. 1011. See Dernier v. Rutland Ry. Light & Power Co., 94 Vt. 187, 110 Atl. 4.

Virginia—Virginia is not a code state. Its practice and pleading are supposed to be in accordance with the common law, although modified by statute. The old forms of action are retained. 35 New York State Bar Ass'n Rep. 1027, 1032; J. F. Bullitt, 17 Va. Law Reg. (U. S.) 797. See Acts Va. 1914, p. 641; Rule-Making Power in Virginia (1916) 2 Va. Law Reg. (N. S.) 292.

[4] Code states include: Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

In code states a statutory system, based partly on common-law and partly on equity notions, is established, in which the same rules are made applicable to law and equity cases.[4] There is a greater similarity

in the essential principles of pleading at common law, in equity, and under the codes than is generally realized. The essential elements of causes of action which must be pleaded are not changed by the codes. The rules as to the manner of making allegations of the respective contentions of the parties have much in common.[5]

The modern English system of regulating procedure by rules of court is now being advocated and adopted in some jurisdictions.[6]

The importance of the study of common-law pleading is not easily realized by the student.[7] Even in a code state, the student should not

[5] Code Pleading: The Aid of the Earlier Systems, B. J. Shipman, 7 Yale Law J. 197 (1898). "It is believed that, aside from technical and formal requirements, there is no rule regulating the substance of pleadings under the codes which is not either taken directly from the older system, or framed by analogy in the application of the same principles." See 4 Standard Enc. Proc. Intro. § 11. Solomon v. Vinson, 81 Minn. 205, 17 N. W. 840; Dunnell, Minn. Pl. (2d Ed.) § 2. Rules of the common-law pleading, as to materiality, certainty, prolixity, and obscurity, are rules of logic not abolished by the North Carolina Code. Crump v. Mims, 64 N. C. 767, 771; Parsley v. Nicholson, 65 N. C. 207. The rules of pleading at common law have not been abrogated by the Code of Civil Procedure. The essential principles still remain. Henry Inv. Co. v. Semonian, 40 Colo. 269, 90 Pac. 682; Hughes, Proc. 488.

[6] The New Jersey Practice Act of 1912 (Laws 1912, p. 377) establishes a system regulated by rules of court similar to that followed in England and Canada. Schwarz Bros. Co. v. Evening News Pub. Co., 84 N. J. Law, 486, 187 Atl. 148; E. M. Morgan, Judicial Regulation of Court Procedure, 2 Minn. Law Rev. 81; 2 American Bar Ass'n J. 46; R. Pound, 1915 Ohio State Bar Ass'n Rep. 83; E. L. Regennitter, 1915, 18 Colo. Bar Ass'n Rep. p. 131; 1918 Miss. State Bar Ass'n Rep. 112, 113; 2 Va. Law Reg. (N. S.) 294, 635. The New York Civil Practice Act, which became effective on April 15, 1921, is a compromise between the views of those who advocated a total abolition and those who advocated the amendment of the Code of Civil Procedure. H. R. Medina, Some Phases of the New York Civil Practice Act and Rules, 21 Columbia Law Rev. 113; New System of Civil Practice in New York, H. M. Ingram, 7 American Bar Ass'n J. 402; G. W. Wickersham, N. Y. Practice Act, 29 Yale Law J. 904; H. Harley, Proposed Revision of New York Code, 11 Ill. Law Rev. 87.

[7] Lawes, Elementary Treatise on Pleading (1806) p. 2; 1 Hoffman, Law Studies, 348, 350; 1 Cooley's Blackstone, c. 27; Bliss, Code Pl. § 141; Phillips, Code Pl. preface 4, § 165; 17 Va. Law Reg. 668; 2 Warren, Law Studies (3d Ed.) pp. 1057, 1082, Littleton, in the reign of Edward IV, declares it to be "one of the most honorable, laudable, and profitable things in the law to have the science of well pleading in actions real and personal," and therefore advises his son "especially to employ his courage and care to learn it." The reports of the time of Henry VI and Edward IV are full of points of pleading. 3 Reeves, Hist. Eng. Law, p. 577, c. 23; Litt. § 534. Justice Story said: "Special pleading contains the quintessence of the law, and no man ever mastered it, who was not by that means made a profound lawyer." The importance of a study of common-law pleading rests, first, on the relationship between the modern

feel that he is dealing with rules which are entirely obsolete, having no relation to existing law. The principles of common-law pleading have not been abolished, but only some of its formal technicalities. It involves the study of how to arrive at the issues of a case, the foundation of all legal investigation. Code pleading springs from common-law pleading; codification is only partial, and a study of common-law pleading is essential to the comprehension of code pleading.

The common-law system of pleading has long been eulogized and venerated by many lawyers, judges, and writers as an admirable and scientific mechanism for the preliminary ascertainment of controverted questions and the preparation of cases for trial.[8] Sir William Jones speaks of it in the following terms of eulogy:

"The science of special pleading is an excellent logic. It is admirably calculated for the purpose of analyzing a cause—of extracting, like the roots of an equation, the true points in dispute, and referring them, with all imaginable distinctness, to the court or jury. It is reducible to the strictest rules of pure dialectics, and tends to fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding." [9]

Mr. Justice Grier, speaking for the Supreme Court of the United States,[10] described the system as one matured by the wisdom of ages

substantive and ancient remedial law in the scheme of forms of action; second, the relationship between modern remedial and ancient remedial law; and, third, the fact that the older cases are expressed in terms of pleading, so that they cannot be studied understandingly without it. The statutes which seek to abrogate or simplify common-law pleading use its terms. In order to understand the progress of the law, the well-educated lawyer must live through its evolution. Further, in modern codes the foundation ideas of pleading have not changed.

[8] The first report of the Maryland Commission on Rules of Practice, 1855, pp. 80, 91, by Professor Samuel Tyler, states: "It must be admitted to be the greatest of all judicial inventions." "We have thus shown that the system of common-law pleading is a natural system, composed of rules, which have been found by experience best adapted for regulating the respective statements of the litigating parties, and ascertaining the real points for decision."

[9] Prefatory Discourse to the Speeches of Isaeus. Works, vol. 4, p. 34. 2 Warren, Law Studies (3d Ed.) 1058. "The substantial rules of pleading," says Lord Mansfield, "are founded in strong sense, and in the soundest and closest logic, and so appear, when well understood and explained, though, by being misunderstood, and misapplied, they are often made use of as instruments of chicane." Robinson v. Raley, 1 Burr. 316.

[10] McFaul v. Ramsey, 20 How. (U. S.) 525, 15 L. Ed. 1010. See Pitts Sons' Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156 (1887). See 10 Harv. Law Rev. 238, 239, where the writer speaks of the matchless precision of the old system, a mill of justice in which an obscure mass of facts was ground down to clear and distinct issues.

and founded on principles of truth and sound reason, which are absolutely inseparable from the correct administration of justice in common-law courts.

It must be admitted that some of these writers have probably confused the real merits of the common-law system with those portions of the system which are merely formal or accidental. In the multitude of decisions on questions of pleading, many sound and enduring principles of legal procedure have been developed, but also much that was arbitrary, formal, technical, and artificial.[11] Procedure acts and rules of court have been enacted from time to time to correct technical inconveniences and useless fictions. Competent critics have asserted that common-law pleading gradually became a mere game of skill, and, instead of being the servant, became the master, of the courts, an end in itself, instead of a means to the determination of substantial rights.[12]

[11] Reeves says of the time of Henry VI and Edward IV: "Such was the humor of the age that captiousness was not discountenanced by the bench. * * * The calamity has been that after other branches of knowledge took a more liberal turn, the minutiæ of pleading continued to be respected with a sort of religious deference." 3 Reeves Hist. Eng. Law, p. 621 (Finlason). See Hale, Hist. Com. Law, p. 177. By the wooden manner in which it came to be administered, many of its artificial distinctions and rules became an obstacle to the very purposes which they were intended to serve, and diverted the attention of the court to side issues, so that the suitor was perhaps unable to get through the vestibule of justice to have the merits of his case considered. Tippet v. May, 1 Bos. & P. 411 (1799), Ames, Cas. Pl. (2d Ed.) p. 64, note 1 (discontinuance by replying to a plea by two of the defendants in an action against three without taking notice of the third against whom they declared. Plaintiffs out of court by the slip, though defendant's plea was bad). See, also, Savignac v. Roome, 6 Term R. 125, Whittier, Cas. Com.-Law Pl. p. 551; Maher v. Ashmead, 30 Pa. 344, 72 Am. Dec. 708; Whittier Cas. Com.-Law Pl. p. 555.

[12] Pollock, Genius of the Com. Law, 23, 37, 72; 3 Reeves, Hist. Eng. Law, c. 23. "The remedial part of the law resembles a mass of patchwork, made up at intervals and by piecemeal, without any preconceived plan or system, for the purpose of meeting the exigencies of the times by temporary expedients." Walker's American Law, § 204. In Allen v. Scott, 13 Ill. 80 (1851), Caton, J., said: "It must be admitted that many of these distinctions are more artificial than substantial, and do not contribute very essentially to the promotion of the ends of justice. So long, however, as we look to the rules of the common law to govern us in pleading, we are not at liberty to disregard them." Wisconsin Cent. R. Co. v. Wieczorek, 151 Ill. 579, 586, 38 N. E. 678. In Illinois from time to time some slight repairs have been made by the Practice Act. Forms of action have been made a little broader. Amendments changing the form of action and transferring the suit from law to chancery, and vice versa, may be allowed. The absurd fictions in ejectment are abolished. But with the real defects and the needless irregularity of the "system" of pleading at common law there has been no interference. The arbitrary forms of action, the irregular scope of the general issue in different actions, the subtlety and uselessness of the manifold distinctions, the excessive and literal accuracy and detail required in some cases, and the entire lack of it in others, these remain in 1922 substantially unchanged as they were before the Hilary Rules of 1834 in England. 1 University of Illinois Law Bul. 1. Serjeant Stephen's masterly Treatise on the Principles of Pleading has doubtless led many lawyers to admire the old system of pleading as a true science founded in principles of the soundest reason and closest logic adapted to the ends of analysis. But, if Stephen had been somewhat more candid, he would have classified many of the rules of pleading under headings indicating tendencies quite the reverse of those which he adopted. He would have had to adopt such headings, for example, as (1) rules which tend simply to the nonproduction of an issue; (2) rules which tend to conceal the specific issues; (3) rules which produce duplicity and multifariousness in the issues; (4) rules which tend to produce uncertainty and vagueness in the issues; (5) rules calculated to introduce obscurity, confusion, and perplexity in the pleading; (6) rules which tend to cause prolixity and delay in pleading; (7) rules which perpetuate historical anomalies and frivolous technicalities; (8) rules which make pleadings turn on doubtful and uncertain distinctions not founded in practical sense or policy; (9) certain miscellaneous, arbitrary, and irregular rules to entrap pleaders and defeat the purposes of pleading. Ballantine, 1 University of Illinois Law Bul. (1917) p. 1.

[13] 3 Street, Foundations of Legal Liab. preface, v. "The rules of pleading—the mode in which and the conditions under which the parties state the case which is to be tried—go far to determine the shape of many rules of law. * * * It is not till Edward I's reign that we can see the beginnings of that peculiarly English branch of law—the science of pleading." 3 Holdsworth Hist. Eng. Law, 472.

The study of common-law pleading is valuable in the first place for a better understanding of the historical development of the substantive law, as right and remedy are bound together, and substantive rights are expressed in terms of remedial rights and forms of action. The forms of action are, in fact, the categories of legal liability. The history of the development of the forms of action is a rich mine for students of legal development and theory. Such essays as those of Ames and Maitland shed much light on fundamental conceptions of liability which underlie all the substantive law.[13]

In the second place, a study of the common-law pleading is necessary for a proper understanding of the reported cases, English and American, in which questions of law are often presented in rulings on the pleadings.

In the third place, this study is valuable for an understanding of modern pleading and procedure. Although common-law pleading is modified in code states and affected by legislation in all, many of its fundamental principles still govern in all jurisdictions and furnish the foundation on which the present procedure is based. The problems and functions and principles of pleading are essentially the same in all

systems, whether at common law, under the code, in equity, or by rule of court.

Function of Pleadings—Necessity of Analysis

The reason why ordinary controversy is utterly inconclusive is that there is no ascertainment by the contending parties of the questions at issue.[14] If a clearly stated issue can be reached, the disputants may discover that the actual difference between them may be easily settled.

The function of pleadings, then, as Odgers says,[15] is "to ascertain with precision the matters on which the parties differ and the points on which they agree, and thus to arrive at certain clear issues on which both parties desire a judicial decision." The pleadings are not, as might be supposed from popular speech, an advocate's address to the judge or jury. They are the formal statements, drawn up by counsel for the respective parties, of the grounds of their claim or defense.[16] From the clash of assertions are disclosed the points in controversy, the propositions affirmed on one side and denied on the other, on which the decision of the case will turn. The primary function of pleading is to settle and define the issues over which the parties are contending.[17] "The points admitted by either side are thus extracted and distinguished from those in controversy; other matters, though disputed, may prove to be immaterial; and thus the litigation

[14] W. T. Foster, Argumentation and Debating, p. 45; Baker, Principles of Argumentation, c. 2; O'Neill, Argumentation and Debate, c. 4.

[15] Odgers, Pl. (7th Ed.) p. 74.

[16] A pleading is a statement in the legal form of facts which constitute the plaintiff's cause of action, or the defendant's ground of defense. Bocock v. Leet, 210 Ill. App. 402. Pleadings are statements which set out causes of action and grounds of defense, and make issues in action which is to be tried. Brumleve v. Cronan, 176 Ky. 818, 197 S. W. 498. "Pleadings" are the written allegations of what is affirmed on the one side or denied on the other, disclosing to the court or the jury trying the cause the matter in dispute between the parties. Smith v. Jacksonville Oil Mill Co., 21 Ga. App. 679, 94 S. E. 900.

[17] That the object of pleading is the narrowing of the dispute to single and controlling issues, see Hereford v. Crow, 3 Scam. (4 Ill.) 423. "The term itself, of 'issue,' occurs as early as the commencement of the Year Books, viz. in the 1st year of Edward II (Year Book I Edward II, 14), and from the same period, at least, if not an earlier one, the production of the issue has been not only the constant effort, but the professed aim and object of pleading." Stephen, Pl. (Williston's Ed.) pp. 137, 142, 416, 441. The purpose of all pleading under the system in force in this state is to arrive quickly and definitely at a certain and single material issue upon which the controversy may be determined. Sovereign Camp of Woodmen of the World v. MacDonald, 76 Fla. 599, 80 South. 566; Kelly v. Armstrong, 102 Ohio St. 478, 132 N. E. 15. Isaacs, Logic versus Common Sense in Pleading, 16 Mich. Law Rev. p. 589.

is narrowed down to two or three matters which are the real questions in dispute." [18]

It is a great benefit to the parties, as Odgers points out, to know exactly what are the matters left in dispute, and what facts they must prove at trial. The question involved may be reduced to a point of law, which may be decided by a judge upon argument, or it may involve a lengthy trial by a jury. By separating off questions of law from questions of fact, the parties may be saved great trouble and expense in procuring evidence of facts which their opponent does not dispute.

The notice function is one that is frequently emphasized as a primary object of pleading.[19] "The defendant is entitled to know what it is that the plaintiff alleges against him; the plaintiff, in his turn, is entitled to know what defense will be raised in answer to his claim." Thus it is said: "The province of the declaration is to exhibit upon the record the grounds of the plaintiff's cause of action, as well as for the purpose of notifying the defendant of the precise character of those grounds as of regulating his own proofs." [20]

The claim of the law of pleading to be a science must be maintained upon the adaptation of its rules to the accomplishment of its main functions, viz. fair notice to the parties and the practical, accurate, and systematic presentation of the precise questions of law and fact involved to the tribunal which is to decide them. The various possible objects and purposes of pleading may be enumerated somewhat as follows: (1) To separate questions of law from questions of fact and decide them so far as possible prior to the trial of the facts. (2) To

[18] Odgers, op. cit. p. 73.

[19] Odgers, Pl. (7th Ed.) p. 72. See, also, Cook v. Scott, 1 Gilman (Ill.) 333; C. B. Whittier, Illinois Pleading Reform, 4 Ill. Law Rev. 178; Notice Pleading, 31 Harv. Law Rev. 501; 35 American Bar Ass'n Rep. pp. 614-635, (1910); R. Pound, Illinois State Bar Ass'n Rep. (1910) pp. 396, 397. The manifest object of all pleading is that parties litigant may be informed of matters in controversy, so that they may be understood by jury and judge. American Express Co. v. State, 132 Md. 72, 103 Atl. 96. The purpose of pleading is to apprise an adversary of the issue he is required to meet. Wickliffe v. First Nat. Bank of Central City, 183 Ky. 783, 213 S. W. 581. It is proposed in the report of a special committee of the American Bar Association for 1910 that "the sole office of the pleadings should be to give notice to the respective parties of the claims, defenses, and cross-demands asserted by their adversaries. The pleader should not be held to state all the elements of claims, defenses, cross-demands, etc., but merely to apprise his adversary fairly of what such claim, defense, or cross-demand is to be." It is said that, if the "notice" function of pleading is emphasized, the other functions will be performed as well now. 35 American Bar Ass'n Rep. pp. 614-635.

[20] Cook v. Scott, 1 Gilman (Ill.) 333; Ohio & M. Ry. Co. v. People, 149 Ill. 663, 666, 36 N. E. 989.

reduce questions of fact to clear-cut issues, by eliminating admitted, immaterial, and incidental matters, and narrowing the case to the one or more definite propositions on which the controversy really turns. (3) To notify parties of the claims, defenses, and cross-demands of their adversaries. (4) To serve as the formal basis of the judgment. (5) To place on record the questions raised and give litigants the advantage of a plea of res judicata, if the same questions should be raised again in other causes. (6) Lastly, there may be added the function of serving as an index of the points to be proved at the trial and apportioning the burden of proof and rebuttal as between the plaintiff and the defendant.[21] Some of these functions of pleading are vastly more important than others, numbers (4) and (5) being sometimes unduly magnified.

The main purpose of the rules of pleading historically has been to compel each party to state the essential elements of claim and defense in order to arrive at issues. The notion that common-law pleading generally accomplishes this object and succeeds in reducing all cases to definite issues is admittedly erroneous. In both common-law and code pleading, however, the issue-raising function far overshadows the notice-giving one, and is the source of the principal rules of pleading. It is so under the modern English pleading. The case must be analyzed and reduced to issues at the trial, if not before, and it is inexpedient to postpone this essential preliminary to the day of the trial.

The first service attempted to be performed by common-law pleading is the discrimination of questions of law from questions of fact, the principle in general from the circumstances of the particular case. Proof of facts is often difficult to get and tedious to produce, while

[21] H. W. Ballantine, The Need of Pleading Reform in Illinois, 1 University of Illinois Law Bul. No. 1, pp. 14–16 (Feb. 1917). The Massachusetts commissioners of 1851 state the purposes of civil pleading as follows: "(1) that each party may be under the most effectual influences, which the nature of the case admits of, so far as he admits or denies anything, to tell the truth, (2) That each party may have notice of what is to be tried, so that he may come prepared with the necessary proof, and may save the expense and trouble of what is not necessary. (3) That the court may know what the subject-matter of the dispute is, and what is asserted or denied concerning it, so that it may restrict the debate within just limitations, and discern what rules of law are applicable. (4) That it may ever after appear what subject-matter was then adjudicated, so that no further or other dispute should be permitted to arise concerning it." 6 Mass. Law Quarterly, p. 104 (Jan., 1921); Hall's Massachusetts Practice (1851). As to functions of criminal pleading and certainty and precision required, see U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; R. M. Millar, 8 Journal Cr. Law, 337; 11 Journal Cr. Law, 344.

questions of law may be decided by the court upon argument of counsel. If a declaration or plea be insufficient in law, the question may be decided without waste of time in contesting the truth of the matter. The amount of time and effort which must be spent upon the trial of issues of fact by court and counsel is very large compared to the amount required for the argument and decision of questions of law. The utility of separating the law from the facts as far as possible is, in theory, obvious.

Equity Pleading

While in equity, as at common law, the forensic altercation might, in theory, be carried to an unlimited extent, in order to lead the plaintiff and defendant through alternate allegations, to the ultimate issues of law or fact in dispute, yet all pleadings after the answer were in practice abandoned. (Langdell, Eq. Pl. § 87.) Each party stated all the facts in one pleading, though belonging to a subsequent stage of pleading, and these were dealt with as if stated in a regular series of affirmative pleadings in proper order. After the answer put in, the plaintiff might amend his bill to anticipate defenses, upon the new light given him by the defendant, and the defendant had to answer afresh the amended bill. Thus the replication was incorporated in the bill, along with the issuable facts which constituted the equity of the bill, and which the plaintiff must prove to obtain relief; and the defendant rejoined with new matter of defense or excuse along with his answer. The replication filed by the plaintiff to put the answer in issue is mere form. (Langdell, Eq. Pl. § 87.) "A bill in equity came to consist of three distinct parts, the narrative, the charging, and the interrogative. The first of these contained a statement of the complainant's case for relief; the second anticipated and rebutted the defendant's supposed positions; while the last was used to probe the defendant's conscience, and to extract from him admissions under oath in his answer. * * * The bill and answer were generally made to include the evidence by which either party maintained his own contention or defeated that of his adversary, and also legal conclusions and arguments, which more appropriately belonged to the briefs of counsel." (Pomeroy, Code Remedies [4th Ed.] § 401.)

Reform of Pleading and Practice

If we are to emancipate ourselves from needless servitude to the subtleties and intricacies of overelaborated pleading, how shall a better system, approximating more closely the simplicity of modern equity procedure, be brought about? The regulation of procedure in all its details by statute and decision under detailed practice acts and codes has not solved the problem. The report of the New York Board of Statu-

tory Consolidation on the simplification of the civil practice in the courts of New York proposes to abandon any elaborate code after sixty-five years of legislative tinkering. The Field Code of 1848, with 391 sections, which has become the basis of procedure in 25 or more states, sought to regulate only the general features of practice. The Throop Code of 1877 with over 3,000 sections was based upon the idea of bringing together in a single book all matters relating to procedure, whether substantive or otherwise, and regulating all of the details of practice by statutory enactments. This experiment has broken down. The New York Commissioners have followed the idea adopted in the New Jersey Practice Act and have framed an act of 71 sections dealing with the essential provisions and directing the changes necessary to simplify procedure and adapt it to present conditions. The board has also prepared 401 rules of court to accompany the short practice act.

An alternative method, which may be better, is to commit the whole subject of procedure in its entirety to rules of court, as has been done in federal equity practice. The Colorado Court Rules Act of 1913 provides: "The Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supersede any statute in conflict therewith. Inferior courts of record may adopt rules not in conflict with such rules or with statute." This statute gives the Supreme Court complete control without attempting to lay down any general principles, and very little modification would be needed to make it available for any jurisdiction.[22] The regulation of pleadings by hard and fast rules has often made questions on the form and manner of pleading the main issue in the litigation. The determination of substantive rights of the case rather than the litigation of procedural rights should be the main object. The danger of too great laxity and carelessness in pleading may be provided for by rules which will afford a speedy opportunity to correct any defects in pleading to which the opponent wishes to object before trial, such as motions for a better statement of the claim or defense or more particulars. Obedience to the rules of procedure may be secured by the assessment of costs rather than by forfeiture of

[22] In 1915, the Legislatures of Alabama and of Michigan made it the duty of the Supreme Court of those states to make rules regulating practice in all courts of record. In Alabama the authority goes to the extent of authorizing the Supreme Court to prescribe rules of evidence. The Legislature of Virginia in 1916 made it the duty of the Supreme Court of Appeals to make general regulations for practice in all courts of record, civil and criminal, and to prepare a system of rules of practice and pleading and of the forms of process to be used in all courts of record in that state.

rights. Rules which safeguard "due process of law" and are "intended to secure to parties a fair opportunity to meet the case against them and a full opportunity to present their own case" should be distinguished carefully from rules intended primarily "to provide for the orderly dispatch of business." Nothing should be obtainable even through the former class except the securing of such opportunity.[23]

It is a failing of courts and lawyers that they sometimes lose sight of the main objective at which they are driving. Often the merits of cases seem to be obscured by controversy over the method of determining them. Modern courts are becoming more and more concerned about the substantial merits, and less and less patient with litigation about the rules of the game. Rules of procedure are merely means to an end, and questions of procedure ought not to be the basis of ultimate decision. Litigation is not a game of chance or skill, turning upon the adroitness or the slips of counsel, and errors in any matter of pleading or procedure should be disregarded, unless it appears that the error has resulted in a miscarriage of justice or affected the investigation of the substantial rights of the parties.[24]

Judge Cutting makes the following striking comparison between common-law pleading and probate pleading in Illinois: "It is a curious fact that in Illinois, if A. owes B. $10,000 and both parties are alive, and A. refuses or neglects to pay B. what he owes him, if he does not go into the municipal court to bring suit against A., he must file a declaration, and A., if he defends, must file pleas, to which B. also files a replication; the pleading progressing, it may be, to the proverbial surrebutter. An issue having been thus made, the cause is

[23] Roscoe Pound, A Practical Program of Procedural Reform, Illinois Law State Bar Ass'n (1910); Some Principles of Procedural Reform, 4 Ill. Law Rev. 388, 491; Roscoe Pound, Regulation of Procedure by Rules of Court, 10 Ill. Law Rev. 163, 364; Manley O. Hudson, 13 Law Series, Mo. Bulletin, p. 8; John Lewson, 11 Ill. Law Rev. 271; Samuel Rosenbaum, 63 University of Pennsylvania Law Rev. 151, 380, 505. See Bulletin XIV, American Judicature Society, Rules of Civ. Proc. (1919); Appendix A, infra.

[24] Pleading as a means to an end, Rees v. Storms, 101 Minn. 381, 112 N. W. 419; Shinn v. Shinn, 78 W. Va. 44, 88 S. E. 610, L. R. A. 1916E, 618. The principle upon which the English Judicature Acts are based is that procedure is not a matter of substantive right, but is merely the machinery devised to expedite the business of the courts, which ought to be regulated by the courts themselves. Formerly suitors and courts were ruled by an iron hand, which reached out of the statute book or out of ancient precedents. D. W. Amram, 62 University of Pennsylvania Law Rev. 269; Studies in English Procedure, Samuel Rosenbaum, 63 University of Pennsylvania Law Rev. 103, 151, 273, 380, 505; Procedural Reform in the Federal Courts, E. P. Wheeler, 66 University of Pennsylvania Law Rev. 1; Some Problems of Procedural Reform, G. E. Osborne, 7 Journal American Bar Ass'n, p. 245.

set for trial, and the judge instructs the jury, as has been heretofore indicated. Any deviation from the beaten path in the matter of procedure may be taken up by one side or the other on appeal. But if, before B. brings suit, A. dies, leaving a widow and children, an administrator is appointed in the matter of his estate. All then is changed. B. need only in such case file a plain statement of his claim in the probate court. The administrator need not file anything. The matter comes on for trial, either before the court alone, or with a jury. The court may orally instruct the jury, and, when verdict is rendered, an appeal may be taken. But no exception can be taken or objection raised to the statement of claim, which is the only pleading, nor to the instructions given to the jury, nor to any of the procedure. If there be protection in the established forms of pleading, who most needs to be protected? It would seem that no one needed it more than the widow and the children, who, in most instances, know nothing of the business affairs of the deceased. If there be such protection in formal pleading, they should have the benefit of it. But experience shows that they are perfectly protected, in so far as human agency can accomplish that desirable thing, in the simple, direct, and expeditious method employed in the probate courts. Those courts enter judgment for just as great amounts, in just as complicated causes, under conditions just as exacting, as do the common-law courts, and yet they are reversed in their finding in not one-fifth as many cases, in proportion to the judgments entered, as are the courts having the old and perhaps more scientific system of pleadings." [25]

[25] Chas. S. Cutting in 85 New York State Bar Ass'n Rep. 850, 858.

CHAPTER I

OUTLINE OF PROCEEDINGS IN AN ACTION

1. Scope of Procedure.
2. Jurisdiction of Courts.
3. Process—The Original Writ.
4. Service—Personal and Constructive.
5. The Appearance.
6. Pleadings.
7. The Declaration of the Plaintiff.
8–9. The Demurrer.
10. Dilatory Pleas.
11–12. Pleas in Bar.
13–14. The Replication and Subsequent Pleadings.
15. Production of Issues.
16. The Method of Trial of the Issues.
17. Right to Open and Close.
18. Methods of Production of Evidence.
19. Burden of Proof.
20. Examination of Witnesses.
21. The Arguments, or Summing Up.
22. The Charge of the Court.
23. Deliberations of the Jury.
24. The Verdict.
25. The Judgment.
26. Writs of Execution.

SCOPE OF PROCEDURE

1. The law of procedure deals with:
   (a) Jurisdiction of courts.
   (b) The process to compel the appearance of the defendant.
   (c) The pleadings.
   (d) The trial.
   (e) The judgment.
   (f) The execution.
   (g) Appellate review.

JURISDICTION OF COURTS

2. Jurisdiction depends upon authority over the subject-matter and over the parties.

The law of procedure deals not with the existence of rights of action and liability, but with the method or process of pursuing actions, civil and criminal. It has to do with pleading, practice, and evidence; the

steps by which proceedings are conducted in the several courts. It deals (1) with the jurisdiction of courts, in which court action must be brought, and the authority of the court over the subject-matter; (2) with process or summons to acquire jurisdiction of the cause and compel the defendant's appearance; (3) with pleading, the formal statements of claim on the one side, and of defenses or replies thereto on the other; (4) with the examination of the issues of law after argument upon demurrer; (5) with the trial of the issues of fact joined in the pleadings; (6) with the judgment or award of the court with respect to the nature and amount of relief to be given, the great object to which all prior proceedings have led up; (7) with final process or execution, which enforces the award of relief by intervention of ministerial or executive officers. (8) Lastly comes review on appeal, writ of error, or motion for a new trial, to correct errors which may have arisen. In general, the law of procedure deals with the mode of pursuit and application of the remedy to the right. A comprehensive view of the various steps in an action at law will be given in this chapter, in order that the part played by the pleadings may be seen in perspective.

Jurisdiction of Courts

Jurisdiction is the power to hear cases and decide them by pronouncing judgment. The power to render judgment depends (1) upon jurisdiction of the subject-matter or class of cases; and (2) upon jurisdiction of the cause or parties.[1]

The judicial powers and jurisdiction of the courts of the states and of the United States are in general derived from their respective constitutions and are further fixed and defined by statutes. Such written law prescribes the nature of the causes that may be brought within the cognizance of the respective courts. In England, however, the source of the power and authority of the common-law courts to afford the relief asked was anciently the original writ, a delegation from the king in each instance. The writ was the warrant of authority for the particular court "to hold the plea" or take cognizance of the cause.[2] In course of time the jurisdiction of the law courts became fixed and established as to those matters in which writs were demandable of common right. Original writs fell out of use as a means of commencing suit, but they left behind them a defined jurisdiction and the limited system of remedies under "forms of action" which we shall have occasion to study in detail.

Some elasticity was afforded by the flexible nature of the action on the case, but a large jurisdiction was unprovided for. To meet this

[1] Courts, 7 R. C. L. p. 1030.

[2] 1 Spence, Eq. Jur. 228; Bigelow, Hist. Proc. 76, 77, 85; 3 Bl. Com. 273, 393.

need the Court of Chancery arose, in which the Chancellor gave equitable relief and did complete justice wherever there was no adequate remedy at common law. The jurisdiction of equity was residuary and supplemental to law, based on a delegation of all judicial authority not committed to the older law courts. Such is the cause of the great division of jurisdiction into legal and equitable, allotting certain kinds of actions and relief to one set of courts and all the rest to another. The line of demarcation between legal and equitable jurisdiction is thus historical and arbitrary.

The principal common-law courts, as they formerly existed in England, were the Courts of King's Bench, Common Pleas, and Exchequer. These three courts for six hundred years continued to be the great superior courts of common law, with largely concurrent jurisdiction in all personal actions. These courts sat in banc at Westminster, but the trials of cases were usually held by judges traveling on circuit in the county where the case arose.

PROCESS—THE ORIGINAL WRIT

3. Original "process" is any writ or notice by which a defendant is called upon to appear and answer the plaintiff's declaration.

The commencement of the suit at common law was formerly by original writ. Judicial process was by summons, attachment, arrest and outlawry.

The Original Writ

In the common-law courts the action was commenced by original writ, which not only gave the court jurisdiction of the subject-matter, but enjoined upon the sheriff the duty of compelling the defendant to appear. "In England the sovereign was the source of all authority, and the courts were his courts, and had no right to proceed in any cause without his authority and permission. It was the principal function of the original writ to give that permission. With us, on the contrary, the judicial power has always been an independent, co-ordinate branch of government. It never required any special license or authority from any executive, by way of original writ to exercise its functions."[3]

The original writ was a mandatory letter or executive order from the king to his officer, the sheriff, to compel the defendant to appear in

[3] Parsons v. Hill, 15 App. D. C. 532, per Morris, J.; Philadelphia, B. & W. R. Co. v. Gatta, 4 Boyce (Del.) 38, 85 Atl. 721, 47 L. R. A. (N. S.) 932, Ann. Cas. 1916E, 1227.

court to answer the demand of the plaintiff. This was the foundation of judicial process; that is, of writs issued in the name of the court, under its seal, by executive or ministerial officers of the court.

Original Writ in Debt

George the Third, etc., to the Sheriff of ———, Greeting: Command C. D., late of ———, that justly and without delay he render to A. B. the sum of £——— of good and lawful money of Great Britain, which he owes to and unjustly detains from him, as it is said; and unless he shall do so, and if the said A. B. shall make you secure of prosecuting his claim, then summon, by good summoners, the said C. D. that he be before us, on ——— wheresoever we shall be in England (or, in C. P. before our justices at Westminster, on ———), to shew wherefore he hath not done it, and have there the names of the summoners, and this writ. Witness ourself, etc. [L. S.]

(Tidd's Appendix, 20.)

By the writ itself the sheriff was required to have it in court on a certain day. On that day the writ was said to be returnable, and the day was called the "return day of the writ." In each of the terms, except Easter, there were four stated days called "general return days"; in that term, five; and on one or the other of these general return days the original writ was always made returnable. On the return day, it was the duty of the sheriff to remit the writ into the superior court of common law, with his return; that is, with a short account in writing of the manner in which he had executed its command to cause the defendant to appear.[4]

Commencement of Action in Modern Practice

In modern practice the original writ is no longer used either as authority for instituting the suit, or for the purpose of compelling appearance by the defendant,[5] though in some of our states the term is retained to designate the process that has taken its place. No writ at all is necessary as authority for instituting suits, and the writ of summons is used as a means of notifying the defendant of the suit, and ordering him to appear in court. The practice is very generally, if not entirely, regulated by statutes, varying somewhat in the different states.[6]

[4] As to commencement of actions at common law, see West v. Ratledge, 15 N. C. 31, Lloyd, Cas. Civ. Proc. 281.

[5] In this country since the jurisdiction of the courts is conferred by Constitutions and statutes, there is no need of any original writ to authorize the institution of an action. President, etc., of Bank of New Brunswick v. Arrowsmith, 9 N. J. Law, 284; Cf. Pressey v. Snow, 81 Me. 288, 17 Atl. 71.

[6] In Illinois it is provided that the first process in all actions to be hereafter commenced in any of the courts of record in this state shall be a summons, except actions where special bail may be required (that is, where a writ of capias ad respondendum may be issued), which summons shall be issued under the seal of the court, tested in the name of the clerk of such court, dated on the day it shall be issued, and signed with his name, and shall be directed to the sheriff (or, if he be interested in the suit, to the coroner of the county), and shall be made returnable on the first day of the next term of the court in which the action may be commenced. If 10 days shall not intervene between the time of suing out the summons, and the next term of court, it shall be made returnable to the succeeding term. The plaintiff may, in any case, have summons made returnable at any term of the court which may be held within three months after the date thereof. Hurd's Rev. St. Ill. 1921, c. 110, § 1. In Hurd's Rev. St. Ill. 1921, c. 10, § 1, it is provided that in certain cases the defendant may be arrested and brought into court on a writ of capias ad respondendum.

In Michigan it is provided as follows: "Actions brought for the recovery of any debt, or for damages only, may be commenced either: (1) By original writ; or (2) by filing in the office of one of the clerks of the court a declaration, entering a rule in the minutes kept by such clerk, requiring the defendant to plead to such declaration within twenty days after service of a copy thereof and a notice of such rule, and serving a copy of such declaration, and notice of such rule personally on the defendant, which mode of commencing an action may be adopted against any person, whether privileged from arrest or not." How. Ann. St. § 7201. And see the following sections as to service of copy of declaration as a substitute for process. See Ellis v. Fletcher, 40 Mich. 321; Begole v. Stimson, 39 Mich. 208. "The original writ in personal actions shall be a summons or a capias ad respondendum, in the form heretofore in use in this state, unless the form thereof shall be altered by rule of court." Comp. Laws 1915, § 12406.

[7] Potter v. John Hutchison Mfg. Co., 87 Mich. 59, 49 N. W. 517.

[8] 3 Bl. Com. 279, 281; 3 Chit. Gen. Prac. 142, 437, 443; Martin, Civ. Proc. § 12; Tidd, Prac. 105, 122. Civil arrest by capias ad respondendum in actions of debt was settled procedure at common law from the reign of Edward III. Tidd, Prac. (8th Ed.) pp. 100, 124. Wherever the defendant could be arrested he could be held to bail and could appear only by giving special bail as con-

The general practice is for the attorney, in commencing an action, to draw up, sign, and present to the clerk of the court, an order requesting him to issue the summons. This order is called a præcipe. It is never essential to the validity of the summons, but is used merely as a convenient way of directing the clerk as to its issuance. A verbal direction would do as well.[7]

Summons and Arrest

The first process upon the original writ in contract actions and for civil injuries unaccompanied by force was a summons, or warning to appear according to the command of the writ, being usually nothing more than a copy of the original writ itself, made out by the plaintiff's attorney for the sheriff, and delivered by one of his deputies to the defendant. But by early statutes a capias was allowed in all ordinary cases, and was generally issued in the first instance.[8]

Attachment

The writ of attachment is a writ commanding the seizure of property of the defendant, to be held as security for the satisfaction of the plaintiff's claim. It always issues before judgment, and thus differs from an execution, which is the process issued after judgment to obtain satisfaction of the judgment. In some states it can be issued only against absconding debtors or persons concealing themselves, or nonresidents; in others, it is issued, in the first instance, to obtain control over property of the defendant with which to satisfy the judgment. At common law the attachment was only to compel the appearance of the defendant, and, when he had appeared, the attachment was dissolved. There was no lien upon the goods to secure the debt. The writ as now issued is solely to attach personal property and real estate to respond to the judgment. The defendant may appear or not, after having been served with the summons; if not, he is defaulted, and the attachment constitutes a lien on the goods for the payment of the claim sued on, which may be enforced by execution. The defendant may generally, however, appear at any time before judgment, and dissolve the attachment by giving a bond, in which case the property is released, and the bond stands in its place.[9] The giving of a bond is sometimes compelled by arrest on civil process, which is another provisional remedy.

As a general rule the action is deemed to be commenced when the writ is issued, although to stop the running of the statute of limitations some courts hold that the writ must be delivered to the officer for service. But others hold that this is not necessary.[10]

trasted with common bail or nominal bail. The defendant could not plead in bailable actions until he had appeared by giving bail. The process by attachment and distringas or distress infinite was availed of wherever the defendant avoided arrest. Tidd. Prac. (8th Ed.) 112. It was the only method of proceeding against a corporation. Tidd. Prac. 105, 109.

[9] See Sellon, Prac. p. 137; 3 Bl. Com. 290, 291. On special bail as a condition of appearance by nonresident whose goods have been seized, see Ownbey v. Morgan, 256 U. S. 94, 41 Sup. Ct. 433, 65 L. Ed. 837, 17 A. L. R. 873, Id., 7 Boyce (30 Del.) 297, 323, 105 Atl. 838, 849. If the property attached is a chose in action, it brings in a new party in the person of one indebted, who is called the "garnishee," and who is required to hold the property in his hands until the attachment or "garnishment," as it is called is dissolved, or he is otherwise discharged. As to this process, see Drake, Attachm. (5th Ed.) cc. 18–37.

[10] Suit is commenced by the issue of summons. Schroeder v. Merchants' & Mechanics' Ins. Co., 104 Ill. 71. See Mason v. Cheney, 47 N. H. 24; County v. Pacific Coast Borax Co., 67 N. J. Law, 48, 50 Atl. 906.

SERVICE—PERSONAL AND CONSTRUCTIVE

4. Jurisdiction to render a personal judgment is based on personal service of summons, and sometimes on substituted service. Jurisdiction in rem, and quasi in rem is based on constructive service by publication and control of some res.

Personal judgments must be based upon personal service of summons upon the defendant, or in case of residents upon substituted service. Constructive service of process by publication is by statute authorized where the court has jurisdiction in rem or quasi in rem. In the latter case seizure of some property by attachment or otherwise is necessary.[11]

Personal Service

There is a most important distinction between the jurisdiction which is based on personal service and jurisdiction which is based upon control over some res or subject-matter, which is under the power of the court. Only by virtue of personal jurisdiction can the court render a personal judgment and create a personal obligation which will bind all his property everywhere.

The ordinary method by which a court gets authority to adjudicate upon the rights and liabilities of the defendant is by service of summons upon him personally within the state. There are statutory provisions as to the officer or agent upon whom summons shall be served in actions against corporations. The service, when personal, may be made at any time after the writ comes into the hands of the officer, but not later than the time fixed by statute, which may be the return day or a certain time before. The officer is bound to use due diligence in serving it, and is liable for neglect or a false return. Having made the service, it is his duty to return the writ to the court from which it issued, with his report of service, or that the defendant cannot be found within his jurisdiction indorsed thereon, which is called his "return."

This act of notifying him of the commencement of the suit is generally performed by reading the writ to him, or handing him a copy of it, or, as is now generally provided by statute, by leaving a copy at his last usual place of abode, if he has one within the jurisdiction of the court.[12] Substituted service, where process is left at the residence of the defendant, is treated by state courts as a kind of personal service.

[11] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

[12] See Heath v. White, 2 Dowl. L. 40; Hinton, Cas. Trial Prac. p. 41; Bimeler v. Dawson, 4 Scam. (Ill.) 536, 39 Am. Dec. 430; Hopkinson v. Sears,

Substituted Service

Substituted service, by leaving a copy of the summons at the defendant's residence or usual place of abode, may by statute be made equivalent to personal service as to a resident defendant, and support a personal judgment. "Substituted service in actions in personam is a departure from the common-law rule requiring personal service, and the statute authorizing such service must be followed strictly. But, when the statute is complied with, the general rule is that substituted service on a resident defendant is equivalent to personal service and warrants a personal judgment." [13]

Courts have no general power to summon nonresidents, and persons resident in one state are not subject to the exercise of personal jurisdiction over them by courts in another.[14] If they hold property there, however, they are subject to have their property rights adjudicated by a judgment in rem. Mere temporary presence in the state is sufficient to subject the nonresident individuals to its power if personal service of summons is secured therein, even if the defendant is merely passing through on a train. But foreign corporations cannot be served, unless doing business in the state. When once obtained, jurisdiction continues through all subsequent proceedings in the same litigation without further notice.

Constructive Service

In certain exceptional cases a court may acquire a limited jurisdiction in rem by notice sent to a nonresident outside the state or published within it, which is regarded as sufficient to give him a reasonable opportunity to appear and defend. But a court cannot acquire jurisdiction to pronounce a personal judgment against one who has no residence within the state, except by actual service of notice upon him within the state, or by his voluntary appearance.

Jurisdiction in rem is jurisdiction in the cause acquired by virtue of control over the subject-matter. All proceedings are really directed against persons and their rights, even though, as in admiralty, a res or ship be impleaded as defendant. Some notification of the proceeding is therefore essential, either by publication in newspapers, or by posting up notices, or by mailing notice to the last known address, or by service of summons outside of the state. An order of court must in general be obtained to make service of the summons by publication or other substituted method, upon a showing by affidavit that personal service within the state cannot be made.[15]

Jurisdiction Quasi in Rem

There has been a wide extension of the doctrine of jurisdiction in rem to cases where there is no direct claim asserted to a tangible res. Thus, where a suit is brought upon an obligation against a nonresident debtor, the court may subject the property of the debtor within the state to the payment of the debt, even though no personal jurisdiction over him can be acquired. No claim is made to the property, except incidentally as a means of obtaining redress for a wrong. It is held that, where a claim is made to property indirectly to satisfy an obligation of a nonresident debtor, an attachment or garnishment or receivership is necessary. Since the suit is not so framed as to set up any direct claim to the res, a claim to specific property must be asserted in some manner, since jurisdiction is based upon that.[16] A judgment

14 Vt. 494, 38 Am. Dec. 236; Vaughn v. Brown, 9 Ark. 20, 47 Am. Dec. 730; Maher v. Bull, 26 Ill. 348; Law v. Grommes, 158 Ill. 492, 41 N. E. 1080 (service of summons by delivering a copy without reading the writ to the defendant insufficient).

13 Lloyd, Cas. Civ. Proc. p. 288, note; Cassidy v. Leitch (N. Y.) 2 Abb. N. C. 315; Missouri, K. & T. Trust Co. v. Norris, 61 Minn. 256, 63 N. W. 624; Nelson v. Chicago, B. & Q. R. Co., 225 Ill. 197, 80 N. E. 109, 8 L. R. A. (N. S.) 1186, 116 Am. St. Rep. 133; 32 Cyc. p. 461; Service in Actions in Personam, C. K. Burdick, 20 Mich. Law Rev. 422, 425; McDonald v. Mabee, 243 U. S. 90, 37 Sup. Ct. 343, 61 L. Ed. 608, L. R. A. 1917F, 458. The Supreme Court of Iowa has held that statutes authorizing service of notice on residents of the state while outside of its territorial limits and the rendition of personal judgment on such service are unconstitutional. Raher v. Raher, 150 Iowa, 51, 129 N. W. 494, 35 L. R. A. (N. S.) 292, Ann. Cas. 1912D, 650. See 20 Mich. Law Rev. 429, 430; McDonald v. Mabee, 243 U. S. 90, 37 Sup. Ct. 343, 61 L. Ed. 608, L. R. A. 1917F, 458. Substituted service of process, by posting on the front door, due process of law. 7 Va. Law Rev. 670 (May, 1921).

14 "Process from tribunals in one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them," far from their homes and business. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Flexner v. Farson, 248 U. S. 289, 39 Sup. Ct. 97, 63 L. Ed. 250; A. W. Scott, Jurisdiction over Nonresidents, 32 Harv. Law Rev. 871, 875.

15 The process of the court is said to "run" only within the limits of its own jurisdiction, and only by service within those limits is jurisdiction to pronounce personal judgment against a defendant without his voluntary appearance acquired. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Lloyd, Cases Civil Procedure, pp. 291, 293, note; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; International Harvester Co. v. Commonwealth of Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479. According to some authorities, no personal judgment can be rendered, even against a resident, merely on the basis of an attachment of the property and publication of summons. De Arman v. Massey, 151 Ala. 639, 44 South. 688; Scott, Cas. Civ. Proc. p. 42.

16 Seizure by court necessary to base service by publication in suits quasi in rem. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Baillo v. Columbia Gold Min. Co., 86 Ore. 1, 22, 42, 166 Pac. 965, 167 Pac. 1107. See W. N. Hohfeld, 26 Yale Law J. 714, 761; Shipley v. Shipley, 187 Iowa, 1295, 175 N. W. 51.

RES: 1. PROPERTY OR OBJECT; 2. CASE; POINT; MATTER; ACTION
IN REM: AN ACTION OR JUDGMENT AGAINST AN OBJECT OR PROPERTY.

so based is in rem and not in personam, and cannot impose any personal liability or obligation, but the only effect is to subject the property attached to the payment of the demand.

THE APPEARANCE

5. The appearance of the defendant is any act or proceeding by which he places himself before the court, in order to participate in the action.

Appearance may be
(a) General.
(b) Special.

Appearance

Personal jurisdiction or power to render a judgment in personam may be acquired either by personal service of summons or by appearance. If the defendant or his attorney does any act with reference to the defense of the action, he is held to submit himself to the authority of the court and all defects in service of process are thereby cured.[17] Such is a general appearance. The defendant, may, however, make a special appearance simply to raise objections to the validity of the service of process or to challenge the jurisdiction of the subject-matter.[18]

The English courts did not, until modern times, claim jurisdiction over the person of the defendant merely by service of summons upon him. It was deemed necessary to resort to further process by attachment of his property and arrest of his person to compel "appearance," which is not mere presence in court, but some act by which a person who is sued submits himself to the authority and jurisdiction of the court. Any steps in the action, such as giving bail upon arrest, operated as an appearance or submission.

The modern law does not seek to compel appearance, but if the defendant is properly served and neglects to appear and plead, the court will render judgment against him for default of appearance. Inasmuch as the default constitutes an admission of the cause of action set forth in the declaration, all that the plaintiff has to prove is his damages.

[17] See Hayes v. Shattuck, 21 Cal. 51; Stockdale v. Buckingham, 11 Iowa, 45; Knight v. Low, 15 Ind. 374; Scott v. Hull, 14 Ind. 136; York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604 (no special appearance in Texas). Western Loan & Savings Co. v. Butte & B. Consol. Min. Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101 (demurrer is appearance); Spencer v. Court of Honor, 120 Minn. 422, 139 N. W. 815 (special appearance); 4 C. J. 1314. Consent of the parties cannot confer upon the court jurisdiction of the subject-matter, and therefore an appearance by the defendant is no waiver of the objection that the court has no jurisdiction of the subject-matter. Wetzel v. Hancock County, 143 Ill. App. 178; Lloyd, Cas. Civ. Proc. p. 307.

[18] Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237; Fisher Sons & Co. v. Crowley, 57 W. Va. 312, 50 S. E. 422, 4 Ann. Cas. 282.

PLEADINGS

6. On the appearance of the parties, the pleadings commence. The various pleadings and their order are as follows:
(a) The declaration of the plaintiff.
(b) The dilatory pleas of the defendant.
(c) The demurrer or plea of the defendant.
(d) The demurrer or replication of the plaintiff.
(e) The demurrer or rejoinder of the defendant.
(f) The demurrer or surrejoinder of the plaintiff.
(g) The demurrer or rebutter of the defendant.
(h) The demurrer or surrebutter of the plaintiff.

Mode of Pleading

Stephen thus describes how the pleadings were once orally delivered.[19]

"As the appearance was an actual one, so the pleading was an oral altercation in open court, in presence of the judges. * * * These oral pleadings were delivered either by the party himself or his pleader, called 'narrator' and 'advocatus'; and it seems that the rule was then already established that none but a regular advocate (or, according to the more modern term, 'barrister') could be a pleader in a cause not his own.

"It was the office of the judges to superintend, or, according to the allusion of a learned writer, moderate, the oral contention thus conducted before them. In doing this, their general aim was to compel the pleaders so to manage their alternate allegations as at length to arrive at some specific point or matter affirmed on the one side and denied on the other. When this matter was attained, if it proved to be a point of law, it fell, of course, to the decision of the judges themselves, to whom alone the adjudication of all legal questions belonged; but, if a point of fact, the parties then, by mutual agreement, referred it to one of the various methods of trial then practiced, or to such trial as the court should think proper. This result being attained, the parties were said to be at issue (ad exitum; that is, at the end of their pleading). The question so set apart for decision was itself called 'the issue,' and was designated, according to its nature, either as an 'issue in fact' or an 'issue in law.' The whole proceeding then closed, in case of an

[19] Stephen, Pl. (Tyler's Ed.) 58–61.

issue in fact, by an award or order of the court directing the institution, at a given time, of the mode of trial fixed upon; or, in case of an issue in law, by an adjournment of the parties to a given day, when the judges should be prepared to pronounce their decision."

The record and continuances:

"During this oral altercation a contemporaneous official minute, in writing, was drawn up, by one of the officers of the court, on a parchment roll, containing a transcript of all the different allegations of fact to the issue, inclusive. And, in addition to this, it comprised a short notice of the nature of the action, the time of the appearance of the parties in court, and the acts of the court itself during the progress of the pleading. These chiefly consisted of what were called the 'continuances' of the proceedings, the nature of which was as follows: There were certain purposes for which the law allowed the proceedings to be adjourned, or continued over, from one term to another, or from one day to another in the same term; and, when this happened, an entry of such adjournment to a given day, and of its cause, was made on the parchment roll; and by that entry the parties were also appointed to reappear at the given day in court. Such adjournment was called a 'continuance.' Thus, the award of the mode of trial on an issue in fact, and also the adjournment of the parties to a certain day to hear the decision of the court on an issue in law, were each of them continuances, and were entered as such on the roll. And if any interval or interruption took place without such an adjournment duly obtained and entered, the chasm thus occasioned in the progress of the suit was called a 'discontinuance,' and the cause was considered as out of court by the interruption, and was not allowed afterwards to proceed. The official minute of the pleading and other proceedings thus made on the parchment roll was called 'the record.' As the suit proceeded, similar entries of the remaining incidents in the cause, were, from time to time, continually made upon it; and, when complete, it was preserved as a perpetual, intrinsic, and exclusively admissible testimony of all the judicial transactions which it comprised. From the beginning of the reign of Richard I. commences a still extant series of records, down to the present day; and such, as far back as can be traced, has always been the stable and authentic quality of these documents in contemplation of law."

The pleadings were formerly delivered orally, and in open court; but this practice has long since ceased. The modern practice is to draw up written pleadings in typewritten form, and file them in the office of the proper officer of the court, usually the clerk's office. Here the opposite party may examine a pleading, or he may procure a copy

from the officer; or it may be that under the statutes of the particular state, or a rule of the court, a copy may be required to be delivered to him. When the pleadings are thus filed they become a part of the record of the cause. They are not, as formerly, transcribed, but are themselves properly indorsed and kept on file as a part of the record.

THE DECLARATION OF THE PLAINTIFF

7. The first pleading in an action is the plaintiff's declaration. This is a statement, in legal form, of the grounds of the plaintiff's right of action.

The parties being in court, the next step is to show by pleadings of record what is the nature of their dispute, and the natural course is for the plaintiff to file his declaration or statement of the facts which constitute his ground of complaint. It answers to the bill in chancery, and the complaint in code procedure. It must fully show the right of action in the plaintiff at the time of bringing the suit, and will be insufficient to warrant judgment in his favor if it fails in this, for he can recover only on the grounds which the declaration sets forth.

Skeleton Form of Declaration

In the ——— Court, ——— County, ——— Term, A. D. 19—. County of ———, to wit:

A. B., plaintiff, by X. Y., his attorney, complains of C. D., defendant, who has been summoned (*or attached, as the case may be*) to answer the said plaintiff in a plea of *(here state the form of action for which the defendant was summoned, as debt, trespass on the case in assumpsit, trespass on the case, covenant, etc.)*.

For that *(here state the cause of action)*.

To the damage of the said plaintiff in the sum of ——— dollars, and therefore he brings his suit, etc.

X. Y., Attorney for Plaintiff.

THE DEMURRER

8. If, admitting the truth of all the facts stated, the declaration is on its face insufficient in law to show a right of action, or is defective in form, the defendant may demur.

9. A demurrer will also lie by the plaintiff to the pleadings of the defendant, or by the defendant to pleadings of the plaintiff, subsequent to the declaration, for insufficiency in substance or in form.

The plaintiff having declared, or filed the statement of his cause of action, it is for the defendant to concert the manner of his defense. For this purpose he considers whether, on the face of the declaration, and supposing the facts to be true, the plaintiff appears entitled, in point of law, to the redress he seeks, and in the form of action which he has chosen. If he appears to be not so entitled in point of law, if the declaration discloses a case insufficient on the merits, or framed in violation of any of the rules of pleading, the defendant may take exception to the declaration on this ground. In doing so he is said to demur, and the objection itself is called a "demurrer." A demurrer (from the Latin demorari, or French demorrer, "to wait, or stay") imports, according to its etymology, that the objecting party will not proceed with the pleading, because no sufficient statement has been made on the other side, but will wait the judgment of the court whether he is bound to answer.[20] The demurrer raises a question of law for the determination of the court. If the decision thereon is against him, the defendant is now generally allowed to plead to the merits of the action as we shall presently explain.

A demurrer is also the proper mode of raising objection to pleadings subsequent to the declaration whether such pleadings are by the plaintiff or by the defendant. If the defendant, instead of demurring to the declaration, pleads to it, as will be hereafter explained, and his plea is insufficient in law, the proper course is for the plaintiff to demur to it. The same is true as to the plaintiff's replication, and the further pleadings, of himself or of the defendant.

The demurrer does not admit mere conclusions of law, or allegations which the court judicially knows to be untrue, or facts not well pleaded.

[20] Stephen, Pl. (Tyler's Ed.) 82; Stout v. Keyes, 2 Doug. (Mich.) 184, 43 Am. Dec. 465; Wallace v. Holly, 13 Ga. 389, 58 Am. Dec. 518; People v. Holten, 259 Ill. 219, 222, 102 N. E. 171.

DILATORY PLEAS

10. If the declaration is not open to a demurrer, or the defendant does not choose to avail himself of that course, he must plead—that is, answer the declaration by matter of fact. The answer of fact is called a plea. Pleas are either:

(a) Dilatory, or
- **(1) To the jurisdiction of the court.**
- **(2) In suspension of the action.**
- **(3) In abatement of the action.**

(b) Peremptory, or in bar of the action.

Dilatory Pleas

There are certain preliminary objections to the maintenance of the suit, which do not attack the core or merits of the plaintiff's case. These formal defects are waived, unless they are raised by the defendant at the first opportunity. These were known in common-law pleading as matters of abatement and suspension, and were raised by the so-called "dilatory pleas," since they tend merely to delay or put off the particular suit, by questioning the method in which it is pursued, rather than by disputing the very cause of suit or right to relief in proper form. Dilatory pleas are to the jurisdiction of the court, alleging that it has no cognizance of the subject-matter; to the disability of the plaintiff, by reason of which he is incapable to commence or continue the suit, as that he is an infant; misnomer, for misnaming the defendant; or the death of either party, which is an abatement of the suit, though it may be continued in most cases in the name of the administrator or executor. Other dilatory pleas take exception to misjoinder of causes of action, or the misjoinder or nonjoinder of parties, in that the suit is wrongly brought as against them, or that there is a defect of necessary parties. These objections are sometimes raised in code pleading by motion or special demurrer, requiring the correction of the pleading.

These pleas had at common law to be pleaded in due order, one at a time, and the court would decide whether the defendant ought to be compelled to proceed further, until the objection were removed; if all were overruled, it was then incumbent on the defendant to plead and answer over to the merits of the case, which was called a plea in bar. Formerly these pleas were often used, without any foundation of truth, merely for purposes of delay, as demurrers are now sometimes used.

PLEAS IN BAR

11. A plea in bar is one which shows some ground for barring or defeating the action on the merits, and contains a prayer to that effect. It is called a "peremptory plea" because it is a positive answer to the declaration, and a "plea to the merits" because it waives all irregularities and informalities, and puts the contest upon the merits of the case.

12. It must deny all or some part of the averments of fact in the declaration, or, admitting them to be true, allege new facts which avoid or repel their legal effect.

If there is no ground for contesting the prosecution of the suit by any of the dilatory pleas or by demurrer, or the defendant does not wish to do so, it is then for him to oppose the averments of the declaration by a defense to the merits of the cause. This he does by a plea in bar. A plea in bar is one that shows some ground for barring or defeating the action on the merits. It is distinguished from all pleas of the dilatory class, as impugning the right of action altogether, instead of merely tending to divert the proceedings to another jurisdiction, as is the effect of a plea to the jurisdiction, or to suspend them, as is the effect of a plea in suspension, or to abate the particular action only, as is the effect of a plea in abatement.

It follows from the nature and object of the plea in bar that it must generally deny all or some essential part of the averments of fact in the declaration, or, admitting them to be true, allege new facts which obviate or repel their legal effect. In the first case, the defendant is said to traverse the matter of the declaration; in the latter, to confess and avoid it. Pleas in bar are consequently divided into pleas by way of traverse and pleas by way of confession and avoidance.[21]

The principal form of traverse is called the "general issue," being used when the defendant wishes to deny his liability on various grounds; but there are other forms, such as special and specific traverses, which differ in containing new and inconsistent matter, as well as an express denial, or in being a denial of a specific part of the declaration only, when such a denial will fully test the plaintiff's right. These pleadings are fully considered hereafter.

[21] "In the modern language of pleading, 'deny' is often substituted for it; and 'pleas in denial' is a term often used, instead of 'pleas by way of traverse.'" Pleas by way of confession and avoidance are divided into pleas by way of justification and excuse, and pleas by way of discharge. They are also referred to as affirmative defenses or defenses of new matter.

THE REPLICATION AND SUBSEQUENT PLEADINGS

13. The replication is the plaintiff's answer to the plea of the defendant.

14. The pleadings subsequent to the replication are the rejoinder and rebutter of the defendant, and the surrejoinder and surrebuttter of the plaintiff.

If the defendant, instead of demurring to the declaration, or pleading in bar, by way of traverse, pleads either one of the dilatory pleas heretofore explained, or pleads in bar by way of confession and avoidance, the plaintiff may, as we have seen, demur to the plea for insufficiency in point of law. If he deems the plea sufficient in law, or does not desire to demur, he must reply or plead to it in matter of fact. Such a pleading on the part of the plaintiff is called the replication. It may, like the pleas of the defendant, be either by way of traverse or by way of confession and avoidance of the allegations of the pleading of the defendant which it opposes. It may also, when the defendant mistakes the cause of action stated in the declaration because of its being too general, contain a restatement of it, so as to show what cause of action was really intended to be stated. This is called a "new assignment."

If the replication is by way of confession and avoidance, the defendant may then, in his turn, either demur, or, by pleading, traverse, or confess and avoid, its allegations. If such a pleading take place, it is called the rejoinder.

In the same manner, namely, that of demurring, or traversing, or pleading in confession and avoidance, is conducted any subsequent pleading to which the nature of the case may lead. The order of the alternate pleadings throughout the whole series is as follows: Declaration of the plaintiff, plea of the defendant, replication of the plaintiff, rejoinder of the defendant, surrejoinder of the plaintiff, rebutter of the defendant, and surrebutter of the plaintiff. After the surrebutter the pleadings have no distinctive names; for beyond that stage they are very seldom found to extend.

PRODUCTION OF ISSUES

15. An issue in pleading is a specific proposition or point of controversy, affirmed on the one side and denied on the other. The reduction of the controversy to issues is the great object of pleading.

Issues may be either:

(a) In law.

(b) In fact.

We have already seen that the defendant, in opposing the allegations of the declaration, must either demur or plead, and that, in the course of the pleadings, they must finally reach a point where there is some question or point presented, affirmed on the one side and denied on the other. The reduction of the controversy to some specific question is the object of all pleading, and, when reached, it is called the "issue"; and the cause, when at issue, is ready for trial or for the decision of the issue raised. A demurrer, either by the defendant to the declaration or other pleading of the plaintiff, or by the plaintiff to a plea or other pleading of the defendant, being a denial of the legal sufficiency of the opposing pleading, raises at once a question of law which it is always the peculiar province of the court to determine, without the aid of a jury. This question must be decided before further proceedings are had, and it is therefore said that the demurrer always tenders an issue in law. Again, if the declaration or other pleading is sufficient on its face, and no demurrer is interposed, the pleadings, whether of the defendant or the plaintiff, stating matters of fact, must at length reach a point where the opposing party will simply traverse or deny what is alleged, and this traverse must always tender an issue, which is one of fact, and which the formal words of the traverse refer to a trial by jury, by concluding "to the country." We shall consider these matters fully in treating in a separate chapter of the rules governing the production of the issue.

The decision on an issue of law may not necessarily end the pleadings, except for the time being, since if the demurrer be overruled, the party offering it is now generally allowed to plead over, as it is termed —that is, to offer the pleading he would have made if the pleading demurred to had been considered sufficient; but the tender and acceptance of an issue of fact close all pleading in the action, as there is then nothing left but a trial, which must dispose of the action on its merits.

The rules of pleading which will be hereafter considered were all framed with special reference to the production of issues, upon the decisions of which the case turns, and the separation of questions of law

for the court from questions of fact for the jury. When the pleadings are all in, and issues joined, then by comparison of what is affirmed on each side and admitted or denied on the other, counsel may ascertain what points are agreed and what are contested which must be established as true by the presentation of evidence. Each side may accordingly map out its case, collect its evidence, and prepare for trial. If the pleadings have performed their function, they have narrowed the case to the exact points of dispute which the parties are to maintain and prove, the decision of which disposes of the case, and upon which the final conclusion of law depends. The relevancy of evidence which leads up to the proof of these issues is now clearly to be seen.

Function of Pleadings

It is the office of pleading, as preparatory to the trial: (1) To give fair notice to the other side of the facts relied on and intended to be proved, and place them on record; (2) to separate the law from the facts, and to lay aside all extraneous, admitted, waived, and granted matter, leaving the essential grounds of contention bare; (3) to apportion the propositions of claim and defense, and thereby determine the burden of proof as to the various issues—i. e. what facts are essential to the cause of action, which the plaintiff must prove to make out his case, and what the defendant must prove to relieve himself from this prima facie cause of action.

THE METHOD OF TRIAL OF THE ISSUES

16. Issues of law are always decided by the court, without a jury, after argument by counsel for the respective parties.

The decision of an issue of fact at law is by trial, which is generally a trial by the court and a jury. The parties, however, may waive a jury trial, and submit an issue of fact to the court. In equity cases trial is by the court.

Some forms of action were hampered by the survival of an ancient method of trial by wager of law.

The decision of an issue of law is always by the court, without the intervention of a jury; and the court also decides certain issues of fact as when the action is founded upon a record, and the defendant has pleaded nul tiel record, as in an action on a domestic judgment, or where a jury trial is waived, or in a proceeding in quo warranto. The demurrer is placed on the argument list or "law and motion calendar," according to the practice which prevails, and, after argument by counsel for both parties, is decided by the judge before whom the argument is made.

Jury Trial

The usual resort of the common-law courts for many centuries past has been the verdict of twelve jurors, though chancery, like the civil law, has relied upon the decision of the judge alone. We still recognize the right of either party to a jury for the trial of "legal issues," unless waived, while "equitable issues" are to be tried and decided by the court alone. Thus, in common-law actions, namely, those for the recovery of specific real or personal property, for debt or damages for breach of contract, and for damages in tort, the right to a trial by jury is preserved. This method of trial by jury is the most distinctive feature of common-law procedure and has molded the law of evidence and the law of pleading. Whether or not it is an anomaly at the present day is a subject of serious debate, particularly in civil cases. It may well be that at some future day we shall class it among the obsolete modes of trial, as a historical curiosity.

Older Modes of Proof

It would be interesting to pause and consider the ancient and primitive practices of proof by ordeal, by battle, and by compurgation, where the proof was accomplished by an appeal to miracle, or by the observance of formalities and external tests not addressed to reason. Trial by jury was at first one of several competing methods of establishing facts.

Wager of Law

In some of the older forms of action, debt, detinue, and account, if the defendant made his oath that he did not owe the debt or detain the goods, and produced twelve oath helpers or compurgators, who swore that they believed his oath, this was conclusive, and equivalent to a verdict in the defendant's favor. This form of licensed perjury, which until comparatively recently reduced to impotence those remedies in which it was permitted to survive, led to their being superseded by more modern forms of action, namely, trover and general assumpsit.

Impaneling the Jury

When the cause is called in court, the first step, and one of the most important in jury trials, is the drawing and selection of the jury. The "panel" is the list of prospective jurors summoned by the sheriff to serve at a particular term, or for the trial of a particular action. Their names are written on ballots or tickets and put in a box, whence they are drawn by lot and called to be sworn upon the jury unless challenged or excused. If the original panel be exhausted by challenges or excuses, a further supply may be summoned, known as "talesmen."

Examination of Jurors

Great latitude is permitted in the examination of jurors on the voir dire, with regard to the various causes of challenge, in order that there may be a full and thorough test of their qualifications. The extent of the examination should fit the importance of the case, being searching and thorough in a momentous case, but brief in a minor one, and perhaps addressed to the whole twelve, rather than to the individuals separately. It is advantageous, if possible, to show confidence in the jury.

The juror knows best his own condition of mind and may be examined fully, though not to his infamy or disgrace. Examples of the kinds of questions which may be put are as to his membership in secret organizations, under oath and obligation to assist fellow members; whether he has formed a partial opinion from rumors he has heard, or from the newspapers (facts not in themselves disqualifying, though, if taken with others, they might show bias, so further examination is necessary to make a prima facie case for exclusion); whether he has any personal knowledge of the facts of the case, or has formed any opinion about it, which he would favor if the testimony were equally balanced; whether he has an opinion which it would require evidence to remove; whether his attention has been called directly or indirectly to any litigation of the same kind in such a way as to influence his judgment (as if he were a plaintiff himself against an insurance company); whether he has any prejudice against corporations, as grasping and oppressive, whether he would take the law from the court, and be guided and controlled by its instructions, or whether he disagrees with some rule involved (e. g., "the fellow servant rule"); whether he has conscientious scruples against the infliction of death penalty; in short, he may be examined generally in regard to his occupation, nationality, religion, social bonds, his sympathy and intellect, and evidence may be introduced by other witnesses as to his relations or expressions of opinion on the merits of the case. The grounds of objection should be specifically stated, in order to assign errors in law in ruling on the challenges upon motion for a new trial.

RIGHT TO OPEN AND CLOSE

17. The right to open and close the case belongs to the plaintiff, if he has anything to prove.

Right to Open and Close

The advantage of the opening and closing speech to the jury, as well as the right to open and close the evidence, belongs at common law

to the plaintiff, if he has anything to prove essential to his prima facie right of action; but it belongs to defendant if there be no issue on the allegations of the declaration.[22] In criminal cases the prosecution always has the opening and closing argument, and it may be given to the plaintiff in all civil suits by a mere rule of practice, irrespective of his true position in debate. This is regarded as a very important advantage, to have the last word, after the opponent has been heard, with no one to explain, expose fallacies, or remove the spell of an emotional appeal.

The Opening Statement

As preliminary to the introduction of evidence, the plaintiff's counsel, or that side which has the affirmative of the questions at issue, and from whom proof is first required, has the right to make an opening statement. He briefly tells what are the issues in the case, states what is admitted and what is disputed, gives an outline of what he expects to prove, and shows the bearing of the evidence which he intends to produce. After this prologue, he then proceeds to call his witnesses and introduce his documentary evidence. The opening statement for the defendant may be reserved until after the close of plaintiff's evidence, or may be made immediately after the opening by plaintiff, in order to get the issues squarely before the jury at the outset.

METHODS OF PRODUCTION OF EVIDENCE

18. The testimony of the witnesses is ordinarily taken by oral examination. In trials at chancery, however, where the system of evidence was derived from the ecclesiastical and civil law, the evidence was taken by written depositions, upon interrogatories and cross-interrogatories in writing. This examination was kept sealed up, until opened, or published at the trial, and the trial was had on these written depositions. But the normal method of producing evidence in equity cases is now the same as at law. Before documents can be introduced, their signature and execution must be duly proved.

The mode of offering testimony is generally by witnesses who are present and testify orally before the jury, though in all the states there

[22] If the defendant admits all the material facts alleged in the declaration, he may assume the entire affirmative and have the right of opening and closing the case, as where he admits the due execution of the contract, but sets up the affirmative defense of discharge by release or operation of law. Gardner v. Meeker, 169 Ill. 40, 48 N. E. 307; Gibson v. Reiselt, 123 Ill. App. 52; Nagle v. Schnadt, 239 Ill. 595, 88 N. E. 178.

are provisions under which the evidence of material witnesses may be taken before the trial, reduced to writing and certified by a proper officer, and thus used at the trial without the appearance of the witnesses themselves. Where witnesses testify orally they are first questioned by the counsel for the party producing them, which is called the "direct examination" or "examination in chief," and then by the opposing counsel, which is called the "cross-examination," and perhaps again by the former, which is called the "redirect examination."

BURDEN OF PROOF

19. The party having the affirmative of the issue must convince the court or jury of the proposition by a preponderance of the evidence. The pleadings to some extent apportion the propositions of claim and defense to be proved by plaintiff or defendant.

The burden of proof proper never shifts, though the burden of rebuttal may give rise to the necessity for the other party to go forward with the evidence.

The burden of proof will generally rest on the plaintiff for some, specific propositions, but on the defendant for others, according to which has the affirmative or negative of the points at issue. This depends on what facts in dispute are essential to the case, or prima facie cause of action, and what to the defense, respectively; he who asserts must prove. The plaintiff must make out a prima facie cause of action, while the defendant must satisfy the court of the truth and adequacy of any defenses of new matter, pleaded in confession and avoidance. As to these the plaintiff need only repel the attack and keep them doubtful or balanced; i. e., below the required degree of persuasion.

Prima Facie Case

It is first incumbent on the plaintiff to make out a prima facie cause of action by proof of the points essential to his recovery, if these be denied, in order to move the tribunal to declare in his favor. What facts and propositions are sufficient prima facie for a decision in the plaintiff's favor are in general indicated by the rules of pleading as to the statement of a cause of action, which marshal and apportion the grounds of claim and defense. But the apportionment is not accomplished by the pleading alone, but is further determined by specific rules as to the burden of proof in various cases. There seems, then, to be no general test of what is a prima facie showing, but this depends

upon specific rules according to the fairness and policy of the matter.

Under the irregular working out of common-law pleading, and the limited series of pleadings under the codes, the pleadings do not fully indicate by whom proof must be made or apportion to each party clearly the propositions which are essential to his case, and which fall to him as the case progresses. Under an ideal system of pleading the turns and logical stages of the proof process would be indicated by the series of pleadings, viz. declaration, plea, replication, rejoinder, surrejoinder, rebutter, and surrebutter. But the general issue at common law did not always mean a negative case, nor disclose who had the affirmative or negative of the defense.

Burden of Rebuttal

When the plaintiff makes out his prima facie case by reasonable and credible evidence, the "burden of proof" is said to "shift" to the defendant, but this use of the phrase is very inaccurate and confusing. The plaintiff must keep the proof of his contentions at the required height. This burden of making out a prima facie case and keeping it good cannot shift.[23] What is meant is that when the asserter or proponent establishes a preponderance in favor of his views, he creates what may be called a burden of rebuttal, the need for his opponent to go forward with the evidence and repel the prima facie case, either by counterproof and refutation of the main propositions of that case, or by direct proof of new propositions of his own in confession and avoidance, which relieve him of the consequences of plaintiff's showing, without necessarily breaking it down. The burden of rebuttal may then be created for the plaintiff to reply to these new objections of the defendant, as well as to restore his own contentions. Thus the center of gravity may shift from plaintiff to defendant and vice versa, but the burden is always on the affirmative to keep a preponderance in his favor, while the negative is safe with an even balance or equilibrium. He need merely repel the adversary's attempt to prove, and rebut a prima facie showing.

Respective Functions of Judge and Jury

Each party must first pass the gauntlet of the judge with his evidence in order to get to the jury on the issue. Unless the plaintiff makes a prima facie case and satisfies the judge that he has sufficient

[23] Professor James Bradley Thayer was the first to demonstrate clearly the inaccuracy of the common expression that the burden of proof "shifts," and to elaborate the distinction between the burden of proof, in the sense of "duty to establish," which never shifts, and what is awkwardly termed "the duty of going forward with the evidence," which does have the characteristic

evidence to be considered by the jury, and to form a reasonable basis for the verdict, a motion for a nonsuit should be granted by the judge. This motion may be made by defendant at the close of plaintiff's case, when it is incumbent upon the plaintiff to establish an alleged fact, and there is no evidence on the point, or the only testimony contradicts it. A motion to direct a verdict for insufficiency of the opponent's evidence to go to the jury may be made by either party at the close of defendant's case. The case should be taken from the jury: (1) Where there is no evidence to support the burden of proof on some essential fact; (2) where there is no conflict in evidence, as where by the testimony of the plaintiff he put his head out of the window on the train, which is contributory negligence and precludes recovery as a matter of law; (3) where the evidence is somewhat conflicting, but so certain and convincing that no reasonable man could decide otherwise. Directing a verdict saves the need of a motion for a new trial; but the result of setting aside a verdict is different, in that it results in a new trial, while directing a verdict results in final judgment. The test for the two motions is not necessarily identical, though very similar.[24] The judge thus has supervisory control over the proof and the jury may be prevented from rendering a verdict against reason which would later have to be set aside as against the evidence.[25]

By a demurrer to the evidence, interposed at the close of the plaintiff's evidence, the court may be asked to pronounce the law upon the case, admitting all facts which the evidence tends to establish and all reasonable inferences therefrom, and waiving all conflicting evidence. Where the evidence fails to prove a prima facie case, the demurrer will be sustained. In theory the functions of court and jury are sharply divided. It is for the court to decide questions of law and for the jury to pass on questions of fact. In practice the court has important functions in passing on the evidence and controlling the work of the jury, and the jury applies the law to the facts under the instructions of the court.

Order of Proof

When the plaintiff has the burden of proof on any one of the issues, he has the right to open the evidence and prove the facts on which he relies to establish his case. The defendant may then present evidence to contradict the plaintiff, and also to support his own propositions in defense, to relieve himself from the consequences of the plaintiff's

referred to as "shifting." See 4 Harv. Law Rev. 45; Wigmore, Ev., § 2487; McAdams v. Bailey, 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, 124 Am. St. Rep. 240.

[24] 4 Wigmore, Ev. § 2494, p. 3539. [25] 4 Wigmore, Ev. § 2486.

prima facie case, and by way of cross-action. Finally the plaintiff may disprove in rebuttal the affirmative portion of his opponent's evidence. Affirmative evidence cannot, in strictness, be given by the plaintiff in rebuttal. He should not reserve his real or main attack until after he has drawn out the testimony of the other party, and until the defendant has closed his case. He should offer all his evidence in chief on the points upon which proof is essential to his recovery. In rebuttal he is confined to rebutting evidence only, unless the court, for good reason, permit him to offer evidence on his original case. If the plaintiff be allowed to give affirmative evidence in rebuttal, the defendant should be allowed to contradict it, by surrebuttal; so where the credibility of defendant's witnesses is assailed. Each side must in turn exhaust his case, and neither may give evidence by piecemeal, but must in the first instance produce all his evidence in chief, on which he relies to establish his case, and is confined in rebuttal to the contradiction of affirmative facts brought out by his adversary's evidence. But it is no objection to rebuttal that it incidentally tends to corroborate the party's case in chief.

The plaintiff should not anticipate defenses, or attempt to disprove facts which have not yet been asserted, and upon which there may finally be no controversy. In an action for the price of goods sold, the plaintiff should prove sale, delivery, and acceptance of the goods, and then rest. He need not prove freedom from defects. If the defendant propounds this, the plaintiff may rebut or refute it.

The departure from the regular order of proof may be allowed in the exercise of a sound discretion by the court, for the rules of practice are not a matter of right as the rules of substantive law, but may be suspended for justice or convenience. While ordinarily the affirmative must exhaust his evidence before the other party begins, yet the court may be requested to reopen the case at various stages of the trial, and admit evidence which has been overlooked or newly discovered, even after one or both have "rested"; i. e., formally announced that his evidence is closed, and even after motion for nonsuit or submission of the case to the court. Particularly in the course of the trial the order of proof is discretionary, and the plaintiff may be permitted to strengthen his original case by the introduction of cumulative evidence in rebuttal, after the defendant has rested, if opportunity is given to the defendant to reply. But he must ask the court to reopen the case for the purpose, or it may be excluded as part of the original case which should not have been withheld.

EXAMINATION OF WITNESSES

20. The witness may be required to answer specific questions, or he may be left to tell his own story in his own way, but he must not be instructed what to say by leading questions. Cross-examination is a great safeguard, but is frequently dangerous to the one attempting it.

A witness being called to the stand, the clerk administers the oath that "the evidence that you shall give to the court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth. So help you God!" Counsel producing the witness first asks him his name, residence, business, and other preliminary matters, and then proceeds to extract the desired information, either by successive questions, or, instead of requiring answers to specific questions, by leaving the witness to tell his own story unguided by questions. This latter method gives less opportunity to the opponent to know beforehand the evidence offered, and to interrupt the course of the examination by captious objections.[20]

It is the duty of the court to exercise a reasonable control over the mode of examination and the evidence offered. Leading questions, questions framed to suggest the desired answer to the witness, may be ruled out, in view of the danger that the answer will be based rather on counsel's suggestion than on the witness' own knowledge. Questions which obviously instruct the witness as to the tenor of his reply, and admit of being answered by yes or no, are generally objectionable on this ground. In dealing with a hostile witness, however, as on cross-examination, the bias and reluctance of the witness remove any danger of suggestion from leading questions. It is proper for the court or jurors to put additional questions to elicit the facts upon which they desire fuller knowledge.

Cross-Examination

Each witness is subject to examination by the opposite as well as by the calling party, to extract his whole knowledge and test its significance and credit before he leaves the stand. "The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination is shown by the great strictness of our law of evidence in excluding hearsay testimony. No assertion or declaration of a person not called as a witness may be offered as a basis of belief, largely because not subject to be probed by that test.

[20] On the art of examining a witness on the stand, see John O. Reed's "The Conduct of Lawsuits."

It takes the place of torture in the medieval system of the civilians, and is said to be 'the greatest legal engine ever invented for the discovery of truth; that, rather than trial by jury, being the great and permanent contribution of the common law procedure.'" [27]

Advantages and Dangers

Cross-examination exposes falsehood and inaccuracies, and beats out the truth, by disclosing the ability and willingness of the witness to declare the truth, his opportunity to ascertain the facts, his powers of memory and observation, his situation and motives, and by fixing the witness as to all the minute details of time and place. It is very difficult to make a fabricated story agree with all the circumstances. Truth alone will match all round. But cross-examination often is a two-edged sword, for it may extract the most unfavorable and damaging facts, confirming the opponent's case, demonstrating the witness' credibility, or supplying fatal gaps which the opponent had left in his proof.

THE ARGUMENTS, OR SUMMING UP

21. It is the function of counsel to sum up the evidence and to assist the jury to evaluate its probative force. He may seek, not merely to convince the reason, but also to persuade by eloquence and appeals to the emotions.

It is a conspicuous function of counsel to assist the jury in coming to their decision by argument as to the probative force of the evidence and testimony of the witnesses. It is for the lawyer to point out where his adversary has failed to prove his case, and by a connected presentation of his own evidence, to make the jury see the controlling points. He may comment freely upon every pertinent fact in evidence, criticize the witnesses, their powers of observation in view of the circumstances of sight, hearing, or perception, their accuracy and memory in view of age and manner of testifying, their credibility and truthfulness in view of bias, moral character, or the improbability of their story, and by thus testing what to believe and what to discredit he may strive to convince their judgment, as well as to persuade their feelings and inclinations, to decide in favor of his client. Where the facts are complicated and intricate, and the witnesses contradicting, he may here show that head for facts, that grasp of particulars and details, by which he is enabled to analyze, arrange, and present the case made by the evidence, which is even more important in winning a favorable decision than a profound knowledge of the law.

[27] Wigmore, Ev. § 1367.

Counsel is not a witness in his argument, and he must make no assertions upon his own credit, or state facts not proven, whether true or not, and objection should be promptly made to improper statements by him.

Forensic Eloquence

Each party seeks to make an impression, leading to a favorable decision by subtle appeals to sympathy, prejudice, and feeling throughout the introduction of the evidence, and even in the process of impaneling the jury. The whole trial is a performance of dramatic art, but it is in the final arguments that the occasion arises for those effusions of forensic eloquence which are frequently exhibited in courts of justice. Here counsel may draw illustrations, analogies, and inferences from literature, ancient and modern, from history, art, science, and everyday life. "Here under the fullest inspiration of excited genius, they may give vent to their glowing conceptions in thoughts that breathe and words that burn. Nay more, giving reign to their imagination, they may permit the spirit of their heated enthusiasm to swing beyond the flaming bounds of time and space." [28]

THE CHARGE OF THE COURT

22. After the evidence is closed and the arguments of counsel, the next step is the charge of the court, instructing the jury as to the rules of law applicable to the issues and the facts which the evidence tends to prove. Each party may submit to the court requests for instructions.

Instructions—Charging the Jury

The jury, in finding a general verdict for plaintiff or defendant, must necessarily apply the law to the facts found; e. g., to decide whether or not they show a legal liability. Accordingly, after the arguments, the judge orally charges the jury, and lays down the rules of law which they are to apply to the facts proved in rendering their verdict for one or the other party. The judge will ordinarily state the nature of the action and defense, the points in issue, what the plaintiff must prove to recover, and what rules will apply to the different states of fact which may possibly be established in the opinion of the jury.

Restrictions on the Charge

At common law the judge was under slight restraint in guiding the jury. He could sum up the evidence, observing where the main issue

[28] Berry v. State, 10 Ga. 511, per Lumpkin, J.

lay, stating what evidence had been given to support it, and giving them his opinion on the credibility of the witnesses and the weight and effect of the evidence—e. g., that the defendant's case was a very "thin" one; but under our practice in the United States such comment, even if correct, would be regarded as an invasion of the province of the jury, and as such reversible error. The judge cannot single out and disparage a particular witness, or express his belief or disbelief of certain testimony, or even make a comparison between direct and circumstantial evidence. It is almost universally provided that judges may not charge juries with respect to matters of fact, but may sum up the testimony and declare the law. The judge is not to state abstract principles of law, but should state the law concretely as applied to different conceivable theories of the case, and instruct the jury to find for the plaintiff or defendant according to one hypothesis or another. He may lay down the rules by which the credibility of the witnesses in general is to be judged, and where there is no evidence or where a fact is admitted he may so state; but he cannot indicate his opinion as to what the evidence proves, and the jury is thus deprived of the benefit of his training and experience.

Requests to Charge

There is no error of omission to charge, in the absence of request; but it is the duty of the judge to instruct the jury upon proper request as to the correct decision, assuming any reasonable hypothesis in relation to the facts in evidence, and it is error for the court to refuse any instruction which correctly declares the law, framed on a theory pertinent to the case. These requests may be presented to the judge before or during argument, but should be made in such time as will give the judge opportunity to examine and pass upon them without delaying the trial. There seems to be no limitation on the number or length of the instructions which may be requested. Very few lawlers are competent to write an elaborate set of instructions without committing errors which might conceivably mislead the jury, and in the hurry of a trial the ablest judge may mistake the law and misdirect the jury; yet a verdict for the plaintiff, obtained upon erroneous instructions, is practically worthless. This is one of the most serious abuses connected with jury trials. Exceptions for errors in giving, refusing, or modifying instructions should be taken before the retirement of the jury, and should specifically point out the ones objected to. In some states exceptions may be entered at any time before entry of final judgment.

DELIBERATIONS OF THE JURY

23. Formerly the jury were kept without food, drink, heat, or light until they agreed, but at the present time they are treated with more consideration and no coercion is permitted.

The jury, after the charge, unless the case be very clear, withdraw from the bar to deliberate upon their verdict. After the case is finally submitted to them, they cannot separate, but are kept in charge of a bailiff or officer of the court, duly sworn to attend them. By the old English practice they were to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they were unanimously agreed, a method of accelerating unanimity which is now given up, and we might very properly give up the requirement of total unanimity for a verdict along with it, even in criminal cases. Formerly, if they did not agree in their verdict before the judges left town, they might be carried around the circuit from town to town in a cart. Now, if it appears to the court that they cannot agree, they are discharged, and the case must be retried. The court is not permitted to coerce the jury into finding a verdict, and should refrain from anything savoring of a threat as to how long the jury will be kept together unless a verdict is rendered.[29]

THE VERDICT

24. In a general verdict the jury apply the law to the facts, and find for the plaintiff or defendant, but in a special verdict they merely find the facts.

The Verdict—General or Special

When they are unanimously agreed, the jury return to the bar, and by their foreman deliver their verdict. A verdict is either general or special. By a general verdict the jury report to the court in general terms that they have found a decision for the plaintiff or the defendant; and, if for the plaintiff, they assess the amount of damages sustained by him in consequence of the injury for which the action is brought.

In a special verdict the jury state the naked facts of the case, as they find them to be proved, concluding conditionally that, if upon the

[29] Buntin v. City of Danville, 93 Va. 200, 24 S. E. 830; Lloyd, Cas. Civ. Proc. pp. 456, 457 (no coercion allowed); De Jarnette v. Cox, 128 Ala. 518, 29 South. 618; Highland Foundry Co. v. N. Y., N. H. & H. R. Co., 199 Mass. 403, 85 N. E. 437.

whole matter the court should be of opinion that the plaintiff has cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This leaves it to the court to apply the law to the facts, and largely obviates the necessity for instructions. The questions passed on by the jury are not unmixed questions of fact. In a general verdict the jury must apply the law under the instructions of the presiding judge. The common law recognized the privilege of the jury to avoid finding a verdict absolutely, either for plaintiff or defendant, and instead, without taking upon themselves to determine the complicated questions of law and fact, to report a special verdict. This was originally to escape the danger of having their verdict attainted by an attaint jury, and of being punished for perjury for a false verdict.[30]

It was entirely optional with the jury at common law to find generally or specially, even in the face of a request or demand for special findings on particular points by court or counsel. Under statutory provisions, however, special questions, stating each point separately, may be framed and submitted by the court on request of counsel, which the jury must answer before their discharge, so that the true legal significance of ascertained facts may be declared by the court. It is thus possible to see how the facts are determined, whether the law is properly applied, and how the special findings harmonize with the general conclusion.[31]

A general verdict, on the other hand, is entirely impenetrable, and the jury may jump at results on a general theory of right and wrong, according to their feelings, sympathy, or prejudice, without the necessity of deliberation, sifting the details of the evidence, or the patient analysis of the different questions involved. Such special findings hold the jury to the line of duty, require orderly thought, and facilitate review and new trial on separate points. When the trial is by the court, we do not allow the judge to make a general finding of law and fact, like a general verdict, without separate written findings on the particular issues raised.

The need of instructions as to the general rules of law applicable to the case is largely obviated by special findings. The object of the charge is to assist the jury in arriving at a general verdict in conformity to the law, and in drawing the right conclusions from the facts found; but where the jury only find the facts, instructions aside from rules as to proof, are immaterial. The jury then have nothing to do with the effect of their answers.

[30] Thayer, Prelim. Treatise Ev. p. 217.

[31] Verdicts, General and Special, Edson R. Sunderland, 29 Yale Law J. 253, 258.

Rule Nisi

When a party obtains a "rule nisi," as to set aside a verdict and enter a nonsuit, this is in effect an order to the adverse party to show cause why such relief should not be granted. Upon motion and argument of the question the court either grants the relief requested and makes the rule absolute, or denies the motion and discharges the rule or order.

Reservation of a Point

"Another incident which sometimes occurs during the trial is the reservation of a point. This happens when some point of law is raised, the decision of which affects the fate of the cause; but, as there is no leisure to discuss it thoroughly at nisi prius, the judge, with the consent of the parties, reserves it for discussion before the full court, and in such case it is in general agreed that the court, before which the point is argued, shall be in the same situation as the judge was before whom it was originally raised, and shall have power to order a verdict or a nonsuit to be entered, as they may think fit." [32]

THE JUDGMENT

25. A judgment is the award of relief pronounced by a court, upon the facts found.

Judgments may be:

(a) Interlocutory.

(b) Final.

An interlocutory judgment is one which defines the rights of the parties at an intermediate stage of the action.

A final judgment is one which finally determines the rights of the parties and puts an end to the suit.

Judgment the Object of Action

The final judgment or decree is the award of the relief provided by law for the redress of injuries or the enforcement of rights, as that the plaintiff do recover his damages, his debt, his possession, and the like, and the whole suit or action is merely the vehicle or means of pursuing and making application for this award. A suit or action may he defined as a proceeding to obtain a judgment (which term we may use to include the decrees of courts of equity), which is the great object and end of all contentious proceedings. The final judgment is the conclusion of law officially pronounced and declared by the court upon the facts found, after due deliberation and inquiry, declaring that the

[32] J. W. Smith's An Action at Law (11th Ed.) p. 162.

plaintiff has either shown himself entitled, or has not, to recover the redress he sues for.

The natural right to relief for breaches of contracts would seem to be performance in kind, to be enforced by order of court directing the defendant to perform under threat of punishment by imprisonment or fine. So in the case of tort it would seem that the plaintiff should have a right to specific reparation, by decree compelling the tort-feasor to restore the state of things that would have existed but for his wrong. So in the case of a claim to property the natural relief would seem to be a decree requiring the detainer to deliver possession of the property and make restitution of the very thing itself. As a general rule, however, we shall find that money damages are the panacea of the common law; that specific relief is regarded as exceptional and extraordinary, and attainable only in equity, except in the case of recovery of debts and of possession of real and personal property.

Judgments as Compared with Decrees

Judgments of the common-law courts did not lay commands upon wrongdoers, nor directly seek to make them repair their wrongs. The judgment was simply that the plaintiff do recover the possession, or debt, or damages. The law then sought by the exertion of physical force through the sheriff and the seizure of defendant's property to give the plaintiff the redress awarded. The sheriff was invested with legal authority under writs of execution to sell and transfer title to the defendant's property subject to debts, and by such seizure and sale to pay the money judgment out of the proceeds. But in no case was it adjudged that the defendant at common law be compelled to act or aid the plaintiff or sheriff to do justice or satisfy the judgment. The defendant need merely submit to the authorized acts of the sheriff. The defendant could not at common law be called before the court and punished for a contempt because he did not actively exert himself in surrendering his property or disclosing its whereabouts to the officer, so that he might carry out and satisfy the judgment. "The defendant might know where the property is, having purposely removed it or concealed it from the sheriff; still he cannot be ordered to deliver it to the plaintiff. So, if a defendant has refused to perform a contract, a court of common law can only give the plaintiff damages, no matter how important to him actual performance may be." [33] Neither did the common-law courts successfully accomplish a division or partition of real estate among the several co-owners, nor compel the rendering of an account, though this was formerly attempted.

[33] Langdell, Eq. Pl., § 40.

Interlocutory Judgments

Probably the best instances of interlocutory judgments are those entered by default in actions of assumpsit, covenant, trespass, case, and replevin, where the sole object of the action is the recovery of damages, by which at common law only the right to recover is determined, leaving the amount to be ascertained by writ of inquiry or other proceedings upon which a final judgment will be rendered. There is one species of interlocutory judgment, however, which establishes only the inadequacy of the defense interposed. This is the judgment for the plaintiff on a plea in abatement, which is a decision on a point independent of the merits of the case, and in form is always that the defendant answer over. The same form of judgment is also rendered in overruling a demurrer.[34]

Judgments before Issue Joined

Judgments before issue joined are of various kinds, and are in their nature interlocutory, though not classed as such, since the two varieties we have just considered are based upon the actual decision of an issue. They are generally the result of the fault or neglect of one of the parties in failing to pursue the means available, and may be for either party. If for the plaintiff, judgment may be for default of appearance of the defendant, after being served with process, or in all actions, of nil dicit where, having appeared, he neither pleads nor demurs, nor maintains his pleadings until the issue is complete. Again, if the defendant's attorney enters on record a statement that he is not informed of any answer to be given, or if the defendant, having no defense, chooses to confess the action, judgment for the plaintiff will be respectively non sum informatus, or by confession. If for the defendant, judgments of non prosequitur, retraxit, cassetur breve, nolle prosequi, may be entered against the plaintiff, according as he fails to maintain his suit, or prays that his own writ be quashed, or discontinues the action.

Final Judgments

Final judgments are instanced by the judgments rendered where an issue in fact has been tried by a jury, who also assess the damages, or where a demurrer to any of the pleadings in chief is sustained or a dilatory plea is upheld. In these cases there is nothing left to be done, and the judgment, therefore, necessarily ends that particular action. These judgments may be in different forms. If on a dilatory plea, either on an issue of fact or law, the judgment is generally that the

[34] See Randolph v. Singleton, 12 Smedes & M. (20 Miss.) 439; Bauer v. Roth, 4 Rawle (Pa.) 83.

writ be quashed or action dismissed. On demurrer, if for the plaintiff, it is quod recuperet; if for the defendant, quod eat sine die. And, on an issue in fact, the form depends upon the particular action.[35]

WRITS OF EXECUTION

26. A writ of execution is an authorization to an executive officer, issued from a court in which a final judgment has been rendered, for the purpose of carrying such judgment into force and effect.

It is founded upon the judgment, must generally conform to it in every respect, and the plaintiff is always entitled to it to obtain a satisfaction of his claim, unless his right has been suspended by proceedings in the nature of an appeal or by his own agreement.

There was a variety of writs of execution at common law against person and property, all of which must be sued out within a year and a day after judgment.

Nature of Execution

Theoretically a judgment is the end of the suit. But the mere judicial declaration of the right to redress, the award of relief, can produce no practical benefit or result, unless the defendant voluntarily submits and satisfies the plaintiff's demand. We come now to execution, the compulsory process for satisfying plaintiff's demand and putting the relief awarded by judgment into effect by the exercise of executive force. Execution is in its nature an executive remedy, supplementary to the judicial remedy, and may consist: (1) In putting the plaintiff in possession of his land or property by force, the actual restitution of the thing taken or detained; (2) in taking from the defendant what belongs to him and turning it over to the plaintiff, or selling it at public auction, transferring title against the owner's will, and applying the proceeds to satisfy the judgment for money; (3) seizing the goods or land of the defendant, and holding them as security until the defendant conforms to the judgment; (4) seizing the person of the debtor himself and imprisoning him until he pays the debt or performs the commands of the court.

[35] See Bauer v. Roth, supra. A judgment must be the adjudication of one controversy, presented by both the pleadings and the proof. Flores v. Smith, 68 Tex. 115, 18 S. W. 224. See Truett v. Legg, 32 Md. 147; Ætna Ins. Co. v. Swift, 12 Minn. 437 (Gil. 326).

Restitution of Possession

In the case of a judgment awarding possession of land, a writ of possession to the sheriff, commanding him to give actual possession to the plaintiff of the land so recovered, is an efficient means to put the sentence of the law into force. To accomplish the delivery, the sheriff may take with him the posse comitatus, or power of the county, calling to his assistance private citizens, and may justify breaking open doors, if the possession be not quietly delivered. But in the action of detinue for recovery of personal chattels, if the wrongdoer were very perverse, he could not be compelled to make restitution of the identical thing taken or retained; but he had his election to deliver the goods or their value, an imperfection in the law, which resulted from the nature of the judgment and the methods of execution employed.

Execution Against Goods or Profits of Land

The only judgments given by the common-law courts were those for the delivery of possession or for the recovery of a debt or damages. By the common law a man could only procure satisfaction for his money judgment from the goods and chattels or the present profits of his debtor's land, by the writs of fieri facias and levari facias. He could neither sell nor take possession of the lands themselves.

Fieri Facias

Under this writ the property is seized, or "levied upon," as the formal expression is; being taken into the actual possession of the officer if the property is personal, or, in the case of land, the lien of the execution being maintained by certain formal methods prescribed by statute. The writ may authorize a sale of the property thus taken under it, or it may be necessary to obtain a further writ called a "venditioni exponas," giving authority for the sale. When "executed," as it is termed, the writ must, like the original process of summons, be returned to the court from whence it issued, with the officer's report or "return" of all acts done under it.

Writ of Elegit

The statute Westm. II, 13 Edw. I, c. 18, granted an executive remedy by writ of elegit (he has chosen), so called because it was the choice or election of the plaintiff to sue out this writ rather than the common-law writs, by which writ the defendant's goods and chattels were not sold, but only appraised, and all of them (except oxen and beasts of the plow) were delivered to the plaintiff, at such reasonable appraisement and price, in part satisfaction of his debt. If the goods were not sufficient, then possession of one-half of his land was also to be delivered to the plaintiff, to hold, till out of the rents and profits the debt should be satisfied.

Writ of Extent

In the case of debts acknowledged upon the court records to be due under the provisions of statutes merchant and statutes staple, upon default the body, land, and goods of the debtor might all be taken at once in execution, to compel the payment of the debt. Here also the sheriff caused the lands to be appraised at their full extended value, and merely delivered possession of them to the plaintiff, until from the rents and profits the debt should be satisfied. Only by such acknowledgment of debts, which was at first permitted only to traders for the benefit of commerce, could one's whole land be subjected to and charged with debts; for other debts only one-half a man's land remained liable, and even that could not be sold.

In place of the variety of forms of execution at common law for levying on personal property and land, under modern statutes we now have one writ, directing the sheriff to levy on personal property, and, if sufficient of that be not found, to levy upon real property, which may be sold at sheriff's sale as well as personal property, although with much greater formality. Such are the methods which the law courts employ for the execution of their judgments. At common law there is a definite limitation on the time of invoking the executive remedy, and all writs of execution must be sued out within a year and a day after the judgment is entered; otherwise, the court concludes prima facie that the judgment is satisfied and extinct. Yet by statute it may be revived by a writ of scire facias, or order to show cause why the judgment should not be revived and execution had against him, to which the defendant may plead any defense in order to show why process of execution should not be issued, or the plaintiff may bring an action of debt founded on the dormant judgment, and get a new one, which was the only method of revival allowed by the common law.

Imprisonment for Debt

The ordinary method of enforcing a judgment where money only is recovered, as a debt or damages and not any specific chattel, is now, as it anciently was, by seizure and sale of the property of the defendant. Execution against the person was, however, extended from criminal procedure, so that the body of the debtor was or might be imprisoned until satisfaction were made for the debt, costs, or damages. This species of execution was by a writ called capias ad satisfaciendum, and was assumed by the courts to be available wherever the defendant was liable to be taken upon a writ of capias ad respondendum, to compel appearance at the beginning of the suit, or as a provisional remedy and security for the judgment. This was at first available only in actions of trespass vi et armis, to subject to imprisonment the

bodies of those who committed any force or violence.[36] It was then extended to the actions of debt and detinue (1350), and later to case (1503). The original exemption from arrest at common law was probably due to feudal reasons, rather than to a regard for personal liberty. Thus execution to imprison the body of the debtor till satisfaction be made was extended to nearly every action in which a personal money judgment could be recovered. Such imprisonment deprived a man of his liberty until he made the satisfaction awarded, and if he did not make satisfaction he had to remain in custody, at his own expense or the charity of others.[37] This led to great hardship and injustice, as is well portrayed in the writings of Charles Dickens.

Imprisonment for debt has accordingly been greatly restricted by statute in the United States and England, and prohibitions against imprisonment for debt are included in most state Constitutions. The object of these provisions is to relieve from imprisonment the honest debtor, who is poor and unable, in good faith, to pay his debts or satisfy the judgment.

The defendant may still, in most states, be arrested in civil actions, as a provisional remedy, or on execution, where he is about to depart from the state with intent to defraud his creditors, or where he is concealing or disposing of his property with intent to defraud his creditors, and in certain other cases. The obligation to pay alimony is held not to be a debt within the provisions of the Constitution against imprisonment for debt, and the court may enforce payment of such an allowance by proceedings in contempt for disobeying the lawful order of the court, if the defendant is contumacious.

[36] Forsythe v. Washtenaw Circuit Judge, 180 Mich. 633, 147 N. W. 549, L. R. A. 1915A, 706; Lloyd, Cas. Civ. Proc. 788, 789, note.

[37] Arrest on civil process. Manby v. Scott, 1 Mod. 124, 132; Lloyd, Cas. Civ. Proc. p. 801, note on poor debtor laws. See Hon. W. R. Ridell, Why Pickwick was Gaoled, 17 Ill. Law Rev. 14, 20.

CHAPTER II

DEVELOPMENT OF FORMS OF ACTION

27. Dependence of Right upon Remedy.
28. Original Writs.
29. Power to Issue New Varieties Limited.
30. History of Forms of Action is History of Substantive Law.
31. Classification of Actions.
32. Real Actions.
33. Mixed Actions.
34. Personal Actions.

DEPENDENCE OF RIGHT UPON REMEDY

27. Forms of action are usually regarded as different methods of procedure adapted to cases of different kinds, but in fact the choice between forms of action is primarily a choice between different theories of substantive liability, and the scope of the actions measures the existence and extent of liability at common law.

The dependence of right upon remedy has a vivid illustration in the system of "forms of action," which embraces the occasions of remedy in the English common law. The question whether a man can bring this or that action, trespass, trover, assumpsit, etc., is the way the question of liability and substantive right presents itself. There ought indeed to be a remedy for every wrong (ubi jus, ibi remedium), yet the right of action at common law depends upon whether the case fits anywhere in a limited and arbitrary list of writs, within the scope and theory of which the facts may be brought. There are only so many rights of action, as there are forms of action. This system of forms of action persisted in actual use in English procedure for six centuries, from the time of Henry II and Edward I until the Judicature Acts (in force in 1875). Most states have abolished the necessity of choosing one of these specified theories in commencing suit. "The forms of action we have buried. Yet, though we have buried them," says Professor Maitland, "they still rule us from their graves." [1] The

[1] Maitland, Eq. p. 296. While the new rules have abolished the distinctive common-law forms, the essential and differentiating rules applicable to pleading as established at common law still survive as a basis of remedial law. Ward v. Huff, 94 N. J. Law, 81, 109 Atl. 287. Parties litigant should so formulate their pleadings and the introduction of evidence as to conform to

names and theories of the forms of action still indicate the recognized causes of action, the occasions of liability, and the starting point of legal doctrines.

What are Forms of Action?

There is the greatest confusion of thought in describing these forms of action. They are usually defined as the "technical mode of framing the writ and pleadings appropriate to the injury and relief." [2] The law of forms of action, however, is not the law of pleading or procedure, though associated therewith. The choice between the forms was not primarily a choice among different methods of procedure or relief, but among different theories of liability. The case must fit the theory chosen. It is true that the formulæ of pleading the cause of action and defenses, and even methods of trial and execution, varied with the different forms of action.[3] But even when the incidental differences in procedure were removed, and the procedure in all actions was reduced to uniformity, the forms of action remained. The essential differences were in the allegations of fact necessary to show the right of action in each form; in other words, in their respective grounds and theories of liability. Some cases may fall under two or three of these theories, and the litigant will have a choice or election between them.

The Development of Law Through the Forms of Action

The general principles of the common law, respecting remedies, rights, and liability for wrongs, have been evolved by inquiring whether the facts of the case were covered by any recognized form (i. e., theory) of remedy. The primary question before the courts has not been the general one whether the plaintiff's statement of his case showed a right in him and a violation by the defendant; it has rather been whether the case presented facts which constituted a "cause of action" in "trespass," "assumpsit," or other particular form attempted to be used. This was more than a matter of pleading; it was a question of remedial right. The development of the forms of action after Edward

applicable common-law forms of action. Woodham v. Hill, 78 Fla. 517, 83 South. 717. See, also, Smith v. Woman's Medical College of Baltimore City, 110 Md. 441, 72 Atl. 1107; Hartford v. Smith, 109 Fed. 703, 118 C. C. A. 201 (Pennsylvania law); Maronen v. Anaconda Copper Min. Co., 48 Mont. 249, 262, 136 Pac. 968.

[2] Form of action, definition, see 2 Warren, Law Studies (3d Ed.) p. 758; First Report, Common-Law Commissioners of 1851, p. 32; 1 Standard Enc. Proc. Intro. § 11.

[3] There were incidental differences, between different forms as to (1) jurisdiction of courts; (2) process; (3) pleading; (4) mode of trial; (5) execution; (6) measure of damages and period of limitation. Maitland, Eq. pp. 296, 297.

I "represents a vigorous, though contorted, growth of our substantive law." [4]

Mode of Pleading no Longer Dependent on Forms of Action

The system of forms of action is usually associated and discussed with common-law pleading, but they pertain rather to the substantive law of contract, tort, and property than to procedure. Forms of action are the recognized theories of liability through which the common-law rights of action have been evolved, classified, and formulated. As such they are much more important than any mere rules of pleading The abolition of the requirement of selecting a particular one of these theories of liability has emancipated pleading from arbitrary variations of procedure in different kinds of action. While the necessary elements of liability and defenses depend on substantive law, only the manner in which the claim or defense shall be set forth depends upon rules of pleading, which are made the same for all actions in modern procedure. But there are still many code states which insist that the pleader shall select and adhere to some particular theory of liability in stating his cause of action.[5]

[4] 1 Standard Enc. Proc. Intro. § 8; 10 Standard Enc. Proc. p. 1. The body of a declaration, and not its commencement and ending, will control its character. George v. Illinois Cent. R. Co., 197 Ill. App. 152. Cause of action declared on in declaration is determined by allegations of fact contained therein, and not by conclusions of law alleged, nor name given to it by pleader. Williams v. Peninsular Grocery Co., 73 Fla. 937, 75 South. 517; Maronen v. Anaconda Copper Mining Co., 48 Mont. 249, 136 Pac. 903.

[5] A complaint must proceed upon some definite theory and be good on that theory, or it will be held insufficient when duly challenged; Miami County Bank v. State, 61 Ind. App. 628, 112 N. E. 389; Barnum v. Rallihan, 63 Ind. App. 349, 112 N. E. 561; Pittsburgh, C., C. & St. L. R. Co. v. James, 64 Ind. App. 456, 114 N. E. 833; Grand Trunk Western Ry. Co. v. Thrift Trust Co., 68 Ind. App. 198, 115 N. E. 685, rehearing denied 68 Ind. App. 198, 116 N. E. 750; Western Const. Co. v. Smithmeier, 69 Ind. App. 591, 122 N. E. 429; Clark v. City of Huntington (Ind. App.) 127 N. E. 301, rehearing denied 128 N. E. 453; Spring v. Fidelity Mut. Life Ins. Co., 183 App. Div. 134, 170 N. Y. Supp. 253; Logan v. Fidelity-Phenix Fire Ins. Co., 187 App. Div. 153, 175 N. Y. Supp. 505; A. L. Gosselin Corporation v. Mario Tapparelli fu Pietro of America, 191 App. Div. 580, 181 N. Y. Supp. 883; Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 22, 115 N. W. 751; Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443.

Compare, however, Southwest Hay & Grain Co. v. Young, 21 Ariz. 405, 189 Pac. 244; Den Adel v. Casualty Co. of America, 188 Iowa, 1, 175 N. W. 846; United States Tire Co. v. Kirk, 102 Kan. 418, 170 Pac. 811; Filler v. Joseph Schlitz Brewing Co., 223 Fed. 313, 138 C. C. A. 555; Schanbacher v. Payne, 79 Okl. 101, 191 Pac. 173; Furman v. A. C. Tuxbury Land & Timber Co., 112 S. C. 71, 99 S. E. 111.

As to forms of action and the theory of the action under the code, see 8 Mich. Law Rev. 315, criticising Cockrell v. Henderson, 81 Kan. 835, 105 Pac. 443, 50 L. R. A. (N. S.) 1; Bowers, Conversion, §§ 488, 489; McPaul v. Ramsey, 20 How. (U. S.) 523, 15 L. Ed. 1010; H. U. Sims, 21 Yale Law J. 215; Necessity of Theory of the Case in Pleading, 50 L. R. A. (N. S.) 3, note; E. F Albertsworth, 94 Cent. Law J., 388, 406; 10 Cal. Law Rev. 202, Theory of the Pleadings in Code States; Election of Remedies, B. S. and A. S. Delnard, 6 Minn. Law Rev. 480, 504, 505; Reinkey v. Findley Electric Co., 147 Minn. 161, 180 N. W. 230; Ash v. Childs Dining Hall Co., 231 Mass. 86, 120 N. E 396; 33 Harv. Law Rev. 240.

Forms of action, and the necessity of choosing between them, have been abolished by all the American codes, following the New York code of 1848. In many of the states which retain forms of action, the common-law forms have been combined or modified by statute. In Michigan contract actions are all called assumpsit, and tort actions for damages are all called trespass on the case.[6]

ORIGINAL WRITS

28. No one could bring an action in the king's courts without the king's writ. The power of issuing writs was delegated to the Chancellor, who acted through his clerks. The function of the original writ was:

(1) To command the sheriff to compel the defendant to appear in court;

(2) To authorize the court to take jurisdiction of the cause.

Original Writs

The ancient system of original writs, by which the king gave jurisdiction to his judges, gave rise to the variety and distinction of forms of action. Original writs were royal commands, and must be sealed by the chancellor, like all other important executive acts which passed under the great seal. The chancery office was thus the officina justitiæ (the magazine of justice), out of which all original writs issued, and for which it was always open to the subject, who might there demand as of right, any writ that his case might call for.

All applicants for justice in the royal courts must first come to the chancery office for their writs. Thus the king at first controlled the jurisdiction of all the judges of the three great superior courts, by his control over the issue of the original writs. The actual drawing

[6] The Michigan Judicature Act of 1915, by chapter XI (Pub. Acts 1915, No. 314), abolishes some of the forms or theories of action for damages, and expands the others to cover the vacant territory. As Professor E. R. Sunderland suggests, why not openly and frankly abolish them all? Why stop halfway in the process of simplification? 14 Mich. Law Rev. 383. Code pleading, while subject to many criticisms, is beyond criticism in abolishing all forms of action.

up and preparing of these important warrants of authority were confided to a staff of special clerks under the Chancellor, who were men learned in the law.

The following is a form of the—

Original Writ in Trespass to the Person

Original Writ—Fitzherbert, Natura Brevium, 196-198.

The King to the Sheriff, etc.: If A. shall make you secure, etc., then put by gages and safe pledges B. that he be before us on the Morrow of All Souls, wheresoever we shall then be in England. And if it be returnable in the Common Pleas, then thus: Before our Justices at Westminster on the Morrow of All Souls, to shew wherefore with force and arms he made an assault upon him the said A. at N., and beat, wounded and ill treated him, so that his life was despaired of, and other enormous things to him did, to the great damage of him the said A. and against our peace: And have there the names of the pledges and this writ. Witness, etc.

The original writ was thus a mandatory letter, issuing at first from the Chancellor, the king's secretary, and later out of the Court of Chancery, under the great seal, and in the king's name, directed to the sheriff, the king's officer, containing a summary statement of the cause of complaint, and requiring him in most cases to command the defendant to satisfy the claim, and, on his failure to comply, then to summon him to appear in one of the superior courts of common law, there to account for his noncompliance. It was a kind of executive order to show cause why he had not redressed the wrong complained of. In some cases, it omitted the former alternative, and required the sheriff simply to enforce the appearance.

One object of the original writ, therefore, was to direct the sheriff to summon the defendant to appear in court. But it was also necessary as authority for institution of the suit; for it was a principle that no action could be maintained in any superior court without the sanction of the king's original writ, the effect of which was to give cognizance of the cause to the court in which it directed the defendant to appear. The king is thus "the fountain of justice," and his writ is the foundation of the jurisdiction of the court.[7]

Since, as we have seen, an original writ was essential to the institution of an action, the various forms of original writs had the effect of limiting and defining the rights of action. No cases were

[7] Philadelphia, B. & W. R. Co. v. Gatta, 4 Boyce (Del.) 38, 85 Atl. 721, 47 L. R. A. (N. S.) 932, Ann. Cas. 1916E, 1227; Parsons v. Hill, 15 App. D. C. 532.

considered as within the scope of judicial remedy at common law but those to which the language of some known writ was found to apply, or for which some new writ, framed on the analogy of those already existing, might, under the statute of Westm. II., be lawfully devised. For this reason, the enumeration of writs and rights of actions became identical.

The argument from right to remedy is reversed, and there are as many rights of action as there are recognized forms of action.

POWER TO ISSUE NEW VARIETIES LIMITED

29. The writ-making power exercised by the king and his Chancellor was curbed by Parliament in 1258, but in the reign of Edward I, in 1285, by the Statute of Westminster II, the power was granted to issue new writs in similar cases to those already recognized in the Register of Writs.

The original writs differed from each other according to the nature of the plaintiff's complaint, and the ground of the defendant's liability. Unless one of the forms would fit the case, the plaintiff could not maintain any action at law.

At first writs were awarded according to the apparent justice and need of the case, but later only according to precedent.

In the earlier part of the thirteenth century the king's general power to make new writs by his great officer, the Chancellor, seems to be unquestioned. After 1258 the uncontrolled power of the Chancellor in granting new writs as the circumstances of cases might require was taken away.[8] Before that time the chief judicial employment of the Chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none before was administered. But by the Provisions of Oxford (1258) Parliament required the consent of the Common Council of the realm for the issue of new original writs.[9]

The most ancient writs had provided for the most obvious kinds of wrong; but, in the progress of society, cases of injury arose that were new in their circumstances, and were not reached by any of the

[8] 2 Pollock and Maitland, Hist. Eng. Law, p. 562.

[9] Authorities differ as to how the supply of new remedies was shut off. The statute of Edw. I (Westm. II) is usually regarded as the source of new remedies, whereas it seems a very inadequate restoration of the common-law principle to award a remedy whenever redress is needed for injustice. 2 Holdsworth, Hist. Eng. Law, p. 430; 3 Street, Foundations Legal Liab. p. 24; Pollock, Torts (11th Ed.) App. A, p. 572.

writs then known in practice. A restoration, in part, of the ancient authority to devise new writs to meet new cases was granted by Parliament in the year 1285. In that year the famous statute of Westm. II, 13 Edw. I, c. 24, was enacted. By this statute it was provided: "That as often as it shall happen in the chancery that in one case a writ is found, and in a like case (in consimili casu), falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the chancery shall agree in making a writ, or adjourn the complaint till the next Parliament, and write the cases in which they cannot agree, and refer them to 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 administer justice unto complainants." New writs were copiously produced under the authority of this statute, while others were added from time to time by express authority of the Legislature. All forms of writs once issued were entered, from time to time, and preserved, in the court of chancery, in a book called the Register of Writs (Registrum Brevium), which, in the reign of Henry VIII, was committed to print and published.[10]

HISTORY OF FORMS OF ACTION IS HISTORY OF SUBSTANTIVE LAW

30. The development and extension of the scope of the different forms of action is the history of the recognition of rights and liability in the law of torts, contracts, and property, and the essentials of rights of action.

The list of original writs determined the jurisdiction of the courts, and the existence of remedial rights and liability. Even when the function of writs as an authorization from the king was gone, yet the judges regarded it as their duty to govern the exercise of their jurisdiction according to the recognized occasions of remedy. Although the original writs became a mere formality, and were superseded as a method of commencing the action, yet the principle of jurisdiction remained, and the forms of action based on the old precedents of writs were still observed as representing the sole occasions of remedial intervention.[11]

[10] See Maitland's History of the Register of Original Writs, 3 Harv. Law Rev. 97, 169; reprinted in Select Essays in Anglo-American Legal Hist. vol. 2, p. 549; Stephen, Pl. c. 1; Gould Pl. (Will's Ed.) c. 1; Chitty, Pl. c. 2; 2 Maitland, Select Papers, 172; 3 Street, Foundations Legal Liab. pp. 28–32.

[11] The writs were like doors to the king's courts; there was one for big dogs and a smaller one for little dogs; there were doors for yellow dogs and black dogs, and the door of case for mongrel curs of no particular breed, but just plain dogs.

The list of original writs was not "a reasoned scheme of a provident all-wise legislator calmly devising theorems of remedial rights for all conceivable wrongs." It was not the result of a rational classification of causes of action according to character of rights and claims to be asserted; the forms of liability were few and arbitrary, not comprehensive and logical; yet the stream of rights flows in these channels, and the history of these theories of liability is the history of the development of English substantive law. A discussion of debt, covenant, or assumpsit, is a discussion of the history of the law of contracts; that of trespass and case is a discussion of the law of torts; that of trover, detinue, replevin, or ejectment is usually a discussion of the law of property; in short, a history of the forms of action falls little short of a history of the common law. Had the judges been more liberal in extending the remedial scope of the various actions, particularly "case," their remedies might have effectually answered many of the purposes of a court of equity, except those of specific relief.

The law must express itself through the limited system of writs and forms already sanctioned by precedent, and little discretion was left to the judges. The common law, thus hampered, was found insufficient to answer the imperative demand for justice; a distinct tribunal arose to supply the deficiencies of the common law and give justice where the common-law remedies were inadequate, namely, the Court of Chancery, which gave a remedy where there was a right on principles of natural justice, to meet the exigencies of cases as they arose, so that no wrong should exist without a remedy. The classification and definition of the different species of contracts and torts, even at the present day, are based on the historic distinctions between the different forms of action and remedy. The test of the existence of liability and of the amount of damages may depend upon whether one form or another is applicable. Therefore, in order to understand the intricacies of the law, it is necessary to approach it by study of the scope of the various theories of remedial right which have been recognized by the courts.

CLASSIFICATION OF RIGHTS OF ACTION

31. According to the relief sought, actions have been divided into:
(a) Real,
(b) Personal, and
(c) Mixed.

32. REAL ACTIONS—Real actions were those brought for the specific recovery of "seisin," the possession of a freehold estate in real property. They have long been obsolete. They included:
(a) The writs of right.
(b) The writs of entry.
(c) The possessory assizes, such as novel disseisin and mort d'ancestor.

33. MIXED ACTIONS—Mixed actions are such as are brought both for the recovery of real property, and for damages for injury in respect to it. Such was waste, now obsolete, to recover land wasted by a tenant with treble damages. Ejectment is sometimes classed as a mixed action.

34. PERSONAL ACTIONS—Personal actions are those brought for the recovery of a debt or possession of specific personal property, or of damages for the breach of a contract, or of damages for some injury to the person, or to one's relative rights, or to personal or real property. According to the nature of the liability, they are classified as:
(a) Actions ex contractu. These are actions based upon a contract or obligation:
(1) Assumpsit.
(2) Covenant.
(3) Debt.
(4) Account.
(b) Actions ex delicto. These are actions brought for the redress of wrongs, and include also actions for the recovery of personal property:
(1) Trespass.
(2) Case.
(3) Trover.
(4) Detinue.
(5) Replevin.

Real Actions

Real actions were those brought for the specific recovery of real property. In these the plaintiff or demandant claimed to recover seisin

TROVER: AN ACTION TO RECOVER DAMAGES FOR GOODS WITHHELD OR USED BY ANOTHER ILLEGALLY.
DETINUE: THE UNLAWFUL DETENTION OF PERSONAL PROPERTY RIGHTFULLY ACQUIRED.
REPLEVIN: THE RECOVERY BY A PERSON OF GOODS CLAIMED TO BE

of a freehold estate, as tenant in fee simple, or as tenant in tail, or for life. The principal real actions formerly in use were (1) the writs of right; (2) the writs of entry; (3) the possessory assizes, such as novel disseisin and mort d'ancestor.[12] Real actions are those in which the demandant seeks to recover seisin from one called a tenant, because he holds the land. They are real actions at common law because the judgment is in rem and awards the seisin or possession.[13] Street thus describes the old scheme of real actions:[14]

"At the top of the scale of actions available for the recovery of lands and interests therein was the writ of right, the most real of the real actions, the great and final remedy for the recovery of proprietary interests in land. Closely associated with this remedy in procedure were certain other writs said to be in the nature of the writ of right. Such were the writ of right of dower, the formedon in descender and reverter, and the writ of right de rationabili parte.

"Below the writ of right were the possessory real actions known as the assizes and the writ of entry. In the assize of novel disseisin the plaintiff recovered both seisin and damages; this being, says Blackstone, the only instance where damages were recoverable in a possessory action at common law.

"The assizes were in the nature of statutory remedies, and available only under circumstances defined for each. The writ of entry, on the other hand, was the universal remedy for the recovery of possession wrongfully withheld from the owner. Its forms were many, 'being plainly and clearly chalked out in that most ancient and highly venerable collection of legal forms, the Registrum Brevium.' Some form of this writ was available by a party ousted of his tenements by abatement, intrusion, or disseisin, and, in general, for deforcements. But the widow's writs for obtaining her dower had special names: Writ of

[12] Maitland, Eq. pp. 318, 321, 337, 338. "Real actions," included in common-law actions, were those brought for the specific recovery of lands; some being founded on the seizure or possession, and some on the property or right. Mathews v. Sniggs, 75 Okl. 108, 182 Pac. 703. "Personal actions," included in common-law actions, were those begun for the specific recovery of goods and chattels, or for damages or other redress for breach of contract or other injury of whatever description; the specific recovery of lands only excepted. Id. "Mixed actions," included in common-law actions, were such as appertained in some degree to both real and personal actions, and therefore reducible to neither of them; being brought both for the specific recovery of lands, and for damages for injuries to such property. Id.

[13] 2 Pollock and Maitland, Hist. Eng. Law, 174, 568, 570; Maitland, Eq. pp. 370, 371.

[14] 3 Street, Foundations of Legal Liab. 44. Writs of entry and writs of right were used in several of the colonies. Lloyd, Cas. Civ. Proc. pp. 147, note, 148, note.

dower, and writ of dower unde nihil habet. If too much were assigned for dower her holdings could be cut down by means of a writ for the admeasurement of dower, sued out at the instance of the heir or his guardian. The writs of dower were analogous to the writ of right."

"One who compares the treatise of Bracton with such a modern work as Chitty on Pleading will be struck with the fact that the comparative importance of the real and personal actions has been reversed in the period spanning the six intervening centuries. Bracton wrote a big book, and a large part of the really English law which he undertook to expound is found in connection with the subject of real actions. Of the personal actions he has little or nothing to say. In Blackstone's treatise only the personal actions are thought deserving of attention. The old real actions were practically obsolete when Chitty wrote (1808), and within the succeeding generation legislation abolished nearly every remaining vestige of them. The procedure incident to their prosecution was too cumbersome."

Most of the real and mixed actions, including the writ of right, the writ of entry, and the writ of formedon, were abolished in England, in 1833 by the Real Property Limitation Act (3 & 4 Wm. IV, c. 27). Their place had already been taken by the action of ejectment. In almost all of the states the writs of dower and right of dower have given way to the action of ejectment, or to a bill in equity, or to some remedy prescribed by statute.

Mixed Actions

The action of ejectment gave possession of land from Henry VII's day onward, but it did not receive the name of a real action or of a mixed action until 1833. Ejectment developed out of the personal action of trespass. The statute of 1833, which abolished all real and mixed actions, except ejectment, writs of dower, and a few others, spoke as if ejectment were either real or mixed, and there seems no reason at the present day why an action for the recovery of possession of land, in which the plaintiff relies upon his proprietary right, should not be called "real." [15]

All common-law actions may accordingly be considered under the two heads, personal and real; the latter head including all actions for the recovery of land, with or without damages. It would be more logical to recognize a class of proprietary actions which would include all actions for the recovery of possession of real or personal property.

Proprietary Actions

Are actions in which the possession of property, real or personal, is demanded or some title or proprietary right is asserted and enforced.

[15] Maitland, Eq. p. 371.

These are sometimes referred to as actions "in rem" because specific relief is sought against a res, and the claim is based upon property rights or ownership, not upon an obligation or a tort. Such are the obsolete common-law real actions, by writ of right, or by writ of entry, and by assize; the modern action of ejectment for the recovery of possession of land, the action of forcible entry and unlawful detainer for the recovery of possession. Here also should be included the actions of detinue and of replevin, which were the remedies of the common law by which the actual specific possession of a chattel was restored to the proper owner.

Personal Actions

Personal actions are subdivided into those brought for the recovery of a debt, or of damages for the breach of a contract, or for tort, for some injury to the person, or to relative rights or to personal or real property. The most common of these actions are debt, covenant, assumpsit, detinue, trespass, trespass on the case, trover, and replevin.

Personal actions are divided, according to their nature, into actions ex contractu and actions ex delicto. The former are actions based upon a contract, express or implied; while the latter are for injuries, the right to recover for which is not based upon contract, but upon tort. This attempt to distribute our personal forms under the two heads of contract and tort was, as Maitland points out, never very successful or very important.[16]

Of the forms of action above enumerated, debt, covenant, account, detinue, replevin, and trespass were in use when the statute of Westminster II. was enacted. The first three are actions ex contractu, while the latter three are actions ex delicto. Some writers put detinue on one side of the line and some on the other. In fact, sometimes it was founded on contract, sometimes on tort, and sometimes on property right like a real action.

[16] Maitland, Eq., p. 369; Pollock, Torts (11th Ed.) App. A, p. 575. Actions at law or in equity may be classified, according to the nature of the cause of action, as (1) actions of tort; (2) actions of contract; (3) actions on noncontractual obligations; (4) proprietary actions; (5) actions of status; and (6) public actions. See 1 Standard Enc. Proc. Intro. § 14, on classification of actions.

CHAPTER III

THE ACTION OF TRESPASS

35. Scope of Trespass.
36. The Wrongful Act.
37. The Plaintiff's Right or Title in Trespass.

SCOPE OF TRESPASS

35. The action of trespass lies for the recovery of damages for an injury to the person, property, or relative rights of another—

(a) Where the injury was committed with force, actual or implied.

(b) Where the injury was immediate, and not merely consequential.

(c) In case of injury to property, where the property was in the actual or constructive possession of the plaintiff at the time of the injury.

Naturally the earliest wrongs to call for remedy were those committed with physical force and violence, such as assault and beating, or battery, false imprisonment, seizing and carrying away goods from another's possession, or abducting his wife. By authority of the writ of trespass a plaintiff could seek redress in the courts for damage done to his person, his possession of goods or land, or his domestic relations by direct physical interference.

A trespass may be committed either upon the person of another, as in the case of assault, assault and battery, or false arrest or imprisonment; or upon his real or personal property, as where a person goes on another's land, or takes or merely injures his goods; or upon his relative rights, as where a person beats or debauches another's daughter or servant. Where the injury complained of is the entry upon real property, the action is called "trespass quare clausum fregit." Where the injury is the taking and carrying away of personal property, it is called "trespass de bonis asportatis." Where the injury is the loss of services, as in an action by a father or master for enticing away or debauching his daughter or servant, it is called trespass "per quod servitium amisit." All trespasses, whether committed with actual or implied force, are called "trespass vi et armis."

Where such an injury as we have described is committed with force, actual or implied, and the injury is immediate, and not consequential; the proper remedy to recover damages for the injury is by action of trespass.[1] But if, on the other hand, a tort is committed without force, either actual or implied, or the injury was merely consequential, or if, in the case of injury to property, the plaintiff's interest or right was only in reversion at the time of the injury, trespass will not lie, and the remedy, as we shall presently see more at length, must be by an action on the case, or trover.[2]

THE WRONGFUL ACT

36. The wrongful act must be a direct application of force, however slight, something that might cause a breach of the peace. The injury must be immediate and not merely consequential upon the defendant's act. Trespass lies for an immediate and forcible injury to person or property by a negligent act.

Trespass will not lie for malicious prosecution, nor for acts done under authority of process regularly issued.

Trespass will lie for abuse of authority of law, making the wrongdoer a trespasser ab initio. (FROM THE BEGINNING)

[1] Scott v. Shepherd, 2 W. Bl. 892, 3 Wils. 403, 1 Smith, Lead. Cas. (8th Am. Ed.) 797, and notes; Leame v. Bray, 3 East, 602; Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267; Gregory v. Piper, 9 Barn. & C. 591; Reynolds v. Clarke, 2 Ld. Raym. 1403; Claflin v. Wilcox, 18 Vt. 605; Painter v. Baker, 16 Ill. 103; Barry v. Peterson, 48 Mich. 203, 12 N. W. 181; Smith v. Webster, 23 Mich. 298; Winslow v. Beal, 6 Call (Va.) 44.

[2] See the cases just cited. And see Ward v. Macauley, 4 Term R. 489; Gordon v. Harper, 7 Term R. 9; Adams v. Hemmenway, 1 Mass. 145; Barry v. Peterson, 48 Mich. 203, 12 N. W. 181; Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; Frankenthal v. Camp, 55 Ill. 169; Cotteral v. Cummins, 6 Serg. & R. (Pa.) 343; Smith v. Rutherford, 2 Serg. & R. (Pa.) 358. In some of the states in which the common-law forms of action are generally in use, the distinction, as to the form of action, between trespass and action on the case has been abolished by statute. "The distinctions between the actions of 'trespass' and 'trespass on the case' are hereby abolished; and in all cases where trespass or trespass on the case has been heretofore the appropriate form of action, either of said forms may be used, as the party bringing the action may elect." Hurd's Rev. St. Ill. 1921, c. 110, § 36. See Blalock v. Randall, 76 Ill. 224; Kapischki v. Koch, 180 Ill. 44, 54 N. E. 179; Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108; Galt v. Chicago & N. W. R. Co., 157 Ill. 125, 41 N. E. 643; George v. Illinois Cent. R. Co., 197 Ill. App. 152.

The Element of Force

Force is either actual or implied. An assault and battery,[3] tearing down a fence and entering upon land, or breaking into a house,[4] or carrying away goods,[5] are examples of actual force; and in these cases there is no difficulty in determining that trespass is the proper remedy for the immediate injury resulting from the wrong, if, of course, in the case of the injury to property, real or personal, the plaintiff was in actual or constructive possession.

Force is implied in every trespass quare clausum fregit. If a man goes upon another's land without right, however peaceably or thoughtlessly, the law will imply force, and trespass will lie.[6] And the same is true if a man's cattle are driven or stray upon another's land and cause injury.[7]

Force is also implied in every false imprisonment, and trespass will lie therefor, though there may have been no actual violence, nor even a touching of the person imprisoned.[8]

If a man's wife, daughter or servant is assaulted, beaten or imprisoned, there is a forcible injury to the man's relative rights, for which he may maintain trespass.[9] Where a wife, daughter, or servant is enticed away, or seduced or debauched, even with her or his consent, the law implies force, and the husband, father, or master may maintain trespass against the wrongdoer.[10]

Generally, a mere nonfeasance cannot support an action of trespass, for in the absence of an act there can be no force.[11] Trespass, therefore, will not lie for the mere detention of goods, where there has been no unlawful taking;[12] nor for neglect to repair the bank of a stream, whereby another's land was overflowed;[13] nor for neglect to repair a fence, whereby another's animal escaped onto the land of the person so negligent or elsewhere, and was injured.[14]

As a rule, a master is not liable in trespass for injuries caused by the negligence or want of skill of his servant, or by his unauthorized act; but must be sued in case, if at all, even though the servant might be liable in trespass.[15] If the injury occurs, however, as the natural and probable consequence of an act of the servant ordered expressly or impliedly by the master, and the act was forcible, and the injury immediate, trespass will lie against the master.[16]

[3] Hurst v. Carlisle, 8 Pen. & W. (Pa.) 176; Scott v. Shepherd, 8 Wils. 403, 2 W. Bl. 892, 1 Smith, Lead. Cas. (8th Am. Ed.) 797; Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267.

[4] Gullie v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

[5] Fouldes v. Willoughby, 8 Mees. & W. 544; Brown v. Stackhouse, 155 Pa. 582, 26 Atl. 669, 35 Am. St. Rep. 908. To maintain trespass for an injury to personal property it is not necessary that the property shall have been carried away or converted by the wrongdoer. Any forcible and immediate injury to it is sufficient. Fouldes v. Willoughby, 8 Mees. & W. 544; Connah v. Hale, 23 Wend. (N. Y.) 462.

[6] Green v. Goddard, 2 Salk. 641; Weaver v. Bush, 8 Term R. 78; Mason v. Keeling, 12 Mod. 335; Wells v. Howell, 19 Johns. (N. Y.) 385; Gullie v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234; Daniels v. Pond, 21 Pick. (Mass.) 369, 32 Am. Dec. 269.

[7] Dolph v. Ferris, 7 Watts & S. (Pa.) 367, 42 Am. Dec. 246. If a person's cattle stray upon another's land, and cause injury, trespass lies, and ordinarily it is the only proper form of action; though, as we shall see, if they got out because of their owner's neglect to repair a fence which he was under a duty to repair, the injured party may treat this neglect as his cause of action, and bring an action on the case for the consequential injury. He may, instead of suing in case, treat the trespass as his cause of action, and maintain trespass. Wells v. Howell, 19 Johns. (N. Y.) 385; Star v. Rookesby, 1 Salk. 335; Mason v. Keeling, 12 Mod. 335; Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99; Erbes v. Wehmeyer, 69 Iowa, 85, 28 N. W. 447.

[8] Emmett v. Lyne, 1 Bos. & P. (N. R.) 255.

[9] On right of a master to sue another in case for causing death of his servant, and on history of trespass and case, see Admiralty Com'rs v. The Amerika, [1917] A. C. 38, 44, 56.

[10] Chamberlain v. Hazlewood, 5 Mees. & W. 515; Akerley v. Haines, 2 Caines (N. Y.) 202; Ditcham v. Bond, 2 Maule & S. 436; Macfadzen v. Olivant, 6 East, 387; Hubbell v. Wheeler, 2 Aikens (Vt.) 359; Weedon v. Timbrell, 5 Term R. 361; Tullidge v. Wade, 3 Wils. 18, 19. As we shall see presently, he may regard the injury (loss of comfort or services) as consequential, and sue in case, at his election.

[11] 1 Chit. Pl. 141; Six Carpenters' Case, 8 Coke, 146; Turner v. Hawkins, 1 Bos. & P. 476.

[12] Saund. 47k, 47l.

[13] 1 Chit. Pl. 141; Hinks v. Hinks, 46 Me. 423.

[14] Cate v. Cate, 50 N. H. 144, 9 Am. Rep. 179; Star v. Rookesby, 1 Salk. 335; Rooth v. Wilson, 1 Barn. & Ald. 59; Powell v. Salisbury, 2 Younge & J. 391; Saxton v. Bacon, 31 Vt. 540; Burke v. Daley, 32 Ill. App. 320.

[15] McManus v. Crickett, 1 East, 108; Moreton v. Hardern, 4 Barn. & C. 223; Broughton v. Whallon, 8 Wend. (N. Y.) 474; Wright v. Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; Havens v. Hartford & N. H. R. Co., 28 Conn. 69; Johnson v. Castleman, 2 Dana (Ky.) 373; Barnes v. Hurd, 11 Mass. 57.

[16] Gregory v. Piper, 9 Barn. & C. 591; Arasmith v. Temple, 11 Ill. App. 89; Grinnell v. Phillips, 1 Mass. 530; Campbell v. Phelps, 17 Mass. 244; Yerger v. Warren, 31 Pa. 319; McCoy v. McKowen, 26 Miss. 487, 59 Am. Dec. 264; Howe v. Newmarch, 12 Allen (Mass.) 49. In Gregory v. Piper, supra, a master had ordered his servant to lay some rubbish near his neighbor's wall, but so that it might not touch the same, and the servant used ordinary care, but some of the rubbish naturally ran against the wall, and it was held that trespass coud be maintained against the master. And in Strohl v. Levan, 39 Pa. 177, it was held that trespass lies against the owner of a vehicle, for a collision, who is riding in it at the time, though driven by a servant, if it was the result of negligence.

The Injury as Immediate

To sustain trespass the injury must have been immediate, and not merely consequential. For consequential injuries, even though there may have been force, the remedy is by action on the case, and not trespass.[17]

If a person, in the act of throwing a log into the highway hits and injures a passer-by, the injury is immediate upon the wrongful act, and trespass will lie; but if, after a log has been wrongfully thrown into the highway, a passer-by falls over it, trespass will not lie.[18] So if a steam roller were driven over a person this would be a clear trespass, but if it were negligently left in the highway and a collision with a team or automobile resulted in the darkness, this would be a consequential injury.

To constitute an immediate injury committed with force, it is not necessary that the wrongdoer shall have intended to apply the force in the manner in which it caused the injury. If a man puts in motion a force, the natural and probable tendency of which is to cause an injury, he is regarded in law as having forcibly and directly caused that injury.[19] If, for instance, a person lays rubbish so near another's wall that, as a natural consequence, some of it rolls against the wall, the injury is forcible and immediate, and the remedy is in trespass.[20] And where the defendant had ascended in a balloon, which descended a short distance from the place of ascent into the plaintiff's garden, and the defendant, being entangled and in a perilous position, called for help, and a crowd of people broke through the fences into the garden and trampled down the vegetables, it was held that, though ascending in a balloon was not an unlawful act, yet, as the defendant's descent, under the circumstances, would ordinarily and naturally draw the crowd into the garden, either from a desire to assist him, or to gratify a curiosity which he had excited, he was answerable in trespass for all the damage done to the garden.[21] And where a person makes an excavation so near his neighbor's land, that the land, from its own weight

[17] Adams v. Hemmenway, 1 Mass. 145; Barry v. Peterson, 48 Mich. 203, 12 N. W. 181.

[18] Leame v. Bray, 3 East, 602. Cook and Hinton, Cas. Com. Law Pl. p. 9, Lloyd, Cas. Civ. Proc. p. 218. Case, not trespass, is the remedy to recover for injury to a vehicle from stone deposited in the highway. Green v. Belitz, 34 Mich. 512.

[19] Leame v. Bray, 3 East, 593. Negligently setting a fire, and burning another's property. Jordan v. Wyatt, 4 Grat. (Va.) 151, 47 Am. Dec. 720, Whittier, Cas. Com. Law Pl. p. 1.

[20] Gregory v. Piper, 9 Barn. & C. 591.

[21] Guille v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

and of necessity, falls, trespass will lie.[22] And where a person negligently drives off another's animal with his own, without endeavoring to ascertain the number of animals he is driving, trespass is a proper remedy against him.[23]

So, where a person through negligent and careless driving, though not willfully, causes his vehicle to forcibly strike another vehicle or a person, the person injured need not bring an action on the case, though, by the weight of authority, such an action is also maintainable, but may sue in trespass.[24] The same is true where a collision between vessels is caused by carelessness or unskillfulness in navigation.[25] And, generally by the weight of authority, where there is an immediate and forcible injury to person or property, attributable to the negligence of another, the party injured may at his election treat the negligence of the wrongdoer as the cause of action and declare in case or consider the act itself as the injury and declare in trespass.[26] Some of the courts, however, hold that where the injury from a negligent act is both forcible and immediate, case will not lie, and that trespass is the only remedy.[27]

So, if a wild or vicious beast, or other dangerous thing, is turned loose or put in motion, and mischief immediately ensues to the person or property of another, the injury is regarded as immediate and as committed with force, and trespass is the proper remedy.[28]

[22] Buskirk v. Strickland, 47 Mich. 389, 11 N. W. 210. Or case will lie. City of Pekin v. Brereton, 67 Ill. 477, 16 Am. Rep. 629.

[23] Brooks v. Olmstead, 17 Pa. 24.

[24] Leame v. Bray, 3 East, 593; Strohl v. Levan, 39 Pa. 177; Turner v. Hawkins, 1 Bos. & P. 472; Claflin v. Wilcox, 18 Vt. 605; Wilson v. Smith, 10 Wend. (N. Y.) 324; McAllister v. Hammond, 6 Cow. (N. Y.) 342; Williams v. Holland, 6 Car. & P. 23; Schuer v. Veeder, 7 Blackf. (Ind.) 342; Bradford v. Ball, 38 Mich. 673; Payne v. Smith, 4 Dana (Ky.) 497; Daniels v. Clegg, 28 Mich. 32; Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249; Post v. Munn, 4 N. J. Law, 61, 7 Am. Dec. 570. For willful injury so caused, trespass is the only remedy.

[25] Percival v. Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210; Simpson v. Hand, 6 Whart. (Pa.) 311, 36 Am. Dec. 231; New Haven Steamboat & Transp. Co. v. Vanderbilt, 16 Conn. 420.

[26] Baldridge v. Allen, 24 N. C. 206; Dalton v. Favour, 3 N. H. 465; Percival v. Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210; Simpson v. Hand, 6 Whart. (Pa.) 311, 36 Am. Dec. 231; Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249; New Haven Steamboat & Transp. Co. v. Vanderbilt, 16 Conn. 420; Claflin v. Wilcox, 18 Vt. 605.

[27] Gates v. Miles, 3 Conn. 64; Case v. Mark, 2 Ohio, 169, criticized in Claflin v. Wilcox, 18 Vt. 605. See Daniels v. Clegg, 28 Mich. 32.

[28] Leame v. Bray, 3 East, 593; Mason v. Keeling, 12 Mod. 333; Beckwith v. Shordike, 4 Burr. 2092.

Squib Case

An illustration of the barren debates as to the distinction between trespass and case is found in the oft-cited Squib Case of Scott v. Shepherd, decided in 1752.[29] A lighted squib or bomb had been tossed by the defendant into a market house. A bystander, in order to avert the threatened injury from himself, took up the squib and tossed it across the market house. Another person near whom it fell likewise threw it in another direction. Thereupon the squib exploded and put out the plaintiff's eye. An action of trespass was brought against the defendant who first threw the bomb, and the action was sustained. Sir William Blackstone, who happened to be a member of the court, dissented, being of the opinion that case only would lie, as the harm was not the immediate and direct result of the plaintiff's act. In this famous case there was no question of liability, but merely of the historical distinction between forms of action.

In another case, in which the distinction between immediate and consequential injury is considered, the defendant had seized the plaintiff by the arm and swung him violently around and let him go, and the plaintiff, becoming dizzy, had involuntarily passed rapidly in the direction of a third person and come violently in contact with him, whereupon the latter pushed him away, and he came in contact with a hook, and was injured. It was held that trespass was the proper remedy.[30]

Where a person beats a drum in the highway, the natural or probable consequence of which is to frighten the horses of another and cause them to run away, and such a consequence results, he is liable in trespass for the injury. It is immaterial whether the injury be willful or negligent, if his act is the immediate cause of it.[31]

If a man starts a fire on his own land negligently, which spreads, and, as an immediate consequence, the property of another is destroyed by it, trespass is a proper remedy for the injury.[32] So if a dog is set on plaintiff's horses, one of which, while being pursued, is injured or killed, this is the direct result of defendant's act, and trespass is the proper form.[33]

[29] Scott v. Shepherd, 3 Wils. 403, 2 W. Bl. 892, 1 Smith, Lead. Cas. (8th Am. Ed.) 797. See 3 Street, Foundations Legal Liab. p. 257.

[30] Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267.

[31] Loubz v. Hafner, 12 N. C. 185, Sunderland Cas. Com. Law Pl. p. 7. See, also, Cole v. Fisher, 11 Mass. 137. That trespass only lies for an act which is or tends to a breach of the peace, see 3 Street, Foundations Legal Liab., p. 235.

[32] Jordan v. Wyatt, 4 Grat. (Va.) 151, 47 Am. Dec. 720; Whittier, Cas. Com. Law Pl. p. 1.

[33] Painter v. Baker, 16 Ill. 103; James v. Caldwell, 7 Yerg. (Tenn.) 38; Sunderland, Cas. Com. Law Pl. p. 9.

If a person pours water directly upon another's person or land, it is clear that the injury is immediate, and that trespass is the remedy.[34] But if a person stops a water course on his own land, whereby it is prevented from flowing as usual, or if he place a spout on his own building, and in consequence thereof the water afterwards runs therefrom upon another's land or house or person, the injury is consequential, and trespass will not lie.

Injuries under Color of Legal Proceedings

Nice questions have arisen as to whether trespass will lie for injuries done to the person or property under color of legal process or proceedings, as in case of wrongful prosecution of a criminal charge, wrongful arrest, or wrongful attachment of goods.

Generally no action at all will lie for an act done under the judgment or order of a court or magistrate having jurisdiction over the subject-matter.[35]

When the court had no jurisdiction at all over the subject-matter, or exceeded its jurisdiction, trespass is the proper form of action against all the parties for any act which, independently of the process, would sustain such an action.[36] If goods have been taken, trover also will lie.

If the court had jurisdiction, but the proceeding or process was irregular and void, trespass is the proper form of action, and generally case will not lie.[37]

When process has been misapplied, as where one person has been arrested under a warrant against another, or the goods of one person

[34] Reynolds v. Clarke, 2 Ld. Raym. 1403.

[35] 1 Chit. Pl. 203; 10 Coke, 76a; Perkin v. Proctor, 2 Wils. 384; Cave v. Mountain, 1 Man. & G. 257; Dicas v. Baron Brougham, 1 Moody & R. 309; Shoemaker v. Nesbit, 2 Rawle (Pa.) 201.

[36] 1 Chit. Pl. 204; 10 Coke, 76a; Perkin v. Proctor, 2 Wils. 385; Branwell v. Penneck, 7 Barn. & C. 536; Doswell v. Impey, 1 Barn. & C. 169; Hull v. Blaisdell, 1 Scam. (Ill.) 334; Allen v. Gray, 11 Conn. 95; Hooker v. Smith, 19 Vt. 151, 47 Am. Dec. 679; Griswold v. Sedgwick, 6 Cow. (N. Y.) 456; Vail v. Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300; Adams v. Freeman, 9 Johns. (N. Y.) 117; Bigelow v. Stearns, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; Horton v. Auchmoody, 7 Wend. (N. Y.) 200.

[37] Parsons v. Lloyd, 3 Wils. 341; Barker v. Braham, Id. 376; Barkeloo v. Randall, 4 Blackf. (Ind.) 476, 32 Am. Dec. 46; Guptill v. Richardson, 62 Me. 257; Sullivan v. Jones, 2 Gray (Mass.) 570; Green v. Morse, 5 Greenl. (Me.) 291; Maher v. Ashmead, 30 Pa. 344, 72 Am. Dec. 708; Milliken v. Brown, 10 Serg. & R. (Pa.) 188. Trespass is the proper remedy where a court has jurisdiction over the subject-matter, but is bound to adopt certain forms in its proceedings, from which it deviates, thereby rendering the proceeding coram non judice. Cole's Case, W. Jones, 171; Davison v. Gill, 1 East, 64. See also, Outlaw v. Davis, 27 Ill. 467; Kraft v. Porter, 76 Ill. App. 328.

have been taken under process against another's goods, trespass, and not case, is the remedy.[38]

When the process of a court has been abused by the officer executing it, as where unnecessary force has been used in making a lawful arrest, or detaining a prisoner, or goods are taken or used improperly under a valid writ, trespass is the remedy.[39]

Trespass will not lie for acts done under legal process, such as writs and warrants regularly issued by a court having jurisdiction, however malicious and groundless the institution of the proceedings may have been. Case for malicious prosecution is the only remedy for improperly putting in motion the regular process of the court.[40]

Trespass ab Initio

A person may lawfully obtain possession of property under the process of a court, or authority of a statute, or otherwise under authority of law, yet if he abuses his authority by dealing with the property in an unauthorized manner, he may become a trespasser ab initio.[41]

"When an entry, authority, or license is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio; but where an entry, authority, or license is given by the party, and he abuses it, then he must be punished for his abuse, but shall not be a trespasser ab initio.[42]

An officer who enters a house by authority of law, and attaches goods therein, becomes a trespasser ab initio by placing there an unfit person as keeper of the goods, against the remonstrance of the owner

[38] Sanderson v. Baker, 2 W. Bl. 833; Cole v. Hindson, 6 Term R. 234; Griswold v. Sedgwick, 6 Cow. (N. Y.) 456; Mead v. Haws, 7 Cow. (N. Y.) 332; Upton v. Craig, 57 Ill. 257; Foss v. Stewart, 14 Me. 312; Baldwin v. Whittier, 16 Me. 33; Parker v. Hall, 55 Me. 362; Melvin v. Fisher, 8 N. H. 406; Lothrop v. Arnold, 25 Me. 130, 43 Am. Dec. 256.

[39] Woodgate v. Knatchbull, 2 Term R. 148; Holroyd v. Breare, 2 Barn. & Ald. 473; Vail v. Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300; Melville v. Brown, 15 Mass. 82; Guptill v. Richardson, 62 Me. 257.

[40] Johnson v. Von Kettler, 84 Ill. 315, 318; Blalock v. Randall, 76 Ill. 224; Beaty v. Perkins, 6 Wend. (N. Y.) 382; Savacool v. Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; Plummer v. Dennett, 6 Greenl. (Me.) 421, 20 Am. Dec. 316; Churchill v. Churchill, 12 Vt. 661; Hobbs v. Ray, 18 R. I. 84, 25 Atl. 694; Whittier, Cas. Com. Law Pl. p. 14; Miller v. Grice, 1 Rich. (S. C.) 147; Owens v. Starr, 2 Litt. (Ky.) 234.

[41] Van Brunt v. Schenck, 13 Johns. (N. Y.) 414; Malcolm v. Spoor, 12 Metc. (Mass.) 279, 46 Am. Dec. 675; Smith v. Gates, 21 Pick. (Mass.) 55; Taylor v. Jones, 42 N. H. 25; Drew v. Spaulding, 45 N. H. 472. See 3 Street, Foundations Legal Liab. 242.

[42] Six Carpenters' Case, 8 Coke, 146; Page v. De Puy, 40 Ill. 506; Louisville & N. R. Co. v. Bartee, 204 Ala. 539, 86 South. 394, 12 A. L. R. 251, 254.

of the house.[43] And the same is true where an officer has made a lawful levy on goods, but sells without giving the notice required by law.[44]

Trespass will also lie where a battery or imprisonment was in the first instance lawful, but the party, by an unnecessary degree of violence, became a trespasser ab initio.[45]

PLAINTIFF'S RIGHT OR TITLE IN TRESPASS

37. The technical limits of trespass to the party in possession, or with the immediate right of possession, are probably due to its origin as a semicriminal action, covering a wrongful application of force which might lead to violence and a breach of the peace.

Possession is to be distinguished from the custody of a servant. A bailee at will is given the rights of a possessor, though for most purposes his possession is that of the bailor.

In some states both a tenant at will and the landlord may sue in trespass.

The family of the owner are licensees, and do not have possession by reason of their occupancy alone.

The owner of land not in the actual possession of another is said to be in constructive possession; that is, he is given the remedies of a possessor.

Naked possession is sufficient against a wrongdoer.

Possession to Support Trespass

Trespass against property is essentially an injury to the possession. This is the gist of the action of trespass, and it will not lie unless the property, whether real [46] or personal,[47] was in the actual or construc-

[43] Malcolm v. Spoor, 12 Metc. (Mass.) 279, 46 Am. Dec. 675.

[44] Carrier v. Esbaugh, 70 Pa. 239. And an officer who levies under a lawful execution, but refuses to permit the debtor to select and have appraised to him the amount of property exempt by law, becomes a trespasser ab initio. Wilson v. Ellis, 28 Pa. 238; Freeman v. Smith, 30 Pa. 264. And a landlord who lawfully distrains goods, but sells without a previous appraisement and advertisement, is a trespasser ab initio. Kerr v. Sharp, 14 Serg. & R. (Pa.) 399.

[45] Bennett v. Appleton, 25 Wend. (N. Y.) 371; Pease v. Burt, 3 Day (Conn.) 485; Boles v. Pinkerton, 7 Dana (Ky.) 453; Hannen v. Edes, 15 Mass. 347.

[46] Campbell v. Arnold, 1 Johns. (N. Y.) 511; Tobey v. Webster, 3 Johns. (N. Y.) 468; Lienow v. Ritchie, 8 Pick. (Mass.) 235; Topping v. Evans, 58 Ill. 209; Bascom v. Dempsey, 143 Mass. 400, 9 N. E. 744; Bucki v. Cone, 25 Fla. 1, 6 South. 160; Goetchins v. Sanborn, 46 Mich. 330, 9 N. W. 437; Yocum v. Zah-

[47] See note 47 on page 76.

tive possession of the plaintiff at the time of the injury. He must have had the actual possession, or the right to immediate possession. If his right was merely in reversion, his remedy is by action on the case, and not trespass.[48]

The general owner of property, in parting with the custody thereof, does not necessarily part with the possession so as to prevent his maintaining trespass against a stranger. The person who has the absolute or general property may maintain the action, though, when the injury was done, he had parted with the custody to a carrier, servant, or other agent, if he gave the latter only a bare authority to carry or keep, not coupled with any interest in the property.[49] And generally, if the owner of property merely permits another gratuitously to use it, having the right to retake possession at any time, he may sue a stranger in trespass for an injury done to it while it was so used.[50] The rule applies equally to an action of trespass by a bailee who had an authority coupled with an interest, and a right to immediate possession, though he did not have actual possession at the time of the injury.[51] In these

ner, 162 Pa. 468, 29 Atl. 778; Wilkinson v. Connell, 158 Pa. 126, 27 Atl. 870; Moon v. Avery, 42 Minn. 405, 44 N. W. 257; Stout v. Keyes, 2 Doug. (Mich.) 184, 43 Am. Dec. 465; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62; Ripka v. Sergeant, 7 Watts & S. (Pa.) 9, 42 Am. Dec. 214; Schnable v. Koehler, 28 Pa. 181; United Copper Mining & Smelting Co. v. Franks, 85 Mo. 321, 27 Atl. 185. See 3 Street, Foundations Legal Liab. p. 234.

[47] Ward v. Macauley, 4 Term R. 489; Gordon v. Harper, 7 Term R. 9; Hall v. Pickard, 3 Camp. 187; Fitler v. Shotwell, 7 Watts & S. (Pa.) 14; Finch v. Brian, 44 Mich. 517, 7 N. W. 81; Ayer v. Bartlett, 9 Pick. (Mass.) 156; Carter v. Simpson, 7 Johns. (N. Y.) 535; Putnam v. Wyley, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346; Van Brunt v. Schenck, 11 Johns. (N. Y.) 377; Bucki v. Cone, 25 Fla. 1, 6 South. 160; Winship v. Neale, 10 Gray (Mass.) 382; Lunt v. Brown, 13 Me. 236; Daniel v. Holland, 4 J. J. Marsh. (Ky.) 18; Parsons v. Dickinson, 11 Pick. (Mass.) 352; Moon v. Avery, 42 Minn. 405, 44 N. W. 257. In Finch v. Brian, supra, the plaintiff had left ment at defendant's house under an agreement for its sale, and the defendant, after consuming a part of it, refused to take and pay for it. The lower court sustained an action of trespass for such consumption, and of course the judgment was reversed.

[48] Halligan v. Chicago & R. I. R. Co., 15 Ill. 558; Whittier, Cas. Com. Law Pl. p. 15; Nachtrieb v. Stoner, 1 Colo. 423. But see Hurd's Rev. St. Ill. 1921, c. 110, § 36.

[49] Gordon v. Harper, 7 Term R. 9; Bertie v. Beaumont, 16 East, 33; Gillett v. Ball, 9 Pa. 13; Putnam v. Wyley, 8 Johns. (N. Y.) 435, 5 Am. Dec. 346; Thorp v. Burling, 11 Johns. (N. Y.) 285; Williams v. Lewis, 3 Day (Conn.) 493; Hart v. Hyde, 5 Vt. 328; Becker v. Smith, 59 Pa. 469; White v. Brantley, 37 Ala. 430; Staples v. Smith, 48 Me. 470; Lane v. Thompson, 43 N. H. 320; Strong v. Adams, 30 Vt. 221, 73 Am. Dec. 305; Bird v. Hempstead, 3 Day (Conn.) 272, 3 Am. Dec. 269; Bulkley v. Dolbeare, 7 Conn. 235.

[50] Lotan v. Cross, 2 Camp. 464; Hall v. Pickard, 3 Camp. 187; Bertie v. Beaumont, 16 East, 33; Edwards v. Edwards, 11 Vt. 537, 34 Am. Dec. 711.

[51] 1 Chit. Pl. 190; 2 Saund. 47d; Fowler v. Down, 1 Bos. & P. 45; Gordon

cases there is a constructive possession, which is sufficient to support the action.[52]

If, however, the owner of property parts with the possession of it, and the bailee, when it is injured by a stranger, has the exclusive right to its use, the owner's right is merely a reversion, and his remedy is by action on the case, and not trespass.[53]

A mere servant, acting in behalf of his employer, and having the bare custody of the goods at the time they are injured, cannot maintain trespass, or any other possessory action, for he has no possession, either actual or constructive.[54] There is no very substantial distinction between the custody of a servant and the possession of a depositary at will; but the bailee is allowed the possessory remedies while the servant is not.

A servant or agent is denied the rights and remedies of a possessor, because his acts are the acts of his employer, and the rights which he represents are those of the employer.[55] By an anomaly of the common law, a subservient bailee, like a depositary for storage, who holds, like a servant, entirely at the orders of the bailor, is yet regarded as having legal possession rather than mere custody and may sue a trespasser.

There can hardly be such a thing as possession in law, entitling one to the possessory remedies, without a claim of title, or at least some independent claim of a limited or temporary interest. A tenant at will, or a bailee at will has possession as against the public in general, though for most purposes his holding is the possession of the owner.

With a few exceptions, what has just been said with reference to personal property applies also to real property. The gist of the action of trespass quare clausum fregit is the injury to the possession, and the general rule is that, unless at the time the injury was committed the plaintiff was in the actual or constructive possession, he cannot main-

v. Harper, 7 Term R. 9; Parsons v. Dickinson, 11 Pick. (Mass.) 352; Hoyt v. Gelston, 13 Johns. (N. Y.) 141; Cook v. Howard, Id. 276; Rackham v. Jesup, 8 Wils. 332.

[52] Dallam v. Fitler, 6 Watts & S. (Pa.) 323; Talmadge v. Scudder, 38 Pa. 517; North v. Turner, 9 Serg. & R. (Pa.) 244.

[53] Ward v. Macauley, 4 Term R. 489; Gordon v. Harper, 7 Term R. 9; Hall v. Pickard, 3 Camp. 187; Putnam v. Wyley, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346; Van Brunt v. Schenck, 11 Johns. (N. Y.) 377; Soper v. Sumner, 5 Vt. 274; Smith v. Plomer, 15 East, 607; Cannon v. Kinney, 3 Scam. (Ill.) 10; Muggridge v. Eveleth, 9 Metc. (Mass.) 233; Wilson v. Martin, 40 N. H. 88; Lunt v. Brown, 13 Me. 236; Bulkley v. Dolbeare, 7 Conn. 235; Hammond v. Plimpton, 30 Vt. 333; Fitler v. Shotwell, 7 Watts & S. (Pa.) 14.

[54] See Bloss v. Holman, Owen, 52. See Pease v. Ditto, 189 Ill. 456, 59 N. E. 983.

[55] Pease v. Ditto, 189 Ill. 456, 59 N. E. 983; Russell v. Scott, 9 Cow. (N. Y.) 279.

tain trespass.[56] If his right was merely in reversion, his remedy is by an action on the case.

If land is in the exclusive possession of a lessee, other than a tenant at will, and in some states even of a tenant at will, case, and not trespass, is the remedy by the landlord for an injury by a stranger affecting the inheritance, even where trespass would be the proper remedy if the landlord himself were in possession.[57] In some jurisdictions it is held that trespass will lie in such a case by the landlord if the tenant in possession was merely a tenant at will, since the landlord has such a constructive possession as will sustain the action;[58] but in New York the contrary was held on the ground that, in the opinion of the court, possession in fact was necessary,[59] and the same ruling has been made in other states.[60]

The mere occupancy of land by a hired servant of the owner, without paying rent, is not possession. The possession is constructively or actually in the owner, and he may maintain trespass as if he had been in actual possession himself.[61]

The family or servants, the guests or lodgers, of a householder, do not have possession, even during the absence of the owner, as there is no claim of title or interest on their part even for the time being. Their occupation is entirely subordinate to and in the name of the owner. Possession implies some claim of title or independent holding.[62]

In a Wisconsin case the defendant committed a trespass during the

[56] Sparhawk v. Bagg, 16 Gray (Mass.) 583; Pfistner v. Bird, 43 Mich. 14, 4 N. W. 625; Ripley v. Yale, 16 Vt. 257; Oatman v. Fowler, 43 Vt. 464; Rucker v. McNeely, 4 Blackf. (Ind.) 179; Carpenter v. Smith, 40 Mich. 639; Alderman v. Way, 4 Yeates (Pa.) 218; Mather v. Trinity Church, 8 Serg. & R. (Pa.) 509, 8 Am. Dec. 663; Dorsey v. Eagle, 7 Gill & J. (Md.) 321; Bartlett v. Perkins, 13 Me. 87; Moore v. Moore, 21 Me. 350; Stuyvesant v. Tompkins, 9 Johns. (N. Y.) 61; Wickham v. Freeman, 12 Johns. (N. Y.) 183.

[57] Lienow v. Ritchie, 8 Pick. (Mass.) 235; Campbell v. Arnold, 1 Johns. (N. Y.) 511; Torrence v. Irwin, 2 Yeates (Pa.) 210, 1 Am. Dec. 340; Roussin v. Benton, 6 Mo. 592.

[58] Starr v. Jackson, 11 Mass. 520; Daniels v. Pond, 21 Pick. (Mass.) 367, 32 Am. Dec. 269.

[59] Campbell v. Arnold, 1 Johns. (N. Y.) 511; Tobey v. Webster, 3 Johns. (N. Y.) 468.

[60] Clark v. Smith, 25 Pa. 137; Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621.

[61] Bertie v. Beaumont, 16 East, 33, 36; Davis v. Clancy, 3 McCord (S. C.) 422.

[62] Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 182, 3 N. E. 272, 56 Am. Rep. 133. Compare however, Prof. H. T. Terry, "Possession," 13 Ill. Law Rev. 314, 320; Prof. Jos. Bingham, "The Nature and Importance of Legal Possession" 13 Mich. Law Rev. 549, 631, 633; "Claim of Title in Adverse Possession," H. W. Ballantine, 28 Yale Law J. 220.

temporary absence of the plaintiff's husband. It was held that the wife had sufficient possession to maintain trespass; she being by the absence of her husband in exclusive occupation of the premises. The court overlooks the point that occupancy and residence are not possession, unless under claim of title of some sort.[63] The situation of the wife would seem to be like that of a servant or licensee or guest. The presumption is that the joint occupancy of husband and wife is the possession of the husband, although this may be rebutted.[64]

In England and in some of our states it is held that the rule that general ownership of property draws to it the possession, applicable to personal property, does not apply to real property; that in the case of real property there is no such constructive possession, and unless the plaintiff had the actual possession by himself or his servant at the time of the injury, he cannot maintain trespass.[65] In most of our states the rule is otherwise, and the owner of land not in the actual possession of another is given the remedies of a possessor.[66]

If no one has actual possession, the owner of the legal title has constructive possession; but there cannot be constructive possession of land by the holder of the legal title where third persons are in the actual adverse possession.[67]

In some cases trespass may be maintained for an injury to property, real or personal, while it was in the actual and lawful possession of the wrongdoer, for an abuse of his possession may ipso facto terminate his possession in the eye of the law, and render him a trespasser ab initio.[68]

If a tenant at will commits waste it is a determination of the ten-

[63] Bieri v. Fonger, 139 Wis. 150, 120 N. W. 863. See, also, Ford v. Schliessman, 107 Wis. 479, 83 N. W. 761; 14 Harv. Law Rev. 389.

[64] Collins v. Lynch, 157 Pa. 240, 27 Atl. 721, 37 Am. St. Rep. 723.

[65] 1 Chit. Pl. 197; Bac. Abr. "Trespass," C, 3; King v. Watson, 5 East, 485; Campbell v. Arnold, 1 Johns. (N. Y.) 511; Fish v. Brannmon, 2 B. Mon. (Ky.) 379; Walton v. Clarke, 4 Bibb (Ky.) 218; Sparhawk v. Bagg, 16 Gray (Mass.) 583; Allen v. Thayer, 17 Mass. 299.

[66] Gillespie v. Dew, 1 Stew. (Ala.) 229, 18 Am. Dec. 42, Whittier, Cas. Com. Law Pl. p. 21; Dobbs v. Gullidge, 20 N. C. 197; Coboon v. Simmons, 20 N. C. 189; Van Brunt v. Schenck, 11 Johns. (N. Y.) 385; Wickham v. Freeman, 12 Johns. (N. Y.) 184; Ledbetter v. Fitzgerald, 1 Ark. 448; Baker v. King, 18 Pa. 138; Davis v. Wood, 7 Mo. 162; Davis v. Clancy, 3 McCord (S. C.) 422; Skinner v. McDowell, 2 Nott & McC. (S. C.) 68; Cairo & St. L. R. Co. v. Woosley, 85 Ill. 370; Dean v. Comstock, 32 Ill. 173; Wilcox v. Kinzie, 3 Scam. (Ill.) 218; Bulkley v. Dolbeare, 7 Conn. 232; Wheeler v. Hotchkiss, 10 Conn. 225.

[67] Ruggles v. Sands, 40 Mich. 559; O'Brien v. Cavanaugh, 61 Mich. 368, 28 N. W. 127; Safford v. Basto, 4 Mich. 406.

[68] Drew v. Spaulding, 45 N. H. 472; Taylor v. Jones, 42 N. H. 25.

ancy, and trespass quare clausum fregit may be maintained against him by the landlord or reversioner.[69]

Naked Possession

Trespass, being an interference with the possession, the de facto exercise of dominion over the property does not require a legal title to support it.

A mere naked possession, without any other title, is sufficient as against a wrongdoer. "It is a general and undeniable principle that possession is a sufficient title to the plaintiff in an action of trespass vi et armis against a wrongdoer. The finder of an article may maintain trespass against any person but the real owner; and a person having an illegal possession may support this action against any person other than the true owner." [70]

A bailee may maintain trespass against a stranger, or even the general owner, for an injury to the property while in his possession,[71] and, as we have seen, even where he had not the actual possession, if he had the right to take immediate possession, since he had the constructive possession. The quantity or certainty of the bailee's interest is immaterial.[72] Even a mere gratuitous bailee may maintain the action against a stranger.[73] As we have seen, a person professedly in possession as a mere servant cannot maintain trespass.

What has been said under this head with reference to trespass on personal property applies also to a great extent to real property. In an action of trespass for injury to real property, the title may come

[69] Cro. Eliz. 784; 1 Chit. Pl. 200; Daniels v. Pond, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; Phillips v. Covert, 7 Johns. (N. Y.) 1; Suffern v. Townsend, 9 Johns. (N. Y.) 35.

[70] Graham v. Sime, 1 East, 244, Whittier, Cas. Com. Law Pl. p. 22; Hoyt v. Gelston, 13 Johns. (N. Y.) 141, Sunderland, Cas. Com. Law Pl. p. 19; Rackham v. Jesup, 3 Wils. 332; Cook v. Howard, 13 Johns. (N. Y.) 276; Hanmer v. Wilsey, 17 Wend. (N. Y.) 91; Fisher v. Cobb, 6 Vt. 622; Potter v. Washburn, 13 Vt. 558, 37 Am. Dec. 615; Welch v. Jenks, 58 Iowa, 694, 12 N. W. 727; Horton v. Hensley, 23 N. C. 163; Illinois & St. L. Railroad & Coal Co. v. Cobb, 94 Ill. 55; Laing v. Nelson, 41 Minn. 521, 43 N. W. 476; Wilbraham v. Snow, 2 Saund. 47d; Jones v. McNeil, 2 Bailey (S. C.) 466; Hendricks v. Decker, 35 Barb. (N. Y.) 298; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Hubbard v. Lyman, 8 Allen (Mass.) 520; Butts v. Collins, 13 Wend. (N. Y.) 139; Barker v. Chase, 24 Me. 230; Burke v. Savage, 13 Allen (Mass.) 408; Carson v. Prater, 6 Cold. (Tenn.) 565.

[71] Heydon & Smith's Case, 13 Coke, 67, 69; Brierly v. Kendall, 17 Q. B. 937; Ames, Lectures Legal Hist. 59.

[72] 1 Chit. Pl. 190; Colwill v. Reeves, 2 Camp. 575; Rooth v. Wilson, 1 Barn. & Ald. 59.

[73] Rooth v. Wilson, 1 Barn. & Ald. 59; Laing v. Nelson, 41 Minn. 521, 43 N. W. 476.

into question, but it is not essential that it should.[74] Actual and exclusive possession without a legal title is sufficient against a wrongdoer, or a person who cannot show any right or authority from the real owner.[75]

Trespass, for instance, has been sustained by a tenant in possession under an illegal lease;[76] by an intruder on public land, who had not been treated as such by the government.[77]

A tenant for years,[78] at will,[79] or, according to some of the authorities, at sufferance,[80] may maintain the action against a stranger, or even against his landlord, where a right of entry was not expressly or impliedly reserved to the latter.[81]

Where the plaintiff was not in actual possession, whether the proper-

[74] 1 Chit. Pl. 195; Lambert v. Strother, Willes, 221; Graham v. Peat, 1 East, 244, Whittier, Cas. Com. Law Pl. p. 22; Cheasley v. Barnes, 10 East, 74.

[75] Graham v. Peat, 1 East, 244, Whittier, Cas. Com. Law Pl. p. 22; Catteris v. Cowper, 4 Taunt. 547; Shoup v. Shields, 116 Ill. 488, 6 N. E. 502; Nickerson v. Thacher, 146 Mass. 609, 16 N. E. 581; Dyson v. Collick, 5 Barn. & Ad. 600; Litchfield v. Ferguson, 141 Mass. 97, 6 N. E. 721; Inhabitants of Barnstable v. Thacher, 8 Metc. (Mass.) 239; Hoffman v. Harrington, 44 Mich. 183, 6 N. W. 225; Fox v. Holcomb, 32 Mich. 494; Newcombe v. Irwin, 55 Mich. 620, 22 N. W. 66; Ralph v. Bayley, 11 Vt. 521; Hall v. Chaffee, 13 Vt. 150; Welch v. Jenks, 58 Iowa, 694, 12 N. W. 727; Webb v. Sturtevant, 1 Scam. (Ill.) 181; Stahl v. Grover, 80 Wis. 650, 50 N. W. 589; Newton v. Marshall, 62 Wis. 8, 21 N. W. 803; Moore v. Moore, 21 Me. 350; Witt v. St. Paul & N. P. Ry. Co., 38 Minn. 122, 35 N. W. 862; Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866; Myrick v. Bishop, 8 N. C. 435; Chambers v. Donaldson, 11 East, 65; Richardson v. Murrill, 7 Mo. 333.

[76] Graham v. Peat, 1 East. 244. Whittier, Cas. Com. Law Pl. p. 22.

[77] Harper v. Charlesworth, 4 Barn. & C. 574; Keith v. Tilford, 12 Neb. 271, 11 N. W. 315; Wincher v. Shrewsbury, 2 Scam. (Ill.) 283, 35 Am. Dec. 108, Whittier, Cas. Com. Law Pl. p. 23.

[78] 2 Rolle, Abr. 551; Geary v. Barecroft, Sid. 347; Stultz v. Dickey, 5 Bin. (Pa.) 285, 6 Am. Dec. 411; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Dorsey v. Eagle, 7 Gill & J. (Md.) 321; Van Doren v. Everitt, 5 N. J. Law. 460, 8 Am. Dec. 615.

[79] 2 Rolle, Abr. 551; Geary v. Barecroft, supra; O'Brien v. Cavanaugh, 61 Mich. 363, 28 N. W. 127; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62.

[80] 2 Rolle, Abr. 551; Geary v. Barecroft, supra; Heydon & Smith's Case, 13 Coke, 69; Graham v. Peat, 1 East, 245, note a.

[81] Anonymous, 11 Mod. 209; Liford's Case, 11 Coke, 48; Dickinson v. Goodspeed, 8 Cush. (Mass.) 119; Faulkner v. Alderson, Gilmer (Va.) 221; Bryant v. Sparrow, 62 Me. 546. But if a tenancy at will had been terminated by notice, and the tenant had merely remained in possession, he cannot maintain the action against his landlord. See Meader v. Stone, 7 Metc. (Mass.) 147; Curl v. Lowell, 19 Pick. (Mass.) 25. It has been generally held that a tenant at sufferance cannot maintain the action against his landlord. Wilde v. Cantillon, 1 Johns. Cas. (N. Y.) 123; Hyatt v. Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; Sampson v. Henry, 13 Pick. (Mass.) 36; Meader v. Stone, 7 Metc. (Mass.) 147; Overdeer v. Lewis, 1 Watts & S. (Pa.) 90, 37 Am. Dec. 440.

ty was real or personal, but relies upon a constructive possession to maintain his action, title becomes very material. He must show such a title as draws to it the constructive possession. He must at least show a right to immediate possession and the absence of adverse possession.[82]

Intangible Property or Right

Where the property or right injured is intangible, that is, not involving possession, the injury can never be considered as trespass, but the remedy must be by an action on the case.[83] Trespass will not lie, for instance, for obstructing a private right of way, where the owner of the right does not own or possess the way itself.[84] Nor will it lie for obstructing a public highway,[85] or a navigable river,[86] and causing special damage to an individual; or for interference with any other mere easement, as by obstructing light and air through ancient windows by an erection on adjoining land.[87] Case and not trespass is the remedy for diversion of or other injury to a water course, or body of water, where the plaintiff is not the owner of the soil, but is merely entitled to the use of the water.[88]

If the injury is to corporeal property, an action of trespass is the proper remedy, notwithstanding the fact that the property was the means by which an incorporeal right was enjoyed. Thus destruction of a dam is a trespass, although the dam is the means by which a franchise granted by the legislature is exercised.[89]

[82] Gillespie v. Dew (1827) 1 Stew. (Ala.) 229, 18 Am. Dec. 42, Whittier Cas. Com. Law Pl. pp. 21, 22, note; Cairo & St. L. R. Co. v. Woolsey, 85 Ill. 370.

[83] Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. 173, and cases hereafter cited.

[84] Dietrich v. Berk, 24 Pa. 470; Jones v. Park, 10 Phila. (Pa.) 165, 31 Leg. Int. 372; Okeson v. Patterson, 20 Pa. 22; Lansing v. Wiswall, 5 Denio (N. Y.) 213; Lambert v. Hoke, 14 Johns. (N. Y.) 383.

[85] Greasly v. Codling, 9 Moore, 459; City of Pekin v. Brereton, 67 Ill. 477, 16 Am. Rep. 629; Lansing v. Wiswall, supra.

[86] Rose v. Miles, 4 Maule & S. 101; Bellant v. Brown, 78 Mich. 204, 44 N. W. 826.

[87] Shadwell v. Hutchinson, 2 Barn. & Adol. 97. And see Blunt v. McCormick, 3 Denio (N. Y.) 283. But see Trauger v. Sassaman, 14 Pa. 514; Hart v. Hill, 1 Whart. (Pa.) 124.

[88] Williams v. Morland, 2 Barn. & C. 910; Lindeman v. Lindsey, 69 Pa. 93, 8 Am. Rep. 219. See Ottawa Gaslight & Coke Co. v. Thompson, 39 Ill. 598.

[89] Wilson v. Smith, 10 Wend. (N. Y.) 324, Sunderland, Cas. Com. Law Pl. p. 10.

CHAPTER IV

ACTION ON THE CASE

38. Scope of Action on the Case.
39. Distinctions between Trespass and Case—Defendant's Act.
40. Plaintiff's Right.
41. Various Wrongs for Which Remedy is Case.

SCOPE OF ACTION ON THE CASE

38. An action on the case lies to recover damages—

(a) For torts not committed by force, actual or implied.

(b) For torts committed by force, actual or implied, where—

(1) The injury was not immediate, but consequential;

(2) The subject-matter affected was not tangible; or

(3) The interest in the property affected did not give the right of possession.

Case is a kind of residuary action covering non-violent wrongs. Trespass and case are supplementary in the field of tort. In general, case lies where no other form or theory of action is available, though it is sometimes concurrent with other forms. Actions on the case were allowed under the statute of Westminster II in cases similar to those covered by the established theories or forms of action.

Trespass and Case

All civil injuries at common law were divided into two kinds, the one without force or violence, as slander, libel, deceit, or the detention of goods; the other coupled with force and violence as battery or false imprisonment. This distinction of private wrongs into injuries with and without force arises from the forms of action or remedy which were available. The two great remedies which thus divided the field of tort are trespass and case.

From the nucleus of violent wrongs remedies were extended to non-violent injuries under the name of actions of trespass on the case, or simply case. The action on the case was not based on any distinct theory of wrong except the supplementary and exclusory one, covering all non-violent injuries; i. e., those not coming within the theory of trespass. It proceeded either by analogy to trespass, where there was an indirect application of force, or on the general principle of affording a remedy for every wrong, even though without violence, direct or indirect. There is thus no strict limit to this action, and it is

the authority which the judges invoked in extending liability and giving redress for such wrongs as nuisance, negligent injuries, slander, libel, deceit, detention of goods, and malicious prosecution.[1]

Development of Trespass on the Case

It will be noticed that the only action at first which would lie for torts was trespass, and that to maintain it, actual or implied violence must be shown. Up to the statute of Westminster II, therefore, there seems to have been no form of action (or original writ) to recover damages for other injuries. Under this statute the action of trespass on the case arose. It lies where a party sues for damages for any wrong or cause of complaint to which trespass will not apply. The action originated in the power given by the statute to the clerks of the chancery to frame new writs in consimili casu with writs already known. Under this statute they constructed many writs for different injuries, which were considered as in consimili casu with—that is, to bear a certain analogy to—a trespass. The new writs invented for the cases supposed to bear such analogy received the appellation of "trespass on the case" (brevia de transgressione super casum), as being founded upon the particular circumstances of the case thus requiring a remedy, and to distinguish them from the old writs of trespass; and the injuries themselves, which were the subject of such writs, were not called "trespasses," but "torts," "wrongs," or "grievances."

The writs of trespass on the case, though invented thus pro re nata, in various forms, according to the nature of the different wrongs which respectively called them forth, began, nevertheless, to be viewed as constituting collectively a new individual form of action; and this new genus took its place, by the name of "trespass on the case," among the more ancient actions of debt, covenant, trespass, etc. Such being the nature of this action, it comprises, of course, different species. There are two, however, of more frequent use than any other one, namely, assumpsit and trover. These forms are known as "trespass on the case" in assumpsit and in trover, respectively, or simply as "assumpsit" and "trover." All other actions of trespass on the case are known generally by that designation, or simply as "case," or "action on the case."

[1] Maitland, Eq. p. 360; 3 Street, Foundations Legal Liab. c. 18, p. 245.

DISTINCTIONS BETWEEN TRESPASS AND CASE—DEFENDANT'S ACT

39. The distinctions between wrongs which are included under trespass and those under case relate:

(1) To the element of force, express or implied.

(2) Whether the injury is immediate or consequential on defendant's act.

(3) Whether the liability is for trespasses of defendant's agents.

(4) Whether possession is interfered with.

As we have already seen, where a tort or civil wrong is committed with force, actual or implied, and the matter affected is tangible, as where the person or corporeal property of another is affected, and the injury is immediate, and not merely consequential, and, in the case of injury to property, the property was in possession of the person complaining; the proper remedy to recover damages for the injury is the action of trespass.[2] If, on the other hand, a tort is committed without force, actual or implied, or if, though the act was committed with force, the matter affected was not tangible, or the injury was not immediate, but consequential, or, in the case of injury to property, the plaintiff's interest in the property was only in reversion, trespass will not lie, and the proper remedy is action on the case.[3]

In most jurisdictions the old artificial distinctions between trespass and case are obsolete.[4]

[2] Scott v. Shepherd, 2 W. Bl. 892, 1 Smith, Lead. Cas. (8th Am. Ed.) 797, and notes; Leame v. Bray, 3 East, 602; Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267; Gregory v. Piper, 9 Barn. & C. 591; Reynolds v. Clarke, 2 Ld. Raym. 1399; Claflin v. Wilcox, 18 Vt. 605; Painter v. Baker, 16 Ill. 103; Barry v. Peterson, 48 Mich. 263, 12 N. W. 181; Winslow v. Beal, 6 Call (Va.) 44; ante, Chap. III.

[3] See the cases above cited. And see Frankenthal v. Camp, 55 Ill. 169; Ward v. Macauley, 4 Term R. 489; Gordon v. Harper, 7 Term R. 9; Adams v. Hemmenway, 1 Mass. 145; Barry v. Peterson, 48 Mich. 263, 12 N. W. 181; Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; Cotteral v. Cummins, 6 Serg. & R. (Pa.) 348.

[4] In some of the states in which the common-law mode of procedure is otherwise generally followed, the distinction, as to the form of action, between action on the case and trespass has been abolished, to a greater or less extent, by statute. In Illinois, for instance, it is provided: "The distinctions between the actions of 'trespass' and 'trespass on the case' are hereby abolished; and in all cases where trespass or trespass on the case has been heretofore the appropriate form of action, either of said forms may be used, as the party bringing the action may elect." Rev. St. c. 110, § 22, 36. It will be noticed that, under this statute, not only will trespass on the case lie where trespass will lie, but trespass will lie in all cases where trespass on the case would be

The Element of Force

Unless the case falls within one of the exceptions which we have already stated, and which will presently be explained more at length, an action on the case will not lie for an injury committed with force, but the party injured must sue in trespass. Trespass is excluded, however, if the harm resulted indirectly from the act of the defendant, or the injury was not to the possession of the plaintiff.

Force is either actual or implied. Assault and battery, tearing down a fence, or breaking into a house are examples of actual force, and there is no difficulty in determining that trespass, and not case, is usually the only remedy.

In many cases where there is no actual force, the law will imply force, and the effect will be the same as if there had been actual force, so far as regards the form of action. Force, as we have seen, is implied in every trespass quare clausum fregit. If a man, without right, goes upon another's land, however quietly and peaceably, the law will imply force, and trespass is the remedy, not case; and the same is true where a man's cattle stray upon another's land. Force is also implied in every false imprisonment, and the proper remedy is trespass, and not case. And where a wife, daughter, or servant is debauched, or enticed away, the law implies force, notwithstanding their consent, and the husband, parent, or master may declare in trespass.[5] And where a fire is started, and, as an immediate consequence, another's property is destroyed, there is constructive force.[6]

Generally, as we have seen, a mere nonfeasance cannot be regarded as forcible; for where there has been no act there can be no force. There is no force, for instance, in a mere detention of goods without an unlawful taking; or in neglect to repair the bank of a stream, whereby another's land is overflowed;[7] or in neglect to repair a fence where-

maintained. See, as to this statute, and its effect, Blalock v. Randall, 76 Ill. 224; St. Louis V. & T. H. R. Co. v. Town of Summit, 3 Ill. App. 155, 160. The distinction still exists for purposes of pleading in Illinois in spite of the legislative attempt to abolish it. You may take your choice of trespass or case, but must plead according to the form chosen. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108; George v. Illinois Cent. R. Co., 197 Ill. App. 152, 157. The Michigan statute (Comp. Laws Mich. vol. 3, c. 11, § 12350) is different. It allows trespass on the case wherever trespass would lie. Trespass is abolished. Cribbs v. Stiver, 181 Mich. 80, 147 N. W. 587.

[5] Chamberlain v. Hazelwood, 5 Mees. & W. 515; ante, p. 69. As we shall see, he may waive the trespass and declare in case for the consequential injury,—loss of society or services.

[6] Jordan v. Wyatt, 4 Grat. (Va.) 151, 47 Am. Dec. 720, Whittier, Cas. Com. Law Pl. p. 1.

[7] 1 Chit. Pl. 141; Hinks v. Hinks, 46 Me. 423.

by another's animal escapes on to the land of the person so negligent or elsewhere, and is injured;[8] and in these instances case, and not trespass, must be the remedy.

The Injury as Immediate or Consequential

Even though an injury may have been committed by force, case will lie, if it was not immediate, but consequential; for, to sustain trespass, as we have seen, the injury must have been immediate. An injury is considered as immediate when the act complained of, itself, and not merely a consequence of that act, occasioned it. But where the damage or injury ensued, not directly from the act complained of, it is consequential or mediate, and cannot amount to a trespass.[9]

To take an illustration already used, if a person in the act of throwing a log into the highway hits and injures a passer-by, the injury is immediate, and trespass is the proper remedy; but if, after a log has been thrown into the highway, some one, in passing, falls over it, and is injured, the injury is consequential, and the action must be in case.[10]

If a person forcibly takes another's goods, the action must generally be trespass. An action on the case, however, will also lie at the suit of a seller of goods against a person who, after the sale and before delivery, forcibly and wrongfully takes the goods, and so puts it out of the seller's power to perform his contract, so that the buyer avoids it; for the injury by the loss of the sale is consequential. Trespass would lie for the forcible and wrongful taking; case will also lie for the consequential injury, so that here the two actions are concurrent remedies.[11]

[8] Cate v. Cate, 50 N. H. 144, 9 Am. Rep. 179; Star v. Rookesby, 1 Salk. 335; Rooth v. Wilson, 1 Barn. & Ald. 59; Powell v. Salisbury, 2 Younge & J. 391; Saxton v. Bacon, 31 Vt. 540; Burke v. Daley, 82 Ill. App. 326. For failure of railroad company to fence track. Eames v. Salem & L. R. Co., 98 Mass. 560, 96 Am. Dec. 676; Holden v. Rutland & B. R. Co., 30 Vt. 297; Kankakee & S. W. R. Co. v. Fitzgerald, 17 Ill. App. 525. So for negligent failure to close gates on a private right of way. Gregoir v. Leonard, 71 Vt. 410, 45 Atl. 748, Lloyd, Cas. Civ. Proc. p. 223, 225 n.; Nirdlinger v. American Dist. Tel. Co., 240 Pa. 571, 88 Atl. 6.

[9] Adams v. Hemmenway, 1 Mass. 145; Barry v. Peterson, 48 Mich. 263, 12 N. W. 181.

[10] Leame v. Bray, 3 East. 602. Case is the remedy to recover for injury to one's vehicle from stone deposited in the highway. Green v. Belitz, 34 Mich. 512. In actions where the injury is occasioned by the forcible act of the defendant, if the injury is direct and immediate the action is trespass, while if consequential or mediate the action is case. Reed v. Guessford, 7 Boyce (Del.) 228, 105 Atl. 428.

[11] Frankenthal v. Camp, 55 Ill. 169. The only ground for reversal in this case was the selection of the wrong form of action, case instead of trespass, and the court was no doubt willing to strain a point to avoid a reversal on this barren technicality.

If a person lays rubbish so near another's wall that, as a necessary or natural consequence, some of it rolls against the wall, the injury is immediate, and the remedy is in trespass.[12]

If a blow be given to the person or property of another, the action must be trespass, and not case.[13] And if a person willfully drives his horse or carriage against another's person or property, trespass and not case is the remedy. But where, through negligent and careless driving, and not willfully, one vehicle is caused forcibly to strike another, it is held that an action on the case is sustainable for the injury, either to the vehicle or the occupant, though in such a case the injury is immediate upon the violence.[14] Trespass would also lie in such a case.[15] And in the case of an injury arising from carelessness or unskillfulness in navigating a ship or vessel, if the injury is merely attributable to negligence or want of skill, and not to willfulness, the party injured may, at his election, sue in case or trespass.[16] In these cases the negligence or unskillfulness of the defendant is treated as the cause of action when case is brought, while in trespass the act itself is the cause of action. By the weight of authority, the rule is not confined to these particular cases, but is general, that where there is an immediate injury to person or property attributable to negligence, the party injured has an election either to treat the negligence of the wrongdoer as the cause

[12] Gregory v. Piper, 9 Barn. & C. 591.

[13] In Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267, it appeared that the defendant had seized the plaintiff by the arm and swung him violently around, and let him go, and that the plaintiff, having become dizzy, involuntarily passed rapidly in the direction of a third person, and came violently in contact with him, whereupon the latter pushed him away, and he came in contact with a hook and was injured. It was held that trespass, not case, was the remedy.

[14] Williams v. Holland, 6 Car. & P. 23; Claflin v. Wilcox, 18 Vt. 605; Wilson v. Smith, 10 Wend. (N. Y.) 324; McAllister v. Hammond, 6 Cow. (N. Y.) 342; Schuer v. Veeder, 7 Blackf. (Ind.) 342; Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267; Bradford v. Ball, 38 Mich. 673; Wyant v. Crouse, 127 Mich. 158, 86 N. W. 527, 53 L. R. A. 626, Lloyd Cas. Civ. Proc. p. 217; Payne v. Smith, 4 Dana (Ky.) 497.

[15] Turner v Hawkins, 1 Bos. & P. 472; Claflin v. Wilcox, 18 Vt. 605; Wilson v. Smith, 10 Wend. (N. Y.) 324; McAllister v. Hammond, 6 Cow. (N. Y.) 342; Strohl v. Levan, 39 Pa. 177. Where an injury done to another by negligence is both direct or immediate and consequential, the party injured has an election to bring either trespass or case. Mullan v. Belbin, 130 Md. 313, 327, 100 Atl. 384.

[16] Rogers v. Imbleton, 2 Bos. & P. (N. R.) 117; Ogle v. Barnes, 8 Term R. 188; Turner v. Hawkins, 1 Bos. & P. 472; Moreton v. Hardern, 4 Barn. & C. 226; Percival v. Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210; Rathbun v. Payne, 19 Wend. (N. Y.) 399; Barnes v. Cole, 21 Wend. (N. Y.) 188.

of action, and to declare in case, or to consider the act itself as the injury, and to declare in trespass.[17]

If a person pours water directly upon another's person or land, the injury is immediate, and trespass is the proper remedy.[18] But if a person stops a water course on his own land, whereby it is prevented from flowing as usual, or if he place a spout on his own building, and in consequence thereof the water afterwards runs therefrom upon another's land or house or person, the injury is consequential, and case is the proper action.[19] Case also lies where excavations are made by a person on his own land in such a way as to cause the soil of an adjoining proprietor to fall.[20] And it lies for injury to person or property communicated by infection.[21]

If a person entices away, or seduces, or debauches another's wife, daughter, or servant, the law, as we have seen, implies force, and the husband, father, or master may sue in trespass for the injury.[22] Or he may at his election treat the loss of society or services, and not the defendant's act, as the injury, and, as that is merely consequential, sue in case.[23]

If a wild or vicious beast, or other dangerous thing, is turned loose or put in motion, and mischief immediately ensues to the person or

[17] Blin v. Campbell, 14 Johns. (N. Y.) 432; Howard v. Tyler, 46 Vt. 687; Wells v. Knight, 32 R. I. 432, 80 Atl. 16 (declaration in trespass rather than case; stone thrown by defendant's blast striking deceased while traveling on a highway, and declaration not stating whether it was due to negligence).

[18] Reynolds v. Clarke, 2 Ld. Raym. 1399.

[19] In the latter case "the flowing of the water, which was the immediate injury, was not the wrongdoer's immediate act, but only the consequence thereof, and which will not render the act itself a trespass or immediate wrong." 1 Chit. Pl. 142. See Reynolds v. Clarke, 1 Strange, 635, 2 Ld. Raym. 1399; Haward v. Bankes, 2 Burr. 1114; Arnold v. Foot, 12 Wend. (N. Y.) 330; Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; Winkler v. Meister, 40 Ill. 349; Hamilton v. Plainwell Water-Power Co., 81 Mich. 21, 45 N. W. 648.

[20] City of Pekin v. Brereton, 67 Ill. 477, 16 Am. Rep. 620. Or the party may bring trespass. Buskirk v. Strickland, 47 Mich. 389, 11 N. W. 210.

[21] Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377.

[22] Chamberlain v. Hazelwood, 5 Mees. & W. 515; Tullidge v. Wade, 3 Wils. 18. See 1 Street, Foundations Legal Liab. pp. 265, 271; 3 Street, Foundations Legal Liab. p. 266.

[23] Chamberlain v. Hazelwood, supra; Van Vacter v. McKillip, 7 Blackf. (Ind.) 578; Clough v. Tenney, 5 Greenl. (Me.) 446; Martin v. Payne, 9 Johns. (N. Y.) 387, 6 Am. Dec. 288; Ream v. Rank, 3 Serg. & R. (Pa.) 215; Wilt v. Vickers, 8 Watts (Pa.) 227; Legaux v. Feasor, 1 Yeates (Pa.) 586; Weedon v. Timbrell, 5 Term R. 361; Parker v. Elliott, 6 Munf. (Va.) 587; Van Horn v. Freeman, 6 N. J. Law, 322; Haney v. Townsend, 1 McCord (S. C.) 207; Jones v. Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98; McClure's Ex'rs v. Miller, 11 N. C. 133; Moran v. Dawes, 4 Cow. (N. Y.) 412.

property of another, the injury is immediate, and trespass, not case, is the remedy.[24] But if a vicious animal is kept with knowledge of its propensities, or a dangerous substance, like explosives or poison, is negligently left exposed, and a person is thereby injured, the remedy is in case.[25]

And where a person negligently causes the burning of another's property, as where a fire is set by sparks from a railroad company's locomotive, or where a man starts a fire on his own land and it reaches and burns adjoining property, case is the proper action.[26]

As we have seen, if a person's cattle stray on another's land and cause injury, trespass by the latter is the proper remedy.[27] If, however, the cattle got out because of the owner's neglect of his duty to repair fences, the person may treat this neglect as his cause of action, and bring case for the consequential injury;[28] or he may sue in trespass as in other cases, treating the trespass as his cause of action.[29]

Generally the remedy against a master for injuries occasioned by the wrong of his servant must be in case, even though, against the servant, it might for the same act be trespass;[30] but, under some circumstances, the master also may be liable in trespass.[31] Where an injury arises

[24] Leame v. Bray, 3 East, 593; Mason v. Keeling, 12 Mod. 333; Beckwith v. Shordike, 4 Burr. 2092; Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99. Thus, where a lighted squib was thrown in a market place, and, being thrown about by others in self defense, ultimately injured a person, the injury was considered as the immediate act of the first thrower, and a trespass, the new direction and new force given it by the other persons not being a new trespass, but merely a continuation of the original force. Scott v. Shepherd, 3 Wils. 403, 2 W. Bl. 892, 1 Smith, Lead. Cas. (8th Am. Ed.) 707.

[25] Mason v. Keeling, 12 Mod. 333; Sarch v. Blackburn, 4 Car. & P. 297; Stumps v. Kelley, 22 Ill. 140; Durden v. Barnett, 7 Ala. 169.

[26] Barnard v. Poor, 21 Pick. (Mass.) 378; Burton v. McClellan, 2 Scam. (Ill.) 434; Johnson v. Barber, 5 Gilman, 425, 50 Am. Dec. 416; Armstrong v. Cooley, 5 Gilman, 509; Jordan v. Wyatt, 4 Grat. (Va.) 151, 47 Am. Dec. 720.

[27] Wells v. Howell, 19 Johns. (N. Y.) 385.

[28] Star v. Rookesby, 1 Salk. 335. And see Mason v. Keeling, 12 Mod. 335; Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99.

[29] Star v. Rookesby, supra; Wells v. Howell, supra.

[30] McManus v. Crickett, 1 East, 108; Havens v. Hartford & N. H. R. Co., 28 Conn. 69; Broughton v. Whallon, 8 Wend. (N. Y.) 474; Arnsmith v. Temple, 11 Ill. App. 39; Illinois Cent. R. Co. v. Reedy, 17 Ill. 580; Toledo W. & W. R. Co. v. Harmon, 47 Ill. 298, 300, 95 Am. Dec. 489. What the servant does in the course of business without directions is not the master's act, but the latter is liable on the principle of respondeat superior, a kind of insurance obligation to answer for the acts of the servant.

[31] Gregory v. Piper, 9 Barn. & C. 591; Chicago & N. W. v. Peacock, 48 Ill. 253 (trespass against railroad company when conductor forcibly expels passenger from cars). Cf. St. Louis A. & C. R. Co. v. Dalby, 19 Ill. 353, 375.

from the want of care or negligence of the servant, the remedy against the master is in case;[32] but if it occurs as the necessary or natural and probable consequence of an act of the servant, ordered expressly or impliedly by the master, then the act is the master's and, if the act was forcible and the injury immediate, the remedy is trespass.[33]

When an injury is done to another maliciously, by the process of a court, as in the case of malicious arrest, malicious prosecution of a criminal charge, malicious attachment of goods, etc., case, and not trespass, is the proper remedy, if the process was regular and the court had jurisdiction; for there has been no trespass,[34]—though it is said that either case or trespass will lie if the process was both malicious and unfounded, even though the court had jurisdiction.[35] If the process or proceeding was irregular and void, case will not lie, but the action must be trespass.[36]

Intangible Property or Rights

As we have shown, in treating of trespass, where the property or right injured is intangible, as the right to reputation, or health and comfort, or incorporeal real property, the injury can never be considered as committed with force, however malicious and however contrived, for the matter injured cannot possibly be affected immediately by any substance. Case, therefore, and not trespass, must be the remedy.[37] An action on the case is the remedy for libel or slander;[38] for injury to health or comfort from a nuisance;[39] for obstructing a private

[32] Moreton v. Hardern, 4 Barn. & C. 223; Johnson v. Castleman, 2 Dana (Ky.) 378; Barnes v. Hurd, 11 Mass. 57; Wright v. Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

[33] Illinois Cent. R. Co. v. Reedy, 17 Ill. 580.

[34] 1 Chit. Pl. 149; Belk v. Broadbent, 3 Term. R. 185; Hayden v. Shed, 11 Mass. 500; Beaty v. Perkins, 6 Wend. (N. Y.) 382; Spalds v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Luddington v. Peck, 2 Conn. 700; Hamilton v. Smith, 39 Mich. 222; Warfield v. Walter, 11 Gill. & J. (Md.) 80; Barnett v. Reed, 51 Pa. 190, 88 Am. Dec. 574; Owens v. Starr, 2 Litt. (Ky.) 234; Kennedy v. Barnett, 64 Pa. 141; Joseph v. Henderson, 95 Ala. 213, 10 South. 843. See Hobbs v. Ray, 18 R. I. 84, 25 Atl. 604; Gay v. De Werff, 17 Ill. App. 417, 420; Markey v. Griffin, 109 Ill. App. 212, 219.

[35] Goslin v. Wilcock, 2 Wils. 302; Sheppard v. Furniss, 19 Ala. 760; Beaty v. Perkins, 6 Wend. (N. Y.) 382; Dixon v Watkins, 9 Ark. 139; Lovier v. Gilpin, 6 Dana (Ky.) 321.

[36] Morgan v. Hughes, 2 Term R. 225; Kennedy v. Terrill, Hardin (Ky.) 490; Muse v. Vidal, 6 Munf. (Va.) 27; Varley v. Zahn, 11 Serg. & R. (Pa.) 185; Berry v. Hamill, 12 Serg. & R. (Pa.) 210.

[37] Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. 173.

[38] Pollard v. Lyon, 91 U. S. 220, 23 L. Ed. 308.

[39] Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392.

right of way,[40] or a public highway,[41] or navigable river,[42] and causing special damages to an individual; or for interference with any other easement, as by obstructing light and air through ancient windows by an erection on adjoining land.[43] Case is also the proper remedy for diversion of, or other injuries to, water courses or waters, where the plaintiff is not the owner of the soil, but is merely entitled to the use of the water.[44] And it will lie for infringing a copyright, patent, or trade-mark,[45] though a bill in equity for an injunction and an accounting is the usual remedy.

If the injury is to corporeal property, and is immediate, and committed with force, case will not lie merely because that property was the means by which an incorporeal right was enjoyed. Thus, where, by legislative authority, a dam has been erected and maintained in a navigable river in connection with a mill, and the dam is wrongfully cut away by another, case will not lie on the ground that an incorporeal right has been injured. "The ground on which the form of action was endeavored to be maintained," it was said in an action on the case for such a wrong, "was that the right to erect the dam, for an injury to which the action was brought, was a franchise, and incorporeal hereditament, and that for an injury to property, or right of that description, trespass will not lie. The principle here adverted to does not apply to the case. The right to erect the dam is a franchise; it is conferred by the legislature, the sovereign power; it is an incorporeal right, but the dam itself is not a franchise, nor is it incorporeal. The right to keep a ferry, or to erect a bridge, or to navigate a particular river or lake by steam, may be a franchise; but the bridge itself, or the boats and machinery employed in the ferry, or the navigation of the river, may, notwithstanding, be the subjects of trespass. * * * So far as the incorporeal right is invaded, the redress is by action on the

[40] Wright v. Freeman, 5 Har. & J. (Md.) 467; Osborne v. Butcher, 26 N. J. Law, 308; Jones v. Park, 31 Leg. Int. (Pa.) 372; Okeson v. Patterson, 20 Pa. 22; Lansing v. Wiswall, 5 Denio (N. Y.) 213; Lambert v. Hoke, 14 Johns. (N. Y.) 383; Wilson v. Wilson, 2 Vt. 68.

[41] Greusly v. Codling, 9 Moore, 489; City of Pekin v. Brereton, 67 Ill. 477, 16 Am. Rep. 629; Lansing v. Wiswall, supra; Wilson v. Wilson, 2 Vt. 68.

[42] Rose v. Miles, 4 Maule & S. 101; Bellant v. Brown, 78 Mich. 291, 44 N. W. 326.

[43] Shadwell v. Hutchinson, 2 Barn. & Adol. 97. And see Blunt v. McCormick, 3 Denio (N. Y.) 283.

[44] Williams v. Morland, 2 Barn. & C. 910; Lindeman v. Lindsey, 69 Pa. 93, 8 Am. Rep. 219; Strickler v. Todd, 10 Serg. & R. (Pa.) 63, 13 Am. Dec. 649. See Ottawa Gaslight & Coke Co. v. Thompson, 39 Ill. 598; Shafer v. Smith, 7 Har. & J. (Md.) 67.

[45] Clementi v. Goulding, 11 East, 244; Roworth v. Wilkes, 1 Camp. 98; Minter v. Mower, 6 Adol. & El. 735; Perry v. Skinner, 2 Mees. & W. 471.

case. But when visible, tangible, corporeal property is injured, if the injury be direct, immediate, and willful, trespass is the proper form of action, although that property may be connected with, or be the means by which an incorporeal right is enjoyed." [46]

PLAINTIFF'S RIGHT

40. Case rather than trespass lies for injuries to intangible personal rights, such as reputation, or incorporeal property rights, such as reversions and easements.

Reversionary Right of Bailor

Under the common-law forms of action, a bailor could not ordinarily bring an action of trespass, trover, or detinue, these actions being founded upon a violation of possession or upon an immediate right of possession.[47] Where any permanent injury is done to the chattel, however, the bailor may maintain an action on the case against a third party for the injury to his reversionary interest.[48] The bailor has also concurrent possessory remedies with the bailee, if the bailment is revocable by him at his pleasure as in the case of a gratuitous loan of a chaise.[49]

VARIOUS WRONGS FOR WHICH REMEDY IS CASE

41. Case lies for certain wrongs of negligence and misfeasance, which may be committed in the course of performance of a contract, and also for the nonperformance of certain obligations prescribed by law, such as those incident to bailments and public callings; also for breach of warranty, neglect of official duty, and for certain statutory liabilities.

Torts in Connection with Contract

Mere breach of contract, without more, will not sustain an action on the case, but the remedy is assumpsit, covenant, or debt.[50] But

[46] Wilson v. Smith, 10 Wend. (N. Y.) 324.

[47] Wilby v. Bower (N. P. 1649) 1 Gray's Cas. Property (2d Ed.) p. 241; Wilson v. Martin, 40 N. H. 88, Gray's Cas. p. 249; Gordon v. Harper (K. B. 1796) 7 T. R. 9, Gray's Cas. p. 242.

[48] Hall v. Pickard (K. B. 1812) 3 Camp. 187, 1 Gray's Cas. 246; New York, L. E. & W. R. Co. v. New Jersey Electric Ry. Co., 60 N. J. Law, 338, 38 Atl. 828, 43 L. R. A. 849; Gordon v. Harper, 7 Term. R. 9; Ward v. Macauley, 4 Term R. 489; Ayer v. Bartlett, 9 Pick. (Mass.) 156; Buckl v. Coue, 25 Fla. 1, 6 South. 160.

[49] Lotan v. Cross (N. P. 1810) 2 Camp. 464, 1 Gray's Cas. p. 245.

[50] Potter v. Brown, 35 Mich. 274; Masters v. Stratton, 7 Hill (N. Y.) 101.

often one of the parties to a contract may commit a tort in the execution of it, or in its nonperformance, and case may lie for the injury.

It lies against attorneys or other agents for neglect or other breach of duty, or misfeasance in the conduct of a cause, or other business,[51] though it is more usual to declare in assumpsit. Assumpsit is the usual remedy for neglect or breach of duty against bailees, as against carriers, wharfingers, warehousemen, and others having the use or care of personal property, whose liability is founded on the common law as well as upon contract; but they are also liable in case for an injury resulting from their neglect or breach of duty in the course of their employment.[52] For any nonfeasance by a party in a public employment which he professes, an action on the case will lie by the party injured, as where a common carrier fails to perform its common-law obligation to serve all who apply.[53]

Even though there may be an express contract, still, if a common-law duty results from the facts, the party may be sued ex delicto in case for any neglect or misfeasance in performing it.[54] "If the

[51] Ashley v. Root, 4 Allen (Mass.) 504; Dearborn v. Dearborn, 15 Mass. 316; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Varnum v. Martin, 15 Pick. (Mass.) 440; Walker v. Goodman, 21 Ala. 647; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Pennington's Ex'rs v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Holmes v. Peck, 1 R. I. 242; Crooker v. Hutchinson, 1 Vt. 73; Lynch v. Com., to Use of Barton, 16 Serg. & R. 368, 16 Am. Dec. 582; Shreeve v. Adams, 6 Phila. (Pa.) 260; Coopwood v. Bolton, 26 Miss. 212; Church v. Mumford, 11 Johns. (N. Y.) 479. So case lies for negligence by a surgeon in performing an operation. Cadwell v. Farrell, 28 Ill. 438.

[52] Corbett v. Packington, 6 Barn. & C. 268; Pozzi v. Shipton, 8 Adol. & E. 963; Southern Exp. Co. v. McVeigh, 20 Grat. (Va.) 264; Warner v. Dunnavan, 23 Ill. 380; Wabash, St. L. & P. Ry. Co. v. McCasland, 11 Ill. App. 491; Chicago, R. I. & P. Ry. Co. v. Barrett, 16 Ill. App. 17; School Dist. in Medfield v. Boston, H. & E. R. Co., 102 Mass. 552, 3 Am. Rep. 502; Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Bank of Orange County v. Brown, 3 Wend. (N. Y.) 158; Lockwood v. Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; Bell v. Wood, 1 Dana (Ky.) 147. Case is a proper remedy against one who has hired a horse for ill usage of it. Rotch v. Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414.

[53] Southern Express Co. v. McVeigh, 20 Grat. (Va.) 264, Whittier Cas. Com. Law Pl. p. 100; Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688. So where the manufacturer of an article negligently furnishes to a purchaser something different from what he purports to furnish, as a defective rope, whereby the purchaser is injured, case will lie. Brown v. Edgington, 2 Man. & G. 279.

[54] Dickson v. Clifton, 2 Wils. 319; Burnett v. Lynch, 5 Barn. & C. 605; Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Kankakee & S. W. R. Co. v. Fitzgerald, 17 Ill. App. 525. Where a person engaged in lending money on real estate security solicits money to loan, and obtains it on his promise to take security by first mortgage on property in value double the sum loaned, and takes a second mortgage unknown to his principal, where-

contract be laid as inducement only, it seems that case for an act, in its nature a tort or injury, afterwards committed in breach of the contract, may often be adopted." [55] Thus, case will lie for not accounting for, and for converting to his own use, bills delivered to a person to be discounted, or the proceeds of such bills.[56] And a count in case stating that the plaintiff, being possessed of some old materials, retained the defendant to perform the carpenter work on a building, and to use those materials, but that the defendant, instead of using them, made use of new materials, thereby increasing the expense, was sustained.[57]

Though covenant or assumpsit is a concurrent remedy, case will lie for a false warranty on the sale of land or goods.[58] And case is the remedy for false representations (required by the statute of frauds to be in writing) as to the credit of a person.[59] It is also the proper remedy for any other fraud or deceit independently of and without relation to any contract between the parties,[60] and for fraudulent

by the money is lost, his principal is not limited to an action of assumpsit for the breach of contract, but may sue in case. Shipherd v. Field, 70 Ill. 438. For the diversion of a stream of water, the use of which is directly granted by contract under seal, case is a proper remedy. The party need not bring covenant on the agreement. Lindeman v. Lindsey, 69 Pa. 93, 8 Am. Rep. 210. And see Strickler v. Todd, 10 Serg. & R. (Pa.) 63, 13 Am. Dec. 649. Where there is a positive duty created by implication of law independent of contract, though arising out of a relation or state of facts created by contract, an action on the case as for a tort will lie for violation or disregard of that duty. Flessher v. Carstens Packing Co., 93 Wash. 48, 160 Pac. 14. See Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 79 N. E. 503, 12 L. R. A. 924; Tuttle v. Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465; 8 Columbia Law Rev. 666.

[55] 1 Chit. Pl. 152; Mast v. Goodson, 3 Wils. 348; Corbett v. Packington, 6 Barn. & C. 273; Burnett v. Lynch, 5 Barn. & C. 609. See, generally, as to actions on the case ex delicto, where there has been a contract: Vasse v. Smith, 6 Cranch, 227, 3 L. Ed. 207; Stoyel v. Westcott, 2 Day (Conn.) 422, 2 Am. Dec. 109; Bulkley v. Storer, 2 Day (Conn.) 531; Humiston v. Smith, 22 Conn. 19; Emigh v. Pittsburg, Ft. W. & C. R. Co., 4 Biss. 114, Fed. Cas. No. 4,449; Philadelphia W. & B. R. Co. v. Constable, 39 Md. 155.

[56] 1 Chit. Pl. 152; Samuel v. Judin, 6 East, 333; Smith v. White, 6 Bing. (N. C.) 218.

[57] Elsee v. Gatward, 5 Term R. 143.

[58] Stuart v. Wilkins, 1 Doug. 21; Williamson v. Allison, 2 East, 446; Ward v. Wiman, 17 Wend. (N. Y.) 193; Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; Mahurin v. Harding, 28 N. H. 128, 59 Am. Dec. 401; Evertson's Ex'rs v. Miles, 6 Johns. (N. Y.) 138; Carter v. Glass, 44 Mich. 154, 6 N. W. 200, 38 Am. Rep. 240; Beebe v. Knapp, 28 Mich. 53; 3 Williston, Cont. § 1505.

[59] Upton v. Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210; Russell v. Clark's Ex'rs, 7 Cranch, 92, 3 L. Ed. 271.

[60] Pasley v. Freeman, 3 Term R. 51; Adamson v. Jarvis, 4 Bing. 73; Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; Barney v. Dewey, 13 Johns. (N. Y.) 226, 7 Am. Dec. 372; Wardell v. Fosdick, 13 Johns. (N. Y.) 325,

representations, not introduced into a written contract between the parties respecting the subject-matter of the representations.[61]

If goods are obtained on credit through a fraudulent contract, the proper remedy is case (or trover), at least before the expiration of the credit; for if, before that time, assumpsit is brought to recover the price, it is a recognition and affirmance of the contract, and it may be successfully met by the defense that the term of credit has not expired.[62]

Case will lie against a surgeon or agent to recover damages for improper treatment, or for want of skill or care, though there is a concurrent remedy by assumpsit on the contract.[63]

A reversioner may maintain an action on the case against his tenant or against a stranger for commissive or willful waste, to the injury of the reversion; and it makes no difference that the tenant has covenanted not to commit waste, for the remedy on the covenant is merely concurrent, and not exclusive.[64] As to whether the action will lie against a tenant for permissive waste (that is, a neglect to repair), there is a conflict of opinion. It seems that it does not lie, and that the only remedy is on the covenants in the lease.[65]

Neglect of Official Duty

Case is a proper remedy against an officer for failure to perform his duty, whereby the plaintiff has sustained an injury (though an action ex contractu on his bond may be a concurrent remedy), as, for not levying an execution, or for not returning it, or for not taking a replevin bond, or for taking an insufficient bond, etc.;[66] and it will lie

7 Am. Dec. 383; Monell v. Colden, 13 Johns. (N. Y.) 395, 7 Am. Dec. 390; 1 Street, Foundations Legal Liab. p. 375.

[61] Culver v. Avery, supra; Wardell v. Fosdick, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383; Hallock v. Powell, 2 Caines (N. Y.) 216; Applebee v. Rumery, 28 Ill. 280; Brumbach v. Flower, 20 Ill. App. 219; Peck v. Brewer, 48 Ill. 54; Walsh v. Sisson, 49 Mich. 423, 13 N. W. 802; Burns v. Dockray, 156 Mass. 135, 30 N. E. 551.

[62] Ferguson v. Carrington, 9 Barn. & C. 59; Kellogg v. Turple, 93 Ill. 265, 34 Am. Rep. 163. See 3 Williston, Cont. § 1525. In some jurisdictions, however immediate recovery of the price is allowed. Heilbronn v. Herzog, 165 N. Y. 98, 58 N. E. 759.

[63] Seare v. Prentice, 8 East, 348; Gladwell v. Steggall, 5 Bing. (N. C.) 733.

[64] 1 Saund. 323b; 2 Saund. 252b; 1 Chit. Pl. 158; Short v. Wilson, 13 Johns. (N. Y.) 33; Kinlyside v. Thornton, 2 W. Bl. 1111; 1 Chit. Pl. 158. The tenant's remedy against a stranger is trespass. Attersoll v. Stevens, 1 Taunt. 194; 1 Chit. Pl. 158, note b.

[65] 1 Chit. Pl. 159; Gibson v. Wells, 1 Bos. & P. (N. R.) 290; Herne v. Bembow, 4 Taunt. 764; Jones v. Hill, 7 Taunt. 392. But it seems to lie against an assignee of the lease. Burnett v. Lynch, 5 Barn. & C. 589.

[66] Failure to replevy goods. Sahourin v. Marshall, 3 Barn. & Adol. 441. For neglect to deliver possession under a writ of habere facias possessionem.

against an officer for making a false return;[67] or against an election officer for refusal to allow a vote;[68] and, generally, against an officer for any neglect of duty.[69]

Statutory Liability

Whenever a statute prohibits an injury to an individual, or enacts that he shall recover a penalty or damages for such injury, and is silent as to the form of remedy, an action on the case (and in some cases other actions) will lie.[70] And if a statute gives a remedy in the affirmative, without a negative, express or implied, for a matter which was actionable in case at common law, the party may still sue at common law.[71] But where a statute gives a new right, or creates a new liability, and prescribes a particular remedy, or if it prescribes a new remedy to enforce a common-law right, and expressly or impliedly excludes the common-law remedy, the statutory remedy must be pursued.[72]

Mason v. Paynter, 1 Gale & D. 381. For not taking a replevin bond, or for taking an insufficient replevin or appeal bond, etc. 1 Chit. Pl. 156; Billings v. Lafferty, 31 Ill. 318.

[67] Heenan v. Evans, 1 Dowl. (N. S.) 204; Wintle v. Freeman, 11 Adol. & El. 539.

[68] Keith v. Howard, 24 Pick. (Mass.) 292; Gates v. Neal, 23 Pick. (Mass.) 308. Or against taxing officer for maliciously failing to tax a person, causing him to lose his right to vote. Griffin v. Rising, 11 Metc. (Mass.) 339.

[69] Spear v. Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 53; Abbott v. Kimball, 19 Vt. 551, 47 Am. Dec. 708; Jacobs v. Humphrey, 2 Cromp. & M. 413; Aireton v. Davis, 9 Bing. 741.

[70] 1 Chit. Pl. 160; Case of The Marshalsea, 10 Coke, 75b; President & College of Physicians v. Salmon, 2 Salk. 451; Friend v. Dunks, 37 Mich. 25; Id., 39 Mich. 733.

[71] Seidmore v. Smith, 13 Johns. (N. Y.) 322; Almy v. Harris, 5 Johns. (N. Y.) 175; Adams v. Richardson, 43 N. H. 212; Coxe v. Robbins, 9 N. J. Law, 384; Bearcamp River Co. v. Woodman, 2 Greenl. (Me.) 404; Proprietors of Fryeburg Canal Co. v. Frye, 5 Greenl. (Me.) 38.

[72] Almy v. Harris, 5 Johns. (N. Y.) 175; Babb v. Mackey, 10 Wis. 371; City of Camden v. Allen, 26 N. J. Law, 398; Weller v. Weyand, 2 Grant, Cas. (Pa.) 103; Brown v. White Deer Tp., 27 Pa. 109; Henniker v. Contoocook Val. R. R. Co., 29 N. H. 146. Thus, where a statute authorizes the taking or injuring of private property for a public use, under the right of eminent domain, and prescribes the remedy by which the owner shall obtain redress, that remedy must be pursued. Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466; Proprietors of Sudbury Meadows v. Proprietors of Middlesex Canal, 23 Pick. (Mass.) 36; Hazen v. Essex Co., 12 Cush. (Mass.) 475. But if the damage done is not incident to the exercise of the power given, but is due to an improper exercise of the power, case or trespass will lie. Mellen v. Western R. Corp., 4 Gray (Mass.) 301; Thompson v. Moore, 2 Allen (Mass.) 350; Detroit Post Co. v. McArthur, 16 Mich. 447; Thomasson v. Agnew, 24 Miss. 93.

CHAPTER V

ACTION OF TROVER

42. Scope of Trover.
43. What Kinds of Property may be Converted.
44. Right and Title of the Plaintiff.
45. Wrongful Act of Conversion.

SCOPE OF TROVER

42. The action of trover, or trover and conversion, lies to recover damages for the conversion by the defendant to his own use of specific personal property, of which the plaintiff was entitled to the immediate possession.

The object of the action is the recovery of the value of the property as damages for its conversion, and not the recovery of the property itself.

In its origin, the action of trover, or trover and conversion, was an action of trespass on the case to recover damages against a person who had found goods, and refused to deliver them on demand to the owner, but converted them to his own use.[1] As the action of detinue was subject to disadvantages (the defenses of law wager, for instance), the action of trover, by a fiction of law—that is, by alleging a fictitious finding—was at length allowed against any person who obtained possession of the personal property of another by any means whatever, and sold or used it without the consent of the owner, or refused to deliver it when demanded. The injury lies in the conversion or misappropriation of the goods, which is the gist of the action, and the statement of the finding, or trover, is not material or traversable.[2]

The object of the action is not the recovery of the property itself—that can be recovered only by detinue or replevin—but to recover the value of the property.[3] Lord Mansfield said: "Trover is in form a tort, but in substance an action to try property. * * * An action of trover * * * is founded on property."

It is thus a substitute for a property action to recover the possession. It makes the converter a compulsory purchaser.[4]

A trespass is compensated for by damages measured by the actual harm done to the thing or the use lost; but a conversion is compensated by payment of the entire value of the thing itself.

The manner in which the defendant may have obtained possession of the property is not material. The form of action supposes that the possession may have been obtained lawfully—that is, by finding—but it lies as well where possession was obtained by a trespass. In such a case, however, by bringing trover the defendant waives the trespass. No damages are recoverable for the act of taking, but all must be for the act of converting.[5]

[1] The action was therefore called "trover" from the French "trouver"—to find. Harper v. Scott, 63 Ill. App. 401; Hull v. Southworth (1830) 5 Wend. (N. Y.) 265. For the history of this action, see J. B. Ames, 11 Harv. Law Rev. 277, 374; 3 Select Essays in Anglo-American Legal Hist., p. 417. See 38 Cyc. 1997.

[2] 1 Chit. Pl. 164; 3 Bl. Comm. 152; Mills v. Graham, 1 Bos. & P. (N. R.) 140; 3 Street, Foundations Legal Liab., p. 164.

[3] 1 Chit. Pl. 164; Mercer v. Jones, 3 Camp. 477; Greening v. Wilkinson, 1 Car. & P. 626; Keyworth v. Hill, 3 Barn. & Ald. 687.

[4] Hambly v. Trott (1776) 1 Cowp. 371. See, also, Langdell, Eq. Pl. § 115, 3 Street, Foundations Legal Liab., pp. 156, 157; Pollock, Torts (11th Ed.) App. A. p. 575.

[5] 1 Chit. Pl. 164, 165.

WHAT KINDS OF PROPERTY MAY BE CONVERTED

43. Trover may be maintained for all kinds of personal property, including legal documents, but not where articles are severed from land by an adverse possessor, at least until recovery of possession of the land. It lies for the misappropriation of specific money, but not for breach of an obligation to pay where there is no duty to return specific money.

The action of trover is confined to the conversion of personal property. It does not lie, therefore, for the appropriation of fixtures still annexed[6] nor for any injuries to land or other real property, even by a severance of what properly belongs to the freehold, unless there has also been an asportation.[7] If, however, after trees, earth, minerals, buildings, or other fixtures have been severed from the freehold, they are carried away, the property is thereby converted into personalty, and

[6] Leman v. Best, 30 Ill. App. 323; Greeley v. Stilson, 27 Mich. 153; Knowlton v. Johnson, 37 Mich. 47; Morrison v. Berry, 42 Mich. 389, 4 N. W. 731, 36 Am. Rep. 446; Bracelin v. McLaren, 59 Mich. 327, 26 N. W. 533; Overton v. Williston, 31 Pa. 155; Darrah v. Baird, 101 Pa. 270; Brown v. Wallis, 115 Mass. 156.

[7] Boraston v. Green, 16 East, 77, 79; Lehr v. Taylor, 90 Pa. 381. See, however, Sanderson v. Haverstick, 8 Pa. 204, where it was held that the action would lie for cutting timber without carrying it away.

trover will lie.[8] It must be remembered that not everything that is fastened to real property thereby becomes real.[9] A building erected under an agreement that it shall remain personal property, remains so, and trover will lie for its conversion.[10] So, as between landlord and tenant, mortgagor and mortgagee, vendor and purchaser, etc., property may remain personal though annexed to the freehold, and if it is personal, trover is the proper remedy for its conversion.[11]

It may be stated here that the action does not lie for stone or gravel dug from land or crops or other articles severed, where the defendant has the actual adverse possession of the land, and claims title to it.[12] The owner must resort to his remedy for the recovery of the land itself. Some cases allow the personal actions for things severed after

[8] Weeton v. Woodcock, 7 Mees. & W. 14; Gordon v. Harper, 7 Term R 13; Pitt v. Shew, 4 Barn. & Ald. 206; Wadleigh v. Janvrin, 41 N. H. 520, 77 Am. Dec. 780; Nelson v. Burt, 15 Mass. 204; Greeley v. Stilson, 27 Mich. 153; Altes v. Hinckler, 86 Ill. 275, 85 Am. Dec. 407. As where growing corn or any other crop is cut and carried away and then converted. Nelson v. Burt, 15 Mass. 204; Altes v. Hinckler, 36 Ill. 275, 85 Am. Dec. 407; Simpkins v. Rogers, 15 Ill. 397; Weldon v. Lytle, 53 Mich. 1, 18 N. W. 533; or where trees have been cut and carried away and made into charcoal, or otherwise converted. Riddle v. Driver, 12 Ala. 590; Greeley v. Stilson, 27 Mich. 153; Final v. Backus, 18 Mich. 218; Mooers v. Wait, 3 Wend. (N. Y.) 104, 20 Am. Dec. 667; Whidden v. Seelye, 40 Me. 247, 63 Am. Dec. 661; or where mineral or earth or manure is dug and taken away, Higgon v. Mortimer, 6 Car. & P. 616; Riley v. Boston Water Power Co., 11 Cush. (Mass.) 11; Daniels v. Pond, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; Goodrich v. Jones, 2 Hill (N. Y.) 142; Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617. Growing grain eaten by trespassing cattle cannot be said to have been converted by the owner of the cattle. The remedy is trespass. Smith v. Archer, 53 Ill. 241. As to manure, see Pinkham v. Gear, 3 N. H. 484; Middlebrook v. Corwin, 15 Wend. (N. Y.) 169; Anderson v. Todesco, 214 Mass. 102, 100 N. E. 1008.

[9] Where machinery is sold to be set up in a mill, but with a stipulation that title shall not pass until it is paid for, and without the vendor's knowledge it is so attached to the realty as to make it, under ordinary circumstances, a fixture, and before it is paid for the property is sold to some one with notice of the vendor's claim, trover will lie for conversion of the machinery. Ingersoll v. Barnes, 47 Mich. 104, 10 N. W. 127.

[10] Smith v. Benson, 1 Hill (N. Y.) 176; Pullen v. Bell, 40 Me. 314; Hinckley v. Baxter, 13 Allen (Mass.) 139; Davis v. Taylor, 41 Ill. 405.

[11] Elwes v. Maw, 3 East, 53; Davis v. Jones, 2 Barn. & Ald. 165. Where the landlord takes possession before the end of the term, without the tenant's consent, and prevents him from removing his personal property, the tenant can maintain trover, though the property is attached to the realty. Watts v. Lehman, 107 Pa. 106.

[12] Mather v. Ministers of Trinity Church, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663; Sunderland, Cas. Com. Law Pl. p. 55, Lloyd, Cas. Civ. Proc. p. 237; Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N. E. 4; Bethea v. Jeffres, 126 Ark. 194, 189 S. W. 606, L. R. A. 1918A, 549; 5 Minn. Law Rev., 155, note.

the recovery of possession of the land, but the normal remedy after ejectment is a claim for damages by way of mesne profits.

It is also necessary, in order to maintain this action, that the plaintiff shall have the right to some specific property. The action will lie for so many pieces of money taken and converted by the defendant,[13] but it will not lie for money had and received generally.[14]

The fact that the plaintiff's interest in the property is in common will not defeat the action. It will lie for an undivided interest in a specific chattel or in a mass.[15]

The conversion of any specific personal property of any sort whatever will give rise to an action of trover.[16] It will lie for the conversion of any valuable paper, as an insurance policy, promissory notes, bonds, certificates of stock, title deeds, copies of records, etc.[17]

RIGHT AND TITLE OF THE PLAINTIFF

44. The plaintiff must have the right to the immediate possession. A defrauded seller may regain his right of possession by election to rescind the sale. The right of possession may arise from bailment or from bare possession itself. A mere servant has custody, not possession. The right of possession is sometimes spoken of as constructive possession.

Title and Possession to Support Trover

In order to maintain this form of action, it is commonly said that the plaintiff must, at the time of the conversion, have had a property, either general or special, in the chattel, and also the actual possession, or the

[13] 1 Chit. Pl. 166; Jackson v. Anderson, 4 Taunt. 24; Bowers, Conversion, § 16.

[14] Orton v. Butler, 5 Barn. & Ald. 652; Royce v. Oakes, 20 R. I. 252, 38 Atl. 371, Whittier, Cas. Com. Law Pl. pp. 78, 199.

[15] Watson v. King, 4 Camp. 272; German Nat. Bank of Chicago v. Meadowcroft, 4 Ill. App. 630, Id., 95 Ill. 124, 35 Am. Rep. 137.

[16] For animals ferae naturae converted after being tamed or killed. Amory v. Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316.

[17] 1 Chat. Pl. 167; Hardw. 111; Atkinson v. Baker, 4 Term R. 231; Towle v. Lovet, 6 Mass. 394; Jarvis v. Rogers, 15 Mass. 389; Kingman v. Pierce, 17 Mass. 247; Day v. Whitney, 1 Pick. (Mass.) 503; Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Chickering v. Raymond, 15 Ill. 362; Rose v. Lewis, 10 Mich. 483; Morton v. Preston, 18 Mich. 60, 100 Am. Dec. 146; Daggett v. Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91; Hicks v. Lyle, 46 Mich. 488, 9 N. W. 529; Brown v. St. Charles, 66 Mich. 71, 32 N. W. 926; Barnum v. Stone, 27 Mich. 332; Lewis v. Shortledge, 1 Wkly. Notes Cas. (Pa.) 507. As to conversion of records, see Inhabitants of First Parish in Sudbury v. Stearns, 21 Pick. (Mass.) 148. Contra, as to shares

right to the immediate possession.[18] "Special property" may arise from a bailment or even from bare possession. The immediate right of possession as against the wrongdoer is all the property right necessary.

It is sufficient that the plaintiff at the time of the conversion had the right to immediate possession, arising either from the actual possession or from title of any sort.[19]

If goods are obtained by fraud, the vendor may avoid the sale, and bring trover against the vendee, at least after a demand and refusal to return the goods, and, by the weight of authority, without a previous demand.[20] It must be borne in mind, however, that if the contract is affirmed, with knowledge of the fraud, by bringing assumpsit or otherwise, the property passes irrevocably, and therefore trover will not lie.[21]

A bailee or any person in possession of goods may maintain trover

of bank stock, as contrasted with the certificates of stock. Sewall v. Lancaster Bank, 17 Serg. & R. (Pa.) 285; Neiler v. Kelley, 69 Pa. 403, Sunderland. Cas. Com. Law Pl. p. 56.

[18] Eisendrath v. Knauer, 64 Ill. 396, 401; Poole v. Symonds, 1 N. H. 289, 8 Am. Dec. 71, Sunderland, Cas. Com. Law Pl. p. 47; Swift v. Moseley, 10 Vt. 208, 33 Am. Dec. 197, Whittier, Cas. Com. Law Pl. p. 189.

[19] Bloxam v. Sanders, 4 Barn. & C. 941; Hotchkiss v. McVickar, 12 Johns. (N. Y.) 403; Stephenson v. Little, 10 Mich. 433; Hance v. Tittabawassee Boom Co., 70 Mich. 227, 38 N. W. 228; Chickering v. Raymond, 15 Ill. 362; Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206; Owens v. Weedman, 82 Ill. 409; Glaze v. McMillion, 7 Port. (Ala.) 279; Purdy v. McCullough, 3 Pa. 466; Traylor v. Horrall, 4 Blackf. (Ind.) 317; Barton v. Dunning, 6 Blackf. (Ind.) 209; Castor v. McShaffery, 48 Pa. 437; Lewis v. Mobley, 20 N. C. 467, 34 Am. Dec. 379; Ribble v. Lawrence, 51 Mich. 569, 17 N. W. 60; Dillenback v. Jerome, 7 Cow. (N. Y.) 294; Caldwell v. Cowan, 9 Yerg. (Tenn.) 262; Dehow v. Colfax, 10 N. J. Law, 128. An equitable right will not support the action. Northern Pac. R. Co. v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513. A statute giving the lessor a lien on crops grown on the demised land does not vest him with such title thereto as to enable him to bring trover for the crops against a purchaser from the tenant. Frink v. Pratt, 130 Ill. 327, 22 N. E. 819. That a mere lien without possession is not enough see, also, Street v. Nelson, 80 Ala. 230; Deeley v. Dwight, 132 N. Y. 59, 30 N. E. 258, 18 L. R. A. 298. And see Stewart v. Bright, 6 Houst. (Del.) 344; Rexroth v. Coon, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863; 38 Cyc. 2050.

[20] Noble v. Adams, 7 Taunt. 59; Ferguson v. Carrington, 9 Barn. & C. 60; Beebe v. Knapp, 28 Mich. 53; Heineman v. Steiger, 54 Mich. 232, 19 N W. 965; Thurston v. Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; Stevens v. Austin, 1 Metc. (Mass.) 557; Green v. Russell, 5 Hill (N. Y.) 183; Woodworth v. Kissam, 15 Johns. (N. Y.) 186; Hitchcock v. Covill, 20 Wend. (N. Y.) 167; Bruner v. Dyball, 42 Ill. 34; Ryan v. Brant, Id. 78; Fulton v. Whalley, 8 Wkly. Notes Cas. 106; Atlas Shoe Co. v. Bechard, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; Williston, Cont., § 1370.

[21] Kimball v. Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Peters v. Ballister, 8 Pick. (Mass.) 495.

against a stranger who takes them out of his possession.[22] The action will therefore lie by an officer who had the possession of, and a special property in, the goods by virtue of an execution or writ of attachment;[23] or by a carrier,[24] a warehouseman,[25] a consignee,[26] a gratuitous bailee,[27] or by any agent who is responsible over to his principal.[28]

The finder of goods has a special property in them which will enable him to maintain trover against any one but the true owner.[29] Bare possession, even though wrongfully obtained, gives the possessor sufficient property to maintain the action against a mere stranger.[30]

The rule by which a bailee, finder, or wrongful possessor is permitted to sue and recover damages which he has not sustained, and by such recovery bar a subsequent action by the bailor for an injury to his general property without his consent, is criticized as unsound by certain authorities.[31] It is suggested that the general owner and the one having a special property should each bring an action for the actual loss or damage to his own particular interest. This might well be the rule where the person in possession does not claim complete title, or where

[22] Burk v. Webb, 82 Mich. 173; Grove v. Wise, 39 Mich. 161.

[23] 2 Saund. 47; Blades v. Arundale, 1 Maule & S. 711; Witherspoon v. Clegg, 42 Mich. 484, 4 N. W. 209; Burk v. Webb, 32 Mich. 173; Dillenback v. Jerome, 7 Cow. (N. Y.) 297; Barker v. Miller, 6 Johns. (N. Y.) 195; Brownell v. Manchester, 1 Pick. (Mass.) 232; Caldwell v. Eaton, 5 Mass. 399; Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Pettes v. Marsh, 15 Vt. 454, 40 Am. Dec. 689; Thayer v. Hutchinson, 13 Vt. 504, 37 Am. Dec. 607; Weidensaul v. Reynolds, 40 Pa. 73; Poole v. Symonds, 1 N. H. 289, 8 Am. Dec. 71, Sunderland Cas. Com. Law Pl. p. 47.

[24] 1 Rolle, Abr. 4; Arnold v. Jefferson, 1 Ld. Raym. 276; Dillenback v. Jerome, 7 Cow. (N. Y.) 297.

[25] Martini v. Coles, 1 Maule & S. 147.

[26] Smith v. James, 7 Cow. (N. Y.) 329; Everett v. Saltus, 15 Wend. (N. Y.) 474.

[27] Rooth v. Wilson, 1 Barn. & Ald. 59; Faulkner v. Brown, 13 Wend. (N. Y.) 63.

[28] 2 Saund. 47b; Stirling v. Vaughan, 11 East, 626; Eisendrath v. Knauer, 64 Ill. 396; Eaton v. Lynde, 15 Mass. 242; Trovillo v. Tilford, 6 Watts (Pa.) 472, 31 Am. Dec. 484.

[29] McLaughlin v. Waite, 9 Cow. (N. Y.) 670; Clark v. Maloney, 3 Har. (Del.) 68.

[30] Knapp v. Winchester, 11 Vt. 351; Duncan v. Spear, 11 Wend. (N. Y.) 54; Faulkner v. Brown, 13 Wend. (N. Y.) 63; Cullen v. O'Hara, 4 Mich. 132; Coffin v. Anderson, 4 Blackf. (Ind.) 410; Barwick v. Barwick, 33 N. C. 80; Allen v. Smith, 10 Mass. 308; Fairbank v. Phelps, 22 Pick. (Mass.) 535; Vining v. Baker, 53 Me. 544; Gunzburger v. Rosenthal, 220 Pa. 300, 75 Atl. 418, 26 L. R. A. (N. S.) 840, 18 Ann. Cas. 572.

[31] 25 Harv. Law Rev. 655; 2 Beven, Neg. (3d Ed.) 736, 737, note; Clerk and Lindsell, Torts (3d Ed.) pp. 202, 282. See Ribble v. Lawrence, 51 Mich. 569, 17 N. W. 60, Whittier, Cas. Com. Law Pl. p. 191, note.

the general owner does not consent to his recovering the total loss. Indeed, it is recognized that the mere naked bailee, at the will of the bailor, cannot recover against a third person for the conversion of the bailed property, where the bailor or owner has intervened and asserted his general property. It is otherwise in the case of a bailee with the right of possession for a specific time and purpose, who has the right to recover to the extent of the value of his special interest in the property, even where the general owner intervenes.[33] It does seem strange that a bailee is entitled to recover for the entire damage done to property by its injury, loss, or misappropriation, while a joint owner of personal property, who sues without joining the other co-owners, is entitled to recover only his own damage. But it is generally recognized that "the peace and order of society require that persons in possession of property, even without title, should be enabled to protect such possession by appropriate remedies against mere naked wrongdoers." [33] Thus the United States government, in carrying on the post office, is bailee of the letters and their contents for hire, and has sufficient interest to maintain an action of trespass or trover against a thief or wrongdoer for disturbing that possession, like any other bailee, and may recover the entire value of the property.[34]

A person having a special property in goods, and being entitled to the possession as against the general owner, as in the case of a pledgee for value, a chattel mortgagee after condition broken, or a bailee having a lien, may maintain trover even against the general owner, or against one who has converted the goods by authority of, or on process against, the general owner.[35]

A mere servant, however, acting professedly as such, and having only the custody of the goods, cannot maintain the action, but, if brought at all, it must be brought by the master.[36]

[32] Engel v. Scott & Holston Lumber Co., 60 Minn. 39, 61 N. W. 825.

[33] Guttner v. Pacific Steam Whaling Co. (D. C.) 96 Fed. 617; 13 Harv. Law Rev. 411.

[34] National Surety Co. v. U. S., 129 Fed. 70, 73.

[35] Roberts v. Wyatt, 2 Taunt. 268; Hutton v. Arnett, 51 Ill. 198; Crocker v. Atwood, 144 Mass. 588, 12 N. E. 421; Eaton v. Lynde, 15 Mass. 242; Ingersoll v. Van Bokkelin, 7 Cow. (N. Y.) 670; M'Connell v. Maxwell, 3 Blackf. (Ind.) 419; Moore v. Hitchcock, 4 Wend. (N. Y.) 292; Duncan v. Spear, 11 Wend. (N. Y.) 54; Faulkner v. Brown, 13 Wend. (N. Y.) 63; Daniels v. Ball, 11 Wend. (N. Y.) 57, note.

[36] Bloss v. Holman, Owen, 52; Ludden v. Leavitt, 9 Mass. 104, 6 Am. Dec. 45; Dillenback v. Jerome, 7 Cow. (N. Y.) 294; Faulkner v. Brown, 13 Wend. (N. Y.) 63. See Pease v. Ditto, 189 Ill. 456, 59 N. E. 983; Cooper v. Cooper, 182 Ill. 80, 23 N. E. 213.

Constructive Possession or Right to Possession

In order to maintain trover, the plaintiff must have had possession, or the right to immediate possession, at the time of the conversion.[37] One is said to have constructive possession when he is given the same rights and remedies as if he were in actual possession. This may be the case of an owner, when no one is in actual possession, or when some bailee at will is in possession subject to his orders.

Where the property was, at the time of the conversion, in the hands of a bailee at will, trover may, in most cases, be maintained either by the general or the special owner—that is, by the bailor or bailee—though a judgment obtained by one of them will be a bar to an action by the other.[38] But this is not the case where the bailee has the exclusive right of possession as against the bailor.

Therefore, where goods leased as furniture with a house were taken in execution against a former owner, and sold by the sheriff, it was held that the landlord could not maintain trover against the sheriff pending the lease, but should have brought an action on the case, as the right of possession was in the tenant.[39]

A landlord, however, generally has such a right of possession of timber wrongfully cut down during the lease as to enable him to maintain trover if it is removed.[40]

The person who has the absolute or general property in goods may maintain trover, though he has never had the actual possession, provided he had the right to immediate possession. The general owner-

[37] Benjamin v. Bank of England, 3 Camp. 417; Bloxam v. Sanders, 4 Barn. & C. 941; Gordon v. Harper, 7 Term R. 9; Hall v. Pickard, 3 Camp. 187; Chickering v. Raymond, 15 Ill. 362; Frink v. Pratt, 130 Ill. 327, 22 N. E. 819; Hall v. Daggett, 6 Cow. (N. Y.) 653; Bush v. Lyon, 9 Cow. (N. Y.) 52; Winship v. Neale, 10 Gray (Mass.) 382; Eisendrath v. Knauer, 64 Ill. 396; Axford v. Mathews, 43 Mich. 327, 5 N. W. 377, 38 Am. Rep. 185; Foster v. Lumbermen's Min. Co., 68 Mich. 188, 36 N. W. 171; Clark v. Draper, 19 N. H. 419. The right to possession must have been immediate, absolute, and unconditional, and not dependent on some act to be done by the plaintiff. It is not enough that the plaintiff had a good right of action, or a right to take possession at some future day. Frink v. Pratt, supra.

[38] Smith v. James, 7 Cow. (N. Y.) 328. See Gauche v. Mayer, 27 Ill. 134 (trespass); Lantz v. Drum, 44 Ill. App. 607, 609.

[39] Gordon v. Harper, 7 Term R. 9; Hall v. Pickard, 3 Camp. 187. And see Nations v. Hawkins' Adm'rs, 11 Ala. 859; Wheeler v. Train, 3 Pick (Mass.) 255; Fairbank v. Phelps, 22 Pick. (Mass.) 535; Forth v. Pursley, 82 Ill. 152; Swift v. Moseley, 10 Vt. 208, 33 Am. Dec. 197; Caldwell v. Cowan, 9 Yerg. (Tenn.) 262.

[40] Gordon v. Harper, 7 Term R. 13; Baker v. Howell, 6 Serg. & R. (Pa.) 476; Shult v. Barker, 12 Serg. & R. (Pa.) 272.

ship with the right to possession creates a constructive possession.[41] Thus, where a person has delivered goods to a carrier or other bailee, who has not the right to withhold the possession from the general owner, he may maintain trover for conversion by a stranger, for the owner has the constructive possession.[42] So an executor or administrator has constructive possession of the goods of his testator or intestate from the time of his death;[43] a trustee of goods has constructive possession, though they are in the actual possession of the cestui que trust;[44] a consignee of goods, who is also the vendee, may bring trover for their conversion after their delivery to the carrier, and before he has acquired actual possession;[45] and the vendee of goods, where the property in them has passed, may maintain the action for their conversion before they left the actual possession of the vendor.[46]

If the bailee of goods, having the right to their possession, as against the bailor, so that the bailor could not in general maintain trespass for their conversion, so deals with them as to terminate the bailment, the bailor acquires constructive possession, and for their subsequent conversion he may maintain trover. Thus, where the owner of cattle leased them, with a farm, for four years, under an agreement by which the lessee might return or purchase them at the end of the term, and before the term had expired the lessee sold them, it was held that the sale terminated the lessee's right to possession, and gave the lessor constructive possession, and that the lessor could maintain trover against both the lessee and his vendee.[47]

A bailor may maintain an action of trover against the bailee, if by wrongful use or disposal of the goods the bailee has repudiated his obligations, and thereby enabled the bailor to exercise the rights and remedies of a person entitled to possession. If a bailee misappropriates the property, as by selling or pledging it as his own, the bailor may immediately elect to treat the bailment as ended and bring trover for its value, or he may elect to treat the bailment as continuing and sue

[41] 2 Saund. 47a, note (1); Bac. Abr., "Trover," C; Gordon v. Harper, 7 Term R. 12; Smith v. James, 7 Cow. (N. Y.) 329; Duncan v. Spear, 11 Wend. (N. Y.) 54; McNear v. Atwood, 17 Me. 434.

[42] Dewell v. Moxon, 1 Taunt. 391; Gordon v. Harper, 7 Term R. 12; Thorp v. Burling, 11 Johns. (N. Y.) 285; Montgomery v. Brush, 121 Ill. 513, 13 N. E. 230.

[43] Gordon v. Harper, 7 Term R. 13; Rogers v. Windoes, 48 Mich. 628, 12 N. W. 882; Kerby v. Quinn, Rice (S. C.) 204; Hill v. Brennan, Id. 285; French v. Merrill, 6 N. H. 465; Towle v. Lovet, 6 Mass. 394.

[44] Wooderman v. Baldock, 8 Taunt. 676.

[45] 1 Chit. Pl. 171.

[46] Rugg v. Minett, 11 East, 210.

[47] Grant v. King, 14 Vt. 367. And see Turner v. Waldo, 40 Vt. 51.

for damages. A bailee, if he has any right of enjoyment or use, must use the thing in moderation, and not exceed the limits of the bailment. If his acts imply an assertion of title or right of dominion inconsistent with the bailor's ownership, this is a conversion of the property. Mere misuse, or unauthorized use of the thing bailed without adverse claim, or negligent loss, may only amount to a breach of obligation, or a tort in the nature of waste, falling short of conversion.

WRONGFUL ACT OF CONVERSION

45. The property must have been converted by the defendant. A conversion may be:

(1) By wrongfully taking and carrying away goods, or assuming a dominion over them, or otherwise depriving the owner of them.

(2) By wrongfully assuming the control, or dominion over, or right to dispose of, or misusing, goods, of which actual possession has been lawfully obtained.

(3) By merely wrongfully detaining goods lawfully obtained.

In the latter case, and in that case only, a demand and a refusal to restore the goods are necessary before bringing the action. A demand and refusal are not necessary to make a conversion, where the defendant has already done an act of conversion.

The Nature of Conversion

A conversion of the property is the gist of the action of trover, and is always essential to support it.[48] It is for the conversion of the goods by the defendant to his own use, not for the act of taking them, that damages are recoverable. For the act of taking, the remedy is trespass.

To constitute a conversion, it is necessary that he shall have, in some sense, misappropriated or assumed adverse dominion over the goods and deprived the owner of them.[49] A conversion may take place in the following ways:

[48] 2 Saund. 46e; 3 Bl. Comm. 152; Mills v. Graham, 1 Bos. & P. (N. R.) 140; Snell v. Weir, 59 Ill. 494, and cases hereafter cited.

[49] Foulds v. Willoughby, 8 Mees. & W. 540; Bailey v. Adams, 14 Wend. (N. Y.) 201; Forth v. Pursley, 82 Ill. 152; Clement v. Boone, 5 Ill. App. 109. Trover does not lie where the plaintiff has the possession, and the defendant, who had the legal title, has merely asserted it by a sale, without an actual taking or delivery of possession. Moorhead v. Scofield, 111 Pa. 584, 5 Atl. 732; Rubin v. Huhn, 229 Mass. 126, 118 N. E. 290, 4 A. L. R. 1190; Salmond, Torts, pp. 296–303; 21 Law Quarterly Rev. 43; G. L. Clark, "The Test of Conversion," 21 Harv. Law Rev. 408.

(1) The wrongful taking, if followed by a removal or carrying away or assumption of dominion, of the goods of another, who has the right of immediate possession, is of itself a conversion; and so is the compelling of a party to deliver up goods, and carrying them away. The wrongdoer need not further use or dispose of the goods.[50] It has been said that, wherever trespass will lie for taking goods of the plaintiff wrongfully, trover will also lie; but this is not so. Trespass and trover are concurrent remedies for the wrongful taking of goods where there has been a complete carrying away,[51] but not otherwise. A conversion is not necessary to support trespass, but it is necessary to support trover. A mere seizure of goods by a stranger, who immediately relinquishes possession, even though there was some asportation, will support trespass, but not trover, for there is no conversion.[52] If, by a mere seizure without a carrying away, the possession is changed in law, then there is a conversion. Trover will therefore lie where goods are wrongfully seized, as a distress, though there is no removal of them.[53]

Trover lies to recover the value of goods obtained by the defendant from the plaintiff by fraud. Replevin will also lie. This in effect is the specific enforcement of the duty of the fraudulent buyer to return the goods and the corresponding right of the seller to immediate possession.[54]

(2) Again, the wrongful assumption of the property in goods, or dominion over them, or right of disposing of them, may be a conversion in itself, though actual possession may have been obtained law-

[50] 2 Saund. 470; Cro. Eliz. 824; Edgerly v. Whalan, 106 Mass. 307; McPartland v. Read, 11 Allen (Mass.) 231; Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301; Daggett v. Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91; Cook v. Hopper, 23 Mich. 511; Prescott v. Wright, 6 Mass. 20; Glenn v. Garrison, 17 N. J. Law, 1; Thurston v. Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; Farrington v. Payne, 15 Johns. (N. Y.) 431; Jones v. Dugan, 1 McCord (S. C.) 428. The collection of a note by one who has no interest in it is a conversion. Chickering v. Raymond, 15 Ill. 362.

[51] Wadleigh v. Janvrin, 41 N. H. 520, 77 Am. Dec. 780; Drew v. Spaulding, 45 N. H. 472; Prescott v. Wright, 6 Mass. 20; Pierce v. Benjamin, 14 Pick. (Mass.) 350, 360, 25 Am. Dec. 396. In other words, trover is a concurrent remedy with trespass "de bonis asportatis." See cases supra.

[52] Samuel v. Morris, 6 Car. & P. 620; Foulkes v. Willoughby, 8 Mees. & W. 540; Loring v. Mulcahy, 3 Allen (Mass.) 575. See Dench v. Walker, 14 Mass. 500.

[53] Cooper v. Monke, Willes, 56; Drew v. Spaulding, 45 N. H. 472.

[54] Beebe v. Knapp, 28 Mich. 53; Heineman v. Steiger, 54 Mich. 232, 19 N. W. 965; Atlas Shoe Co. v. Bechard, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; 3 Williston, Cont. § 1370. The seller must as a rule tender to the buyer the return of whatever was paid for the goods. Williston, Sales, § 567.

fully, or not obtained at all.[55] The mere taking of an assignment of goods from a person who has no right or authority to dispose of them, has been held a conversion.[56] Where a person intrusted with the goods of another wrongfully puts them into the hands of a third person, or otherwise disposes of them, or misuses them, it is a conversion.[57]

[55] M'Combie v. Davies, 6 East, 540; Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Jackson v. Anderson, 4 Taunt. 24; Connah v. Hale, 23 Wend. (N. Y.) 462; Whipple v. Gilpatrick, 19 Me. 427; Reynolds v. Shuler, 5 Cow. (N. Y.) 323; Bristol v. Burt, 7 Johns. (N. Y.) 254, 5 Am. Dec. 264; Follett v. Edwards, 30 Ill. App. 386; Webber v. Davis, 44 Me. 147, 69 Am. Dec. 87; Gibbs v. Chase, 10 Mass. 128; Gilman v. Hill, 36 N. H. 311; Lathrop v. Blake, 23 N. H. 46; Cook v. Hopper, 23 Mich. 511; Scudder v. Anderson, 54 Mich. 122, 19 N. W. 775; Ainsworth v. Partillo, 13 Ala. 460; Adams v. Goddard, 48 Me. 212; Farrand v. Hurlburt, 7 Minn. 477 (Gil. 383); Rice v. Clark, 8 Vt. 109; Lindley v. Downing, 2 Ind. 418. Where the purchaser of land without right forbids the assignee of a chattel on the premises to remove it, there is a conversion. Badger v. Batavia Paper Manuf'g Co., 70 Ill. 302. And trover lies for property lawfully distrained or taken in execution, if it is used or sold without a compliance with the law as to appraisal, etc. Tripp v. Grouner, 60 Ill. 474. It is not essential, to a conversion, that the property be appropriated to the use of the wrongdoer. It is enough that he disposes or assumes to dispose of it. Mead v. Thompson, 78 Ill. 62.

[56] Baldwin v. Cole, 6 Mod. 212; M'Combie v. Davies, 6 East, 540; Rice v. Clark, 8 Vt. 109; Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551.

[57] M'Combie v. Davies, 6 East, 540; Jackson v. Anderson, 4 Taunt. 24; Turner v. Waldo, 40 Vt. 51; Lockwood v. Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; Bristol v. Burt, 7 Johns. (N. Y.) 254, 5 Am. Dec. 264; Rightmyer v. Raymond, 12 Wend. (N. Y.) 51; Pierce v. Schenck, 3 Hill (N. Y.) 28; Gibbs v. Chase, 10 Mass. 128; Briggs v. Boston & L. R. Co., 6 Allen (Mass.) 246, 83 Am. Dec. 626; Etter v. Bailey, 8 Pa. 442; Lathrop v. Blake, 23 N. H. 46; Chickering v. Raymond, 15 Ill. 362; Race v. Chandler, 15 Ill. App. 532; Barnum v. Stone, 27 Mich. 332; Edwards v. Frank, 40 Mich. 616; Johnston v. Whittemore, 27 Mich. 463; Hicks v. Lyle, 46 Mich. 488, 9 N. W. 529; Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301; Bowlin v. Nye, 10 Cush. (Mass.) 416; Hall v. Boston & W. R. Co., 14 Allen (Mass.) 443, 92 Am. Dec. 783; Grant v. King, 14 Vt. 367. Trover will lie against a carrier or wharfinger who delivers goods to a wrong person by mistake, or under a forged order, or, of course, knowingly. Stephenson v. Hart, 4 Bing. 483; Wyld v. Pickford, 8 Mees. & W. 461; Devereux v. Barclay, 2 Barn. & Ald. 702; Lubbock v. Inglis, 1 Starkie, 104; Claflin v. Boston, etc., R. Co., 7 Allen (Mass.) 341; Lichtenhein v. Boston & P. R. Co., 11 Cush. (Mass.) 70; Packard v. Getman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; Id., 6 Cow. (N. Y.) 757, 16 Am. Dec. 475; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Indianapolis & St. L. R. Co. v. Herndon, 81 Ill. 143; Illinois Cent. R. Co. v. Parks, 54 Ill. 294; Bowlin v. Nye, 10 Cush. (Mass.) 416; Moses v. Norris, 4 N. H. 304; Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301; Bullard v. Young, 3 Stew. (Ala.) 46. But not for mere negligent loss by carrier. In this case the action should be case or contract. Moses v. Norris, 4 N. H. 304. It lies against a person who illegally makes use of property of which he has lawfully obtained the actual possession or custody. Mulgrave v.

As a rule, trover will not lie for a mere omission or nonfeasance against a person who was lawfully in the actual possession of goods, as against a carrier or other bailee who negligently loses the goods, or neglects to deliver them, but the remedy in such cases is by assumpsit or case.[58] There is no conversion if the bailee sets up no title or claim in defiance of the owner's right, or has not exercised a dominion inconsistent with his title.

The rule is that one tenant in common of goods cannot maintain trover against his cotenant if the goods remain in the latter's possession, although he refuse to permit the former to participate in the use of the article, since, in law, the possession of one is the possession of both.[59] But, if one tenant in common destroy the chattel, or commit an act which is equivalent thereto, as selling or otherwise dis-

Ogden, Cro. Eliz. 219; Nicholson v. Chapman, 2 H. Bl. 254; Richardson v. Atkinson, 1 Strange, 576; Johnson v. Weedman, 4 Scam. (Ill.) 495; Ripley v. Dolbier, 18 Me. 382; Rice v. Clark, 8 Vt. 100; Lockwood v. Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; Dench v. Walker, 14 Mass. 500. The action will lie against a warehouseman with whom grain has been placed merely for storage, and who has wrongfully mixed it with his own. Haddix v. Einstman, 14 Ill. App. 443; Erwin v. Clark, 13 Mich. 10. Or against a bank which places a special deposit with its own funds, and reports and treats it as a part of its own assets. First Nat. Bank of Monmouth v. Dunbar, 19 Ill. App. 553; Id., 118 Ill. 625, 9 N. E. 186. Or against a carrier of liquor or his servant for an adulteration of it. Dench v. Walker, 14 Mass. 500. Or against the hirer or bailee of a horse for driving it a greater distance than is agreed, or in a different direction. Wheelock v. Wheelright, 5 Mass. 104; Homer v. Thwing, 3 Pick. (Mass.) 492; Rotch v. Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; Lucas v. Trumbull, 15 Gray (Mass.) 306; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Perham v. Coney, 117 Mass. 102; Fisher v. Kyle, 27 Mich. 454; Ruggles v. Fay, 31 Mich. 141. See Carney v. Rease, 60 W. Va. 676, 55 S. E. 729.

[58] M'Combie v. Davies, 6 East, 540; Devereux v. Barclay, 2 Barn. & Ald. 704; Ross v. Johnson, 5 Burr. 2825; Williams v. Gesse, 3 Bing. (N. C.) 849, Bowlin v. Nye, 10 Cush. (Mass.) 416; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Brown v. Waterman, 10 Cush. (Mass.) 117, 118; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300; McMorris v. Simpson, 21 Wend. (N. Y.) 610; Moses v. Norris, 4 N. H. 304; Dorman v. Kane, 5 Allen (Mass.) 38; Severin v. Keppel, 4 Esp. 157; Robinson v. Austin, 2 Gray (Mass.) 564; Davis v. Hurt, 114 Ala. 146, 21 South. 408, Sunderland, Cas. Com. Law Pl. p. 57, Lloyd, Cas. Civ. Proc. p. 234; Wing v. Milliken, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238.

[59] 1 Chit. Pl. 175; 2 Saund. 47h; Holliday v. Camsell, 1 Term R. 658; Smith v. Stokes, 1 East, 363; Heller v. Hufsmith, 102 Pa. 534; Cole v. Terry, 19 N. C. 252; Benjamin v. Stremple, 13 Ill. 466; St. John v. Standring, 2 Johns. (N. Y.) 468; Mersereau v. Norton, 15 Johns. (N. Y.) 179; Gilbert v. Dickerson, 7 Wend. (N. Y.) 449, 22 Am. Dec. 592; Farr v. Smith, 9 Wend. (N. Y.) 338, 24 Am. Dec. 162. Contra by statute, Benjamin v. Stremple, supra. And see cases contra in the following note.

posing of it, his cotenant may maintain trover for the value of his share.[60]

(3) Again, the mere detention of goods, without right, may constitute a conversion.[61] In the cases thus far dealt with, proof of the wrongful act of the defendant is sufficient to establish a conversion, without showing a demand of the goods and a refusal to restore them.[62] In other cases, where the defendant had the rightful

[60] 1 Chit. Pl. 176; 2 Saund. 47h; Martyn v. Knowllys, 8 Term R. 146; Wilson v. Reed, 3 Johns. (N. Y.) 175; Hyde v. Stone, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; Id., 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; Mumford v. McKay, 8 Wend. (N. Y.) 442, 24 Am. Dec. 34; Nowlen v. Colt, 6 Hill (N. Y.) 461, 41 Am. Dec. 756; Browning v. Cover, 108 Pa. 595; Tubbs v. Richardson, 6 Vt. 442, 27 Am. Dec. 570; Hurd v. Darling, 14 Vt. 214; Weld v. Oliver, 21 Pick. (Mass.) 559; Delaney v. Root, 99 Mass. 546, 97 Am. Dec. 52; Burbank v. Crooker, 7 Gray (Mass.) 158, 66 Am. Dec. 470; Webb v. Mann, 3 Mich. 139; Tolan v. Hodgeboom, 38 Mich. 624; Lowthorp v. Smith, 2 N. C. 255; Campbell v. Campbell, 6 N. C. 65; Baylis v. Cronkite, 89 Mich. 413. In Channon v. Lusk, 2 Lans. (N. Y.) 211, it was held that where the common property is severable in its nature, like grain, so that the share of each tenant can be determined, each has the right to sever and take his share; and if one tenant, who is in possession of the whole, refuses to allow his cotenant to take his share, this is equivalent to a conversion. And see Fiquet v. Allison, 12 Mich. 328, 86 Am. Dec. 54; McLaughlin v. Salley, 46 Mich. 219, 9 N. W. 256. And in Needham v. Hill, 127 Mass. 133, it was held that, where one tenant in common of chattels so appropriates them to his own use as to render any future enjoyment of them by his cotenant impossible, the latter may maintain trover against him. And see Ripley v. Davis, 15 Mich. 75, 90 Am. Dec. 262. And it has been held that where a tenant in common of an indivisible chattel, holding possession thereof, claims sole ownership, and refuses to allow his cotenant to hold at all, the latter may maintain trover. Bray v. Bray, 30 Mich. 479; Grove v. Wise, 39 Mich. 161. But see the cases in the preceding note.

[61] As where a carrier or other bailee wrongfully refuses to deliver goods after a proper demand and payment of any money that may be due. Northern Transp. Co. of Ohio v. Sellick, 52 Ill. 249. And see Chamberlin v. Shaw, 18 Pick. (Mass.) 278, 29 Am. Dec. 586; Adams v. Clark, 9 Cush. (Mass.) 215, 57 Am. Dec. 41; Richardson v. Rice, 104 Mass. 156, 6 Am. Rep. 210; Donlin v. McQuade, 61 Mich. 275, 28 N. W. 114; Monroe v. Whipple, 56 Mich. 516, 23 N. W. 202; Wheeler & Wilson Manuf'g Co. v. Heil, 115 Pa. 487, 8 Atl. 616, 2 Am. St. Rep. 575; McLean v. Walker, 10 Johns. (N. Y.) 471; Marshall v. Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463; Bryce v. Brooks, 26 Wend. (N. Y.) 367.

[62] Lovell v. Martin, 4 Taunt. 801; Baldwin v. Cole, 6 Mod. 212; Forsdick v. Collins, 1 Starkie, 173; Gibbs v. Jones, 46 Ill. 319; Bane v. Detrick, 52 Ill. 19; Howitt v. Estelle, 92 Ill. 218; Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Union Stockyard & Transit Co. v. Mallory Son & Zimmerman Co., 157 Ill. 554, 41 N. E. 888, 48 Am. St. Rep. 341; Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 508; Hunt v. Holton, 13 Pick. (Mass.) 216; Gilmore v. Newton, 9 Allen (Mass.) 171, 85 Am. Dec. 749; Carter v. Kingman, 103 Mass. 517; Tompkins v. Haile, 3 Wend. (N. Y.) 406; Bates v. Conkling, 10 Wend. (N. Y.) 389; Connah v. Hale, 23 Wend. (N. Y.) 462; Newsum v.

custody of the goods in the first instance, and his detention is relied upon as a conversion, it is essential for the plaintiff to show that he made a proper demand for the goods and that the defendant refused to deliver them to him.

A demand and refusal are necessary in all cases where the defendant became, in the first instance, lawfully possessed of the goods, and the plaintiff cannot show some distinct misuse or misappropriation.[63] Thus, where goods are delivered under a contract, as to do something with them, and return them when completed, the mere omission to perform the contract is not in itself a conversion, and a demand and refusal must be shown to support trover.[64]

The demand must be made by the person who is the owner of the goods, general or special, and entitled to the possession, or by his duly-authorized agent;[65] and it must be made upon the party who, at the time, has the possession of the goods by himself or his agent or servant, or the general controlling power over them.[66] Where a de-

Newsum, 1 Leigh (Va.) 86, 19 Am. Dec. 739; Horsefield v. Cost, Add. (Pa.) 152; Riford v. Montgomery, 7 Vt. 418; Courtis v. Cane, 32 Vt. 232, 76 Am. Dec. 174; Grant v. King, 14 Vt. 367; Kyle v. Gray, 11 Ala. 233; Hake v. Buell, 50 Mich. 89, 14 N. W. 710; Davis v. Duncan, 1 McCord (S. C.) 213; Pierce v. Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396. And see the cases heretofore cited. A demand, therefore, is not necessary where goods have been obtained by means of a fraudulent purchase, Ryan v. Brant, 42 Ill. 78; Thurston v. Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; Stevens v. Austin, 1 Metc. (Mass.) 557; Riley v. Boston Water Power Co., 11 Cush. (Mass.) 11; nor where possession was taken under a wrongful claim of ownership, Bruner v. Dyball, 42 Ill. 34; nor where the defendant has sold the property and appropriated the proceeds, Howitt v. Estelle, 92 Ill. 218.

[63] 2 Saund. 47e; Edwards v. Hooper, 11 Mees. & W. 366; Jones v. Fort, 9 Barn. & C. 764; Dewell v. Moxon, 1 Taunt. 391; Vincent v. Cornell, 13 Pick. (Mass.) 294, 23 Am. Dec. 683; Bond v. Ward, 7 Mass. 123, 5 Am. Dec. 28; Carleton v. Lovejoy, 54 Me. 445; Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Yeager v. Wallace, 57 Pa. 365; Rodgers v. Brittain, 39 Mich. 477; Farley v. Lincoln, 51 N. H. 580, 12 Am. Rep. 182; Cooper v. Newman, 45 N. H. 339; Bruner v. Dyball, 42 Ill. 34; Clink v. Gunn, 90 Mich. 135, 51 N. W. 193; Baker v. Lothrop, 155 Mass. 376, 29 N. E. 643; Kennet v. Robinson, 2 J. J. Marsh. 84; Pettigru v. Sanders, 2 Bailey (S. C.) 549.

[64] Severin v. Keppel, 4 Esp. 156. Where a carrier fails to deliver goods, there must be a demand and refusal before bringing trover. Dewell v. Moxon, supra; Brown v. Cook, 9 Johns. (N. Y.) 361.

[65] Phillips v. Robinson, 4 Bing. 106; May v. Harvey, 13 East, 197; Hagar v. Randall, 62 Me. 439; Mills v. Ball, 2 Bos. & P. 457; Delano v. Curtis, 7 Allen (Mass.) 470.

[66] Nicoll v. Glennie, 1 Maule & S. 588; White v. Demary, 2 N. H. 546; Baker v. Beers, 64 N. H. 102, 6 Atl. 35; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Bayley v. Bryant, 24 Pick. (Mass.) 198; Mannan v. Merritt, 11 Allen (Mass.) 582; Griswold v. Plumb, 13 Mass. 298; Vincent v. Cornell, 13 Pick.

mand is necessary, it must be made before the action is brought.[67] It need not be in any particular form, since its purpose is merely to give an opportunity to restore the goods. If it distinctly notifies the party who is the claimant and of the goods demanded, it is sufficient.[68] It need not be made on the party personally. A demand in writing left at his house is sufficient.[69] It must be absolute in its terms, and not qualified with conditions,[70] and it must not be excessive.[71]

Where a demand is necessary, there must also be a refusal.[72] Where there has been a refusal to restore the goods, it will not constitute a conversion unless the demand was properly made, as just explained, nor unless the party refusing has the power to deliver up the goods, and the circumstances are such that it is his duty to restore them. A refusal to deliver a thing upon demand is not of itself a conversion, but merely presumptive evidence of a conversion, and open to rebuttal by proof of facts which constitute a legal justification or excuse.[73]

(Mass.) 294, 23 Am. Dec. 683; Edwards v. Hooper, 12 Law J. Exch. 304; Knapp v. Winchester, 11 Vt. 351; Mitchell v. Williams, 4 Hill (N. Y.) 13.

[67] Morris v. Pugh, 3 Burr. 1242; Storm v. Livingston, 6 Johns. (N. Y.) 44; Hagar v. Randall, 62 Me. 439; White v. Demary, 2 N. H. 546; Cross v. Barber, 16 R. I. 266, 15 Atl. 69; Galvin v. Galvin Brass & Iron Works, 81 Mich. 16, 45 N. W. 654.

[68] 1 Chit. Pl. 178.

[69] Logan v. Houlditch, 1 Esp. 22.

[70] Rushworth v. Taylor, 12 Law J. Q. B. 80.

[71] Abington v. Lipscombe, 1 Gale & D. 233.

[72] Taylor v. Hanlon, 103 Pa. 504.

[73] 1 Chit. Pl. 179, and authorities and illustrations there given; Smith v. Young, 1 Camp. 439; Green v. Dunn, 3 Camp. 215; Johnson v. Coulliard, 4 Allen (Mass.) 446; Gilmore v. Newton, 9 Allen (Mass.) 171, 85 Am. Dec. 749; Hagar v. Randall, 62 Me. 439; Clark v. Hale, 34 Conn. 398; Daggett v. Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91; Sargent v. Gile, 8 N. H. 325; Race v. Chandler, 15 Ill. App. 532; Leman v. Best, 30 Ill. App. 323; Horsefield v. Cost, Add. (Pa.) 152; Blakey v. Douglas (Pa. Sup.) 6 Atl. 398; Hallenbake v. Fish, 8 Wend. (N. Y.) 547, 24 Am. Dec. 68; Robinson v. Hartridge, 13 Fla. 501; Farrar v. Rollins, 37 Vt. 295; Yale v. Saunders, 16 Vt. 243; Hill v. Belasco, 17 Ill. App. 194. An unconditional refusal to restore goods will amount to a conversion, though, for some particular reason, there may be a right to detain the goods, as where the party has a lien on them. The reason for the refusal should be stated. Kellogg v. Holly, 29 Ill. 437. One in the possession of property may always claim a lien upon it, or he may have the right to satisfy himself, as any prudent man would do, that the party demanding it is the real owner, or the proper agent to receive it. See Mills v. Ball, 2 Bos. & P. 464; Clark v. Chamberlain, 2 Mees. & W. 78; Dowd v. Wadsworth, 13 N. C. 130, 18 Am. Dec. 567; Blankenship v. Berry, 28 Tex. 448.

CHAPTER VI

THE ACTIONS OF DETINUE AND REPLEVIN

46. Scope of Action of Detinue.
47. Plaintiff's Right in Detinue.
48. The Wrongful Detention.
49. Scope of Action of Replevin.
50. Plaintiff's Right in Replevin.
51. Taking or Detention by Defendant.

SCOPE OF ACTION OF DETINUE

46. The action of detinue lies where it is sought to recover, not damages for the taking or detention of a personal chattel, but the chattel itself, with damages for its detention. The judgment awards either recovery of the chattel itself, or its value, with damages for its detention. To maintain the action—

(a) The chattel must be specific and capable of identification.

(b) The plaintiff must have either a general or special property in the chattel, or the right to immediate possession.

(c) The defendant must be in the actual possession of the chattel at the time of commencing suit.

The action of detinue is the only remedy by suit at common law for the recovery of personal property in specie, except in those cases where the party can maintain replevin.[1] In trespass or trover for wrongfully taking or detaining goods, or in assumpsit for not delivering them, damages only, and not the specific property, can be recovered. It seems that the action was originally deemed an action ex contractu, but now the wrongful detention of the goods is considered the gist of the action. The action lies without regard to any bailment or contract, and even though the defendant may have wrongfully obtained possession in the first instance; and it is therefore more properly classed with actions ex delicto, or with proprietary actions.[2]

[1] Southern Hardware & Supply Co. v. Lester, 166 Ala. 86, 52 South. 828. Dame v. Dame, 43 N. H. 37. See Robinson v. Peterson, 40 Ill. App. 132. In some of the states detinue has been abolished, and replevin is the only remedy to recover possession of personal property. See Corbitt v. Brong, 44 Mich. 150, 6 N. W. 213; Young v. Edwards, 64 W. Va. 67, 60 S. E. 902.

[2] Gledstane v. Hewitt, 1 Cromp. & J. 565; Broadbent v. Ledward, 11 Adol. & E. 209. This is an action proprietary in its nature, and it is difficult to include it either amongst forms of action ex contractu, or with actions ex

The action of detinue was for a long period the proper remedy of the bailor and was chiefly used in the field of bailment. When an own-

delicto. The right to join detinue with debt (2 Saund. 117b), and to sue in detinue for not delivering goods in pursuance of the terms of a bailment to the defendant, seem to afford ground for considering it rather as an action ex contractu than an action of tort. On the other hand, it seems that detinue lies, although the defendant wrongfully became the possessor thereof (of goods), in the first instance, without relation to any contract. And it has recently been considered as an action for tort; the gist of the action not being the breach of a contract, but the wrongful detainer. Gledstane v. Hewitt, 1 Cromp. & J. 565, 1 Tyrw. 450; Gossett v. Morrow, 187 Ala. 387, 65 South. 826; Wilkinson v. Verity, L. R. 6 C. P. 206; 2 Pollock and Maitland, Hist. Eng. Law, pp. 175, 176; Martin, Civ. Proc. p. 75; Bryant v. Herbert, 3 C. P. D. 189, 390, 391. Mr. McKelvey, in his work on Pleading, classes detinue with debt, covenant, and assumpsit, as based on an acquired right (that is, as an action ex contractu or quasi ex contractu), as distinguished from actions based on a natural right (that is, actions ex delicto). His reasoning is as follows: "Sec. 18. In detinue this feature is not quite so apparent; in fact, the tendency has been to class the action with that of trover and to treat the detaining in the former action as a tortious act, similar to the converting in the latter. It is conceived that the true theory of the action of detinue is that the detention is the violation of a special or acquired right. For, while it is true that one person has the natural right not to have his property interfered with by another, and that wrongful detention is an interference which would be a violation of this right, yet, viewed in this light, the wrongful act furnishes ground for an action of trover, and not of detinue. The same act may furnish grounds for an action of detinue, but not unless it is viewed in another light, namely, as a detention of property which the defendant is under an obligation to deliver to the plaintiff, or, in other words, a failure to perform a special obligation, a violation of a special right, which the plaintiff has acquired, not by reason of his simple ownership of the property, but by reason of the fact that there is a special relation between himself and the defendant, such as a bailment, and that owning or having the general right to the property which is lawfully in defendant's possession, he has asserted that right in such a way—e. g., by demand—as to acquire a special right to the immediate possession of the property, and to put upon the defendant a special obligation to deliver it to him. It has already been seen that the judgment in the action of detinue is for the recovery of the property, or its value, in the alternative. The special obligation to deliver the property, similar to an obligation based on a promise and arising because of the special relation of the parties, is thus recognized and enforced. In fact, the action of detinue has been brought upon a contract to deliver a specific chattel. It seems clear, therefore, that detinue is properly classed with the actions of debt, covenant, and assumpsit." It seems that detinue started as a contract action to enforce the obligation of a bailee to deliver up specific chattels, a form closely allied to debt. The scope of the action was extended, so that it ceased to be based on a personal obligation and became based on property right and wrongful detention. Whitehead v. Harrison, 6 Q. B. (N. S.) 423, 51 E. C. L. 423; Ward v. Semken, 2 App. D. C. 424; 3 Street, Foundations Legal Liab. 2 Pollock and Maitland, Hist. Eng. Law, 152, 153, 157, 171, 172, 173, 174; Martin, Civ. Proc. p. 77.

er bails or delivers a thing to another for any purpose, he has an action against the bailee for the return of the goods; but whether the action was based upon ownership or upon contract was a distinction not clearly drawn or perceived. Gradually the claim for a specific chattel was distinguished from a debt or claim for a certain quantity of money, or of corn or the like. Roughly, this distinction may seem to correspond with that between contractual and proprietary rights.

Detinue in its modern form (theory) has come to be what we may term a proprietary action, a remedy to enforce a right of property. It carries into effect the right to the immediate possession of a particular thing. The restitution of the goods themselves wrongfully withheld makes it necessary, in this action of detinue, to ascertain the thing detained, in such manner that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like; for that cannot be known from other money or corn, unless it be in a bag or sack, for then it may be distinguishably marked, and unless the property is specified the duty enforced would be a mere debt or obligation.

There was a most serious imperfection in the remedy of detinue, even where it existed. Its judgment was conditional—that the plaintiff should recover from the defendant the said goods, or (if they cannot be had) their value and the damages for detaining them. This left to the defendant the choice between delivering up the thing and paying a sum of money, and if he would do neither the one nor the other, then goods of his were seized and sold, and the plaintiff in the end had to take money instead of the thing that he demanded.[3]

In modern times this defect has been cured, so that a plaintiff who recovers in detinue gets a judgment for the specific delivery of the chattel detained. The action may now be used concurrently with replevin, trover, and trespass de bonis asportatis, in all cases of the wrongful detention of chattels, regardless of whether the defendant originally acquired possession lawfully by bailment or by theft.

For What Property

Detinue lies for the recovery of a specific chattel only, and not for the recovery of fixtures, or other real property.[4] The goods for which

[3] Kirkland v. Pilcher, 174 Ala. 170, 57 South. 46; 2 Pollock and Maitland, Hist. Eng. Law, pp. 178, 174; Martin, Civ. Proc. p. 78; 3 Street, Foundations Legal Liab. pp. 40, 153. Changed by the Common-Law Procedure Act, 1854, § 78.

[4] Coupledike v. Coupledike, Cro. Jac. 39 (1605). See McFadden v. Crawford, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894. But where property which was attached to the realty, so as to become a part of it, has been removed, and where timber, crops, minerals, etc., have been severed, and have thus acquired the character of personal property, detinue will lie. See Cooper v. Watson, 73 Ala. 252; Adler v. Prestwood, 122 Ala. 367, 24 South. 999.

it is brought must be distinguishable from other property, and their identity ascertainable by some certain means.[5] It lies to recover any chattel that is so identified that it may be recovered in specie.[6] The chattel, of course, must be in existence. The action cannot be maintained in case of its destruction before suit is brought.[7] But if the chattel is destroyed after suit is commenced defendant will not be relieved from liability.[8]

THE PLAINTIFF'S RIGHT IN DETINUE

47. The plaintiff must have a right to the immediate possession, which may arise from general ownership, or some special interest, or as against a wrongdoer from bare possession. The right of the plaintiff in the case of bailment arises from the contractual obligation of the defendant.

To maintain this action it is said, as in trover, that the plaintiff must have either a general or special property in the chattel, or the right to the immediate possession thereof, at the time the action is commenced.[9] If his right is merely in reversion, the action will not lie.[10] The action may be brought by either the general [11] or special [12] owner,

[5] 1 Chit. Pl. 187; Comyn, Dig. "Detinue," B, C; Co. Litt. 286b; 3 Bl. Com. 152; Isaack v. Clark, 2 Bulst. 308; Banks v. Whetstone, Moore, 894; Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513, 3 L. R. A. (N. S.) 138, 112 Am. St. Rep. 961; Brown v. Ellison, 55 N. H. 556.

[6] Dame v. Dame, 43 N. H. 37. To recover title deeds, Atkinson v. Baker, 4 Term R. 229, 231; Lewis v. Hoover, 1 J. J. Marsh. (Ky.) 500, 19 Am. Dec. 120; Stoker v. Yerby, 11 Ala. 322. To recover an insurance policy, Robinson v. Peterson, 40 Ill. App. 132; Spence v. McMillan, 10 Ala. 583 (bag of money).

[7] Caldwell v. Fenwick, 2 Dana (Ky.) 332 (slave dead when action brought); Lindsey v. Perry, 1 Ala. 203.

[8] Wilkerson v. McDougal, 48 Ala. 517. Contra: Whitfield v. Whitfield, 44 Miss. 254; Bethen v. McLennon, 23 N. C. 523.

[9] Gordon v. Harper, 7 Term R. 9; Philips v. Robinson, 4 Bing. 106; Minge v. Clark, 193 Ala. 447, 69 South. 421; Burnley v. Lambert, 1 Wash. (Va.) 308; Staton v. Pittman, 11 Grat. (Va.) 99; O'Neal v. Baker, 47 N. C. 168; Burns v. Morrison, 36 W. Va. 423, 15 S. E. 62; Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513, 3 L. R. A. (N. S.) 138, 112 Am. St. Rep. 961; Robinson v. Peterson, 40 Ill. App. 132; Ramsay v. Barcroft, 2 Mo. 151; Hughes v. Jones, 2 Md. Ch. 178; Boulden v. Estey Organ Co., 92 Ala. 182, 9 South. 233. If the owner of an estate deliver the title deeds to a bailee, and then convey away the estate, detinue for the deeds must be brought by the new, and not the original, proprietor. See Philips v. Robinson, 4 Bing. 106.

[10] Gordon v. Harper, supra; O'Neal v. Baker, supra.

[11] Philips v. Robinson, 4 Bing. 111.

[12] Brooke, Abr. "Detinue"; 1 Saund. 47b, c, d; Philips v. Robinson, 4 Bing. 111; Boyle v. Townes, 9 Leigh (Va.) 158.

if entitled to the immediate possession, although he never has had the actual possession.[13] And, as against a mere trespasser, prior possession alone will be sufficient to support the action.[14] In the older forms the right of the plaintiff was based either upon a contract of bailment or upon the obligation of one who came into possession by finding to return the property.

THE WRONGFUL DETENTION

48. The wrongful act may consist in a tortious detention of the property, regarded as an infringement of plaintiff's right of property, or in the breach of a bailee's obligation to deliver up the property on request. It is no answer to such demand that the bailee has by his own misconduct parted with the property.

The gist of this action is the wrongful detention of the goods, and not the original taking.[15] It lies against any person who has the actual possession of the chattel, whether he originally acquired such possession lawfully, as by bailment, delivery, or finding,[16] or tortiously, as by fraud or trespass.[17]

Demand before bringing the action is necessary if the detention is

[13] 2 Saund. 47a, note; 1 Brooke, Abr. "Detinue," pls. 30, 45; 1 Rolle, Abr. 606; Comyn, Dig. "Detinue" A; Phillips v. Robinson, 4 Bing. 111; Robinson v. Peterson, 40 Ill. App. 132; Hundley v. Buckner, 6 Smedes & M. (Miss.) 70; Jones v. Strong, 28 N. C. 367. A mere equitable title is not sufficient to sustain or defeat an action of detinue. Hicks v. Meadows, 193 Ala. 246, 69 South. 432.

[14] Huddleston v. Huey, 73 Ala. 215; Behr v. Gerson, 95 Ala. 438, 11 South. 115; Blair v. Williams, 159 Ala. 655, 49 South. 71; Maxler v. Hawk, 233 Pa. 316, 82 Atl. 251, Ann. Cas. 1913B, 559; Justice v. Moore, 69 W. Va. 51, 71 S. E. 204, Ann. Cas. 1912D, 17.

[15] 1 Chit. Pl. 137; 3 Bl. Com. 152; Co. Litt. 286b; Walker v. Fenner, 20 Ala. 192; Benje v. Creagh's Adm'r, 21 Ala. 151; Charles v. Elliott, 20 N. C. 606.

[16] Co. Litt. 286b; Bac. Abr. "Detinue"; Kettle v. Bromsall, Willes, 118; Dame v. Dame, 43 N. H. 37.

[17] 1 Chit. Pl. 137, 138; Kettle v. Bromsall, Willes, 118; Bernard v. Herbert, 3 Cranch, C. C. 346, Fed. Cas. No. 1,347; Dame v. Dame, 43 N. H. 37; Peirce v. Hill, 9 Port. (Ala.) 151, 33 Am. Dec. 306; Owings v. Frier, 2 A. K. Marsh. (Ky.) 268, 12 Am Dec. 393; Hall v. Reed, 15 B. Mon. (Ky.) 479; Goff v. Gott, 5 Sneed (Tenn.) 562. It is laid down in some of the old books that detinue cannot be maintained where the defendant took the goods tortiously. See 1 Chit. Pl. 137, 138. But while it started in cases of bailment as a purely contractual action, it was soon extended into the field of tort. The contractual liability for which detinue would lie survived, but the action has been applied to all cases of wrongful detention.

not in itself unlawful, but not otherwise. In Wilkinson v. Verity,[18] a silver communion had been delivered to defendant to hold for safe custody and deliver on demand of the parish. The defendant in 1859, more than six years before action brought, sold the plate. The plaintiffs demanded delivery and on defendant's failure to comply brought detinue. It was held that a fresh cause of action accrued to the church wardens upon the demand and refusal to deliver up the plate, notwithstanding the previous unknown conversion by the defendant more than six years before the action. The breach of the contractual duty did not arise until the demand and refusal, and it was no answer for the bailee to say that he had by his own misconduct incapacitated himself from complying.

The action will not lie against a person who never had actual possession or control of the chattel sought to be recovered, as against an executor for a chattel which was bailed to his testator, but which has never come into the possession of the executor.[19] Nor does it lie against a bailee who has lost the chattel by accident before demand;[20] but if he has wrongfully and elusively sold and delivered, or otherwise disposed of, the chattel to another, he remains liable.[21] If a person, by representing that he has the chattel, induces the owner to bring the action against him, he will be estopped to deny possession of it by him.[22]

[18] L. R. 6 C. P. 206. See Brock v. Headen, 13 Ala. 370; Miles v. Allen, 28 N. C. 88; Jones v. Green, 20 N. C. 488.

[19] 1 Chit. Pl. 138; Isaack v. Clark, 2 Bulst. 308; Brewer v. Strong's Ex'rs, 10 Ala. 961, 44 Am. Dec. 514; Burnley v. Lambert, 1 Wash. (Va.) 308; Staton v. Pittman, 11 Grat. (Va.) 99; Burns v. Morrison, 36 W. Va. 423, 15 S. E. 62; Behr v. Gerson, 95 Ala. 438, 11 South. 115; Walker v. Fenner, 20 Ala. 192; Kyle v. Swem, 99 Ala. 573, 12 South. 410; Charles v. Elliott, 20 N. C. 606.

[20] 1 Chit. Pl. 138; Brooke, Abr. "Detinue," pls. 1, 33, 40.

[21] Jones v. Dowle, 9 M. & W. 19; Reeve v. Palmer, 5 C. B. (N. S.) 84; Wilkinson v. Verity, supra; 1 Chit. Pl. 138; Brooke, Abr. "Detinue," pls. 1, 33, 40, and pls. 2, 34; Devereux v. Barclay, 2 Barn. & Ald. 703; Mertens v. Adcock, 4 Esp. 251; Bank of New South Wales v. O'Connor, 14 App. Cas. 273; Walker v. Fenner, 20 Ala. 192; Dame v. Dame, 43 N. H. 37; Merrit v. Warmouth, 2 N. C. 12; Lowry v. Houston, 3 How. (Miss.) 394; Haley v. Rowan, 5 Yerg. (Tenn.) 301, 26 Am. Dec. 268; Burns v. Morrison, 36 W. Va. 423, 15 S. E. 62; Rucker v. Hamilton, 3 Dana (Ky.) 36; Kershaw's Ex'rs v. Boykin, 1 Brev. (S. C.) 301; Robb v. Cherry, 98 Tenn. 72, 38 S. W. 412.

[22] Dyer v. Pearson, 3 Barn. & C. 38.

SCOPE OF ACTION OF REPLEVIN

49. The action of replevin lies, where specific personal property has been wrongfully taken and is wrongfully detained, to recover possession of the property, together with damages for its detention. To support the action it is necessary:

(a) That the property shall be personal.

(b) That the plaintiff, at the time of suit, shall be entitled to the immediate possession.

(c) That (at common law) the defendant shall have wrongfully taken the property (replevin in the cepit). But, by statute in most states, the action will now also lie where the property is wrongfully detained, though it was lawfully obtained in the first instance (replevin in the detinet).

(d) That the property shall be wrongfully detained by the defendant at the time of suit.

The primary object of replevin is to enable the plaintiff to obtain possession of the goods at the outset, without waiting until he has established his right by action. Like detinue, the action is primarily to recover the goods in specie; but the action differs from detinue in that the plaintiff does not have to wait, as in detinue, until the action is determined, before he can obtain possession. The secondary object of the action of replevin is to recover the value of the goods, if for any reason the primary object is defeated, and, in all cases, to recover damages to compensate for the loss of the use of the property while it was detained by the defendant.[23]

Replevin may be described as an action for the recovery of possession, in which the "provisional remedy" of an immediate delivery of the chattel claimed is granted. The action has to a large extent displaced detinue, and is the common remedy to recover possession of a chattel and damages for its wrongful detention, or, in case the thing itself cannot be specifically recovered, damages for its value as well as for its detention.

At common law replevin lay only for an unlawful taking of goods, and for several hundred years was employed only for one sort of unlawful taking, that of a wrongful distress. An action of replevin was the regular way for the tenant to contest the validity of the extra-

[23] Cobbey, Repl. §§ 23, 24; Mennie v. Blake, 6 El. & Bl. 842; Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750; Pedrick v. Kuemmell, 74 N. J. Law, 379, 65 Atl. 846. See Leeper, Graves & Co. v. First Nat. Bank of Hobart, 26 Okl. 707, 110 Pac. 655, 29 L. R. A. (N. S.) 747, Ann. Cas. 1912B, 802; Atlantic Refining Co. v. Feinberg (Del. Super.) 112 Atl. 685.

judicial seizure by which his landlord had taken his goods upon a distress for rent. It consisted in a redelivery of the pledge, or thing taken in distress, to the owner upon his giving security to try the right of distress and to restore it if the right should be adjudged against him.[24]

The theory of the action was broad enough to cover any case of wrongful taking, and the statement by Blackstone (3 Com. 146) that it was only available in cases of wrongful distress was soon shown to be incorrect. It is now recognized to extend to any unlawful taking from plaintiff's possession.[25] The doubtful question is whether it extends to mere detention.

If A. merely detained goods which he had acquired lawfully, at common law, B. must proceed in detinue and could not replevy the goods on the basis of an alleged unlawful detention. Replevin was in this respect like the statutory summary proceedings for forcible entry on land. It contemplated the situation where property, being in the peaceable possession of B., is seized by A. Provisionally, the status quo is at once restored, pending the settlement of the controverted right. In form the action proceeds for damages, but, if plaintiff fails, defendant will be given judgment for the return of the goods.

Replevin is not founded merely upon the right to obtain redress for a tort; in replevin and detinue, recovery of specific property is the end and aim of the action. In present-day law the action of replevin differs from detinue chiefly by the circumstance that the plaintiff at once secures possession of the chattels in dispute. This immediate relief is in the nature of a provisional remedy; the recovery of the chattels pending the outcome of the action. By this provisional relief the plaintiff really accomplishes his object to get possession of his goods; to keep possession, however, he must go ahead and establish his right. Hence as a condition of getting this relief in advance, and having the sheriff deliver the property over to him, he is required to give security in the form of a bond or undertaking, with sureties, to make out the justice of the claim or return the property to the defendant.

[24] 3 Street, Foundations Legal Liab. c. 10, pp. 207, 217.

[25] "The writ of replevin, as shown by the register, merely alleged an unlawful taking and withholding by the defendant." 3 Street, Foundations Legal Liab., 215; Mennie v. Blake, 6 El. & Bl. 842; Keen, Cas. Pl. p. 32, Cook & Hinton, Cas. Com. Law Pl. p. 84. Replevin at common law was maintainable in cases where there was an unlawful taking and an unlawful detention of personal property, and in such a proceeding there was a seizure under a writ of replevin of the subject-matter of the litigation at the beginning of the proceeding, while detinue at common law was maintainable for the recovery of personal property in all cases where there was an unlawful detainer, regardless of the manner of taking, and recovery of the property was had only after judgment. Troy Laundry Machinery Co. v. Carbon City Laundry Co. (N. M.) 196 Pac. 745.

After the provisional remedy of immediate delivery is granted both parties become actors in the suit; the plaintiff to be vindicated in his possession and to recover damages, while the defendant is like a plaintiff asserting his claim to the chattels. The pleading by which he prays for their return was formerly called an "avowry" or "cognizance." The plaintiff answered this as though he were a defendant.

In most states the old common-law action of replevin has been superseded by a statutory action in the nature of replevin; but the principles governing the common-law action apply to a great extent in all the states. By judicial decision or statute the action is usually extended to cases of unlawful detention where there was no wrongful taking.[26]

Mode of Procedure

The mode of proceeding in this form of action was originally as follows: The plaintiff first procured a writ from the court of chancery, directed to the sheriff and commanding him to seize the property and deliver it to the plaintiff, upon his giving security to prosecute an action against the other party to determine his right to the property, and to return it if the action should go against him. If the sheriff could seize the property under this writ, he did so, and delivered it to the plaintiff, who was then bound to prosecute his action. If the property could not be replevied ,because sold or disposed of by the defendant or for any other reason, the plaintiff might still bring his action, and his recovery would be the full value of the property. If the property was replevied the declaration in the action subsequently instituted alleged that the defendant had detained the property, and the action was therefore called replevin in the detinuit. If the goods were not replevied under the writ, the declaration alleged that the defendant still detains the property, and the action was therefore called replevin in the detinet.[27] In the former the plaintiff, having obtained possession

[26] Replevin is largely regulated by statute. Corbett v. Pond, 10 App. D. C. 17; Warren v. Leiter, 24 R. I. 36, 52 Atl. 70; Anderson v. Hapler, 34 Ill. 436, 85 Am. Dec. 318. Under Gen. St. 1906, § 2171, replevin lies for an unlawful detention of chattels as well as in cases where the taking was tortious. Evans v. Kloeppel, 72 Fla. 207, 73 South. 180; Hughes Trust & Banking Co. v. Consolidated Title Co., 81 Fla. 568, 88 South. 260. Under 3 Comp. St. 1910, p. 4368, § 2, replevin lies not only for the unlawful taking of the goods, but also for wrongful detention. Schwartz v. King Realty & Investment Co., 93 N. J. Law, 111, 107 Atl. 154. The essential elements of an action in claim and delivery are the same as in the common law action of replevin. Bush v. Bush, 55 Utah, 237, 184 P. 823.

[27] Replevin in the detinet has long since become obsolete. See editor's note to Potter v. North, 1 Saunders, 347b, Chit. Pl. (8th Am. Ed.) p. 162. It was never anything but a distinction in the form of declaring, not in the form

of the property, could only recover damages for the detention of them and not their value. In the latter he recovered their full value. If a part of the goods were replevied, and a part could not be replevied, the action was in the detinuit as to the former, and in the detinet as to the latter.

For what the Action Lies—Nature of the Property

To support replevin, the property must be personal. The action will not lie for taking property so attached to the freehold as to acquire the character of immovable fixtures, or real property; nor does it lie to recover growing crops or timber.[28] But it will lie for removable fixtures, such as tenant's fixtures; and it will lie for things previously attached to the freehold, and for crops and growing timber which have been severed and converted into personal property.[29]

Replevin cannot be maintained for money which has no identifying marks or receptacle.[30]

When Not Available

The action will not lie to determine the title to land. But the fact that the question of title may incidentally arise will not necessarily defeat the action.[31]

of action. McKelvey, Pl. 40-52. Later the declaration was always made out in the detinuit, but the damages included the value in case the chattels were not restored.

[28] 2 Saund. 84; Brown v. Wallis, 115 Mass. 156, 158; Chatterton v. Saul, 16 Ill. 149; Vausse v. Russel, 2 McCord (S. C.) 329; McAuliffe v. Mann, 37 Mich. 539; Roberts v. Dauphin Deposit Bank, 19 Pa. 71; Huebschmann v. McHenry, 29 Wis. 655. Growing crops are subject to replevin, without regard to whether they are growing or, having matured, have ceased to derive any nutriment from the soil. Stephens v. Steckdaub, 202 Mo. App. 392, 217 S. W. 871.

[29] Ogden v. Stock, 34 Ill. 522, 85 Am. Dec. 332; Cresson v. Stout, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; Davis v. Easley, 13 Ill. 192; Chatterton v. Saul, 16 Ill. 149; Dorr v. Dudderar, 88 Ill. 107; Richardson v. York, 14 Me. 216; Nichols v. Dewey, 4 Allen (Mass.) 386; Wait v. Baldwin, 60 Mich. 622, 27 N. W. 697, 1 Am. St. Rep. 551; Ortmann v. Sovereign, 42 Mich. 1, 3 N. W. 223; Marquette, H. & O. R. Co. v. Atkinson, 44 Mich. 160, 6 N. W. 230; Stearnes v. Raymond, 26 Wis. 74; Harlan v. Harlan, 15 Pa. 507, 53 Am. Dec. 612; Snyder v. Vaux, 2 Rawle (Pa.) 423, 21 Am. Dec. 466; Green v. Ashland Iron Co., 62 Pa. 97; Young v. Herdic, 55 Pa. 172; Coomalt v. Stanley, 3 Clark (Pa.) 389; Lehman v. Kellerman, 65 Pa. 489. Where the owner of land and all parties interested treated a warehouse erected thereon as personal property, replevin will lie against one wrongfully taking possession of the same. Burdick v. Tum-A-Lum Lumber Co., 91 Or. 417, 179 Pac. 215.

[30] Money is not subject of an action of claim and delivery unless it is marked or designed so as to make it specific as regards identification. Hillyer v. Eggers, 32 Cal. App. 704, 164 Pac. 27.

[31] It was held that replevin would lie for ore dug from the plaintiff's land, and that it was no objection that the question of title might incidentally

Replevin will not lie for timber, crops, or minerals severed and removed from land by one who is in the adverse possession of the land under a claim of title.[32] It will not lie for property which is in the custody of the law; that is, in the hands of court or executive officers under attachment or otherwise.[33]

PLAINTIFF'S RIGHT IN REPLEVIN

50. It is sometimes said that a general or special property is necessary to support the action, but in truth the right of immediate possession as against the defendant is all that is necessary.

Title to Support

To support replevin, the plaintiff must have such a property in the goods, either general or special, as entitles him to the immediate possession of them, as against the defendant. If he cannot show this, the action must fail, without regard to whether the defendant has any title, or not; for the action must be maintained, if at all, on the strength of the plaintiff's own title and right.[34] If, even though he may have an interest in the property, he is not entitled to the immediate possession, he must seek redress in some other form of action, for replevin will not lie.[35]

arise, if the action was not brought to try the title. Green v. Ashland Iron Co., 62 Pa. 97. See Christenson v. Hanna, 183 Ill. App. 115. The title to land cannot be tried in an action of replevin. Hickingbottom v. Lehman, 124 Miss. 682, 87 South. 149; Walden v. Feller, 99 Misc. Rep. 570, 164 N. Y. Supp. 493.

[32] Brown v. Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660; Powell v. Smith, 2 Watts (Pa.) 126, Whittier, Cas. Com. Law Pl. p. 217; Anderson v. Napier, 34 Ill. 436, 85 Am. Dec. 318; Ogden v. Stock, 34 Ill. 522, 85 Am. Dec. 332; Miller v. Wesson, 58 Miss. 831; Cromelien v. Brink, 29 Pa. 522. Cf. McKinnon v. Meston, 104 Mich. 642, 62 N. W. 1014; Ames, Lectures Legal Hist. p. 172.

[33] Kingman & Co. v. Reinemer, 160 Ill. 208, 46 N. E. 786; Kelso v. Youngren, 86 Minn. 177, 90 N. W. 316. While replevin lies to recover personal property unlawfully detained, property in custody of law cannot be so secured. Azparren v. Ferrel, 44 Nev. 157, 191 Pac. 571, 11 A. L. R. 678. An automobile lawfully taken in possession and held by the board of police commissioners of Baltimore city for use as evidence in a criminal prosecution is not subject to replevin by a claimant. Good v. Board of Police Com'rs of City of Baltimore, 137 Md. 192, 112 Atl. 294, 13 A. L. R. 1164. Under Act April 3, 1779 (1 Smith's Laws, p. 470) § 2, writ of replevin to recover property seized by public official is unauthorized, and where so seized will, on motion, be quashed. York v. Marshall, 257 Pa. 503, 101 Atl. 820.

[34] 1 Chit. Pl. 145b; Thomas v. Spafford, 46 Me. 408; Waterman v. Robinson, 5 Mass. 303; Tracy v. Warren, 104 Mass. 377; Hallett v. Fowler, 8 Allen (Mass.) 93; Johnson v. Neale, 6 Allen (Mass.) 227; Stanley v. Neale, 98 Mass. 343; Holler v. Coleson, 23 Ill. App. 324; Pattison v. Adams, 7 Hill (N. Y.) 126, 42 Am. Dec. 59; Walpole v. Smith, 4 Blackf. (Ind.) 304; Wilson v. Royston, 2 Ark. 315; Lester v. McDowell, 18 Pa. 91; Pease v. Ditto, 189 Ill. 456, 59 N. E. 983. To maintain replevin, plaintiff must show title and right to possession. Brown v. Sheedy, 90 Or. 74, 175 Pac. 613; Doody v. Collins, 229 Mass. 332, 111 N. E. 897; First Nat. Bank v. Kreuzberg, 75 Okl. 97, 181 Pac. 717.

[35] Gordon v. Harper, 7 Term R. 9; Wheeler v. Train, 3 Pick. (Mass.) 258; Collins v. Evans, 15 Pick. (Mass.) 64; Haverstick v. Fergus, 71 Ill. 105; Hunt v. Strew, 33 Mich. 85; Kingsbury v. Buchanan, 11 Iowa, 387; Lester v. McDowell, 18 Pa. 91; Weed v. Hall, 101 Pa. 592; Belden v. Laing, 8 Mich. 500; Chinn v. Russell, 2 Blackf. (Ind.) 174; Smith v. Williamson, 1 Har. & J. (Md.) 147; Azparren v. Ferrel, 44 Nev. 157, 191 Pac. 571, 11 A. L. R. 678. Though a chattel mortgagee may maintain replevin either against the mortgagor or a third person after condition broken, he cannot maintain the action either before default in payment, nor after such default, but before expiration of the time during which the mortgagor may retain possession. Even the general owner of a chattel cannot maintain the action where another has a special property therein giving him, and not the general owner, the right to possession. The action must be brought by the special owner. Hunt v. Strew, 33 Mich. 85. The lessee of attached property, and not the lessor, is the proper party to bring replevin. Hunt v. Strew, supra. And see Simpson v. Wrenn, 50 Ill. 222, 99 Am. Dec. 511; Moore v. Moore, 4 Mo. 421. The seller of a chattel unconditionally cannot maintain replevin therefor against the buyer merely because the latter has not paid for it. McNail v. Ziegler, 68 Ill. 224. But if the sale was for "cash on delivery" the action lies, if the chattel is not so paid for immediately upon demand therefor. Dole v. Kennedy, 38 Ill. 282. A vendor may replevy goods sold by him, where possession was obtained from him by the perpetration of a fraud. Bush v. Bender, 118 Pa. 94, 4 Atl. 213; Goldschmidt v. Berry, 18 Ill. App. 276; Farwell v. Hanchett, 19 Ill. App. 620; Id., 120 Ill. 573, 11 N. E. 875; Carl v. McGonigal, 58 Mich. 567, 25 N. W. 516.

[36] Powell v. Bradlee, 9 Gill & J. (Md.) 220; Bostick v. Brittain, 25 Ark. 482; Baker v. Fales, 16 Mass. 147; Pratt v. Parkman, 24 Pick. (Mass.) 42; Miller v. Warden, 111 Pa. 300, 2 Atl. 90; Midvale Steel Works v. Hallgarten & Co., 15 Wkly. Notes Cas. (Pa.) 47. One who has the legal right to the possession of property under a bill of lading may maintain replevin therefor, though he has never had possession. Powell v. Bradlee, supra. And the action may be maintained by the mortgagee of a chattel against one who takes it from the possession of the mortgagor after default in payment by the latter. Fuller v. Acker, 1 Hill (N. Y.) 473; Esson v. Tarbell, 9 Cush. (Mass.) 412. So where a person, to secure advances, gave another a shipper's receipt for goods in transitu, it was held that the latter could maintain replevin for the goods. Midvale Steel Works v. Hallgarten, supra. The gist of an action

Possession in the plaintiff at the time of the caption is not necessary. It is sufficient if he has the right to possession at the time of suit.[36]

It is not at all necessary that the plaintiff shall be the general owner. A special property will support the action, even as against the general

owner, if it is such as to give the right to the immediate possession.[37] Right of possession is the ground of the action, rather than general ownership.

In reason, it would seem to be clear that the right of the plaintiff to possession of the property, as against the defendant, should be the only question to be determined, and that actual title should only be material in so far as it determines this right. In some states, however, it is held that mere possession at the time of the unlawful taking of property by one without any authority at all is not enough to support replevin, though it might be sufficient to support trover; that either a general or special ownership must be shown, even as against a mere wrongdoer; and that, for instance, one who has the care of goods merely for safe-keeping, without any interest in them, cannot maintain the action.[38] In some states, on the other hand, no title need be shown, as against a mere wrongdoer. Where goods are taken from a person in

in replevin is the right to the possession of property in controversy. Bank of Buffalo v. Crouch (Okl.) 174 Pac. 764. Writ of replevin is a possessory action, and does not necessarily involve title. Scarborough v. Lucas, 119 Miss. 128, 80 South. 521.

[37] Mead v. Kilday, 2 Watts (Pa.) 110; Woods v. Nixon, Add. (Pa.) 131, 1 Am. Dec. 364; Harris v. Smith, 3 Serg. & R. (Pa.) 20; Young v. Kimball, 23 Pa. 193; Miller v. Warden, 111 Pa. 309, 2 Atl. 99; Quinn v. Schmidt, 91 Ill. 84; Gould v. Jacobson, 58 Mich. 288, 25 N. W. 194; Tyler v. Freeman, 3 Cush. (Mass.) 261; Fuller v. Acker, 1 Hill (N. Y.) 473; Gordon v. Jenney, 16 Mass. 465; Kramer v. Mathews, 68 Ind. 172; Entsminger v. Jackson, 73 Ind. 144; Grosvenor v. Phillips, 2 Hill (N. Y.) 147. It may be maintained by a pawnee, pledgee, or other person having a lien, and the right to possession. Hartman v. Keown, 101 Pa. 341; Reichenbach v. McKean, 95 Pa. 432. The action may be maintained by the mortgagee of chattels upon condition broken. Cleaves v. Herbert, 61 Ill. 126; Hendrickson v. Walker, 32 Mich. 68; Wood v. Weimar, 104 U. S. 786, 26 L. Ed. 779; Gould v. Jacobson, supra; Fuller v. Acker, supra; Esson v. Tarbell, 9 Cush. (Mass.) 412. And the mortgagee may maintain replevin against a person who levies on the property as the property of the mortgagor, where the mortgage provides that the debt shall become due, and the mortgagee shall be entitled to possession, in case of a levy. Quinn v. Schmidt, 91 Ill. 84. But the action will not lie where the time during which it is agreed that the mortgagor may retain possession has not expired. Esson v. Tarbell, supra; Ingraham v. Martin, 15 Me. 373. The action may be maintained by an auctioneer who is entitled to possession. Tyler v. Freeman, supra; Rich v. Ryder, 105 Mass. 310. And it may be maintained by an officer having the right to possession under a levy. Gordon v. Jenney, supra; Dezell v. Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628.

[38] Walpole v. Smith, 4 Blackf. (Ind.) 304, Whittier, Cas. Com. Law Pl. p. 212; Waterman v. Robinson, 5 Mass. 303; Perley v. Foster, 9 Mass. 112; Warren v. Leland, Id. 265; Dunham v. Wyckoff, 3 Wend. (N. Y.) 280, 20 Am. Dec. 695; Miller v. Adsit, 16 Wend. (N. Y.) 335. Replevin is a possessory action, and lies only in favor of one entitled to possession at the time of its commencement, and the right to possession must be coupled with ownership,

peaceable possession, by one who has not title or authority, the mere prior possession will support the action against the latter.[39]

The mere custody of a servant or agent is an insufficient basis to enable him to bring replevin for a wrongful taking, but suit must be brought by the one for whom he holds.[40]

The plaintiff must in all cases have the right to possession at the time the action is brought, and not merely at some prior or subsequent time; for "the state of things existing when the suit is commenced will control the determination." [41]

A tenant in common cannot maintain replevin against his co-tenant.[42] And it is held in some states that one tenant in common of goods cannot alone maintain this action; that he cannot, for instance, maintain it against an officer who attaches the goods as the sole property of the other owner.[43] "Replevin," said the Massachusetts court, "is an action founded on the general or special property of the plaintiff, and it is settled that, when a chattel is illegally taken and detained, all the part owners must join in replevin; and it is a good plea in

either general or special. Frick v. Miller, 7 Boyce (Del.) 366, 107 Atl. 391, judgment affirmed Miller v. Frick's Adm'r, 7 Boyce (Del.) 374, 107 Atl. 394; White Co. v. Union Transfer Co., 270 Pa. 514, 113 Atl. 432.

[39] Cleaves v. Herbert, 61 Ill. 126; Van Namee v. Bradley, 69 Ill. 299; Cummins v. Holmes, 109 Ill. 15; Harris v. Smith, 3 Serg. & R. (Pa.) 20. One in the sole and peaceable possession of goods, not as an intruder, trespasser, or wrongdoer, but as owner, either of the whole or some special property in them, has a valid title as against all strangers, which they cannot defeat by showing an outstanding title in some third party. Van Baalen v. Dean, 27 Mich. 104; Sanford v. Millikin, 144 Mich. 311, 107 N. W. 884; Wood v. Weimar, 104 U. S. 786, 26 L. Ed. 770 (right of possession suffices); Hall v. Ligon, 111 S. C. 245, 97 S. E. 710.

[40] Horn v. Zimmer, 180 Ill. App. 323; Pease v. Ditto, 189 Ill. 456, 59 N. E. 983; Warren v. Leland, 9 Mass. 265.

[41] Cobbey, Repl. § 25; Cory v. Hewitt, 26 Mich. 228; Moriarty v. Stoffern, 89 Ill. 528. The right to maintain replevin must exist at the very moment the writ is issued. Wattles v. Du Bois, 67 Mich. 313, 34 N. W. 672.

[42] Wills v. Noyes, 12 Pick. (Mass.) 324; Barnes v. Bartlett, 15 Pick. (Mass.) 71; Busch v. Nester, 70 Mich. 525, 38 N. W. 458; Kindy v. Green, 32 Mich. 310; Wetherell v. Spencer, 3 Mich. 123.

[43] Hart v. Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75; Gardner v. Dutch, 9 Mass. 427; Ladd v. Billings, 15 Mass. 15; Scudder v. Worster, 11 Cush. (Mass.) 573. But when a mass or mixture of similar, specific, and fungible articles belong to several parties in different and distinct proportions, each owner may maintain replevin for his proportion against one who unlawfully takes and detains all the articles, though they have never been separated, and have no distinguishing marks. Gardner v. Dutch, supra. Page v. Jones, 26 N. M. 195, 190 Pac. 541, 10 A. L. R. 761; Halsey v. Simmons, 85 Or. 324, 166 Pac. 944, L. R. A. 1918A, 321.

abatement that the property is in the plaintiff and another." [44] This would not apply to the full extent in those states where it is held that mere possession at the time of the unlawful taking of goods, without any other title, is sufficient to support replevin against the wrongdoer.[45]

TAKING OR DETENTION BY DEFENDANT

51. Replevin may be maintained upon any wrongful taking. In many jurisdictions it has been extended to cases of mere unlawful detention. As a general rule the defendant must continue in the actual or constructive possession of the property at the time of commencing suit.

Though, as we have seen, replevin was originally used in cases in which property had been illegally taken in distress, it is not so limited now, but it will lie in any case where goods have been illegally taken and are wrongfully detained, provided, of course, the plaintiff is entitled to their possession.[46]

At common law the action would only lie where the property was unlawfully or tortiously taken from the actual or constructive possession of the plaintiff, a trespass in the taking being absolutely essential; and this is still the rule in some of our states.[47] Under such circumstances the action is called "replevin in the cepit." At the present time in most states, by statute, the remedy has been enlarged so as to embrace cases in which property has been lawfully received or taken, but is wrongfully detained. In these states it will lie either where the property was tortiously or wrongfully taken, or where, though possession was originally acquired lawfully, the property is wrongfully detained.[48]

Some form of action for damages should be brought if the defendant has not the actual possession of the property when the action is commenced, for the remedy is proprietary and enforces the right of possession. While the action is primarily for recovery of possession, the same facts which show a wrongful obstruction of the right of property show also a tort, and the plaintiff is entitled to recover damages which he has suffered by the wrongful taking or detention, and also the value of the goods in case the property itself cannot be had.

The defendant must in all cases have actual or apparent possession and control of the property at the time the action is commenced. If the property has been lost, or destroyed, or disposed of by him, to the plaintiff's knowledge, the action will not lie, but the plaintiff must bring trespass or trover.[49] But if the defendant has been in the unlawful possession of the property, and the plaintiff brings replevin without reason to know of any change in the circumstances, the defendant

[44] Hart v. Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

[45] In Michigan, for instance, it is held that replevin lies by a tenant in common who is entitled to the possession of an undivided interest in personal property, against a wrongdoer who is a stranger to the title. McArthur v. Oliver, 60 Mich. 605, 27 N. W. 689. But a tenant in common to maintain the action must show something more than his undivided ownership. He must at least show that he was in possession. Hess v. Griggs, 43 Mich. 397, 5 N. W. 427. One partner can bring replevin for the whole partnership property, if it is seized on execution for another's individual debt. Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714.

[46] 1 Chit. Pl. 184; Ilsley v. Stubbs, 5 Mass. 283; Pangburn v. Patridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250; Haythorn v. Rushforth, 19 N. J. Law, 160, 38 Am. Dec. 540. It lies for goods obtained by false pretenses. Ayes v. Hewett, 19 Me. 281; Browning v. Bancroft, 8 Metc. (Mass.) 278; Farley v. Lincoln, 51 N. H. 577, 12 Am. Rep. 182; 3 Street, Foundations Legal Liab. p. 215.

[47] Woodward v. Grand Trunk Ry. Co., 46 N. H. 524; Dame v. Dame, 43 N. H. 37; Farley v. Lincoln, 51 N. H. 579, 12 Am. Rep. 182; Wright v. Armstrong, Breese (Ill.) 172; Simmons v. Jenkins, 76 Ill. 479; Johnson v. Prussing, 4 Ill. App. 575. It was held in Woodward v. Grand Trunk Ry. Co., supra, for instance, that replevin could not be maintained against a carrier, for the detention (though wrongful) of goods which came into its possession lawfully. At common law the action would lie only where trespass de bonis asportatis would lie. Sawtelle v. Rollins, 23 Me. 196; Pangburn v. Patridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250; Allen v. Crary, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; Marshall v. Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463; Enfield v. Stewart, 24 N. M. 472, 174 Pac. 428, 2 A. L. R. 196, 200.

[48] Page v. Crosby, 24 Pick. (Mass.) 215; Simpson v. M'Farland, 18 Pick. (Mass.) 427, 29 Am. Dec. 602; Dugan v. Nichols, 125 Mass. 576; Sexton v. McDowd, 38 Mich. 148; Weaver v. Lawrence, 1 Dall. (Pa.) 156, 1 L. Ed. 79. Under these statutes the action will lie generally whenever trover could be supported,—that is, whenever the defendant wrongfully detains the goods, or converts them, without regard to the manner in which he obtained them. Cobbey, Repl. § 51; Sawtelle v. Rollins, 23 Me. 196; Eveleth v. Blossom, 54 Me. 447, 92 Am. Dec. 555; Wills v. Barrister, 36 Vt. 220; Marshall v. Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463; Hart v. Boston & M. R. R., 72 N. H. 410, 56 Atl. 920; Whitman v. Merrill, 125 Mass. 127; Baker v. Fales, 16 Mass. 147; Pedrick v. Kuemmell, 74 N. J. Law, 379, 65 Atl. 846.

[49] Mitchell v. Roberts, 50 N. H. 486; Gildas v. Crosby, 61 Mich. 413, 28 N. W. 153; Richardson v. Reed, 4 Gray (Mass.) 441, 444, 64 Am. Dec. 77; Whittier, Cas. Com. Law Pl. pp. 219, 220 n.; Gaff v. Harding, 48 Ill. 148; Hall v. White, 106 Mass. 599; Sinnott v. Feiock, 165 N. Y. 444, 59 N. E. 265, 53 L. R. A. 565, 80 Am. St. Rep. 736. See note in 18 L. R. A. (N. S.) at page 1260; Nielsen v. Rebard, 43 Nev. 274, 183 Pac. 984; Nielsen v. Hyland, 51 Utah, 334, 170 Pac. 778. Replevin will lie though property is not in actual possession of defendant, if it is under his control, so that he may deliver it if he so desires. Burkee v. Great Northern Ry. Co., 133 Minn. 200, 158 N. W. 41; De Wolff v. Morino (Mo. App.) 187 S. W. 620.

cannot defeat the action by showing that, unknown to the plaintiff, he had disposed of the property before issuance of the writ; but the action will proceed, and the plaintiff may recover the value of the property. And where the plaintiff is in possession of the property when the writ issues, but the property has been injured or depreciated through the defendant's fault, or if he is in possession of a part only, the plaintiff is not bound to accept the property, or the part thereof, but may proceed with his action for damages.[50]

The action will not lie to determine the title and right to possession of property which is claimed by the defendant, but of which the plaintiff has possession at the time of suit.[51]

Same—Demand

A demand is not necessary before bringing the action, where the possession of the property was wrongfully obtained, as under a void sale by a pound master, or under an execution against a third person, or a sale voidable for fraud, so long as the goods are in the hands of the buyer.[52] Where, on the other hand, the possession was lawfully

[50] McBrian v. Morrison, 55 Mich. 351, 21 N. W. 368; Snow v. Roy, 22 Wend. (N. Y.) 602; Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259; Andrews v. Hoeslich, 47 Wash. 220, 91 Pac. 772, 18 L. R. A. (N. S.) 1205, 125 Am. St. Rep. 890, 14 Ann. Cas. 1118 (diamond ring pawned by plaintiff to defendant and sold without plaintiff's knowledge or consent). Compare Kierbow v. Young, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. (N. S.) 210, 11 Ann. Cas. 1148. See Lloyd, Cas. Civ. Proc. p. 238, 240, note; Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414; Anderson v. Boneman, 109 Mich. 532, 165 N. W. 830.

[51] Bacon v. Davis, 30 Mich. 157; Hickey v. Hinsdale, 12 Mich. 99; Aber v. Bratton, 60 Mich. 357, 27 N. W. 564. One cannot bring replevin for property actually in his own possession against an officer who has merely levied on it. Hickey v. Hinsdale, supra. It is not always necessary, however, that goods levied on shall have been actually removed, in order to constitute such a change of possession from the owner to the officer as will entitle the owner to maintain replevin. O'Connor v. Gidday, 63 Mich. 630, 30 N. W. 313; Gutsch v. McIlhargey, 69 Mich. 377, 37 N. W. 303; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77. Thus, where property was seized on an attachment, an inventory made, and a portion of the goods packed up in a trunk, but left in the owner's office, and a portion was removed, and the key of the office was retained for a time by the officer, it was held that this was a sufficient change of possession to justify replevin. Maxon v. Perrott, 17 Mich. 332, 97 Am. Dec. 191. When property levied on has been left in the owner's possession, the fact that he became receiptor for it to the officer does not entitle him to maintain replevin. Morrison v. Lumbard, 48 Mich. 548, 12 N. W. 696.

[52] Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Ballou v. O'Brien, 20 Mich. 304; LeRoy v. East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 102; Bertwhistle v. Goodrich, 53 Mich. 457, 19 N. W. 143; Clark v. Lewis, 85 Ill. 417; Tuttle v. Robinson, 78 Ill. 332; Goldschmidt v. Berry, 18 Ill. App. 276; Stillman v. Squire, 1 Denio (N. Y.) 327; Stone v. Perry, 60 Me. 48; Appleton v. Barrett, 29 Wis. 221; Furley v. Lincoln, 51 N. H. 577, 12 Am. Rep. 182; Jones v. Smith, 123 Ind. 585, 24 N. E. 368; Denton v. Smith, 61 Mich. 431, 28 N. W. 160.

acquired, and a statute allows the action, a demand and refusal are essential to the maintenance of the action, the rule being substantially the same as in detinue.[53]

[53] Ohio & M. Ry. Co. v. Noe, 77 Ill. 513; Hamilton v. Singer Mfg. Co., 54 Ill. 370; Adams v. Wood, 51 Mich. 411, 16 N. W. 788; Cadwell v. Pray, 41 Mich. 307, 2 N. W. 52; Lynch v. Beecher, 38 Conn. 490; Chandler v. Colcord, 1 Okl. 260, 32 Pac. 830; Chapin v. Jenkins, 50 Kan. 385, 31 Pac. 1084.

CHAPTER VII

ACTIONS OF DEBT, COVENANT, AND ACCOUNT

52-53. Scope of Action of Debt.
54. Certainty of Amount Due.
55. Scope of Action of Covenant.
56. Scope of Action of Account.

SCOPE OF ACTION OF DEBT

52. The action of debt lies where a party claims the recovery of a debt; that is, a liquidated or certain sum of money due him. The action is based upon contract, but the contract may be implied, either in fact or in law, as well as express; and it may be either a simple contract or a specialty. The most common instances of its use are for debts:

(a) Upon unilateral contracts express or implied in fact.
(b) Upon quasi contractual obligations having the force and effect of simple contracts.
(c) Upon bonds and covenants under seal.
(d) Upon judgments or obligations of record.
(e) Upon obligations imposed by statute.

53. The action will not lie:

(a) To recover unliquidated damages for breach of a promise.
(b) Nor, generally, to recover an installment of a debt payable in installments before the whole is due.
(c) Nor on a promise to pay out of a particular fund, or in a particular kind of money, or in property or services.

Nature of the Obligation

The action of debt was the common law's remedy for the enforcement of its earliest known obligations.[1] It never lay to recover damages for the breach of promises or covenants. A contractual debt must arise from some transaction, such as a loan or sale, or from a formal admission of debt by a sealed document. It was the action by which money claims of definite amount were collected, just as trespass was

[1] On the history of debt, see Ames, Lectures Legal Hist. 88, 122, 150; also Detinue, 76-78; 3 Street, Foundations Legal Liab. 127; 1 Williston, Cont. § 11; 8 Holdsworth, Hist. Eng. Law. 282, 326, 329, 339; Maitland, Eq. pp. 357, 332; Henry, 26 Yale Law J. p. 664; Sir F. Pollock, 6 Harv. Law Rev. 398; 2 Pollock and Maitland, Hist. Eng. Law, pp. 203-214.

the general remedy for all injuries committed by force. In the action of debt, the plaintiff demands a sum of money, together with "damages" for its unjust detention. The early idea was that of a right against a person who had possession of something, usually a sum of money, which he owes, and hence ought to turn over to the owner; for instance, the duty to return a borrowed implement of husbandry, or a specified amount of barley consumed by the borrower, was a debt as much as the duty to return a loan of money. Money and chattels were once both recoverable in the action of debt. The debtor was one who wrongfully withholds from the creditor property which is his. But the action of detinue for the detention of goods and chattels split off from the action of debt, for the recovery of specific chattels.[2]

This action gives specific enforcement of the duty to pay. It gives the specific thing demanded, namely, the recovery of a debt eo nomine and in numero, and not merely the recovery of damages.[3] Damages are generally awarded for the detention of the debt; but, as a rule, they are merely nominal, and are not, as in assumpsit and covenant, the principal object of the suit. Debt is a much more extensive remedy than assumpsit or covenant; for assumpsit, as we have seen, does not lie on a specialty—that is, on a sealed contract, or a contract of record; and covenant does not lie on a contract that is not under seal, whereas debt lies either upon simple contracts or specialties. This we shall presently see more in detail. "A debt, technically so called, may be evidenced by record, by contract under seal, or by simple contract only. Its distinguishing feature is that it is for a sum certain, or that may readily be reduced to a certainty; and the action of debt lies for the recovery thereof, eo nomine, without regard to the manner in which the obligation is incurred or is evidenced." [4]

Debt will lie on any simple contract to recover money due upon an executed consideration, whether the contract is verbal or written, ex-

[2] On debt for the recovery of a specific amount of unascertained chattels, see Ames, Lectures Legal Hist. p. 89; 3 Street, Foundations Legal Liab. pp. 128, 129; 2 Pollock and Maitland, Hist. Eng. Law (2d Ed.) p. 205.

[3] 1 Chit. Pl. 121; Thompson v. French, 10 Yerg. (Tenn.) 452; Minnick v. Williams, 77 Va. 758. The action does not lie for a breach of a sealed contract to convey land, to recover purchase money paid. The action being for the breach, and not for a sum of money eo nomine and in numero, it should be covenant. Haynes v. Lucas, 50 Ill. 436. It would lie to recover the purchase money as a debt arising from the obligation created by law to repay it as money had and received. The terms "sum certain" and debt "eo nomine" and "in numero" are used to distinguish a claim for a liquidated debt from a claim for unliquidated damages, which are not ascertainable in amount.

[4] Baum v. Tonkin, 110 Pa. 569, 1 Atl. 535.

press or implied.[5] It also lies to enforce a quasi contractual obligation to pay a sum certain.[6] It will lie to recover money lent, money paid by the plaintiff for the use of the defendant, money had and received by the defendant for the use of the plaintiff, or the balance due on an account stated;[7] to recover interest due on the loan or forbearance of money;[8] for work and labor;[9] work, labor and materials;[10] for goods sold and delivered, or bargained and sold;[11] for use and occupation of land.[12] Thus generally in all cases where the consideration has been executed and where there is an absolute duty to pay in money the value of the performance rendered, there debt on simple contract or indebitatus assumpsit is a proper remedy. Debt lies in all cases where the law courts can properly give specific performance of a duty to pay money, namely, where the duty is an absolute one, not subject to any conditions.

In What Sense was Debt Proprietary?

"This action of debt was nothing in essence but an action for the recovery of money unjustly detained, together with damages for the said wrongful detention, such damages being claimed, not in the writ, but in the plaintiff's first count."[13] An action for the recovery of a

[5] People v. Dummer, 274 Ill. 637, 113 N. E. 934. Simple contract debts must be founded on a quid pro quo or executed consideration. Ames, Lectures Legal Hist. pp. 88, 91; 8 Harv. Law Rev. 261.

[6] Van Deusen v. Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582, Whittier's Cas. Com. Law Pl. p. 350, note. It lies at the suit of a person entitled to costs in an action, either as a party or as an officer. There is an implied contract. Doyle v. Wilkinson, 120 Ill. 430, 11 N. E. 890. In Barber v. Chester County, 1 Chest. Co. Rep. (Pa.) 162, it was said that debt will lie wherever indebitatus assumpsit is maintainable. See District of Columbia v. Washington & G. R. Co., 1 Mackey (12 D. C.) 361, 382; 3 Street, Foundations Legal Liab. 133.

[7] 1 Chit. Pl. 122; Speake v. Richards, Hob. 207; Young v. Hawkins, 4 Yerg. (Tenn.) 171.

[8] Herries v. Jamieson, 5 Term R. 553; Sparks v. Garrigues, 1 Bin. (Pa.) 152.

[9] Com. Dig. "Debt," B; Thompson v. French, 10 Yerg. (Tenn.) 452, Whittier, Cas. Com. Law Pl. p. 356; Seretto v. Rockland, S. T. & C. H. Ry. Co., 101 Me. 140, 63 Atl. 651.

[10] Smith v. Proprietors of First Congregational Meetinghouse in Lowell, 8 Pick. (Mass.) 178.

[11] Emery v. Fell, 2 Term R. 28; Dillingham v. Skein, 1 Hempst. 181, Fed. Cas. No. 3,912a.

[12] Egler v. Marsden, 5 Taunt. 25; Wilkins v. Wingate, 6 Term R. 62; King v. Fraser, 6 East, 348; McKeon v. Whitney, 3 Denio (N. Y.) 452. And see Trapnall v. Merrick, 21 Ark. 503; McEwen v. Joy, 7 Rich. (S. C.) 33; Davis v. Shoemaker, 1 Rawle (Pa.) 135.

[13] Debt at the Time of the Year Books, G. Stone, 36 Law Quarterly Rev., pp. 61, 62. See 3 Holdsworth, Hist. Eng. Law, 326, 339, 344.

debt was thought of as like an action for the recovery of a book lent, or for the recovery of a plot of land which the defendant unjustly detained from the plaintiff.

This crude and primitive common-law conception of debt, that the creditor was demanding the return of his own money, and that the action was "proprietary" or "real," seems to be somewhat overemphasized by many legal scholars.[14] It is said that the duty to restore the money arose not because the debtor had promised or contracted to pay, but because of some transaction, as that he had borrowed it or received value, known as quid pro quo. But the promise or agreement to pay the price was just as much a part of the debt transaction as the delivery of the res.[15] To-day it would seem that the idea of debt being created solely by the receipt of quid pro quo and not by the promise or agreement to pay for it, is outgrown. To-day a promise may be regarded as giving rise to an enforceable duty to pay, at least where the consideration for the promise is executed. The only reason why debt will not lie upon a bilateral contract to enforce a promise to pay the price of goods to be delivered is that by the doctrine of implied conditions such promise does not give rise to an absolute duty to pay until the title has passed or the consideration has been fully executed. Then debt or indebitatus assumpsit will lie to enforce the duty to pay.

Specialty Debts

Debts by specialty arise when a sum of money is acknowledged to be due by a deed or instrument under seal, such as by deed of covenant or by bond or obligation. An obligation or bond is a deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. This is the creation or acknowledgment of a debt from the obligor to the obligee, often subject to a condition subsequent, unless the obligor performs a duty such as the payment of rent or money borrowed, the observance of a covenant, and the like, on failure of which the bond becomes forfeited. In any case the bond is no mere promise; it is the confession of a legal debt. The obligor has admitted that he owes

[14] See R. L. Henry, Consideration in Contracts, 26 Yale Law J. pp. 664, 690–694. Debt was indeed a "proprietary action," in the sense of being the vindication or enforcement of a right. The judgment was not for damages for breach of promise, but for recovery of the debt itself. See Vaughn, C. J., in Edgcomb v. Dee, Vaughn, 89, Ames, Lectures Legal Hist. pp. 150, 151; 1 Williston, Cont. § 11.

[15] See R. L. Henry, Consideration in Contracts, 26 Yale Law J. p. 694. In debt the word "agreed" must be used, instead of "promised," but this is mere form. McGinnity v. Laguerenne, 5 Gilman (Ill.) 101, Whittier, Cas. Com. Law Pl. p. 374.

the money and is bound by his confession. As Prof. Langdell says, it is rather of the nature of a grant of a right to a sum of money than a promise to pay.[16]

Debts of Record

A judgment for a sum of money adjudged by the court to be due from the defendant to the plaintiff in any former action is a debt of record; that is, a sum of money which appears to be due by the evidence of a court of record. This is an obligation of the highest nature, being established by the adjudication of a court of record. An action of debt was the only means for the enforcement of a judgment after a year and a day had elapsed from the time of its recovery. After such time execution could not issue thereon, as the judgment was presumed to be satisfied. So that, if one has once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment, and shall not be put upon the proof of the original cause of action; but, upon showing the judgment once obtained, still in force, and yet unsatisfied, he is entitled to a new judgment for the debt.

Debt thus lies on any obligation of record to pay money.[17] It lies, for instance, on a domestic judgment of a court of record, and on the judgment of a court of record of a sister state, which, in most states, is regarded as a specialty.[18] Debt will lie on a foreign judgment, but not as on a record or specialty.

[16] Langdell, Summary Cont. § 100; Ames, Lectures Legal Hist. p. 98; 3 Street, Foundations Legal Liab. p. 131; 3 Holdsworth, Hist. Eng. Law, 324; 2 Pollock & Maitland, Hist. Eng. Law, 217; Edgcomb v. Dee, Vaughn, p. 101; Merryman v. Wheeler, 130 Md. 566, 569, 101 Atl. 551 (debt rather than covenant, when payments all due).

[17] Woods v. Pettis, 4 Vt. 556. Debt on simple contract or assumpsit will not lie on a judgment of a sister state. Knickerbocker Life Ins. Co. v. Barker, 55 Ill. 241; Boston India Rubber Factory v. Holt, 14 Vt. 92, Whittier, Cas. Com. Law Pl. p. 134.

[18] Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Greathouse v. Smith, 3 Scam. (Ill.) 543; Young v. Cooper, 59 Ill. 121; St. Louis, A. & T. H. R. Co. v. Miller, 43 Ill. 199; Blattner v. Frost, 44 Ill. App. 580; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179. Assumpsit does not lie in these cases. Debt does not lie on a judgment of foreclosure of a mortgage, directing, in the alternative, the payment of the amount due, or a sale of the land. Burges v. Souther, 15 R. I. 202, 2 Atl. 441. But see Blattner v. Frost, 44 Ill. App. 580. It lies on a decree in equity directing absolutely the payment of a sum certain. Warren v. McCarthy, 25 Ill. 95; Post v. Neafie, 3 Caines (N. Y.) 22. See W. N. Hohfeld, 11 Mich. Law Rev. 568; W. W. Cook, 15 Columbia Law Rev. 237.

Debts upon Recognizance

Are a sum of money, recognized or acknowledged to be due to the state or to an individual, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party in a criminal proceeding, his good behavior, or the like; and these, if forfeited upon nonperformance of the condition, are also ranked among this principal class of debts, viz. debts of record, since the contract on which they are founded is witnessed by the highest kind of evidence, viz. by matter of judicial record.[19]

On Statute Debts

Debt is also a proper remedy, generally concurrent with the remedy by assumpsit, to recover a specific sum of money due by virtue of a statute, where the statute prescribes no particular form of action.[20] If a statute prohibits the doing of an act under a certain penalty ascertained by the act, to be recovered either by the party aggrieved, or by an informer,[21] and prescribes no particular mode of recovery, debt will lie.[22] It will lie to recover, under a statute money lost and paid on a wager, or to recover usury paid, or to recover a delinquent tax.[23] And whenever a statute gives the right to recover damages for

[19] Com. v. Green, 12 Mass. 1; Green v. Dana, 13 Mass. 493; Pate v. People, 15 Ill. 221; Elmer v. Richards, 25 Ill. 289; Dowlin v. Standifer, 1 Hempst. 290, Fed. Cas. No. 4,041a; State v. Folsom, 26 Me. 209; National Surety Co. v. Nazzaro, 233 Mass. 74, 123 N. E. 316; 1 Williston, Cont. § 220. The recognizance is equivalent to a judgment; nothing remains to be done but execution. Within a year from the date fixed for payment, a writ of execution will issue as a matter of course, on the creditor applying for it, unless the debtor, having discharged his duty, has procured the cancellation of the entry which described the confession. The recognizance was formerly in more common use than now, and large sums of money were lent upon its security.

[20] Com. Dig. "Action on Statute," E; Bac. Abr. "Debt," A; Tilson v. Town of Warwick Gaslight Co., 4 Barn. & C. 962; Love v. Pusey & Jones Co., 3 Pennewill (Del.) 577, 52 Atl. 542; City of Springfield v. Postal Telegraph Cable Co., 164 Ill. App. 270. See Town of Geneva v. Cole, 61 Ill. 397.

[21] Where a penal statute expressly gives the whole or a part of a penalty to a common informer, and enables him generally to sue for the same, debt will lie, and he need not declare qui tam (1 Chit. Pl. 120); but there must be an express provision enabling an informer to sue (Rex v. Mallard, 2 Strange, 828; Fleming v. Bailey, 5 East, 313, 315).

[22] 1 Rolle, Abr. p. 598, pls. 18, 19; Underhill v. Ellicombe, 1 McClel. & Y. 457; Cross v. U. S., 1 Gall. 26, Fed. Cas. No. 3,434; Rogers v. Brooks, 99 Ala. 31, 11 South. 753; Vaughan v. Thompson, 15 Ill. 39; President, etc., of Town of Jacksonville v. Block, 36 Ill. 507; Ewbanks v. President, etc., of Town of Ashley, 36 Ill. 177; Benalleck v. People, 31 Mich. 200; note 20, supra, and cases there cited.

[23] Town of Geneva v. Cole, 61 Ill. 397; People, to Use of Christian County, v. Davis, 112 Ill. 272; Ryan v. Gallatin County, 14 Ill. 78. See People v.

any particular injury, as for waste, extortion, etc., and the damages are ascertained by the act, and are not uncertain, debt will lie to recover them, if the statute prescribes no other remedy.[24]

If in any case the statute giving the right to sue for a penalty, or other debt created by it, prescribes a particular remedy for its recovery, other than debt, the action of debt will not lie. The form of action prescribed by the statute must be followed.[25]

CERTAINTY OF AMOUNT DUE

54. By the early rule the plaintiff must allege and prove a certain amount due. But the rule was relaxed, so that plaintiff could recover less than the amount demanded, if the sum due was capable of being ascertained at the trial. It does not lie for unliquidated damages.

For Sum Certain Only

The action of debt lies only for a liquidated sum of money; that is, a pecuniary demand where the amount due is fixed and specific or where it can readily be reduced to certainty by a mathematical computation. Blackstone tells us that in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all, for the debt is only a single cause of action fixed and determined, and which, therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. "If, therefore, I bring an action for £30, I am not at liberty to prove a debt of £20 and recover

Dummer, 274 Ill. 637, 113 N. E. 934. A suit in debt for taxes is not an action upon a contract, express or implied, under the Chicago Municipal Court Act.

[24] "Whenever a statute gives a right to recover damages, reduced, pursuant to the provisions of such statute, to a sum certain, an action of debt lies, if no other specific remedy is provided." Bigelow v. Cambridge, etc., Turnpike Corp., 7 Mass. 202. And see Strange v. Powell, 15 Ala. 452; Blackburn v. Baker, 7 Port. (Ala.) 284; Adams v. Woods, 2 Cranch, 341, 2 L. Ed. 297; Israel v. President, etc., of Town of Jacksonville, 1 Scam. (Ill.) 201; Cushing v. Dill, 2 Scam. (Ill.) 461; Vaughan v. Thompson, 15 Ill. 39; Portland Dry Dock & Ins. Co. v. Trustees of Portland, 12 B. Mon. (Ky.) 77 And in Reed v. Davis, 8 Pick. (Mass.) 514, where a statute gave the remedy by action of debt generally to recover penalties and forfeitures given by statute, it was held that debt would lie to recover treble damages for waste given by a statute, though it is evident that the amount was not ascertained and certain.

[25] Stevens v. Evans, 2 Burr. 1157; Underhill v. Ellicombe, 1 McClel. & Y. 450; Confrey v. Stark, 73 Ill. 187; Almy v. Harris, 5 Johns. (N. Y.) 175; Smith v. Drew, 5 Mass. 514; Gedney v. Inhabitants of Tewksbury, 8 Mass. 307; Smith v. Woodman, 28 N. H. 520.

a verdict thereon, any more than, if I bring an action of detinue for a horse, I cannot thereby recover an ox." [26]

In Rudder v. Price, however, Lord Loughborough says that, while the demand in an action of debt must have been for a sum certain in its nature, yet it was by no means so necessary that the amount be set out precisely that less could not be recovered.[27] A promise to pay so much as certain services or goods were worth would not formerly support a count in debt, as the price must be fixed.[28] But at the present day either debt or indebitatus assumpsit will lie for the reasonable value of services or goods, though not fixed by the parties. If the claim is for the value of something given as contrasted with unliquidated damages, that is sufficiently certain.

Debt will not lie, for instance, for a refusal to convey shares in a building according to the terms of a contract under seal. The remedy is by action of covenant.[29] Neither will debt lie for breach of a promise of indemnity against loss or damage by fire contained in a fire insurance policy, although on principle this may well be questioned as the duty to pay is absolute.[30]

Debt will not lie on a guaranty contract, as on a promise to pay the debt of another in consideration of forbearance, etc.,[31] or in some jurisdictions against the indorser of a bill or note, or by an indorsee

[26] Bl. Com. p. 154. See Baum v. Tonkin, 110 Pa. 569, 1 Atl. 535; Gregory v. Bewly, 5 Ark. 318; Little v. Mercer, 9 Mo. 218; Mix v. Nettleton, 29 Ill. 245; Hoy v. Hoy, 44 Ill. 469; Haynes v. Lucas, 50 Ill. 436; Fox River Mfg. Co. v. Reeves, 68 Ill. 403; Knowles v. Inhabitants of Eastham, 11 Cush. (Mass.) 429. See Young v. Ashburnham (C. P. 1578) 3 Leon. 161.

[27] Rudder v. Price, 1 H. Bl. 547, 550. See also, U. S. v. Colt, Fed. Cas. No. 14,830, Pet. C. C. 145, Whittier, Cas. Com. Law Pl. pp. 371, 373, note; Norris v. School Dist. No. 1 in Windsor, 12 Me. 203, 28 Am. Dec. 182; Thompson v. French, 10 Yerg. (Tenn.) 452.

[28] Young and Ashburnham's Case (C. P. 1578) 3 Leon. 161, Cook and Hinton, Cas. Com. Law Pl. p. 144. Cf. Norris v. School Dist. No. 1 in Windsor, 12 Me. 293, 28 Am. Dec. 182, Cook and Hinton, Cas. Com. Law Pl. p. 148; Seretto v. Rockland, S. T. & O. H. Ry., 101 Me. 140, 63 Atl. 651.

[29] Fox River Mfg. Co. v. Reeves, 68 Ill. 403.

[30] Flanagan v. Camden Mut. Ins. Co., 25 N. J. Law, 506, Whittier, Cas. Com. Law Pl. pp. 352, 355, note. See Heffron v. Rochester German Ins. Co., 220 Ill. 514, 77 N. E. 262 (no recovery on policy of fire insurance under the common counts). Compare People's Ins. Co. v. Spencer, 53 Pa. 353, 359, 91 Am. Dec. 217.

[31] 1 Chit. Pl. 127; Bishop v. Young, 2 Bos. & P. 83; Gregory v. Thomson, 31 N. J. Law, 166; Tappan v. Campbell, 9 Yerg. (Tenn.) 436. But see Brown v. Bussey, 7 Humph. (Tenn.) 573; Hall v. Rodgers, Id. 536; Potter v. Gronbeck, 117 Ill. 404, 408, 7 N. E. 580; Cubbins v. Mississippi River Commission, 241 U. S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041; Ames, Lectures Legal Hist. pp. 93, 94; 8 Harv. Law Rev. 261.

against the acceptor of a bill.[32] But the action of debt has been allowed more extensively in America as a remedy on bills and notes than in England, even against parties secondarily liable. In general debt will lie wherever a duty is created to pay a sum certain. If the one primarily liable does not pay, the indorser or drawer comes under a duty to pay the amount of the note or bill.[33]

The action cannot generally be supported for one entire debt, payable in installments, till all are due,[34] though for rent payable quarterly, or otherwise, or for an annuity, or on a stipulation to pay a certain sum on one day and a certain sum on another day, debt lies on each default.[35] And even where one sum is payable by installments, if the payment is secured by a penalty, debt may be maintained for the penalty.[36]

Debt will not lie to recover on a promise to pay a debt out of a particular fund, or in services, or in a particular kind of currency not legal tender.[37] It does not lie, for instance, on a note or writing obliga-

[32] Bishop v. Young, 2 Bos. & P. 78; Cloves v. Williams, 3 Bing. N. C. 868; Smith v. Segar, 3 Hen. & M. (Va.) 394; Stovall's Ex'r v. Woodson, 2 Munf. (Va.) 303. Quere, Hilborn v. Artus, 3 Scam. (Ill.) 344. Contra, Raborg v. Peyton, 2 Wheat. 385, 4 L. Ed. 268; Kirkman v. Hamilton, 6 Pet. 20, 8 L. Ed. 305; Home v. Semple, 3 McLean, 150, Fed. Cas. No. 6,658; Planters' Bank v. Galloway, 11 Humph. (Tenn.) 342. In Watkins v. Wake, 7 Mees. & W. 488, it was held that the action would lie by the indorsee against his immediate indorser. And see Stratton v. Hill, 3 Price, 253. And it is held that it will lie by the indorsee of a bill or note against the drawer or maker. Camp v. Bank of Owego, 10 Watts (Pa.) 130; Willmarth v. Crawford, 10 Wend. (N. Y.) 343. And in Loose v. Loose, 36 Pa. 538, it was maintained by the indorsee against a remote indorser. And see Onondaga County Bank v. Bates, 3 Hill (N. Y.) 53. But see Weiss v. Mauch Chunk Iron Co., 58 Pa. 295, 303, Whittier, Cas. Com. Law Pl. p. 351, note; 3 Street, Foundations Legal Liab., pp. 130–143; Raborg v. Peyton, 2 Wheat. 385, 4 L. Ed. 268.

[33] See Raborg v. Peyton, 2 Wheat. 385, 4 L. Ed. 268.

[34] Hunt's Case (1588) Owen, 42; Rudder v. Price, 1 H. Bl. 547, Whittier, Cas. Com. Law Pl. p. 360; Fontaine v. Aresta, 2 M'Lean, 127, Fed. Cas. No. 4,905; Farnham v. Hay, 3 Blackf. (Ind.) 107; Sparks v. Garrigues, 1 Bin. (Pa.) 152; Hoy v. Hoy, 44 Ill. 469. See Jameson v. Board of Education, 78 W. Va. 812, 89 S. E. 255, L. R. A. 1916F, 926, 934.

[35] Hunt's Case (1588) Owen, 42; Rudder v. Price, supra; Hoy v. Hoy, 44 Ill. 469.

[36] Fontaine v. Aresta, supra; 1 Chit. Pl. 127; Coates v. Hewit, 1 Wils. K. B. 80. In such case only the actual amount due can be recovered.

[37] Wilson v. Hickson, 1 Blackf. (Ind.) 230; Osborne v. Fulton, Id. 234; Illinois State Hospital for Insane v. Higgins, 15 Ill. 185; Mix v. Nettleton, 29 Ill. 245; Snell v. Kirby, 3 Mo. 21, 22 Am. Dec. 450; Hudspeth v. Gray, 5 Ark. 157; Deberry v. Darnell, 5 Yerg. (Tenn.) 451; Sinclair v. Piercy, 5 J. J. Marsh. (Ky.) 63; January v. Henry, 3 T. B. Mon. (Ky.) 8; Young v. Scott, 5 Ala. 475; Beirne v. Dunlap, 8 Leigh (Va.) 514; Scott v. Conover, 6 N. J. Law, 222. But see Gift v. Hall, 1 Humph. (Tenn.) 480. It will lie on a contract

tory for the payment of a certain sum in "United States bank notes, or its branches," or in notes of a particular bank,[38] or in lumber,[39] or in county orders.[40] But it will lie for a debt payable in money or goods at the option of either party, or to pay a definite sum in goods.[41]

In the cases mentioned the only remedy is by assumpsit or covenant to recover damages for breach of promise as contrasted with specific enforcement of the duty to pay a sum certain.

SCOPE OF ACTION OF COVENANT

55. The action of covenant lies for the recovery of damages for breach of a covenant, that is, a promise under seal; whether the damages are liquidated or unliquidated. When the damages are unliquidated it is the only proper form of action.

The action of covenant lies for the breach of a contract under seal, executed by the defendant; and at common law it will lie in no other case.[42] If the specialty has been materially varied or modified by a subsequent informal agreement, the remedy is in assumpsit.[43]

to pay in property "or" in money. Crockett v. Moore, 3 Sneed (Tenn.) 145, Whittier, Cas. Com. Law Pl. p. 358, 360, note, Sunderland, Cas. Com. Law Pl. p. 115; Dorsey v. Lawrence, Hardin (Ky.) 508; Minnick v. Williams, 77 Va. 758; Henry v. Gamble, Minor (Ala.) 15; Bradford v. Stewart, Id. 44.

[38] Wilson v. Hickson, supra; Osborne v. Fulton, supra. Cf. Belford v. Woodward, 158 Ill. 122, 136, 41 N. E. 1007, 29 L. R. A. 593 (gold coin).

[39] Cassady v. Laughlin, 3 Blackf. (Ind.) 134. It seems, however, that debt lies if the debtor merely had the option to pay in goods, or do some other act, and has not done so. Bloomfield v. Hancock, 1 Yerg. (Tenn.) 101; Young v. Hawkins, 4 Yerg. (Tenn.) 171; Nelson v. Ford, 5 Ohio, 473; Fox River Mfg. Co. v. Reeves, 68 Ill. 403.

[40] Mix v. Nettleton, 29 Ill. 245 (debt will lie on a judgment payable in United States gold coin). Cf. Belford v. Woodward, 158 Ill. 122, 136, 41 N. E. 1007, 29 L. R. A. 593.

[41] McKinnie v. Lane, 230 Ill. 544, 82 N. E. 878, 120 Am. St. Rep. 338 (indebitatus assumpsit); Emery v. Fell, 2 Term R. 28; 3 Street, Foundations Legal Liab. p. 188; Ames, Lectures, Legal Hist. p. 153.

[42] Gale v. Nixon, 6 Cow. (N. Y.) 445; Simonton v. Winter, 5 Pet. 141, 8 L. Ed. 75; Tribble v. Oldham, 5 J. J. Marsh. (Ky.) 137; Rockford, R. I. & St. L. R. Co. v. Beckemeier, 72 Ill. 267; Wilson v. Brechemin, Brightly, N. P. (Pa.) 445; Maule v. Weaver, 7 Pa. 329; Jackson v. Waddill, 1 Stew. (Ala.) 579; U. S. v. Brown, 1 Paine, 422, Fed. Cas. No. 14,670. See section 141, p. 273, for declaration in covenant. In some states, even where the common-law proce-

[43] McVoy v. Wheeler, 6 Port. (Ala.) 201, Lloyd, Cas. Civ. Proc. pp. 186, 187; Phillips & C. Const. Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Radzinski v. Ahlswede, 185 Ill. App. 513.

Where a contract for the sale of lands is signed and sealed both by the vendor and vendee, covenant will lie for breach of a promise therein by the vendee to pay the purchase money, but if the contract is signed and sealed by the vendor only, and merely delivered to and accepted by the vendee, the vendor cannot maintain covenant against the vendee on what purports in the instrument to be a covenant by the latter to pay the purchase money. The action must be assumpsit, or perhaps debt.[44]

The action of covenant could not be employed for the recovery of a debt, even though the existence of the debt is attested by a bond or sealed instrument. "The law is economical; the fact that a man has one action is a reason for not giving him another." [45] Covenant came, however, to be permitted in the case of a sealed debt, where there was an express covenant to pay the debt, or where there were words that could be construed as such.[46]

Whenever the defendant has executed and delivered a contract under seal, and has broken it, covenant is the proper remedy.[47] It may be maintained whether the covenant for the breach of which it is brought is express, or is to be implied by law from the terms of the

dure is in use, the distinction as to form in actions on sealed and actions on unsealed instruments has been abolished by statute. See Adam v. Arnold, 86 Ill. 185. But the statute does not, by allowing assumpsit, prevent the plaintiff from suing in covenant. The action of covenant still lies. Goodrich v. Leland, 18 Mich. 110; Christy v. Farlin, 49 Mich. 319, 13 N. W. 607. It has been held that covenant lies on an instrument purporting to be, and operating as, a deed, although not sealed. Jerome v. Ortman, 66 Mich. 668, 33 N. W. 759. On the history of covenant, see Ames, Legal Essays, pp. 97–104; 3 Street, Foundations Legal Liab. pp. 114–127; Chit. Pl. (6th Am. Ed.) pp. 115–120.

[44] Gale v. Nixon, supra; First Congregational Meetinghouse Society v. Town of Rochester, 66 Vt. 501, 29 Atl. 810, Whittier, Cas. Com. Law Pl. p. 287; Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762 (grantee by deed poll). As to debt, see 5 Minn. Law Rev. p. 225, note.

[45] Covenant will not lie, when payments are all due and payable. Merryman v. Wheeler, 130 Md. 506, 101 Atl. 551; Ames, 2 Harv. Law Rev. 56; 2 Pollock and Maitland, Hist. Eng. Law, p. 217; 3 Street, Foundations Legal Liab. pp. 119, 120; 3 Holdsworth, Hist. Eng. Law, p. 324.

[46] Outtoun v. Dulin, 72 Md. 530, 20 Atl. 134, Lloyd, Cas. Civ. Proc. p. 189, note; Taylor v. Wilson, 27 N. C. 214, Sunderland, Cas. Com. Law Pl. 124.

[47] Hopkins v. Young, 11 Mass. 302; Morse v. Aldrich, 1 Metc. (Mass.) 544; Douglass v. Hennessey, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583; Northwestern Ben. & Mut. Aid Ass'n of Illinois v. Wanner, 24 Ill. App. 357; Moore v. Vail, 17 Ill. 185; Goodrich v. Leland, 18 Mich. 110; New Holland Turnpike Co. v. Lancaster County, 71 Pa. 442. The action is proper to recover damages for breach of a covenant of warranty, or of seisin, or against incumbrances, or for quiet enjoyment, contained in a conveyance of land under seal. See Illinois Land & Loan Co. v. Bonner, 91 Ill. 114; Moore v. Vail, 17 Ill. 185; Harding v. Larkin, 41 Ill. 413; Jones v. Warner, 81 Ill. 343; Harlow v.

deed,[48] and whether it be for something that has been done in the past, or something in præsenti, or for the performance of something in the future.[49]

The damages sought to be recovered need not necessarily be unliquidated. If they are liquidated, so that debt will lie, the plaintiff may nevertheless bring covenant instead, for the remedies are concurrent; but if the sum, the payment of which is secured by a writing under seal, is unliquidated and uncertain in amount, covenant is the only remedy for its recovery.[50] Indeed, since, as we have seen, assumpsit will not lie for breach of a contract under seal, it follows that covenant is the only remedy, to recover unliquidated damages for the breach of a contract under seal.

Thomas, 15 Pick. (Mass.) 66; Donahoe v. Emery, 9 Metc. (Mass.) 63; Hovey v. Smith, 22 Mich. 170; Peck v. Houghtaling, 35 Mich. 127. The action lies for the wrongful dissolution of a partnership by articles under seal, Addams v. Tutton, 39 Pa. 447; or upon a bond with a penalty, New Holland Turnpike Co. v. Lancaster County, supra; U. S. v. Brown, 1 Paine, 422, Fed. Cas. No. 14,670.

[48] Dexter v. Manley, 4 Cush. (Mass.) 14; Grannis v. Clark, 8 Cow. (N. Y.) 36; Frost v. Raymond, 2 Caines (N. Y.) 188, 2 Am. Dec. 228; Vanderkarr v. Vanderkarr, 11 Johns. (N. Y.) 122; Kent v. Welch, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; Gates v. Caldwell, 7 Mass. 68; Roebuck v. Duprey, 2 Ala. 535; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350. Whether or not a covenant will be implied is a question of substantive law, and has nothing to do with the form of action, or any question of pleading. Whether the covenant is express or implied, the method of pleading is the same. Grannis v. Clark, 8 Cow. (N. Y.) 36.

[49] Illustrations of covenants for something in præsenti are found in covenants against incumbrances contained in a deed of land, Jones v. Warner, 81 Ill. 343; or covenants of seisin, Brady v. Spurck, 27 Ill. 478. These are really contracts of indemnity against loss by defects of title. A covenant for quiet enjoyment is an illustration of a covenant for something in the future. Brady v. Spurck, 27 Ill. 478. And any promise under seal, whether to pay money, or to do some other act, or to forbear from doing some act, is such a covenant.

[50] Jackson v. Waddill, 1 Stew. (Ala.) 570; Byrd v. Knighton, 7 Mo. 443; Taylor v. Wilson, 27 N. C. 214; Wilson v. Hickson, 1 Blackf. (Ind.) 230; Scott v. Conover, 6 N. J. Law, 222; Johnston v. Salisbury, 61 Ill. 316. For breach of a contract executed under the seals of both parties thereto only an action of debt or covenant will lie. Van Buren Light & Power Co. v. Inhabitants of Van Buren, 118 Me. 458, 109 Atl. 8.

SCOPE OF ACTION OF ACCOUNT

56. The action of account lies where one has received goods or money for another in a fiduciary capacity, to ascertain and recover the balance due. It can only be maintained where there is such a relationship between the parties, as to raise an obligation to account, and where the amount due is uncertain and unliquidated.

The common-law action of account render, or account, as it is more conveniently designated, is one which has generally fallen into disuse, by reason of the fact that matters within its scope may generally be the subject of an action of general assumpsit, or a suit in a court of equity. It is still in use, however, in some of the states.[51]

Obligation to Account

Where one has received property belonging to another, to invest or use on his behalf, the obligation arises by operation of law to account for what becomes of it to the owner.[52] It is an obligation like debt arising from the receipt of something. Agents charged with handling for profit money or goods, or collecting rents and profits from another's land, such as bailiffs, partners, factors, commission merchants, executors, trustees, and guardians, come under a legal obligation to render an account of the capital (corpus) and proceeds which they receive on behalf of their principal. The obligation to account is thus one which the law imposes independently of contract. It is not founded on promise, but on the existence of a relationship of fact, namely, the being intrusted with the handling of property belonging to another.

[51] Action of account, as such, was not abolished by Practice Act, § 17, repealing all inconsistent acts and parts of acts, in view of section 11. Deavitt v. Corry, 90 Vt. 531, 98 Atl. 1000. In some states the action has been superseded. In others the common-law action is still in force, and in others it has been extended, or a similar remedy has been expressly provided for by statute. For the history of the common-law action, and whether it may still be employed, see Godfrey v. Saunders, 3 Wils. 94; Duncan v. Lyon, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513; Neal v. Keel's Ex'rs, 4 T. B. Mon. (Ky.) 102; Griffith v. Willing, 3 Bin. (Pa.) 317; Harker v. Whitaker, 5 Watts (Pa.) 474; Closson v. Means, 40 Me. 337; Pardridge v. Ryan, 134 Ill. 247, 25 N. E. 627; Garrity v. Hamburger Co., 136 Ill. 499, 27 N. E. 11; Kemp v. Merrill, 92 Ill. App. 46; Enterprise Oil & Gas Co. v. National Transit Co., 172 Pa. 421, 33 Atl. 687, 51 Am. St. Rep. 746; 3 Street, Foundations Legal Liab. p. 99.

[52] Thouron v. Paul, 6 Whart. (Pa.) 615; Lloyd, Cas. Civ. Proc. p. 179; 1 Am. and Eng. Enc. Law (1st Ed.) 128, title "Account Render"; article by Prof. C. C. Langdell, 2 Harv. Law Rev. 242, 267; Hening, 3 Select Essays, Anglo-American Legal Hist. 343.

Action of Account

This obligation was recognized by the ancient common law and was enforced by the action of account. Owing to defects of legal procedure, this action was later superseded by the action for money had and received and by bill in equity. In the action of account the amount of money claimed is uncertain and unliquidated, but by an accounting before auditors the balance due is ascertained and declared by the judgment of the court as a debt.

Account is the proper form of action when one has received money or property for the use of another for which he should account to the latter,[53] or where two persons are partners in a mercantile adventure.[54] "It is said of this action that it is one of great antiquity, and lies at common law against guardians, bailiffs, receivers, and mercantile copartners, to compel an account of profits or moneys received. It was an action provided by law in favor of merchants, and for advancement of trade and traffic, as, when two joint merchants occupy their stock of goods and merchandise in common, to their common profit, one of them, naming himself a merchant, shall have an account against the other, naming him a merchant, and shall charge him as receptor denariorum." [55] "By the common law, the action lay only against a guardian in socage, bailiff, or receiver, or by one in favor of trade and commerce against another wherein both were named merchants; that is to say, against all who had charge or possession of the lands, goods, chattels, or moneys of another with a liability to render an account thereof, such as partners, trustees, guardians, and all who could be specially described as above." [56] At common law the action

[53] Harrington v. Deane, Hob. 36; Bredin v. Dwen, 2 Watts (Pa.) 95; Bredin v. Kingland, 4 Watts (Pa.) 420; Shriver v. Nimick, 41 Pa. 91; Lee v. Abrams, 12 Ill. 111.

[54] Fowle v. Kirkland, 18 Pick. (Mass.) 299; Griffith v. Willing, 3 Bin. (Pa.) 317; Irvine v. Hanlin, 10 Serg. & R. (Pa.) 220; Appleby v. Brown, 24 N. Y. 143; Kelly v. Kelly, 3 Barb. (N. Y.) 419; Beach v. Hotchkiss, 2 Conn. 425; Leonard v. Leonard, 1 Watts & S. (Pa.) 342.

[55] Appleby v. Brown, 24 N. Y. 143; Co. Litt. 172a. A receiver is a collector, who has received money. A bailiff is manager of an estate, who has had charge of property under the duty to account for its proceeds or profits. Street, Foundations Legal Liab. 109–111. A factor or commission merchant is one employed to buy or sell goods. See Ames, Lectures Legal Hist. p. 116.

[56] 1 Am. & Eng. Enc. Law, 129. It lies against an attorney for money received from his client, Bredin v. Kingland, 4 Watts (Pa.) 420; and generally wherever one person has received money as the agent of another, and should account therefor. Long v. Fitzsimmons, 1 Watts & S. (Pa.) 530; Shriver v. Nimick, 41 Pa. 91. If a father takes possession of and manages the estate of his deceased son, without administering, he may be held liable to the child of such decedent in account render, as agent or bailiff. McLean's Ex'rs v. Wade, 53 Pa. 146. And the action lies by a landlord against his tenant, who

could be maintained between mercantile partners where there were two of them only, and not when the firm consisted of more than two.[57] But in most states where the action is in use this has been changed by statutes.[58] Indeed, in many respects the scope of this action has been very much extended by statute, both in England and in this country.[59]

The action is in form an action arising ex contractu, and will only lie where there is a relation giving rise to an obligation to account between the parties upon which it can be founded. This obligation, like that of debt, is specifically enforced. There is an analogy between the obligation to account and a trust, and it has been called a common-law trust.[60]

The action will only lie where the amount sought to be recovered is uncertain and unliquidated.[61] If the mutual debits and credits of the parties have been ascertained, or an account has been stated between them, assumpsit or debt, and not account, is the proper remedy to recover the definite balance due.[62] In some cases assumpsit or covenant may be concurrent remedies with this form of action; but debt can never be so, for account will never lie where the object of the suit is the recovery of a sum certain.

Method of Procedure

The action of account render differs from the other common-law actions in the mode of procedure. Though it is commenced like them, the judgment is first rendered upon the liability to account, quod computet, which is an interlocutory judgment only.[63] The court thereupon appoints auditors or arbitrators, whose business it is to take and report the account between the parties, with the balance due, and upon their report the final judgment is rendered. If the balance was found in favor of the defendant, no judgment for it could be given him at common law. In Pennsylvania the jury may settle the accounts in the first instance, and then final judgment only is rendered; but, where this cannot be done, the practice is as above indicated. In Illinois and some other states the jury merely determine the liability to account, and hear no evidence as to the state of the accounts; that being left to the auditors appointed to take the account and ascertain the balance due.

is bound to render a portion of the profits as rent. Long v. Fitzimmons, 1 Watts & S. (Pa.) 530. It lies by one tenant in common against the other for his share of the rents and profits. Barnum v. Landon, 25 Conn. 137; Cheney v. Ricks, 187 Ill. 171, 58 N. E. 234; Wolkau v. Wolkau, 202 Ill. App. 396; Enterprise Oil & Gas Co. v. National Transit Co., 172 Pa. 421, 33 Atl. 687, 51 Am. St. Rep. 740. And it lies by a cestui que trust against a trustee who has received the profits of lands, Dennison v. Goehring, 7 Pa. 175, 47 Am. Dec. 505; or against a testamentary trustee for an account of his receipts and expenditures, Bredin v. Dwen, 2 Watts (Pa.) 95.

[57] Beach v. Hotchkiss, 2 Conn. 425; Appleby v. Brown, 24 N. Y. 143.

[58] See Park v. McGowen, 64 Vt. 173, 23 Atl. 855.

[59] 1 Am. & Eng. Enc. Law, 130. See Barnum v. Landon, 25 Conn. 137 (between tenants in common); Crow v. Mark, 52 Ill. 332 (tenants in common); Lee v. Abrams, 12 Ill. 111; Knowles v. Harris, 5 R. I. 402, 73 Am. Dec. 77; McPherson v. McPherson, 33 N. C. 391, 53 Am. Dec. 416.

[60] Conklin v. Bush, 8 Pa. 514. See Scott, Cas. Trusts, 568, 571; Ames, Lectures Legal Hist. 116 to 121; Langdell, Eq. Jurisdiction, 85–89; 3 Street, Foundations Legal Liab. 99; 2 Harv. Law Rev. 242, 267.

[61] Foster v. Allanson, 2 Term R. 479; Andrews v. Allen, 9 Serg. & R. (Pa.) 241; Beitler v. Ziegler, 1 Pen. & W. (Pa.) 135; Morgan v. Adams, 37 Vt. 233; Crousillat v. McCall, 5 Bin. (Pa.) 433; Gratz v. Phillips, Id. 568.

[62] See Langdell, Eq. Jurisdiction, pp 75–86.

[63] Leinhart v. Kirkwood, 130 Ill. App. 393; McPherson v. McPherson, 33 N. C. 391, 53 Am. Dec. 416 (two judgments—first, that plaintiff and defendant account together; and, second, that plaintiff or defendant recover the balance found to be due).

CHAPTER VIII

ACTION OF ASSUMPSIT (SPECIAL AND GENERAL)

57–58. Scope of Special Assumpsit.
59–60. Scope of General Assumpsit.
61. Varieties of Common Counts.
62. Contracts of Record and Statutory Liabilities.

SPECIAL ASSUMPSIT

57. The action of assumpsit arose as one species of action on the case, upon analogy to various rights of action in tort. Consideration became the test of whether there was sufficient ground to enforce a promise.

58. Special assumpsit lies for the recovery of damages for the breach of simple contract, either express or implied in fact. The term "special contract" is often used to denote an express or explicit contract as contrasted with a promise implied in law.

The action of assumpsit, or trespass on the case in assumpsit, is so called from the word "assumpsit" (he undertook, or he promised), which, when the pleadings were in Latin, was inserted in the declaration as descriptive of the defendant's undertaking.[1] It is a proper remedy for the breach of any simple or unsealed contract, whether the contract is verbal or written, express or implied, and whether it is for the payment of money, or for the performance of some other act, as to render services or deliver goods, or for the forbearance to do some act.[2] In no case will the action lie unless there has been an actual contract or promise, or unless the law will imply one; for a promise either given in fact or implied by law is essential.[3]

[1] 1 Chit. Pl. 111; Board of Highway Com'rs v. City of Bloomington, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471, 477, note; Clark v. Van Cleef, 75 N. J. Eq. 152, 71 Atl. 260.

[2] Rudder v. Price, 1 H. Bl. 551; Bull, N. P. 167. As to the nature of the action, see, also, Ward v. Warner, 8 Mich. 508; Farmers' Nat. Bank v. Fonda, 85 Mich. 533, 32 N. W. 604.

[3] Rudder v. Price, 1 H. Bl. 551, 554, 555; Taylor v. Laird, 25 L. J. Exch. 329; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; Thornton v. Village of Sturgis, 38 Mich. 639; Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296. Assumpsit lies only when damages are sought for the breach of a contract, express or implied. Casey v. Walker & Mosby, 122 Va. 465, 95 S. E. 434.

Origin of Remedy

The history of assumpsit, of the development of the remedy for enforcing promises made upon a valuable consideration, is too obscure and remote a field for us to enter.[4] The action of covenant hardened before it could be extended to unwritten agreements, even when made upon valuable consideration, and until near the end of the fifteenth century such pacts found no remedy. Prior to the sixteenth century the law of contracts rested on the foundations of debt, covenant, and account, but for the development of this branch of the law they were entirely inadequate. The action of assumpsit supplied the remedy for breach of simple contracts, and its extension is largely the history of the substantive law of contract.

Under the statute of Westminster II the issuance of new writs was confined to cases which bore some resemblance to wrongs included within the recognized theories of action. When a man undertook by promise to do something and did it improperly, or where he obtained something by a promise and then broke the promise, writs of trespass on the case were allowed for the wrong done.[5]

The action of assumpsit was thus developed from the analogies of actions ex delicto rather than the analogy of covenant, debt, or any action ex contractu. What the particular analogies were that the courts strained to transform a tort remedy to a contract remedy in the law of obligations hardly concerns us here. Whether assumpsit is descended from an action of trespass on the case for negligent misfeasance in doing a thing which the defendant had undertaken to do (which is in one aspect an action on the promise), or whether assumpsit has descended from an action on the case in the nature of deceit for nonfeasance to recover money paid on the faith of a promise, or damages caused by the deceitful artifice, whether from one or both of these, it concerns us principally to know the result at which the courts slowly and painfully arrived,[6] a remedy to enforce contractual duties. It is

[4] On the history of assumpsit, see Ames, Lectures Legal Hist. pp. 128–171; Ames, 2 Harv. Law Rev. 1, 53; Henry, Consideration in Contracts, 26 Yale Law J. 664; Maitland, Eq. pp. 362, 366; 3 Street, Foundations Legal Liab. pp. 172–206; 3 Holdsworth, Hist. Eng. Law, 329–349; Holmes, Com. Law, pp. 274–288.

[5] Assumpsit as trespass on the case upon a promise. Carter v. White, 32 Ill. 509; Carrol v. Green, 92 U. S. 509, 513, 23 L. Ed. 738; 3 Street, Foundations Legal Liab. 178; Bagaglio v. Paolino, 35 R. I. 171, 85 Atl. 1048, 44 L. R. A. (N. S.) 80 (trespass on the case includes both assumpsit and case for torts). An action on the case includes assumpsit as well as an action in form ex delicto. Wadleigh v. Katahdin Pulp & Paper Co., 116 Me. 107, 100 Atl. 150.

[6] Miller v. Ambrose, 35 App. D. C. 75. It seems that nonperformance of promises became actionable in the first part of the sixteenth century, when

interesting to compare the evolution of assumpsit with that of detinue, which started with a contractual theory, and, as it developed, invaded the field of tort, although it still retained its contractual scope.

The action of covenant enforced promises made in writing under seal simply as promises, expressed in such form as to be binding. The action of assumpsit as finally developed enforces promises, not because they are promises, but only when they are based on consideration. The action of debt on simple contract enforced a duty to pay for an equivalent already received. But in the simple contract the obligation is based on the promise, not upon receipt of the quid pro quo, and it is now immaterial whether or not one side of the consideration has been executed. This action of assumpsit supplied the much-needed remedy for the recovery of unliquidated damages for the violation of express contracts not under seal. A great development took place by the extension of this action by means of an implied or fictitious promise to debts and to obligations in the nature of debt arising from the receipt of benefits or value. This form of the remedy is distinguished as general assumpsit; the original form of the action upon an actual promise being called special assumpsit.

Assumpsit as a Concurrent Remedy with Case for Tort

The fact that a person's breach of contract is also a tort, rendering him liable in an action ex delicto (in case, for instance) does not prevent the other party to the contract from maintaining assumpsit. Thus one may often sue a bailee or a carrier in case or in assumpsit at his election.[7]

Where property is placed in a person's custody under a contract by which he is to repair the same, or carry it, or do any other act in relation to it, and it is lost or injured by reason of his negligence, there is a breach of contract as well as a tort, and the other party may bring assumpsit instead of case.[8]

money or something of value was obtained by the promisor on the faith of his promise. Accordingly we find the language of the declaration in assumpsit to be: "Yet the said defendant, not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc. 3 Street, Foundations Legal Liab. 172; 1 Williston, Cont. § 99; Consideration and Requisites of the Action of Assumpsit, W. S. Holdsworth, 2 Boston University Law Rev. 87, 91.

[7] Though an evicted tenant may sue on the covenant for quiet enjoyment, he may elect to treat the eviction by the landlord as an unlawful invasion of his rights, and sue in tort. Mitsakos v. Morrill, 237 Mass. 20, 129 N. E. 294. An action in tort may be maintained for the violation of a duty flowing from relations between parties created by contract. Commercial City Bank v. Mitchell, 25 Ga. App. 837, 105 S. E. 57.

[8] Inhabitants of Milford v. Bangor Ry. & Electric Co., 104 Me. 233, 71 Atl. 750, 30 L. R. A. (N. S.) 531 (case for breach of duty arising out of express or implied contract concurrent with assumpsit). See Hobbs v. Smith, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 607; Lawson v. Crane & Hall, 83 Vt. 115, 74 Atl. 641.

In assumpsit for the value of a boiler placed in the defendants' custody for repairs, and destroyed by reason of their negligence, it was contended that the action should have been in case, but the action was sustained. "If there had been no previous contract relation between the parties," it was said, "damages occasioned by the negligence of the defendants could have been recovered only in an action on the case; but the fact that the boiler came into the possession of the defendants by reason of, or as incidental to, the contract for repairs to be made upon it, imposed the duty upon the defendants to exercise ordinary care for the safety and preservation of their customer's property. By receiving the boiler into their possession for the purpose of repairing, they must be held to have subjected themselves to an undertaking, implied from the nature of the express contract for repairs, to do what in good faith and common fairness ought to be done for the protection of their customer's goods. If they have failed in the performance of the duty imposed by this implied undertaking, an action of assumpsit will lie. At the same time it is true that if the failure involves a tort, such as the willful destruction of his customer's goods, or a conversion of them to his own use, he may be proceeded against, at the election of his customer, for the tort and in an action ex delicto." [9] There are many other cases where a party may at his election sue either in assumpsit or in case.[10] Thus assumpsit and case are concurrent remedies for breach of warranty in a sale of goods.[11]

[9] Zell v. Dunkle, 156 Pa. 353, 27 Atl. 38. And see Reeside's Ex'r v. Reeside, 49 Pa. 322, 88 Am. Dec. 503; Hunt v. Wynn, 6 Watts (Pa.) 47; B. B. Ford & Co. v. Atlantic Compress Co., 138 Ga. 490, 75 S. E. 909, Ann. Cas. 1913D, 226, 229, note (a tort arising out of a breach of the bailee's duty imposed by relation or by express contract may be waived by the bailor and assumpsit maintained).

[10] While negligence, considered merely as a tort, is a wrong independent of contract, it may also be a breach of contract, if the contract itself calls for care. Lord Electric Co. v. Barber Asphalt Paving Co., 226 N. Y. 427, 123 N. E. 756, reversing judgment 180 App. Div. 887, 166 N. Y. Supp. 1102; Western Union Telegraph Co. v. Bowen, 16 Ala. App. 253, 76 South. 985. Where the law imposes a duty arising from the relation rather than the contract, and there is a breach of duty, the aggrieved party may sue in trespass on the case, but if there be no legal duty, except arising from the contract, there can be no election, and the party must rely upon the agreement alone. Walser v. Moran, 42 Nev. 111, 180 Pac. 492, reversing judgment on rehearing 42 Nev. 111, 173 Pac. 1149.

[11] Lassiter v. Ward, 33 N. C. 443; Caldbeck v. Simanton, 82 Vt. 69, 71 Atl. 881, 20 L. R. A. (N. S.) 844, Sunderland, Cas. Com. Law Pl. p. 126. See 3 Williston, Cont. § 1505; 27 Harv. Law Rev., p. 10.

The Action Applies Only to Simple and Quasi Contracts

The action of assumpsit must be based upon a simple contract or a quasi contract. It will never lie at common law on a specialty, that is, on a contract under seal or of record. In these cases the proper remedy is debt or covenant, and not assumpsit.[12]

Where a bond or other higher security is taken in the place of a simple contract, the mere acceptance of the higher security ipso facto merges and extinguishes the lower—that is, the simple contract—without regard to the intention of the parties, and assumpsit will not lie. The action must be covenant or debt on the higher security.[13] In order that a merger may thus result, however, the subject-matter of the two securities must be identical, and the parties must be the same; and the higher security must be taken in the place of the lower, and not merely as collateral security.[14] There is no merger if the higher security is void, as where a usurious bond is taken for money previously lent without usury, and on a parol promise to repay it, or where an infant gives a bond with a penalty for necessaries furnished him. In such cases assumpsit may be brought on the simple contract, or quasi contract, as the case may be, the higher security being inoperative.[15]

[12] Assumpsit is not sustainable upon a specialty. Merryman v. Wheeler, 130 Md. 566, 101 Atl. 551. For breach of a contract under the seals of both parties thereto only an action of debt or covenant will lie. Van Buren Light & Power Co. v. Inhabitants of Van Buren, 118 Me. 458, 109 Atl. 3. 1 Chit. Pl. 111; January v. Goodman, 1 Dall. (Pa.) 208, 1 L. Ed. 103; Richards v. Killam, 10 Mass. 239; Codman v. Jenkins, 14 Mass. 93; Andrews v. Callender, 13 Pick. (Mass.) 484; Harley v. Parry, 18 Pa. 44; Hamilton v. Hart, 109 Pa. 629; and cases hereafter cited. Where a judgment is a specialty, debt or scire facias, and not assumpsit, is the proper remedy. In many states, by statute, the remedy by assumpsit has been extended to contracts under seal, and other specialties. See Goodrich v. Leland, 18 Mich. 110; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; City of Shawneetown v. Baker, 85 Ill. 563; Martin v. Murphy, 16 Ill. App. 283. See 5 C. J. Assumpsit, p. 1383.

[13] Clark, Cont. (3d Ed.) 71, 599; Acton v. Symon, Cro. Car. 415; Butler v. Miller, 1 Denio (N. Y.) 407; Price v. Moulton, 10 C. B. 561; Banorgee v. Hovey, 5 Mass. 11, 4 Am. Dec. 17; Jones v. Johnson, 3 Watts & S. (Pa.) 276, 38 Am. Dec. 760; Moale v. Hollins, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684; Keefer v. Zimmerman, 22 Md. 274; Wann v. McNulty, 2 Gilman (Ill.) 355, 43 Am. Dec. 58; Martin v. Hamlin, 18 Mich. 354, 100 Am. Dec. 181; Hammond v. Hopping, 13 Wend. (N. Y.) 505; McCrillis v. How, 3 N. H. 348.

[14] Clark, Cont. (3d Ed.) 599; Holmes v. Bell, 3 Man. & G. 213; Doty v. Martin, 32 Mich. 462; Witbeck v. Waine, 16 N. Y. 532; Day v. Leal, 14 Johns. (N. Y.) 404; Hooper's Case, 2 Leon. 110; Butler v. Miller, 1 Denio (N. Y.) 407; Banorgee v. Hovey, 5 Mass. 11, 4 Am. Dec. 17.

[15] 1 Saund. 295, note; Bull. N. P. 182; Scurfield v. Gowland, 6 East, 241; McCrillis v. How, 3 N. H. 348; Hammond v. Hopping, 13 Wend. (N. Y.) 505; Ayliff v. Archdale, Cro. Eliz. 920.

SCOPE OF GENERAL ASSUMPSIT

59. General assumpsit is brought for breach of a fictitious or implied promise raised by law from a debt founded upon an executed consideration. The basis of the action is the promise implied by law from the performance of the consideration, or from a debt or legal duty resting upon the defendant.

60. General assumpsit will not lie where there has been an express contract, except:

(a) Where the contract, or some divisible part thereof, has been fully executed by the plaintiff, and nothing remains but the payment of money by the defendant.

(b) Where, after part performance of the contract by the plaintiff, further performance is prevented by an act of the defendant, or by some act or event which in law operates as a discharge of the contract, or if the contract is abandoned or rescinded.

(c) In a few states there can be a recovery in general assumpsit for a part performance of an entire contract benefiting the defendant, if the plaintiff acted in good faith.

(d) If the special contract is merely void (not illegal), or merely unenforceable, or voidable and has been avoided, there may be a recovery in general assumpsit for part performance.

(e) General assumpsit lies for additional work done on request in performing a special contract.

Assumpsit as General and Special

The division of this action into general and special assumpsit arose from the extension of assumpsit into the field of debt. Special assumpsit is where the action is founded upon a breach of an actual promise contained in a contract expressly entered into by the parties. In general assumpsit the plaintiff does not count upon a special contract or actual promise, but upon a promise implied by law from the existence of a legal duty to pay money for value received.

Contracts Implied in Fact and in Law

The term "implied contracts" is used in two senses. In one sense it means a tacit contract, implied as a matter of fact from the conduct of the parties, because their conduct shows agreement, as where one of them has delivered goods or performed services to or for the other, at the other's request or with the other's knowledge, and under such

circumstances that the other must as a reasonable man have known that payment for them was expected. Though no express promise to pay was made, the law recognizes that by his conduct he impliedly promised to pay, and to enforce this implied in fact promise assumpsit is the proper remedy.[16]

The term "implied contracts" is also applied to promises implied or created by the law without any agreement in fact between the parties, and even when the circumstances negative the existence of any agreement in fact, as where one person pays money which another person ought to have paid, or receives money which another ought to have received, or, in some cases, where benefits are conferred upon another without any agreement. The promise in these cases is merely a fiction of law, resorted to for the purpose of allowing a remedy by assumpsit. The obligation is not contractual, but quasi contractual.[17]

General Assumpsit, or the Common Counts

In general assumpsit, the action is based, not on a special promise, but on a promise implied by law from the existence of a duty to pay money, either arising from a simple contract debt or from a quasi contract. Like debt, it specifically enforces the unconditional duty to pay money. Indebitatus or general assumpsit will lie upon debt arising from quid pro quo, upon contracts implied in fact, and upon constructive or quasi contracts. It is not necessary for the pleader to indicate what kind of "implied" contract, whether in fact or in law, he relies upon.

If a person requests another to do work for him under such circumstances that the other has a right to expect pay therefor, and the latter does the work, the law will, as an inference of fact, imply a promise by the former to pay what the services were reasonably worth, and the action to recover such compensation is general assumpsit. So, if a man orders goods from another without an express promise to pay a certain price, and they are delivered, the seller may maintain general assumpsit to recover their value. So, if a person pays money which another should have paid, he may maintain general assumpsit against the latter to recover it, such a count being known as a count for money paid by the plaintiff for the use of the defendant. And where a man receives money which in equity and good conscience belongs to another, the latter may sue in general assumpsit to recover, this count being known as the count for money received by the defendant for the use of the plaintiff, or for money had and received. And where a man lends money to another without an express promise by the latter to repay it, he may recover the debt in general assumpsit on a count for money lent. And if parties state an account between them, general assumpsit lies for the balance, the count being known as a count for a balance due on account stated. General assumpsit is also known as the common counts. The common counts are not suited to enforce collateral undertakings, guaranties, and contracts of indemnity.

Recovery on a fire insurance policy cannot be had on the common counts, as payment of the premiums is not sufficient of itself to constitute a quid pro quo or raise an implied promise. Accordingly the promise itself and the conditions thereof must be specifically set forth. But in case of adjustment of the loss this makes an account stated, and the implied promise to pay the amount due is regarded as a different contract from the policy itself, which may be enforced by the common counts.[18]

It is a general rule of law that if there is an executory special contract, the common counts will not lie, but the plaintiff must declare in special assumpsit on the contract; for the law will not imply a promise to pay, except where the consideration is executed on the plaintiff's part and a duty arises to pay the value of what he has done.[19]

When will a debt arise out of what plaintiff has done under a special contract?

(1) If the special contract has been fully executed by the plaintiff, and nothing remains but the payment of the price in money by the defendant, the plaintiff may either declare in special assumpsit on the contract, or he may declare in general assumpsit, at his election,

[16] Clark, Cont. (3d Ed.) 18, 623.

[17] Clark, Cont. (3d Ed.) 623; Woods v. Ayres, 39 Mich. 345, 33 Am. Rep. 396.

[18] Heffron v. Rochester German Ins. Co., 220 Ill. 514, 77 N. E. 202. The common counts will not lie against a guarantor who receives no direct personal benefit. Cubbins v. Mississippi River Commission, 241 U. S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041; Worley v. Johnson, 60 Fla. 294, 53 South. 543, 33 L. R. A. (N. S.) 639 (indorser); Potter v. Gronbeck, 117 Ill. 404, 7 N. E. 586; Ames, 8 Harv. Law Rev. 261; Legal Essays, 93, 94. But see Abe Lincoln Mut. Life & Accident Soc. v. Miller, 23 Ill. App. 341 (debt lies by beneficiaries to recover death benefit under mutual benefit insurance certificate).

[19] 2 Smith, Lead. Cas. Eq. (12th Ed.) 18, 19 (notes to Cutter v. Powell); Edward Thompson Co. v. Kollmeyer, 46 Ind. App. 400, 92 N. E. 660, Lloyd, Cas. Civ. Proc. p. 200; Theis v. Svoboda, 166 Ill. App. 20; note in 21 Columbia Law Rev. 573, 575. To recover in assumpsit for breach of an executory contract of sale of corporate stock, plaintiff must declare specially on the contract; general counts alone not being sufficient, except where payment is the only unperformed act. Thomas v. Mott, 78 W. Va. 113, 88 S. E. 651. Where a special contract remains executory, the plaintiff must sue upon it. Kinney v. McNabb, 44 App. D. C. 340; Standard Fashion Co. v. Lopinsky, 84 W. Va. 523, 101 S. E. 152; Waddell v. Phillips, 133 Md. 497, 105 Atl. 771. A claim for damages for breach of contract to do some act other than pay money must be specially pleaded. Cook v. Dade, 101 Mich. 561, 158 N. W. 175.

or he may join the common counts with special counts.[20] Where the declaration is in general assumpsit, it is not based on the special contract, but on the defendant's legal liability to pay for the benefits received; but the contract is evidence of the value of the benefits, and his recovery will be limited to the compensation therein fixed.

(2) If, by the terms of the special contract, which the plaintiff has performed, he is to be paid, not in money, but in specific articles, the declaration must be special. The common counts will not lie where the price is payable partly in cash and partly by the conveyance of land.[21]

[20] Felton v. Dickinson, 10 Mass. 287; Knight v. New England Worsted Co., 2 Cush. (Mass.) 271; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; Perkins v. Hart, 11 Wheat. 237, 6 L. Ed. 463; Bank of Columbia v. Patterson, 7 Cranch, 299, 3 L. Ed. 351; Chesapeake & O. Canal Co. v. Knapp, 9 Pet. 566, 9 L. Ed. 222; Baker v. Corey, 10 Pick. (Mass.) 496; Lane v. Adams, 10 Ill. 167; Combs v. Steele, 80 Ill. 101; Throop v. Sherwood, 4 Gilman (Ill.) 92; Tunnison v. Field, 21 Ill. 108; McArthur Bros. Co. v. Whitney, 202 Ill. 527, 67 N. E. 163; Everett v. Gray, 1 Mass. 101; Trammell v. Lee County, 94 Ala. 194, 10 South. 213; Jewell v. Schroeppel, 4 Cow. (N. Y.) 564; Williams v. Sherman, 7 Wend. (N. Y.) 109; Peltier v. Sewall, 12 Wend. (N. Y.) 386, Whittier, Cas. Com. Law Pl. p. 262; Ridgeley v. Crandall, 4 Md. 441; Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285; Baltimore & O. R. Co. v. Polly, 14 Grat. (Va.) 447; Bomeisler v. Dobson, 5 Whart. (Pa.) 398; Kelly v. Foster, 2 Bin. (Pa.) 4; Miles v. Moodie, 3 Serg. & R. (Pa.) 211; Nugent v. Teachout, 67 Mich. 571, 35 N. W. 254. The action cannot be brought before the expiration of a term of credit given by the special contract, for until then the defendant has not broken his contract, and no right of action at all has accrued. Robson v. Godfrey, 1 Starkie, 275; Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; Manton v. Gammon, 7 Ill. App. 201; Hunneman v. Inhabitants of Grafton, 10 Mete. (Mass.) 454; Loring v. Gurney, 5 Pick. (Mass.) 16. The common counts lie in case of a contract for the sale of goods only where the contract has been performed by the seller, and nothing remains to be done but to make the payment. Brand v. Henderson, 107 Ill. 141; Montgomery County v. New Farley Nat. Bank, 200 Ala. 170, 75 South. 918. Where an attorney rendered services under a contract providing for a contingent fee, and the contract was wholly executed, he may recover his fee in assumpsit on the common counts. Carpenter v. Smithey, 118 Va. 533, 88 S. E. 321. Common counts may be joined with a special one, alleging an express written contract. Alexander v. Capital Paint Co., 136 Md. 658, 111 Atl. 140; Conservation Co. v. Stimpson, 136 Md. 314, 110 Atl. 495.

[21] Pierson v. Spaulding, 61 Mich. 90, 27 N. W. 865, Whittier, Cas. Com. Law Pl. pp. 257, 260, note; Bayliss v. Fettyplace, 7 Mass. 329; Emerton v. Andrews, 4 Mass. 653; Cochran v. Tatum, 3 T. B. Mon. (Ky.) 405; Mitchell v. Gile, 12 N. H. 390; Ranlett v. Moore, 21 N. H. 330; Morse v. Sherman, 106 Mass. 432; Witt v. Ogden, 13 Johns. (N. Y.) 56; Harrison v. Luke, 14 Mees. & W. 139; Shearer v. Jewett, 14 Pick. (Mass.) 232; Doebler v. Fisher, 14 Serg. & R. (Pa.) 179; Beals v. See, 10 Pa. 56, 49 Am. Dec. 573. See Thomas Mfg. Co. v. Watson, 85 Me. 300; 27 Atl. 176; Brooks v. Scott's Ex'r, 2 Munf. (Va.) 344, Lloyd, Cas. Civ. Proc. p. 197; Meyers v. Schemp, 67 Ill. 469; McKinnie v. Lane, 230 Ill. 544, 82 N. E. 878, 120 Am. St. Rep. 338. Indebitatus assumpsit is not the proper form of action where the agreement sought to be enforced is not for the payment of money for machinery, but for the liquidation of the debt by the obtaining of notes from a third party for whom defendant is acting. Power Equipment Co. v. Gale Installation Co., 210 Ill. App. 147.

(3) If, after the plaintiff has performed part of the special contract according to its terms, he is prevented from performing the residue by some act of the defendant;[22] or if he is so prevented by some act or event, not within the control of either party, which in law operates as a discharge of the contract, and excuses nonperformance by him of the residue;[23] or if, after such partial performance, the contract is abandoned by mutual consent, or waived or rescinded[24]—the plaintiff may maintain general assumpsit to recover for what he has done. Or, in the case of prevention of further performance by the defendant, the plaintiff may, at his election, sue in special assumpsit, for such prevention is a breach of the contract by the defendant, and the plaintiff may, instead of claiming a discharge of the contract, consider it as being still in force.[25]

[22] Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285; Derby v. Johnson, 21 Vt. 17; Moulton v. Trask, 9 Mete. (Mass.) 577; Perkins v. Hart, 11 Wheat. 237, 6 L. Ed. 463; Jones v. Judd, 4 N. Y. 412; Howell v. Medler, 41 Mich. 641, 2 N. W. 911; Mooney v. York Iron Co., 82 Mich. 203, 46 N. W. 370; Hoagland v. Moore, 2 Blackf. (Ind.) 167; Catholic Bishop of Chicago v. Bauer, 62 Ill. 188; Bannister v. Read, 1 Gilman (Ill.) 99; Selby v. Hutchinson, 4 Gilman (Ill.) 319; Webster v. Enfield, 5 Gilman (Ill.) 298; Guerdon v. Corbett, 87 Ill. 272; Sanger v. City of Chicago, 65 Ill. 506; Kipp v. Massin, 15 Ill. App. 300; Johnson v. Trinity Church Soc., 11 Allen (Mass.) 123; Hall v. Rupley, 10 Pa. 231; Algeo v. Algeo, 10 Serg. & R. (Pa.) 235; Greene v. Haley, 5 R. I. 263; Wright v. Haskell, 45 Me. 489.

[23] Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Willington v. Inhabitants of West Boylston, 4 Pick. (Mass.) 101; Lakeman v. Pollard, 43 Me. 464, 69 Am. Dec. 77; Fuller v. Brown, 11 Mete. (Mass.) 440; Fenton v. Clark, 11 Vt. 557; Leonard v. Dyer, 26 Conn. 172, 68 Am. Dec. 382; Green v. Gilbert, 21 Wis. 395; Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57; Terrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578; Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858, Whittier, Cas. Com. Law Pl. p. 318, 319, note.

[24] Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285; Linningdale v. Livingston, 10 Johns. (N. Y.) 36; Perkins v. Hart, 11 Wheat. 237, 6 L. Ed. 463; Hill v. Green, 4 Pick. (Mass.) 114; Catholic Bishop of Chicago v. Bauer, 62 Ill. 188; Hunt v. Sackett, 31 Mich. 18; Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Goodrich v. Lafflin, 1 Pick. (Mass.) 57; Bannister v. Read, 1 Gilman (Ill.) 99; Jenkins v. Thompson, 20 N. H. 457; Adams v. Crosby, 48 Ind. 153; Clark v. Moore, 3 Mich. 55; Allen v. McKibbin, 5 Mich. 449; Wildey v. Fractional School Dist. No. 1 of Paw Paw and Antwerp, 25 Mich. 419.

[25] Jones v. Judd, 4 N. Y. 412; Derby v. Johnson, 21 Vt. 17; Pedan v. Hopkins, 13 Serg. & R. (Pa.) 45; Stewart v. Walker, 14 Pa. 293; Jewell v. Blandford, 7 Dana (Ky.) 473; Rankin v. Darnell, 11 B. Mon. (Ky.) 31, 52 Am. Dec.

(4) Where the plaintiff has, even without willful fault, failed to perform the special contract within the time or in the manner therein stipulated in some material respect, he cannot maintain special assumpsit on the contract, for he cannot show substantial performance on his part.[26] If he can recover at all, it must be in general assumpsit, on a promise by the defendant implied in law because of the benefits received by him. As to whether he can recover at all, even in general assumpsit, the authorities are conflicting. The question is whether the law will refuse a party in default any relief or will imply a promise by the defendant to pay for the benefits received by him. If it will, general assumpsit will lie; but, if it will not, there can be no recovery at all. The question must be answered by the substantive law of contract or quasi contract.[27]

557; Davis v. Ayres, 9 Ala. 292. See Loehr v. Dickson, 141 Wis. 332, 124 N. W. 293, 30 L. R. A. (N. S.) 495; Levy & Hipple Motor Co. v. City Motor Cab Co., 174 Ill. App. 20; St. John v. St. John, 223 Mass. 137, 111 N. E. 719. It is held in Illinois that a recovery of the balance due on a building contract cannot be had under common counts, where the contractor relies on matter of excuse for not procuring the final certificate of approval by the architect; but in case of substantial performance, where no certificate is called for, recovery may be had under the common counts for labor and material in spite of slight variations. Why the plaintiff cannot show excuse for nonproduction of an architect's certificate under the common counts to show a recoverable indebtedness for value received is not entirely clear. Expanded Metal Fireproofing Co. v. Boyce, 233 Ill. 284, 84 N. E. 275. Compare Peterson v. Pusey, 237 Ill. 204, 86 N. E. 602. See, also, Catholic Bishop of Chicago v. Bauer, 62 Ill. 188; Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 369, 81 N. E. 1038; City of Elgin v. Joslyn, 136 Ill. 525, 26 N. E. 1090; Parmly v. Farrar, 169 Ill. 606, 48 N. E. 693. It is otherwise in case full performance has been prevented by act of the defendant. Catholic Bishop of Chicago v. Bauer, supra; Mooney v. York Iron Co., 82 Mich. 263, 46 N. W. 376. And substantial performance. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

[26] Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268.

[27] See Clark, Cont. (3d Ed.) 647. For cases in which a recovery in general assumpsit has been allowed, see Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Dermott v. Jones, 23 How. 220, 16 L. Ed. 442; Blood v. Wilson, 141 Mass. 25, 6 N. E. 362; Kelly v. Town of Bradford, 33 Vt. 35; Pinches v. Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264; McMillan v. Malloy, 10 Neb. 228, 4 N. W. 1004, 35 Am. Rep. 471; Corwin v. Wallace, 17 Iowa, 374; White v. Oliver, 36 Me. 92; Blakeslee v. Holt, 42 Conn. 226; Lucas v. Godwin, 3 Bing. N. C. 737; Parker v. Steed, 1 Lea (Tenn.) 206; Taylor v. Williams, 6 Wis. 363; Wadleigh v. Town of Sutton, 6 N. H. 15, 23 Am. Dec. 704; Norris v. School Dist. No. 1 in Windsor, 12 Me. 293, 28 Am. Dec. 182; Viles v. Barre & M. Traction & Power Co., 79 Vt. 311, 65 Atl. 104, Sunderland, Cas. Com. Law Pl. p. 164. For cases in which it is held that there can be no recovery at all, see Cutter v. Powell, 6 Term. R. 320; Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Myrick v. Slason, 19 Vt. 122; St. Albans Steam Boat Co. v. Wil-

(5) If the special contract, which the plaintiff has partially performed, is void (not illegal) or unenforceable, or voidable, and has been avoided by the plaintiff or defendant, general assumpsit may be maintained for the partial performance. This rule, as is shown in the note below, is subject to some qualification.[28]

kins, 8 Vt. 54; Champlin v. Rowley, 18 Wend. (N. Y.) 187; Bozarth v. Dudley, 44 N. J. Law, 304, 43 Am. Rep. 373; Miller v. Phillips, 31 Pa. 218; Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52. If the plaintiff voluntarily abandoned the contract after a partial performance, or was otherwise in fault in failing to perform according to its terms, there can, by the weight of authority, be no recovery at all. Faxon v. Mansfield, 2 Mass. 147; Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; McMillan v. Vanderlip, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; Jennings v. Camp, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; Lantry v. Parks, 8 Cow. (N. Y.) 63; Badgley v. Heald, 4 Gilman (Ill.) 64; Angle v. Hanna, 22 Ill. 481, 74 Am. Dec. 161; Thrift v. Payne, 71 Ill. 408; Moritz v. Larsen, 70 Wis. 569, 36 N. W. 331; Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; Hapgood v. Shaw, 105 Mass. 276; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Champlin v. Rowley, 18 Wend. (N. Y.) 187; Olmstead v. Beale, 19 Pick. (Mass.) 528; Hansell v. Erickson, 28 Ill. 257; Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638; Gillespie Tool Co. v. Wilson, 123 Pa. 19, 16 Atl. 36; Schelble v. Klein, 89 Mich. 376, 50 N. W. 857; Gill v. Vogler, 52 Md. 663; Krizer v. Leppel, 42 Minn. 6, 43 N. W. 484. See Ballantine, Forfeiture for Breach of Contract, 5 Minn. Law Rev. p. 329.

[28] Thurston v. Percival, 1 Pick. (Mass.) 415. Thus, where an infant performs services under a contract, which he has a right to avoid because of his infancy, and he avoids the contract before he has fully performed, he may bring general assumpsit for the services rendered. Moses v. Stevens, 2 Pick. (Mass.) 332; Medbury v. Watrous, 7 Hill (N. Y.) 110; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Ray v. Haines, 52 Ill. 485; Clark, Cont. 259, and cases there cited. And generally, where a person who has partly performed a contract rescinds it on the ground of fraud, undue influence, duress, or for want or failure of consideration, or want of capacity to contract, or because of a breach of the contract by the other party operating as a discharge, he may recover in general assumpsit for his part performance. Clark, Cont. (3d Ed.) 650; Planche v. Colburn, 8 Bing. 14; Ex parte Maclure, L. R. 5 Ch. App. 737; Seipel v. International Life Ins. & Trust Co., 84 Pa. 47; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Medbury v. Watrous, 7 Hill (N. Y.) 110; Williams v. Bemis, 103 Mass. 91, 11 Am. Rep. 318; Brown v. St. Paul, M. & M. Ry. Co., 36 Minn. 236, 31 N. W. 941; Shane v. Smith, 37 Kan. 55, 14 Pac. 477; Russell v. Bell, 10 Mees. & W. 340; Willson v. Force, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; Toledo, W. & W. R. Co. v. Chew, 67 Ill. 378; Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N. W. 280; Goodwin v. Griffis, 88 N. Y. 629; Walker v. Duncan, 68 Wis. 624, 32 N. W. 689; Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313; Citizens' Gaslight & Heating Co. v. Granger, 118 Ill. 266, 8 N. E. 770. As to the qualifications of this rule and the exceptions, see Clark, Cont., supra. If the special contract is void because it is illegal, in that it is contrary to public policy, or in violation of the common law, or of a statute, neither of the

(6) If the special contract has been fully performed by the plaintiff, and something additional has also been done by him under circumstances entitling him to compensation therefor, the declaration may be special, as far as the express contract goes, and general as to the extras.[29]

VARIETIES OF COMMON COUNTS

61. The common counts are certain formulæ for alleging an indebtedness founded on various common transactions, such as the loan of money, the sale of goods, the doing of work and labor, or the stating of an account. They cover both debts and quasi contracts.

Classification of Common Counts

General assumpsit, or the common counts, may be classified as: (1) Indebitatus assumpsit or the debt counts; or (2) quantum meruit and quantum valebant, the value counts.

parties, if in pari delicto, can recover from the other for a partial performance. See Clark, Cont. (3d Ed.) 650. When an agreement is not illegal, but merely void, or unenforceable, as where it fails to comply with the statute of frauds, or is made ultra vires by a corporation, or for any other reason, and one of the parties refuses to perform his part after performance or part performance by the other, the law will create a promise to pay for the benefits received. If a man delivers goods or performs services for another under a contract which is thus void or unenforceable, but not illegal in the sense of being unlawful, he may recover in general assumpsit the value of the goods or services. Van Deusen v. Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582; Nugent v. Teachout, 67 Mich. 571, 35 N. W. 254; Whipple v. Parker, 29 Mich. 369; Patten v. Hicks, 43 Cal. 509; Rebman v. San Gabriel Valley Land & Water Co., 95 Cal. 390, 30 Pac. 564; Cadman v. Markle, 76 Mich. 448, 43 N. W. 315, 5 L. R. A. 707; Ellis v. Cary, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125; Steven's Ex'rs v. Lee, 70 Tex. 279, 8 S. W. 40; Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881; Schoonover v. Vachon, 121 Ind. 3, 22 N. E. 777; Miller v. Eldridge, 126 Ind. 461, 27 N. E. 132; Koch v. Williams, 82 Wis. 186, 52 N. W. 257; Smith v. Wooding, 20 Ala. 324; Walker v. Shackelford, 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61; Baker v. Lauterbach, 68 Md. 64, 11 Atl. 704; McGinnis v. Fernandes, 126 Ill. 228, 19 N. E. 44; Little v. Martin, 3 Wend. (N. Y.) 219, 20 Am. Dec. 688; Montague v. Garnett, 3 Bush (Ky.) 297; Wonsettler v. Lee, 40 Kan. 367, 19 Pac. 802; Clark, Cont. 134, 785. A party, however, who has partly performed a contract which is merely unenforceable, and illegal or void, as in the case of oral contracts within the statute of frauds, cannot, by the weight of authority, abandon it, and recover for the part performance, if the other party is willing to carry out the contract. Clark, Cont. (3d Ed.) 650, and cases there cited.

[29] Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285; Id., 12 Wend. (N. Y.) 334; McCormick v. Connoly, 2 Bay (S. C.) 401.

Indebitatus Counts

(1) Indebitatus assumpsit, or indebitatus counts, allege the existence of a debt owing from the defendant to the plaintiff, and that in consideration thereof the defendant promised to pay a sum of money equal to the debt.[30] These counts are divided into: (1) Money counts; and (2) other counts. The money counts relate only to money transactions as the basis of the debt, while the other counts relate to any transaction other than a money transaction upon which a debt may be founded. The usual money counts are for: (a) Money paid by the plaintiff for the use of the defendant; (b) money received by the defendant for the use of the plaintiff, or money had and received; (c) money lent; (d) interest due; (e) balance due on account stated. The most usual counts other than money counts, included in the indebitatus counts, are for: (a) Use and occupation of land; (b) board and lodging furnished; (c) goods sold and delivered; (d) goods bargained and sold; (e) lands sold and conveyed; (f) work, labor, and services; (g) work, labor, and materials; (h) judgment recovered by the plaintiff against the defendant, in cases where assumpsit will lie; (i) liability imposed by statute upon the defendant to pay money to the plaintiff; and (j) any other circumstances upon which a debt may be founded, excluding money transactions.

Same—Money Paid for the Use of Another

Whenever one person requests or allows another to assume such a position that the latter may be and is compelled to discharge a legal liability of the former, the law creates or implies a request by the former to the latter to make the payment, and a promise to repay him, and the liability thus created may be enforced by action of assumpsit.[31] The action in such a case is technically called an action for money paid by the plaintiff for the use of the defendant, and the recovery is in general assumpsit.

[30] Cast v. Roff, 26 Ill. 453. Indebitatus assumpsit does not lie on an executory contract, nor where the agreement is for the doing of some other thing than the payment of money. Cast v. Roff, supra; Meyers v. Schemp, 67 Ill. 469.

[31] Clark, Cont. (3d Ed.) 627; Exall v. Partridge, 8 Term R. 308; Wells v. Porter, 7 Wend. (N. Y.) 119; Perin v. Parker, 25 Ill. App. 465; Id., 126 Ill. 201, 18 N. E. 747, 2 L. R. A. 336, 9 Am. St. Rep. 571; Cross v. Cheshire, 7 Exch. 43; Packard v. Lienow, 12 Mass. 11; Long v. Greene, 7 Mass. 268; Goodridge v. Lord, 10 Mass. 483; Wheeler v. Wheeler, 111 Mass. 247; Nichols v. Bucknam, 117 Mass. 488; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; Norton v. Colgrove, 41 Mich. 544, 3 N. W. 159; Post v. Campau, 42 Mich. 90, 3 N. W. 272; Hassinger v. Solms, 5 Serg. & R. (Pa.) 4; Taylor v. Gould, 57 Pa. 152. Where a person takes up certificates of indebtedness of another at his request, he may maintain assumpsit. Cairo & V. R. Co. v. Fackney, 78 Ill. 116. And see, for cases of payments on request, Allen v. Breusing, 32 Ill. 505.

Where a member of a firm gave a promissory note, signed in the partnership name, for a debt of his own, and his partner was compelled to pay it, it was held that the latter might recover from the former as for money paid to his use.[32] Another illustration is where one of several sureties, or other joint debtors, pays the whole debt. In such case he is allowed to recover from each of the others his proportionate share; and a request to pay and promise to repay are feigned, in order to entitle him to the remedy by action of assumpsit.[33] And the same is true where a surety pays the debt of his principal.[34]

Same—Money Received for the Use of Another, or Money Had and Received

Whenever one person has received money to which another person, in justice and good conscience, is entitled, the law creates or implies a promise by the former to pay it to the latter, and an action of assumpsit will lie to enforce this liability on the basis of the fictitious promise.[35] The action is technically called an action for money received by the defendant for the use of the plaintiff, or an action for money had and received.

Thus, where one person by means of fraud, duress, trespass, or any other tort, obtains another's money, and converts it to his own use, or obtains his property and sells the same, and converts the proceeds, the other may waive the tort, and bring assumpsit on a promise, created by law, to repay the money so obtained.[36]

"Thoughts much too deep for tears pervade the court,
When I assumpsit bring, and, godlike, waive the tort." [37]

[32] Cross v. Cheshire, 7 Exch. 43.

[33] Kemp v. Fender, 12 Mees. & W. 421; Doremus v. Selden, 19 Johns. (N. Y.) 213; Wilton v. Tazwell, 80 Ill. 29; Nickerson v. Wheeler, 118 Mass. 295; Harvey v. Drew, 82 Ill. 600; Steckel v. Steckel, 28 Pa. 233. Where several persons agree to contribute equally to certain expenditures, and one advances more than his share, the excess is so much paid for the use of the others, and may be recovered in assumpsit. Buckmaster v. Grundy, 3 Gilman (Ill.) 626. And see Crain v. Hutchinson, 8 Ill. App. 179.

[34] Alexander v. Vane, 1 Mees. & W. 511; Pownal v. Ferrand, 6 Barn. & C. 439; Crisfield v. State, to Use of Handy, 55 Md. 192.

[35] Moses v. Macferlan, 2 Burr. 1005. See Clark, Cont. (3d Ed.) 630, for a collection of the cases, and a discussion of the doctrine. See, also, Atkinson v. Scott, 30 Mich. 18; Catlin v. Birchard, 13 Mich. 110; Lawson's Ex'r v. Lawson, 16 Grat. (Va.) 230, 80 Am. Dec. 702; Vrooman v. McKaig, 4 Md. 450, 59 Am. Dec. 85; McCren v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Loomis v. O'Neal, 73 Mich. 582, 41 N. W. 701; Swift & C. & B. Co. v. U. S., 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341; Johnson's Ex'x v. Jennings' Adm'r, 10 Grat. (Va.) 1, 60 Am. Dec. 323; Devine v. Edwards, 101 Ill. 138; Walker v. Conant, 65 Mich. 194, 31 N. W. 780; Wright v. Dickinson, 67 Mich. 680, 35 N. W. 164, 11 Am. St. Rep. 602; Trumbull v. Campbell, 8 Gilman (Ill.) 502; Creel v. Kirkham, 47 Ill. 344; Johnston v. Salisbury, 61 Ill. 316; Watson v. Woolverton, 41 Ill. 241; Bennett v. Connelly, 103 Ill. 50; Bradford v. City of Chicago, 25 Ill. 411; Gloyd v. Hotel La Salle Co., 221 Ill. App. 104 (not in case of voluntary surrender by servant of tips to hotel proprietor); Bowen v. School Dist. No. 9 of Rutland, 36 Mich. 149; Floyd v. Day, 3 Mass. 403, 3 Am. Dec. 171; Mason v. Waite, 17 Mass. 560; Arms v. Ashley, 4 Pick. (Mass.) 71; Barr v. Craig, 2 Dall. (Pa.) 151, 1 L. Ed. 327; Miller v. Ord, 2 Bin. (Pa.) 382. A count for money had and received will lie only where defendant has received money or other value equivalent to money, as a negotiable note. Thus it lies against one who has fraudulently procured the surrender of his own note. Penobscot R. Co. v. Mayo, 67 Me. 470, 24 Am. Rep. 45, Whittier, Cas. Com. Law Pl. pp. 320, 323, note. Assumpsit will not lie for money received by the defendant for the rent of land, the title to which is claimed by the plaintiff, where his claim is disputed, since the title to land cannot be tried in this form of action. King v. Mason, 42 Ill. 223, 89 Am. Dec. 420; Kran v. Case, 123 Ill. App. 214; Lewis v. Robinson, 10 Watts (Pa.) 338. The owner of land may waive a trespass thereon, and, affirming the conversion, sue, in an action for money had and received, one who severs wood, gravel, or other parts of the realty, and transforms it into money, but only when title to the land is not in dispute. Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N. E. 4.

[36] Clark, Cont. (3d Ed.) 632; Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721; Thompson v. Howard, 31 Mich. 309; Neate v. Harding, 6 Exch. 349; Farwell v. Myers, 64 Mich. 234, 31 N. W. 128; Loomis v. O'Neal, 73 Mich. 582, 41 N. W. 701; People v. Wood, 121 N. Y. 522, 24 N. E. 952; Klewert v. Rindskopf, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731; Gilmore v. Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Hindmarch v. Hoffman, 127 Pa. 284, 18 Atl. 14; Cory v. Board of Chosen Freeholders of Somerset County, 47 N. J. Law, 181; Atlee v. Backhouse, 3 Mees. & W. 633; Shaw v. Woodcock, 7 Barn. & C. 73; Jones v. Hoar, 5 Pick. (Mass.) 289; Carleton v. Haywood, 49 N. H. 314; Stearns v. Dillingham, 22 Vt. 624, 54 Am. Dec. 88; Gray v. Griffith, 10 Watts (Pa.) 431; Pearsoll v. Chapin, 44 Pa. 9; Stant v. Evans, 85 Ill. 455; McDonald v. Brown, 16 Ill. 32; Alderson v. Ennor, 45 Ill. 128; Stiles v. Easley, 51 Ill. 275; Arnold v. Dodson, 272 Ill. 377, 112 N. E. 70. "The fundamental fact upon which this right of action depends is that the defendant has received money belonging to the plaintiff, or to which the plaintiff is entitled. It is not sufficient to show that the defendant has by fraud or wrong caused the plaintiff to pay money to others than the defendant, or to otherwise sustain loss or damage. 'Assuming a defendant to be a tort-feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort.'" Clark, Cont. (3d Ed.) 633, and cases there collected; Keener, Quasi Cont. 160; Horne v. Mandelbaum, 13 Ill. App. 607. In action for alleged wrongful taking of valuable fossil from plaintiff's land and converting it, petition held to show waiver of tort and reliance on implied promise to pay value of property. Garrity v. State Board of Administration of Educational Institutions, 99 Kan. 695, 162 Pac. 1167.

[37] 1 Law Quarterly Rev. p. 232; Verschures Creameries, Ltd., v. Hull & Netherlands S. S. Co. [1921] 2 K. B. 608. It is a question of electing to pro-

The action will also lie to recover money paid by mistake of fact,[38] as where money is paid as due upon the basis of erroneous accounts, and, upon a true statement of account, it is found not to have been due.[39]

The action will lie to recover money paid on a consideration which has failed,[40] as in a case where the purchaser of goods has paid the price and the seller fails to deliver the goods;[41] or where the purchaser has paid for goods which did not belong to the seller, and which have been reclaimed by the real owner;[42] or, in most jurisdictions, where bills, notes, bonds, stock, or other securities have been sold and paid for, and they have turned out to be forgeries, or for some other reason to be worthless.[43]

Same—Balance Due on Account Stated

The action of assumpsit lies to recover the balance due upon an account stated, for the law implies a promise to pay it. But the common counts may not be used to enforce a promise to pay a supposed tort liability for damages inflicted. An account stated is an acknowledgment of debt.[44]

ceed on alternative theories of liability, where an obligation and a tort liability arise from the same transaction.

[38] Clark, Cont. (3d Ed.) 637, where the cases are collected. See Bize v. Dickason, 1 Term R. 285; Citizens' Bank of Baltimore v. Graffiin, 31 Md. 507, 1 Am. Rep. 66; Mayer v. Mayor, etc., of City of New York, 63 N. Y. 455; Hazard v. Franklin Mut. Fire Ins. Co., 7 R. I. 429; Holtz v. Schmidt, 59 N. Y. 253; Stuart v. Sears, 119 Mass. 143; Devine v. Edwards, 101 Ill. 138; Board of Highway Com'rs v. City of Bloomington, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471; Walker v. Conant, 65 Mich. 194, 31 N. W. 786; Stempel v. Thomas, 89 Ill. 146; Wolf v. Beaird, 123 Ill. 585, 15 N. E. 161, 5 Am. St. Rep. 565; Chambers v. Union Nat. Bank, 78 Pa. 205; Thomas v. Brady, 10 Pa. 164.

[39] Dails v. Lloyd, 12 Q. B. 531; Townsend v. Crowdy, 8 C. B. (N. S.) 477; Stuart v. Sears, supra.

[40] Claflin v. Godfrey, 21 Pick. (Mass.) 1; Lafiin v. Howe, 112 Ill. 253; Raney v. Boyd, 39 Ill. 24; Graffenreid v. Kundert, 31 Ill. App. 394; Town v. Wood, 87 Ill. 512; Ripley v. Case, 86 Mich. 261, 49 N. W. 46; Wright v. Dickinson, 67 Mich. 580, 35 N. W. 104, 11 Am. St. Rep. 602; Earle v. Bickford, 6 Allen (Mass.) 549, 83 Am. Dec. 651; Newsome v. Graham, 10 Barn. & C. 234; Johnson's Ex'x v. Jennings' Adm'r, 10 Grat. (Va.) 1, 60 Am. Dec. 323; Schwinger v. Hickok, 53 N. Y. 280; Kauffelt v. Leber, 9 Watts & S. (Pa.) 93; Clark, Cont. (3d Ed.) 640, and cases there collected.

[41] Giles v. Edwards, 7 Term. R. 181.

[42] Eicholz v. Bannister, 34 Law J. C. P. 105; Hook v. Rebison, Add. (Pa.) 271.

[43] Claflin v. Godfrey, 21 Pick. (Mass.) 1; Ripley v. Case, 86 Mich. 261, 49 N. W. 46; Westropp v. Solomon, 8 C. B. 345; Wilson v. Alexander, 3 Scam. (Ill.) 392; Lunt v. Wrenn, 113 Ill. 168; Tyler v. Bailey, 71 Ill. 34; Kauffelt v. Leber, 9 Watts & S. (Pa.) 93. And money paid on a purchase of land to which the vendor and grantor has no title may be so recovered back. Demesmey v. Gravelin, 56 Ill. 93. And see Trinkle v. Reeves, 25 Ill. 214, 76 Am. Dec. 793; Lafiin v. Howe, 112 Ill. 253.

Same—Goods Sold and Delivered, or Bargained and Sold

Whenever goods are sold and delivered, or bargained and sold, under a special contract fixing the price to be paid, the action to recover the price is either special assumpsit on that contract or the price of the goods, which the law implies to be their value, may be recovered in general assumpsit.[45]

The action may be either in indebitatus assumpsit, on the count for goods sold, or goods bargained and sold, or on the quantum valebant count.[46] As we have seen, in indebitatus assumpsit the plaintiff alleges the sale, a debt arising therefrom, and a promise by the defendant to pay the debt. In the quantum valebant count no debt is alleged, but the sale is averred, and it is alleged that in consideration thereof the defendant promised to pay what the goods were worth.

Same—Goods Wrongfully Obtained and Converted

We have seen that, where goods are wrongfully obtained and converted into money, assumpsit will lie by the owner to recover the money, as money received for his use, but that such a form of assumpsit will not lie where the goods are not converted into money by the wrongdoer.[47] Whether assumpsit in any form will lie in the latter

[44] W. F. Parker & Son v. Clemons, 80 Vt. 521, 68 Atl. 646, Whittier, Cas. Com. Law Pl. p. 249; Hopkins v. Logan, 5 Mees. & W. 241; Marshall v. Lewark, 117 Ind. 377, 20 N. E. 253; Warren v. Carpl, 61 Vt. 331, 17 Atl. 741; Irving v. Veitch, 3 Mees. & W. 100; Watkins v. Ford, 69 Mich. 357, 37 N. W. 300; Throop v. Sherwood, 4 Gilman (Ill.) 92, 98; Mackin v. O'Brien, 33 Ill. App. 474; Hoyt v. Wilkinson, 10 Pick. (Mass.) 31; Stevens v. Tuller, 4 Mich. 387. On account stated, see note, 29 L. R. A. (N. S.) 331.

[45] Seckel v. Scott, 66 Ill. 106; Brand v. Henderson, 107 Ill. 141; Burnham v. Roberts, 70 Ill. 19.

[46] Shearer v. Jewett, 14 Pick. (Mass.) 232; Bemis v. Charles, 1 Metc. (Mass.) 440; Goodrich v. Lafiin, 1 Pick. (Mass.) 57; Loring v. Gurney, 5 Pick. (Mass.) 15; Wadsworth v. Gay, 118 Mass. 44; Adams v. Columbian Steamboat Co., 3 Whart. (Pa.) 75; Hill v. Wallace, Add. (Pa.) 145; Clark v. Moore, 3 Mich. 55; Wilson v. Wagar, 26 Mich. 452; Knight v. New England Worsted Co., 2 Cush. (Mass.) 271; Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N. W. 280; Toledo, W. & W. R. Co. v. Chew, 67 Ill. 378; Willson v. Force, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; Larkin v. Mitchell & Rowland Lumber Co., 42 Mich. 206, 3 N. W. 904.

[47] Sale of automobile to which manufacturer had title was conversion by party who sold it, for which manufacturer could maintain trover or could waive tort action and recover on common counts after disposition of car for money or other property. Finney v. Studebaker Corp. of America, 196 Ala. 422, 72 South. 54; Parker v. Lee, 19 Ga. App. 499, 91 S. E. 912.

case is not clear. Some courts hold that the only remedy is in tort, as by action of trover and conversion.[48] Other courts, however, hold that the owner of the goods may waive the tort, and maintain assumpsit for the value of the goods, as upon a fictitious sale, and promise to pay for them.[49]

Same—Land Sold

The indebitatus counts include a count for real property sold. It has been held in many cases that, where the agreement to pay the price

[48] Jones v. Hoar, 5 Pick. (Mass.) 285; Galloway v. Holmes, 1 Doug. (Mich.) 330 (but see Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N. W. 280); Winchell v. Noyes, 23 Vt. 303; Strother's Adm'r v. Butler, 17 Ala. 733, 52 Am. Dec. 190; Androscoggin Water Power Co. v. Metcalf, 65 Me. 40; Allen v. Ford, 19 Pick. (Mass.) 217; Bethlehem Borough v. Perseverance Fire Co., 81 Pa. 445; Sandeen v. Kansas City, St. J. & C. B. R. Co., 79 Mo. 278; Clark, Cont. (3d Ed.) 632. And in such jurisdictions, where the goods taken have been converted into money, there can be no recovery on a count for goods sold and delivered; the count must be for money had and received. Allen v. Ford, 19 Pick. (Mass.) 218; Brown v. Holbrook, 4 Gray (Mass.) 103. Where one wrongfully converts personal property, but does not receive any money therefor, the tort cannot be waived, and an action ex contractu brought, because, until the wrongdoer has received money to which the owner of the property is entitled, there can be no action for money had and received, or upon an implied promise to pay. Marietta Mining Co. v. Armstrong, 25 Ga. App. 23, 102 S. E. 451; Woodruff v. Zaban & Son, 133 Ga. 24, 65 S. E. 123, 134 Am. St. Rep. 186, 17 Ann. Cas. 974.

[49] Russell v. Bell, 10 Mees. & W. 340; Willson v. Force, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; Toledo, W. & W. R. Co. v. Chew, 67 Ill. 378; Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N. W. 280; Goodwin v. Griffis, 88 N. Y. 629; Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803; Walker v. Duncan, 68 Wis. 624, 32 N. W. 689; Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313; McCullough v. McCullough, 14 Pa. 295; Finney v. McMahon, 1 Yeates (Pa.) 248; Clark, Cont. 646. But see Creel v. Kirkham, 47 Ill. 344; Johnston v. Salisbury, 61 Ill. 316; Stearns v. Dillingham, 22 Vt. 624, 54 Am. Dec. 88; Thurston v. Mills, 16 East, 254; Tuttle v. Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; Boyer v. Bullard, 102 Pa. 555; Weller v. Kershner, 109 Pa. 219; 3 Street, Foundations Legal Liab. 108; Thurston, Cas. Quasi Cont. 585. Where there has been a tortious taking or detention of property, which has not been sold by the tort-feasor, owner may waive the tort and recover the fair value thereof in an action of assumpsit upon an account for goods sold and delivered. Conawny v. Pepper, 7 Boyce (Del.) 511, 108 Atl. 676. Where defendant appropriated plaintiff's property, plaintiff may waive the tort and maintain an action in assumpsit for the value of the property, even though defendant had not sold and converted the same into money. Daniels v. Foster & Kleiser, 95 Or. 502, 187 Pac. 627; Election of Remedies, B. A. & A. S. Deinard, 6 Minn. Law Rev. 341, 358, 360, 502, 504.

of land was to pay the same in money, such price could be recovered under a general count for lands sold and conveyed.[50]

Same—Work, Labor, and Services

When work is done or services are rendered, not under a special contract as to compensation, but under such circumstances that the law will imply a promise to pay what they are worth, or where, though done or rendered under a special contract, that contract has been fully performed, general assumpsit will lie to recover compensation therefor. As in the case of goods sold, and as explained in treating of such cases, the action may be in indebitatus assumpsit,[51] or on the quantum meruit.[52]

(2) The quantum meruit and quantum valebant counts are used where, in the first case, the plaintiff has performed services, or in the second, sold goods, for or to the defendant, and he alleges this fact directly as the consideration for the defendant's promise to pay, which is also alleged, so much as the plaintiff deserved (quantum meruit), in the case of services performed, or so much as the goods were worth (quantum valebant), in the case of goods sold. These counts do not, as do the indebitatus counts, allege a debt arising from the performance of the services or sale of the goods, and a promise to pay the debt, but directly allege the performance of the services or sale of the goods as the consideration for a promise to pay what the plaintiff deserved or what the goods were worth.[53]

[50] Nugent v. Teachout, 67 Mich. 571, 35 N. W. 254; Siltzell v. Michael, 3 Watts & S. (Pa.) 329; Nelson v. Swan, 13 Johns. (N. Y.) 483; Bowen v. Bell, 20 Johns. 338, 11 Am. Dec. 286; Whitbeck v. Whitbeck, 9 Cow. (N. Y.) 266, 18 Am. Dec. 503; Goodwin v. Gilbert, 9 Mass. 510; Felch v. Taylor, 13 Pick. (Mass.) 133; Pike v. Brown, 7 Cush. (Mass.) 133; Basford v. Pearson, 9 Allen (Mass.) 387, 85 Am. Dec. 764; Elder v. Hood, 38 Ill. 533.

[51] Fuller v. Brown, 11 Metc. (Mass.) 440; Kelly v. Foster, 2 Bin. (Pa.) 4; Miles v. Moodie, 3 Serg. & R. (Pa.) 211; Harris v. Christian, 10 Pa. 233. Indebitatus assumpsit will not lie for work and labor where the plaintiff has been discharged without performance. The action must be on the special agreement. Algeo v. Algeo, 10 Serg. & R. (Pa.) 235.

[52] King v. Welcome, 5 Gray (Mass.) 41; Atkins v. Barnstable County, 97 Mass. 428; Summers v. McKim, 12 Serg. & R. (Pa.) 405; Frazer v. Gregg, 20 Ill. 299; Allen v. McKibbin, 5 Mich. 449; Mooney v. York Iron Co., 82 Mich. 263, 46 N. W. 376.

[53] The use of the quantum or value counts is never necessary, since the reasonable value of goods sold and delivered or work and labor done may be recovered upon an indebitatus count. Norris v. School Dist. No. 1 in Windsor, 12 Me. 293, 28 Am. Dec. 182.

CONTRACTS OF RECORD AND STATUTORY LIABILITIES

62. Assumpsit will not lie, in the absence of statute, to enforce a domestic judgment nor a judgment rendered in a sister state. But a judgment of a foreign court is not considered a debt of record.

Assumpsit will lie to enforce certain statutory obligations to pay money.

Same—Action on Judgment

A judgment of a court directing the payment of money clearly cannot be regarded as a true contract, for the element of agreement is wanting.[54] Whether or not assumpsit will lie depends on the character of the judgment. Assumpsit will only lie on a simple contract, or a quasi contractual obligation having the force and effect of a simple contract debt. It will not lie on a contract under seal, or on any other specialty. A judgment of a court of record, not being a foreign court, is not merely evidence of the debt, but is conclusive evidence of it. It is a specialty, and therefore assumpsit will not lie.[55]

It was long ago determined, however, that the judgment of a foreign court is merely evidence of the debt, and not conclusive, so that it has only the force of a simple contract, and therefore assumpsit may be maintained upon it.[56] The action will also lie on a domestic judgment of an inferior court not of record, since it is not a specialty.[57] Some of the courts have therefore held that assumpsit will lie on a justice's judgment; but there are decisions to the contrary, on the ground that even a justice's judgment is conclusive, and therefore a specialty.[58]

[54] See State of Louisiana v. Mayor, etc., of City of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64; Rae v. Hulbert, 17 Ill. 572; Belford v. Woodward, 158 Ill. 135, 41 N. E. 1037, 20 L. R. A. 593; 2 Street, Foundations Legal Liab. p. 206; 12 Columbia Law Rev. p. 272.

[55] Andrews v. Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; Du Bois v. Seymour, 152 Fed. 600, 81 C. C. A. 590, 11 Ann. Cas. 656, note.

[56] Hall v. Odber, 11 East, 124; Walker v. Witter, 1 Doug. 4; Buchanan v. Rucker, 1 Camp. 63; Sadler v. Robins, Id. 253; Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105; Hubbell v. Coundrey, 5 Johns. (N. Y.) 132; Boston India Rubber Factory v. Holt, 14 Vt. 92; Grant v. Easton, L. R. 13 Q. B. Div. 302; Mellin v. Horlick (C. C.) 31 Fed. 865; McFarlane v. Derbishire, 8 U. C. Q. B. 12; Chit. Pl. (16th Am. Ed.) p. 119.

[57] Dictum in Williams v. Jones, 13 Mees. & W. 631; Green v. Fry, Fed. Cas. No. 5,758, 1 Cranch, C. C. 137.

[58] James v. Henry, 16 Johns. (N. Y.) 233; Pease v. Howard, 14 Johns. (N. Y.) 479; Bain v. Hunt, 10 N. C. 572; Adair's Adm'r v. Rogers's Adm'r, Wright (Ohio) 428. The judgment of a justice in another state is not a specialty debt of record. Collins v. Modisett, 1 Blackf. (Ind.) 60. See Robinson v. Prescott, 4 N. H. 450; Mahurin v. Bickford, 6 N. H. 567.

It was at one time held in some states that the judgment of a court of record in a sister state is of the same effect as any other foreign judgment—merely evidence of the debt—so that assumpsit will lie upon it;[59] but, in view of the provision of the federal Constitution that a judgment rendered in one state shall have the same force and validity in every other state as in the state in which it was rendered, a judgment of a court of record of one state is conclusive evidence of the debt in every other state (except that it may be attacked for fraud or want of jurisdiction), and therefore a specialty, and it necessarily follows that it will not support the action of assumpsit. The remedy is debt.[60]

Same—Liability Imposed by Statute

Where an obligation to pay money is imposed by statute, it may be enforced by an action of assumpsit. Illustrations of such an obligation arise where a statute imposes a duty upon one county or parish to pay another for money expended in the support of a pauper, or where a statute allows an action to recover usury paid, or money lost and paid on a wager. But assumpsit will not lie if the statute prescribes some other remedy and impliedly excludes the remedy by assumpsit.[61]

[59] Hitchcock v. Aicken, 1 Caines (N. Y.) 460; Lambkin v. Nance, 2 Brev. (S. C.) 99; Pawling v. Willson, 13 Johns. (N. Y.) 192.

[60] Andrews v. Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213 (but see Shumway v. Stillman, 6 Wend. [N. Y.] 447); Garland v. Tucker, 1 Bibb (Ky.) 301; McKim v. Odom, 12 Me. 91; Boston India Rubber Factory v. Holt, 14 Vt. 92; Morehead v. Grisham, 13 Ark. 431. See 2 Black. Judgm. §§ 853–873. In some states the court has gone even further, and held that the judgment of a court of record in a sister state is so conclusive that it cannot be attacked even for fraud. See McRae v. Mattoon, 13 Pick. (Mass.) 53.

[61] Inhabitants of Milford v. Com., 144 Mass. 64, 10 N. E. 516; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. Ed. 805; Woods v. Ayres, 39 Mich. 345, 33 Am. Rep. 396; Woodstock v. Town of Hancock, 62 Vt. 348, 19 Atl. 991; McCoun v. New York Cent. & H. R. R. Co., 50 N. Y. 176; Board of Sup'rs of Sangamon County v. City of Springfield, 63 Ill. 66; Inhabitants of Bath v. Inhabitants of Freeport, 5 Mass. 325; Watson v. Inhabitants of Cambridge, 15 Mass. 286. At common law a penalty given by statute may be recovered either in debt or assumpsit. Ewbanks v. President, etc., of Town of Ashley, 30 Ill. 177. But, if the statute prescribes the form of action for its recovery, the recovery can be had only in that form of action. Confrey v. Stark, 73 Ill. 187; Peabody v. Hayt, 10 Mass. 36. Assumpsit is the proper remedy under a statute (providing no other remedy) to recover back money paid for intoxicating liquors. Friend v. Dunks, 37 Mich. 25; Id., 39 Mich. 733.

CHAPTER IX

EJECTMENT AND THE REAL ACTIONS

63. The Ancient Real Actions.
64-65. Scope of Ejectment.
66. Essential Allegations in Ejectment.
67. The Title of the Plaintiff.
68. The Ouster.
69. The Damages.
70. Trespass for Mesne Profits.
71. The Title of the Plaintiff.
72. The Ejectment.
73. The Damages.
74. Forcible Entry and Detainer.
75. Forms of Declaration in Ejectment.

THE ANCIENT REAL ACTIONS

63. Prior to the development of ejectment, if an ousted owner wanted to recover possession of land, he must bring an assize or a writ of entry or a writ of right. The assizes were possessory actions of a more summary nature than the solemn, proprietary writ of right. The writs of entry rely on a recent seisin in the demandant and a recent flaw in the tenant's title.

It is well to observe the intimate connections between the theory of title and "real actions" for the recovery of property. Title is a man's legal claim to the land; it is the answer to the questions: Can he hold possession? Can he bring ejectment or other action to recover possession? In the ancient common law there was a great variety of writs to recover seisin (possession of a freehold) according to the nature of the title relied on and the defect in the possession of the tenant attacked. These ancient remedies for the assertion of title to real property arose one above another in a regular scale, from the extrajudicial and summary remedy of entry, through the possessory actions by assize, the writs of entry, and finally the solemn proprietary writ of right. The remedies by assize were actions like the modern forcible entry and detainer, serving only to regain possession of which a demandant (that is, he who sues for the land) had been deprived. They decided nothing with respect to the future right of property, only restoring the demandant to that state or situation of possession in which he was before. So in modern times actions of forcible

entry and detainer are remedies, of statutory origin, for the protection of the actual possession of realty, whether rightful or wrongful, against a forcible invasion. Like the assize of novel disseisin, they set a strict limit to the owner's right of self-help.

Real actions are said to be proprietary and possessory, but that possessoriness is largely a matter of degree.[1]

(1) The assize of novel disseisin summarily restored to the ousted possessor his possession, when forcibly taken from him, without inquiry as to the chain of title. The prior actual possession was prima facie title, conferring a presumptive right of possession. There were other possessory assizes, but the principle is best illustrated in the novel disseisin. It could be brought only by a disseisee against a disseisor, not by the heir of the disseisee or against the heir of the disseisor. It is an action available to a person who has been turned out of possession against the person who turned him out, and the complaint must be of a recent dispossession.

(2) Writs of entry were intermediate between the assizes and the writ of rights and went somewhat further back into the history of title. "Are they proprietary or are they possessory? The answer seems to be that in their working they are proprietary; in their origin possessory or quasi possessory." [2]

The writ of entry is an old common-law remedy for the recovery of the possession of land by one who has been disseised or wrongfully dispossessed by the person in possession at the time the writ is sued out, or by one under whom he claims. "The writ," says Blackstone, "is directed to the sheriff, requiring him to 'command the tenant of the land that he render to the demandant the land in question, which he claims to be his right and inheritance; and into which, as he saith, the said tenant had not entry, but by (or after) a disseisin, intrusion, or the like, made to the said demandant, within the time limited by law for such actions; or that upon refusal he do appear in court on such a day, to show wherefore he hath not done it.' This is the original

[1] Of real actions, which all concerned the freehold, some were adapted to determine the right to possession merely, and were thence called possessory; while others of a higher nature and more elaborate procedure were proprietary and determined the title. The main distinction came to consist in the different periods of limitation. Hayes, Conveyancng (5th Ed.) 227, 228, 232, 234. On the distinction between proprietary and possessory actions, see Martin, Civ. Proc. §§ 123, 124; 2 Pollock and Maitland, Hist. Eng. Law, pp. 46, 75; 3 Holdsworth, Hist. Eng. Law, p. 10; Producers' Oil Co. v. Hanszen, 238 U. S. 325, 35 Sup. Ct. 755, 59 L. Ed. 1330. On the history of English real actions, see, also, Maitland, Eq. pp. 315 to 340; Martin, Civ. Proc. c. 4; Den ex dem. Johnson v. Morris, 7 N. J. Law, 6, 11 Am. Dec. 508.

[2] Maitland, Eq. pp. 338, 340; 3 Holdsworth, Hist. Eng. Law, p. 10.

process, the præcipe upon which all the rest of the suit is grounded, wherein it appears that the tenant is required either to deliver seisin of the lands, or to show cause why he will not. This cause may be either a denial of the fact of having entered by or under such means as are suggested, or a justification of his entry by reason of title in himself or in those under whom he makes claim; whereupon the possession of the land is awarded to him who produces the clearest right to possess it." [3]

A writ of entry suggested a recent flaw of a particular kind in the tenant's title. The demandant relies on a recent seisin, and the writs were available only if the tenant was the first, second, or third holder from the creator of the flaw in the title, the one who came to the land by some faulty or wrongful entry.

(3) The writ of right was the great and final remedy to assert ownership, and carried the investigation back to some recognized source of title. The owner must trace his right back through conveyances, voluntary and involuntary, and descents, to a source of title which is older and better than that of the other party. Every step of the title must be proved. It is one thing to have a rightful title; it is another to have one capable of being proved or to supply legal evidence and means of proof which can be made before a jury. Every title to land has its root in possession or occupancy, either of the government or of an individual, and the possession which goes back continuously and without break to the oldest possession is the best title. Possession of land was formerly protected under the name of seisin of the freehold.

The possessory assizes, the writs of entry, and the writ of right form a sort of hierarchy of actions for the protection of seisin and title to freehold estates.

Limitations on Real Actions

At common law the ousted owner of land gradually lost his possessory remedies one by one—first the extrajudicial remedy of self-help (re-entry); then the possessory actions by assize; then the writs of entry. But the only limitation on the writ of right to recover seisin at common law was lack of evidence. Several early statutes of limitation were passed which fixed an arbitrary limit back of which a suitor in a real action could not go in tracing a title. The effect was that a more recent seisin, though wrongful, became a paramount source of title.[4]

[3] 3 Bl. Com. 180.

[4] See Ballantine, Title by Adverse Possession, 32 Harv. Law Rev. 137, 138; 2 Pollock and Maitland, Hist. Eng. Law, 81. On the abolition of real and mixed actions, with their different periods of limitation, see Hayes, Conveyancing (5th Ed.) pp. 234-236.

In 1833 the Real Property Limitation Act (3 & 4 Wm. IV, c. 27, § 36) abolished real and mixed actions with certain minor exceptions. Practically for a long time prior to that the action of ejectment had superseded almost all the actions which were then abolished.

SCOPE OF EJECTMENT

64. The action of ejectment lies to recover possession of real property adversely held by the defendant. In order that the action may be maintained:

(a) The plaintiff must have the right to possession at the time the action is commenced. Prior possession is sufficient as against a mere intruder or trespasser.

(b) The plaintiff must have been ousted or dispossessed.

(c) And the defendant must be in the adverse and illegal possession of the land, actual or constructive, at the time the action is brought.

65. In the absence of a statutory provision to the contrary, merely nominal damages are given for the dispossession in the action of ejectment proper. The mesne profits, etc., during the defendant's possession must be recovered in a separate action of trespass, called an action of trespass for mesne profits, brought after the recovery in ejectment, or by some similar remedy. In many jurisdictions, by statute, mesne profits and other damages may be, and in some must be, recovered in the action of ejectment proper.

Asserts Right of Possession of Land

Since the disuse of the ancient "real actions," ejectment has become the common means of trying title to lands or tenements and recovering possession thereof. It is the name now applied to the action by which the plaintiff asserts his right of possession of land, resulting either from absolute ownership or some lesser proprietary right, whereby he is entitled to enter into immediate possession of some interest in the land.

Origin in Trespass

The action of ejectment was in its beginning an action of trespass brought by a lessee for years against one who had entered on the land and ejected him. The intent of the action was to recover damages for the trespass committed against the lessee in ejecting him from his farm. The lessee was not granted by the early common law any other remedy against the ejector; the real actions to recover possession of

the freehold not being open to him, but only to his lessor. But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing justice, and, in the prosecution of a writ of ejectment, introduced a new species of relief, viz. a judgment to recover the term and a writ of possession to the sheriff to execute it by delivering possession.[5]

Ejectment, originally employed to enable a lessee to recover damages against an intruder who ejected him, was first enlarged to enable him to recover possession of the land. Afterwards lease and lessee became a fiction, the lessor being the real plaintiff and suing as Doe on the demise of himself. The defendant, if a tenant, could call to his aid the landlord's title, by which he derived his possession. Thus ejectment became in effect a real action open to all owners to assert their title and right of possession. All that is involved is the present right of possession, without regard to where the ultimate fee or ownership may be. The judgment in ejectment was not formerly conclusive upon the title between the parties, which might be retried unless an injunction were granted against repeated ejectments.

Extension to Freeholders

Ejectment was originally an action of trespass which could be brought by a lessee to recover damages for ouster from an estate for years. It became an action to recover possession of the term when the courts undertook to award a recovery. But, to recover seisin of a freehold interest, an estate for life or in fee, resort must be had to the old real actions, viz. a writ of right, a writ of entry, or an assize. Ejectment was an action to recover possession of a term, a mere chattel interest. But by recourse to several fictions the action of ejectment was extended to assert the right of possession based on title to a freehold estate as well as to a term. The theory of ejectment required a lease, an entry, by the lessee to perfect his estate, and an ouster of the lessee by some ejector. This could be satisfied by alleging such transactions as a matter of form, like the loss and finding in trover and detinue or the promise in general assumpsit. "For this purpose there was only wanting a fictitious lessee, a fictitious ejector, and a fictitious ouster; and, for the sake of getting rid of the almost endless technicalities and subtleties of real actions, the courts readily sanctioned the introduction of these fictions, which have now been

[5] Ejectment was originally a personal action, but became "mixed," partly real and partly personal, when judgment was given for possession of land as well as damages. 2 Pollock and Maitland, Hist. Eng. Law, p. 571, note; 3 Bl. Com. 200, 201.

acquiesced in for more than three centuries, and the result is that, if I claim title to a piece of land of which you are in possession, I begin by serving upon you a declaration and notice, which in this action takes the place of a writ. The declaration states that I made a lease or demise to a fictitious person, say John Doe; that he entered into possession; and that another fictitious person, say Richard Roe, forcibly ejected or ousted him from the premises. Thus John Doe becomes the nominal plaintiff, and Richard Roe the nominal defendant. But appended to this declaration is a notice purporting to be written by Richard Roe to you, informing you that he has been sued, but that, being a casual ejector only, he shall not defend, and advising you to appear and defend. This the court will permit you to do by entering into a consent rule, by which you confess the fictions of a lease, entry, and ouster, as alleged in the declaration, and agree to try the question of title only. Such is the circuitous manner in which one of the most important actions was made to effect its purpose." [6]

Thus, if both A. and B. claimed to be seised in fee of Blackacre, and B. was in possession of the land, A. would not sue in his own name; for, if he did, he would have to bring a real action. He pretended that he had demised Blackacre a few days previously to John Doe or Richard Roe; and this fictitious lessee would obligingly lend his name as plaintiff; and as he claimed no title in himself, but only a right to possession derived from the lease, he could sue in ejectment, and the action would be called Doe ex dem. A. v. B. The plaintiff would plead A.'s seisin, and the demise to himself; the defendant was not allowed to traverse the fictitious demise, but he would deny A.'s seisin; and so A.'s title to the land would become an issue in the action, and be judicially decided.[7]

Fictions Abolished

Ejectment is now brought in the name of the claimant out of possession against the occupant of the land. The fictions of pleading by which this action was developed have been of late years generally abolished. But its history is a most characteristic story of the growth

[6] Walker, Am. Law, 620. See, for a history of the action of ejectment, 3 Bl. Comm. 199; Adams, Ejectment, c. 1; Sedgwick and Wait, Trial of Title to Land, c. 1; French v. Robb, 67 N. J. Law, 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433; Den ex dem. Johnson v. Morris, 7 N. J. Law, 6, 11 Am. Dec. 508; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187; 9 R. C. L. pp. 828, 829.

[7] Odgers, Pl. (7th Ed.) p. 210. See "A Century of Law Reform," p. 214. Such was the method employed to make ejectment do the work of a real action. The real plaintiff was the person alluded to as "the lessor of the plaintiff."

of English law by the gradual extension of a particular right of action of a special nature of all proprietors who wished to recover possession and establish title.

By statute in most states these fictitious allegations have been swept away, and the action is made a simple and direct remedy for the assertion of the title to real property held adversely, and recovery of the possession. The old fictions are no longer resorted to. Thus in Illinois the action of ejectment is expressly retained by statute,[8] but it is provided that "the use of fictitious names of plaintiffs or defendants, and of the names of any other than the real claimants and the real defendants, and the statements of any lease or demise to the plaintiff, and of an ejectment by a casual or nominal ejector, are hereby abolished."[9] The same is true in Michigan[10] and other states.

When Ejectment Lies—For What Property

Ejectment will only lie for the recovery of possession of real property, as for lands, or buildings annexed to land, upon which an entry might in point of fact be made, and of which the sheriff could deliver actual possession.[11] It will not lie to recover property which, in legal

[8] Hurd's Rev. St. 1921, c. 45, §§ 1-8; Ætna Life Ins. Co. v. Hoppin, 255 Ill. 115, 99 N. E. 375.

[9] Hurd's Rev. St. 1921, c. 45, § 8.

[10] 3 Comp. Laws Mich. 1915, §§ 13168, 13169. But see Doe ex dem. Alabama State Land Co. v. McCullough, 155 Ala. 246, 46 South. 472; Doe ex dem. Townsend v. Roe, 26 Del. 78, 80 Atl. 352.

[11] Butler v. Frontier Telephone Co., 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. (N. S.) 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858; Lloyd, Cas. Civ. Proc. 159, 163, note; 1 Chit. Pl. 210; Doe ex dem. Butcher v. Musgrave, 1 Man. & G. 639; Black's Lessee v. Hepburne, 2 Yeates (Pa.) 331; Nichols v. Lewis, 15 Conn. 137; White v. White, 16 N. J. Law, 202, 31 Am. Dec. 232; Jackson ex dem. Saxton v. May, 16 Johns. (N. Y.) 184. "Whenever a right of entry exists, and the interest is tangible, so that possession can be delivered, an ejectment will lie." Jackson v. Buel, 9 Johns. (N. Y.) 298. Thus, where a grantor in a deed reserved to himself, his heirs and assigns forever, "the right and privilege of erecting a milldam" at a certain place, "and to occupy and possess the said premises without any hindrance or molestation" from the grantee or his heirs, it was held that the right reserved was such an interest in the land as would support an action of ejectment. Jackson v. Buel, supra. The owner of the soil may maintain ejectment against one who appropriates a part of a highway to his own use. Wright v. Carter, 27 N. J. Law, 77. The riparian owner may maintain ejectment for land below high-water mark. Nichols v. Lewis, supra; People v. Mauran, 5 Denio (N. Y.) 389. The action lies for a room or chamber without land. Per Parker, C. J., in Otis v. Smith, 9 Pick. (Mass.) 207. Where a boiler, engine, and stack are erected upon the land of a person at the joint expense of himself and another, under an agreement to use the same as a common source of power, without limitation as to time, the interest thus created is in the nature of real estate, for which ejectment will lie in the

consideration, is not tangible, as rent, or other incorporeal hereditaments, or a water course, where the land over which the water runs is not the property of the claimant.[12]

Same—Title to Support

Any person having the right of entry upon land, whether his title be in fee simple, or merely for life, or for a term of years, may maintain the action.[13] The plaintiff must have such an estate as entitles him to the possession.[14] The right to possession must also be of some duration, and exclusive. The action will not lie, therefore, for a standing place, or where a party has merely a license to use land.[15]

The plaintiff must, in all cases, recover upon the strength of his own title. He cannot found his claim upon the insufficiency of the defendant's title, for possession gives the defendant a right against every one who cannot show a better title, and the party who would change

case of an ouster. Hill v. Hill, 43 Pa. 521. One entitled to the right of mining on land may maintain ejectment. Turner v. Reynolds, 23 Pa. 199; Conduct v. Erie R. Co., 80 N. J. Eq. 519, 85 Atl. 612; Priddy v. Thompson, 204 Fed. 955, 123 C. C. A. 277. Ejectment lies whenever right of entry exists and interest is of such a character that it can be held and enjoyed and possession thereof delivered in execution of judgment for its recovery. Walters v. Sheffield, 75 Fla. 505, 78 South. 539.

[12] 1 Chit. Pl. 210; 3 Bl. Com. 206; City of Grand Rapids v. Whittlesey, 33 Mich. 109; Bay County v. Bradley, 30 Mich. 163, 33 Am. Rep. 367; Taylor v. Gladwin, 40 Mich. 232; Black's Lessee v. Hepburne, 2 Yeates (Pa.) 331. Payment of a ground rent reserved upon a conveyance in fee cannot be enforced by ejectment. Kenege v. Elliot, 9 Watts (Pa.) 258. Though lands have for some purposes been impressed with the character of personalty, in accordance with the provisions of a will, ejectment nevertheless lies to recover them. Shaw v. Chambers, 48 Mich. 355, 12 N. W. 486.

[13] 1 Chit. Pl. 211. A tenant in common may maintain ejectment against a third person for his share of the land. Chambers v. Handley's Heirs, 3 J. J. Marsh. (Ky.) 98; Robinson v. Roberts, 31 Conn. 145; Tarver v. Smith, 38 Ala. 135; Den ex dem. Carson's Heirs v. Smart, 34 N. C. 369. Or tenants in common may sue jointly. Hicks v. Rogers, 4 Cranch, 165, 2 L. Ed. 583; Innis v. Crawford, 4 Bibb. (Ky.) 241; Touchard v. Keyes, 21 Cal. 202. And one tenant in common may maintain the action against the other, if he can show an ouster.

[14] Batterton v. Yonkum, 17 Ill. 288; Heffner v. Betz, 32 Pa. 376. Suits for land in ejectment are possessory in their nature, whether based on prior possession or title. Butler v. Borroum (Tex. Civ. App.) 218 S. W. 1115. On the right of a lessee to maintain ejectment before entry into possession, see 2 Minn. Law Rev. 367, 370; 2 Pollock and Maitland, Hist. Eng. Law, 109.

[15] Rex v. Inhabitants of Mellor, 2 East, 190; Goodtitle ex dem. Miller v. Wilson, 11 East, 345. The right reserved to a grantor of land to erect a milldam, and occupy the land for that purpose, will support ejectment. Jackson v. Buel, 9 Johns. (N. Y.) 298. The action of ejectment involves both the right of possession and the right of property. Chance v. Carter, 81 Or. 229, 158 Pac. 947.

the possession must therefore show a prior possession or trace his paper title back to some one who can be shown to have had possession or else to some acknowledged source of title, such as grant from the government.[16]

By the weight of authority, prior possession, without any further title, is sufficient, as against a mere intruder; so that if a stranger, who has no color of title, should evict a person who has been in quiet possession, but who has no strict legal title, the latter may maintain ejectment against him.[17]

The plaintiff must have a legal right to possession. The legal title, so far as it relates to the right of possession, must prevail in ejectment. A mere equitable or beneficial interest, without the legal title, will not suffice either to support the action or to defeat it.[18]

[16] Goodtitle v. Baldwin, 11 East, 488; Doe ex dem. Moore v. Hill, Breese (Ill.) 304; Joy v. Berdell, 25 Ill. 537; Stuart v. Dutton, 39 Ill. 91; Walton v. Follansbee, 131 Ill. 147, 23 N. E. 332; Creigh v. Shatto, 9 Watts & S. (Pa.) 82; Welker's Lessee v. Coulter, Add. (Pa.) 390; Johnston v. Jackson, 70 Pa. 164; Schauber v. Jackson, 2 Wend. (N. Y.) 13; Adair v. Lott, 3 Hill (N. Y.) 182; Roseboom v. Mosher, 2 Denio (N. Y.) 61; Webster v. Hill, 38 Me. 78; Douglass v. Libbey, 59 Me. 200; Hall v. Gittings' Lessee, 2 Har. & J. (Md.) 112; Doe ex dem. Campbell v. Fletcher, 37 Md. 430; Stehman v. Crull, 26 Ind. 436; Huddleston v. Garrott, 3 Humph. (Tenn.) 629; Meeker v. Boylan, 28 N. J. Law, 274. If the defendant shows a paramount outstanding title in some third person, the action must fail. Rupert v. Mark, 15 Ill. 540; Ballance v. Flood, 52 Ill. 49; Masterson v. Cheek, 23 Ill. 72; Holbrook v. Brenner, 31 Ill. 501; Casey v. Kimmel, 181 Ill. 154, 54 N. E. 905; Burns v. Curran, 275 Ill. 448, 114 N. E. 166 (mere prior possession is sufficient unless defendant shows better title); Hunter v. Cochran, 3 Pa. 105; Jackson v. Givin, 8 Johns. (N. Y.) 137, 5 Am. Dec. 328; Peck v. Carmichael, 9 Yerg. (Tenn.) 825; Massengill v. Boyles, 11 Humph. (Tenn.) 112; Atkins v. Lewis, 14 Grat. (Va.) 30.

[17] 1 Chit. Pl. 212; Doe ex dem. Harding v. Cooke, 7 Bing. 346; Doe v. Dyeball, Moody & M. 346; Wimberly v. Hurst, 33 Ill. 160, 83 Am. Dec. 295; Bates v. Campbell, 25 Wis. 613; Woods v. Lane, 2 Serg. & R. (Pa.) 53; Shumway v. Phillips, 22 Pa. 151; Hoey v. Furman, 1 Pa. 295, 44 Am. Dec. 129; Reed v. Shepley, 6 Vt. 602; Russell v. Irwin's Adm'r, 38 Ala. 44; Leport v. Todd, 32 N. J. Law, 124; Jackson ex dem. Murray v. Hazen, 2 Johns. (N. Y.) 22; Jackson ex dem. Duncan v. Harder, 4 Johns. (N. Y.) 202, 4 Am. Dec. 262; Smith v. Lorillard, 10 Johns. (N. Y.) 338; Whitney v. Wright, 15 Wend. (N. Y.) 171. But see Marshall v. Stalnaker, 70 W. Va. 394, 74 S. E. 48; Taylor v. Russell, 65 W. Va. 632, 64 S. E. 923.

[18] Doe ex dem. Da Costa v. Wharton, 8 Term R. 2; Chiles v. Davis, 58 Ill. 411; Rountree v. Little, 54 Ill. 323; McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139; Buell v. Irwin, 24 Mich. 145; Ryder v. Flanders, 30 Mich. 336; Geiges v. Greiner, 68 Mich. 153, 36 N. W. 48; Hopkins v. Ward, 6 Munf. (Va.) 38; Smith v. McCann, 24 How. 398, 16 L. Ed. 714; Leonard v. Diamond, 31 Md. 536; Eggleston's Lessee v. Bradford, 10 Ohio, 312; Thompson v. Lyon, 33 Mo. 219; Cunningham v. Dean, 33 Miss. 46; Gillett v. Treganza, 13 Wis. 472; Cheney v. Cheney, 26 Vt. 606; Thompson v. Adams, 55 Pa. 479; Mulford v. Tunis, 35 N. J. Law, 256; Taylor v. Russell, 65 W. Va. 632, 64 S. E. 923. If the defendant has the legal title, though he acquired it by fraud, and though the plaintiff may be equitably entitled to the land, the action cannot be maintained. The plaintiff must seek his remedy in a court of equity. Rountree v. Little, supra; Dyer v. Day, 61 Ill. 336; Union Brewing Co. v. Meier, 163 Ill. 427, 45 N. E. 264. A party cannot recover in ejectment on the basis of an estoppel in pais (as an estoppel of the defendant to set up a title against a title acquired by the plaintiff in reliance upon the defendant's representations). Hayes v. Livingston, 34 Mich. 384, 22 Am. Rep. 533. Nor can the defendant set up an equitable estoppel against the plaintiff's legal title. Ryder v. Flanders, 30 Mich. 336; Nichols v. Caldwell, 275 Ill. 520, 526, 114 N. E. 278. Nor can the defendant interpose the merely equitable defense that the plaintiff's title was fraudulently obtained. Harret v. Kinney, 44 Mich. 457, 7 N. W. 63. Nor that grantor was incompetent. Walton v. Malcolm, 264 Ill. 380, 106 N. E. 211, Ann. Cas. 1915D, 1021. But compare Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505. The legal title can be set up by a trustee in an action by the cestui que trust. Doe ex dem. Shewen v. Wroot, 5 East, 138; Brolaskey v. McClain, 61 Pa. 146; Jackson ex dem. Simmons v. Chase, 2 Johns. (N. Y.) 84; Jackson v. Sisson, 2 Johns. Cas. (N. Y.) 321. A trustee may maintain ejectment against his cestui que trust. Beach v. Beach, 14 Vt. 28, 39 Am. Dec. 204; Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531. "But, where trustees ought to convey to the beneficial owner, it will, after a lapse of many years, and under certain circumstances, be left to the jury to presume that they have conveyed accordingly; so where the beneficial occupation of an estate by the possessor under an equitable title induces a fair presumption that there has been a conveyance of the legal estate to such possessor. But, when the facts of the case preclude such presumption, the party having only the equitable interest cannot prevail in a court of law." 1 Chit. Pl. 212; England ex dem. Syburn v. Slade, 4 Term R. 683; Sinclair v. Jackson ex dem. Field, 8 Cow. (N. Y.) 543; Wales v. Bogue, 31 Ill. 464. But in no case can presumptions drawn from the fact of defendant's continued possession, short of the period necessary to give him title, overthrow the plaintiff's right of recovery based on his undisputed legal title. Christopher v. Detroit, L. & N. R. Co., 56 Mich. 175, 22 N. W. 311. If a cestui que trust is legally entitled to the possession as against the trustee, he may maintain ejectment. Kennedy v. Fury, 1 Dall. (Pa.) 72, 1 L. Ed. 42; Presbyterian Congregation v. Johnston, 1 Watts & S. (Pa.) 9; Caldwell v. Lowden, 3 Brewst. (Pa.) 63.

The plaintiff must have the right of possession at the time the action is commenced.[19] A remainderman or reversioner cannot bring the action while the right of possession is in another.

[19] Doe ex dem. Whatley v. Telling, 2 East, 257; Right ex dem. Lewis v. Beard, 13 East, 210; Carpenter v. Joiner, 151 Ala. 454, 44 So. 424; Wood v. Morton, 11 Ill. 547; Pitkin v. Yaw, 13 Ill. 251; Van Vleet v. Blackwood, 39 Mich. 728; Smith v. McCann, 24 How. 398, 16 L. Ed. 714; Wilson's Lessee v. Inloes, 11 Gill & J. (Md.) 351; Whitley v. Bramble, 9 B. Mon. (Ky.) 143; Laurissini v. Doe ex dem Corquette, 25 Miss. 177, 57 Am. Dec. 200; Jackson ex dem. Hardenbergh v. Schoonmaker, 4 Johns. (N. Y.) 390.

Same—The Injury—Against whom the Action Lies

Ejectment will only lie for what in fact, or in legal consideration, amounted to an ouster or dispossession of the plaintiff's lessor (or plaintiff);[20] and further than this the defendant must be in the adverse and illegal possession of the land at the time the action is brought.[21] If there has been no ouster, or the defendant is not thus in possession when the action is commenced, the action must fail. Trespass would be the proper remedy, not ejectment.

Recovery of Damages—Trespass for Mesne Profits

At common law the plaintiff, in addition to the recovery of the land itself, is entitled to recover damages for his dispossession, but these damages are merely nominal. Though the plaintiff may have been kept out of possession for a long time, he cannot recover for mesne profits in the action of ejectment proper, unless the right is expressly given by statute. His remedy, in the absence of such a statute, is to bring an action of trespass for mesne profits after he has recovered in

[20] 3 Bl. Com. 199; 1 Chit. Pl. 213; Deuchatell v. Robinson, 24 La. Ann. 176; Chamberlin v. Donahue, 41 Vt. 306; Jackson ex dem. Garnsey v. Pike, 9 Cow. (N. Y.) 69. Wrongful detention, after a lawful entry, may amount to an ouster, as where a tenant holds over after his term has expired, and refuses to quit possession. See McCann v. Rathbone, 8 R. I. 297; Kinney v. Harrett, 46 Mich. 87, 8 N. W. 708. The mere receipt of all the profits by one tenant in common of land does not amount to an ouster, entitling his cotenant to maintain ejectment. 1 Chit. Pl. 214. If the possession of one tenant in common is not adverse to the other's right, the latter cannot maintain the action. Gower v. Quinlan, 40 Mich. 572. But if a tenant in common excludes his cotenant, and refuses to let him occupy the land, it is otherwise. 1 Chit. Pl. 214; Co. Litt. 199b; Barnitz v. Casey, 7 Cranch, 456, 3 L. Ed. 403; Buchanan v. King's Heirs, 22 Grat. (Va.) 414; Lundy v. Lundy, 131 Ill. 188, 23 N. E. 337; Lawrence v. Ballou, 37 Cal. 518; Valentine v. Northrop, 12 Wend. (N. Y.) 494; Shaver v. McCraw, 12 Wend. (N. Y.) 562; Cumberland Valley R. Co. v. McLanahan, 59 Pa. 23.

[21] Right ex dem. Lewis v. Board, 13 East, 210, 212; Goodright ex dem. Balch v. Rich, 7 Term R. 327; Reed v. Tyler, 56 Ill. 288; Whitford v. Drexel, 118 Ill. 600, 9 N. E. 203; Lockwood v. Drake, 1 Mich. 14; White v. Hapeman, 43 Mich. 267, 5 N. W. 313, 38 Am. St. Rep. 178; Wallis v. Doe ex dem. Smith's Heirs, 2 Smedes & M. (Miss.) 220; Smith v. Doe ex dem. Walker, 10 Smedes & M. (Miss.) 584; Jackson ex dem. Clowes v. Hakes, 2 Caines (N. Y.) 335; Cooley v. Penfield, 1 Vt. 244; Kribbs v. Downing, 25 Pa. 309; McIntire v. Wing, 113 Pa. 67, 4 Atl. 197; Corley v. Pentz, 76 Pa. 57. It was held, for instance, that a landlord in possession could not maintain the action to bar the right of his absconding lessee. Jackson v. Hakes, supra. An actual possession by the defendant is not necessary. It is sufficient if he has a deed for the premises, which has been recorded, and claims to have purchased them. McDaniels v. Reed, 17 Vt. 674. And see Anderson v. Courtright, 47 Mich. 161, 10 N. W. 183; Heinmiller v. Hatheway, 60 Mich. 301, 27 N. W. 558; Banyer v. Empie, 5 Hill (N. Y.) 48.

ejectment. This action is in form an action of trespass vi et armis, but is in effect to recover the rents and profits of the estate during the time the defendant was in possession. In this action the plaintiff complains of his ejection, of the reception of the mesne profits by the defendant, and of the waste or dilapidations, if any, committed or suffered by him, and prays judgment for the damages thereby sustained.[22]

In some states this action of trespass for mesne profits is still the proper remedy. In other states, by statute, the mesne profits, and any damages sustained by reason of the defendant's wrong, may and must be recovered in the action of ejectment proper.[23] In other states the statutory remedy does not fall strictly under either of these forms.[24]

At common law one recovery in ejectment was not a bar to a second ejectment between the same parties, because the issue presented was the right of possession, and title was not directly in issue. But the modern tendency is to make the judgment conclusive, as in other actions, in so far as the question of title is actually adjudicated.[25]

[22] See 1 Chit. Pl. 215; Benson v. Matsdorf, 2 Johns. (N. Y.) 369; Holmes v. Davis, 19 N. Y. 488; Van Alen v. Rogers, 1 Johns. Cas. (N. Y.) 281, 1 Am. Dec. 113; Jackson v. Loomis, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347; Poindexter v. Cherry, 4 Yerg. (Tenn.) 305; Cutts v. Spring, 15 Mass. 135; Murphy v. Guion, 2 Hayw. (N. C.) 162; Hylton v. Brown, 2 Walsh. C. C. 165, Fed. Cas. No. 6,983; Starr v. Pease, 8 Conn. 541; Lloyd v. Nourse, 2 Rawle (Pa.) 49; Morrison v. Robinson, 31 Pa. 456; Brandmeier v. Pond Creek Coal Co., 229 Pa. 280, 78 Atl. 273; Whittington v. Christian, 2 Rand. (Va.) 363; Ringhouse v. Keener, 63 Ill. 230 (proceeding to recover mesne profits is substantially a new suit, not a continuation of the action of ejectment).

[23] Scott v. Colson, 156 Ala. 450, 47 South. 60; Raymond v. Andrews, 6 Cush. (Mass.) 265. The statutory provision in Massachusetts for the recovery of mesne profits in the same action in which the premises are demanded excludes an independent action of trespass for mesne profits after recovery of the premises. Raymond v. Andrews, supra; Provident Inst. for Sav. v. Burnham, 128 Mass. 458. Statutes are common authorizing the recovery of mesne profits in ejectment: Alabama, Code 1907, § 3830; District of Columbia, Code of Laws 1901, § 905; Florida, Gen. St. 1906, § 1908; Illinois, Hurd's Rev. St. 1921, c. 45, § 33; Maine, Rev. St. 1916, c. 100, § 11; Massachusetts, Rev. Laws 1902, c. 179, § 12; Michigan, Comp. Laws 1915, §§ 13203-13210, 13218; Mississippi, Code 1906, § 1848; New Jersey, 2 Comp. St. 1910, Ejectment, p. 2063, § 45; Vermont, G. L. 1917, § 2135; Virginia, Code 1919, § 5481; West Virginia, Code 1913, § 4098.

[24] In Michigan it is provided by statute that the plaintiff recovering judgment in ejectment shall be entitled to recover damages for rents and profits, etc. The mode of recovery prescribed by the statute is for the plaintiff, within a year after docketing of the judgment in ejectment, to make and file a suggestion of his claim, in the form of a declaration in an action of assumpsit for use and occupation. Proceedings are then had for determining the right to damages. See Comp. Laws Mich. 1915, §§ 13203-13205. The practice in Illinois is substantially the same. Hurd's Rev. St. 1921, c. 45, §§ 33, 43-57.

[25] Miles v. Caldwell, 2 Wall. (69 U. S.) 35, 17 L. Ed. 755; Barger v. Hobbs

Statutory Substitutes for Ejectment

The action of ejectment with its old common-law fictions, is now in force in very few, if any, of the states. In most states an action of the same nature has been substituted by statutes expressly prescribing the mode of procedure, and the circumstances under which it will or will not lie. Generally—in Illinois and Michigan, for instance, as above explained—the action is still designated as "ejectment," and most of the rules applicable to the old common-law action of ejectment apply. To ascertain the extent and effect of these statutory changes, the student must consult the statutes and decisions of his state.[26]

Same—Trespass to Try Title

In Texas, and formerly in South Carolina and Alabama, an action called "trespass to try title" was substituted for the action of ejectment. This action is in form an action of trespass quare clausum fregit, but a controverted title may be determined therein, and possession of the land recovered, in addition to the recovery of damages for the trespass. The action, unlike ejectment, will lie against an adverse claimant of land even though he has never been in actual possession, and there has therefore been no actual trespass.[27] In Texas this is the only form of action to try a controversy as to the title of land.[28] The action is intended as a substitute for ejectment, and is governed by substantially the same rules,[29] but it can be maintained on an equitable title.[30]

67 Ill. 502; Ætna Life Ins. Co. v. Hoppin, 255 Ill. 115, 99 N. E. 375; Cook County v. Calumet & C. Canal & Dock Co., 131 Ill. 505, 23 N. E. 629; Lynch v. Lynch, 221 Pa. 423, 70 Atl. 804.

[26] See, also, Tyler, Ejectment, 611–837; Newell, Ejectment; Warvelle, Ejectment.

[27] Titus v. Johnson, 50 Tex. 224. It lies against a tenant holding over after expiration of his term. Thurber v. Conners, 57 Tex. 96. Suits for land, in ejectment or trespass to try title, are possessory in their nature, whether based on prior possession or title; and one having prior possession of land is not required to exhibit his full title to recover against a mere trespasser. Butler v. Borroum (Tex. Civ. App.) 218 S. W. 1115.

[28] In Texas it is provided by statute as follows: "All fictitious proceedings in the action of ejectment are abolished, and the method of trying titles to lands, tenements, or other real property shall be by action of trespass to try title." Rev. St. 1911, art. 7731. "The trial shall be conducted according to the rules of pleading, practice and evidence in other cases in the district court, and conformably to the principles of trial by ejectment, except as herein otherwise expressly provided." Id. art. 7732. See Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

[29] As in ejectment, the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's; and he must rely on his

[30] See note 30 on following page.

Writs of Entry

The remedy of writ of entry was a real action, and was, with other real actions, abolished in England by the statute of 3 & 4 Wm. IV, c. 27, § 36. It has also been abolished in most of our states. Its name is retained, however, in a few states—Massachusetts, Maine, and New Hampshire.

The writ of entry will only lie to recover real property. The demandant must have the legal title, and not merely an equitable title, and must have the right of possession at the time the action is commenced.[31] There must also have been a disseisin of the demandant by the tenant, or by one under whom the latter claims.[32]

ESSENTIAL ALLEGATIONS IN EJECTMENT

66. The essential allegations of the declaration are:

(a) The title of the plaintiff to certain land.

(b) The wrongful dispossession or ouster.

(c) The damages.

title as it existed at the commencement of the action. Collins v. Ballow, 72 Tex. 330, 10 S. W. 248. A petition, alleging plaintiff's ownership in fee simple of land, that defendant was in possession thereof and forcibly detaining it from plaintiff, with facts showing plaintiff's right to possession, though not literally complying with the fiction prescribed by Rev. St. Tex. art. 7733, for petition in trespass to try title, and not containing the indorsement required by article 7734, substantially complies with those statutes and shows the suit to be for recovery of land. Evans v. Hudson (Tex. Civ. App.) 216 S. W. 491.

[30] The action, unlike ejectment, is not limited to the enforcement of a strictly legal right, but may be supported on an equitable title. Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Wright v. Dunn, 73 Tex. 293, 11 S. W. 330. In trespass to try title, it is not necessary for plaintiff, who relies on equitable title, to plead specifically facts on which his title is based; customary allegations being sufficient to authorize proof of any fact tending to establish title. Blumenthal v. Nussbaum (Tex. Civ. App.) 195 S. W. 275.

[31] "In a writ of entry the demandant must recover upon the strength of his own title, and not upon the weakness of that of the tenant. Not merely the possession, but the title, is in issue, and he can recover only to the extent to which he proves title." Butrick v. Tilton, 141 Mass. 93, 6 N. E. 563. The demandant need not show a perfect title. It is sufficient if he shows a good title as against the tenant. Mere possession under a claim of right constitutes legal seisin which will avail against every one not having an older and better title. Pettingell v. Boynton, 139 Mass. 244, 29 N. E. 655.

[32] Wyman v. Brown, 50 Me. 139.

SAME—THE TITLE OF THE PLAINTIFF

67. The declaration must describe the premises in question, and state the title of the plaintiff thereto. It should also allege a right of entry in the plaintiff at the time the action is brought.

The fictions by which the action of ejectment was extended from a remedy for a lessee to all claimants, involved alleging in the declaration: (1) A lease from the real plaintiff to the nominal plaintiff, John Doe; (2) the entry by the nominal plaintiff under the lease; and (3) the ouster of the nominal plaintiff by the nominal defendant (the casual ejector, Richard Roe) during the term of the lease. This childish mummery is now generally discarded.

Description of Premises

As the recovery of a specific tract or tracts of land is the main object of this action, the declaration must describe the premises demanded with certainty and precision, so as to clearly identify them, not only in order that it may be seen that the property demanded is the same as that with reference to which evidence is introduced, but also in order that possession may be delivered to the plaintiff or demandant if he succeeds in establishing his right.[33]

The Plaintiff's Right

As we have shown above, the plaintiff, to maintain ejectment, must have a legal right to possession at the time the action is commenced, though prior peaceable possession, without further title, may be sufficient as against a mere intruder or trespasser. The declaration must, of course, show such a title and right, or it will fail to state a good cause of action. It is sufficient under some statutory forms to allege that plaintiff was owner and possessed of the premises sued for, describing them as in a deed of conveyance.[34]

[33] Stringer v. Mitchell, 141 Ga. 403, 81 S. E. 194; Seeley v. Howard, 23 Mich. 11; Barclay v. Howell, 6 Pet. (U. S.) 498, 8 L. Ed. 477; Munson v. Munson, 30 Conn. 425; Hawn v. Norris, 4 Bin. (Pa.) 77. See Clark v. Clark, 7 Vt. 190; Wooster v. Butler, 13 Conn. 309; Stewart v. Camden & A. R. Co., 33 N. J. Law, 115; State v. Heaphy, 88 Vt. 428, 92 Atl. 813; Davis v. Judge, 44 Vt. 500; Sedgwick and Wait, Trial of Title to Land, § 455. And see Lazar v. Caston, 67 Miss. 275, 7 South. 321.

[34] Jackson v. Tribble, 156 Ala. 480, 47 South. 310; Bush v. Glover, 47 Ala. 167, Whittier, Cas. Com. Law Pl. p. 64; Code Ala. 1907, § 3839; Parr v. Van Horn, 38 Ill. 226; Almond v. Bonnell, 76 Ill. 536; Dickerson v. Hendryx, 88 Ill. 60; Holt v. Rees, 44 Ill. 30 (the allegation of possession will be supported by proof of a legal right to possession); Livingston v. Ruff, 65 S. C. 284, 286, 43 S. E. 678; Dugas v. Hammond, 130 Ga. 87, 60 S. E. 208; 19 C. J. Ejectment, pp. 1109, 1112.

SAME—THE OUSTER

68. The declaration should state an ouster or dispossession of the plaintiff, in fact or in law, and an actual, adverse possession by the defendant.

The action of ejectment, as we have seen, is only proper where there has been what amounts, in point of fact or in point of law, to an ouster or dispossession of the person having the right of entry upon the premises in question. As we have also seen, the ouster need not be by an actual turning out of the plaintiff. It may be, for instance, merely a holding over by a tenant after the expiration of his term. It is also generally essential that the defendant shall be in actual possession when suit is brought, and that such possession shall be adverse. These requirements may not exist in all the states, for the scope of this action has been enlarged in some of them by statute. The declaration must, in all cases, show such an ouster or dispossession, and such adverse possession or claim, as is necessary in the particular jurisdiction to a maintenance of the action.[35]

SAME—THE DAMAGES

69. The declaration should also state the damages caused by the dispossession of the plaintiff, though their recovery is not the main object of the action. They are usually, at common law, nominal only. If the action, as in some states, includes the recovery of mesne profits, the damages must include such profits, and should be laid high enough to cover both the full amount of such profits and the damages for the injury.

While at common law the damages recoverable in this action were, and in some states still are, only those caused by the dispossession or ouster, and the amount would, therefore, be generally only a nominal sum, in most the plaintiff is also allowed to recover the mesne profits, or those which the defendant has received during his adverse posses-

[35] Whipple v. McGinn, 18 R. I. 55, 25 Atl. 652 (detention by the defendant must be alleged); Guerard v. Jenkins, 80 S. C. 223, 61 S. E. 258.

sion;[36] and in such case the damages alleged must include a sum sufficient to cover these.[37] At common law, and when the above privilege is not allowed, as the right of possession only is the subject of controversy, the damages in ejectment are merely nominal, and a nominal amount only need be stated.[38]

TRESPASS FOR MESNE PROFITS

70. The essential allegations of the declaration are:
(a) The title of plaintiff.
(b) The ejectment.
(c) The damages.

SAME—THE TITLE OF THE PLAINTIFF

71. The declaration must describe the premises from which the profits arose, and the title of the plaintiff thereto, as well as the value of the profits themselves, and their receipt by the defendant.

It is obvious from the nature of this action that the plaintiff must expressly state and describe the different parcels of land from which the profits arose,[39] as the defendant might otherwise compel him to make what is called a new assignment, or restatement of the grounds of his action, by pleading "liberum tenementum" or the common bar. As it is a separate action from the prior action of ejectment, the plaintiff's title to the premises should also appear, as well as the value of the mesne profits accrued, and their receipt by the defendant during the period of the ejectment. All these facts are stated in a general and summary manner, as in other forms of trespass, save that the description of the premises must be such as to identify them, and the value of the mesne profits which the defendant is alleged to have received

[36] Lyons v. Stickney, 170 Ala. 184, 54 South. 490; Scott v. Colson, 156 Ala. 450, 47 South. 60; Norman v. Beekman, 58 Fla. 325, 50 South. 876; Alexander v. Shalala, 228 Pa. 297, 77 Atl. 554, 31 L. R. A. (N. S.) 844, 139 Am. St. Rep. 1004, 20 Ann. Cas. 1330; Garner v. Jones, 84 Miss. 505. And see Danziger v. Boyd, 54 N. Y. Super. Ct. 305; Herreshoff v. Tripp, 15 R. I. 92, 23 Atl. 104; Croston v. McVicker, 76 W. Va. 461, 85 S. E. 710.

[37] See Battin v. Bigelow, Pet. C. C. 452, Fed. Cas. No. 1,103; Bayard v. Inglis, 5 Watts & S. (Pa.) 465; Sneider v. I. Schwenk, Inc. (N. J.) 115 Atl. 527.

[38] See Duncan v. Journey, 137 Ill. App. 568; Rinfret & Arruda v. Morrisey, 29 R. I. 223, 69 Atl. 763.

[39] See Higgins v. Highfield, 13 East, 407.

must be correctly alleged.[40] The pleader will here avoid confusion by noting that while this action may be between those only who were parties to the prior action of ejectment, and while in such cases the judgment in that action will be conclusive proof of the plaintiff's possessory title, and of the entry and possession of the defendant,[41] the suit may also be for the recovery of mesne profits for an occupancy antecedent to the time for which the plaintiff's title has been actually established, or the action may be brought against a precedent occupier, in which cases the record would not be admissible, and the plaintiff would be compelled to prove his title as in any action.[42] The action, therefore, so far as the pleadings are concerned, must be separate and independent, as if no prior adjudication had been made.

SAME—THE EJECTMENT

72. The declaration must also state the entry and ejectment by the defendant, and the time during which the latter continued.

For the same reasons as those above given regarding the particularity of statement necessary in showing the plaintiff's right, the declaration must also contain a formal allegation that at a certain time the defendant wrongfully entered upon the premises in question, and ejected the plaintiff therefrom, and the length of time such dispossession continued;[43] and this statement of the injury should also include an allegation of waste or other injury to the property committed by the defendant during that period, as the plaintiff will be allowed to include such damage in his recovery.

SAME—THE DAMAGES

73. The declaration must also state the damages resulting from the wrongful dispossession, which in this action are generally the value of the mesne profits received by the defendant.

We have before seen that the damages in the common-law action of ejectment are nominal, only. In this action for mesne profits, the

[40] See Higgins v. Highfield, 13 East, 407.

[41] Chirac v. Reinicker, 11 Wheat. (U. S.) 280, 6 L. Ed. 474; Lion v. Burtis, 5 Cow. (N. Y.) 408; Whittington v. Christian, 2 Rand (Va.) 303.

[42] Aslin v. Parkin, 2 Burrows, 665; Jackson v. Randall, 11 Johns. (N. Y.) 405; West v. Hughes, 1 Har. & J. (Md.) 574, 2 Am. Dec. 539.

[43] See Higgins v. Highfield, 13 East, 407.

recovery of the profits themselves, or rather their value, is the object of the action, and not the enforcement of the possessory right. The damages to be stated, therefore, are the value of such profits during the period of dispossession;[44] but the plaintiff may add to this, if specially alleged as part of his claim, the damage resulting from any injury done to the premises in consequence of any misconduct of the defendant.[45] And this case is also an instance within the general rule that the recovery cannot exceed the damages laid.

FORCIBLE ENTRY AND DETAINER

74. Forcible entry and detainer is a remedy given by statute for the recovery of the possession of land and of damages for its detention. It is entirely regulated by statute, and the statutes vary materially in the different states.

Forcible entry and detainer was not a common-law action, but was given by the statute of 8 Hen. VI. That statute, of course, is old enough to be a part of our common law, and has been so recognized, though in most states similar statutes have been enacted. This action is a remedy by which to recover possession of land from one who entered forcibly thereon (that is, with actual force) while the plaintiff was in peaceable possession.

Under the English statute, upon complaint made to any justice of the peace of a forcible entry, with strong hand, on lands or tenements, or a forcible detainer after a peaceable entry, the justice was required forthwith to try the truth of the complaint by jury, and, upon force found, to restore the possession to the party so put out; and in such case, or if any alienation should have been made to defraud the possessor of his right (which alienation was declared to be void), the offender forfeited treble damages to the party aggrieved, etc.[46]

This summary remedy is given by statute in most of our states.[47] It is purely a statutory remedy, and the cases in which it will lie must

[44] See Jackson v. Loomis, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547; Den ex dem. Bray v. McShane, 13 N. J. Law, 35.

[45] See Stewart v. Camden & A. R. Co., 33 N. J. Law, 115; New Orleans v. Gaines, 15 Wall. (U. S.) 624, 21 L. Ed. 215; Huston v. Wickersham, 2 Watts & S. (Pa.) 308.

[46] 3 Bl. Com. 179.

[47] American statutes usually extend the remedy to unlawful detainers of certain kinds, as by tenants holding over, as well as for a forcible entry or a forcible detainer. Steiner v. Priddy, 28 Ill. 179; Dudley v. Lee, 39 Ill. 339; 9 Cyc. 42.

be determined by reference to the statutes, which differ in the various states. It is given "for the purpose of protecting the possession of real property, by affording to persons entitled to the possession a cheap and convenient remedy for recovering the same. The action of forcible entry and detainer is purely a civil remedy, and does not involve directly the title to the premises in dispute. The only questions involved in these proceedings are (1) whether the plaintiff was in possession of the premises, and (2) whether that possession has been forcibly or illegally invaded by the defendant, and detained after the entry. The remedy deals only with the question of possession, leaving the question of title to be settled in the action of ejectment." [48]

[48] Newell, Ejectment, 855, 856; Fitzgerald v. Quinn, 165 Ill. 354, 46 N. E. 287; Meier v. Hilton, 257 Ill. 174, 100 N. E. 520. The statutes in the different states vary so much that no general rules can well be laid down; nor would it be advisable to go into and explain the different statutes. In Illinois the action lies by a person entitled to the possession of lands or tenements (1) when a forcible entry is made thereon; (2) when a peaceable entry is made and the possession unlawfully withheld; (3) when entry is made into vacant and unoccupied lands or tenements without right or title; (4) when any lessee of lands or tenements, or any person holding under him, holds possession without right after the determination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwse; (5) when a vendee having obtained possession under a written or verbal agreement to purchase lands or tenements, and having failed to comply with his agreement, withholds possession thereof, after demand in writing by the person entitled to such possession; (6) when lands or tenements have been conveyed by any grantor in possession, or sold under the judgment or decree of any court in this state, or by virtue of any (power of) sale in any mortgage or deed of trust contained, and the grantor in possession, or party to such judgment or decree, or to such mortgage or deed of trust, after the expiration of the time of redemption, when redemption is allowed by the law, refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto or his agent. Hurd's Rev. St. Ill. 1921, c. 57, § 2. Under this and similar statutes there need not necessarily be either actual or threatened force in the entry or in the detention. In Michigan it is provided that, when any forcible entry shall be made, or when an entry shall be made in a peaceable manner, and the possession shall be unlawfully held by force, the person entitled to the premises may be restored to the possession thereof in the manner provided by the statute (forcible entry and detainer). Comp. Laws Mich. 1915, § 13230. Under this and similar statutes, there must be either an entry by actual or threatened force, or an unlawful detention by such means. See Shaw v. Hoffman, 25 Mich. 168; Harrington v. Scott, 1 Mich. 17; Reeder v. Purdy, 41 Ill. 279; 16 Mich. Law Rev. 653; Bugner v. Chicago Title & Trust Co., 280 Ill. 620, 638, 117 N. E. 711.

75. FORMS OF DECLARATION IN EJECTMENT

Modern Form

State of Illinois, Champaign County. ———, plaintiff, by X., his attorney, complains of ———, defendant, who has been duly summoned in a plea of ejectment.

For that, whereas, the said plaintiff, on the ——— day of ———, A. D. 19—, was possessed of a certain dwelling house (here describe the premises with the appurtenances), situate in the city of ———, in the county of ———, and the same being known and designated as (here describe the premises according to the recorded plat, or by the government survey, or by metes and bounds, so from the description it will be possible to clearly identify the premises and deliver possession), which said premises the plaintiff claims in fee (or otherwise, as the case may be); and he, the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit, on the ——— day of ——— A. D. 19—, entered into the said premises, and ejected the plaintiff therefrom, and unjustly withholds from the plaintiff the possession thereof, to the damage of the plaintiff of ——— dollars and therefore he brings his suit.

———, Attorney for Plaintiff.

The above is a modern declaration in ejectment (taken substantially from 1 Shinn, Pl. & Prac. 653), proper in a state where the use of fictitious parties and the allegation of a fictitious lease have been abolished. Under the old practice, where the action was instituted in the name of a fictitious plaintiff as the real plaintiff's lessee, against a fictitious defendant, and the tenant, or real party defendant, came in, and was substituted as defendant, the following form of declaration is given by Stephen:

Old Form of Ejectment

(Title of court and venue).

C. D. was attached to answer John Doe of a plea, wherefore he, the said C. D., with force and arms, entered into five messuages, five stables, five coachhouses, five yards, and five gardens, situate and being in the parish of ———, in the county of ———, which A. B. had demised to the said John Doe for a term which is not yet expired, and ejected him from his said farm, and other wrongs to the said John Doe there did, to the damage of the said John Doe, and against the peace of our said lord the now king; and thereupon the said John Doe, by ———, his attorney, complains: For that whereas the said A. B. heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, in the parish aforesaid, in the county aforesaid, had

demised the said tenements, with the said appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from the ——— day of ———, in the year aforesaid, for and during and unto the full end and term of ——— years from thence next ensuing, and fully to be complete and ended. By virtue of which said demise the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed for the said term so to him thereof granted as aforesaid. And the said John Doe being so thereof possessed, the said C. D., afterwards, to wit, on the ——— day of ———, in the year aforesaid, with force and arms, entered into the said tenements, with the appurtenances, in which the said John Doe was so interested, in manner and for the term aforesaid, which is not expired, and ejected him, the said John Doe, out of his said farm, and other wrongs to the said John Doe then and there did, against the peace of our said lord the king, and to the damage of the said John Doe of £———; and therefore he brings his suit, etc.

CHAPTER X

THE DECLARATION IN GENERAL—TORT ACTIONS

76. Formal Parts of Declaration.
77. Statement of Cause of Action.
78-79. Several Counts in Same Declaration.
80. Joinder of Different Causes of Action.
81. Different Versions of the Same Cause of Action.
82. Conformance to Process.
83. Essential Allegations in Tort Actions.
84. Essential Allegations in Trespass.
85-87. Right of Plaintiff.
88. The Wrongful Act of Defendant.
89. The Damages.
90. Forms of Declaration in Trespass.
91-92. Essential Allegations in Case.
93-94. The Breach of Duty.
95. Anticipating Defenses in Case.
96. Essentials in Slander and Libel.
97. In Deceit.
97a. In Malicious Prosecution.
98. The Damages.
99. Forms of Declaration in Case.
100. Essential Allegations in Trover.
101. The Conversion.
101a. The Damages.
102. Form of Declaration in Trover.
103-104. Essential Allegations in Detinue.
105. The Detention.
106. The Damages.
107. Form of Declaration in Detinue.
108. Essential Allegations in Replevin.
109. The Right of Plaintiff to Certain Goods.
110. The Wrongful Act.
111. The Damages.
112. Form of Declaration in Replevin.

FORMAL PARTS OF DECLARATION

76. The declaration is a statement of all material facts constituting the plaintiff's cause of action in a methodical and legal form. It consists of the following parts:

(a) Statement of title of court.
(b) Statement of venue in the margin.
(c) The commencement.
(d) The body, or statement of the cause of action.
(e) The conclusion.

The following is the form of a declaration:[1]

Caption or Title.—In the Circuit Court of ——— County.
Term or Time of Filing.—To the ——— Term, A. D. ——.
Venue.—State of Illinois, County of ———, ss.

Commencement.—A. B., Plaintiff, by X. Y., his attorney, complains of C. D., defendant, who has been summoned to answer the said plaintiff in a plea of trespass on the case in assumpsit.

Body.—Inducement: For that whereas, on the ——— day of ———, A. D. 19—, at ———, in the county aforesaid, the said plaintiff, at the request of the defendant, bargained with the said defendant to buy of him, and the said defendant then and there sold to the said plaintiff, a large quantity of corn, to wit, one thousand bushels at the price of sixty cents for each bushel thereof, to be delivered by the said defendant to the said plaintiff in the week then next following, at the said plaintiff's elevator in said city, and to be paid for by the said plaintiff to the said defendant on the delivery thereof as aforesaid.

Consideration or Promise: And in consideration thereof and that the said plaintiff had promised the said defendant, at his request, to accept and receive the said corn, and to pay him for the same at the price aforesaid, he, the said defendant, on the day first aforesaid, in the county aforesaid, promised the said plaintiff to deliver the said corn to him as aforesaid.

Averment of Readiness to Perform by Plaintiff: And although the said time for the delivery of the said corn has long since elapsed, and the said plaintiff has always been ready and willing to accept and receive the said corn, and to pay for the same, at the price aforesaid, and has offered so to do.

Breach: Yet the said defendant did not, nor would, within the time aforesaid or afterwards, deliver the said corn, or any part thereof to the said plaintiff at his elevator, as aforesaid, or elsewhere, but refuses so to do;

Damage: Whereby the said plaintiff has been deprived of divers gains and profits which would otherwise have accrued to him from the delivery of the said corn to him as aforesaid;

Conclusion.—To the damage of the said plaintiff of five hundred dollars, and therefore he brings his suit.

X. Y., Attorney for Plaintiff.

The declaration may conveniently be examined, first, with reference to its formal parts and general structure; and, secondly, with reference

[1] 1 Shinn. Pl. & Prac. 442. See Legg, "A Suit at Law in Illinois," pp. 459, 463; Chit. Pl. (16th Am. Ed.) p. *277; 1 Tidd, Prac. p. 361.

to the substance and essential allegations in the different forms of action in tort and contract.

It will be observed that a declaration has the following parts: Title as to court, title as to time, the venue, the commencement, the body or statement of the cause of action showing the right, the injury, and the damages, and the conclusion.

Title of Court and Term

With respect to the title of the court, it consists, in general, of a superscription of the name of the court, thus, "In the circuit court of ——— county." With respect to the title of term, it is either general, thus, "October term, 1895," or special, that is, where a particular day of the term is stated. Such title refers to the time when the party is supposed to deliver his oral allegation in open court; and, as it was only in term time that the court anciently sat to hear the pleading, it is therefore always of a term that the pleadings are entitled, though they are often in fact filed or delivered in vacation time. The term of which any pleading is entitled is usually that in which it is actually filed or delivered, or, where this takes place in vacation time, the title is of the term last preceding.

The most frequent practice is to entitle generally. But it is to be observed that a pleading so entitled is by construction of law presumed, unless proof be given to the contrary, to have been pleaded on the first day of the term. And the effect of this is that, if a general title be used, it will sometimes occasion an apparent objection. Thus, in the case of a declaration so entitled, it may appear in evidence on the trial that the cause of action arose in the course and after the first day of the term of which the declaration is entitled, or this may appear on the face of the declaration itself; and in either case this objection would arise: that the plaintiff would appear to have declared before his cause of action accrued, whereas the cause of action ought of course always to exist at the time the action is commenced.[2] The means of avoiding this difficulty is to entitle specially of the particular day in the term when the pleading was actually filed or delivered.

The Commencement

What is termed the commencement of the declaration follows the venue in the margin,[3] and precedes the statement of the cause of action, or body of the declaration. It contains the names of the parties, and the capacity in which they sue and are sued (whether as a corporation, or in a representative character as executor or receiver, or if an infant, by guardian or next friend), and a statement that the defendant had been summoned or attached to answer, as shown in the form given above.

[2] See Pugh v. Robinson, 1 Term Rep. 116, Sunderland, Cas. Com. Law Pl. p. 248; Paul v. Graves, 5 Wend. (N. Y.) 76.

[3] Venue in the margin, see Harris v. Cocoanut Grove Development Co., 63 Fla. 175, 59 South. 11; Henry v. Spitler, 67 Fla. 146, 64 South. 745, Ann. Cas. 1916E, 1267.

Form of commencement: State of Illinois, County of Cook—ss.: In the Circuit Court of Cook County. To the [October] Term, A. D. 1922. A. B., plaintiff, by C. D., his attorney, complains of X. Co. (a corporation organized and existing under the laws of the state of Illinois), defendant, summoned to answer the plaintiff of a plea of trespass on the case: For that, whereas the defendant, etc.

The Body of the Declaration

The body of the declaration is the most important part of it, for it is here that the plaintiff states the facts showing his cause of action. This part will presently be considered at some length. Sometimes the word "inducement" is used to describe that part of the statement showing the existence of a right or duty, and the allegations showing the violation are termed the "gist" or "gravamen" of the action.

The Conclusion

The conclusion of a declaration is the formal statement at the end, after the statement of the cause of action. It is, "to the plaintiff's damage of $———, and therefore he brings his suit," etc. This "ad damnum" is properly a part of the conclusion in all personal and mixed actions.

The production of suit (secta) is one of the instances, frequently noticeable in common-law pleading, where a form is retained, though its reason has been swept away. In ancient times the plaintiff was required to establish the truth of his declaration in the first instance, and before it was answered by his opponent, by the production of his secta —that is, a suite or train of followers prepared to confirm his allegations; but the practice has been discontinued, though the formula then used to announce his readiness still remains. In all common-law actions it is still customary to conclude the declaration with the phrase "and therefore he brings his suit." [4]

[4] 3 Bl. Com. 295; Walter v. Laughton, 10 Mod. 253. Notice that the plaintiff brings, not *this* suit, but *his* suit, a following of witnesses. 2 Pollock and Maitland, Hist. Eng. Law, pp. 603, 604; Thayer, Prelim. Treatise Ev. p. 12.

STATEMENT OF CAUSE OF ACTION

77. The declaration must state distinctly and with certainty every fact that is essential to the plaintiff's prima facie case. No essential allegation can be imported into the declaration by inference or intendment. The principal points necessary to be shown in the statement of a cause of action are:

(a) The plaintiff's right.
(b) The defendant's wrongful act violating that right.
(c) The consequent damages.

The term "cause of action" is much used in pleading and procedure, but eludes exact definition.[5] Probably it is unsafe to define it more particularly than to say that the cause of action consists in some transaction from which a remedial right to relief arises. The typical elements or operative facts of these remedial rights differ with the different kinds of actions, whether of tort, contract, or property. At common law, the question was whether the declaration stated a cause of action in the particular form or theory of action selected, and the necessary allegations of the declaration varied with the different forms of action.

The Plaintiff's Right

It is of the essence of a cause of action that some right of the plaintiff shall have been violated, and it is therefore necessary for the plaintiff to show a right. In an action for breach of a contract, for instance, as in the form of declaration given above, the plaintiff must show a valid agreement between himself and the defendant giving him the legal right to require some act or forbearance of the defendant. The same is true of an action ex delicto. The plaintiff must show that he had a right, as that he was in the actual or constructive possession of the land in an action of trespass quare clausum fregit, or that he had a general or special property in, and was entitled to the possession of the property, in an action for conversion.

[5] Read v. Brown, 22 Q. B. D. 128. "The cause of action is the thing done or omitted to be done, which confers the right to sue; that is, the wrong against the plaintiff, which caused a grievance for which the law gives a remedy." Greene v. L. Fish Furniture Co., 272 Ill. 148, 156, 111 N. E. 725. See 22 Columbia Law Rev., p. 61; Pomeroy, Code Rem. (4th Ed.) 461, 547. Essential allegations in declaration, prima facie case, Friedlander v. Rapley, 38 App. D. C. 208; Bradley v. Federal Life Ins. Co., 178 Ill. App. 524; Jackson v. Virginia Hot Springs Co. (U. S. D. C. Va. 1913) 209 Fed. 979; Gogol v. Baltimore & O. R. Co. (D. C.) 226 Fed. 224.

The Injury by the Defendant

No cause of action can arise unless some right of the plaintiff has been violated or injured by the defendant. The injury as well as the right, must therefore be shown in the declaration.

In an action for breach of contract it is not only necessary to show the existence of the contract, binding the defendant to perform or forbear some act for the plaintiff, but it is necessary to show that the defendant has violated some duty arising from the contract; that is, that the performance of the contract became due, and that he failed to perform it. This is shown in the form of declaration given above. So in an action of trespass quare clausum fregit the trespass by the defendant must be shown; and in an action of trover a showing of conversion by the defendant is necessary.

The Consequent Damages

Not only is it necessary to show that the defendant has violated or injured some right of the plaintiff, but it is further necessary to show that the plaintiff has been damaged thereby, for injury without damage ("injuria sine damno") does not give rise to a cause of action.[6] In most cases, where a wrong is shown, damage will be presumed; and, though no actual damage is shown, nominal damages may be recovered. The fact, however, that damage will be presumed in any given case does not dispense with the necessity for an averment of damage in the declaration.

The Legal Syllogism

A complete statement of the entire right of action would include both the facts and the legal rules, rights, and duties involved.[7] A judgment for relief is a conclusion which naturally follows from certain premises of law and fact, which may be stated as follows:

(1) Major premise, a proposition of law: Against him who rides over my corn, I may recover damages by law. (2) Minor premise, a proposition of fact: A. has ridden over my corn. (3) Conclusion: Therefore, I shall recover damages against A. If the major premise be denied, this is a demurrer in law: if the minor, it is then an issue of fact; but, if both be determined to be true, the conclusion of law or judgment of the court cannot but follow, unless the defendant brings

[6] Damage is the gist of the action in slander. Pollard v. Lyon, 91 U. S. 225, 230, 23 L. Ed. 308. Private action for public nuisance. Swain & Son v. Chicago, B. & Q. R. Co., 252 Ill. 622, 97 N. E. 247, 38 L. R. A. (N. S.) 763. See Treusch v. Kamke, 63 Md. 274 (no damages alleged from negligence, fatal on demurrer).

[7] Complete statement of cause of action is a syllogism. Lamphear v. Buckingham, 33 Conn. 237, Whittier, Cas. Com. Law Pl. p. 521; 3 Bl. Com. p. 396.

forward circumstances of justification and excuse, such as "leave and license," to avoid it.

Only Facts Alleged

The proposition of law is never pleaded, since, if the peculiar facts and circumstances are alleged in the declaration, the court will at once be able to ascertain and apply to them the general principles of law. Such, then, is the first rule of pleading, that only the operative facts which constitute the cause of action, the foundation from which the remedial right springs, should be alleged.

The doctrines of law are not to be ascertained from the declaration, but by the judges from the recognized sources of the law. Pleading is nothing more than affirming or denying in an orderly manner those propositions of fact which constitute the ground of action or defense. Rights of action and defense result from the law operating on the facts. Each party submits to the court, and the court decides, what is the legal operation of the facts stated. But the rule that only facts should be pleaded was not consistently followed.

Pomeroy says in his work on Code Remedies:[8]

"Passing from these technical incidents, I proceed to inquire what were the real and essential principles and elements of the common-law pleading. How far was it true that the material facts constituting the cause of action, and these alone, were to be alleged? This statement was partly correct—that is, correct under most important limitations and reservations, in certain of the forms of action; while in the other of these forms of action it was not true in the slightest extent; in fact, it was diametrically opposed to the truth. I will recapitulate the important actions, and refer them to their proper classes. In ejectment there can be no pretense that any attempt was made to allege the actual facts constituting the cause of action; the declaration and accompanying proceedings were a mess of fictions which had become ridiculous, whatever may have been their original usefulness, and the answer was the general issue. The record thus threw no light upon the real issues to be tried by the jury. In trover the averments of the declaration were that the plaintiff was possessed, as his own property, of certain specified chattels; that he lost them; and that the defendant found them, and converted them to his own use. Throwing out of view the abused fictions of a loss and a finding, there was here the statement of two facts, namely, the description of the chattels so as to identify them, and the plaintiff's property in them; but the most important allegation of all, the one upon which in the vast majority of cases the whole controversy would turn, was a pure conclusion of law. The statement

[8] Section 404 (4th Ed.).

that defendant had converted the same to his own use did not indicate any fact to be considered and decided by the jury in reaching their verdict. In the action of debt, also, the important allegation was a mere conclusion of law, namely, that the defendant was indebted to the plaintiff in a certain sum, whereupon an action had accrued; and, although the declaration contained a further statement of the consideration or cause of the indebtedness, yet as a whole it did not pretend to set forth the material facts constituting the cause of action. In assumpsit the pleadings were of two very different species. In all cases of implied promises, and especially when the common counts were resorted to, the averments were purely fictitious, as much so as in ejectment; there was not the slightest approach towards a statement of the facts constituting a cause of action as they actually existed. When the suit was brought upon an express contract, and the declaration was in the form of a special assumpsit, there was a greater appearance of alleging facts; but even here the facts were stated in their supposed legal aspect and effect, as legal conclusions, and not simply as they occurred.

"There are left to be considered the actions of covenant, detinue, trespass, and case. In each one of these, according to the nature of the action, the facts constituting the grounds for a recovery were more nearly stated, although in some of them the averments were required to be made in an exceedingly precise and technical manner. The declaration in a special action on the case necessarily comprised a narrative of the actual facts constituting the cause of action; but, as has been said, this narrative was thrown into a very arbitrary, technical, and unnatural shape. It therefore bore some resemblance in substance to a complaint or a petition, when properly framed according to the reformed theory; and some judges have even said that every complaint or petition is a declaration in a special action on the case. The assertion so often made by the older text-writers, and repeated by modern judges, that the common-law system of pleading demanded allegations of the facts constituting the cause of action or the defense, is thus, as a general proposition, manifestly incorrect, for in many forms of action there was no pretense of any such averments.

"Sec. 405. But we must go a step farther in order to obtain an accurate notion of the common-law theory. In all the instances where fictions were discarded, and where the important allegations were not mere naked conclusions of law, but where, on the contrary, the plaintiff assumed to state the 'issuable' facts constituting his cause of action, he did not narrate the exact transaction between himself and the defendant from which the rights and duties of the respective parties arose; he stated only what he conceived to be the legal effect of these

facts. The 'issuable' facts, in the contemplation of the common-law system, were not the facts as they really occurred, and as they would be proved by the evidence, from which the law derived the right of recovery; they were the legal aspect of those facts—not strictly the bare conclusions of law themselves derived from the circumstances of the case, but rather combinations of fact and law, or the facts with a legal coloring, and clothed with a legal character. The result was that the 'issuable' facts as averred in the pleading were often purely fictitious; that is, no such events or occurrences as alleged ever took place, but they were represented as having taken place in the manner conceived of by the law. The pleader of course set forth his own view of this legal effect under the peril of a possible error in his application of the law to his case; if a mistake was made in properly conceiving of this legal effect—or, in other words, if the facts established by the evidence did not correspond with his opinion as to their legal aspect stated in the declaration—the plaintiff's suit would entirely fail."

SEVERAL COUNTS IN SAME DECLARATION

78. A count is a separate and independent statement of material facts, constituting a cause of action. Several counts may be included in the same declaration; each count, in such a case, being regarded as a separate declaration.

79. Several counts may be either:
(a) Statements of distinct causes of action.
(b) Different statements of the same cause of action.

Where a party has several distinct causes of action, he is allowed to pursue them cumulatively in the same action, subject to certain rules, to be presently explained, as to joining such demands only as are of similar quality or character. Thus he may join a claim of debt on a bond with a claim of debt on simple contract, and pursue his remedy for both by the same action of debt. So, if several distinct trespasses have been committed, these may all form the subject of one action in trespass.[9] Where the plaintiff thus makes several demands in the same action, he sets them out separately in his declaration in what are called "separate counts" in the same declaration.

[9] Scott v. Parlin & Orendorff Co., 245 Ill. 460, 92 N. E. 318 (different acts of negligence may be charged in different counts as cause of injury). See Flynn v. Staples, 34 App. D. C. 92, 27 L. R. A. (N. S.) 702 (several acts of negligence causing the injury may be alleged in one count of a declaration as one cause of action); Gartin v. Draper Coal & Coke Co., 72 W. Va. 405, 78 S. E. 673.

Each count is a separate statement of a cause of action. Again, a plaintiff is allowed to state the same cause of action in different ways in different counts, as if he were setting out so many separate and distinct causes of action. This is for the purpose of preventing the defeat of a just right through an accidental variance of the evidence from the allegations. The same cause of action is stated in different ways in different counts so as to meet the evidence as it may develop at the trial.

The use of several counts is subject to the requirement that each count must be as complete and distinct in itself as if pleaded alone. The sufficiency of one of several counts is to be determined upon its own averments, without regard to the other counts.[10] One count, however, may refer to another for matter without repeating it.

The use of several counts when applied to distinct causes of action is entirely consistent with the rule against duplicity, for the object of that rule is to prevent several issues in respect of the same demand only; there being no objection to several issues where the demands are several.

Where several counts are thus used, the defendant may, according to the nature of his defense, demur to the whole, or plead a single plea applying to the whole, or he may demur to one count and plead to another, or plead a separate plea to each count; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of several issues. But, whether one or more issues be produced, if the decision, whether in law or fact, be in the plaintiff's favor as to any one or more counts, he is entitled to judgment pro tanto, though he fail as to the remainder.[11]

JOINDER OF DIFFERENT CAUSES OF ACTION

80. Where the plaintiff has several and distinct causes of action of the same nature and character, or to which the same plea may be pleaded, and on which the same judgment may be rendered, he may pursue them all in the same action.

The joinder of distinct causes of action is permissible under the conditions stated in the above proposition, though it seems that the

[10] Porter v. Drennan, 13 Ill. App. 362; Lake Shore & M. S. Ry. Co. v. Hessions, 150 Ill. 546, 37 N. E. 905; Smith v. Philadelphia B. & W. R. Co. (Del. Super.) 115 Atl. 416 (negligence aforesaid insufficient).

[11] Olson v. Kelly Coal Co., 236 Ill. 502, 504, 86 N. E. 88. See Illinois Practice Act, § 78.

first, or nature of the cause of action, is the best criterion,[12] as instances exist, as in uniting debt and detinue, or debt on specialty with the same action on a judgment or simple contract, where the pleas are different, and the judgment in detinue is also in a different form.[13] In actions in form ex contractu, the plaintiff may join as many counts as he has causes of action of the same nature in assumpsit, and, as above seen, the different actions of debt, or debt with detinue.[14] So several distinct trespasses, both to the person and property, may be joined in the same declaration in trespass,[15] and several takings at different days and places in replevin,[16] and several causes of action in case may be joined with trover.[17] But where the causes of action are of a different nature, and the same judgment could not be rendered, they cannot be joined.[18] Actions ex contractu cannot be joined with those in form ex delicto,[19] though the case of debt and detinue seems to be

[12] Tidd, Prac. (9th Ed.) 12; 1 Chit. Pl. 229. See Whipple v. Fuller, 11 Conn. 582, 29 Am. Dec. 330; Chicago W. D. Ry. Co. v. Ingraham, 131 Ill. 650, 23 N. E. 350; Brady v. Spurck, 27 Ill. 478. Misjoinder of causes of action was, without good reason, regarded as a most serious error at common law. It might result from combining inharmonious forms of action, although the tests of what could be combined were not clear or satisfactory. See Joinder of Actions, E. R. Sunderland, 18 Mich. Law Rev. 571, 574. Some actions of different forms, such as debt and detinue, case and trover could be joined. Misjoinder might result from the diversity of capacities in which the parties sued or were sued.

[13] The general issue in debt on specialty is non est factum; in debt on judgment, nil debet or nul tiel record. The judgment in detinue is an alternative one, for the goods or their value. See H. J. Howe, Misjoinder of Causes of Action in Illinois, 14 Ill. Law Rev. 581.

[14] See Smith v. Proprietors of First Congregational Meetinghouse in Lowell, 8 Pick. (Mass.) 178; Farnham v. Hay, 3 Blackf. (Ind.) 167; Union Cotton Manufactory v. Lobdell, 13 Johns. (N. Y.) 462; Gray v. Johnson, 14 N. H. 414. But see Tillotson v. Stipp, 1 Blackf. (Ind.) 77.

[15] Baker v. Dumbolton, 10 Johns. (N. Y.) 240; Parker v. Parker, 17 Pick. (Mass.) 236; Bishop v. Baker, 19 Pick. (Mass.) 517; Chicago W. D. Ry. Co. v. Ingraham, 131 Ill. 650, 23 N. E. 350.

[16] Fitzh. Nat. Brev. 68, note a; Bull. N. P. 54.

[17] Brown v. Dixon, 1 Term R. 277; Smith v. Goodwin, 4 Barn. & Adol. 413; Beebe v. Knapp, 28 Mich. 53. But a count in trover cannot be joined with one in trespass. Crenshaw v. Moore, 10 Ga. 384. As to slander and malicious prosecution, see Miles v. Oldfield, 4 Yeates (Pa.) 423, 2 Am. Dec. 412.

[18] Selby v. Hutchinson, 4 Gilman (Ill.) 319; Toledo, W. & W. R. Co. v. Jacksonville Depot Building Co., 63 Ill. 308.

[19] Stoyel v. Westcott, 2 Day (Conn.) 418, 2 Am. Dec. 109; Church v. Mumford, 11 Johns. (N. Y.) 479; Bodley v. Roop, 6 Blackf. (Ind.) 158; Copeland v. Flowers, 21 Ala. 472. But see Hallock v. Powell, 2 Caines (N. Y.) 216; Crooker v. Willard, 28 N. H. 134, note. It is improper to unite in the same declaration a cause of action sounding in contract with one sounding in tort.

an exception,[20] and assumpsit cannot be joined with covenant, or debt or account,[21] or trespass with case,[22] as they are actions of different natures; nor, for the same reason, can trespass or case be joined with replevin or detinue.

Neither can causes of action due in different rights be joined.[23] "Thus a count on behalf of two plaintiffs jointly could not be joined with a count on behalf of one of them severally; counts could not be joined each of which set up a several right in a different plaintiff against the same defendant; counts setting up different causes of action in favor of the same plaintiff against different defendants could not be joined; and counts alleging the joint liability of two or more defendants could not be joined with counts alleging the several liability of any or all of them." [24]

DIFFERENT VERSIONS OF THE SAME CAUSE OF ACTION

81. Facts constituting but a single cause of action may be differently stated in separate counts, in the same declaration, without duplicity.

The rule here stated is the result of an ancient relaxation of the rule against duplicity, allowed where the nature of the facts upon which the plaintiff's claim rests rendered it doubtful whether a single statement might not fail to justify a recovery, either from insufficiency in law, or inability to properly support the claim by competent proof. The pleader is therefore permitted to include in his declaration several statements of the same cause of action, each of which differently represents the same state of facts, and upon one of which

Shafer v. Security Trust Co., 82 W. Va. 618, 97 S. E. 290; Wells v. Kanawha & M. Ry. Co., 78 W. Va. 762, 90 S. E. 337; 20 Columbia Law Rev. 712, 800.

[20] See Tidd. Prac. 11, note b. It has been shown above that debt and detinue were closely related in origin, and detinue first lay to enforce the obligation of a bailee to deliver.

[21] Pell v. Lovett. 19 Wend. (N. Y.) 546; Canton National Bldg. Ass'n v. Weber, 34 Md. 669; Cruikshank v. Brown, 5 Gilman (Ill.) 75; McGinnity v. Laguerenne, 5 Gilman (Ill.) 101; Guinnip v. Carter, 58 Ill. 296. See Mayer v. Lawrence, 58 Ill. App. 195.

[22] Cooper v. Bissell, 16 Johns. (N. Y.) 146; Sheppard v. Furniss, 19 Ala. 760; Dalson v. Bradberry, 50 Ill. 82.

[23] Kennedy v. Stallworth, 18 Ala. 263; Patrick v. Rucker, 19 Ill. 428; Albin v. Talbott, 46 Ill. 424; Safford v. Miller, 59 Ill. 205; Sleeper v. World's Fair Banquet Hall Co., 166 Ill. 57, 46 N. E. 782; McMullin v. Church, 82 Va. 501.

[24] E. R. Sunderland, Joinder of Actions, 18 Mich. Law Rev., 571, 582.

a verdict may be obtained, though he fail as to the rest. He may thus insert as many counts or statements as he pleases, though there can be but one recovery of the sum claimed as due. This rule, says Stephen, is a relaxation of very ancient date, and has long since passed, by continual sufferance, into allowable and regular practice. It takes place when the pleader, in drawing the declaration in any action, after having set forth his case in one view, feels doubtful whether, as so stated, it may not be insufficient in point of law, or incapable of proof in point of fact, and at the same time perceives another mode of statement by which the apprehended difficulty may probably be avoided. Not choosing to rely on either view of the case exclusively, he takes the course of adopting both, and accordingly inserts the second form of statement, in the shape of a second count, in the same manner as if he were proceeding for a separate cause of action. If, upon the same principle, he wishes to vary still further the method of allegation, he may find it necessary to add many other succeeding counts besides the second; and thus, in practice, a great variety of counts often occurs in respect of the same cause of action, the law not having set any limits to the discretion of the pleader, in this respect, if fairly and rationally exercised.[25]

Resort may be had to several counts in respect of the same cause of action, either where the state of facts to which each count refers is really different, or where the same state of facts is differently represented. The first case may be illustrated by an action of debt on a penal bond whereby the defendant engaged to pay a certain penalty in the event of nonpayment of a sum of money on the 11th of June, and another sum on the 10th of July, and a certain sum every month after, till a certain sum was satisfied. Let it be supposed that the plaintiff complains of a failure in payment both on the 11th of June and 10th of July. Either failure entitles him to the penal sum for

[25] Stephen, Pl. (Tyler's Ed.) 258; Ward v. Bell, 2 Dowl. 76 (different counts compared to safety valves); Newby v. Mason, 1 Dowl. & Ryland, 508. See Kelgwin, Precedents of Pl. pp. 425–428; Jackson v. Baker, 24 App. D. C. 100. "The multiplication of counts has long been considered one of the chief abuses in the system of pleading. * * * To allow the plaintiff or defendant to state his case in ten or fifteen different ways is a custom the reasonableness of which is not readily perceived." The principal reason is the strictness of the rules as to variance. Report of the Common Law Commissioners. On the "licensed duplicity of plural counts" to meet (1) the uncertainties of evidence in support of the plaintiff's case; (2) to meet doubt as to the law; (3) to obtain for the plaintiff the greatest possible latitude of proof, see note in Kelgwin, Precedents of Pl. pp. 424, 426ff. A count not varying substantially from a preceding count is objectionable for redundancy. Sowter v. Seekonk Lace Co., 34 R. I. 304, 83 Atl. 437.

which he brings the action; but, if he states them both in the same count, the declaration will be double. The case, however, may be such as to make it convenient to rely on both defaults; for there may be a doubt whether one or other of the payments were not made, though it may be certain that there was at least one default; and if, under these circumstances, the plaintiff should set forth one of the defaults, and the defendant should take issue upon it, he might defeat the action by proving payment on the day alleged, though he would have been unable to prove the other payment. To meet this difficulty, the pleader might resort to two counts. The first of these would set forth the penal bond, alleging a default of payment on the 11th of June; the second would again set forth the same bond, describing it as "a certain other bond," etc., and would allege a default on the 10th of July. The effect of this would be that the plaintiff, at the trial, might rely on either default, as he might then find convenient. In this instance, the several counts are each founded on a different state of facts, that is, a different default in payment, though in support of the same demand. But it more frequently happens that it is the same state of facts differently represented which forms the subject of different counts. Thus, where a man has ordered goods of another, and an action is brought against him for the price, the circumstances may be conceived to be such as to raise a doubt whether the transaction ought to be described as one of goods sold and delivered, or of work and labor done; and, in this case, there would be two counts, setting forth the claim both ways, in order to secure a verdict, at all events, upon one of them. The best illustration of the practice of thus restating a cause of action in the same declaration is found in the use of the common counts in general assumpsit, which have been noticed in another place. They embrace not only what are called the "money counts," or those for money transactions, but also include counts for almost any state of facts upon which a debt may be founded. The money counts are those generally for money lent to the defendant, had and received by him for the plaintiff, or paid out for him by the latter, for interest due, and for an account "stated" or agreed upon. The others may be, among other things, for work and labor, goods sold and delivered, use and occupation, etc. And first of all, preceding the common counts, there may be a special count declaring on an express contract. This is done because it often happens that, when the special counts are found incapable of proof at the trial, the cause of action will resolve itself into one of these general pecuniary forms of demand, and thus the plaintiff may obtain a verdict on one of these money counts, though he fail as to all the rest. Again, the same state of facts may be varied by omitting in one count some matter stated in another. In such a case the more

special count is used, lest the omission of this matter should render the other insufficient in point of law. The more general count is adopted, because, if good in point of law, it will relieve the plaintiff from the necessity of proving such omitted matter in point of fact. If the defendant demurs to the latter count as insufficient, and takes issue in fact on the former, the plaintiff has the chance of proving the matter alleged, and also the chance of succeeding on the demurrer.

It is to be observed that, whether the subjects of several counts be really distinct or identical, they must always purport to be founded on distinct causes of action, and not to refer to the same matter; and this is effected by the insertion of such words as "other," "the further sum," etc. This is evidently rendered necessary by the rule against duplicity, which, though evaded, as to the declaration, by the use of several counts, in the manner here described, is not to be directly violated.[26]

Several Counts

The following illustrates a declaration containing several counts:

Trespass for Assault and Battery.

For that the said C. D., heretofore, to wit, on the ——— day of ———, A. D. ———, with force and arms, at ———, in the county of ———, made an assault upon the said A. B., and beat, wounded, and ill-treated him, so that his life was despaired of.

And also for that the said C. D. heretofore, to wit, on the day and year aforesaid, with force and arms, at ———, aforesaid, in the county aforesaid, made another assault upon the said A. B., and again beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to him then and there did, against the peace of the state.

To the damage of the said A. B. of ——— dollars, and therefore he brings his suit, etc.

CONFORMANCE TO PROCESS

82. The declaration must correspond with the writ or process. The formal statement of the cause of action must correspond with all material statements in the process by which the action is commenced; or the deviation will constitute a variance.

It was a rule of great antiquity that the declaration must conform to the original writ, and, though the original writ is no longer in use,

[26] Stephen Pl. (Tyler's Ed.) 261; Hart v. Longfield, 7 Mod. 148; West v. Troles, 1 Salk. 213; Hitchcock v. Munger, 15 N. H. 97.

the rule is to be regarded as still in force, in its effect, in such of the United States as follow the methods of pleading at common law, as to the process now generally in use for commencing an action in the place of the original writ. A convincing proof of its force at the present day is that even in code pleading, though some writers claim that the principles applicable are derived entirely from the practice act itself, and not from the common law, the agreement between the summons and complaint in most of the particulars hereafter mentioned is essential, and for the same reason. Under the rule, it may be taken as still requisite that the declaration must correspond with the process in the following respects: (1) As to the names of parties to the action,[27] though when the process describes the defendant by a wrong name, and he appears in his right one, he may be declared against by the latter.[28] (2) As to the number of parties, for it would not be allowable to commence an action in the name of one, and frame the declaration—an intermediate step—in the names of several.[29] (3) As to the character in which the parties sue or are sued. If the action is brought by the plaintiff in a representative capacity, as an executor, the plaintiff cannot declare in his own right, though, if he styles himself executor simply, without showing that he sues as such, he may declare in his own right, the demand being still the same.[30] (4) As to the cause of action, both as to its form and the extent of the demand.[31] (5) As to time, it being essential that no material fact be stated in the declaration as happening after the date or teste of the process,[32] which is generally considered as the time of the commencement of the action.[33]

The consequences of a variance between the declaration and process were generally serious at common law, though the strictness formerly prevailing has been considerably relaxed. The fault may be generally

[27] See Fitch v. Heise, Cheves (S. C.) 185; Willard v. Missani, 1 Cow. (N. Y.) 37.

[28] Willard v. Missani, 1 Cow. (N. Y.) 37; Donnelly v. Foote, 19 Wend. (N. Y.) 148.

[29] Rogers v. Jenkins, 1 Bos. & P. 383.

[30] Rogers v. Jenkins, 1 Bos. & P. 383, and note b; Lashlee v. Wily, 8 Humph. (Tenn.) 659.

[31] Stamps v. Graves, 11 N. C. 102; Weld v. Hubbard, 11 Ill. 573; Slater v. Fehlberg, 24 R. I. 574, 54 Atl. 383. See Coyle v. Coyle, 26 N. J. Law, 132.

[32] Bemis v. Faxon, 4 Mass. 263.

[33] See Caldwell v. Heitshu, 9 Watts & S. (Pa.) 51; Bunker v. Shed, 8 Metc. (Mass.) 150; Cox v. Cooper, 3 Ala. 256; Thompson v. Bell, 6 T. B. Mon. (Ky.) 559; Day v. Lamb, 7 Vt. 426; Carpenter v. Butterfield, 3 Johns. Cas. (N. Y.) 145. But it is only prima facie evidence of the fact, and not conclusive. Burdick v. Green, 18 Johns. (N. Y.) 14.

taken advantage of by plea in abatement,[84] except where modified rules have been adopted in different states, though a variance as to the cause of action is ground for setting aside the proceedings as irregular.

ESSENTIAL ALLEGATIONS IN TORT ACTIONS

83. In tort actions generally the plaintiff must show a right, an invasion of the right caused by an act of the defendant, and damage resulting therefrom, and matters of excuse in general need not be negatived in the declaration.

We shall now take up the essential allegations of the declaration in the different forms of actions, taking up first those necessary to show tort liability and then those necessary to show contract liability. The typical elements or grounds constituting a cause of action differ with the different kind of actions, whether in contract, tort, or property. In common-law pleading the declaration must state a cause of action in the particular form or theory of action selected.

In tort actions the plaintiff is, in general, to allege and prove merely the nature of the harm and defendant's share in causing it. Matters of justification and excuse, as self-defense, leave and license, contributory negligence, consent or privilege, are put on the defendant to plead and prove, since it is unfair to assume that any of them are present or to require the plaintiff to disprove the existence of each. But in malicious prosecution the plaintiff must negative defendant's good faith and reasonableness by showing malice and lack of probable cause as part of his prima facie case, though in the nature of excuse for the defendant, who is relieved on grounds of public policy, to protect prosecutors from the burden of attack, which might hamper public justice. In slander and libel, on the other hand, the plaintiff is relieved from the burden of showing the falsity of the defamatory words, and the defendant must prove the truth of his slanderous utterance in defense—a rule well calculated to give a man pause in making slanderous statements about his neighbors.[85]

[84] Bradley v. Jenkins, 3 Brev. (S. C.) 42; Prince v. Lamb, 1 Breese (Ill.) 378. And see, contra, Stamps v. Graves, 11 N. C. 102.

[85] Wigmore, Ev. § 2485.

NB: IT IS NECESSARY TO DEMAND WHAT THE PERSON'S PROBABLE CAUSE IS FOR DOING HIS/HER ACTION TO YOU. FAILURE TO DO SO IS DIFFICULT TO BRING A TORT ACTION.

ESSENTIAL ALLEGATIONS IN TRESPASS

84. The essential allegations of the declaration in trespass are:

(a) For injuries to the person:

(1) The application of force by direct act of defendant.

(2) The damages.

(b) For injuries to real or personal property, or to relative rights:

(1) The title or right of plaintiff.

(2) The wrongful act of defendant, causing direct injury.

(3) The damages.

SAME—RIGHT OF PLAINTIFF

85. The declaration in actions for trespass to property, real or personal, or to relative rights, should state the property or thing affected and the title or right of the plaintiff in relation thereto. For injuries to the person no statement of the right is necessary.

86. The statement must show such possession, actual or constructive, as is sufficient to sustain the action.

87. The property must be described sufficiently for identification, but the plaintiff's title or interest may be generally stated.

In the action of trespass the plaintiff must in general allege and prove that the defendant was guilty of an act by which force was directly applied to the plaintiff's person or to his possession of land or goods. Any facts which show that the defendant's act was justifiable or excusable are an affirmative defense, and hence must be alleged and proved by the defendant.

In trespass for injury to the person, the declaration need contain only a statement of the wrongful act. This appears to be an exception to the rule that the declaration in all forms of action should contain a statement of the right of the plaintiff as well as the violation of that right by act of the defendant. But, since the rights of personal security and liberty belong to all, there is no necessity of alleging their existence in the pleading. All that is necessary, then, is the statement of the wrongful act of the defendant, such as an assault and battery, or false imprisonment, and the damages caused thereby.

In trespass to land or goods, it is necessary to describe the property affected, whether real or personal, and to show the plaintiff's right or title. Thus the declaration must allege the property to be plaintiff's

property, or at least in plaintiff's possession. It is sufficient to plead ownership, and then any evidence showing sufficient right and interest to maintain trespass is enough. Possession alone need be proved. It will be sufficient to prove actual possession without any title or actual possession coupled with title, or title coupled with the right of immediate possession. It is sufficient to say that the goods were the goods "of the plaintiff" or "that he was lawfully possessed of them as of his own property." [36] It is sometimes said that constructive possession is sufficient. By constructive possession is meant that a person entitled to possession is treated as if he had actual possession, and is given the rights and remedies of a possessor.

SAME—THE WRONGFUL ACT OF DEFENDANT

88. The declaration must state the wrong or injury violating the plaintiff's right, and must on the face of it show a trespass; that is, an injury committed with force, actual or implied, and an injury that was direct and immediate upon the defendant's act, and not merely consequential.

The declaration in trespass must contain a concise statement of the wrongful act complained of, whether to the person or property of the plaintiff, or to his relative rights. This form of action only lies where there has been what the law considers a trespass, and the declaration must therefore show such an injury as amounts to a trespass; that is, it must show the commission of an injury by force, actual or implied, as by alleging that it was inflicted vi et armis, or with force and arms, and contra pacem, according to the ancient forms; [37] and it must show that the injury was direct and immediate, and not merely consequential.

It is only necessary to state the injury in a general manner, showing a forcible act which is prima facie a trespass. The particular circumstances of the defendant's misconduct need not be set out, nor whether

[36] Rocker v. Perkins, 6 Mackey (D. C.) 379, Whittier, Cas. Com. Law Pl. p. 30 (colt of the plaintiff; sufficient to allege ownership).

[37] It was formerly necessary to allege that the act of trespass was committed "with force and arms" (vi et armis): The conclusion of the declaration in trespass or ejectment for these forcible injuries was "against the peace of our lord the king" (contra pacem), although these were words of mere form, and not traversable. Chit. Pl. pp. 402, 403; Day v. Muskett, 2 Salk. 640. The omission of the words "with force and arms" and "against the peace" is a mere formal defect. Higgins v. Hayward, 5 Vt. 73, Whittier, Cas. Com. Law Pl. p. 28; 21 Cyc. 817.

THERE CAN BE NO TRESPASS IF PLAINTIFF HAS CONSENTED BY CONTRACT TO ACTION BY DEFENDANT.

it was intentional, negligent, or accidental. If the injury was accidental, this must be set up by special plea by the defendant.[38]

SAME—THE DAMAGES

89. The declaration must also allege the damages which are the legal and natural consequences of the injury.

The form of statement must be according to their nature, as general or special.

As the main object of the action is the recovery of damages, the declaration should contain an allegation of the damage sustained, and the amount must be laid high enough to cover the actual demand. While the trespass may, in many instances, be a mere technical infringement of another's right, it always gives the right to recover at least nominal damages, but to recover substantial damages, they must be pleaded.[39] They will be generally or particularly stated, as we shall see elsewhere, according as they are general or special.

FORMS OF DECLARATION IN TRESPASS

90. The following forms show the essential allegations in the different varieties of trespass.

Declaration in Trespass for an Assault, Battery and False Imprisonment

From Puterbaugh, Common Law Pleading and Practice (8th Ed.) p. 357. Form 183.

In the ——— Court. ——— Term, 19—.
State of Illinois, } sct.
County of ———, }

A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of trespass: For that the defendant, on, etc., with force

[38] Boss v. Litton, 5 C. & P. 407; Gibbons v. Pepper, 1 Ld. Raymond, 38; Hussey v. King, 83 Me. 568, 22 Atl. 476. See Brown v. Kendall, 6 Cush. (Mass.) 202; Welch v. Durand, 36 Conn. 182; 4 Am. Rep. 55; 1 Chit. Pl. p. 127. At the time the declarations were first drawn in this form, the doctrine of absolute liability for all harm caused directly by one's voluntary acts prevailed. Even self-defense and accident would not be heard as an excuse. The rule in the more modern action on the case is different from that in trespass.

[39] An allegation "et alia enormia" is generally introduced in the declaration to enable the plaintiff to give in evidence matters which tend to aggravate the

and arms, etc., in the county aforesaid, assaulted the plaintiff, and seized and laid hold of him, and with violence pulled and dragged him about, and gave and struck the plaintiff a great many violent blows and strokes, and also then and there forced the plaintiff to go from out a certain dwelling house, in the city of ———, in the county aforesaid, into the public street there and compelled him to go in and along divers public streets, to a certain police office in the said city, and also then and there imprisoned the plaintiff, and detained him in prison there, without any reasonable or probable cause whatsoever, for the space of ——— then next following, contrary to the laws of this state, and against the will of the plaintiff, whereby the plaintiff was then and there not only greatly hurt, bruised and wounded, but was exposed to public disgrace, and injured in his credit and circumstances, and other wrongs the defendant to him, the plaintiff, then and there did, against the peace of the people of this state, and to the damage of the plaintiff of ——— dollars, and therefore he brings his suit.

Declaration in Trespass for Injury to Personalty

From 2 Chitty, Pleading (13th Am. Ed.) pp. *846, *860.

In the King's Bench. On ——— the ——— Day of ——— in ——— Term, 1 Wm. IV.

———, (to wit) A. B., the plaintiff in this suit, complains of C. D., the defendant in this suit, being in the custody of the marshal of Marshalsea of our said lord the now king, before the king himself, of a plea of trespass, for that the said defendant, on, etc. (day of injury, or about it), with force and arms, etc., at, etc. (venue), drove a certain cart, with great force and violence, upon and against a certain horse of the said plaintiff, of great value, to wit, of the value of £———, there then being, and thereby then and there with one of the shafts, and with other parts of the said cart of the said defendant, so greatly pierced, cut, hurt, lacerated and wounded the said horse of the said plaintiff that by reason thereof the said horse, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, died, to wit, at, etc. (venue), aforesaid.

And other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff, and against the peace of our said lord the king. Wherefore the said plaintiff saith, that he is injured,

injury done, and thereby increase the damages; but it is not material to the right of action, which depends upon the original trespass. See Phelps v. Morse, 9 Gray (Mass.) 207; Halsey v. Matthews, 3 Ind. 404; Reed v. Peoria & O. R. Co., 18 Ill. 403; Ziebarth v. Nye, 42 Minn. 511, 44 N. W. 1027; Moore v. Bayliss, 56 Hun, 647, 10 N. Y. Supp. 62.

and hath sustained damage to the amount of £———, and therefore he brings his suit, etc.

Pledges, etc.

Declaration in Trespass for Assault and Battery

(Commence as above.)

For that the defendant, on the ——— day of ———, A. D. 19—, with force and arms, at ———, in the county aforesaid, made an assault upon the plaintiff, and then and there beat, wounded, and ill-treated him, so that he became and was sick, sore, lame, and disordered, and so continued until the present time (here set out any special damage for which it is sought to recover). And other wrongs against the plaintiff then and there did, against the peace and dignity of the state of ——— (or commonwealth of ———, or people of the state of ———, according to the practice).

(Conclude as above.)

Declaration in Trespass de Bonis Asportatis, or for Injury to Personal Property

(Commence as above.)

For that the defendant, on the ——— day of ———, A. D. 19—, with force and arms, at ———, in the county aforesaid, seized and took certain goods and chattels of the plaintiff, to wit, ——— (here describe the goods) of great value, to wit, of the value of ——— dollars, and carried away the same (or, according to the fact, greatly broke, damaged, injured and destroyed the same), and converted them to his own use. And other wrongs to the plaintiff then and there did, against the peace and dignity of ———.

(Conclude as above.)

Declaration in Trespass Quare Clausum Fregit

(Commence as above.)

For that the defendant, on the ——— day of ———, A. D. 19— (or on the ——— day of ———, A. D. 19—, and on divers other days between that day and the commencement of this suit), with force and arms, broke and entered the close of the plaintiff; that is to say, a certain close situated and being at ———, in the county aforesaid, and ——— (here set out any special damage for which it is sought to recover). And other wrongs to the plaintiff then and there did against the peace and dignity of ———.

(Conclude as above.)

ESSENTIAL ALLEGATIONS IN CASE

91. The essential allegations in actions on the case are:

(a) The plaintiff's right.

(b) The facts showing the existence of a legal duty on the part of the defendant.

(c) A wrongful act by defendant in breach of his duty.

(d) Damages proximately caused by the wrongful act.

92. In many cases it is necessary to state facts showing the existence of a duty owing from the defendant to plaintiff, as where it arises from the relation of passenger and carrier or master and servant, or where the defendant was in control of some dangerous machinery or a vicious animal.

The Plaintiff's Right

In actions for injury to property, the plaintiff's right or interest in the thing affected must be clearly stated. In the case of injury to chattels, the plaintiff's right or interest in them will be ordinarily sufficiently described by an averment that they are his goods or chattels, or that he was lawfully possessed of them as his own property; but, if the interest is reversionary only, it should be so described, and the declaration should explicitly allege that the acts done were injurious to the reversion.[40]

The declaration in case must show a right in the plaintiff, a duty existing on the part of the defendant, and a violation of that duty. If, however, the right which is violated is that of personal security, this need not be stated.[41] It is usually necessary to state somewhat fully the facts and circumstances showing the existence of a duty toward the plaintiff on the part of the defendant, the neglect or breach of which would be an injury to the plaintiff.[42] Thus, in an action for negligent injury it must appear that the plaintiff was in a situation where defendant owed him a duty to exercise due care for his safety, as that defendant was in control of machinery or other agency causing danger to the plaintiff, for which the defendant was responsible. A

[40] Jackson v. Pesked, 1 Maul & S. 234, Whittier, Cas. Com. Law Pl. p. 92; George v. Fisk & Norcross, 32 N. H. 32, Whittier, Cas. Com. Law Pl. p. 89; City of Chicago v. McDonough, 112 Ill. 85, 1 N. E. 337.

[41] In such case the plaintiff's allegations commence with a statement of the injury committed, and no inducement or statement of his right is necessary, just as in trespass vi et armis for injuries to the person.

[42] In an action on the case, all the facts upon which plaintiff relies must be stated in the declaration. Wadleigh v. Katahdin Pulp & Paper Co., 116 Me. 107, 100 Atl. 150.

bare allegation that the defendant owed a legal duty to plaintiff is a mere conclusion of law and worthless; the facts creating the duty must be alleged, as that the relation of passenger and carrier existed.[43] The existence of defendant's duty toward the plaintiff must appear from facts or circumstances from which the law infers such duty, as where the defendant's liability is based upon his ownership or control of the premises upon which the injury occurred and his duty to furnish employees a safe place to work.[44]

[43] Ensley Ry. Co. v. Chewning, 93 Ala. 24, 9 South. 458, Whittier, Cas. Com. Law Pl. p. 98; Seymour v. Maddox, 16 Q. B. 326, Whittier, Cas. Com. Law Pl. p. 432; Maenner v. Carroll, 46 Md. 193, Whittier, Cas. Com. Law Pl. p. 109; Mackey v. Northern Mill Co., 210 Ill. 115, 71 N. E. 448; City of Chicago v. Selz, Schwab & Co., 202 Ill. 545, 67 N. E. 386; 29 Cyc. 566; 14 Cyc. 331, 332; 20 Standard Enc. Proc. 305. In Gillman v. Chicago Rys. Co., 268 Ill. 305, 109 N. E. 181, it is held that in an action of tort in a fourth-class case in the municipal court of Chicago the statement of claim must show a cause of action based on a breach of legal duty by the defendant, such, for example, as facts showing the relation of carrier and passenger, a duty owed by the defendant to the plaintiff, and neglect of that duty by the defendant or its servants in the scope of their employment, and damage to the plaintiff as the result of that neglect. The court emphasizes the function of the statement of claim, which is the substitute for a declaration, as the basis of a judgment, and the insufficiency of the statement of claim may be availed of on a writ of error even in the absence of a demurrer.

[44] A declaration by an employee against a corporation, his employer, for injury by a grindstone bursting should allege: (1) The relation, that plaintiff was in the employ of the defendant and was its servant, and was subject to its orders and directions in his work; (2) the duty of the defendant to furnish safe appliances and place to work; (3) the negligent acts of defendant in permitting the grindstone to be and remain in a dangerous condition, showing how it was defective and why dangerous, and that defendant knew or ought to have known of the defects; (4) the causal connection between the negligence and the injury; (5) the due care of the plaintiff, (in some jurisdictions) and the fact that plaintiff did not know of the danger and was not chargeable with knowledge of it; (6) the damages. What allegations show a breach of the master's duty to furnish servant a safe place to work, see Sargent Co. v. Baublis, 215 Ill. 429, 74 N. E. 455; Raxworthy v. Heisen, 274 Ill. 398, 407, 113 N. E. 699; Vogrin v. American Steel & Wire Co., 263 Ill. 474, 105 N. E. 332; Romani v. Shoal Creek Coal Co., 271 Ill. 366, 111 N. E. 88.

SAME—THE BREACH OF DUTY

93. To show a breach of duty, the defendant's wrongful act and the mental conditions of responsibility, such as intent or negligence or malice or fraud, must be alleged.

94. It must appear that the wrongful act of defendant was the legal cause of the injury to the plaintiff's right.

In declarations in trespass, the injury is stated without any averment of the defendant's motive or intent or of the circumstances under which it was committed. In general, in actions on the case, it is necessary to state, not only the wrongful act complained of, but also the wrongful intent, fraud, or negligence with which it was done and the circumstances showing that it was wrongful. In some actions the scienter (knowledge) must be alleged and proved, as of the vicious propensity of the dog in an action for keeping a dog accustomed to bite people or sheep. But in an action for debauching a wife or servant it is not necessary to allege or prove that the defendant knew that the female was the wife or servant of the plaintiff.

In actions for negligence there is some conflict whether a general charge of negligence, as that defendant so negligently and carelessly operated a car that plaintiff was thrown from the car and injured, is sufficient, or whether the facts and circumstances showing negligence must be stated specifically.[45] When it is said that it is sufficient to plead negligence generally, it is usually meant that the pleader, having set out the specific facts showing a duty of care and acts causing injury, may state generally that such acts were negligently done. A mere general averment of negligence is insufficient.

In the case of a passenger injured in a street car collision, it will be sufficient for the declaration to show that the plaintiff was a passenger upon defendant's car, that defendant was a common carrier, and that defendant failed to perform its duty to carry safely, by permitting the car to collide with another of defendant's cars. It will not be necessary to plead the facts showing the cause of the collision, as the facts alleged bring the case within the doctrine of res ipsa loquitur, and an allegation of negligence is unnecessary.[46]

The causal connection between the negligent act of the defendant and the injury received by the plaintiff should be made to appear. "Whereby" and "by means of the premises" are frequently used to charge that injury resulted from the defendant's act to plaintiff's person or property, and that the negligence was the proximate cause of the injury.[47]

[45] General allegation improper. King v. Wilmington & N. C. Electric Ry. Co., 1 Pennewill (Del.) 452, 41 Atl. 975, Whittier, Cas. Com. Law Pl. p. 111; East St. Louis Connecting Ry. v. Wabash, St. L. & P. Ry. Co., 123 Ill. 594, 600, 15 N. E. 45; Race v. Easton & A. R. Co., 62 N. J. Law, 536, 41 Atl. 710. General allegation permitted. Snyder v. Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 490, 64 Am. St. Rep. 922, Whittier, Cas. Com. Law Pl. p. 115; Chicago City Ry. Co. v. Jennings, 157 Ill. 274, 280, 41 N. E. 629; Greinke v. Chicago City R. Co., 234 Ill. 504, 85 N. E. 327; City of Chicago v. Selz, Schwab & Co., 202 Ill. 549, 67 N. E. 386; Chicago City Ry. Co. v. Shreve, 226 Ill. 536, 80 N. E. 1049 (general charge is sufficient after verdict); Illinois Cent. R. Co. v. Aland, 192 Ill. 39, 61 N. E. 450 (it is sufficient to allege that defendant negligently and carelessly propelled the engine with great force against certain cars where plaintiff was working with the knowledge of the defendant). See 32 Yale Law Journal, 483, p. 497, post.

ANTICIPATING DEFENSES IN CASE

95. In some jurisdictions the plaintiff must negative the possible existence of certain technical defenses, viz. contributory negligence, fellow-servant rule, and assumption of risk.

In some jurisdictions it is necessary in a declaration for negligence by a servant against the employer to negative the defenses of contributory negligence, fellow-servant rule, and assumption of risk. In Calumet Iron and Steel Company v. Martin,[48] the general rule is declared to be that, in order to recover for injuries from negligence, it must be alleged and proved that the plaintiff was, at the time he was injured, observing ordinary care for his personal safety. After the period of the statute of limitations, the declaration cannot be amended to supply this "substantial fact."[49] In an action of trespass on the case by a servant against his employer a declaration is defective in Illinois and some other states which does not negative knowledge or assumption of risk.[50] It has been held that negativing knowledge of the risk is insufficient as it does not appear but that the servant had easy means of knowing.[51]

[46] Ellis v. Waldron, 19 R. I. 369, 371, 33 Atl. 869 (res ipsa loquitur).

[47] Hartnett v. Boston Store of Chicago, 185 Ill. App. 332; Strain v. Strain, 14 Ill. 368; McGanahan v. East St. Louis & C. Ry. Co., 72 Ill. 557, Whittier, Cas. Com. Law Pl. p. 118; 20 Standard Enc. Proc. 313.

[48] Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N. E. 456. Cf. City of Orlando v. Heard, 29 Fla. 581, 11 South. 182, Whittier, Cas. Com. Law Pl. p. 119.

[49] Walters v. City of Ottawa, 210 Ill. 259, 266, 88 N. E. 651.

[50] City of La Salle v. Kostka, 190 Ill. 130, 60 N. E. 72; Dalton v. Rhode Island Co., 25 R. I. 574, 57 Atl. 383, Whittier, Cas. Com. Law Pl. p. 124 (assumption of risk).

[51] Gould v. Aurora, E. & C. Ry. Co., 141 Ill. App. 344.

In an action by a servant against his employer to recover for a personal injury for negligence, the declaration must negative the defense of the fellow-servant rule, if it is alleged that the negligent acts were done by the servants of the defendant without showing to what class they belonged. It is held, however, that if the allegations indicate that the plaintiff was not a fellow servant, no negative allegation is needed.[52]

What the plaintiff must allege as a matter of pleading to state a cause of action is a more or less arbitrary matter. Since the plaintiff comes into court asking relief, it might seem that logically he should be required to set up and prove all the conditions essential to recovery, and that he should negative all possible defenses, such as contributory negligence, assumption of risk, and fellow-servant rule. In fact, however, the plaintiff is ordinarily only required to make out a prima facie case and need not refer to all the conditions, positive and negative, which are ultimately essential to a recovery. The plaintiff must show an apparent reason for his request and give fair notice of the facts relied on as the basis of his claim. This will, in general, indicate as to what matters the plaintiff has the burden of proof, which is a question of fairness, policy, and convenience. Matters of justification and excuse are for the defendant to prove, since it is unfair to require the plaintiff to disprove the existence of each and all of them.[53] The defenses of contributory negligence, assumption of risk, and fellow-servant rule are technical at best and should not be favored by the rules of pleading. If they are to be raised at all, they should be set up affirmatively by the defendant.

[52] Libby, McNeill & Libby v. Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191, Whittier, Cas. Com. Law Pl. p. 122; Schillinger Bros. Co. v. Smith, 225 Ill. 74, 81, 80 N. E. 65; McInerney v. Western Packing & Provision Co., 249 Ill. 240, 243, 94 N. E. 510; Richter v. Chicago & E. R. Co., 273 Ill. 625, 113 N. E. 153; Di Marcho v. Builders' Iron Foundry, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

[53] In Illinois the burden of proof to negative assumption of risk is on the plaintiff. Swift Co. v. Gaylord, 229 Ill. 339, 340, 82 N. E. 209.

ESSENTIALS IN SLANDER AND LIBEL

96. In declarations for slander or libel elaborate averments are required to produce "certainty" in the charge. The formal parts of the declaration for defamation included:

(1) The inducement, the prefatory statement of extrinsic matter.
(2) The colloquium.
(3) The publication of the scandal itself.
(4) The innuendoes.
(5) The consequent damages.

The defamatory words themselves must be quoted.

The requirements of common-law pleading are curiously strict in regard to declarations for slander and libel.[54] The declaration in slander at common law consists of an elaborate and absurd jargon of recitals and explanations which obscure the real issues to be tried almost as effectually as if the pleadings were still drawn in Latin. The "certainty" required is described by Odgers in his work on Libel and Slander as follows:[55] "The court formerly expected to be assisted in dealing with the question by a variety of minute averments in the plaintiff's declaration. Thus it was necessary that there should be a colloquium, an averment that the defendant was speaking of and concerning the plaintiff, as well as constant innuendoes in the statement of the words themselves, 'he (meaning thereby the plaintiff).' So, too, many other allegations were required describing the locality, the relationship between the various persons mentioned, and all the surrounding circumstances necessary to fully understand the defendant's words. And these matters could not properly be proved at the trial unless they were set out on the record; if they were not, and the plaintiff had a verdict, the court would subsequently arrest judgment on the ground that it did not appear clearly on the face of the record that the words were actionable. And this technicality was carried to an absurd extent. Thus, where the defendant said, 'Thou art a murderer, for thou art the fellow that didst kill Mr. Sydnam's man,' the court of Exchequer Chamber, on error brought, arrested judgment, because there was no averment that any man of Mr. Sydnam's had in fact been

[54] These strict rules are inherited from a time when the courts wished to discourage actions for defamation and would strain to find an innocent meaning for the words charged. Such a hostile attitude is responsible for the technicalities in criminal pleading and procedure. 1 Street, Foundations Legal Liab., pp. 284–300.

[55] Odgers, Libel (5th Ed.) pp. 136, 137. See, also, Newell, Slander and Libel (3d Ed.) p. 733; Keigwin, Precedents of Pl. 285.

killed.[56] Had the words been '*and* thou art,' instead of '*for* thou art,' the plaintiff would probably have been allowed to recover. Again, in Ball v. Roane (1593) Cro. Eliz. 308, the words were: "There was never a robbery committed within forty miles of Wellingborough but thou hadst thy part in it.' After a verdict for the plaintiff, the court arrested judgment, 'because it was not averred there was any robbery committed within forty miles, etc., for otherwise it is no slander.' So in Foster v. Browning (1625) Cro. Jac. 688, where the words were, 'Thou art as arrant a thief as any is in England,' the court arrested judgment 'because the plaintiff had not averred that there was any thief in England.' But the climax was reached in a case cited in Dacy v. Clinch (1661) 1 Sid. 53, where the defendant had said to the plaintiff, 'As sure as God governs the world, or King James this kingdom, you are a thief.' After verdict for the plaintiff, the defendant moved in arrest of judgment, on the ground that there was no averment on the record that God did govern the world, or King James this kingdom. But here the court drew the line, and held that 'these things were so apparent' that neither of them need be averred."

In a charge of slander and libel, the defamatory words themselves must be set out in hæc verba (in the very words).[57] If the slander be uttered in a foreign language, it must be set out in the original words with a translation of the original.[58] The term "colloquium" is used to refer to the allegation that the words were used in a discourse "of and concerning" the plaintiff. It is necessary to show the application of defamatory words to the plaintiff,[59] and if in themselves they do not make the meaning clear, to give such explanation as to show how they were defamatory; e. g., "he burnt it," in connection with a supposed arson.[60]

[56] Barrons v. Ball (1614) Cro. Jac. 331.

[57] Proof of similar or equivalent words is not admissible. Wallace v. Dixon, 82 Ill. 202; Schultz v. Sohrt, 201 Ill. App. 74. But a slight variance is not fatal; i. e., "You are a liar" is supported by proof that "You are a damned liar." 25 Cyc. 472.

[58] Kenyon v. Cameron, 17 R. I. 122, 20 Atl. 233, Whittier, Cas. Com. Law Pl. p. 132.

[59] "The gravamen of an action for libel is not injury to the plaintiff's feelings, but damage to his reputation in the eyes of others. It is not sufficient, therefore, that the plaintiff should understand himself to be referred to in the article. It is necessary to constitute libel that others than the plaintiff should be in a position to understand that the plaintiff is the person referred to." Duvivier v. French, 104 Fed. 278, 43 C. C. A. 529, Whittier, Cas. Com. Law Pl. p. 144.

[60] Where defamatory language is of a clear import and on its face applies to the plaintiff, no colloquium or setting is necessary in the declaration. Choctaw Coal & Mining Co. v. Lillich, 204 Ala. 533, 86 South. 383, 11 A. L. R. 383; 17 R. C. L. 304. "Thus, if the imputation be that the plaintiff was 'foresworn,' this not being of itself actionable, because it does not necessarily impute the offense of perjury, it must be specifically alleged, by way of inducement, that there had been a judicial proceeding, in which the plaintiff was a witness and gave evidence, and that the defendant, when speaking the words, referred to such matter in using the term 'foresworn,' and intended to impute that the plaintiff had been guilty of the crime of perjury." 1 Chit. Pl. 415. "Where the libelous matter can be collected from the words themselves, there need be no averment as to circumstances." Thus, if the declaration be, "He perjured himself," the charge of crime appears, and it is for the defendant to plead its truth if he can. A declaration was sustained by the King's Bench in 1661 as against a motion in arrest of judgment which charged the defendant with saying of plaintiff, an attorney, "He has no more judgment in the law than Master Cheyny's bull," although it was urged that the declaration was defective in not alleging that Mr. Cheyny had a bull, and that the bull knew no law. Sed non allocatur. Baker v. Morphew, 2 Keble, 202, 84 Eng. Rept. 126. A charge, ironically made, that the plaintiff was an "honest lawyer," would have required more explanation. See Kelgwin, Precedents of Pl. pp. 285, 205.

Innuendoes are clauses which indicate the meaning conveyed to the hearers, but they cannot enlarge the meaning shown by the inducement in which the surrounding circumstances are set forth.[61] It is hard to see what difference it should make in what part of the declaration the facts appear and why we should perpetuate these technical absurdities in our pleading.[62]

SAME—IN DECEIT

97. The essential elements in the wrong of deceit must be shown in the declaration, which are, representation of material facts calculated to influence plaintiff's conduct, falsity, scienter, reliance, and damage.

In an action for deceit, the essential allegations are:[63] (1) The specific false representations of material facts; (2) the scienter that the de-

[61] Innuendoes are not sufficient to supply the lack of inducement and colloquium or extend the meaning of words beyond their natural import or sense. MacLaughlin v. Fisher, 136 Ill. 111, 116, 24 N. E. 60; Brettun v. Anthony, 103 Mass. 37, Whittier, Cas. Com. Law Pl. pp. 136, 137, note; Barnett v. Phelps, 97 Or. 242, 191 Pac. 502, 11 A. L. R. 663.

[62] For an amusing instance of the use of innuendoes, see Triggs v. Sun Printing & Pub. Ass'n, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326, reversing 91 App. Div. 259, 86 N. Y. Supp. 486.

[63] Eibel v. Von Fell, 63 N. J. Law, 3, 42 Atl. 754; Arthur v. Griswold, 55 N. Y. 410; Pforzheimer v. Selkirk, 71 Mich. 600, 40 N. W. 12, Whittier, Cas. Com. Law Pl. p. 162; Watson v. Jones, 41 Fla. 241, 25 South. 678, Whittier, Cas. Com. Law Pl. p. 170; Cantwell v. Harding, 249 Ill. 354, 94 N. E. 488; 10 Standard Proc. Fraud and Deceit, 52–58; 20 Cyc. 102.

fendant knew his statements to be untrue; (3) that they were believed to be true by the plaintiff and were relied upon by him; (4) that the plaintiff acted thereon; (5) that the plaintiff suffered damages by such action. It should appear that the damage is the result of the deceit. It is not sufficient to charge fraud generally, but the facts constituting the fraud must be set forth specifically, including the actual misrepresentations. While it is not necessary to charge an intent to defraud, it should appear that the representations were intended or calculated to influence the plaintiff to act upon them.

SAME—IN MALICIOUS PROSECUTION

97a. In case for malicious prosecution the declaration must show that proceedings were had in a court at the instance of defendant, the crime charged must be stated, and it must appear that the charge was made falsely, maliciously, and without any reasonable and probable cause. It must also appear that the accused was innocent, and that the proceedings are at an end, having been terminated in his favor. The damages must also be alleged, as damage is of the gist of the action.

In malicious prosecution the gist of the action is a prosecution instituted with malice and without probable cause, resulting in damage to the plaintiff's liberty, reputation, and pocketbook. It must be alleged that the defendant started some criminal proceedings before some court, and the charge on which the defendant prosecuted the plaintiff must be shown. It need not appear that the indictment or complaint sufficiently charged a crime. It must appear that the defendant was the cause of setting the machinery of the law in motion against the plaintiff. It must be alleged that there was no reasonable or probable cause for the institution of the proceeding, but that it was done maliciously to injure the plaintiff. The declaration should further show the falsity of the charge and the termination of the proceedings in favor of the plaintiff and the damage to the plaintiff.[64]

[64] On declaration in malicious prosecution, see 19 Standard Proc. 83-97; Pippet v. Hearn, 5 Barn. & Ald. 634, Whittier, Cas. Com. Law Pl. pp. 158, 159, note; 26 Cyc. 74.

SAME—THE DAMAGES

98. The declaration must state the damages resulting as the legal and natural consequences of the injury done. These may be general or special, and special damages should be alleged specifically. In many torts coming within the action on the case, damage is said to be of the gist of the action and must be alleged to show a cause of action.

Whatever damages the plaintiff has suffered from the injury committed by the defendant, which follow as the legal and natural consequences of such injury, are recoverable, and should be laid in a sum sufficiently high to cover all the plaintiff expects to prove, as his recovery will be limited by the amount stated.[65] As in other actions, they may be general or special, and, if special or peculiar to the case, they must be alleged specifically.[66] Recovery will be confined to the injuries claimed by the declaration to have resulted from the particular negligence charged. In case, unlike trespass, damage is usually an essential element of liability.[67]

99. FORMS OF DECLARATION IN CASE

Form of Declaration in Case for Libel

From 2 Chitty, Pleading (13th Am. Ed.) pp. *596, *620.

In the Common Pleas.

——— next after ——— in ——— Term, ——— Will. 4.

——— (to wit) D. C. was attached to answer A. B. of a plea of trespass on the case, and thereupon the said A. B. by E. F., his attorney, complains, for that whereas the said plaintiff, now is a good, true,

[65] Foreman v. Sawyer, 73 Ill. 484 (judgment cannot exceed ad damnum la'd in the declaration).

[66] City of Chicago v. McLean, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765. Special damages must be pleaded with particularity, such as mental pain and expenses of cure. Garvey v. Metropolitan West Side Elevated R. Co., 155 Ill. App. 601 (mental suffering); Corey v. Bath, 35 N. H. 530, 545 (general damage).

[67] McGlamery v. Jackson, 67 W. Va. 417, 68 S. E. 105, 21 Ann. Cas. 239 (lack of ad damnum clause in trespass on the case is demurrable); Washington v. Baltimore & O. R. Co., 17 W. Va. 190 (negligence); Sullivan v. Waterman, 20 R. I. 372, 39 Atl. 243, 39 L. R. A. 773 (public nuisance); Howell v. Young, 5 Barn. & Cress. 259; Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308 (libel and slander); Jackson & Sharp Co. v. Fay, 20 App. D. C. 105 (damages in deceit).

honest, just, and faithful subject of this realm, and as such has always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbors, and other good and worthy subjects of this realm to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, etc. (venue). And whereas also, the said plaintiff hath not ever been guilty, or until the time of the committing of the said several grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty of perjury or any other such crime. By means of which said premises, the said plaintiff, before the committing of the said several grievances by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to wit, at, etc. (venue), aforesaid. And whereas also, before the committing of the several grievances by the said defendant as hereinafter mentioned, a certain action had been depending in the said court of our lord the now king, before the king himself, at Westminster, in the county of Middlesex, wherein one G. H. was the plaintiff, and one J. K. was the defendant, and which said action had been then lately tried at the assizes in and for the county of ———, and on such trial the said plaintiff had been and was examined on oath, and had given his evidence as a witness for and on the part and behalf of the said G. H. to wit, at, etc. (venue), aforesaid. Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending to injure the said plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that he the said plaintiff had been and was guilty of perjury, and to subject him to the pains and penalties by the laws of this kingdom made and provided against, and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff heretofore, to wit, on, etc. at, etc. (venue), aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published, of and concerning the said plaintiff, and of and concerning the said action which had been so depending as aforesaid, and of and concerning the evidence by him the said plaintiff given on the said trial, as such witness as aforesaid, a certain false, scandalous, malicious, and defamatory libel containing, amongst other things the false, scandalous, malicious, defamatory, and libelous matter following, of and concerning the said

plaintiff, and of and concerning the said action, and of and concerning the evidence by him the said plaintiff given on the said trial, as such witness as aforesaid, that is to say he (meaning the said plaintiff) was foresworn on the trial (meaning the said trial), and thereby then and there meaning that the said plaintiff, in giving his evidence as such witness, on the said trial as aforesaid, had committed willful and corrupt perjury.

And the said plaintiff further saith, that the said defendant further contriving and intending as aforesaid, heretofore, to wit, on the day and year aforesaid, at, etc. (venue), aforesaid, falsely, wickedly, and maliciously, did publish a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said plaintiff, and of and concerning the said action, which had been so depending as aforesaid, and of and concerning the evidence by him the said plaintiff given on the said trial, as such witness as aforesaid, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the evidence given by him the said plaintiff on the said trial, as such witness as aforesaid, that is to say, (vary the statement of the words and inuendoes, as may be advisable, under the particular circumstances of each case.)

And the said plaintiff further saith, that the said defendant further contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, at, etc. (venue), aforesaid, falsely, wickedly, maliciously, wrongfully, and unjustly, did publish, and cause and procure to be published, a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said plaintiff, as follows, that is to say, he (meaning the said plaintiff) is perjured. By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been, and to be a person guilty of perjury and have, by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused, and still do refuse to have any transaction, acquaintance, or discourse with the said plaintiff, as they were before used and accustomed to have, and otherwise would have had. And also by reason

thereof one M. N., who before and at the time of the committing of the said grievance, was about to retain and employ, and would otherwise have retained and employed, the said plaintiff as his servant, for certain wages and reward, to be therefore paid to the said plaintiff afterwards, to wit, on the day and year aforesaid, at, etc. (venue) aforesaid, wholly refused to retain and employ the said plaintiff in the service and employ of the said M. N. and the said plaintiff hath from thence hitherto remained and continued, and still is wholly out of employ; and the said plaintiff hath been and is, by means of the premises, otherwise greatly injured, to wit, at, etc. (venue), aforesaid. Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £———, and therefore he brings his suit, etc.

Declaration for Malicious Prosecution

From Encyclopedia of Forms No. 13,415 and No. 6,951.

——— Court of the County of ———, to wit, ——— Term.

———complains of ———, who has been summoned to answer the said plaintiff of a plea of trespass on the case, for this, to wit, that on the ——— of ———, 19—, at ———, the defendant went before one ———, a United States commissioner for the ——— district of ———, and then and there before said ——— falsely and maliciously and without any reasonable or probable cause whatsoever, charged plaintiff with having feloniously stolen or taken from out of a mail of the United States a certain registered letter received by plaintiff as postmaster at ———, on or about the ——— day of ———, 19—, and upon such charge the defendant falsely and maliciously and without any reasonable or probable cause whatever, caused and procured said ———, United States commissioner as aforesaid, to make and grant his certain warrant under his hand for the apprehending of plaintiff and for having plaintiff before him, the said ———, or some other United States commissioner, to be dealt with according to the law of said supposed offense, and said defendant, under and by virtue of said warrant, afterwards, to wit, ———, 18—, at ——— county, ———, aforesaid, wrongfully and unjustly and without any reasonable cause whatsoever, caused plaintiff to be arrested by his body and taken into custody and to be imprisoned and brought by public conveyance from ———, ——— county, to ———, in the custody of a deputy marshal of the United States, and before a great many people in the public highway and the streets of ———, and to be detained in custody a long space of time, to wit, ——— hours then next following and defendant afterwards, to wit, ———, 19—, at ———, falsely and maliciously and without any reasonable or probable cause whatsoever, caused the plaintiff to be carried in custody before said ———, so being United States commissioner as aforesaid, to be examined before said commissioner of and concerning said supposed crime, which said commissioner, having heard and considered all that said defendant could say or allege against the plaintiff touching said supposed offense, then and there, to wit, on the day last aforesaid, at ———, adjudged and determined that the said plaintiff was not guilty of the said supposed offense, and then and there caused the plaintiff to be discharged out of custody, fully acquitted and discharged of the said supposed offense, and the defendant hath not further prosecuted his said complaint, but hath deserted and abandoned the same, and the said complaint and prosecution is wholly ended and determined, to wit, at ———, aforesaid; to the plaintiff's damage ——— dollars. And therefore he brings his suit.

ESSENTIAL ALLEGATIONS IN TROVER

100. The essential allegations of the declaration in trover are:

(a) The plaintiff's possession or right of immediate possession of certain goods, with description.

(b) The conversion, including in some cases demand and refusal.

(c) The value of the goods and damages by their conversion.

The declaration must describe the property converted and the plaintiff's right thereto.

The description of the property must be sufficient for purposes of identification, but the plaintiff's property or right may be generally stated.

The Plaintiff's Right

We have already shown what right in the plaintiff is necessary to support this action, and have seen that he must have had an absolute or special property in the goods, and the actual possession, or a right to immediate possession, at the time of the conversion. The declaration must therefore show the existence of such right.

The manner of stating the plaintiff's right is by general words only, as that, at or before the time of the conversion, he was possessed of the goods as his own property or as special owner, as the case may be; and the particular facts constituting the right or interest need not appear.[68]

[68] Warren v. Dwyer, 91 Mich. 414, 51 N. W. 1062. And see Baals v. Stewart, 109 Ind. 371, 9 N. E. 403, as to the statement under the Indiana Code; 21 Enc. Pl. and Prac. 1003; Bowers Conversion, §§ 490–492. In action for conversion, plaintiff must allege that he was in possession or entitled to possession of the property at the time of the alleged conversion. Munday v. Britton, 205 Mo. App. 153, 222 S. W. 504.

Description of Property

In actions for injuring or taking away goods or chattels, it is in general necessary that their kind, quantity, number, and value should be stated.[69] It would be insufficient to allege that the defendant injured or took the plaintiff's goods and chattels without showing their number or nature. In trover, trespass, and case less particularity is required than in detinue or replevin, in which the plaintiff seeks to recover the goods themselves. The price or value should be stated, though it has been held that the omission to do so will not be fatal.[70] The time should also be alleged, though it seems that it is only essential to show a time before suit brought.[71] It is usual to state that the plaintiff, being possessed of such goods as are described, on a certain day, casually lost the same out of his possession, and that afterwards, on the day and year aforesaid, they came into the possession of the defendant by finding, in accordance with the ancient form, though the statement of the finding is not now material.[72]

[69] Hazelton v. Locke, 104 Me. 164, 71 Atl. 661, 20 L. R. A. (N. S.) 35, 15 Ann. Cas. 1009; Taylor v. Morgan, 8 Watts (Pa.) 833; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; Town of Colebrook v. Merrill, 46 N. H. 160; Ball v. Patterson, 1 Cranch, C. C. 607, Fed. Cas. No. 814; Henry v. Sowles (C. C.) 28 Fed. 521; Stinchfield v. Twaddle, 81 Me. 273, 17 Atl. 66; Kerwin v. Balhatchett, 147 Ill. App. 561; Winchester v. Rounds, 55 Ill. 451; Bowers, Conversion, §§ 494-497. It is sufficient to allege the nature and kind of chattels referred to and the quantity or number converted. Howton v. Mathias, 197 Ala. 457, 73 South. 92. A complaint for the conversion of money derived from the sale of plaintiff's interest in cotton *held* sufficiently to describe the money. Id.

[70] Connoss v. Meir, 2 E. D Smith (N. Y.) 314. And see Pearpoint v. Henry, 2 Wash. (Va.) 102; Fry v. Baxter, 10 Mo. 302; Insigi v. Shea, 148 Mass. 538, 20 N. E. 110. In an action for conversion of a note, an allegation of its face value is a sufficient allegation of its value. Farmers' State Guaranty Bank v. Pierson (Tex. Civ. App.) 201 S. W. 424. In action for conversion of automobile, description of automobile in complaint as "one automobile, * * * the property of the plaintiff," *held* sufficient. Robertson v. Hooton, 17 Ala. App. 258, 85 South. 582.

[71] Dietus v. Fuss, 8 Md. 148; Glenn v. Garrison, 17 N. J. Law, 1. A count in trover is subject to demurrer where the time of conversion is not averred. Schlossburg v. Willingham, 17 Ala. App. 678, 88 South. 191.

[72] Royce v. Oakes, 20 R. I. 252, 38 Atl. 371, Whittier, Cas. Com. Law Pl. p. 199. A general demurrer to a petition in an action for conversion which avers facts showing that the plaintiff has a general or a special property in the chattels alleged to have been converted, the right of possession thereof at the time of conversion, and that the defendant has converted same to his own use, is properly overruled. Wire v. Slocum, 80 Okl. 111, 194 Pac. 1061.

SAME—THE CONVERSION

101. The declaration should also allege a conversion of the property by the defendant, to his own use, contrary to the right of the plaintiff.

The manner of alleging the conversion is not by setting out the facts and particulars of the defendant's misconduct, but by a general statement that, at the time and place mentioned, the defendant unlawfully converted the goods in question to his own use.[73]

In some cases, as we have seen, as where a person comes lawfully into the possession of property, and does not illegally use or abuse it, a demand for possession must be made upon him for the property before he will be guilty of a conversion in detaining it. In these cases the fact of demand must be alleged in the declaration, or no conversion will be shown.[74]

SAME—THE DAMAGES

101a. The declaration must state the damages which are the legal and natural consequence of the conversion, and the amount laid should cover the value of the goods and any other actual damage.

The amount of damages which is recoverable in this action is usually measured by the value of the goods at the time of the conversion, with interest;[75] but the plaintiff is entitled to include also any other loss that is its legal and natural consequence, if not too remote,

[73] Duggan v. Wright, 157 Mass. 223, 32 N. E. 159, Whittier, Cas. Com. Law Pl. p. 198. This is not an allegation of a conclusion of law, but of a "composite" fact, and allows evidence of all such unjustified dealing as may tend to show a conversion. 21 Enc. Pl. & Prac. 1077.

[74] Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 635, 18 N. E. 322, 1 L. R. A. 303. Where a conversion has actually occurred, there is no necessity of alleging and proving a demand and refusal to maintain an action of trover. Daniels v. Foster & Kleiser, 95 Or. 502, 187 Pac. 627.

[75] Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 632, 637, 18 N. E. 322, 1 L. R. A. 303; Waller v. Bowling, 108 N. C. 280, 12 S. E. 990, 12 L. R. A. 201. See Leoncini v. Post (Com. Pl. N. Y.) 13 N. Y. Supp. 825. General rule that plaintiff cannot recover amount larger than he is suing for, as shown by his pleadings, is applicable in trover. I. H. Pitts & Son Co. v. Bank of Shiloh, 20 Ga. App. 143, 92 S. E. 775. In trover, without any specific ad damnum clause in declaration, but with prayer that defendant appear and answer, amount of damages asked for will be construed to be the alleged value of the property sued for. Id.

and the statement should therefore be large enough to cover the actual damage inflicted.[76] The defendant may lessen the amount of the recovery by showing, in mitigation of damages, that the plaintiff has himself recovered the property, or that it has been restored to him and accepted; but this is matter of defense, and the allegation of the declaration must still be made.[77] As in other actions, the form of laying damages will depend upon whether they are general or special.

102. FORM OF DECLARATION IN TROVER

Declaration in Trover

From 2 Chitty, Pleading (13th Am. Ed.) pp. *596, *835.

In the Common Pleas.

——— Next after ——— in ——— Term, ——— Wm. IV.

——— (to wit) C. D. was attached to answer A. B. of a plea of trespass on the case, and thereupon the said A. B. by E. F., his attorney, complains, for that whereas the said plaintiff, heretofore, to wit, on, etc., at, etc. (venue), was lawfully possessed, as of his own property of certain * * * goods and chattels, to wit, ten horses * * * of great value, to wit, of the value of £———, of lawful money of Great Britain. And being so possessed, the said plaintiff afterwards, to wit, on the day and year first above mentioned, at, etc. (venue), aforesaid, casually lost the said * * * goods and chattels, out of his possession; and the same afterwards, to wit, on the day and year first aforesaid, at, etc. (venue), aforesaid came to the possession of the said defendant by finding. Yet the said defendant well knowing * * * the said goods and chattels, to be the property of the said plaintiff, and of right to belong and appertain to him, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said

[76] Alleging "to the great damage" has been held sufficient (Mattingly v. Darwin, 23 Ill. 618), though this, it would seem, can only be because the statement has been made elsewhere than in the ad damnum clause, of the value of the goods, as some averment is certainly necessary as a basis for computation. See, generally, as to damages in this action, Stone v. Codman, 15 Pick. (Mass.) 297; Kingsbury v. Smith, 13 N. H. 109; Simpson v. Alexander, 35 Kan. 225, 11 Pac. 171; H. S. Benjamin Wagon & Car Co. v. Merchants' Exch. Bank, 63 Wis. 470, 23 N. W. 502; Ramsey v. Hurley, 72 Tex. 104, 12 S. W. 56; Hartley State Bank v. McCorkell, 91 Iowa, 660, 60 N. W. 197 (loss of use). See Bowers, Conversion, § 693.

[77] Stirling v. Garritee, 18 Md. 468. And see Yale v. Saunders, 16 Vt. 243; Hart v. Skinner, 16 Vt. 138, 42 Am. Dec. 500; Green v. Sperry, 16 Vt. 390, 42 Am. Dec. 519; Dahill v. Booker, 140 Mass. 308, 5 N. E. 496, 54 Am. Rep. 465; Morton v. Frick Co., 87 Ga. 230, 13 S. E. 463. See Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. 778.

plaintiff in this behalf, hath not as yet delivered the said * * * goods and chattels, or any or either of them, or any part thereof, to the said plaintiff, although often requested so do to, and hath hitherto wholly refused so to do; and afterwards, to wit, on the day and year last aforesaid, at, etc. (venue), aforesaid, converted and disposed of the said * * * goods and chattels, to his own use. Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £———, and therefore he brings his suit, etc.

ESSENTIAL ALLEGATIONS IN DETINUE

103. The essential allegations of the declaration are:

(a) The right of the plaintiff to certain goods and chattels of a certain value, described.

(b) The unlawful detention.

(c) The damages.

104. The declaration must describe the thing detained sufficiently for purposes of identification and assert the plaintiff's title and right of possession.

Description of the Property

As the action of detinue lies only to recover specific chattels, known and distinguished from all others, more certainty is required in the declaration in their description than in trespass or trover; and it must be such as to particularly identify them as the goods in question.[78] This particularity, however, need not extend to every matter of detail, and need only include enough to identify them, either as individual articles or as a number of things belonging to a particular class, according to the circumstances of each particular case.[79]

There were anciently two modes of counting in detinue. The plaintiff must say either, "I bailed the chattel to you," or "I lost the goods and you found them" (detinue sur trover). Only in times much later did the lawyers say that these phrases about finding (trover) and bailment, though one of them must be used, are not "traversable," and that defendant must not deny them, but must deny the wrongful detention.[80]

[78] Taylor v. Wells, 2 Saund. 74a, 74b; Haynes v. Crutchfield, 7 Ala. 189.

[79] An allegation of the value of the property seems necessary. Hawkins v. Johnson, 3 Blackf. (Ind.) 46. And see Robinson v. Woodford, 37 W. Va. 877, 16 S. E. 602.

[80] 1 Saunders, Pl. & Ev. 434; 2 Pollock and Maitland, Hist. Eng. Law, p. 176; 1 Chit. Pl. 121, 124. Compare the fictitious allegations of losing and finding in trover.

The Plaintiff's Right

We have already shown what right the plaintiff must have in the chattels sued for, in order to maintain this action. We have shown that he must have either a general or special property in the chattels, or that he must have a right to the immediate possession of them.[81] That he has this right must, of course, be shown in the declaration by proper allegations. We have also shown that in some cases, but not in all, demand must be made for the property before the right of action will accrue. Where this is necessary, the fact of demand must be alleged.

SAME—THE DETENTION

105. The declaration must also show a wrongful act of detaining by the defendant, contrary to the legal right of the plaintiff. This act might be in the nature of a tort or a breach of a bailment obligation. A demand before suit should be alleged if necessary to terminate defendant's right of possession.

The unlawful act of the defendant which is the gist of this action is, as we have seen, the withholding by the defendant of the specific thing in question from the plaintiff, and retaining it in his own possession or under his control, in opposition to the right of the latter. A detention must therefore be distinctly alleged. The method of alleging a detention is by a formal statement that, at the place already named, the defendant unjustly detains the goods in question from the plaintiff.

SAME—THE DAMAGES

106. As the judgment in this action is in the alternative, that the plaintiff recover the goods, or the value thereof if the specific goods cannot be had, damages should be laid sufficient to cover both such value and the actual loss caused by the detention.

The allegation of damages in the declaration in this action is always necessary, as the judgment is that the plaintiff recover the specific chattel, or, in case it is not forthcoming, its value; and a sum should be laid which will be large enough to cover both this value and any actual damage which the plaintiff has suffered by the fact of the detention.[82] The measure of damages, if the goods cannot be had, is their value at the time of the verdict, with the addition of such special damage as the plaintiff may have sustained by the wrongful act of the defendant.[83]

[81] See Ames, Lectures Legal Hist. p. 71; Whitehead v. Harrison, 6 Q. B. (N. S.) 423, 2 Dowl. & L. 122; Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513, 8 L. R. A. (N. S.) 138, 112 Am. St. Rep 961. See, also, Hensley v. Orendorff, 152 Ala. 599, 44 South. 869.

107. FORM OF DECLARATION IN DETINUE

(Commence as in previous forms.)

For that whereas the plaintiff, on the ——— day of ———, A. D. 19—, at ———, in the county aforesaid, delivered to the defendant certain goods and chattels, to wit, fifty bushels of wheat, of the plaintiff, of the value of ——— dollars, to be redelivered by the defendant to the plaintiff when he, the defendant, should be thereto afterwards requested. Yet the defendant, although he was afterwards, to wit, on the ——— day of ———, A. D. 19—, at ———, aforesaid, in the county aforesaid, requested by the plaintiff so to do, hath not as yet delivered the said goods and chattels, or any part of them, to the plaintiff, but so to do hath hitherto wholly refused, and still refuses, and still unjustly detains the same from the plaintiff, to wit, at ———, aforesaid, in the county aforesaid, to the injury and damage of the said plaintiff of twenty pounds, and therefore he brings his suit, etc. See 2 Chit. Pl. (4th Am. Ed.) p. 277.

ESSENTIAL ALLEGATIONS IN REPLEVIN

108. The essential allegations of the declaration where a declaration is used in the particular practice are:
(a) The plaintiff's title to certain goods at commencement of the action.
(b) The unlawful taking and detention; or, by statute in some states, an unlawful detention only.
(c) The demand and refusal in some cases.
(d) The damages.

[82] See Arthur v. Ingels, 34 W. Va. 639, 12 S. E. 872, 11 L. R. A. 557.

[83] See White v. Sheffield & T. St. Ry. Co., 90 Ala. 253, 7 South. 910; Grand Island Banking Co. v. First Nat. Bank of Grand Island, 34 Neb. 93, 51 N. W. 596.

SAME—THE RIGHT OF PLAINTIFF TO CERTAIN GOODS

109. The declaration must state the articles taken and detained, or (by statute) merely detained, and the plaintiff's right thereto.

The property must be described sufficiently for identification, but the right of the plaintiff may be generally stated.

As has been before stated, the property which is the subject of this action must be personal, and such as is capable of definite description and of delivery; and, in describing it in the declaration, care and accuracy must be used, since the question of identification is an important one. Where the chattels taken and detained are in their nature distinguishable from all others of a similar kind, less particularity of description is required than when they are not so distinguishable. In the latter case the declaration must go further, and show what indicia or earmarks are peculiar to them.[84] The plaintiff should count on the identical chattels replevied, and no more or less, as the defendant might be entitled to a judgment for the return of a larger or the correct number, though not a number less than those actually in question;[85] and the declaration should also state their value correctly, though the strictness formerly necessary is not now required.[86] In brief, here, as in all cases where specific property is in question, the statement must be sufficiently accurate and complete for the court and jury to see that the property as to which evidence is offered is the same as that referred to in the pleadings.

The practice in bringing actions of replevin is now almost universally regulated by statute, and the statutes must therefore be consulted. In some states the declaration is not used at all, but an affidavit takes its place. In these cases the affidavit must comply with the rules above stated, for it must, like a declaration, show facts constituting a cause of action.

[84] Magee v. Siggerson, 4 Blackf. (Ind.) 70; Rider v. Robbins, 13 Mass. 285; Wingate v. Smith, 20 Me. 287; Wood v. Darnell, 1 Ind. App. 215, 27 N. E. 447; Crum v. Elliston, 83 Mo. App. 591; Lockhart v. Little, 30 S. C. 326, 9 S. E. 511; Hall v. Durham, 117 Ind. 429, 20 N. E. 282.

[85] See Root v. Woodruff, 6 Hill (N. Y.) 418. And see Sanderson's Ex'rs v. Marks, 1 Har. & G. (Md.) 252.

[86] See Pomeroy v. Trimper, 8 Allen (Mass.) 393, 85 Am. Dec. 714; Thomas v. Spofford, 46 Me. 408. And, as to the effect of the statement, see Bailey v. Ellis, 21 Ark. 488.

The Plaintiff's Right

As we have seen, it is essential, in order to support this action, that the plaintiff shall have, at the time of suit, the right of immediate possession. It has been held not sufficient to allege that plaintiff was "entitled to the possession of the goods." It should be alleged that the articles were the "goods and chattels of the plaintiff" at the time of the taking.[87]

SAME—THE WRONGFUL ACT

110. The declaration must show such an interference by the defendant as subjects him to liability in replevin under the laws of the particular state. It must in all states show an unlawful detention of the chattel at the time of suit, while in some states it must also show that the defendant acquired possession unlawfully in the first instance.

At common law, as we have seen, the possession of the property must have been unlawfully acquired in the first instance by the defendant, or replevin will not lie. An unlawful detention, without an unlawful taking, is not enough. And this rule is affirmed by statute in some states. Where this is the law, the declaration will be bad if it does not allege an unlawful taking. In other states, as we have seen, the remedy by replevin has been extended by statute so as to be coextensive with the action of detinue in this respect, and to embrace cases in which the property is unlawfully detained, though possession was in the first instance obtained lawfully, as under a contract. In these cases it is sufficient to show an unlawful detention only, without showing an unlawful taking. In all cases an unlawful detention must be shown.[88]

From the early use of this action as a remedy for a wrongful distress

[87] Bond v. Mitchell, 3 Barb. (N. Y.) 304, Whittier, Cas. Com. Law Pl. p. 226. See Puterbaugh, Ill. Pl. & Pr. (7th Ed.) p. 309; Warner v. Carlton, 22 Ill. 415 (form); Harris v. Smith, 132 Cal. 316, 64 Pac. 400. A replevin complaint, alleging that plaintiff was the owner of a steer when it was taken from him by plaintiff, but not alleging that plaintiff was entitled to the possession at the time the action was commenced, which was some two years later, held insufficient to support a judgment for plaintiff. Almada v. Vandecar, 94 Or. 515, 185 Pac. 907. Complaint in action in claim and delivery should state facts from which it may be inferred with reasonable certainty that plaintiff is entitled to possession of property at time of commencement of action; an allegation of ownership being insufficient, inasmuch as owner may not be entitled to possession. Bush v. Bush, 55 Utah, 237, 184 Pac. 823.

[88] Glass v. Basin & Bay State Min. Co., 31 Mont. 21, 77 Pac. 302.

the place of taking became a material fact, to be truly laid and proved.[89] The strictness of this rule has been much relaxed, however, and in some of the states the action is now made transitory by statute, but it seems still necessary that a venue should be laid in the county in which the cause of action arose, though the omission has been held cured by verdict. Clearly, it should be accurately stated when such place is involved as a matter of essential description. Should it not be within the plaintiff's power to ascertain the true locality, he may, it seems, aver a taking and detention, or a detention only, at any place where the property has been discovered in the possession of the defendant.[90]

Demand and Refusal

As we have already shown, a demand of possession before suit is not necessary where the original acquisition of possession by the defendant was unlawful, as where he obtained possession by fraud or trespass, and, of course, in these cases no demand need be alleged. In those states, however, where the action is allowed to recover property lawfully obtained but unlawfully detained, the declaration, if it does not show an unlawful taking, but relies merely on an unlawful detention, must allege a demand and a refusal to surrender the property; a demand being necessary to render the detention unlawful.

SAME—THE DAMAGES

111. The declaration must also state the damages which are the legal and natural consequences of the wrongful act.

The allegation of value is essential, and the damages should be stated according as they are general or special, and laid high enough to cover the actual loss.

As the object of this action is the recovery of the thing itself, the damages recoverable will be generally for the unlawful taking and detention, or for the latter where the taking is justified; and the allegation here referred to is the statement of at least a nominal sum in the declaration to cover the loss so sustained.[91] An allegation of some damage is always essential,[92] and the plaintiff may often recover compensation for the use of the property, as well as vindictive or punitive damages, and damages may be assessed up to the time of the trial.

[89] Gardner v. Humphrey, 10 Johns. (N. Y.) 53. See Byers v. Ferguson, 41 Or. 77, 65 Pac. 1007, 68 Pac. 5.

[90] Abercombie v. Parkhurst, 2 Bos. & P. 481.

[91] See Washington Ice Co. v. Webster, 62 Me. 341, 16 Am. Rep. 462; Younglove v. Knox, 44 Fla. 743, 33 South. 427

[92] Faget v. Brayton, 2 Har. & J. (Md.) 350.

112. FORM OF DECLARATION IN REPLEVIN

From Encyclopedia of Forms. Forms No. 6,939 and No. 17,730.

State of ———, } ——— Court of ———County.
——— County. } ss. ——— Term, A. D. 19—.

———, plaintiff in this suit, by ———, his attorney, complains of ———, defendant in this suit, of a plea wherefore he wrongfully took the goods and chattels of the said plaintiff and unlawfully detained the same until, etc. For that the said defendant, on the ——— day of ———, in the year 19—, at No. ———, ——— street in the city of ———, in the county aforesaid, wrongfully took the goods and chattels, to wit: (describing them), of the said plaintiff, of the value of ——— dollars, and unjustly detained the same until, etc.

And also wherefore the defendant unjustly detained the goods and chattels until, etc. For that the said defendant, on the ——— day of ———, in the year 19—, at No. ———, ——— street in the city of ———, in the county aforesaid, the goods and chattels of the said plaintiff, to wit, (describing them), of the value of ——— dollars, wrongfully detained, etc.

But that the said defendant, although often requested, hath refused, and yet refuses, to deliver the said goods and chattels above mentioned to the said plaintiff.

Wherefore the said plaintiff says he is injured and hath sustained damage to the amount of ——— dollars, and therefore he brings his suit, etc.

———, Plaintiff's Attorney.

CHAPTER XI

THE DECLARATION IN CONTRACT ACTIONS

113–114. Prima Facie Case in Contract Actions.
115. Essential Allegations in Special Assumpsit.
116–117. Performance and Fulfillment of Conditions.
118. Conditions subsequent and Provisos.
119. The Breach.
120. The Damages.
121–122. Essential Allegations in General Assumpsit or Common Counts.
123. Statement of an Executed Consideration.
124. The Promise.
125. The Breach.
126. The Damages.
127. Forms of Declaration in Assumpsit, Special and General.
128. Necessary Allegations in Debt.
129–132. The Statement.
133. The Breach.
134. The Damages.
135. Forms of Declaration in Debt.
136. Necessary Allegations in Covenant.
137–138. The Execution of the Covenant and its Terms.
139. The Breach.
140. The Damages.
141. Form of Declaration in Covenant.
142. Essential Allegations in Account or Account Render.
143. The Statement.
144. The Breach.
145. The Damages.

PRIMA FACIE CASE IN CONTRACT ACTIONS

113. It is for the plaintiff in his declaration to allege facts sufficient to make out a prima facie cause of action.

114. He must allege the making of the contract, the consideration, and state each thing which had happened or been performed in fulfillment of the conditions of the promise.[1] He must also allege a breach of duty by the defendant.

Having considered the pleading rules as they affect the structure of declarations in general and the essential allegations in the various tort actions, we now proceed to consider the essential allegations in contract actions, namely assumpsit, general and special, covenant, debt, and account.

[1] 2 Williston, Cont. § 674 (pleading in actions on conditional contracts).

In contract actions the plaintiff's prima facie case consists in showing the normal affirmative elements of a valid contract and the coming into operation of an affirmative contractual duty; on the other hand, negative elements, such as fraud or illegality, which destroy the validity of the contract, and matters of excuse and discharge, as impossibility, performance, or release, must come from the defendant, to prevent plaintiff's recovery. Thus, where the plaintiff has proved the existence of the debt sued on, the burden of proving payment is on the defendant. The plaintiff must allege nonpayment of the money demand to make the declaration perfect on its face; but payment is an affirmative defense, even in many jurisdictions where it may be raised by the defendant under a denial. Thus negative averments may be necessary to the plaintiff's pleading, though they constitute no part of his original substantive cause of action which he is called upon to prove or establish.

In actions upon contracts for damages, the plaintiff must assign the breach by the defendant which is relied upon as ground for recovery, and allege the essential facts to apprise the defendant in what particulars he has failed to perform. But when the plaintiff pleads or proves the contract, and the fulfillment of conditions to create an operative duty of performance by the defendant as by tender or performance on his own part, it is then incumbent upon the defendant to prove performance, or sufficient excuse for nonperformance as an affirmative defense, without proof of breach on behalf of the plaintiff. Even the burden of proving the general allegation of performance by the plaintiff as a condition precedent is taken off the plaintiff in modern English practice, unless the defendant specially pleads nonperformance of some condition.

ESSENTIAL ALLEGATIONS IN SPECIAL ASSUMPSIT

115. The essential allegations of the declaration are:
(a) The statement of the making of the contract and the terms of promise on which the action is founded.
(b) The consideration.
(c) The performance by the plaintiff of all conditions precedent.
(d) The breach by the defendant.
(e) The damages.

The statement of the making of the contract is the first important requisite in showing the cause of action in special assumpsit. It may include either a mere allegation of the consideration and promise, or, where that is not sufficient to render intelligible the count which

follows, an explanatory allegation or inducement may be necessary. In any case, it must be a clear and particular statement of every fact which is necessary, in the particular case, both to show what contract was actually made, and to plainly indicate such of its terms, beneficial to the plaintiff, as constitute the part for the failure of which he sues.[3]

Explanatory Inducement

Where the mere allegation of the consideration and the promise will not alone show the contract in an intelligible manner, it has been customary to set forth, in the nature of a preamble, the circumstances under which the contract was made.[4] This explanatory statement is termed an "inducement." The extent to which it is carried depends upon the necessity for explanatory matter in the particular case.

Thus, in assumpsit on an award, the existing difficulties between the parties, resulting in the submission to arbitration, are concisely stated by way of inducement, as that "certain differences had existed and were depending";[5] and, on a contract to pay money upon a consideration of forbearance, the declaration should begin by stating with brevity the existence of the debt forborne, and from whom it is due.[6] So, in a declaration against an attorney for negligence, or a carrier or innkeeper for loss of goods, it is proper to show by way of inducement that the defendant followed the occupation in respect of which the plaintiff employed him. Unless such an allegation is contained somewhere in the declaration, the defendant cannot be charged thereon for the breach of a duty which results only from the particular character which he held, and in reference to which he was retained.[6]

Consideration

Except in the case of bills of exchange and promissory notes, and certain other contracts that import a consideration,[7] it is always necessary for the declaration expressly to state the consideration for the promise, for, if no consideration is alleged, the promise will appear, from all that the declaration shows, to be nudum pactum, and there-

[2] Cotterill v. Cuff, 4 Taunt. 285; Bristow v. Wright, 2 Doug. 667; Stearns v. Barrett, 1 Pick. (Mass.) 443, 11 Am. Dec. 223; Favor v. Philbrick, 7 N. H. 326. And see Smith v. Boston, C. & M. R. Co., 36 N. H. 458; Smith v. Webster, 48 N. H. 142, Whittier, Cas. Com. Law Pl. p. 292; Ferguson v. Tucker, 2 Har. & G. (Md.) 183.

[3] Johnson v. Clark, 5 Blackf. (Ind.) 564.

[4] 1 Chit. Pl. 297.

[5] 1 Chit. Pl. 297.

[6] Dartnall v. Howard, 4 Barn. & C. 345.

[7] In these cases the declaration must show on its face that the contract is of such a nature as to import a consideration. Nothing of this character can be left to be implied. 1 Chit. Pl. (16th Am. Ed.) 300; Martin, Civ. Proc. § 59.

fore void.[8] And it is equally essential that the consideration alleged shall appear to be legally sufficient to support the promise.[9] It may sometimes happen, however, that, even where there is a sufficient consideration, the declaration, by omitting some averment in stating it, may make it appear insufficient, in which case the declaration would be as defective as if the consideration were defective in fact. It may not be aided by intendment. Care should therefore be taken, in stating the consideration, to make it appear sufficient on the face of the declaration.[10] It has also been laid down as a rule that the consideration stated must be coextensive with the promise, in order to support it; but this is nothing more than saying that the declaration must show a sufficient consideration for the particular promise alleged.[11]

If no consideration is stated or that which is stated is clearly illegal or insufficient, the defendant may take advantage of the defect either by demurrer, or by motion in arrest of judgment, or writ of error;[12] but a defective statement will be aided by a verdict for the plaintiff

[8] Harding v. Craigie, 8 Vt. 501; Murdock v. Caldwell, 8 Allen (Mass.) 309; Jones v. Ashburnham, 4 East, 455; Dartnall v. Howard, 4 Barn. & C. 345; Bailey v. Freeman, 4 Johns. (N. Y.) 280; Jerome v. Whitney, 7 Johns. (N. Y.) 321; Hulme v. Renwick, 16 Ill. 371; Potter v. Earnest, 45 Ind. 416; Beverley v. Holmes, 4 Munf. (Va.) 95; Moseley v. Jones, 5 Munf. (Va.) 23; Curley v. Dean, 4 Conn. 265, 10 Am. Dec. 140; Bailey v. Bussing, 20 Conn. 1; Shelton v. Bruce, 9 Yerg. (Tenn.) 24; Benden v. Manning, 2 N. H. 289; New Market Iron Foundry v. Harvey, 23 N. H. 406.

[9] Thus, if the consideration for the defendant's promise was a promise by the plaintiff, it must appear that the plaintiff's promise was binding on him when the defendant's promise was made; and it must not in any case appear that the consideration was illegal, or was past. Harding v. Craigie, supra.

[10] Harding v. Craigie, supra: Dartnall v. Howard, supra. Thus, where the plaintiff declared that a person, since deceased, was indebted to him, and that after the death, in consideration of the premises, "and that the plaintiff, at the defendant's request, would give time for the payment of the debt," the defendant promised, etc., but did not state that there was any person in existence who was liable, in respect of assets or otherwise, to be sued by the plaintiff for the debt, and to whom he gave time,—the declaration was held bad on demurrer; for no benefit was shown to move to the defendant, nor did it appear that any detriment had been sustained by the plaintiff, as it was not stated that any one was liable to be sued by him, or that he had suspended the enforcement of any right. Jones v. Ashburnham, supra.

[11] Thus, where the plaintiff stated that the defendant was liable in the character of executor to pay a certain debt, and then averred that in consideration thereof he personally promised to pay the debt, the declaration was held bad on motion in arrest of judgment, no additional consideration being shown for his assuming personal liability. Rann v. Hughes, 7 Term R. 350, note a. And see Berry v. Harper, 4 Gill & J. (Md.) 470; Mitchinson v. Hewson, 7 Term R. 348.

[12] See the cases above cited, and see particularly Harding v. Craigie, 8 Vt. 501; Kean v. Mitchell, 13 Mich. 207; Laing v. Fidgeon, 6 Taunt. 108; Mitch-

if it sufficiently appear, upon a reasonable construction of the declaration, that there was in fact a consideration capable of supporting the promise.[13]

In all cases the statement should be accurate, for the consideration is essential to the contract, and if it is misdescribed the contract is misdescribed.[14]

The consideration must be shown with certainty and particularity. Nothing that is essential can be left to implication and intendment. The degree of certainty will vary somewhat, according to the particular kind of the consideration. An averment that the promise was made for a valuable consideration, without setting forth what it was, is insufficient upon general demurrer.[15]

Same—Executed Consideration

Considerations are either executed or executory. An executed consideration consists of something done before or at the time of the promise, at the request of the promisor. In these cases it must be shown by the declaration that the consideration arose at the promisor's (defendant's) request.[16] It is said not to be necessary, in stating executed considerations, to allege them with the same certainty and particularity as to time and place, or as to quantity, quality, value, etc., as is required in stating executory considerations.[17] It must, however, be shown that the executed consideration was furnished at the defendant's request.

inson v. Hewson, 7 Term R. 348; Dartnall v. Howard, 4 Barn. & C. 345; Benden v. Manning, 2 N. H. 289; Winston's Ex'r v. Francisco, 2 Wash. (Va.) 187.

[13] Ward v. Harris, 2 Bos. & P. 205; Shaw v. Redmond, 11 Serg. & R. (Pa.) 27.

[14] White v. Wilson, 2 Bos. & P. 116; Bulkley v. Landon, 3 Conn. 404; James & Mitchell v. Adams, 16 W. Va. 245, Whittier, Cas. Com. Law Pl. pp. 293, 297; Lansing v. McKillip, 3 Caines (N. Y.) 286, Whittier, Cas. Com. Law Pl. p. 298, 301, note.

[15] Wickliffe v. Hill, 4 Bibb (Ky.) 269, Whittier, Cas. Com. Law Pl. pp. 298, 301, note (valuable consideration insufficient on demurrer). See Kean v. Mitchell, 13 Mich. 207.

[16] 1 Saund. 264, note 1; Hayes v. Warren, 2 Strange, 933; Parker v. Crane, 6 Wend. (N. Y.) 647; Balcom v. Craggin, 5 Pick. (Mass.) 205; Harding v. Craigie, 8 Vt. 501; Goldsby v. Robertson, 1 Blackf. (Ind.) 247; Stoever v. Stoever, 9 Serg. & R. (Pa.) 434; Andrews v. Ives, 3 Conn. 368; Dodge v. Adams, 19 Pick. (Mass.) 429. See City of Redding v. Shasta County, 86 Cal. App. 48, 171 Pac. 806.

[17] 1 Chit. Pl. 302; Andrews v. Whitehead, 13 East, 105, 116, 117; Sexton v. Miles, 1 Salk. 22; Lampleigh v. Brathwait, Hob. 106.

Same—Executory Considerations

An executory consideration is where the contract is bilateral; that is, where a promise is given for a promise, each promise being the consideration for the other. In these cases a greater degree of certainty is required than in stating an executed consideration. The performance of his promise by the plaintiff may have been, according to the terms of the contract, a condition precedent to the defendant's liability to perform his promise; or each may have been required to perform concurrently with the other; or the plaintiff may have been required to continue to do or forbear some act.

In the statement of an executory consideration precedent—that is, a promise by the plaintiff which was required to be performed as a condition precedent to performance by the defendant—a great degree of certainty is required.[18] "The consideration and the promise of the defendant are distinct things, and, in order to show that the plaintiff possesses a right of action, it is in general necessary to aver performance of the consideration on his part, which allegation, being material and traversable must be made with proper certainty of time, etc. This obligation of averring performance imposes upon the plaintiff the necessity of stating the consideration with a greater degree of certainty and minuteness than in the case of executed considerations; for the court would otherwise be unable to judge whether the performance averred in the declaration were sufficient." [19]

Concurrent conditions occur in the case of mutual promises which are to be concurrently performed, as in promises to marry, to sell and deliver goods, and to receive and pay for them, etc. In these cases the plaintiff must always allege a performance or an offer to perform on his part.[20] A mere allegation of readiness and willingness to perform may not be sufficient.[21]

[18] 1 Chit. Pl. 302; 1 Saund. 264, note 1.

[19] 1 Chit. Pl. 303; Glover v. Tuck, 24 Wend. (N. Y.) 153; Read v. Smith, 1 Allen (Mass.) 519; Russell v. Slade, 12 Conn. 455. Thus, in an action for wages agreed to be paid to the plaintiff in consideration that he would proceed on a certain voyage, it was held necessary to state the particular voyage. White v. Wilson, 2 Bos. & P. 116, 120; Ward v. Harris, Id. 205.

[20] Morton v. Lamb, 7 Term R. 125; Metz v. Albrecht, 52 Ill. 491; Hough v. Rawson, 17 Ill. 588; Stephenson v. Cady, 117 Mass. 6. In an action for breach of a contract by which the plaintiff had agreed to buy a certain quantity of corn of the defendant at a certain price, and the defendant had promised to deliver the corn within one month, the plaintiff merely alleged that he had always been ready and willing to receive the corn, but that it had not been delivered within the month. The court held that readiness to receive

[21] Kane v. Hood, 13 Pick. (Mass.) 281, Whittier, Cas. Com. Law Pl. p. 303, note.

If any error is made in describing the consideration which forms the basis of the contract, this may be a fatal variance, as the whole contract must be proved as stated, and the plaintiff will fail at the trial unless permitted to amend his declaration. It is necessary that the whole of the consideration should in general be stated and that it be proved to the extent alleged.[23]

The Promise

The declaration must in all cases show that a promise has been made, either by expressly averring that the defendant "promised," or by other equivalent words.[23] Formal words need not be used if it sufficiently appear from the whole declaration that a promise has actually been made.[24] The promise must be stated with certainty and precision, and any material variance between allegations and the proof will be fatal. It may be set forth in terms or according to its legal effect.[25]

was not a sufficient performance of his obligation by the plaintiff; that payment of the price was intended to be concurrent with delivery of the corn. As the plaintiff did not allege that, during the time in which delivery might have been made, he had been ready to pay the price, there was nothing, as he had shaped his case, to show that he had not himself broken the contract and discharged the defendant by nonreadiness to pay. Morton v. Lamb, supra. 2 Williston, Cont. §§ 832, 833.

[23] James v. Adams, 16 W. Va. 245, Whittier, Cas. Com. Law Pl. p. 203. The entire consideration must be alleged, such as all the property sold, in each count. Stone v. White, 8 Gray (Mass.) 589 (it is not sufficient to prove part of an entire consideration).

[23] 1 Chit. Pl. 308; North v. Kizer, 72 Ill. 172 (undertook); Cooper v. Landon, 102 Mass. 58, 60. And see the cases cited in the following note, and Whittier, Cas. Com. Law Pl. p. 291, note; Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co., 62 W. Va. 288, 292, 57 S. E. 826; Wald v. Dixon, 55 W. Va. 191, 46 S. E. 918. An express promise ought to be laid in the declaration. Bannister v. Victoria Coal & Coke Co., 63 W. Va. 502, 61 S. E. 338.

[24] Avery v. Inhabitants of Tyringham, 3 Mass. 160, 3 Am. Dec. 105; Sexton v. Holmes, 3 Munf. (Va.) 566; Peasley v. Boatwright, 2 Leigh (Va.) 198; Cooke v. Simms, 2 Call (Va.) 39; McGinnity v. Laguerenne, 5 Gilman (Ill.) 101; Booth v. Farmers' & M. Nat. Bank of Rochester, 1 Thomp. & C. (N. Y.) 49; Wingo v. Brown, 12 Rich. (S. C.) 279; Elsee v. Gatward, 5 Term R. 145. Thus, in assumpsit on a bill of exchange, where the declaration showed the defendant's liability on the bill as the drawer, but omitted to add that he promised to pay, the court refused to arrest the judgment for this omission, and held that the count was a count in assumpsit, because the drawing of the bill was a promise. Starke v. Cheeseman, 1 Ld. Raym. 538, 1 Salk. 128. And the same doctrine has been extended to a promissory note. Wegersloffe v. Keene, 1 Strange, 224. And see Dole v. Weeks, 4 Mass. 451; Mountford v. Horton, 2 Bos. & P. (N. R.) 62.

[25] Lent v. Padelford, 10 Mass. 230, 6 Am. Dec. 119; Stroud v. Gerrard, 1 Salk. 8; Salinas v. Wright, 11 Tex. 572; Smith v. Webb, 16 Ill. 105; Mutual Acc. Ass'n of the Northwest v. Tuggle, 138 Ill. 428, 28 N. E. 1066.

Only such parts need be set out as show the entire act required to be done by the defendant.[26]

It is not necessary to state that the promise was in writing, even when a writing is required by statute,[27] for the writing is not the contract, but merely evidence of it. The declaration should, however, specify the parties by and to whom the promise was made,[28] the time when it was made,[29] and sometimes the place. And if the promise is alternative, or contains limitations or restrictions of any kind qualifying the manner of performance, or the liability of the defendant to perform, the declaration must correspond in every particular, or there will be a fatal misdescription.[30] "All those parts of the contract which are material for the purpose of enabling the court to form a just idea of what the contract actually was, or which are necessary for the purpose of furnishing the jury with a criterion in the assessment of damages, should be stated with certainty and precision." [31]

It is in general sufficient to state those parts of the contract of which a breach is alleged, and it is not necessary or proper to set out in the declaration other parts not qualifying or varying the material parts in question.[32] The statement of additional matter would be confusing prolixity. The perfection of pleading consists in combining brevity with certainty and precision.

[26] Cotterill v. Cuff, 4 Taunt. 285; Couch v. Ingersoll, 2 Pick. (Mass.) 292; Miles v. Sheward, 8 East, 7; Ranlett v. Moore, 21 N. H. 336; Morse v. Sherman, 106 Mass. 432.

[27] Moore v. Earl of Plymouth, 3 Barn. & Ald. 66; Walker v. Richards, 39 N. H. 259; Wallis v. Frazier, 2 Nott & McC. (S. C.) 180; Baker v. Jamesan, 2 J. J. Marsh. (Ky.) 547; Nelson v. Dubois, 13 Johns. (N. Y.) 177; Miller v. Drake, 1 Caines (N. Y.) 45; Blick v. Brigg, 6 Ala. 687; Brown v. Barnes, 6 Ala. 604.

[28] Jones v. Owen, 5 Adol. & E. 222; Price v. Easton, 4 Barn. & Adol. 433; Belton v. Fisher, 44 Ill. 32. Misdescription of the parties may be fatal. Jell v. Douglas, 4 Barn. & Ald. 374; Belton v. Fisher, supra; Shepard v. Palmer, 6 Conn. 95. A failure to state the name of the parties, or a misdescription, may be aided by verdict. 1 Chit. Pl. 309; Rolte v. Sharp, Cro. Car. 77; Blackwell v. Irvin's Adm'rs, 4 Dana (Ky.) 187.

[29] Ring v. Roxbrough, 2 Tyrw. 468; 1 Chit. Pl. 300; Stephens v. Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485. But the exact time alleged need not be proved. 1 Chit. Pl. 309.

[30] Stone v. Knowlton, 3 Wend. (N. Y.) 374; Fay v. Goulding, 10 Pick. (Mass.) 122; Lower v. Winters, 7 Cow. (N. Y.) 263; Butler v. Tucker, 24 Wend. (N. Y.) 447; Smith v. Boston, C. & M. R. Co., 36 N. H. 458; Rennyson v. Reifsnyder, 11 Pa. Co. Ct. R. 157; Bridge v. Austin, 4 Mass. 115; Walker v. Tirrell, 101 Mass. 257, 3 Am. Rep. 352; Curley v. Dean, 4 Conn. 265, 10 Am. Dec. 140.

[31] 1 Chit. Pl. 310.

[32] Where the defendant promises to do two or more things, the plaintiff is only required to set forth that particular part of the contract which he al-

It is a general rule that the contract must be stated correctly, and, if the evidence differs from the statement, the whole foundation of the action fails, because the contract must be proved as laid.[33]

SAME—PERFORMANCE AND FULFILLMENT OF CONDITIONS

116. The declaration must allege the performance or fulfillment of all conditions precedent to the defendant's duty to perform his promise. It must allege due performance by the plaintiff, or aver a sufficient excuse for the nonperformance.

117. Where reciprocal promises involve mutual conditions, to be performed at the same time, the plaintiff must aver performance of his part of the contract, or a readiness and an offer to perform.

Where the consideration for the defendant's promise was past or executed when the promise was made—or, in other words, where the contract was unilateral; or where, though the contract was bilateral, that is, consisted of mutual promises, the performance of his promise by the defendant was not dependent or conditional upon performance by the plaintiff; nor upon any other subsequent event, as the act of some third person, or the lapse of a certain time, or upon notice or demand—the declaration, after alleging the consideration and the promise, should proceed at once to allege the breach.[34]

leges the defendant to have broken. It is so where there are several covenants in a deed; plaintiff may sue for the breach of any one alone. Smith v. Webster, 48 N. H. 142, Whittier, Cas. Com. Law Pl. p. 292.

[33] Averment of an absolute contract to deliver 40 bags of wheat is not sustained by proof of an optional one to deliver 40 or 50 bags, as the contract must be declared upon in the declaration according to the original terms of it. Penny v. Porter, 2 East, 2, Whittier, Cas. Com. Law Pl. p. 290. The promise must be accurately alleged to avoid a variance. Menifee v. Higgins, 57 Ill. 50; Davisson v. Ford, 23 W. Va. 617.

[34] If the day appointed in the contract for the doing of any act by the defendant fails before the day when the act constituting the consideration is to be done by the plaintiff, or where for any other reason the performance by the defendant does not depend upon performance by the plaintiff, performance need not be alleged. Cunningham v. Morrell, 10 Johns. (N. Y.) 204, 6 Am. Dec. 332; Robb v. Montgomery, 20 Johns. (N. Y.) 15; Gould v. Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90; Kane v. Hood, 13 Pick. (Mass.) 281; Boone v. Eyre, 1 H. Bl. 273, note; Pepper v. Haight, 20 Barb. (N. Y.) 429; Bennet v. Pixley's Ex'rs, 7 Johns. (N. Y.) 249; Obermyer v. Nichols, 6 Bin. (Pa.) 159, 6 Am. Dec. 439; Morford v. Mastin, 6 T. B. Mon. (Ky.) 609, 17 Am. Dec. 168; Norris v. School Dist. No. 1 in Windsor, 12 Me. 293, 28 Am. Dec. 182; McGehee v. Hill, 4 Port. (Ala.) 170, 29 Am. Dec. 277.

When, however, the consideration of the defendant's promise was a promise by the plaintiff which was required to be performed as a condition precedent to performance by the defendant,[35] or if the defendant was not required to perform before the happening of some subsequent event,[36] as the act of a third person, the lapse of a certain time,[37] or notice,[38] or a request or demand by the plaintiff,[39] the declaration must allege the fulfillment of such condition precedent, or, in case of nonperformance of a condition precedent by the plaintiff, must show an excuse therefor. Excuse for the nonperformance of a condition cannot as a general rule be shown under an allegation of due performance.[40]

[35] McIntire v. Clark, 7 Wend. (N. Y.) 330; Lester v. Jewett, 11 N. Y. 453; Couch v. Ingersoll, 2 Pick. (Mass.) 292; Naftzger v. Gregg, 3 Cal. Unrep. 520, 31 Pac. 612; Goodwin v. Lynn, 4 Wash. C. C. 714, Fed. Cas. No. 5,553; People ex rel. Chicago & I. R. Co. v. Glann, 70 Ill. 232; Continental Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; Zerger v. Sailer, 6 Bin. (Pa.) 24; Salmon v. Jenkins, 4 McCord (S. C.) 288; Harrison v. Taylor, 3 A. K. Marsh. (Ky.) 168; Bean v. Atwater, 4 Conn. 3, 10 Am. Dec. 91; Smith's Heirs v. Christmas, 7 Yerg. (Tenn.) 505; Bailey v. Clay, 4 Rand. (Va.) 346. A declaration on a promise to pay money in consideration of forbearance, must aver such forbearance. Com. Dig. "Pleader," C, 22.

[36] Thus, in an action on a promise to pay money when collected, collection of the money must be averred. Dodge v. Coddington, 3 Johns. (N. Y.) 146. And see Williams v. Smith, 3 Scam. (Ill.) 524.

[37] Worsley v. Wood, 6 Term R. 710.

[38] Massachusetts Mut. Life Ins. Co. v. Kellogg, 82 Ill. 614; Independent Order of Mut. Aid v. Paine, 17 Ill. App. 592, Whittier, Cas. Com. Law Pl. pp. 302, 303, note. In order to sustain an action on a life insurance policy, the declaration must show the making of the policy, the material terms of the contract, the performance of all conditions precedent, such as notice and proof of loss, the happening of the contingency in which defendant becomes liable to pay, and the failure to pay. Massachusetts Mut. Life Ins. Co. v. Kellogg, 82 Ill. 614.

[39] Whenever it is essential to the cause of action that the plaintiff should have actually formally requested or demanded performance by the defendant, such request or demand must be averred. 1 Chit. Pl. 339; Com. Dig. "Pleader," C, 60; Bach v. Owen, 5 Term R. 409. Such is the case in assumpsit on a note, or otherwise for money payable on demand, or a certain time after demand. Thorpe & Uxor v. Booth, 1 Ryan & M. 388; Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; Carter v. Ring, 3 Camp. 459; Lobdell v. Hopkins, 5 Cow. (N. Y.) 516; or for failure to deliver goods, or perform any other act, on demand, Bach v. Owen, 5 Term R. 409; Peck v. Methold, 3 Bulst. 297; Ernst v. Bartle, 1 Johns. Cas. (N. Y.) 327. See Foulds v. Watson, 116 Ill. App. 130.

[40] Thus, in declaring on a promise to pay a sum of money in consideration that the plaintiff would execute a release or conveyance, the declaration must allege that the release or conveyance was executed, or tendered and refused.

In case of reciprocal promises, constituting mutual conditions to be performed at the same time, the plaintiff must aver performance by him, or a readiness and offer to perform, or an excuse for not offering to perform.[41]

In averring the excuse for nonperformance by the plaintiff of a condition precedent, the particular circumstances which constitute the excuse must be stated.[42]

It is sufficient to set out the performance of a condition precedent in the language of the condition,[43] provided the condition appears thereby to have been performed according to the intent of the parties, but not otherwise. It is not sufficient to pursue the words if the intent be not also performed. Performance according to the intent must

Collins v. Gibbs, 2 Burr. 899; Parker v. Parmele, 20 Johns. (N. Y.) 130, 11 Am. Dec. 253. The averment of performance will, of course, be unnecessary, where the plaintiff has been prevented, or in some manner discharged, by the defendant from carrying out his part of the contract. Shaw v. Lewistown & K. Turnpike Co., 2 Pen. & W. (Pa.) 454; Newcomb v. Brackett, 16 Mass. 161; Miller v. Whittier, 32 Me. 203; Bryan v. Spurgin, 5 Sneed (Tenn.) 681. In such a case the plaintiff must state the excuse for his nonperformance. In so doing, the particular circumstances constituting the matter of excuse, including the plaintiff's readiness, must be alleged, as it is not sufficient to set forth merely the fact that he was so prevented or discharged from completing his obligation. Baker v. Fuller, 21 Pick. (Mass.) 318; Clarke v. Crandall, 27 Barb. (N. Y.) 73; Home Ins. Co. of New York v. Duke, 43 Ind. 418; Stagg v. Munro, 8 Wend. (N. Y.) 399. Matter of excuse must always be alleged where there has been a failure in performance of a condition precedent. Expanded Metal Fireproofing Co. v. Boyce, 233 Ill. 284, 84 N. E. 275; Walsh v. North American Cold Storage Co., 200 Ill. 322, 331, 103 N. E. 185. An exception exists in actions on bills and notes and on insurance policies. Excuse of demand of payment of a note may be shown under allegation of "due presentment" for payment. Spann v. Baltzell, 1 Fla. 301, 46 Am. Dec. 340, Whittier, Cas. Com. Law Pl. p. 309; German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68, 1 N. E. 113; Tobey v. Berly, 26 Ill. 420.

[41] Lester v. Jewett, 11 N. Y. 453; Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. Ed. 219; Tinney v. Ashley, 15 Pick. (Mass.) 552, 26 Am. Dec. 620; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Allen v. Hartfield, 76 Ill. 358; Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527; Henderson v. Lauck, 21 Pa. 359; Smith v. Lewis, 26 Conn. 110; Clark v. Wels, 87 Ill. 438, 29 Am. Rep. 60. Actual performance need not be alleged. Whitall v. Morse, 5 Serg. & R. (Pa.) 358. In an action for nondelivery of goods sold, or to recover the price of goods sold, where delivery of the goods and payment of the price were to be concurrent, the declaration must allege a readiness on the part of the plaintiff, and an offer to perform his part of the agreement. Morton v. Lamb, 7 Term R. 125; Metz v. Albrecht, 52 Ill. 491; Hough v. Rawson, 17 Ill. 588, Whittier, Cas. Com. Law Pl. p. 303, note; Osgood v. Skinner, 211 Ill. 229, 235, 71 N. E. 869; 2 Williston, Cont. § 833, p. 1588.

[42] 2 Saund. 129, 132.

[43] Smith's Adm'r v. Lloyd's Ex'x, 16 Grat. (Va.) 295.

be shown. An exact performance must be stated.[44] An allegation of performance of all conditions precedent in general terms is not ordinarily sufficient.[45]

The omission of the averment of performance of a condition precedent, or of an excuse for the nonperformance, is fatal on demurrer, or on objection after judgment by default;[46] but after a verdict the omission may in some cases be aided by the common-law intendment that everything may be presumed to have been proved which was necessary to sustain the action; for a verdict will cure a case defectively stated.[47]

CONDITIONS SUBSEQUENT AND PROVISOS

118. A condition which merely affords a defense or excuse for failure to perform a contract is defensive matter, which need not be negatived in the declaration. The border line as to what conditions should be negatived in the declaration and what should be set up as a defense is doubtful and uncertain.

The plaintiff need not refer to conditions subsequent, but may leave it to the defendant to plead them, if he so desires, by way of defense.[48] The mere language of a condition, however, will not indicate with cer-

[44] 1 Chit. Pl. 334; Com. Dig. "Pleader," C, 58; Thomas v. Van Ness, 4 Wend. (N. Y.) 553. And see Wright v. Tuttle, 4 Day (Conn.) 313.

[45] Kern v. Zeigler, 13 W. Va. 707, Whittier, Cas. Com. Law Pl. p. 306; Continental Ins. Co. v. Rogers, 119 Ill. 474, 486, 10 N. E. 242, 59 Am. Rep. 810; Whelan v. Massachusetts Bonding & Ins. Co., 205 Ill. App. 122, 131; Bogardus v. Phœnix Mfg. Co., 120 Ill. App. 46, 49. By common law the general averment of performance of conditions precedent was bad in form, for not alleging with particularity the facts of performance. By statutes similar to the provision of the English Common-Law Procedure Act of 1852 in many states one may aver the performance of conditions precedent generally. 4 Enc. Pl. & Prac. 633, note. In the absence of statute, a general allegation of performance of conditions precedent by the plaintiff will probably be sustained after verdict, but is ground of demurrer. Newton Rubber Works v. Graham, 171 Mass. 352, 50 N. E. 547; Korbly v. Loomis, 172 Ind. 352, 88 N. E. 698, 139 Am. St. Rep. 370, 19 Ann. Cas. 904; 5 Minn. Law Rev. 147 (alleging performance of conditions precedent under the Code).

[46] Collins v. Gibbs, 2 Burr. 899.

[47] Ferry v. Williams, 8 Tount. 62; Colt v. Root, 17 Mass. 230; Bailey v. Clay, 4 Rand. (Va.) 346; Lellingwell v. White, 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97.

[48] Continental Ins. Co. v. Rogers, 119 Ill. 474, 486, 10 N. E. 242, 59 Am. Rep. 810; Rockford Ins. Co. v. Nelson, 65 Ill. 415; Buckstaff v. Russell & Co., 151 U. S. 626, 632, 14 Sup. Ct. 448, 38 L. Ed. 292; Ferguson v. Cappeau, 6 Har. & J. (Md.) 394, Whittier, Cas. Com. Law Pl. pp. 301, 305, note

tainty whether it is precedent or subsequent. In fact, Professor Williston declares: "What are generally called conditions subsequent in contracts are so called with little propriety. They are in substance conditions precedent to the vesting of liability and are subsequent only in form." [49] "Insurance policies always expressly except certain risks. The burden of alleging and proving that the loss was caused by one of these excepted risks is generally put on the defendant insurer, though this is often not easy to justify." [50]

If the defendant's covenant or promise be subject to exceptions which qualify his liability, the declaration must notice the exception, or there will be a fatal misstatement.[51] The cases draw a distinction between an exception and a proviso. An exception in the body of the covenant or promise must be set out. "But if A. covenants to convey to B. a certain farm, with a separate proviso that on A.'s performing a certain act he shall not be bound to convey the particular close, parcel of the farm, B., in declaring on the covenant, need not take notice of the proviso." [52] For it is in the nature of a condition subsequent, of which A. may avail himself in defense, if he has performed the act mentioned in the proviso. A distinction analogous to that stated prevails in declaring upon penal statutes. "Where an exception is incorporated

(semble); Ætna Ins. Co. v. Phelps, 27 Ill. 71, 81 Am. Dec. 217, 272. Conditions subsequent, provisos, or other matters in defeasance of a right of action are matters of defense, to be shown by the defendant. Wilmington & R. R. Co. v. Robeson, 27 N. C. 391.

[49] 2 Williston, Cont. § 667.

[50] Corbin, Cas. Cont. 709, note; Ames, Cas. Pl. 302–306; Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. Rep. 699; Red Men's Fraternal Acc. Ass'n v. Rippey, 181 Ind. 454, 103 N. E. 345, 104 N. E. 641, 50 L. R. A. (N. S.) 1006, note. "It is well settled that in actions upon insurance policies containing a stipulation that the policy shall be void if any of the representations of the insured are untrue, the defendant must allege and prove the untruth of the particular representation claimed to be untrue." The same is true as to policies, conditioned to be void if the insured commits suicide. Ames, Cas. Pl. (2d Ed.) 304, 305, note.

[51] Yavasour v. Ormrod, 6 Barn. & Cress. 430; Ames, Cas. Pl. (2d Ed.) 291; Browne v. Knill, 2 Brod. & Bing. 395, Ames, Cas. Pl. 295; Ferguson v. Cappeau, 6 Har. & J. (Md.) 394, Whittier, Cas. Com. Law Pl. p. 301. A bill of lading containing exception for loss by "the dangers of the seas," held a qualified undertaking, and not a proviso, and does not support an allegation of a general undertaking to transport the goods safely and deliver them. See 6 Cyc. "Carriers," 514; Bridge v. Austin, 4 Mass. 115. The precise terms of the contract of shipment need not be set out, where the action is based on breach of the obligation of a common carrier in case. Atlanta & W. P. R. Co. v. Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039. See Ames, Cas. Pl. (2d Ed.) 295.

[52] Wills' Gould, Pl. (6th Ed.) 364, 365; 16 Columbia Law Rev. 527; Fike v. Stratton, 174 Ala. 541, 56 South. 929.

with the enacting clause of a statute, he who pleads the clause ought to plead the exception." But it is otherwise of a proviso; that is a subsequent and independent clause, which provides that in certain cases the statute shall not operate.

SAME—THE BREACH

119. The breach, in special assumpsit, is the violation of his contract by the defendant. Being an essential ground of the action, the declaration must state it expressly and with certainty, but less particularity is requisite when the facts constituting it lie more properly within the knowledge of the defendant.

As the breach of a contract is obviously an essential part of the cause of action, it cannot be omitted from the declaration.[53] The manner of its allegation must necessarily be governed by the nature of the promise or stipulation broken.[54] It should be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with its import and effect.[55] Though the ex-

[53] Garrett v. Hitchcock, 77 Ga. 427; Benden v. Manning, 2 N. H. 289.

[54] Withers v. Knox, 4 Ala. 138; Patterson v. Jones, 13 Ark. 69, 56 Am. Dec. 296.

[55] Wilcox v. Cohn, 5 Blatchf. 346, Fed. Cas. No. 17,640; Julland v. Burgott, 11 Johns. (N. Y.) 477; Karthaus v. Owings, 2 Gill & J. (Md.) 441; Gardner v. Armstrong, 31 Mo. 535. The words of the contract need not necessarily be used; but it is necessary that the words that are employed shall show clearly that the contract has been broken. In debt on a bond for instance, conditioned for the payment of an annual sum to "the wife" of the obligee, a breach assigned in nonpayment to "the obligee" is insufficient. Lunn v. Payne, 6 Taunt. 140. And see Moxley's Adm'rs v. Moxley, 2 Metc. (Ky.) 309; Atlantic Mut. Fire Ins. Co. v. Young, 38 N. H. 451, 75 Am. Dec. 200. If the breach assigned varies from the sense and substance of the contract, and is either more limited or larger than the promise, it will be insufficient. Thus, in the case of a promise to repair a fence, except on the west side thereof, a breach that the defendant did not repair the fence, without showing that the want of repair was in other parts of the fence than on the west, is bad on demurrer, though it may be aided by verdict. 1 Chit. Pl. 344; Com. Dig. "Pleader," C, 47. It is unsafe to unnecessarily narrow the breach. Thus, where the breach assigned was that the defendant had not used a farm in a husbandlike manner, "but on the contrary had committed waste," it was held that the plaintiff could not give evidence of the defendant's using the farm in an unhusbandlike manner, if such misconduct did not amount to waste, though on the former words of the assignment such evidence would have been admissible. 1 Chit. Pl. 345; Harris v. Mantle, 3 Term R. 307. The safest course is to state the breach first in the words of the contract, and then

press words of the contract will generally be sufficient, they may not always be so. The assignment must not be too general; it must show the subject-matter of complaint.[56] "And therefore it seems that a general averment quod non performavit, or that 'the defendant did not perform the said agreement,' is insufficient [on demurrer, though aided by verdict], because 'did not perform his agreement' might involve a question of law, and also because the object of pleading is to apprise the defendant of the cause of complaint, so that he may prepare his plea and defense and evidence in answer." [57] "And yet, as the defendant must know in what respects he has or has not performed his contract, any great particularity, it should seem, ought not on principle to be required." [58]

Where the matter to be performed by the defendant is contingent upon the happening of some other event, the breach should not be assigned in the words of the contract, but it should first be averred that such event has taken place; [59] and, if the contract is in the alternative or the disjunctive, it is obvious that the assignment should be that the defendant did not do one act or the other.[60]

The omission to assign a breach renders the declaration fatally defective, not only on demurrer, but on motion in arrest of judgment or writ of error; it cannot be aided by verdict.[61] But, if a breach is assigned, a defect in assigning it must be taken advantage of by demurrer, and will be cured by verdict.[62]

to superadd that the defendant, disregarding, did so and so, showing any particular breaches not narrowing or prejudicing the previous general assignment, so that the plaintiff retains the advantage of both; and no inconvenience can result from laying the breach as extensively as the contract, for the plaintiff may recover although he only prove a part of the breach as laid. 1 Chit. Pl. 346; Barnard v. Duthy, 5 Taunt. 27.

[56] Warn v. Bickford, 7 Price, 550; Baxter v. Jackson, 1 Sid. 178; Williams v. Staton, 5 Smedes & M. (Miss.) 347.

[57] 1 Chit. Pl. 343; Knight v. Keech, Skin. 344.

[58] 1 Chit. Pl. 343.

[59] Serra v. Wright, 6 Taunt. 45; McGehee v. Childress, 2 Stew. (Ala.) 506.

[60] As on a promise to deliver a horse by a particular day, "or" pay a sum of money; or on a promise that the defendant "and" his executors and assigns should repair. Wright v. Johnson, 1 Sid. 440; Aleberry v. Walby, 1 Strange, 231; Colt v. How, Cro. Eliz. 348. But, in assigning the breach of a contract to pay "or cause to be paid" a sum of money, it is sufficient to say that the defendant did not pay, omitting the disjunctive words, for he who causes to be paid pays. 1 Chit. Pl. 343; Aleberry v. Walby, 1 Strange, 231.

[61] 1 Chit. Pl. 347; Brickhead v. Archbishop of York, Hob. 198; Heard v. Baskerville, Hob. 232.

[62] Harmon v. Owden, 1 Salk. 140; Knight v. Keech, Skin. 344; Charnley v. Winstanley, 5 East, 270, 271; Weigley's Adm'rs v. Weir, 7 Serg. & R. (Pa.) 310; Horrel v. McAlexander, 3 Rand. (Va.) 94; Thomas v. Roosa, 7 Johns. (N. Y.) 461.

SAME—THE DAMAGES

120. The declaration should state the damages which arise as the direct and legal, and sometimes the actual, though not direct, consequences of the breach. Such damages may be general or special, and should be alleged according to their nature.

Wherever there has been a breach of contract, the plaintiff is necessarily entitled to some compensation in the way of damages, though it may often be difficult to ascertain the amount.[63] They must always be the direct or proximate result of the facts stated, and, as we shall hereafter see, it is a general rule of pleading that the declaration must allege them, whether they are the main object of the action or only an incident. The amount recoverable in special assumpsit is generally fixed by the terms or nature of the contract itself, under recognized rules of law, and may be only the contract price with interest, or it may include special or consequential damage in addition. The manner of stating the damage will depend upon its character, as general or special; but a sum large enough to cover the whole claim must be alleged, as it is a general rule that the recovery cannot exceed the demand,[64] though it may be less.[65]

[63] Com. Dig. "Pleader," C, 84.

[64] Tidd, Prac. (9th Ed.) 896; Tennant's Ex'r v. Gray, 5 Munf. (Va.) 494; Morton v. McClure, 22 Ill. 257; Jones v. Robinson, 8 Ark. 484; Harris v. Jaffray, 3 Har. & J. (Md.) 546; Holt v. Molony, 2 N. H. 322. The ad damnum clause will govern though a less amount be laid, under a videlicet, in the body of the declaration. Chicago & A. R. Co. v. O'Brien, 34 Ill. App. 155. When a larger sum is recovered than is claimed, the error may be cured by a remittitur of the excess, and this will generally be required. Louisville, E. & St. L. R. Co. v. Harlan, 31 Ill. App. 544; Sedgwick, Dam. § 578. Damages arising subsequent to the commencement of the action were not generally allowed at common law, the judgment being taken to refer to the situation of the parties at the time of suit brought, chiefly on the ground that these subsequent matters would cause surprise to the defendant. Com. Dig. "Damages," D; Markley v. Duncan, 1 Harp. (S. C.) 276. It is now the general rule, though its application is not free from difficulty, that such damages may be included in the recovery where they are the direct and material consequences of the breach, and so connected with it that they would not sustain an action by themselves. Fetter v. Beal, 1 Ld. Raym. 339; Pierce v. Woodward, 6 Pick. (Mass.) 206; Chamberlain v. Porter, 9 Minn. 260 (Gil. 244); Cooke v. England, 27 Md. 14, 92 Am. Dec. 618. See Warner v. Bacon, 8 Gray (Mass.) 397, 69 Am. Dec. 253, per Metcalf, J.; Jameson v. Board of Education, 78 W. Va. 612, 89 S. E. 255, L. R. A. 1916F, 926.

[65] Gardiner v. Cronsdale, 2 Burr. 904; Van Rensselaer's Ex'rs v. Platner's Ex'rs, 2 Johns. Cas. (N. Y.) 18; Sayer, Dam. 45. See Covington v. Lide's Ex'rs, 1 Bay (S. C.) 158.

ESSENTIAL ALLEGATIONS IN GENERAL ASSUMPSIT OR COMMON COUNTS

121. The essential allegations of a declaration in general assumpsit are:
- (a) A statement of the executed consideration, or quid pro quo, from which defendant's indebtedness arose.
- (b) A promise by the defendant to pay money.
- (c) A breach of the promise.
- (d) The damages.

122. In this form of action there are various general formulæ, called "the common counts." These counts are as follows:[66]
- (a) Indebitatus counts, which allege that the defendant was indebted to the plaintiff in a certain sum * * *, and that, being so indebted, he, in consideration thereof, promised the plaintiff to pay him the said sum on request. The grounds of indebtedness usually alleged are:
  - (1) For money paid by the plaintiff to the defendant's use.
  - (2) For money had and received by the defendant to the plaintiff's use.
  - (3) For money lent by the plaintiff to the defendant.
  - (4) For interest due by the defendant to the plaintiff.
  - (5) For money found to be due from the defendant to the plaintiff on account stated.
  - (6) For use and occupation of land.
  - (7) For board and lodging.
  - (8) For goods sold and delivered.
  - (9) For goods bargained and sold.
  - (10) For work, labor, and services.
  - (11) For work, labor, and materials.
  - (12) Any other circumstances on which a debt may be founded.

[66] The first five counts are called "money counts," because they relate to money transactions.

- (b) Value counts, which include:
  - (1) Quantum meruit, in which it is alleged that, in consideration that the plaintiff, at the request of the defendant, had done work * * * (stating the facts), he, the defendant, promised the plaintiff to pay him so much money as he therefor reasonably deserved to have; that the plaintiff deserved to have a certain sum, etc.
  - (2) Quantum valebant, in which it is alleged that the plaintiff sold and delivered to the defendant certain goods, or sold land; that the defendant, in consideration thereof, promised the plaintiff to pay him so much as the goods were reasonably worth; that they were reasonably worth a certain sum, etc.

The form of the declaration in general assumpsit is very simple, and needs scarcely any discussion. The chief difficulty is in determining when general assumpsit will lie. Instead of stating the concrete facts of the cause of action, the common counts state only general conclusions of law, as that defendant is indebted for money had and received, or some other vague reason. These general statements do not disclose the exact ground of the liability, or assist in presenting the issues of law and fact on which the case depends. They are convenient in avoiding the danger of a variance and concealing the real basis of the claim, but violate the true principles and policies of pleading.[67]

SAME—STATEMENT OF AN EXECUTED CONSIDERATION

123. The declaration must allege an existing indebtedness to the plaintiff, based on the receipt of value by him at his request.

Indebitatus Assumpsit

In stating the debt and its cause in these counts the plaintiff alleges that the defendant, on a certain day, at a certain place, was indebted to him in a certain sum, for a certain described cause or consideration furnished by the plaintiff, and stating the consideration to have been

[67] On the common counts, see Pike v. Zadig, 171 Cal. 273, 152 Pac. 923; 4 Cal. Law Rev. 352; Pomeroy, Code Remedies (4th Ed.) § 540; McLeod v. Powe & Smith, 12 Ala. 9. Whittier, Cas. Com. Law Pl. p. 330; Cory v. Board of Chosen Freeholders of Somerset County, 47 N. J. Law, 181 (plaintiff need not state the special circumstances).

furnished at the special instance and request of the defendant.[68] The time and place, while they should be alleged, are in general immaterial, except that a time must not be laid subsequent to the date when the cause of action accrued;[69] and with regard to place, if the action is brought in a court of inferior jurisdiction, the declaration should allege that the cause of action arose within such jurisdiction.[70] The statement of the sum claimed is also, generally, immaterial, except that enough must be laid to cover the actual amount. Another requisite is the statement of the cause of the debt, as well as the debt itself; and this is both for the information of the defendant, so that he may know what debt is sued on and what defense to make, and in order to identify the subject-matter of the action, so as to enable him to plead the recovery in bar of any subsequent action for the same debt.[71] As this form of action is founded upon contract, the cause or consideration of the debt should be stated as having taken place or as having been furnished at the special instance and request of the defendant.[72]

Quantum Meruit and Quantum Valebant Counts

In the quantum meruit count the plaintiff declares that, in consideration of his having performed some personal service for the defendant, at his request, the latter promised to pay him so much therefor as he

[68] Victors v. Davies, 12 Mees. & W. 758, Whittier, Cas. Com. Law Pl. p. 324; Lawes, Pl. § 420. A declaration in indebitatus assumpsit is good on general demurrer, though it states neither time, place, nor a request to pay. Keyser v. Shafer, 2 Cow. (N. Y.) 437. And consequently, in those states where special demurrers are abolished, it would seem that the allegation of some of these facts would be unnecessary, though it is certainly the better practice to allege them. McEwen v. Morey, 60 Ill. 32; McCrary v. Brown, 157 Ala. 518, 50 South. 402.

[69] See Langer v. Parish, 8 Serg. & R. (Pa.) 134, and cases cited.

[70] This is in addition to the statement of the county as a venue. Thornton v. Smith, 1 Wash. (Va.) 81; Wetmore v. Baker, 9 Johns. (N. Y.) 307; Briggs v. President, etc., of Nantucket Bank, 5 Mass. 96.

[71] Hibbert v. Courthope (K. B. 1694) Carthew, 276, Whittier, Cas. Com. Law Pl. p. 315. It is not necessary, however, to give a particular description of the work done or goods sold, etc. Lewis v. Culbertson, 11 Serg. & R. (Pa.) 49, 14 Am. Dec. 607. See Edwards v. Nichols, 3 Day (Conn.) 16, Fed. Cas. No. 4,296; Crane v. Grassman, 27 Mich. 443.

[72] McCrary v. Brown, 157 Ala. 518, 50 South. 402; 2 Enc. Pl. & Prac. 1004; Canfield v. Merrick, 11 Conn. 425, 429 (semble); Massachusetts Mut. Life Ins. Co. v. Green, 185 Mass. 306, 70 N. E. 202. But see Somerville v. Grim, 17 W. Va. 803, 810. The statement that money was "lent" implies that it was advanced at the request of the defendant. But this does not apply to money "paid." Victors v. Davies, 12 Mees. & W. 758, Whittier, Cas. Com. Law Pl. pp. 324, 325; Somerville v. Grim, 17 W. Va. 803, 810. So of count for goods sold and delivered. McEwen v. Morey, 60 Ill. 32.

reasonably deserved, and then states how much he deserves for such service.[73]

In the quantum valebant count the plaintiff declares that, in consideration of his having sold and delivered real or personal property to the defendant at his request, he promised to pay him so much as the goods or land were reasonably worth, and then states what the value was. There is no necessity for using the value or quantum counts rather than the indebitatus counts to recover for what one's goods or services are reasonably worth.[74]

In these counts it is not sufficient to state merely that the defendant was indebted to the plaintiff in a certain sum, and promised payment, but it must be shown what was the cause or subject-matter or nature of the debt; as that it was for work done, or goods sold, etc.[75] But it is not necessary to state the particular description of the work done, or goods sold, etc., for the only reason why the plaintiff is bound to show in what respect the defendant is indebted is that it may appear to the court that it is not a specialty.[76]

Account Stated

It is usual, in actions of general assumpsit, to add, to the counts above mentioned, a statement of a cause of action alleging that the defendant accounted with the plaintiff, and that, upon such accounting, the defendant was found to be indebted to the plaintiff in a certain sum.[77] As the consideration for the promise is here the statement of the account ascertaining and fixing the sums due which constitute the debt,

[73] Lawes, Pl. § 504. See Parcell v. McComber, 11 Neb. 209, 7 N. W. 529, 38 Am. Rep. 366; Lee v. Ashbrook, 14 Mo. 378, 55 Am. Dec. 110; Wadleigh v. Town of Sutton, 6 N. H. 15, 23 Am. Dec. 704.

[74] Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858, Whittier, Cas. Com. Law Pl. pp. 318, 319, note; Viles v. Barre & M. Traction & Power Co., 79 Vt. 311, 320, 65 Atl. 104. Recovery of the reasonable value of goods sold or services rendered may be had under an indebitatus count, so that neither a quantum meruit nor a quantum valebat count is ever necessary. Norris v. School Dist. No. 1 in Windsor, 12 Me. 293, 28 Am. Dec. 182; Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858.

[75] 2 Saund. 350, note 2; Rooke v. Rooke, Cro. Jac. 245; Beauchamp v. Bosworth, 3 Bibb (Ky.) 115; Chandler v. State, 5 Har. & J. (Md.) 284; Maury v. Olive, 2 Stew. (Ala.) 472.

[76] 1 Chit. Pl. 353; Hibbert v. Courthope, Carth. 276, Whittier, Cas. Com. Law Pl. p. 315; Ambrose v. Roe, Skin. 217, 218; Story v. Atkins, 2 Ld. Raym. 1429; Lewis v. Culbertson, 11 Serg. & R. (Pa.) 49, 14 Am. Dec. 607.

[77] Milward v. Ingram, 2 Mod. 44; Trueman v. Hurst, 1 Term R. 42; Peacock v. Harris, 10 East. 104; Knowles v. Michel, 13 East. 249; Stallings v. Gottschalk, 77 Md. 429, 26 Atl. 524. Recovery on this count can be only when a certain and fixed sum is admitted to be due. See Richey v. Hathaway, 149 Pa. 207, 24 Atl. 191; Warren v. Caryl, 61 Vt. 331, 17 Atl. 741.

and not the existence of the debt itself, the original cause of the indebtedness need not be stated.[78]

SAME—THE PROMISE

124. The promise of the defendant, though it is an implied one, must always be alleged.

It is not intended by this that there must be a detailed statement of the defendant's contract, but a brief allegation that the defendant "promised" or "agreed" to pay the sum owed or value claimed. This much is held essential to a proper statement of the cause of action, as the declaration might otherwise show the alleged consideration to be merely a voluntary or gratuitous act on the part of the plaintiff, for which there could be no recovery.[79] It does not make any difference whether the defendant ever made any such promise, nor is it necessary to prove it. All that is necessary to prove is a debt, and the law implies a promise. But some courts will reverse a case on this technical matter.[80]

SAME—THE BREACH

125. The breach of the promise in general assumpsit is the neglect and refusal of the defendant to perform it, that is, to pay. As in special assumpsit, it is an essential part of the cause of action, and must in all cases be stated.

[78] Millward v. Ingram, supra; Fitch v. Leitch, 11 Leigh (Va.) 471; Montgomerie v. Ivers, 17 Johns. (N. Y.) 38; Hoyt v. Wilkinson, 10 Pick. (Mass.) 31. And see Gilson v. Stewart, 7 Watts (Pa.) 100; Cross v. Moore, 23 Vt. 482.

[79] Booth v. Farmers' & Mechanics' Nat. Bank of Rochester, 1 Thomp. & C. (N. Y.) 49, per Mullin, P. J.; Muldrow v. Tappan, 6 Mo. 276; Kingsley v. Bill, 9 Mass. 199; Candler v. Rossiter, 10 Wend. (N. Y.) 487; Cooper v. Landon, 102 Mass. 58. But see Clark v. Reed, 12 Smedes & M. (Miss.) 554. The word "promised" is not necessary if an equivalent be used, as "undertook" or "agreed." See Corbett v. Packington, 6 Barn. & C. 268; Shaw v. Redmond, 11 Serg. & R. (Pa.) 27; Sexton v. Holmes, 3 Munf. (Va.) 568; Wingo v. Brown, 12 Rich. (S. C.) 279; City of Newport News v. Potter, 122 Fed. 321, 58 C. C. A. 483, Whittier, Cas. Com. Law Pl. p. 326.

[80] Wald v. Dixon, 55 W. Va. 191, 46 S. E. 918, Whittier, Cas. Com. Law Pl. p. 333. Coffin v. Hall, 106 Me. 120, 75 Atl. 385; Bannister v. Victoria Coal & Coke Co., 63 W. Va. 502, 61 S. E. 338; Danser v. Mallonee, 77 W. Va. 26, 86 S. E. 895. But see Potomac Laundry Co. v. Miller, 26 App. D. C. 230 (1905, rule of court). Contra, Wheeler v. Wilson, 57 Vt. 157. In actions of indebitatus assumpsit the law invokes the fiction of an implied promise on equitable grounds to promote the ends of justice. Garmire v. McDonough & Co., 197 Ill. App. 527.

The neglect or refusal of the defendant to fulfill his promise, whether express or implied, is always a necessary allegation in the declaration, as it is essential to the plaintiff's right to sue. In form it is usually a brief statement that the defendant has neglected and refused to pay, and still neglects and refuses so to do. This is the common breach usually assigned in actions upon the common counts, and a separate breach is always assigned to each count, as each is a separate and complete statement of a cause of action.[81]

SAME—THE DAMAGES

126. The declaration must allege the damages directly resulting from the breach by the defendant, and must lay them high enough to cover the actual demand.

The measure of recovery in this action will obviously be the amount of the indebtedness due, or the reasonable worth and value of the services rendered or goods or land sold, where no sum was agreed upon; and the damages must always be laid high enough to cover all that the plaintiff expects to prove, as his recovery will be limited to the amount stated.[82]

127. FORMS OF DECLARATION IN ASSUMPSIT, SPECIAL AND GENERAL

Form of Declaration in Special Assumpsit [83]

(Caption.) A., plaintiff, by B., his attorney, complains of C., defendant, of a plea of trespass on the case upon promises.

For that whereas *(this is inducement)*, on the ——— day of ———, A. D. 18—, at ———, in the county aforesaid, the said plaintiff, at the request of the said defendant, bargained with the defendant to buy of him, and the defendant then and there sold to the plaintiff, a large quantity of corn, to wit, one thousand bushels, at the price of sixty

[81] Yong Den v. Hitchcock, 11 Hawaii, 270, Whittier, Cas. Com. Law Pl. p. 328; Taft v. Brewster, 9 Johns. (N. Y.) 335; Holman v. Criswell, 13 Tex. 38. See Ames, Cas. Pl. (2d Ed.) 320.

[82] Liquidated damages for breach of special contract cannot be recovered under the common counts. Butterfield v. Seligman, 17 Mich. 95, Whittier, Cas. Com. Law Pl. p. 260. Compare Sprague v. Morgan, 7 Ala. 952 (semble, contra).

[83] Forms of declarations in assumpsit are set out in Moran v. Dennis, 184 Ill. App. 272; Phelps v. Hughes, 180 Ill. App. 363; Rider v. Robbins, 13 Mass. 284; Dillon v. Craig, 168 Mich. 216, 132 N. W. 1041; Burton v. Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

cents for each bushel thereof, to be delivered by the defendant to the plaintiff, on or before the ——— day of ———, A. D. 18—, at the plaintiff's elevator, at the place aforesaid, and to be paid for by the plaintiff to the defendant on the delivery thereof, as aforesaid. And *(this is averment of consideration)* in consideration thereof, and that the plaintiff had promised the defendant, at his request, to accept and receive the said corn, and to pay him for the same at the price aforesaid, he, the defendant *(this is the averment of the defendant's promise)*, on the day first aforesaid, in the county aforesaid, promised the plaintiff to deliver the said corn to him as aforesaid. And *(this is the averment of performance or readiness to perform by plaintiff and breach by defendant)*, although the time for the delivery of the said corn has long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said corn, and to pay for the same, at the price aforesaid, to wit, sixty cents for each bushel thereof. Yet the defendant, although requested, did not, nor would, within the time aforesaid or afterwards, deliver the said corn, or any part thereof, to the plaintiff at his elevator aforesaid, or elsewhere, but refuses so to do. Whereby *(this is the averment of damage)* the plaintiff has been deprived of divers gains and profits which would otherwise have accrued to him from the delivery of the said corn to him as aforesaid, amounting to the sum of ——— dollars, and therefore he brings his suit.

———, Plaintiff's Attorney.

Forms of Declaration in General Assumpsit

(The consolidated common counts, indebitatus assumpsit.)

(Goods sold and delivered.) [84]

For that, whereas, the said C. D. heretofore, to wit, on the ——— day of ———, A. D. 18—, at ———, in the county of ———, was indebted to the said A. B. in the sum of ——— dollars, for divers goods, wares and merchandises by the said A. B. before that time sold and delivered to the said C. D. at his special instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to

[84] Atwood v. Lucas, 53 Me. 508, 89 Am. Dec. 713, Whittier, Cas. Com. Law Pl. p. 816. In an action for goods sold and delivered where recovery is based on the common counts, the evidence must show a delivery of the goods alleged to have been sold. Reeb v. Bronson, 196 Ill. App. 518. A count for goods bargained and sold will lie where title has passed to the defendant without delivery. Acme Food Co. v. Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807; Seckel v. Scott, 66 Ill. 106. See, also, 1 Chit. Pl. (16th Am. Ed.) pp. 345, 347.

pay him the said sum of money when he, the said C. D., should be thereto afterwards requested.

(Work and labor.)

And whereas, also, the said C. D. afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of ——— dollars, for work and labor, care and diligence by the said A. B. before that time done, performed and bestowed in and about the business of the said C. D., and for the said C. D., at his like instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D. should be thereto afterwards requested.

(Money lent.)

And whereas, also, the said C. D. afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of ——— dollars, for so much money by the said A. B. before that time lent and advanced to the said C. D., at his like instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested.

(Money paid.)

And whereas, also, the said C. D. afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of ——— dollars, for so much money by the said A. B. before that time paid, laid out, and expended to and for the use of the said C. D., at his like instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested.

(Money had and received.)

And whereas, also, the said C. D. afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of ——— dollars, for so much money by the said C. D. before that time had and received to and for the use of the said A. B.; and, being so indebted, he, the said C. D.,

in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested.

(Account stated.)

And whereas, also, the said C. D. afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, accounted with the said A. B. of and concerning divers other sums of money from the said C. D. to the said A. B. before that time due and owing and then in arrear and unpaid; and upon that account the said C. D. was then and there found to be in arrear and indebted to the said A. B. in the farther sum of ——— dollars; and being so found in arrear and indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested.

("Common breach.")

Yet the said C. D., not regarding his said several promises and undertakings, but contriving and fraudulently intending, craftily and subtilly, to deceive and defraud the said A. B. in this behalf, hath not yet paid the said several sums of money, or any part thereof, to the said A. B., although oftentimes afterwards requested; but the said C. D. to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of ——— dollars; and therefore he brings his suit, etc.

———, Attorney for Plaintiff.

Form of Quantum Meruit Assumpsit Count

For that, whereas, the defendant heretofore, to wit, on the ——— day of ———, in the year 19—, at the county aforesaid, in consideration that the plaintiff, at the request of the defendant, had done certain labor and services for him, etc. (stating the subject-matter according to the fact, and conclude as follows):

The defendant promised the plaintiff to pay him, on request, so much money as he therefor reasonably deserved to have, and the plaintiff avers that he then and there reasonably deserved to have therefor the sum of ——— dollars, whereof the defendant then and there had notice.

(Conclude with the "common breach," as above.)

Form of Quantum Valebant Count in Assumpsit

(Place first the indebitatus count.)

And whereas, also, on the day last above mentioned, at the county aforesaid, in consideration that the plaintiff, at the request of the defendant, had before that time sold and delivered (or bargained and sold, as the case may be) to the defendant, divers other goods, chattels, and effects, the defendant promised the plaintiff to pay him, when requested, so much money as the last mentioned goods, chattels, and effects, at the time of the sale and delivery (or bargain and sale, as the case may be) thereof were reasonably worth, and the plaintiff avers that the same were then and there reasonably worth the sum of ——— dollars, whereof the defendant, on the day last aforesaid, there had notice.

(Conclude with the "common breach," as in indebitatus count.)

NECESSARY ALLEGATIONS IN DEBT

128. The necessary allegations of the declarations are:

(a) In debt on simple contract:
  (1) A statement of the debt and quid pro quo.
  (2) The breach.
  (3) The damages.

(b) In debt on specialty:
  (1) A statement of the execution of the specialty.
  (2) Nonpayment by the defendant.
  (3) The damages.

(c) In debt on judgments:
  (1) A statement of the judgment.
  (2) Nonpayment or nonsatisfaction.
  (3) The damages.

(d) In debt on statutes:
  (1) A statement of the act or omission in violation of the statute.
  (2) Nonpayment of the debt or penalty.
  (3) The damages.

SAME—THE STATEMENT

129. If on simple contract, the declaration must allege the quid pro quo; that is, the receipt of value from which the debt arises.

130. If on specialty, the deed or instrument must be stated, either in precise words or according to its substance and legal effect. The consideration of the instrument need not be alleged, unless performance of it is a condition precedent.

131. If on a judgment, it must be described with sufficient accuracy and detail fully to identify it, and, if the court is not a court of record, its jurisdiction over the parties and subject-matter must be averred. The proceedings in the action prior to the judgment need not be shown.

132. If on a statute, the act or offense charged must be shown to be within its provisions, and the defendant excluded from the operation of any exception in its enacting clause. An exception in the body of the act is matter of defense only.

The mode of stating the cause of action in debt varies, according to the source or basis of the obligation, which may, as we have seen, be either a simple contract, a specialty, a judgment, or a statute.

On Simple Contracts

Where the action is brought on a simple contract debt, the declaration must show the consideration on which such contract was founded with exactitude, and it must appear that there is a liability established either by law or by an express agreement of the defendant. The form of the statement should be that the defendant agreed to pay the debt, and not that he promised; the basis of the action being the receipt of value and the duty arising from an executed consideration, and not, as in assumpsit, from the promise.[85]

The indebitatus count in debt differs from those in assumpsit; for, although it states that the defendant was indebted to the plaintiff in a named sum of money "for goods sold," etc., precisely as in assumpsit, and it is not necessary to set forth the nature or particulars of the transaction in detail, yet no promise should be stated, as in assumpsit. The quantum meruit and quantum valebant counts were formerly used in debt, and resembled those in assumpsit, except the words "agreed to pay" were used, instead of "promised to pay."

On Specialties

In debt on sealed instruments the declaration usually states the execution of the specialty, and makes profert of it,[86] without any men-

[85] McGinnity v. Laguerenne, 5 Gilman (Ill.) 101, Whittier, Cas. Com. Law Pl. p. 374.

[86] Cleveland v. Rodgers, 1 A. K. Marsh. (Ky.) 193; Bender v. Sampson, 11 Mass. 42; Scott v. Curd, Hardin (Ky.) 69.

tion of the consideration on which the contract was founded. It is necessary, however, where performance of the consideration by the plaintiff is a condition precedent to his right to sue, to allege fulfillment of the conditions to defendant's liability.[87] The statement of the specialty must be a correct description of it, as to time, parties, etc.; and it must appear, either by express allegation or by the use of descriptive words importing the fact, that it was under seal.[88] If not set out verbatim, it must be stated according to its legal operation and effect.[89] It must appear that the contract was by deed, and it is a general rule, as we shall hereafter see, that profert of the deed must be made, unless it is in possession of the adverse party or lost or destroyed.[90]

In an action upon a penal bond, it was formerly the practice for plaintiff to set out only the defendant's obligation to pay the penalty, without mentioning the condition subsequent which it was the object of the bond to enforce. The defendant would then crave oyer of the condition and plead performance, and the defendant would reply, assigning breaches of the condition.[91] Upon a penal bond the real cause of action is the breach of the condition subsequent. It is in effect a covenant to perform the condition of the bond. The action is only in form for a debt, which is recited by way of penalty, and in reality is an action for damages for breach of contract, and only the actual damages can now be collected.

By statute the plaintiff is usually required to assign the breaches complained of in his declaration, and the defendant may then meet them in his pleas. Although judgment may still be entered for the penalty of the bond, this stands merely as security for the damages caused by the breach of condition as found by the jury.[92]

[87] See Whitney v. Spencer, 4 Cow. (N. Y.) 39; Caldwell v. Richmond, 64 Ill. 80; Nash v. Nash, 16 Ill. 79; United States Fidelity & Guaranty Co. v. District Grand Lodge No. 27 of Grand United Order of Odd Fellows, 58 Fla. 373, 50 South. 952; Nottingham v. Ackiss, 110 Va. 810, 67 S. E. 351 (1910, conditional note).

[88] Moore v. Jones, 2 Ld. Raym. 1536; Van Santwood v. Sandford, 12 Johns. (N. Y.) 197; Barrett v. Carden, 65 Vt. 431, 26 Atl. 530, 36 Am. St. Rep. 876. See Kidd v. Beckley, 64 W. Va. 80, 60 S. E. 1089 (making and signing need not be alleged).

[89] Scott v. Lelber, 2 Wend. (N. Y.) 479; Lent v. Padelford, 10 Mass. 235, 6 Am. Dec. 119; White v. Thomas, 39 Ill. 227; Barrett v. Carden, supra.

[90] Bender v. Sampson, 11 Mass. 42. And see Conwell v. Clifford, 45 Ind. 392.

[91] Reynolds v. Hurst, 18 W. Va. 648, Whittier, Cas. Com. Law Pl. p. 377; Morris Canal & Banking Co. v. Van Voorst, 20 N. J. Law, 167, Whittier, Cas. Com. Law Pl. pp. 388, 389, note.

[92] Patrick v. Rucker, 19 Ill. 428, 439 (condition must be set out and breach es assigned).

On Judgments

If the action is on a judgment, no statement of the cause of action on which the record was founded is necessary.[93] The statement should consist of a description of the judgment, which may be in a concise form, and need not state in full the previous proceedings in the action in which it was obtained.[94] The particular form which should be used may be a brief statement that, at a certain time and in a certain court of a given county and state, an action was duly brought, and that in such action a judgment was duly rendered in favor of the plaintiff therein for a certain sum; and, while it has been held unnecessary to allege that such judgment is still in force, it would seem the better practice to do so.[95] If the judgment sued on is a domestic one, rendered by a court of the state in which it is sought to be enforced, and by a court of record, it is not essential to allege that such court had jurisdiction, the statement that it was a court of record being sufficient; but if rendered by an inferior court, as that of a justice of the peace, it should be averred that the court had jurisdiction both of the parties and the subject-matter. Where the judgment is a foreign one, rendered in a court of a foreign country, the allegation of such jurisdiction is always necessary, but not where judgment is rendered by a court of general jurisdiction in a sister state,[96] and, in declaring upon a justice's judgment of a sister state, the statute conferring jurisdiction upon the justice must also be pleaded.[97]

On Statutes

In debt on a statute at the suit of the party aggrieved, or by a common informer, the statement should embrace all the material facts to show that the offense or act charged against the defendant was within its provisions. All circumstances necessary to support the action must be alleged, but it is sufficient if these be substantially set forth, and the

[93] Green v. Ovington, 16 Johns. (N. Y.) 55; Biddle v. Wilkins, 1 Pet. (U. S.) 686, 7 L. Ed. 315.

[94] See Denison v. Williams, 4 Conn. 402.

[95] A declaration on judgment should describe the court by which it was rendered, the place where it was held, the names of the parties, the date at which it was entered, and the amount of the judgment. 23 Cyc. p. 1514, note 43.

[96] Rae v. Hulbert, 17 Ill. 572 (sister state); Mink v. Shaffer, 124 Pa. 280, 290, 16 Atl. 805. See Henry v. Allen, 82 Tex. 35, 17 S. W. 515; Pennington v. Gibson, 16 How. 65, 81, 14 L. Ed. 847.

[97] Sheldon v. Hopkins, 7 Wend. (N. Y.) 435, Whittier, Cas. Com. Law Pl. p. 383. See, also, Hubbard v. Davis, 1 Aiken (Vt.) 296; Stiles v. Stewart, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142; Spooner v. Warner, 2 Ill. App. 240.

precise words of the statute need not be used.[98] If there is an exception or proviso incorporated in the enacting clause of the statute and part of it, the plaintiff must show that the defendant is not within the exception; but, if the exception is contained in a subsequent clause, it is a matter of defense only.[99] In framing the declaration, it is necessary to conclude with the words, "against the form of the statute" or "statutes," in order to show, on the face of the record, that the action is founded on the statute.[1]

SAME—THE BREACH

133. The statement of the breach in all actions of debt is the nonpayment by the defendant of the debt alleged; and the allegation is an essential one. By statute breach of the conditions subsequent of a penal bond must be assigned.

As this action is only sustainable for the recovery of a debt, the breach is necessarily confined to a statement of the nonpayment of the money previously alleged to be payable; and such breach is nearly similar, whether the action be on simple contract, specialty, record, or statute.[2] It is an allegation that the defendant, though often requested so to do, has not paid to the plaintiff the sum demanded, but has wholly neglected and refused so to do.[3] If the action be on a bond, whether a common money bond or a special bond for the performance of covenants, within the statute,[4] the penalty is the debt at law, and the breach

[98] A declaration to recover damages given by a special statute should embrace all the material elements of the statute. Henniker v. Contoocook Val. R. Co., 29 N. H. 146. See Hall v. Bumstead, 20 Pick. (Mass.) 2; Berry v. Stinson, 23 Me. 140; Brown v. Harmon, 21 Barb. (N. Y.) 508; Rogers v. Brooks, 99 Ala. 31, 11 South. 753; Gunter v. Dale County, 44 Ala. 630.

[99] Jones v. Axen, 1 Ld. Raym. 120; Hart v. Cleis, 8 Johns. (N. Y.) 41; Smith v. U. S., 1 Gall. 261, Fed. Cas. No. 13,122; Smith v. Moore, 6 Greenl. (Me.) 278, and cases there cited; Whitecraft v. Vanderver, 12 Ill. 235, Whittier, Cas. Com. Law Pl. pp. 384, 385, note.

[1] Wells v. Iggulden, 5 Dowl. & R. 13; Town of Barkhamsted v. Parsons, 3 Conn. 1; Cross v. U. S., 1 Gall. 26, Fed. Cas. No. 3,434; Peabody v. Hayt, 10 Mass. 36; Penley v. Whitney, 48 Me. 351.

[2] See Gale v. O'Bryan, 12 Johns. (N. Y.) 216; Rynders v. Coxie, 80 Ill. App. 629.

[3] The allegation of a demand is necessary, though the omission is cured by verdict. Lusk v. Cassell, 25 Ill. 209.

[4] St. 8 & 9 Wm. III. c. 11, which has been substantially adopted into the common law of this country. Reynolds v. Hurst, 18 W. Va. 648, Whittier, Cas. Com. Law Pl. p. 377; Morris Canal & Banking Co. v. Van Voorst, 20 N. J. Law, 167, 170, Whittier, Cas. Com. Law Pl. p. 380.

by nonpayment should therefore be alleged in the above form; but, if the bond have a condition within the statute, the breaches of such condition should be assigned.[5] Real conditions subsequent need not be negatived in the declaration.[6]

SAME—THE DAMAGES

134. The damages in this action are only incidental, and not the principal object of the suit; but a nominal sum should always be alleged.

By the term "damages" is here meant a demand additional to and independent of the sum or debt claimed, which, if for the detention of the sum expressly agreed to be paid, as for interest, should be for more than a nominal sum, and for sufficient to cover the amount of the demand.[7] The damages in this action are usually nominal only, for a small sum. Though they are only an incident to the main object of the suit, some damage must always be alleged for the detention of the debt.

In an action on a penal bond, the damages assessed for breach of condition subsequent are not included in the judgment, and will be greater than those laid for the detention of the debt.[8]

135. FORMS OF DECLARATION IN DEBT

Declaration in Debt for Goods Sold and Delivered

In the Common Pleas.

The 12th day of June, 1845.

Somersetshire, to wit. Jonathan Gregory (the plaintiff in this suit), by Abraham Elliot, his attorney, complains of James Johnson (the defendant in this suit), who has been summoned to answer the said plaintiff in an action of debt, and he demands of the said defendant the sum of £500, which he owes to and unjustly detains from the said plaintiff.

For that, whereas, the said defendant heretofore, to wit, on the first day of December, in the year of our Lord 1844, was indebted in £500, for goods then sold and delivered by the said plaintiff to the said defendant, at his request, to be paid by the said defendant to the said plaintiff on request. Whereby, and by reason of the nonpayment thereof, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of £500, above demanded. Yet the said defendant, although often requested, hath not paid the said sum of £500, above demanded, or any part thereof, to the damage of the said plaintiff of £50, and therefore he brings his suit, etc.

(Warren Law Studies, 583.)

Declaration in Debt on Common Money Bond

For that, whereas, the said defendant, on the ——— day of ———, A. D. 19—, at ———, in the county aforesaid, by this certain writing obligatory, sealed with his seal, and by him delivered to the plaintiff, and now shown to the court here, acknowledged himself to be held and firmly bound to the said plaintiff in the sum of ——— dollars, to be paid by the plaintiff. Yet the defendant, although often requested, hath not as yet paid the said sum of ——— dollars, or any part thereof, to the plaintiff; but so to do hath hitherto wholly refused, and still refuses.

Declaration in Debt on Bond with Conditions

For that, whereas, the said defendants, on the ——— day of ———, A. D. 19—, at ———, in the county aforesaid, by their certain writing obligatory, sealed with their seals, and by them delivered to the plaintiff, and now shown to the court here, acknowledged themselves to be held and firmly bound to the plaintiff in the sum of ——— dollars; which said bond was and is subject to a condition thereunder written, as follows, to wit: That if the said C. D. should pay to the plaintiff the sum of ——— dollars, with interest thereon from the ——— day of ———, 19—, then the said obligation should be void; otherwise, it should remain in full force and virtue. And the plaintiff avers that the said C. D. hath not paid to him the said sum of ——— dollars, with interest from the ——— day of ———, A. D. 19—, in accordance with said condition, although often requested so to do, and thereby an action hath accrued to the plaintiff to demand of the defendants the said sum of ——— dollars *(the penalty of the bond)*. Yet the defendants, although often requested, have not paid the said sum of ——— dollars, or any part thereof, to the plaintiff, but so to do have hitherto wholly refused and still refuse.

[5] Patrick v. Rucker, 19 Ill. 423, 439. Burden of assigning and proving breaches of the conditions of a penal bond is now thrown on the plaintiff. Barrett v. Douglas Park Bldg. Ass'n, 75 Ill. App. 98. Compare Douglas v. Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583. See 2 Williston, Cont. p. 1287, § 667.

[6] Lesher v. United States Fidelity & Guaranty Co., 239 Ill. 502, 508, 88 N. E. 208; 2 Williston, Cont. § 607.

[7] Allen v. Smith, 12 N. J. Law, 159, Whittier, Cas. Com. Law Pl. p. 416. See Russell v. City of Chicago, 22 Ill. 283, 288; Brown v. Smith, 24 Ill. 196; Linder v. Monroe's Ex'rs, 33 Ill. 388; Maguire v. Town of Xenia, 54 Ill. 299.

[8] Allen v. Smith, supra. Compare Stephens v. Sweeney, 2 Gilman (Ill.) 375, and cases cited in preceding note.

The statement of the condition, and its breach, will vary, of course, according to the condition; the condition in the above bond being merely to pay money, whereas a bond may be conditioned to perform any other act. The condition should be stated clearly and accurately, and its breach alleged.

Declaration in Debt on a Judgment

For that, whereas, the said plaintiff, by the consideration and judgment of the ——— court of ——— county, in the state of ——— *(describe the court accurately)*, on the ——— day of ———, A. D. 19—, recovered a judgment against the said defendant for the sum of ——— dollars debt, ——— dollars damages, and ——— dollars costs of suit *(here describe the judgment accurately)*, as by the record thereof in the said court appears,[9] and which said debt, damages, and costs amount to a large sum, to wit, to the sum of ——— dollars. And the plaintiff further says that the said judgment is in full force, and not reversed, annulled, or satisfied. And thereby an action has accrued to the plaintiff to demand and have from the defendant the amount of the said judgment, to wit, the sum of ——— dollars. Yet the defendant, although often requested, hath not paid the said sum, or any part thereof, to the plaintiff, but so to do hath wholly refused and still refuses.

Declaration in Debt on a Statute to Recover a Penalty or Forfeiture

For that, whereas, the said defendant on the ——— day of ———, A. D. 19—, at ———, in the county aforesaid, did ——— *(here allege the acts done by the defendant, using the words of the statute, so as to bring the case strictly within it)*, contrary to the form of the statute in such case made and provided. Whereby, and by force of the said statute, an action has accrued to the plaintiff to demand and have of the defendant the sum of ——— dollars. Yet the defendant, though often requested, hath not paid the said sum, or any part thereof, to the plaintiff, but so to do hath hitherto wholly refused and still refuses.

NECESSARY ALLEGATIONS IN COVENANT

135. The essential allegations of the declaration in covenant are:

(a) The execution of the covenant.
(b) The promise.
(c) The performance of conditions precedent.
(d) The defendant's breach.
(e) The damages.

[9] If the judgment was rendered in a sister state, add at this point the words, "and a copy of which record, duly authenticated, the plaintiff now here in court produces." 1 Shinn, Pl. and Prac. 552.

SAME—THE EXECUTION OF THE COVENANT AND ITS TERMS

137. The declaration should state the deed or contract, or such portions as are essential to the cause of action, and allege that it was under seal and was delivered. The promise may be alleged according to the express words or their legal operation and effect.

138. The consideration of the specialty need not be stated, unless performance of it was a condition precedent. In the latter case it must be described, and performance alleged or nonperformance excused.

Most of the rules to be observed in framing a declaration in assumpsit and debt equally apply in framing the declaration in covenant. As in all cases of written instruments, the deed or contract may be set out in its express words, or stated according to its legal operation and effect.[10] Only such portions need be mentioned as are essential to the cause of action,[11] and covenants which are not expressly mentioned, but are implied from those stated or from the general tenor of the instrument, should be set forth in the declaration in the same manner as if they were expressed.[12] The deed or contract should also be stated as being under seal,[13] and its delivery should be alleged,[14] and profert made, or an excuse shown for the omission.[15] As the seal dispenses with the necessity for a consideration, a statement of the consideration is generally unnecessary; but, when the performance of the consideration constitutes a condition precedent to the right of the

[10] Lent v. Padelford, 10 Mass. 230, 6 Am. Dec. 119; Salinas v. Wright, 11 Tex. 572; Scott v. Leiber, 2 Wend. (N. Y.) 479; Davis v. Shoemaker, 1 Rawle (Pa.) 135; Higgins v. Bogan, 4 Har. (Del.) 330; Gates v. Caldwell, 7 Mass. 68; post, p. 484, and cases there cited.

[11] Sandford v. Halsey, 2 Denio (N. Y.) 235. And see Eddy v. Chace, 140 Mass. 471, 5 N. E. 306.

[12] Grannis v. Clark, 8 Cow. (N. Y.) 36.

[13] Moore v. Jones, 2 Ld. Raym. 1536; Bilderback v. Pouner, 7 N. J. Law, 64. See John W. Waldeck Co. v. Emmart, 127 Md. 470, 96 Atl. 634. Where declaration did not allege that contract sued on was under seal, the action was one of assumpsit and not covenant. Kerr, Evans & Co. v. Co-operative Improvement Co., 129 Md. 460, 99 Atl. 708.

[14] Perkins v. Reeds, 8 Mo. 33.

[15] Read v. Brookman, 3 Term R. 151; Dugger v. Oglesby, 99 Ill. 405.

plaintiff to bring the action, it should be stated as in assumpsit, and performance alleged or excused as in that action.[16]

SAME—THE BREACH

139. The breach of a covenant may be stated according to its substance, or in the express words of the covenant. The declaration must show the covenant broken and a right of action in the plaintiff.

The breach in this action is the violation by the defendant of the terms of his covenant; and the form in which it is to be assigned may be by a general assignment, if enough will thereby appear on the face of the statement to show a violation and a resulting cause of action in the plaintiff.[17] It may also be assigned according to the substance, instead of the letter, of the covenant;[18] and the assignment may be in the alternative, where it is necessary to thus conform to the covenant itself. There may be several breaches in the same declaration, and, if one be well assigned, the declaration cannot be held ill on general demurrer.[19]

[16] Homer v. Ashford, 3 Bing. 322; Goodwin v. Lynn, 4 Wash. C. C. 714, Fed. Cas. No. 5,553; Knox v. Rinehart, 9 Serg. & R. (Pa.) 45; Harrison v. Taylor, 3 A. K. Marsh. (Ky.) 168; Gardiner v. Corson, 15 Mass. 503; ante, p. 247. In the case of dependent covenants, performance or a readiness to perform must always be averred. See Livingston v. Anderson, 30 Fla. 117, 11 South. 270. Where the covenant is definite in its terms and the act to be done by the plaintiff is purely a matter of fact, it is sufficient to aver performance in general terms, as in case of the payment of money. But where the covenant is indefinite, or in the alternative, or involves a question of law, the general averment is not sufficient. Byrne v. McNulty, 2 Gilman (Ill.) 424.

[17] Randel v. President, etc., of Chesapeake & D. Canal, 1 Har. (Del.) 151; Camp v. Douglas, 10 Iowa, 586. Notice must be averred if the breach is mainly in the knowledge of the plaintiff. Huff v. Campbell, 1 Stew. (Ala.) 543. And see Foster v. Woodward, 141 Mass. 160, 6 N. E. 853. If the action is for a breach of covenants of warranty or seisin, an eviction must be alleged, though no particular formality is required. Day v. Chism, 10 Wheat. (U. S.) 449, 6 L. Ed. 363; Knepper v. Kurtz, 58 Pa. 480; Bleddsoe's Ex'r v. Wadsworth, 21 Wend. (N. Y.) 120. See, also, Hamilton v. Lusk, 88 Ga. 520, 15 S. E. 10; Cheney v. Straube, 35 Neb. 521, 53 N. W. 479.

[18] Potter v. Bacon, 2 Wend. (N. Y.) 583. See Griffin v. Reynolds, 17 Ala. 198; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432. While, in an action for breach of a covenant, the covenant may be set out in its own words, the breach must be assigned in accordance with its meaning. Chicago, M. & St. P. R. Co. v. Hoyt, 37 Ill. App. 64. See Jobbins v. Kendall Mfg. Co. (U. S. D. C. R. I.) 196 Fed. 216.

[19] Com. Dig. tit. "Pleader," 2, V, 2, 3; McCoy v. Hill, 2 Litt. (Ky.) 374. See Thome v. Haley, 1 Dana (Ky.) 268; Taylor v. Pope, 3 Ala. 190.

SAME—THE DAMAGES

140. The damages, which must be the legal and natural consequences of the breach, are the principal object of the action, and must be laid high enough to cover the actual demand.

The amount recoverable in this action is the damage caused by the breach, and the damages may either depend upon the opinion of the jury, in which case they are said to be unliquidated, or they may be a specific sum stipulated for in the contract.[20] In either case the amount alleged must be large enough to cover the sum intended to be proved; for the plaintiff cannot recover more than his declaration calls for.

141. FORM OF DECLARATION IN COVENANT

Declaration in Covenant on an Indenture of Lease for Not Repairing

(Commence as in previous forms.)

For that, whereas, on the ——— day of ———, A. D. 19—, at ———, in the county aforesaid, by a certain indenture then and there made between the said plaintiff of the one part and the said defendant of the other part, and delivered by each to the other, one part of which said indenture, sealed with the seal of the defendant, the plaintiff now brings here into court, the plaintiff, for the consideration therein mentioned, did demise and lease unto the defendant a certain messuage or tenement and other premises in the said indenture particularly specified, to hold the same, with the appurtenances, to him, the defendant, his executors, administrators, and assigns, from the ——— day of ———, A. D. 19—, for and during the full term of five years from thence next ensuing, and fully to be complete and ended, at a certain rent, payable by the defendant to the plaintiff, as in the said indenture is mentioned. And the defendant, for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree, to and with the plaintiff, his heirs and assigns, amongst other things, that he, the defendant, his executors, administrators, and assigns, should and would, at all times during the continuance of the said demise, at his and their own costs and charges, support, maintain, and keep the said messuage or tenement and premises in good and tenantable repair, order, and condition; and to leave the same in such good repair, order, and con-

[20] See Amos v. Cosby, 74 Ga. 793; Clark v. Zeigler, 79 Ala. 346; White v. Street, 67 Tex. 177, 2 S. W. 529; Brown v. Hearon, 66 Tex. 63, 17 S. W. 395; Provident Life & Trust Co. v. Fiss, 147 Pa. 232, 23 Atl. 560.

dition at the end or other sooner determination of the said term; as by the said indenture, reference being had thereto, will fully appear. By virtue of which said indenture the defendant afterwards, to wit, on the ——— day of ———, A. D. 19—, entered into the said premises, with the appurtenances, and became and was possessed thereof, and so continued until the end of said term. And although the plaintiff hath always, from the time of the making of the said indenture, hitherto done, performed, and fulfilled all things in the said indenture contained on his part to be performed and fulfilled, yet protesting that the said defendant hath not performed and fulfilled anything in the said indenture contained on his part and behalf to be performed and fulfilled. In fact the plaintiff says that the defendant did not, during the continuance of the said demise, support, maintain, and keep the said messuage or tenement and premises in good and tenantable repair, order, and condition, and leave the same in such repair, order, and condition at the end of said term; but for a long time, to wit, for the last three years of said term, did permit all the windows of the said messuage or tenement to be, and the same during all that time were, in every part thereof, ruinous, in decay, and out of repair, for want of necessary reparation and amendment; and the defendant left the same, being so ruinous, in decay and out of repair as aforesaid, at the end of the said term, contrary to the form and effect of his said covenant. And so the plaintiff saith that the defendant, although often requested, hath not kept the said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the plaintiff hath hitherto wholly refused, and still refuses, to the damage of said plaintiff of $——— (enough to cover damages), and therefore he brings his suit.

ESSENTIAL ALLEGATIONS IN ACCOUNT OR ACCOUNT RENDER

142. The essential allegations of the declaration in account or account render are:

(a) A statement of the facts showing a legal relation between plaintiff and defendant which gives rise to the right to an accounting.

(b) The refusal of defendant to account.

(c) The damages.

SAME—THE STATEMENT

143. The declaration must allege privity between the plaintiff and defendant, the plaintiff's property, the manner in which the defendant received it, and the special character in which the defendant is charged. If several are made defendants, the averment must be of a joint liability only. In some cases it must be shown from whose hands the defendant received the money.

As the object of the action of account or account render is to ascertain the amount of the plaintiff's claim, it is unnecessary that the sum should be accurately stated; and it is sufficient, as to time, that the defendant be charged as receiving the money or property between certain dates. To sustain the action, privity or relationship between the parties is essential, and such privity must therefore be alleged.[21] And the particular character or capacity in which the defendant acted and is chargeable must also be stated, as the proof must, in every case, correspond with the plaintiff's allegations.[22] It seems necessary, where the action is against a receiver of money, to show from whom he received it, in order that he may be prepared to meet the charge against him;[23] and in actions between tenants in common, under the statute of Anne,[24] as well as in actions between partners, it is necessary to aver that the money was received for the common benefit of the plaintiff and defendant, and that the defendant has received more than his share of the profits.[25]

[21] The meaning of the term "privity" as given in the authorities is somewhat confusing, and the division of it into several classes is not much better. Probably the best definition is that it is a fiduciary relationship or connection growing out of the charge of another's property, as, where A. delivers B. money to pay C., and C. has an action of account against B. So, if B. collects money as agent of C., he is accountable to him.

The relationship subsisting between the immediate parties to a contract is called "privity of contract."

[22] Barnum v. Landon, 25 Conn. 137; Cearnes v. Irving, 31 Vt. 604; Hughes v. Woosley, 15 Mo. 492; Wright v. Guy, 10 Serg. & R. (Pa.) 227.

[23] McMurray v. Rawson, 3 Hill (N. Y.) 59.

[24] 4 Anne, c. 16, § 27, which has been generally adopted into the common law of this country, or followed by the enactment of similar statutes here Cheney v. Ricks, 187 Ill. 171, 58 N. E. 234.

[25] Griffith v. Willing, 3 Bin. (Pa.) 317.

SAME—THE BREACH

144. The declaration must also allege a neglect or refusal of the defendant to account. A demand is unnecessary.

From what has been stated, it is obvious that the breach or infraction of the plaintiff's right here is the neglect or refusal of the defendant to account as to the matters in question, and the allegation need be only a formal one to that effect. A special demand before suit brought is not necessary, and therefore need not be averred.[26]

SAME—THE DAMAGES

145. The amount claimed to be due should also be stated, but the recovery may exceed the sum alleged.

As it is the object of the action to recover an uncertain sum or quantity claimed to be due, the declaration should state the amount of the demand in the form of a claim for damages, but this action is an exception to the rule as to the limitation of the recovery by the amount of damages laid. Here it is neither necessary to state the correct sum, nor to make the demand large enough to cover all that the proof may establish, as it is the object of the action to ascertain what the damages really are. The plaintiff may have judgment for a greater sum than he alleges;[27] and where he states the value of chattels, and also lays damages, he may obtain judgment, when entitled to it, for the value and also for damages, distinguishing each.

[26] Sturges v. Bush, 5 Day (Conn.) 452. But see Kemp v. Merrill, 92 Ill. App. 46.

[27] Gratz v. Phillips, 5 Bin. (Pa.) 564.

CHAPTER XII

DEMURRER, AIDER, AND AMENDMENT

146–147. Nature and Office of the Demurrer.
148–150. Form of Demurrer.
151. Effect of Demurrer—As an Admission.
152. As Opening the Record.
153–155. Judgment on Demurrer.
156. Joinder in Demurrer—Forms.
157. Pleading Over Without Demurrer.
158–160. Aider by Pleading Over.
161. Formal Defects Cured by Statute.
162. Election to Demur or Plead.
163. Amendment.

NATURE AND OFFICE OF THE DEMURRER

146. If the allegations of the adverse party are legally insufficient upon their face to sustain the cause of action sought to be enforced, or to constitute a defense, as the case may be, objection may, and in some cases must, be taken by demurrer. It will lie for insufficiency either in substance or in form. It admits the truth of all matters sufficiently pleaded on the other side, but denies their sufficiency in law.

147. A demurrer can never be founded upon matter collateral to the pleading which it opposes, but must always arise on the face of the statement itself.

By demurring, a party objects to his opponent's pleading, as defective in law. In effect he says: "Assuming the statements contained in your pleading to be true, for purposes of argument, still it is bad and discloses no cause of action," or "defense to my action," as the case may be. A demurrer thus asserts that the pleading objected to is defective on the face of it in substance or in form.

The most important issue raised by demurrer is whether on the face of a declaration, supposing the facts to be true, the plaintiff is entitled in law to the redress he seeks. This objection may be raised, not only by demurrer, but also by objections to evidence, or by motion for nonsuit, for judgment on the pleadings, and in arrest of judgment, or on writ of error. At common law, if the party elected to demur rather than to plead, the judgment on demurrer disposed of the action, with-

out opportunity to amend or proceed further. But since the admissions by demurrer are solely for the sake of argument, being an appeal to the judgment of the court whether the defendant shall be bound to answer the plaintiff, upon his own showing, in modern practice judgment on demurrer is not final. Now, if on demurrer the defendant prevails, the plaintiff will be given leave to amend his declaration; and, if the demurrer be overruled, the defendant may plead and raise an issue on the facts of the case.

A demurrer, as we have seen, imports, in pleading, that the party will await the judgment of the court whether he is bound to answer, and will not proceed with the pleadings because no sufficient statement has yet been made by the other side. It is in strictness rather an excuse for not pleading than a plea,[1] since it neither asserts nor denies any matter of fact, and only advances a legal proposition, viz. that the pleading demurred to is insufficient, in law, to maintain the case shown by the adverse party.[2] It may be taken by either party, and to any of the pleadings, until issue joined;[3] and it may be for insufficiency either in substance, as that the case shown by the opposite party is wanting in essential elements, as that a declaration in assumpsit on a contract fails to allege a consideration or a promise; or in form, as that the matter alleged is stated in an inartificial manner, for it is a cardinal principle of law that every pleading must contain sufficient matter, and that such matter must be deduced and alleged according to the forms of law; and if either of these be wanting, it is cause for demurrer.[4] It may be remarked here, generally, that a violation of any of the rules of pleading is, in general, ground for demurrer.

By a demurrer the party demurring tenders an issue. It is not an issue in fact, but an issue in law, the question raised being whether the pleading demurred to is sufficient, as a matter of law, admitting

[1] Bac. Abr. "Pleas," N 1; Hulton v. Jeffreys, 10 Mod. 280.

[2] People v. Holten, 259 Ill. 219, 222, 102 N. E. 171. A demurrer to a declaration cannot properly be said to be a plea to the merits, except in cases where a judgment on the demurrer in favor of the defendant would be a bar to a subsequent suit on the same cause of action; and this can never be the case where the declaration is defective only for the want of some necessary averment. Quarles v. Waldron, 20 Ala. 217. And see Hickok v. Coates, 2 Wend. (N. Y.) 419, 20 Am. Dec. 632. And compare Gillaspie v. Wesson, 7 Port. (Ala.) 454, 31 Am. Dec. 715; Auditor v. Woodruff, 2 Ark. 73, 33 Am. Dec. 368.

[3] Co. Litt. 72a; Bac. Abr. "Pleas," N 1.

[4] Colt & Glover v. Bishop of Coventry and Lichfield, Hob. 164; Stout v. Keyes, 2 Doug. (Mich.) 184, 43 Am. Dec. 165; Wallace v. Holly, 13 Ga. 389, 58 Am. Dec. 518. See Ohio & M. Ry. Co. v. People ex rel., 149 Ill. 663, 86 N. E. 989. A demurrer is but a legal exception to the sufficiency of a pleading. Mason v. Cater, 192 Iowa, 143, 182 N. W. 179; Wood v. Papendick, 268 Ill. 385, 109 N. E. 266.

the facts stated to be true, to require the party demurring to answer it. Questions of law being for determination by the court, the demurrer refers the question to the judgment of the court.[5]

FORM OF DEMURRER

148. A demurrer, as to its form, may be either
(a) General, or
(b) Special.

149. A general demurrer is one which excepts to the sufficiency of the opposing pleading in general terms, without specifically disclosing the nature of the objection. It is sufficient where the objection is on matter of substance.

150. A special demurrer takes exception to the sufficiency of the adverse pleading by showing specifically the particular grounds of such exception. It is necessary where the objection turns on matter of form only; that is, where, notwithstanding the objection, the opposite party appears entitled to judgment, so far as relates to the merits of the action.

At common law the distinction above noted consisted merely in the form of demurring, since the office and effect of both a general and special demurrer were the same. A general demurrer would lie for defects both in substance and in form.[6] But by two English statutes [7] passed with a view to the discouragement of merely formal objections, and which have been generally followed in this country, it was provided that judgment should be given according to "the very right of the cause," without regard to imperfections, omissions, defects, or wants of form, except such as the party demurring should specifically assign as causes of demurrer, and with the further provision that sufficient matter must appear in the pleadings upon which judgment according to such right could be rendered. Since these statutes, therefore, objections of form are to be reached only by special demurrer, and

[5] A pleading which, with all reasonable inferences in favor of the pleader, shows facts entitling him to relief is not subject to demurrer, the office of which is to raise an issue of law as to the substantial rights of the parties. Sogn v. Koetzle, 38 S. D. 99, 160 N. W. 520.

[6] See J. S. of Dale v. J. S. of Vale, Jenk. Cent. Cas. 133. That there was such a thing as a special demurrer at common law, see Anon., 3 Salk. 122. Special demurrers were never necessary, except in cases of duplicity at common law.

[7] 27 Eliz. c. 5; 4 Anne, c. 16.

the objections must be specifically stated.[8] These statutes do not apply where the demurrer is to a plea in abatement. "Matter of form may be taken advantage of on a general demurrer, when the plea only goes in abatement, for the statute of Elizabeth only means that matters of form in pleas which go to the action shall be helped on a general demurrer." [9]

It is to be observed that under a special demurrer the party may, upon the argument, not only take advantage of the particular faults which his demurrer specifies, but also of all such objections in substance as are not required by the statutes to be particularly set down; as "every special demurrer includes a general one." [10] It therefore follows that, unless the objection be clearly of a substantial kind, the safer course is to demur specially in all cases.[11] Where a general demurrer is plainly sufficient, however, it is more usually adopted in practice, since the effect of the special form is to apprise the opposite party more distinctly of the nature of the objection to be relied on, thus enabling him to avoid it by amendment, or meet it fully on the argument.[12]

With respect to the degree of particularity with which, under these statutes, the special demurrer must assign the ground of demurrer, it may be observed that it is not sufficient to object in general terms that the pleading is "uncertain, defective, informal," or the like, but it is necessary to show in what respect it is uncertain, defective, or informal.

A demurrer may be taken either to the whole or to a particular count of the declaration. Where a declaration contains several counts or statements of causes of action, or several breaches of the contract or

[8] King v. Rotham, Freem. 38; Heard v. Baskerville, Hob. 232; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; Steffe v. Old Colony R. Co., 156 Mass. 202, 30 N. E. 1137; Gordon v. Bankard, 37 Ill. 147; Cover v. Armstrong, 66 Ill. 267; Cook v. Scott, 1 Gilman (Ill.) 333.

[9] Walden v. Holman, 2 Ld. Raym. 1015.

[10] See State v. Peck, 60 Me. 498.

[11] 1 Archb. N. P. 313; Clue v. Baily, 1 Vent. 240. The demurrer must be special for duplicity, that being a formal defect. Franey v. True, 26 Ill. 184; Willey v. Carpenter, supra. As some states have abolished the use of special demurrers, there would seem to be then no method of objection when a general demurrer could not properly be used. See Chandler v. Byrd, Hempst. 222, Fed. Cas. No. 2,591b. And in those states what are called "general" demurrers are "special" also, in that they must specify the points objected to. See Heard v. Baskerville, Hob. 232; State v. Peck, 60 Me. 498.

[12] See, as to general demurrers, Tresham v. Ford, Cro. Eliz. 880; Cole v. Maunder, 2 Rolle, Abr. 548; Hodges v. Steward, 3 Salk. 68; George v. Thomas, 16 Tex. 74, 67 Am. Dec. 612; Lumpkin County v. Williams, 89 Ga. 388, 15 S. E. 487. The demurrer in code and equity pleading is always special, pointing out the objectionable features relied upon.

covenant declared on, some of which are sufficient and others not, the defendant should demur only to the latter, as judgment would be given against him on an exception to the whole declaration, separate and divisible parts of it being good.[13] A demurrer may sometimes be taken to a part of a single count or plea, where the matters alleged are distinct and divisible in their nature.[14] If, however, the fault consists in the fact that parties or causes of action have been improperly joined, the demurrer should be to the whole declaration.[15]

Motions to Strike Out

The usual method of objection to parts of a pleading is by motion to strike out what is superfluous, redundant, or immaterial, and thus clear up the issues by use of the pruning hook.[16] By filing an amended pleading after a demurrer is sustained, or by answering after a demurrer is overruled, the party waives any exception to the ruling before the appellate court.[17] Therefore a motion to strike out, rather than a demurrer, may be preferable to save the benefit of the objection.

[13] Cochran v. Scott, 3 Wend. (N. Y.) 229; Mumford v. Fitzhugh, 18 Johns. (N. Y.) 457; Nash v. Nash, 16 Ill. 79. See Conant v. Barnard, 103 N. C. 315, 9 S. E. 575.

[14] Powdick v. Lyon, 11 East. 565; Benbridge v. Day, 1 Salk. 218; Greathouse v. Dunlap, 3 McLean, 303, Fed. Cas. No. 5,742; Douglass v. Satterlee, 11 Johns. (N. Y.) 16. A demurrer may be interposed to each separate cause of action or defense, but cannot be addressed to fragmentary parts of a pleading. 6 Cyc. 300; State ex rel. Ellis v. Atlantic Coast Line R. Co., 53 Fla. 711, 44 South. 230; Kennon v. Western Union Tel. Co., 92 Ala. 399, 9 South. 200.

[15] Foxwist v. Tremaine, 2 Saund. 210a; Fankboner v. Fankboner, 20 Ind. 62.

[16] The sufficiency of a defense must be tested by demurrer, and cannot be considered on motion to strike a paragraph as irrelevant. Bulova v. E. L. Barnett, Inc., 111 Misc. Rep. 150, 181 N. Y. Supp. 247, order modified 193 App. Div. 161, 183 N. Y. Supp. 495. Where questions which should have been raised by demurrer were raised by motion to strike portion of answer, the motion may be treated as a demurrer. Lyons v. Farm Property Mut. Ins. Ass'n of Iowa, 188 Iowa, 506, 176 N. W. 291. It is not office of demurrer to test improper allegations concerning damages, remedy being by motion to strike or objections to evidence or special charges. Western Union Telegraph Co. v. Morrison, 15 Ala. App. 532, 74 South. 88, judgment reversed (Sup.) Ex parte Western Union Telegraph Co., 200 Ala. 496, 76 South. 438. A demurrer is not the proper way to test the sufficiency of a notice of defense filed under section 46 of the Practice Act, but motion to strike from the files. White v. Bourquin, 204 Ill. App. 83, 90; 31 Cyc. 191. See on demurrers and motions to strike out, Hall v. O'Neil Turpentine Co., 56 Fla. 324, 47 South. 609, 16 Ann. Cas. 738; Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 South. 922; State v. Seaboard Air Line Ry., 56 Fla. 670, 47 South. 986.

[17] Error in sustaining a demurrer is waived by amending or asking leave

EFFECT OF DEMURRER—AS AN ADMISSION

151. A demurrer admits, for the purpose of the decision on the demurrer, and for that purpose only, all matters of fact that are well pleaded. It does not admit matters of fact that are not well pleaded, nor does it admit allegations of conclusions of law or of fact.

The technical reason of the rule that a demurrer admits all matters of fact that are sufficiently pleaded is that this is the method of testing the legal effect of the allegations and separating questions of law from questions of fact. The demurrer is consequently an admission, for purposes of argument, that the facts alleged are true,[18] and the only question for the court therefore is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged.[19]

The rule is subject, however, to the qualification that the matter of fact must be sufficiently pleaded.[20] It is said that, if the facts are not alleged in a formal and sufficient manner, a demurrer does not operate as an admission,[21] but this is to be understood as subject to the alterations which have been introduced into the law of demurrer by the statutes of Elizabeth and Anne above mentioned; and therefore, if the demurrer be general instead of special, it will amount to an admission, though the matter demurred to be informally pleaded.[22] A demurrer only admits the facts that are pleaded. It does not admit

to amend or plead over. Bennett v. Union Cent. Life Ins. Co., 203 Ill. 444, 67 N. E. 971.

[18] J. S. of Dale v. J. S. of Vale, Jenk. Cent. 133; Barber v. Vincent, Freem. 531; Lamphear v. Buckingham, 33 Conn. 237, Whittier, Cas. Com. Law Pl. p. 521; Matthews v. Tower, 39 Vt. 433; Compher v. People, 12 Ill. 290; Nispel v. Laparle, 74 Ill. 376. It not only thus admits the facts, but it also admits the consequences of those facts, provided such consequences may fairly be considered as their legitimate results. Hyde v. Moffat, 16 Vt. 271. And see Dickerson v. Winslow, 97 Ala. 491, 11 South. 918, 31 Cyc. 833–837, and cases cited.

[19] A demurrer to the declaration raises the question of law whether the plaintiff, upon the facts stated, is entitled to recover. Hobson v. McArthur, 3 McLean, 241, Fed. Cas. No. 6,554; Henderson v. Stringer, 6 Grat. (Va.) 130. It is not the office of demurrer to allege facts, but it simply concerns such facts as are stated in the pleading demurred to. Jennings v. Peoria County, 196 Ill. App. 195. Allegations of fact contained in a demurrer will be disregarded. Id.

[20] Rex v. Knollys, 1 Ld. Raym. 10; Pierson v. Wallace, 7 Ark. 282; Lamphear v. Buckingham, 33 Conn. 237; Matthews v. Tower, 39 Vt. 433.

[21] Com. Dig. "Pleader," 2, 6.

[22] 1 Archb. N. P. 318.

conclusions, either of law or of fact, which the adverse party may have seen fit to draw in his pleading.[23] Nor will it admit an averment contrary to what before appears certain on the record,[24] or an averment which the pleader was estopped to make;[25] nor an averment which the court can judicially know to be impossible or untrue;[26] nor an immaterial averment.[27]

Though a demurrer is thus held to admit facts well pleaded, its operation in this respect is only in view of the proposed determination of their legal sufficiency. It is strictly confined to this, and cannot be made use of as an instrument of evidence on an issue in fact. As it has been expressed, the admission is for the purpose of the argument only.[28]

[23] Millard v. Baldwin, 8 Gray (Mass.) 484; Rex & Regina v. Knollys, 1 Ld. Raym. 10. "A demurrer admits the truth of such facts as are issuable and well pleaded; but it does not admit the conclusions which counsel may choose to draw therefrom, although they may be stated in the complaint. It is to the soundness of those conclusions, whether stated in the complaint or not, that a demurrer is directed, and to which it applies the proper test." Branham v. Mayor, etc., of City of San Jose, 24 Cal. 602. And see People ex rel. Harless v. Hatch, 33 Ill. 9; Compher v. People, 12 Ill. 290; Hopper v. Covington, 118 U. S. 148, 6 Sup. Ct. 1025, 30 L. Ed. 190.

[24] Com. Dig. "Pleader," 2, 5, 6; Tresham v. Ford, Cro. Eliz. 830.

[25] Lawes, Pl. 170; Columbian Granite Co. v. W. C. Townsend & Co., 74 Vt. 183, 52 Atl. 432.

[26] Cole v. Maunder, 2 Rolle, Abr. 548; Tresham v. Ford, Cro. Eliz. 830. This does not apply to facts of which the courts cannot take judicial notice, though the court may have private knowledge that they are untrue, as a special local custom, for instance. Hodges v. Steward, 3 Salk. 68.

[27] Scovill v. Seeley, 14 Conn. 238.

[28] Stinson v. Gardiner, 33 Me. 94; Tomkins v. Ashby, Moody & M. 32; Pease v. Phelps, 10 Conn. 62; Scovill v. Seeley, 14 Conn. 238; Havens v. Hartford & N. H. R. Co., 28 Conn. 69; Doolittle v. Selectmen of Branford, 59 Conn. 402, 22 Atl. 336. An admission of facts by a demurrer in one cause is not evidence of those facts in another cause, although between the same parties. Auld v. Hepburn, 1 Cranch, C. C. 122, Fed. Cas. No. 650; Stinson v. Gardiner, 33 Me. 94. "A default, like a demurrer, is a constructive admission of the truth of the adversary's pleading." East India Co. v. Glover, 1 Strange, 612, Ames, Cas. Pl. 66. Judgment on default may be arrested or reversed, if the declaration would be insufficient after verdict. Collins v. Gibbs, 2 Burr. 899.

SAME—AS OPENING THE RECORD

152. Upon a demurrer the court will consider the whole record, and give judgment for the party who, upon the whole, appears to be entitled to it. This rule does not apply:

EXCEPTIONS—(a) On demurrer by the plaintiff to a plea in abatement.

(b) Where, though the right, on the whole record, appears to be with the plaintiff, he has not put his action on that ground.

(c) Where there has been a discontinuance.

(d) Only questions of substantive right and not of form will be considered.

(e) In Illinois the general issue will prevent the retroactive attack of a demurrer on the declaration. Nor can a demurrer be carried back after a demurrer has been overruled.

It is a well-established rule that on demurrer the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it.[29] Thus, on demurrer to the replication, if the court think the replication bad, but perceives a substantial defect in the plea, it will give judgment, not for the defendant, but for the plaintiff, provided the declaration be good; but, if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant.[30] The demurrer,

[29] Piggot's Case, 5 Coke's Rep. 29a; Anon., 2 Wils. 150; Rigeway's Case, 3 Coke's Rep. 52a; Foster v. Jackson, Hob. 56; Le Bret v. Papillon, 4 East, 502; Marsh v. Bulteel, 5 Barn. & Ald. 507; Davies v. Penton, 6 Barn. & C. 216; Tippet v. May, 1 Bos. & P. 411; Auburn & O. Canal Co. v. Leitch, 4 Denio (N. Y.) 65; Miller v. Kingsbury, 8 Fla. 356; Leslie v. Harlow, 18 N. H. 518; Gorman v. Lenox, 15 Pet. 115, 10 L. Ed. 680; Bishop v. Quintard, 18 Conn. 395; Claggett v. Simes, 31 N. H. 22; Bates v. Cort, 2 Barn. & C. 474; Townsend v. Jemison, 7 How. 706, 12 L. Ed. 880; Barnett v. Barnett, 16 Serg. & R. (Pa.) 51; Day v. Pickett, 4 Munf. (Va.) 104; Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; Dupee v. Blake, 148 Ill. 453, 35 N. E. 867; Mount Carbon Coal & R. Co. v. Andrews, 33 Ill. 176; McFadden v. Fortier, 20 Ill. 509; Snyder v. President, etc., of State Bank of Illinois, Breese (Ill.) 101; Illinois Fire Ins. Co. v. Stanton, 57 Ill. 354; Haynes v. Lucas, 50 Ill. 436. See 10 Ill. Law Rev. 417; Hedrick v. People, 221 Ill. 374, 377, 77 N. E. 441, 5 Ann. Cas. 600; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; Heimberger v. Elliot Frog & Switch Co., 245 Ill. 448, 92 N. E. 297.

[30] Piggot's Case, 5 Coke's Rep. 29a, and other cases cited above. Demurrer reaches back to condemn the first pleading defective in substance. Chelsea Exch. Bank v. Travelers' Ins. Co., 173 App. Div. 829, 160 N. Y. Supp. 225. But see Ex parte Hines, 205 Ala. 17, 87 South. 691, granting certiorari Hines v. McMillan, 17 Ala. App. 509, 87 South. 696.

at whatever stage of the pleadings it is taken, reaches back, in its effect, through the whole record, and ultimately attaches to the first substantial defect in the pleadings, on whichever side it may have occurred; and therefore, though the parties join in the demurrer upon any particular point, at any stage of the pleadings, judgment must still be given upon the whole record, and regularly against the party in whose pleading such fault occurred. This rule belongs to the general principle that when judgment is to be given, whether the issue be in law or fact, and whether the cause has proceeded to issue or not, the court is always bound to examine the whole record, and adjudge for the plaintiff or defendant, according to the legal right, as it may, on the whole, appear.[31]

Exceptions to the Rule

The rule above stated is subject to the following exceptions:

(1) Where the plaintiff demurs to a plea in abatement, and the court decides against the plea, judgment of respondeat ouster—that is, that the defendant answer over—will be given, without regard to any defects in the declaration. The reason of this exception is that the issue here considered is upon the sufficiency of the plea alone. The declaration is not in question, and the demurrer to this plea also prays this form of judgment.[32]

(2) While, on the whole record, the right may appear to be with the plaintiff, the court will not adjudge in favor of such right unless the plaintiff has himself put his action on that ground. This is well explained by the following instance: Where, in an action on a covenant to perform an award, and not to prevent the arbitrators from making it, the plaintiff declared in covenant, and assigned, as a breach, that the defendant would not pay the sum awarded, and the defendant pleaded a revocation of the authority of the arbitrators by deed, before award made, to which the plaintiff demurred, the court held the plea good as being a sufficient answer to the breach alleged, and therefore gave judgment for the defendant, although they were of opinion that the matter stated in the plea would have entitled the plaintiff to main-

[31] Stephen, Pl. (Tyler's Ed.) 160.

[32] Belasyse v. Hester, 2 Lutw. 1592; Routh v. Weddell, Id. 1607; Hastrop v. Hastings, 1 Salk. 212; Ryan v. May, 14 Ill. 49; Hunter v. Bilyeu, 30 Ill. 367; Knott v. Clements, 13 Ark. 335; Ellis v. Ellis, 4 R. I. 110; Crawford v. Slade, 9 Ala. 887, 44 Am. Dec. 463; Price v. Grand Rapids & I. R. Co., 18 Ind. 137.

tain his action if he had alleged, by way of breach, that the defendant had prevented the arbitrators from making their award.[33]

(3) A further exception to the rule exists where the plaintiff neglects to sign judgment against the defendant on allegations the latter has failed to answer, whereby the action is said to be discontinued. The principle to be here applied is that the plaintiff, by thus omitting to follow up his entire demand, creates an interruption in the proceedings, which is called, in technical phrase, a "discontinuance," and which amounts to error on the record. The commission of this fault places the plaintiff where he is in no position to ask for judgment; but it is now generally cured by statute, after verdict, as well as after judgment.[34]

(4) Finally, in its examination of the whole record, the court will consider this apparent right of the party only as it appears in matter of substance, and not in respect to mere form, such as would properly have been the subject of a special demurrer. Thus, where the declaration was open to an objection merely of form, and the plea was bad in substance, and the defendant demurred to the replication, judgment was awarded the plaintiff by reason of the insufficiency of the plea, without regard to the formal defect in the declaration.[35]

In Illinois, if there are two or more pleas, including the general issue, the presence of the general issue will prevent a demurrer to the other pleas from attacking the declaration.[36] This is put on the ground that a party cannot plead and demur at the same time to the same pleading. This doctrine that the general issue will prevent the retroactive operation of the demurrer to a special plea was not recognized in England, but originated in New York, where it was later overthrown.

It is the rule in Illinois that where a demurrer to a pleading has been overruled, and the demurring party has pleaded over, if a demurrer is filed to this plea, or any subsequent pleading, it does not open the

[33] Marsh v. Bulteel, 5 Barn. & Ald. 507. And see Head v. Baldrey, 6 Adol. & E. 468.

[34] 32 Hen. VIII, c. 30. See Tippet v. May, 1 Bos. & P. 411, Ames, Cas. Pl. (2d Ed.) 64. See Flemming v. Mayor, etc., of City of Hoboken, 40 N. J. Law, 270, Whittier, Cas. Com. Law Pl. p. 439.

[35] Humphreys v. Bethlly, 2 Vent. 198-222; Com. Dig. "Pleader," E, 1; Id. F, 4; Dunlevy v. Fenton, 60 Vt. 506, 68 Atl. 651, 130 Am. St. Rep. 1009, Whittier, Cas. Com. Law Pl. p. 532. See 31 Cyc. 341.

[36] Von Boeckmann v. Corn Products Refining Co., 274 Ill. 605, 113 N. E. 902. See note, May a demurrer to a separate defense be carried back to complaint, where the defendant has also pleaded a general denial? 26 L. R. A. (N. S.) 117; 10 Ill. Law Rev. 417, Restriction of the Retroactive Operation of the Demurrer, R. W. Millar.

record, so as to attack the pleading to which the demurrer had been previously overruled.[37] But the weight of authority is otherwise.

JUDGMENT ON DEMURRER

153. The judgment rendered upon a demurrer is the judicial determination by the court, without a jury, of an issue of law only.

154. When rendered in favor of the party demurring, its effect is that of a final determination of the merits of the cause, unless, as is now generally allowable, the pleading is amended so as to obviate the objection.

155. When rendered against the party demurring, it was final at common law, but he is now allowed to plead over.

The judgment sustaining a demurrer regularly follows the nature of the pleading demurred to, and, where the demurrer is taken to any of the pleadings in chief (as the declaration, plea in bar, etc.), is final, whether for plaintiff or defendant; that is, on demurrer to any of the pleadings which go to the action, the judgment for either party will, at common law, be the same as upon an issue in fact joined in the same pleading, and found in favor of the same party.[38] At common law, in case of a judgment in favor of the party demurring, it was final against the other party. The latter could not amend his pleadings and go on with the action. Under the modern statutes and practice, however, the courts will generally allow him to amend. So, also, if the judgment was against the party demurring, it was final at common law.[39] In modern practice, however, and under the statutes, it is otherwise, and he is very generally allowed to plead over.[40] The common-

[37] Demurrer cannot be carried back after demurrer overruled. Fish v. Farwell, 160 Ill. 236, 43 N. E. 307; City of Chicago v. People, 210 Ill. 84, 92, 71 N. E. 816; People v. Powell, 274 Ill. 222, 113 N. E. 614. On effect of demurrer previously overruled, see 10 Ill. Law Rev. 424. Compare Johnson v. Pensacola & P. R. Co., 16 Fla. 623, 26 Am. Rep. 731, Ames, Cas. Pl. p. 57.

[38] Humphreys v. Bethlly, 2 Vent. 222; State v. Peck, 60 Me. 498; Martin v. Bartow Iron Works, 35 Ga. 320, Fed. Cas. No. 9,157; Brown v. Jones, 10 Gill & J. (Md.) 334; Little v. Perkins, 8 N. H. 469, and the cases previously cited under the rule to which these exceptions are noted. Bac. Abr. "Pleas," N 4; Gray v. Gray, 34 Ga. 499; Perkins v. Moore, 16 Ala. 17; Bouchaud v. Dias, 3 Denio (N. Y.) 238; Silver v. Rhodes, 2 Har. (Del.) 369, Whittier Cas. Com. Law Pl. p. 534; Hale v. Lawrence, 22 N. J. Law, 72, 80; Weiss v. Binnian, 178 Ill. 241, 245, 52 N. E. 969; Mt. Carbon Coal & R. Co. v. Andrews, 53 Ill. 176, 184.

[39] Hale v. Lawrence, 22 N. J. Law, 72; State v. Peck, 60 Me. 498.

[40] The party whose demurrer is overruled may elect to stand by it. If he

law rule did not apply to demurrer to a plea in abatement. If overruled, and the judgment on the plea was given in favor of the defendant, he could bring a new action. If sustained, the defendant was allowed to plead over. The judgment was "respondeat ouster." [41]

A final judgment rendered on demurrer is as conclusive of the facts confessed by the demurrer as a verdict finding the same facts would have been, since they are established, in both cases, by matter of record. The operation of the judgment here is that of an estoppel, and facts thus established can never afterwards be contested between the same parties, or those in privity with them, in another suit.[42] If, therefore, on a demurrer to the declaration, judgment is rendered for the defendant, the plaintiff can never afterwards maintain, against the same defendant or those in privity with him, any similar action upon the same grounds as were disclosed in the first declaration, unless such judgment result from the omission of an essential allegation. In the latter instance the judgment would be no bar to a second action supplying the missing allegation; nor is it a bar, where the action is misconceived, to an action afterwards brought in proper form. The ground upon which the estoppel rests, in these instances, is a determination of the merits of the action which, by reason of the admitted facts shown upon the record, the unsuccessful party is precluded from again bringing in question.

JOINDER IN DEMURRER—FORMS

156. Where an issue in law is tendered by demurrer the opposing party must join in it.

The tender of an issue in law must always be accepted.[43] A party cannot decline a question on the legal sufficiency of his own pleading without abandoning it. The acceptance is therefore as imperative as

takes no steps from which a waiver of his demurrer is implied, such as leave to plead over, he may be heard to urge error in the ruling in a court of review. Bennett v. Union Cent. Life Ins. Co., 203 Ill. 439, 67 N. E. 971.

[41] Walden v. Holman, 2 Ld. Raym. 1015; Nowlan v. Geddes, 1 East. 634; Casey v. Cleveland, 7 Port. (Ala.) 445; Getchell v. Boyd, 44 Me. 482; Shaw v. Dutcher, 19 Wend. (N. Y.) 222; Clifford v. Cony, 1 Mass. 495; Mantz v. Hendley, 2 Hen. & M. (Va.) 308; Cushman v. Savage, 20 Ill. 330.

[42] Bissell v. Spring Valley Twp., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411. And see Vanlandingham v. Ryan, 17 Ill. 25; Wilson v. Ray, 24 Ind. 156. Compare Stevens v. Dunbar, 1 Blackf. (Ind.) 56; Wilbur v. Gilmore, 21 Pick. (Mass.) 250.

[43] Halton v. Jeffreys, 10 Mod. 280; Brown v. Jones, 10 Gill & J. (Md.) 334; Clay Fire & Marine Ins. Co. v. Wusterhausen, 75 Ill. 285.

in the case of an issue in fact. The method of accepting the tender of an issue in law is by a set form of words, called the "joinder in demurrer." With respect to issues in law tendered by demurrer, it is immaterial whether the issue be well or ill tendered, that is, whether the demurrer be in proper form or not. In either case the opposite party is equally bound to join in demurrer; for it is a rule that there can be no demurrer upon a demurrer,[44] and there is no ground for a traverse or pleading in confession and avoidance, while the pleading to which the demurrer is taken still remains unanswered.

Form of General Demurrer (for Matter of Substance Only)

A. B., Plaintiff, v. C. D., Defendant.

In the ——— Court of ——— County. Debt (or other form of action).

And the said C. D., defendant in the above-mentioned action, by X. Y., his attorney, comes and defends the wrong (or force) and injury, when, etc.; and says that the said declaration, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the plaintiff to have and maintain his aforesaid action against him, the said defendant; and that he, the defendant, is not bound by law to answer the same. And this he is ready to verify. Wherefore for want of a sufficient declaration in this behalf, the defendant prays judgment, and that the plaintiff may be barred from having or maintaining his aforesaid action against him, etc. ———————, Defendant's Attorney.

Joinder in Demurrer

(Title of Court and Cause.)

And the said A. B., plaintiff in the above-mentioned action, says that the said declaration and the matters therein contained, in manner and form as the same are therein pleaded and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action against him, the said defendant. And the plaintiff is ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the defendant hath not answered the said declaration, nor hitherto in any manner denied the same, the plaintiff prays judgment, and his debt aforesaid, together with his damages by him sustained by reason of the detention thereof to be adjudged to him.

———————, Plaintiff's Attorney.

[44] Bac. Abr. "Pleas," N 2; Halton v. Jeffreys, 10 Mod. 280; Campbell v. St. John, 1 Salk. 219. But see Townsend v. Jemison, 7 How. (U. S.) 706, 12 L. Ed. 880, Sunderland, Cas. Com. Law Pl. p. 196.

Form of Special Demurrer to Declaration (for Matter of Form)

(Title of Court and Cause.)

And the said C. D., defendant in the above-mentioned action, by X. Y., his attorney, comes and defends the wrong (or force) and injury, when, etc.; and says that the said declaration and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the plaintiff to have or maintain his aforesaid action against him, the said defendant; and that he, the defendant, is not bound by law to answer the same. And this he is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the defendant prays judgment, and that the plaintiff may be barred from having or maintaining his aforesaid action against him, etc.

And the defendant states and shows to the court here the following cause of demurrer to the said declaration; that is to say, (1) that no day or time is alleged in the said declaration at which the said causes of action, or any of them, are supposed to have accrued. (Other causes may be added according to the number of objections; e. g., duplicity.) (2) ———. (3) ———. (4) ———.

(Conclusion as in general demurrer.)

PLEADING OVER WITHOUT DEMURRER

157. A party may in many cases plead over without demurring, and, notwithstanding such pleading, afterwards avail himself of an insufficiency in the pleading of his adversary. But he cannot do so—

EXCEPTIONS—When faults in pleading are aided by

(a) Pleading over.

(b) Verdict.

(c) The curative effect of statutes as to matters of form.

While, as we have seen, it is the effect of a demurrer to admit the truth of all matters of fact sufficiently pleaded on the other side, it cannot be said, e converso, that it is the effect of a pleading to admit the sufficiency in law of the facts adversely alleged. On the contrary, it has been seen that, upon a demurrer arising at a later stage of the pleading, the court will retrospectively consider the sufficiency in law of matters to which an answer in fact has been given. And it has also been shown that, even after an issue in fact and verdict thereon, the court is bound to give judgment on the whole record, based upon an examination of the legal sufficiency of all allegations, throughout the whole series of the pleadings. It follows, therefore, that advantage

may be often taken by either party of a legal insufficiency in the pleading of the other side, either by motion in arrest of judgment, motion for judgment non obstante veredicto, or writ of error, according to the circumstances of the case, although he has answered instead of demurring, provided the case is not one within the exceptions above noted, and which will be now explained; that is, provided the fault is not cured by the subsequent pleading, or cured or aided by verdict, or by a statute requiring the objection to be raised at a particular stage of the proceeding.

AIDER BY PLEADING OVER

158. If the party wishes to plead, instead of demurring, and still preserve his right of objection to a defective adverse pleading, he must so frame his own pleading as to avoid a waiver of such defects by the formation of a complete issue.

159. A defect in pleading is aided if the adverse party plead over to or answer the defective pleading in such a manner that an informality or omission therein is supplied or rendered formal or intelligible.

160. The defect may be thus supplied either—

(a) Expressly, or

(b) By implication.

Faults in pending that have been passed over without a demurrer are often aided by the pleading offered in its stead, so that the right of objection is either waived or otherwise lost. This will happen, for instance, where a defendant, pleading in confession and avoidance, expressly supplies matter, the absence of which from the declaration would otherwise constitute an incurable defect. Thus, in an action of trespass for taking a hook, where the plaintiff omitted to allege in the declaration that it was his hook, or even that it was in his possession, and the defendant pleaded a matter in confession and avoidance, justifying his taking the hook "out of the plaintiff's hand," the court, on motion in arrest of judgment, held that, as the plea itself showed that the hook was in the possession of the plaintiff, the objection, which would otherwise have been fatal, was cured.[45] As to ob-

[45] Glascok v. Morgan, 1 Sid. 184; Com. Dig. "Pleader," C, 85; Id. E, 37; Fletcher v. Pogson, 3 Barn. & C. 192; Wallace v. Curtiss, 36 Ill. 156. At common law a defective declaration may be aided by the plea, and a defective plea by the replication. U. S. v. Morris, 10 Wheat. (U. S.) 246, 6 L.

jections of form, it has been laid down as a general proposition that, "if a man pleads over, he shall never take advantage of any slip committed in the pleading of the other side which he could not take advantage of upon general demurrer;" [46] in other words, formal defects are thereby waived. The answering pleading may actually supply the defect or omission by express allegation of the fact which ought to have been stated, or it may contain an implied admission, correcting the informality by waiving it.[47] No such implied admission, however, will be sufficient to cure a defect in substance.[48] An omission of that character must be expressly supplied.[49]

FORMAL DEFECTS CURED BY STATUTE

161. The right of objection to purely formal defects will also be lost, after pleading over, when such defects are cured by statute, though not by the pleading itself.

In addition to the instances above given in which faults in pleading may be remedied, a third is found in the effect of the different statutes of jeofails and amendments, two of which have already been referred to,[50] the cumulative effect of which is to provide that neither after verdict, judgment by confession, nil dicit, nor non sum informatus, can

Ed. 814; Bank of Illinois v. Brady, 3 McLean, 268, Fed. Cas. No. 888. Pleading the general issue waives defects in the writ or a variance between the writ and declaration. M'Kenna v. Fisk, 1 How. (U. S.) 241, 11 L. Ed. 117; McNeill v. Arnold, 17 Ark. 154; Barrow v. Burbridge, 41 Miss. 622; Mills v. Carpenter, 82 N. C. 298. But, though waiving averments otherwise necessary, it does not dispense with proof of material allegations. Ohio & M. R. Co. v. Brown, 23 Ill. 94; Illinois Fire Ins. Co. v. Stanton, 57 Ill. 359.

[46] Per Holt, C. J., Anon., 2 Salk. 519; Nordhaus v. Vandalia R. Co., 242 Ill. 166, 169, 89 N. E. 974; People v. American Life Ins. Co., 267 Ill. 504, 507, 108 N. E. 679. See Bauman v. Bean, 57 Mich. 1, 23 N. W. 451, Whittier, Cas. Com. Law Pl. p. 560; That defects not subject to general demurrer are cured by pleading over, see 31 Cyc. 719, note 78.

[47] Ground of general demurrer can be waived by pleading to merits, but not such substantial defects as would render it insufficient to sustain a judgment. Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680.

[48] White v. Delavan, 21 Wend. (N. Y.) 26; Roberts v. Dame, 11 N. H. 226; Cross v. City of Chicago, 195 Ill. App. 86, 89. An express denial of a material fact, omitted from the declaration or other pleading, will by the weight of authority cure such omission. Wallace v. Curtiss, 36 Ill. 156; Bruce v. Beall, 100 Tenn. 573, 47 S. W. 204; 31 Cyc. 714–716.

[49] See Slack v. Lyon, 9 Pick. (Mass.) 62; Wallace v. Curtiss, 36 Ill. 156; Elliot v. Stuart, 15 Me. 160.

[50] 27 Eliz. c. 5; 4 Anne, c. 16. These statutes form a part of our common law.

the judgment be arrested or reversed for any objection of form. Thus, if a declaration omits to state the day on which a certain trespass was committed, and the defendant, without demurring, pleads over to issue, and there is a verdict against him, the fault is cured by the statutes, if not also by the pleading over.

ELECTION TO DEMUR OR PLEAD

162. In many cases, as we have seen, a party must demur in order to take advantage of defects, while in others he may, even after judgment, raise objections which he might also have taken by demurrer. In many cases it may not be advisable to demur, even where a demurrer would lie.

It will be useful here to examine shortly the considerations by which, in view of what we have said about demurrer, the pleader should be governed in making his election to demur or plead.

He is first to consider, says Stephen, whether the declaration or other pleading opposed to him is sufficient, in substance and in form, to put him to his answer. If sufficient in both, he has no course but to plead. On the other hand, if insufficient in either, he has ground for demurrer; but whether he should demur or not is a question of expediency, to be determined upon the following considerations: If the pleading be insufficient in form, he is to consider whether it be worth while to take the objection, recollecting the indulgence which the law allows in the way of amendment; but also bearing in mind that the objection, if not taken, will, as we have seen, be aided by pleading over, or, after pleading over, by the verdict, or by the statutes of jeofails and amendments. If he chooses to demur, he must take care to demur specially, lest, upon general demurrer, he should be held excluded from the objection. On the other hand, supposing an insufficiency in substance, he is to consider whether that insufficiency be in the case itself or in the manner of statement; for in the latter case it might be removed by an amendment, and it may, therefore, not be worth while to demur. And whether it be such as an amendment would remove or not, a further question will arise as to whether it be not expedient to pass by the objection for the present, and plead over; for a party by this means often obtains the advantage of contesting with his adversary, in the first instance, by an issue in fact, and of afterwards urging the objection in law, by motion in arrest of judgment or writ of error. This double aim, however, is not always advisable; for, though none but formal objections are cured by the statutes of jeofails and amendments, there are some defects of substance as well as form which may be aided by

pleading over as well as by verdict; and therefore, unless the fault be clearly of a kind not to be so aided, a demurrer is the only mode of objection that can be relied upon. The additional delay and expense of a trial is also sometimes a material reason for proceeding in the regular way by demurrer, and not waiting to move in arrest of judgment, or to bring a writ of error. Another reason for demurring is that costs are not generally allowed when judgment is arrested, nor where it is reversed upon writ of error, but each party pays his own costs, while on demurrer the party succeeding obtains his costs.[51]

It has been contended that argument on demurrer is usually futile. Time and effort are spent by lawyers and courts in criticizing pleadings on points far removed from the merits involved. The demurring attorney is engaged in educating his opponent on the law. The tendency, therefore, is to avoid pointing out important errors, or pressing them any more than is necessary to raise them on the record in the appellate court. Demurring is seldom more than a waste of time and a means of delay, except (1) where there is some essential element of a cause of action or defense which is not set up, and which cannot be supplied with any chance of proving it; (2) when the pleading, although good in substance, is not as definite and certain as it ought to be, and by a special demurrer the pleader may be required to state his case more in detail, thereby giving better notice, narrowing the issues, and increasing the risk of variance in the proof. In some jurisdictions special demurrers for defects in form have been abolished, but the line between form and substance is difficult to draw. To abolish demurrers entirely, while allowing the same objections in point of law to be raised under another name, is as ludicrous a piece of self-deception as the old fictions in ejectment. Some other solution of the abuses must be found.

AMENDMENT

163. A party will generally be allowed to correct inaccuracies or supply omissions in his pleadings by amendment at any time before the jury have retired, if he has not been guilty of laches in applying for leave to amend, and if the amendment does not change the form of action, or introduce a new cause of action or ground of defense, or prejudice the adverse party.

Under the ancient system of oral pleadings, the parties were allowed to correct and adjust their pleadings during the oral altercation, and were not held to the form of statement they might first advance. Beginning with the statute of 14 Edw. III, c. 6, various statutes have been enacted from time to time in England, and similar statutes have been enacted in all of our states, providing for amendments, so that the subject is now largely regulated by statute. These statutes are called "statutes of jeofails and amendments." They are called "statutes of jeofails" from "J'ai failé"—an expression used by the pleader of former days when he perceived a slip in his proceedings. The object of these statutes is to afford facilities for all reasonable amendments, and the principle generally prevailing at the present time by virtue of these statutes, and the decisions of the courts, is that all such amendments shall be allowed as may be necessary for the purpose of determining the real question or questions in controversy between the parties, and administering justice.[52] An application for leave to amend is generally addressed to the discretion of the court, but in the exercise of its discretion it is governed by certain principles and established rules.

The court will generally allow an amendment to correct mistakes in the names of parties,[53] or to strike out parties improperly joined,[54] or bring in parties improperly omitted, or who have become necessary parties since commencement of the suit,[55] or to correct the pleading as to the capacity in which a party sues or is sued.[56] And an amendment is frequently allowed in order to conform the pleadings to the proof that has been offered, so as to avoid a variance, where no prejudice to the opposite party can result.

It is always safer to apply for leave to amend before issue joined, or at least before the trial has commenced, for the court may refuse to allow an amendment after that time.[57] A party cannot insist upon a right to amend if he has been guilty of laches.[58] The court may, however, in the exercise of its discretion, allow amendments at any time before the jury have retired, if it properly protects the other party,[59] and some amendments, as amendments to conform to the proof, may be allowed after verdict, and even after judgment.[60]

[51] Stephen Pl. (Tyler's Ed.) 165, 166.

[52] 1 Am. & Eng. Enc. Law, 546; Blenkhorn v. Penrose, 43 Law T. 668.

[53] Porter v. Hildebraud, 14 Pa. 129.

[54] Miller v. Pollock, 99 Pa. 202.

[55] Steed v. McIntyre, 68 Ala. 407; Braswell v. McDaniel, 74 Ga. 819.

[56] Sick v. Michigan Aid Ass'n, 49 Mich. 50, 12 N. W. 905; Hines v. Rutherford, 67 Ga. 606.

[57] Ritchie v. Van Gelder, 9 Welsb. H. & G. 762.

[58] Jones v. Welling (D. C.) 16 Fed. 655; Dawes v. Gooch, 8 Mass. 488; Fowble v. Rayberg, 4 Ohio, 45; Elder's Ex'rs v. Harris, 76 Va. 187; Sackett v. Thompson, 2 Johns. (N. Y.) 200.

[59] Barker v. Justice, 41 Miss. 240; Hill v. Chipman, 59 Wis. 211, 18 N. W. 160.

[60] McKinney v. Jones, 55 Wis. 39, 11 N. W. 606, and 12 N. W. 381. See 31 Cyc. 393–407.

It is the rule in some states, that an amendment will not be allowed if it changes the form of action, as from assumpsit to covenant or case, or from trespass to case, or vice versa, etc.[61] Nor will an amendment be allowed by some, if it changes the cause of action, or introduces a new cause of action.[62] An amendment should never be allowed if it would result in prejudice to the adverse party.[63] And always, when it is allowed, the court may and should impose such terms as will fully protect the adverse party, such as payment of costs of the application, and, in some cases, costs of the whole suit up to the time of the amendment.[64]

If an amendment introduces into the declaration a new and different cause of action from that originally stated, it will be subject to the plea of the statute of limitations, if that has run against the claim. But obviously amendments should be allowed which do not introduce a new cause of action, but where the new allegations merely amplify or vary the claim set up in the original count, even if essential elements are added.[65]

The question of the running of the statute of limitations and the

[61] Mahan v. Smitherman, 71 Ala. 563; Flanders v. Cobb, 88 Me. 488, 34 Atl. 277, 51 Am. St. Rep. 410; Slater v. Fehlberg, 24 R. I. 574, 54 Atl. 383. In some states this rule is changed by statute, or is not recognized. See Redstrake v. Cumberland Mut. Fire Insurance Co., 44 N. J. Law, 294 (where an amendment was allowed, changing the form of action from assumpsit to covenant); Philadelphia, B. & W. R. Co. v. Gatta, 4 Boyce (Del.) 38, 85 Atl. 721, 47 L. R. A. (N. S.) 932, Ann. Cas. 1916E, 1227; North v. Nichols, 39 Conn. 355; Morse v. Whitcher, 64 N. H. 591, 15 Atl. 207. See Ames, Cas. Pl. (2d Ed.) p. 245, note. An amendment changing the legal theory or basis of the claim is sometimes held to set up a new cause of action. Allen v. Tuscarora Val. R. Co., 229 Pa. 97, 78 Atl. 34, 30 L. R. A. (N. S.) 1096, 140 Am. St. Rep. 714, Whittier, Cas. Com. Law Pl. pp. 585, 590, note. Departure from law to law. 3 Minn. Law Rev. 59, 132; 33 Harv. Law Rev. 243.

[62] City of Columbus v. Anglin, 120 Ga. 785, 792, 48 S. E. 318; Silver v. Jordan, 139 Mass. 280, 1 N. E. 280; Farmers' & Mechanics' Bank v. Israel, 6 Serg. & R. (Pa.) 293; Royse v. May, 93 Pa. 454; Shenandoah Val. R. Co. v. Griffith, 76 Va. 913; Peck v. Sill, 3 Conn. 157; Ward v. Patton, 75 Ala. 207; Snyder v. Harper, 24 W. Va. 206; Daley v. Gates, 65 Vt. 591, 27 Atl. 193. In some states such an amendment is allowed by statute, if no prejudice will result. The allowance of an amendment to a declaration setting forth an additional ground of negligence as the cause of injury does not amount to the statement of a new cause of action. Chobanian v. Washburn Wire Co., 33 R. I. 289, 80 Atl. 394, Ann. Cas. 1913D, 730. On amendment introducing a new cause of action, see Austin W. Scott Progress of the Law—Civil Procedure, 33 Harv. Law Rev., 242; Ames. Cas. Pl. (2d Ed.) p. 241, note, 245-247, note.

[63] Kille v. Ege, 82 Pa. 102.

[64] Keeler v. Shears, 6 Wend. (N. Y.) 540; Mobley v. Mobley, 7 Rich. (S. C.) 431.

[65] Carlin v. City of Chicago, 262 Ill. 564, 104 N. E. 905, Ann. Cas. 1915B, 213; Foster v. St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803.

right to amend the declaration thereafter should never turn upon the question whether the original declaration states a good cause of action. The test should be whether the commencement of the action constituted fair notice of the assertion of that particular claim. But the law in Illinois is otherwise. The statute of limitations goes on running in spite of a defective declaration. A striking example of this is found in the case of Walters v. City of Ottawa.[66] This was an action against the city for personal injury by defective sidewalk, in which the declaration failed to state that formal notice had been given as required by statute. The city pleaded the general issue, but later withdrew this plea and filed a demurrer, which was sustained. The plaintiff thereupon amended her declaration by adding to each count averments showing the giving of the notice in due season. The city again pleaded the general issue and also the one-year statute of limitations. A verdict of $1,000 was rendered against the city, but the Supreme Court reversed the judgment which had been entered thereon, holding that an amendment to the declaration supplying such essential averments more than a year after the injury is open to a plea of the statute of limitations.[67]

By the weight of authority, to supply one of the essential elements of a cause of action does not constitute a new and separate cause of action. An amendment after the limitation period is permissible, although the declaration was demurrable, where it is the perfection of the same cause of action attempted to be pleaded. That is the only sort of amendment that is really important.[68] It is well settled that the statute of limitations is no bar to an amendment of the declaration as to nonessentials.[69]

[66] 240 Ill. 259, 88 N. E. 651. See, also, Bradley v. Chicago-Virden Coal Co., 231 Ill. 622, 83 N. E. 424; Allis-Chalmers Mfg. Co. v. City of Chicago, 297 Ill. 444, 130 N. E. 736. The statute of limitations continues to run until a good cause of action with all essential facts is stated, and, if it has then run, will be a bar to a new cause of action stated in the amended count. Allis-Chalmers Mfg. Co. v. City of Chicago, 297 Ill. 444, 450, 130 N. E. 736.

[67] This case has been severely commented upon by Dean Wigmore, 4 Ill. Law Rev., 344. See, also, Proceedings Ill. Bar Ass'n 1909, pp. 310, 314. Compare Enberg v. City of Chicago, 271 Ill. 404, 111 N. E. 114; 11 Ill. Law Rev. 117; 64 University of Pennsylvania Law Rev. 640.

[68] Neubeck v. Lynch, 37 App. D. C. 576, 37 L. R. A. (N. S.) 813. See also cases collected in 3 L. R. A. (N. S.) 259, 297; 33 L. R. A. (N. S.) 196; 47 L. R. A. (N. S.) 932; Lassiter v. Norfolk & C. R. R. Co., 136 N. C. 89, 48 S. E. 642, 1 Ann. Cas. 456; Alabama Consol. Coal & Iron Co. v. Heald, 154 Ala. 580, 45 South. 680; 30 Harv. Law Rev. 294, note; 29 Yale Law J. 685; 5 Iowa Law Bul. 275; Lammars v. Chicago, Great Western R. Co., 187 Iowa, 1277, 175 N. W. 311.

[69] Ames. Cas. Pl. (2d Ed.) pp. 242, 243, 244, note; Deering Co. v. Burzak, 227 Ill. 71, 81 N. E. 1; Lake Shore & M. S. R. Co. v. Enright, 227 Ill. 403, 81 N. E. 374.

CHAPTER XIII

DEFENSIVE PLEADINGS AND SCOPE OF GENERAL ISSUE IN DIFFERENT ACTIONS

164. Functions and Objects of Pleading.
165. Parties Must Demur or Plead.
166. Traverse or Confession and Avoidance.
167. Forms of Traverse.
168. The Common or Specific Traverse.
169. The General Issue—Its Nature and Use.
170. Scope of General Issue in Trespass.
171. Confession and Avoidance in Trespass.
172. Forms of Pleas in Trespass.
173. Scope of General Issue in the Action on the Case.
174. Affirmative Pleas and Specific Denials in Case.
175. Form of the General Issue in Case or Trover.
176. Scope of General Issue in Trover.
177. In Detinue.
178. In Replevin.
179. Forms of General Issue in Replevin.
180. Special Traverse and Affirmative Defenses in Replevin.
181. Form of Avowry and Cognizance Combined.
182. Scope of General Issue in Special Assumpsit.
183. In General Assumpsit.
184. In Debt on Simple Contracts and Statutes.
185. In Debt on Specialty.
186. In Debt on Judgments.
187. In Covenant.
188. In Ejectment.
189. Comparison of Scope of Different General Issues.

FUNCTIONS AND OBJECTS OF PLEADING

164. The primary object of pleading is the production of an issue between the parties. Without an issue there can be no valid trial. The notice function of pleadings is also important, and there are other subordinate objects.

The pleadings, as we have seen, are so conducted as always to evolve some question, either of law or fact, disputed between the parties, as the subject for decision, and the question so produced is called the issue. This is the main object of pleading. Without an issue, there can be no valid trial. This has been repeatedly held, and the proposition would seem too clear to need argument to support it, for unless an issue has been formed, there is nothing to try. It has

been held, for instance, that payment pleaded in an action on a bill or note, but not replied to, is not in issue, and that a trial, therefore, is a nullity.[1] It is not always necessary, however, that it shall appear affirmatively on the record that there was a formal joinder in an issue tendered, in order to support a verdict and judgment. The want of a formal joinder in an issue tendered, it has been held, where the parties proceed to trial, will be cured by a verdict, as it will be presumed that the issue was accepted.[2]

PARTIES MUST DEMUR OR PLEAD

165. After the declaration, the parties must, at each stage of the proceedings in the action, either
(a) Demur, or
(b) Plead
(1) By way of traverse, or
(2) In confession and avoidance.

This rule has two branches:

(1) The party must demur or plead. One or the other of these courses he is bound to take, if he means to maintain his action or defense, until issue is tendered. If he does neither, but confesses the right of the adverse party, or says nothing, the court immediately gives judgment for his adversary—in the former case, as by confession; in the latter, by non pros. or nil dicit.[3]

TRAVERSE OR CONFESSION AND AVOIDANCE

166. If the declaration or other opposing pleading is sufficient both in substance and in form, so that a demurrer will not lie, or if the party does not wish to demur, he must plead, and his pleading must be either—

[1] Munday v. Vail, 34 N. J. Law, 418 (see Hughes, Proc. 762); Hubler v. Pullen, 9 Ind. 273, 68 Am. Dec. 620. See Israel v. Reynolds, 11 Ill. 218; Lindsay v. Stout, 59 Ill. 491; Devine v. Chicago City R. Co., 237 Ill. 278, 284, 86 N. E. 689; Henry v. Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

[2] Gillespie v. Smith, 29 Ill. 473, 81 Am. Dec. 328; Hazen v. Pierson, 83 Ill. 241; Whiting v. Cochran, 9 Mass. 532; Hagen Paper Co. v. East St. Louis Pub. Co., 209 Ill. 535, 537, 109 N. E. 979 (no similiter, waived). Where parties go to trial voluntarily without completing written issues, the case will be treated as if an oral issue had been joined. Witteman Co. v. Goeke, 200 Ill. App. 108, 114. See 29 W. Va. Law Quarterly, 128.

[3] Steph. Pl. (Tyler's Ed.) 156; Henry v. Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

(a) By way of traverse; or
(b) By way of confession and avoidance.
The altercation will sooner or later end in an issue.

If the party pleads, it must either be by way of traverse or by way of confession and avoidance. He can deny or traverse the entire declaration or some essential allegations, contained in it. On the other hand, he can say: "Well, that is true, so far as it goes; but it is only half the truth. Here are several other facts which are omitted from your pleading, and which will put a very different complexion on the case." [4] Setting up such new matter in justification and excuse or discharge is called pleading by way of confession and avoidance, or an affirmative plea. The pleader admits that the declaration shows a good prima facie case; but he alleges additional facts which tend to change the legal effect of the allegations admitted.

Replication

When the plea of the defendant is put in, if it does not amount to a traverse or total contradiction of the declaration, but only evades it by matter in confession and avoidance, the plaintiff may plead again, and reply to the defendant's plea, either traversing it—that is, totally denying it—as, if in an action of debt upon bond the defendant pleads payment, that he paid the money when due; here the plaintiff in his replication may totally traverse this plea, by denying that the defendant paid it, or the replication may confess and avoid the plea, by some new matter or justification consistent with the plaintiff's former declaration, as, in an action for trespassing upon land whereof the plaintiff is seised, if the defendant shows a title to the land by descent, and that therefore he had a right to enter, and gives color to the plaintiff, the plaintiff may either traverse and totally deny the fact of the descent, or he may confess and avoid it, by replying that true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for term of life.

Rejoinder

To the replication the defendant may rejoin, or put in an answer called a rejoinder.

Surrejoinder

The plaintiff may answer the rejoinder by a surrejoinder.

Rebutter

Upon which the defendant may rebut.

[4] Odgers, Pl. and Prac. p. 141.

Surrebutter

And the plaintiff answer him by a surrebutter.

Which pleas, replications, rejoinders, surrejoinders, rebutters, and surrebutters proceed until in the course of pleading they come to an issue, a proposition affirmed on one side and denied on the other, which must be tried.

Pleadings at common law only terminated in an issue of fact with a denial or traverse. When either side advances or affirms any new matter, which he avers to be true, this tenders no issue, because it does not yet appear whether the fact will be disputed; the other party not yet having asserted the contrary. But, on the other hand, when either side traverses or denies the facts pleaded by his antagonist, he tenders an issue to the other, for the deadlock of opposition is reached, and there remains only the inquiry as to the facts.

Forced Issue under the Codes

Under code systems an early issue is forced by the limited series of pleadings, the altercation being cut short at an arbitrary stage—the answer in some Codes; the reply in others. If a natural issue has not been already evolved, a constructive issue is thus raised by law, and the material new matter alleged in the last pleading is deemed to be denied, and any further new matter may be set up in replication thereto without being pleaded.[5] This is in line with the policy of the courts under the general issue, when it was found inconvenient to attempt to focus the controversy upon ultimate and decisive special issues, but it was deemed more convenient to leave a vague complex issue, to be analyzed later at the trial. The ancient theory of issues still remains, though all pleadings subsequent to the answer or reply have been lopped off, leaving the case to be further developed by evidence without pleadings.

FORMS OF TRAVERSE

167. The different forms of traverse or denial may be classed as:
(a) The common or specific traverse.
(b) The general traverse, including:
  (1) The general issue.
  (2) The replication de injuria.
(c) The special traverse.
A traverse concludes with a tender of issue.

[5] Hepburn, Hist. Code Pl. § 129; Pomeroy, Code Remedies (4th Ed.) § 478.

Pleas are divided into two general classes, viz.: Dilatory pleas; and pleas peremptory, or in bar. Pleas in bar are said to be either in denial—that is, by way of traverse—or by way of confession and avoidance of the cause of action. It will be seen, however, that the general issue may raise various defenses of both sorts. Traverses are of four sorts: (1) General issues; (2) specific or common traverses; (3) special or absque hoc traverses; (4) replications de injuria.

Where an allegation is traversed, or denied, it is evident that a question is at once raised between the parties; and it is a question of fact, namely, whether the facts in the declaration or other pleading, as the case may be, which the traverse denies are true. A question being thus raised, or, in other words, the parties having arrived at a specific point or matter affirmed on the one side and denied on the other, the party traversing is generally obliged to offer or refer this question to some mode of trial, or to tender issue. This he does by annexing to the traverse an appropriate formula (as for instance: "And of this he puts himself upon the country"), proposing a trial by the country—that is, by a jury. If this tender of issue be accepted by the other party, the parties are at issue on a question of fact, and the question itself is called the "issue." A tender of an issue of fact is accepted by what is called a "joinder in issue," or "similiter," thus: "And the said A. B., as to the plea of the said C. D., above pleaded, and whereof he has put himself upon the country, doth the like."

As we have seen, the tender of an issue in law, by demurrer, is necessarily accepted by the other party; but this is not so of the tender of an issue in fact. An issue in fact need not necessarily be accepted, for the other party may consider the traverse itself as insufficient in law. A traverse, for instance, may, in denying a part only of the declaration, be so framed as to involve a part that is immaterial or insufficient to decide the action, or the traverse may be deemed defective in point of form, and the other party may object to its sufficiency in law on that ground. He therefore has a right to demur to the traverse as insufficient in law, instead of joining in the issue tendered.

THE COMMON OR SPECIFIC TRAVERSE

168. The common or specific traverse is an express denial of a particular allegation in the opposing pleading in the terms of the allegation, accompanied by a tender of issue or formal offer of the point denied for trial.

Traverses are of various kinds. The most ordinary kind is called the "common traverse." It consists of a tender of issue; that is, of a denial, accompanied by a formal offer of the point denied for decision; and the denial which it makes is by way of express contradiction in terms of the allegation traversed. It controverts only a single specific allegation of the opposing pleading. Its use in a plea is thus to deny any single one of the allegations of the declaration, the failure to prove which would destroy the plaintiff's case, and where such allegation would not be controverted by the general issue in the particular action.

Thus, in an action of covenant on a lease for not repairing windows, a common traverse would be: "And the said C. D., by X. Y., his attorney, comes and defends the wrong and injury when, etc., and says that the said A. B. ought not to have or maintain his aforesaid action against him, the said C. D., because he says that the windows of the said messuage or tenement were not in any part thereof ruinous, in decay, or out of repair, in manner and form as the said A. B. hath above complained against him, the said C. D. And of this he puts himself upon the country."

It will be noticed that this traverse is expressed in the negative. This, however, is not invariably the case with a common traverse; for, if opposed to a precedent negative allegation, it will, of course, be in the affirmative. Thus, where in assumpsit the defendant pleads the statute of limitations, saying in his plea "that he, the said C. D., did not, at any time within the six years next before the commencement of this suit, undertake or promise in manner and form as the said A. B. hath above complained," etc., the plaintiff's replication traversing the plea would be in the affirmative, thus: "And the said A. B. says that, by reason of anything in said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said C. D., because he says that the said C. D. did, within six years next before the commencement of this suit, undertake and promise," etc.

THE GENERAL ISSUE—ITS NATURE AND USE

169. The general issue is a denial of the legal conclusion sought to be drawn from the declaration.

It denies by a general form of expression the defendant's liability, and enables the defendant to contest, without specific averments of the defense to be asserted, most of the allegations which the plaintiff may be required to prove to sustain his action, and in some actions to raise also various affirmative defenses. It fails to perform the functions of pleading, either in giving notice or in reducing the case to specific issues.

While the common or specific traverse is of frequent occurrence, there is another class of traverses which, from its great frequency and importance, requires particular study. It is that of the general issues. In most of the actions there is, at common law, an appropriate form of plea fixed by ancient usage, as the proper method of traversing the declaration, where the defendant means to deny the defendant's liability.[6] This form of the traverse is called the "general issue" in that action; and it appears to be so called because the issue that it tenders is of a more general and extended character than that tendered by a common traverse. It differs from the common traverse, in that it denies by a general form of expression, such as "not guilty," the defendant's liability, instead of denying some specific allegation of fact on which his liability depends.

The scope and effect of this plea is an important matter, for the tender of issue thus made on the declaration closes the pleadings at an early stage, thereby facilitating the progress of the cause; and, further than this, the general issue provides a brief and convenient form of plea in many actions, comprehensive in its nature, and under which

[6] The "general issue," technically so called, does not appear in code pleading, though the general denial in the answer to the complaint is often called by that name. The statutory form is more limited in its scope, though under it the defendant may generally prove anything which tends to controvert any of the material allegations of the declaration. See Moorman v. Barton, 16 Ind. 206. The general denial in code pleading has a twofold office: (1) It forces the plaintiff to prove all his material allegations of fact, at least by sufficient evidence to make out a prima facie case. (2) It permits the defendant to offer all evidence which controverts those averments and contradicts the plaintiff's proofs. Pomeroy, Code Remedies (4th Ed.) 768. A general denial puts in issue only those facts which the plaintiff must aver and prove in order to establish a prima facie case. Mark v. Stuart-Howland Co., 226 Mass. 35, 115 N. E. 42, 2 A. L. R. 678.

the defendant is permitted to prove, without specific allegation, almost all matters in denial of his liability, as alleged, or to contest in evidence all allegations requiring proof on the part of the plaintiff.

Thus, in trespass, case, and trover, it is not guilty; in debt upon simple contract, nil debet, he owes nothing; in covenant or debt on bond, non est factum, it is not his deed; in assumpsit, nonassumpsit, he made no such promise. The effect of these general issues varied with the different forms of action, as to what defenses could be set up under them, and what must be raised by specific denials aimed at particular allegations, and what by pleas in confession and avoidance.

To confine the investigation to the points of actual disagreement, and relieve the plaintiff of the burden of proving what the defendant does not really dispute, it is provided in code pleading that the plaintiff may verify his complaint, and then the denials of the answer must be specific, and must also be made under oath. This requires the denials to be truthfully made, and to put in issue only the points on which the defendant means to rely. Thus, in a suit on a fire insurance policy, there may be no dispute as to the execution of the contract sued on, but the company may expect to avoid liability by showing in defense some excuse. Accordingly, if the complaint be verified, the company cannot deny the signature or due execution of the policy, of which the proof might be difficult for the plaintiff to obtain and produce. It is a great imposition to compel the plaintiff to produce, and the court to hear, evidence in regard to what is not truly disputed. It is burdensome enough to have to establish rights in real controversies.[7] At com-

[7] Bliss, Code Pl. §§ 188, 422. In the Report of the Common-Law Commissioners, on which the Rules of Hil. T. 4 Wm. IV were founded, by which the scope of the general issue was limited, it is said: "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 apprised 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 judge. 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 that 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 exact question or questions of fact to be tried. It not unfrequently, therefore, happens

mon law, while it is a principle that pleadings ought to be true, yet there were no means of enforcing the rule. Thus the common-law pleadings often failed to reduce the case to the real issues in dispute.

Nothing could be more absurd than the irregular, variable, and arbitrary scope of the general issue in different forms of action. There is no rhyme or reason or policy in it; nothing but a bewilderment of historical eccentricities.[8] The function of pleading is to ascertain with precision the matters on which the parties differ and the points on which they agree, and thus to arrive at certain clear-cut issues upon which the case has to be decided. The main object of pleadings is to produce such issues, and thus to narrow the controversy to the real points which have to be contested and proved. The practical utility of pleadings to accomplish this function or object has been grievously impaired by the unreasonable scope and latitude which are allowed to the general issue in some actions. The apparent singleness and simplicity of the general issue are entirely illusory. It fails to focus the controversy upon the real point. It frequently violates the rule that a party must either plead by way of denial or in confession and avoidance. In assumpsit, case, debt on simple contract, ejectment, and trover, the general issue has an exceedingly broad scope, which cannot be explained by any principle or process of reasoning. What has to be specially pleaded is largely an accidental matter of arbitrary exceptions.

When the defendant pleaded affirmatively to justify or excuse the charge, it was necessary to set forth the particular facts of palliation and excuse by a special plea of confession and avoidance, which would apprise the court and the adverse party of the nature and circumstanc-

that the parties are taken by surprise, and find themselves opposed by some unexpected matter of defense 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 unnecessary 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 adversary, if compelled to plead specially, would have thought it undesirable to dispute. It may even happen (and that is not an unfrequent occurrence) that the controversy under this form of plea turns entirely upon the 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 way of special pleading, and raised the question upon demurrer."

[8] See Ballantine, The Proposed New Practice Act in Illinois, 2 University of Illinois Law Bul. No. 8, pp. 155, 156; Axel Tieson, Elements of Superstition in Pleading, 80 Cent. Law J. 159, 165.

es of the defense; but, special pleading having become perverted into an obstacle to justice, the courts, by relaxation of the strictness anciently observed, permitted the scope of the general issue to be extended, so as to leave almost every defense open, and to allow many affirmative defenses to be given in evidence at the trial under the general issue.

Where a given defense can be set up under the general issue, it is improper to attempt to raise that defense by a specific traverse. Where the general issue can be used as a denial, it must be used. The reason for requiring the general issue seems to have been to close the pleadings at an early stage. The rule, however, does not prohibit a party from pleading affirmatively new matter which is admissible under the general issue, but only such as constitutes a mere denial.[9]

In view of the important character of this plea in restricting the progress of the pleadings and extending the privilege of the defendant in establishing his defense in evidence, it seems proper here to explain in what cases it should be used. To do this, it is necessary to examine the scope of the different general issues in each particular action, to ascertain what defenses must or must not be pleaded specially.

In one action a given defense may be admissible under the general issue, while in another the same defense would require a specific traverse or an affirmative plea.

SCOPE OF GENERAL ISSUE IN TRESPASS

170. "Not guilty" is the general issue in trespass, and operates as a denial of the act of trespass alleged. It also denies the plaintiff's title or right of possession of land or goods, unless limited by statute or rule of court. All defenses in justification and excuse, or in discharge, must be specially pleaded.

In trespass, whether to person or property, the general issue is "not guilty." It operates in the first place as a denial that the defend-

[9] Ott v. Schroeppel, 3 Barb. (N. Y.) 56, Whittier, Cas. Com. Law Pl. pp. 888, 889, note 26. See Governor, to Use of Thomas, v. Lagow, 43 Ill. 134; McCord v. Mechanics' Nat. Bank of Chicago, 84 Ill. 49; Wadhams v. Swan, 109 Ill. 46; Warner v. Wainsford (1603) Hob. 127. A plea is not objectionable on the ground of amounting to the general issue, unless setting up facts merely amounting to denial of allegations in declaration necessary to be proven in support of plaintiff's case under plea of general issue. Kerr, Evans & Co. v. Co-operative Improvement Co., 129 Md. 469, 99 Atl. 708. Where defendant's special pleas were no more than pleas of general issue, and all matters alleged were available under that plea, sustaining demurrers to special pleas was not error. People's Saving Bank of Tallassee v. Jordan, 200 Ala. 509,

ant committed the act of trespass alleged, to wit, the application of force to the plaintiff's person, the entry on his land, or the taking or damaging of his goods. It also denies the plaintiff's possession, title, or right of possession of the land or goods.

Under it, therefore, the defendant can show such matters as directly controvert the fact of his having committed the acts complained of.[10] Matter of justification and excuse would admit them, and must therefore be specially pleaded.[11] In trespass for assault and battery, if the defense is that the defendant did not assault or beat the plaintiff, it will be proper to plead the general issue; but if his defense be of any other description the plea will be inapplicable.[12] So, in trespass quare clausum fregit, or trespass de bonis asportatis, if the defendant did not in fact break and enter the close in question, or take the goods, the general issue, "not guilty," will be proper, and it will also be applicable if he did break and enter the close, but it was not in the possession of the plaintiff, or not lawfully in his possession, as against the better title of the defendant, or if he did take the goods, but they did not belong to the plaintiff, for, as the declaration alleges the trespass to have been committed on the close or goods of the plaintiff, the plea of not guilty involves a denial that the defendant broke and entered or took the close or goods of the plaintiff, and is therefore a fit plea, if the defendant means to contend that the plaintiff had no possession of the close, or property in the goods, sufficient to entitle him to call them his own.[13] If the defense is of any other kind, the

76 South. 442; Shepherd v. Butcher Tool & Hardware Co., 198 Ala. 275, 73 South. 498; Huntsville Knitting Co. v. Butner, 198 Ala. 528, 73 South. 907; Cox v. Hagan, 125 Va. 656, 100 S. E. 666.

[10] See Gibbons v. Pepper, 1 Ld. Raym. 38 (where the horse ran away with the defendant, and so it would not be his act which produced the injury); Pearcy v. Walter, 6 Car. & P. 232; Fuller v. Rounceville, 29 N. H. 554.

[11] Cotterill v. Starkey, 8 C. & P. 691, 34 Eng. Com. Law, 965; Hall v. Fearnley, 3 Q. B. 919 (inevitable accident); Waters v. Lilley, 4 Pick. 147, 16 Am. Dec. 333; Butterworth v. Soper, 13 Johns. (N. Y.) 443; Gambling v. Prince, 2 Nott & McC. (S. C.) 138.

[12] Badkin v. Powell, 1 Cowp. 478; Olsen v. Upsahl, 69 Ill. 273, Whittier, Cas. Com. Law Pl. p. 42; Chicago Title & Trust Co. v. Core, 223 Ill. 58, 63, 79 N. E. 108. In case of trespass to the person, the defendant must always plead his justification, specially when the act is his own, Knapp v. Salsbury, 2 Camp. 500; Boss v. Litton, 5 Car. & P. 407, Whittier, Cas. Com. Law Pl. p. 84 (inevitable accident, absence of negligence); so in case of self-defense, justifying the act done in defense of property, Hyatt v. Wood, 3 Johns. (N. Y.) 239; Sampson v. Henry, 11 Pick. (Mass.) 379; Ford v. Logan, 2 A. K. Marsh. (Ky.) 325. And see Herrick v. Manly, 1 Caines (N. Y.) 253; Gates v. Lounsbury, 20 Johns. (N. Y.) 427; Comstock v. Oderman, 18 Ill. App. 326, Whittier, Cas. Com. Law Pl. p. 45.

[13] Badkin v. Powell, 1 Cowp. 478; Hyatt v. Wood, 4 Johns. (N. Y.) 152, 4

general issue will not apply; as, for instance, where the defendant intends to show a justification or excuse, or a discharge.[14]

The Hilary Rules of 1834 restricted the scope of the general issue by providing that, in trespass quare clausum fregit, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession. If this is intended to be traversed, it must be by a specific traverse.

In trepass de bonis asportatis, the plea of not guilty operated under the Hilary Rules as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of plaintiff's property therein. To put in issue the plaintiff's right, the specific traverse "not possessed" was used. Prior to these rules of court there was no occasion for a specific traverse.

CONFESSION AND AVOIDANCE IN TRESPASS

171. All defenses in justification and excuse, or in discharge, must be specially pleaded in confession and avoidance in trespass.

All defenses in justification and excuse, and in discharge, must be specially pleaded in confession and avoidance in trespass,[15] as self-

Am. Dec. 258; Brown v. Artcher, 1 Hill (N. Y.) 260, Whittier, Cas. Com. Law Pl. p. 89; Proprietors of Monumoi Great Beach v. Rogers, 1 Mass. 160; Ebersol v. Trainor, 81 Ill. App. 645; Smith v. Edelstein, 92 Ill. App. 38. In trespass the defendant may offer as many titles to the land as he pleases, and, if they fail him, may resort to and defend upon his possessory right. Mackay v. Reynolds, 2 Bay (S. C.) 474; Strange v. Durham, Id. 429. And see Nevins v. Keeler, 6 Johns. (N. Y.) 63. The plea of "liberum tenementum," which states a general freehold title in the defendant without otherwise describing it, is an instance of a special plea in trespass "quare clausum fregit," which admits both the plaintiff's possession and the trespass charged. See Caruth v. Allen, 2 McCord (S. C.) 226; Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 187, 3 N. E. 272, 56 Am. Rep. 133; Marks v. Madsen, 201 Ill. 51, 103 N. E. 625; Ward v. Mississippi River Power Co., 265 Ill. 486, 107 N. E. 115.

[14] Coles v. Carter, 6 Cow. (N. Y.) 691; Senecal v. Labadie, 42 Mich. 126, 3 N. W. 296; Finch's Ex'rs v. Alston, 2 Stew. & P. (Ala.) 83, 23 Am. Dec. 299, Whittier, Cas. Com. Law Pl. p. 43; Hahn v. Ritter, 12 Ill. 80; Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108; Ruggles v. Lesure, 24 Pick. (Mass.) 187.

[15] Leave and license: In trespass, justification under a license must be specially pleaded, and cannot be shown under the general issue, notwithstanding the broad provisions of Code 1907, Ala. § 5331. Louisville & N. R. Co. v. Bartee, 204 Ala. 539, 86 South. 394, 12 A. L. R. 251; Sturman v. Colon, 48 Ill. 468; Chicago Title & Trust Co. v. Core, 223 Ill. 58, 63, 79 N. E. 108;

defense (son assault demesne), leave and license, defense of property, entry or seizure by virtue of judicial process, or contributory negligence, and such matters in discharge as release, statute of limitations, arbitration and award, and former recovery.

The plea of liberum tenementum, the "common bar," is that the land was the soil and freehold of the defendant. This plea admits possession in the defendant, such as would enable him to sue a stranger. but asserts a freehold in the defendant and a right to the immediate possession as against the plaintiff. This admits that the defendant did the act complained of against the possession of the plaintiff, but justifies it.[16] The general issue disputes both possession and title, but this plea shows defendant's title on the record, and compels the plaintiff to make a new assignment of the locus in quo with more specific description.

172. FORMS OF PLEAS IN TRESPASS

Pleas of the General Issue and Self-Defense in Trespass

(Puterbaugh, Common Law Pleading and Practice [8th Ed.] 367.)

In the ——— ——— Court. ——— Term, 19—.

C. D. ats. A. B. Trespass.

And the defendant, by E. F., his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said supposed trespasses above laid to his charge, or any or either of them, in manner and form as the plaintiff has above thereof complained

Compare Kapischki v. Koch, 180 Ill. 44, 54 N. E. 179. Self-defense (son assault demesne): Thomas v. Riley, 114 Ill. App. 520. Defense of property: Illinois Steel Co. v. Novak, 184 Ill. 501, 56 N. E. 960. Necessity for landlord to enter to make repairs: Comstock v. Oderman, 18 Ill. App. 326. Entry or seizure by virtue of judicial process: Olsen v. Upsahl, 69 Ill. 273; McNall v. Yehon, 22 Ill. 409; Bryan v. Bates, 15 Ill. 87; Ilg v. Burbank, 59 Ill. App. 291; Blalock v. Randall, 76 Ill. 224, 228. Justification under legal authority is not available as defense to action of trespass unless specially pleaded, but defendant may show under general issue in mitigation that he was acting in good faith and under what he considered legal authority. Jackson v. Bohlin, 16 Ala. App. 105, 75 South. 697.

[16] Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 182, 3 N. E. 272, 56 Am. Rep. 133; Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751; Marks v. Madsen, 261 Ill. 51, 103 N. E. 625; Ward v. Mississippi River Power Co., 265 Ill. 486, 107 N. E. 115. In trespass quare clausum fregit for constructing a sidewalk along land against objection, the defendant, by pleading liberum tenementum, admits that plaintiff was in possession and the doing of the acts charged. Morgan v. City of Vienna, 208 Ill. App. 322; Boyd v. Kimmel, 161 Ill. App. 206.

against him: And of this the defendant puts himself upon the country, etc.

(Self-defense—Son assault demesne.)

And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, that the plaintiff just before the said time when, etc., in the county aforesaid, made an assault upon the defendant, and would then and there have beaten, bruised and ill-treated him, if he had not immediately defended himself against the plaintiff; wherefore the defendant did then and there defend himself against the plaintiff, as he lawfully might for the cause aforesaid, and in so doing did commit the supposed trespasses in the said declaration mentioned: And so the defendant says, that if any hurt or damage then and there happened to the plaintiff, the same was occasioned by the said assault so made by the plaintiff upon him, the defendant, and in his necessary defense of himself against the plaintiff. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him, etc.

Plea of Liberum Tenementum in Trespass Quare Clausum Fregit

And for a further plea in this behalf, as to the breaking and entering the said close, in which, etc., in the said declaration mentioned, and with feet in walking, treading down, trampling upon, consuming and spoiling the grass and herbage then and there growing, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him; because he says that the said close in the said declaration mentioned, and in which, etc., now is and at the said several times when, etc., was the close, soil and freehold of him, the said defendant. Wherefore he, the said defendant, at the said several times when, etc., broke and entered the said close, in which, etc., and with feet in walking, trod down, trampled upon, consumed and spoiled the grass and herbage then and there growing, as he lawfully might for the cause aforesaid, which are the same trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained. And this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

SCOPE OF GENERAL ISSUE IN THE ACTION ON THE CASE

173. "Not guilty" is the proper general issue in an action on the case, and is a formal denial of liability, admitting almost all defenses. Under the Hilary Rules, however, it denies the wrongful act only, and not the inducement or statement of the right infringed.

The scope and effect of this plea is much broader in case than in trespass vi et armis, where it operates as a mere denial or traverse of the facts alleged. An effect is given it similar to that in the action of assumpsit, by which the defendant may contest under it, not only the truth of the facts alleged in the declaration, but may also give in evidence anything which "would in equity and conscience, under the existing circumstances, preclude the plaintiff from recovering, * * * because the plaintiff must recover upon the justice and conscience of his case, and on that only." [17] The defendant, upon the general issue of not guilty, may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may offer affirmative defenses. The defendant is therefore allowed to prove, under the general issue, any matter of defense in contravention of the plaintiff's right of action, even though such matters are strictly the proper subjects of a plea in confession and avoidance of the declaration.[18] This, in effect, may

[17] Per Lord Mansfield, Bird v. Randall, 3 Burr. 1353. See Birch v. Wilson, 2 Mod. 276; Bradley v. Wyndham, 1 Wils. 44; Greenwalt v. Horner, 6 Serg. & R. (Pa.) 76, Whittier, Cas. Com. Law Pl. pp. 182, 184, note; Plowman v. Foster, 6 Cold. (Tenn.) 52, 1 Chit. Pl. 491. "In actions on the case, the defendant, upon the plea of not guilty, might formerly not only have put the plaintiff upon proof of the whole charge contained in the declaration, but might have offered any matter in excuse or justification of it, or he might have set up a former recovery, release, or satisfaction; for an action on the case was considered as founded upon the mere justice and conscience of the plaintiff's case, and in the nature of a bill in equity, and in effect was so, and therefore such a former recovery, release, or satisfaction need not have been pleaded, but might have been given in evidence under the general issue." Tidd, New Prac. 805. But by the Hilary Rules as to pleading, it is declared that "in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act, alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defense than such denial shall be admissible under that plea. All other pleas in denial shall take issue on some particular matter of fact alleged in the declaration, and all matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit."

[18] See the cases last cited. And see Newton v. Creswick, 3 Mod. 166; Underwood v. Parks, 2 Strange, 1200; Huson v. Dale, 19 Mich. 28, 2 Am. Rep. 66; Taylor v. Robinson, 29 Me. 323; Wiggins Ferry Co. v. Blakeman, 54 Ill. 201 (contributory negligence); Chicago City Ry. v. Leach, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216 (fellow servant). In trespass on the case defendant may, with few exceptions, prove under the general issue matters in confession and avoidance. Dunham v. Western Union Telegraph Co., 85 W. Va. 425, 102 S. E. 113. Evidence of justification is competent under a plea of the general issue, though the commencement and ending of the declaration describe the action as trespass, provided the body of the declaration describe an action in the nature of an action on the case. George v. Illinois Cent. R. Co., 197 Ill. App. 152.

be that the defendant did not commit the wrongful act complained of, or that it was excusable, or that he was released from its consequences.[19] This latitude was probably allowed for the same reason that permitted the extended use of the general issue in assumpsit, though it is difficult to see how it is reconcilable with any of the principles of pleading.

Thus, if your automobile is damaged and you sue the wrongdoer in trespass, the plea of "not guilty" will serve as a denial of the facts stated in the declaration, and no more. Matters of justification or excuse, such as contributory negligence or leave and license, cannot be proved under this plea. But, if you sue in case, the defendant may, under a plea of "not guilty," not only put the plaintiff upon proof of the whole charge contained in the declaration, but may offer any matter in excuse or justification of it, or he may set up a former recovery, release, or discharge.[20] An action on the case is said to be in the nature of a bill in equity, and the defendant may prove under the general issue almost anything, except the statute of limitations and truth in slander and libel, which shows that the defendant ought not to recover—an illogical and whimsical reason for slipshod pleading.

By the Hilary Rules, the scope of the plea was limited, so that it should operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts

[19] City of Chicago v. Babcock, 143 Ill. 358, 365, 32 N. E. 271 (accord and satisfaction); Papke v. G. H. Hammond Co., 192 Ill. 631, 643, 61 N. E. 910 (release); Cooper v. Lawrence, 204 Ill. App. 261 (conditional privilege in defamation cases, such as fair comment on the public acts of a public man). The exceptions to the general rule above stated are the statute of limitations, a justification in slander, and the retaking of a prisoner on fresh pursuit, which must be specially pleaded.

[20] Wiggins Ferry Co. v. Blakeman, 54 Ill. 201 (1870; contributory negligence); City of Chicago v. Babcock, 143 Ill. 358, 365, 32 N. E. 271 (1892; accord and satisfaction); Kapischki v. Koch, 180 Ill. 44, 54 N. E. 179 (former recovery); Papke v. G. H. Hammond Co., 192 Ill. 631, 643, 61 N. E. 910 (1901; release); Brown v. Baltimore & Ohio R. Co., 6 App. D. C. 237 (release); Herrick v. Swomley, 56 Md. 439, 456 (release).

stated in the inducement. All other pleas in denial must be specific traverses, and take issue on some particular matter of fact alleged in the declaration; e. g., the plaintiff's title to the goods. All matters in confession and avoidance must be pleaded specially.

AFFIRMATIVE PLEAS AND SPECIFIC DENIALS IN CASE

174. At common law, under the general issue in case, as in trover, debt, and assumpsit, most of the affirmative defenses may be admitted without being specially pleaded. The two principal exceptions are statute of limitations and truth in slander and libel.

In Illinois certain matters of inducement must be specifically denied in case; also under the Hilary Rules.

In general, all matters in justification and excuse, or in discharge of the alleged right of action, should be shown under the general issue in case rather than pleaded affirmatively in confession and avoidance. There were two principal exceptions to this rule. The statute of limitations it was necessary to plead specially.[21] Truth in slander and libel must be specially pleaded, with specific instances of the misconduct charged, with time and place.[22]

The Hilary Rules have not been adopted in Illinois.[23] Apparently under their influence, however, the Illinois court has held that in the action on the case the general issue does not deny "matters of inducement." Just what is included in this indefinite judicial exception is not yet entirely clear. Under the English rules, "not guilty" denied only the breach of duty or wrongful act of the defendant, and matters of inducement in the action on the case included the statement of all facts necessary to show the right of the plaintiff and the existence of the duty of defendant, of which the injurious act was claimed to be a violation.[24] The Illinois exception of "matters of inducement" probably is not so extensive. It has been held in Illinois that this exception includes the occupation, ownership, or operation of the property or instrumentalities which are set out as the cause of the injury, or the representative character in which the parties appear in the litigation, or the employment of the servants for whose acts the defendant is alleged to be responsible.[25]

[21] Wall v. Chesapeake & O. R. Co., 200 Ill. 66, 65 N. E. 632; Gunton v. Hughes, 181 Ill. 132, 54 N. E. 895.

[22] Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243, 3 Ann. Cas. 526; Stowell v. Beagle, 57 Ill. 97.

[23] Hoffmann v. World's Columbian Exposition, 55 Ill. App. 290.

[24] Torrence v. Gibbins, 5 Q. B. 207; Wright v. Lainson, 2 M. & W. 739, 744, 748; Dunford v. Trattles, 12 M. & W. 529; Lewis v. Alcock, 3 M. & W. 188; Frankum v. Earl of Falmouth, 2 Adol. & El. 452. See Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692.

175. FORM OF THE GENERAL ISSUE IN CASE OR TROVER

(3 Chitty, Pleading [13th Am. Ed.] p. *1030.)

In the King's Bench. ——— Term, ——— Wm. IV.

C. D. ats. A. B.

And the said defendant, by E. F. his attorney, comes and defends the wrong and injury, when, etc., and says, that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him. And of this he the said defendant puts himself upon the country, etc.

SCOPE OF GENERAL ISSUE—IN TROVER

176. The general issue in trover, as in trespass and case, is "not guilty," which is a formal denial of the wrongful conversion. It denies a legal conclusion, and so admits all defenses, except release and statute of limitations.

The scope of the general issue in this action is so broad that almost any defenses, including bankruptcy of the defendant, may be given in evidence under it, except a release, or the bar of the statute of limi-

[25] McNulta v. Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; Pennsylvania Co. v. Chapman, 220 Ill. 428, 77 N. E. 248; Chicago Union Traction Co. v. Jerka, 227 Ill. 95, 81 N. E. 7; Carlson v. Johnson, 263 Ill. 556-560, 105 N. E. 712; Thomas v. Anthony, 261 Ill. 288, 103 N. E. 974; Clark v. Wisconsin Cent. R. Co., 261 Ill. 407, 103 N. E. 1041; 9 Ill. Law Rev. 44, 442; 10 Ill. Law Rev. 417, 421. These denials may be presented by specific traverse or by notice in writing under the general issue. In Florida it is held, in an action for damages for wrongful death caused by railroad acting through its special agent, servant, or employee, a plea of not guilty does not admit that the person whose conduct caused death was defendant's special agent, servant, or employee. Varnes v. Seaboard Air Line R. Co., 80 Fla. 624, 86 South. 433. See Gillespie v. Pennsylvania Co., 272 Pa. 393, 116 Atl. 540 (agency or employment, and ownership of instrumentalities involved, must be denied under Practice Act 1915 [Pa. St. 1920, §§ 17186, 17193]).

tations.[26] This latitude is permissive only, however, and the defendant is at liberty to plead specially anything admitting both the property in the plaintiff and the conversion, but justifying the latter.[27] Under the Hilary Rules in England, the scope of the general issue is made narrow, and most defenses must be pleaded specially, "not guilty" operating strictly as a denial of the wrongful conversion only, and admitting proof of no other defense; but the rule of the common law remains as first stated in this country.[28]

SAME—IN DETINUE

177. "Non detinet" is the general issue in detinue, and is a formal denial of the detention. It denies the detention and also operates as a denial of the right of possession or property of the plaintiff in the goods claimed.

In detinue, the declaration states that the defendant detains certain goods of the plaintiff, and the general issue alleges that he "does not detain the said goods in the said declaration specified," etc. The plea is proper, not only where the denial is of the actual detention of the goods mentioned, but also where it is that the goods so detained are

[26] Webb v. Fox, 7 Term R. 391; Ward v. Blunt, Cro. Eliz. 147; Kennedy v. Strong, 10 Johns. (N. Y.) 291; Hurst v. Cook, 19 Wend. (N. Y.) 403, Whittier, Cas. Com. Law Pl. p. 200. As taking the goods for just cause, Kline v. Husted, 3 Caines (N. Y.) 275; or disproof of plaintiff's title by showing title in a stranger, Rotun v. Fletcher, 15 Johns. (N. Y.) 207; though in the latter case the defendant must also show some title in himself, Duncan v. Spear, 11 Wend. (N. Y.) 54. And see Fenlason v. Rackliff, 50 Me. 362; Fisher v. Meek, 33 Ill. 92.

[27] Webb v. Fox, 7 Term R. 391. But see Kennedy v. Strong, 10 Johns. (N. Y.) 291, where the practice of special pleading in such cases is condemned. Any special plea showing no conversion is bad on special demurrer in trover. Fulton v. Merrill, 23 Ill. App. 599; Gates v. Thede, 91 Ill. App. 603.

[28] "In trover, it was formerly necessary for the plaintiff to prove, on the general issue of not guilty, his property in the goods for the conversion of which the action was brought, and their value, and that the defendant actually converted them to his own use, or, having them in his possession, refused to deliver them to the plaintiff on demand, which was evidence of a conversion. In this action, it was commonly said, there could be no special plea, except a release; but this was a mistake, for the defendant might have pleaded specially anything else which, admitting the plaintiff had once a cause of action, went to discharge it, as the statute of limitations, or a former recovery, etc. But now, by a late statutory rule of pleading, it is declared that, "in an action for converting the plaintiff's goods, the plea of not guilty will operate as a denial of the conversion only, and not the plaintiff's title to the goods." Tidd, New Prac. 807.

the property of the plaintiff, as it puts both facts in issue. Any proof necessary to controvert these facts would therefore be admissible, as showing there had been no detention,[29] but not evidence in justification, as that the goods were pledged to the defendant,[30] or to establish a lien upon them in his favor,[31] as the detention would be thereby admitted. The latter are special defenses, which tend to show that the detention was rightful. Matters in excuse or discharge should be specially pleaded.

In detinue, the defendant may at common law give in evidence, under the general issue of non detinet, his property in the goods, or a gift of them from the plaintiff; for that proves he detains not the plaintiff's goods. But by the Hilary Rules, "the plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defense than such denial, shall be admissible under that plea." In this action, therefore, the defendant must, under the above rule, specially deny the plaintiff's property in the goods, when necessary for his defense.[32]

Form of General Issue

(In detinue—Non detinet.)

(Commence as above.) * * * And says that he does not detain the said goods and chattels (or "deeds and writings," according to the subject of the action) in the said declaration specified, or any part thereof, in manner and form as the said plaintiff hath above complained. And of this the defendant puts himself upon the country.

[29] See Tanner v. Allison, 3 Dana (Ky.) 422; Smith v. Townes' Adm'r, 4 Munf. (Va.) 191; Dozier v. Joyce, 8 Port. (Ala.) 303; Brown v. Brown, 13 Ala. 208, 48 Am. Dec. 52; Robinson v. Peterson, 40 Ill. App. 132.

[30] Com. Dig. "Pleader," 2, X, 3; Richards v. Frankum, 6 Mees. & W. 420. When detention is excused or justified, defendant must plead his defense.

[31] Phillips v. Robinson, 4 Bing. 106; Richards v. Frankum, supra.

[32] Tidd, New Prac. 804; Richards v. Frankum, 6 Mees. & W. 420

SAME—IN REPLEVIN

178. "Non cepit" is the general issue in replevin, and is a formal denial both of the fact and the place of the alleged taking. It denies the taking only, and not the plaintiff's right of possession. Where replevin may be and is brought for goods lawfully obtained, but unlawfully detained, the general issue is "non detinet," which is a denial of the detention. It denies the detention only, and not the plaintiff's right.

The general issue in replevin, "non cepit modo et forma," controverts all the material allegations of the declaration save that which affirms that the goods are the property of the plaintiff.[33] It admits the allegation of property in the plaintiff, and therefore under it the defendant cannot have a return of the goods.[34] It applies to the case where the defendant did not in fact take the goods alleged, and where he did not take or have them at the place mentioned in the declaration.[35] Where the wrongful act of the defendant consists only of a wrongful detention, after a lawful taking, and replevin is allowed by statute, "non detinet" is the general issue as in detinue; but the effect of this is no greater than that of "non cepit," and therefore, if the defendant wishes to deny the plaintiff's property, he must allege an adverse title in himself, or some one under whom he claims. The pleas of non cepit and non detinet concede the right of possession to be in the plaintiff, and only put in issue the taking and detention.[36]

[33] The distinction between the effect of the general issue in replevin and that in detinue and trover is here noticeable. See Wildman v. Norton, 1 Vent. 249. See, also, Trotter v. Taylor, 5 Blackf. (Ind.) 431; Vickery v. Sherburne, 20 Me. 34; Galusha v. Butterfield, 2 Scam. (Ill.) 227; Dole v. Kennedy, 38 Ill. 282; Dyer v. Brown, 71 Ill. App. 317; Williams v. Smith, 10 Serg. & R. (Pa.) 202.

[34] Simpson v. McFarland, 18 Pick. (Mass.) 427, 29 Am. Dec. 602; Whitwell v. Wells, 24 Pick. (Mass.) 25; Van Namee v. Bradley, 69 Ill. 299; Mount Carbon Coal & R. Co. v. Andrews, 53 Ill. 176.

[35] Johnson v. Wollyer, 1 Strange, 507; Potter v. North, 1 Saund. 347, note 1; Smith v. Snyder, 15 Wend. (N. Y.) 325. Where the declaration is for the unlawful detention only, the plea in denial should be non detinet or non detinuit; and that would seem to be the proper plea at the present time on principle, unless in case of an actual wrongful taking, since the gist of the action is now the wrongful detention. Bourk v. Riggs, 38 Ill. 321; Chandler v. Lincoln, 52 Ill. 74.

[36] Hopkins v. Burney, 2 Fla. 42, Whittier, Cas. Com. Law Pl. pp. 231, 232; Van Namee v. Bradley, 69 Ill. 299.

By statute in some states a plea of "not guilty," or other general issue, is allowed to put in issue, not only the wrongful taking and detention, but also the right of the plaintiff to the possession of the property claimed, and even matters in excuse may be admissible under it.[37]

179. FORMS OF GENERAL ISSUE IN REPLEVIN

General Issue in Replevin for a Taking—Non Cepit

(Encyclopedia of Forms. Forms No. 17,726 and No. 17,759.)

State of ———.

The ——— Court for the County of ———.

State of ———,
County of ———.} ss.

And the said defendant, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says, that he did not take the said goods and chattels (describing them), in the said declaration mentioned, or any or either of them, or any part thereof in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, etc.

———, Attorney for Defendant.

General Issue in Replevin for a Detention—Non Detinet

(Encyclopedia of Forms. Forms No. 17,726 and No. 17,760.)

State of ———.

The ——— Court for the County of ———.

State of ———,
County of ———.} ss.

And the said defendant, by ———, his attorney, comes and defends the wrong and injury, when, etc., and says, that he does not detain the said goods and chattels (describing them) in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this the said defendant puts himself upon the country, etc.

———, Attorney for the Defendant.

[37] Holliday v. McKinne, 22 Fla. 153, Whittier, Cas. Com. Law Pl. p. 235; Bennett v. Holloway, 55 Miss. 211. The general denial in replevin under the Codes has a peculiar comprehensiveness and allows almost all defenses, affirmative as well as negative. 5 Minn. Law Rev. 503, note; A. L. Squire, 24 Case and Comment, 19.

SPECIAL TRAVERSE AND AFFIRMATIVE DEFENSES IN REPLEVIN

180. Denial of the right or title of the plaintiff is commonly made by a peculiar argumentative species of denial, known as a special traverse.

Affirmative defenses must be specially pleaded. An avowry or cognizance is somewhat in the nature of a cross-action by the defendant.

Special Traverse

A denial of the right or the title of the plaintiff is properly made by a special traverse. This plea consists of two parts: (1) The inducement sets up facts and circumstances inconsistent with the title or right of plaintiff, such as title in the defendant or in a third person. (2) The absque hoc clause follows this argumentative denial with a direct denial of the title of the plaintiff.[38] Upon such pleas the plaintiff has the burden of proof, and the defendant, if he succeeds, is entitled to a return of the goods without making avowry or cognizance, because the plaintiff must recover on the strength of his own title and right to immediate possession.[39]

Affirmative Defenses

Matter in justification and excuse for the taking, such as levy on execution or attachment, or on distress, or seizure for taxes, must be specially pleaded,[40] as also statute of limitations, satisfaction or release,[41] and estoppel to claim goods.[42] Avowry or cognizance admits that plaintiff is owner of the goods, but alleges a right to take or detain them, somewhat in the nature of a cross-action. By avowry the defendant justifies taking the goods in his own right and by cognizance he claims them in the right of another. This is more in the nature of a cross-action than of a plea, and asks the return of the goods. The usual ground is taking on distress warrant for rent in arrear, or taking under legal process.[43] A reply is necessary to an avowry, or to a plea of justification.

The answer to the avowry or cognizance is called a "plea in bar," and then follow "replication," "rejoinder," etc., the ordinary name of each pleading being thus postponed one step.

[38] Van Namee v. Bradley, 69 Ill. 299; Atkins v. Byrnes, 71 Ill. 326; Reynolds v. McCormick, 62 Ill. 412; Pease v. Ditto, 189 Ill. 450–468, 59 N. E. 983; Lamping v. Payne, 83 Ill. 463; Chandler v. Lincoln, 52 Ill. 74.

[39] Atkins v. Byrnes, 71 Ill. 326; Reynolds v. McCormick, 62 Ill. 412, 415; Quincy v. Hall, 1 Pick. (Mass.) 357, 11 Am. Dec. 198, Whittier, Cas. Com. Law Pl. pp. 238, 240, note. Plea of property in a third person in replevin is matter of inducement to a formal traverse of the right of property in the plaintiff, which must be proved by the plaintiff. Kee & Chapell Dairy Co. v. Pennsylvania Co., 291 Ill. 248, 126 N. E. 179; Beatty v. Parsons, 2 Boyce (Del.) 134, 78 Atl. 302 (denial of property in plaintiff).

[40] Lowry v. Kinsey, 20 Ill. App. 209; Mount Carbon Coal & R. Co. v. Andrews, 53 Ill. 176; Lammers v. Meyer, 59 Ill. 214; Wheeler v. McCorristen, 24 Ill. 41; Schemerhorn v. Mitchell, 15 Ill. App. 418.

[41] Anderson v. Talcott, 1 Gilman, 365, 371; Simmons v. Jenkins, 76 Ill. 479.

[42] Leeper v. Hersman, 58 Ill. 218; Colwell v. Brower, 75 Ill. 516; Mann v. Oberne, 15 Ill. App. 35.

181. FORM OF AVOWRY AND COGNIZANCE COMBINED

(3 Chitty, Pleading [13th Am. Ed.] pp. *1043 and *1047.)

In the King's Bench, (or "C. P." or "Exchequer.")

——— Term, ——— Wm. IV.

C. D. & E. F. ats. A. B.

And the said C. D. and E. F. by G. H. their attorney, come and defend the wrong and injury, when, etc., and the said C. D. in his own right well avows, and the said E. F. as bailiff of the said C. D. well acknowledges the taking of the said (goods and chattels) in the said declaration mentioned, in the said (dwelling-house) in which, etc., and justly, etc., because they say that the said plaintiff for a long time, to wit, the space of ——— years next before and ending on a certain day, to wit, the ——— day of ———, A. D. ———, and from thence until and at the said time, when, etc., held and enjoyed the said dwelling house in which, etc., with the appurtenances, as tenant thereof to the said C. D. by virtue of a certain demise thereof to the said plaintiff theretofore made, at and under a certain yearly rent, to wit, the yearly rent of £———, payable quarterly, on, etc. (stating the days of payment), in every year, by even and equal portions, and because the sum of £——— of the rent aforesaid, for the space of ———, ending as aforesaid, on the said ——— day of ———, in the year aforesaid, and from thence until, and at the said time when, etc., was due and in arrear from the said plaintiff to the said C. D., he the said C. D. well avows, and the said E. F., as bailiff of the said C. D. well acknowledges, the taking of the said goods and chattels in the said dwelling house, in which, etc., and justly, etc., as for and in the name of a distress for the said rent so due and in arrear to the said C. D. as aforesaid, and which still remains due and

[43] James v. Dunlap, 2 Scam. (3 Ill.) 481; Krause v. Curtis, 73 Ill. 450; Dayton v. Fry, 29 Ill. 525.

unpaid. And this they the said defendants are ready to verify; wherefore they pray judgment and a return of the said (goods and chattels) together with their damages, etc., according to the form of the statute in such case made and provided, to be adjudged to them, etc.

SCOPE OF GENERAL ISSUE IN SPECIAL ASSUMPSIT

182. "Non assumpsit" is the general issue in assumpsit, whether special or general, and is in effect a formal denial of liability on the promise or contract alleged. It denies not only the inducement or statement of the plaintiff's right, but also the breach, and allows any defense tending to show that there was no debt or cause of action at the time of commencing suit.

In Special Assumpsit

Where the action is in special assumpsit, the general issue of "non assumpsit" is a denial of the contract as alleged, covering all that is covered by what is termed the "inducement" or "statement" of the plaintiff's right. Under it, any proof is proper showing that no such contract as is stated was in fact made;[44] that the statement of the contract is wrong in terms, or omits a material part; or that the subject-matter of the contract is misdescribed; or that there has been a failure of consideration or a different consideration from that stated;[45] or that the promise of the defendant is not the agreement pleaded; or that he made no promise at all.[46]

In the recent case of Benes v. Bankers' Life Ins. Co.,[47] the Illinois Supreme Court states the scope of the general issue in assumpsit as follows: "It is well settled that nearly every defense is admissible, under the general issue or plea of non assumpsit, which shows that there was not a subsisting cause of action in the plaintiff at the time

[44] Com. Dig. "Pleader," G, 2. See Lyall v. Higgins, 4 Q. B. 528; Brind v. Dale, 2 Mees. & W. 775; Smith v. Parsons, 8 Car. & P. 199; Falconer v. Smith, 18 Pa. 130, 55 Am. Dec. 611; Hunt v. Test, 8 Ala. 713, 42 Am. Dec. 659.

[45] Craig v. Missouri, 4 Pet. (U. S.) 436, 7 L. Ed. 903; Hilton v. Burley, 2 N. H. 193; Talbert v. Cason, 1 Brev. (S. C.) 298.

[46] See Metzner v. Bolton, 9 Exch. 518; Latham v. Rutley, 8 Dowl. & R. 211; Wailing v. Toll, 9 Johns. (N. Y.) 141; Vasse v. Smith, 6 Cranch (U. S.) 231, 3 L. Ed. 207; Stansbury v. Marks, 4 Dall. (Pa.) 130, 1 L. Ed. 771; Wilt v. Ogden, 13 Johns. (N. Y.) 56; Bayliss v. Fettyplace, 7 Mass. 325; Britton v. Bishop, 11 Vt. 70; Carvill v. Garrigues, 5 Pa. 152; Sill v. Rood, 15 Johns. (N. Y.) 230; Edson v. Weston, 7 Cow. (N. Y.) 278; Young v. Black, 7 Cranch (U. S.) 565, 3 L. Ed. 440.

[47] Benes v. Bankers' Life Ins. Co., 282 Ill. 236, 241, 118 N. E. 443.

the suit was brought. A bankrupt or insolvent's discharge and the statute of limitations are among the very few exceptions to this rule. Under such general issue, the defendant may put in issue the plaintiff's capacity to sue, the execution of the contract, and the release and satisfaction and payment of the debt, if made previous to the commencement of the suit. 2 R. C. L. § 28 p. 770. Whatever matter of defense was contained in the special plea, which plaintiff was bound to prove under the general issue, renders that plea subject to the objection that it amounted to the general issue and was therefore properly held demurrable by the court. Wadhams v. Swan, 109 Ill. 46."

Tidd states the scope of the general issue in assumpsit as follows:[48] "In assumpsit, we have seen, the general issue, or common plea in denial, is non assumpsit: and this plea was formerly holden to be proper, when there was either no contract between the parties, or not such a contract as the plaintiff had declared on; and the defendant might have given in evidence under it, that the contract was void in law, by coverture (James v. Fowks, 12 Mod. 101), gaming (Hussey v. Jacob, 1 Ld. Raym. 87), usury (Ld. Bernard v. Saul, 1 Strange, 498), etc., or voidable by infancy (Darby v. Boucher, 1 Salk. 279; Madox v. Eden, 1 Bos. & P. 481, [a]), duress, etc., or, if good in point of law, that it had been performed (Brown v. Cornish, 1 Ld. Raym. 217; Paramore v. Johnson, 1 Ld. Raym. 566, 12 Mod. 376; Sea v. Taylor, 1 Salk. 394), or that there was some legal excuse for its nonperformance as a release, or discharge before breach or nonperformance by the plaintiff of a condition precedent, etc. This sort of evidence was calculated to show that the plaintiff never had a good cause of action; but, if he had, the defendant might have given in evidence under the general issue, that it was discharged by an accord and satisfaction (Paramore v. Johnson, 1 Ld. Raym. 566, 12 Mod. 376; Martin v. Thornton, 4 Esp. Rep. 181, per Ld. Alvanley, C. J.; but see Adderley v. Evans, 1 Ken. 250; Roades v. Barnes, 1 Ken. 391, 1 Burr. 9, 1 Black. 65; and see

[48] Tidd, New Prac. 323, 339. Illegality. Pollak v. Electric Ass'n, 128 U. S. 446, 9 Sup. Ct. 119, 32 L. Ed. 474 (Ala. law); McCrea v. Parsons, 112 Fed. 917, 50 C. C. A. 612 (Ill. law). Evidence of infancy was allowed under the plea of non assumpsit. Forrestell v. Wood (Md.) 23 Atl. 133; Thorne v. Fox, 67 Md. 67, 73, 8 Atl. 607; Thrall v. Wright, 38 Vt. 494. Cf. Lynch v. Johnson, 109 Mich. 640, 67 N. W. 908 (affirmative defense). Insanity or drunkenness admissible under general issue. Walker v. Winn, 142 Ala. 560, 39 South. 12, 110 Am. St. Rep. 50, 4 Ann. Cas. 537; Collins v. Trotter, 81 Mo. 275; Young v. Stevens, 48 N. H. 133, 136, 2 Am. Rep. 202, 97 Am. Dec. 592. Coverture. Streeter v. Streeter, 43 Ill. 155. In England prior to the Hilary Rules of 1833, coverture, like many other affirmative defenses, was admissible under the general issue. Culver v. Johnson, 90 Ill. 91. Accord and satisfaction. Herrick v. Swamley, 56 Md. 439, 456; Covell v. Carpenter, 24 R. I. 1, 51 Atl. 425; First Nat. Bank of Wellsburg v. Kimberlands, 16 W. Va. 555.

Rolt v. Watson, 12 Moore, 82, 4 Bing. 273; Siboni v. Kirkman, 1 Mees. & W. 418, 1 Tyr. & G. 777), arbitrament, release, foreign attachment, or former recovery for the same cause, etc. In short, the question in assumpsit, upon the general issue, was whether there was a subsisting debt or cause of action, at the time of commencing the suit. But matter of defense arising after action brought could not have been pleaded in bar of the action generally,[49] and therefore was not admissible in evidence under the general issue; and matters of law in avoidance of the contract, or discharge of the action, were usually pleaded. It was also necessary to plead a tender, or the statute of limitations, etc., and to plead or give a notice of set-off. Anciently, matters in discharge of the action must have been pleaded specially. Afterwards, a distinction was made between express and implied assumpsits; in the former, these matters were still required to be pleaded, but not in the latter. At length, about the time of Lord Holt, they were universally allowed to be given in evidence under the general issue. But now, by one of the late statutory rules of pleading [Hilary Rules], it is declared that 'in all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.' " [50]

Under the Hilary Rules, then, the general issue does not extend to deny the breach [51] nor performance by the plaintiff of a condition precedent to his right to sue, nor performance by him of a bilateral contract. These latter are properly the subjects of a common or specific traverse.

The rules as to general issue in debt on simple contract and in assumpsit are similar. In assumpsit, the general issue, "non assumpsit," puts on the plaintiff the burden of proving the contract and the breach as assigned in the declaration, and the defendant may

[49] Matter of defense arising after action brought cannot be pleaded in bar of the action generally, and therefore is not admissible in evidence under the general issue. It is necessary to plead the statute of limitations specially; also in discharge in bankruptcy, statute of frauds, tender, and set-off. Jockish v. Hardtke, 50 Ill. App. 202; Ward v. Athens Min. Co., 98 Ill. App. 227 (1901); Collins v. Montemy, 3 Ill. App. 182; Minard v. Lawler, 26 Ill. 302, 304; Tidd, New Prac. pp. 339, 340.

[50] Thus, if the defendant be charged with an express promise, and his case be that, after making such promise, it was released or performed, this plainly confesses and avoids the declaration. To allow the defendant, therefore, to give this in evidence under the general issue, which is a plea by way of traverse, is to lose sight of the distinction between the two kinds of pleading.

[51] Smith v. Parsons, 8 Car. & P. 109. Matter in confession and avoidance, including discharge, must be specially pleaded under circuit court rule 66. Mizell v. Watson, 57 Fla. 111, 49 South. 149.

g.ve in evidence under it that the contract was void or voidable, that there was some legal excuse for its nonperformance, or that, if there had once been a cause of action, it has since been discharged. In short, the question in assumpsit upon the general issue is whether there is a subsisting debt or cause of action at the time of commencing suit.

In Benes v. Bankers' Life Ins. Co.,[52] the Illinois court says: "The authorities on common-law pleading do recognize and lay down the rule that the defendant is at liberty to plead any matter which does not amount to the general issue; i. e., any matter the plaintiff is not bound to prove to maintain his case, although such matter may be proved under the general issue. Chitty, after making such a statement in substance, further says that in actions of assumpsit, generally, all matters of discharge of the action may be pleaded specially. 1 Chit. Pl. *515. This court in several decisions has apparently recognized such practice, but held the evidence admissible either with or without such a plea by the defendant. * * * This court, however, is committed to the rule that the defense of forfeiture of an insurance policy by reason of the failure to pay subsequent premiums, or of the violation of other conditions subsequent, must be alleged by way of special plea and proved by a defendant insurance company."

In addition to discharge in bankruptcy and statute of limitations, other special pleas in assumpsit are statute of frauds,[53] tender and set-off; also, in suits on promissory notes and negotiable bonds, want of consideration, total and partial failure of consideration, and fraud either in the execution or in the consideration.

General Issue in Assumpsit—Non Assumpsit

(Commence as above.) * * * Says that he did not undertake or promise in manner or form as the plaintiff hath complained. And of this the defendant puts himself upon the country.

Plea of Statute of Limitations—In Assumpsit

(Title of court and cause.)

And the said C. D., defendant in the above-mentioned action, by X. Y., his attorney, comes and defends the wrong and injury, when, etc.,

[52] 252 Ill. 230, 118 N. E. 443.

[53] See 64 University of Pennsylvania Law Rev. 754. The statute of frauds must be pleaded specially in special assumpsit; it is otherwise as to the common counts. Beard v. Converse, 84 Ill. 512. See Maggs v. Ames, 4 Bing. 470, Whittier, Cas. Com. Law Pl. p. 346; note in 40 L. R. A. (N. S.) 43. In equity, the statute of frauds must be pleaded specially in all cases. Clayton v. Lemen, 233 Ill. 435, 84 N. E. 691. In many states, the defendant is allowed to show noncompliance with the statute of frauds under a denial of the contract. Mogart v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367, 7 Ann. Cas. 1140; Holt v. Howard, 77 Vt. 49, 58 Atl. 797; Barrett v.

and says that the plaintiff ought not to have or maintain his aforesaid action against him because he says that he, the said defendant, did not, at any time within six years next before the commencement of this suit, undertake or promise, in manner and form as the plaintiff hath complained. And this the defendant is ready to verify. Wherefore he prays judgment, if the plaintiff ought to have or maintain his aforesaid action against him, etc.

SAME—IN GENERAL ASSUMPSIT

183. The general issue operates as a denial of the indebtedness of defendant, but the statute of limitations, discharge in bankruptcy, and a few other matters must be specially alleged.

General Issue

The general issue in the action of general assumpsit is nonassumpsit. This plea operates similarly to the general issue in special assumpsit and in debt on simple contract, but with certain peculiarities. It is, in the first place, a denial of the indebtedness and of all the matters of fact from which the debt and the promise alleged may be implied by law, such as the bargain, sale and delivery, the performance of work, or the receipt of money to the use of the plaintiff. All defenses in excuse and in discharge may, for the most part, be shown under the general issue. Matters in discharge need not be specially pleaded.[54] The statute of frauds may be shown under the general issue without pleading it contrary to the rule in special assumpsit.[55] All defenses, which show the transaction to be void or voidable, including illegality, fraud, duress, and incapacity, may be shown under the general issue.

Affirmative Defenses

Matters in discharge, such as payment, novation, accord and satisfaction, conditions subsequent, may be shown under the general issue, with the following exceptions: (1) Statute of limitations; (2) discharge in bankruptcy; (3) infancy (query); (4) set-off;[56] (5) failure

McAllister, 33 W. Va. 738, 11 S. E. 220, Ames, Cas. Pl. (2d Ed.) pp. 332, 333, 335.

[54] Gillfillan v. Farrington, 12 Ill. App. 101, 107.

[55] Meyers v. Schemp, 67 Ill. 469; Chicago & W. Coal Co. v. Liddell, 69 Ill. 639; Beard v. Converse, 84 Ill. 512; Sturr Piano Co. v. Lawrence, 190 Ill. App. 451. See 49 L. R. A. (N. S.) 43 note.

[56] Kennard v. Secor, 57 Ill. App. 415.

and lack of consideration of negotiable notes, if a copy is filed with the common counts;[57] (6) usury.

SAME—IN DEBT ON SIMPLE CONTRACTS AND STATUTES

184. The proper general issue in debt on simple contracts and statutes is "nil debet," which is a formal denial of the debt. It denies not only the existence of any contract, but under it any matters in excuse or in discharge may also be shown.

Nil debet is the general form of traverse in debt, where it is not founded on a specialty or a record; and it is applicable alike whether the debt arises by simple contract or by the operation of a statute. The general issue in this action is very broad. It allows any defense which goes to show the nonexistence of the debt. The declaration in debt on simple contract alleges that the defendant is indebted to the plaintiff on some consideration—for instance, for goods sold and delivered. The general issue alleges "that he does not owe the sum of money," etc. Were the allegation merely "that the goods were not sold and delivered," it would, of course, be applicable to no case but that where the defendant means to deny the sale and delivery; but, as the allegation is that he does not owe, it is evident that the plea is adapted to any kind of defense that tends to deny an existing debt, and therefore, not merely, in the case supposed, to a defense consisting of a denial of the sale and delivery, but also to the defenses of release, satisfaction, arbitrament, and a multitude of others, to which a traverse of a narrower kind would be inapplicable. In short, there is hardly any matter of defense to an action of debt to which the plea of nil debet may not be applied, because almost all defenses resolve themselves into a denial of the debt.[58] The scope is almost the same as the general

[57] Columbia Heating Co. v. O'Halloran, 144 Ill. App. 74; Wilson v. King, 83 Ill. 232, 238. If the common counts alone are used, the defendant has no notice describing the instrument relied upon for a recovery, and accordingly it is held that the defendant cannot be required to set up defenses such as the statute of frauds specifically.

[58] Fidler v. Hershey, 90 Pa. 363; Stilson v. Tobey, 2 Mass. 521; Burnham v. Webster, 5 Mass. 266; Bullis v. Giddens, 8 Johns. (N. Y.) 82; Bussey v. Barnett, 9 Mees. & W. 312; Trustees of Dartmouth College v. Clough, 8 N. H. 22; Lindo v. Gardner, 1 Cranch (U. S.) 343, 2 L. Ed. 130. And see McKyring v. Bull, 16 N. Y. 293, 69 Am. Dec. 690; McGavock v. Puryear, 6 Cold. (Tenn.) 34, Whittier, Cas. Com. Law Pl. p. 387 (illegality); Bailey v. Cowles, 86 Ill. 333 (accord and satisfaction).

issue in assumpsit. The form is often given in modern works as "nunquam indebitatus," which is a term borrowed from the Hilary Rules adopted in England in the reign of William IV; but, as those rules do not apply in this country, the older term has been retained here.[59]

General Issue in Debt on Simple Contract—Nil Debet

(Commence as above.) * * * And says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff hath above complained. And of this the defendant puts himself upon the country.

SAME—IN DEBT ON SPECIALTY

185. The general issue in debt on a specialty is "non est factum," which is a formal denial that the deed mentioned in the declaration is the deed of the defendant; but it is only proper when the deed is the foundation of the action. It denies the execution and validity of the deed.

As the foundation of this action is the sealed instrument evidencing the legal debt, and as the defendant cannot deny the liability if he executed the instrument, and it is valid, the general issue of "nil debet" would be improper.[60] Under "non est factum" the defendant may

[59] The plea of nil debet was abolished, and another plea substituted in lieu thereof, by the late statutory rules of pleading, which declare that "the plea of nil debet shall not be allowed in any action," and that "in actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that he never was indebted, in manner and form as in the declaration alleged, and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit, and all matters in confession and avoidance shall be pleaded specially, as therein directed in actions of assumpsit." In other actions of debt, in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, it is declared by another statutory rule that "the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance." Tidd, New Prac. 363.

[60] Boynton v. Reynolds, 3 Mo. 79. See Warren v. Consett, 2 Ld. Raym. 1500; Russell v. Hamilton, 2 Scam. (Ill.) 56; Gargan v. School Dist., 4 Colo. 53, Whittier, Cas. Com. Law Pl. p. 396; Mix v. People, 92 Ill. 549, 552. See Price v. Farrar, 5 Ill. App. 536. Suit and declaration being in debt on specialty, defendant's pleas (1) that he never was indebted as alleged; (2) that he did not promise as alleged—were improper. Merryman v. Wheeler, 130 Md. 566, 101 Atl. 551. In action of debt upon specialty, general issue plea is non est factum; and, if other defenses are relied upon, they must be specially pleaded. Id. But see Adams v. Adams, 70 W. Va. 546, 92 S. E. 463. That defendant did not make or sign the writing sued on is a defense which may be properly put in issue in an action of debt on a sealed instrument, either by a plea of nil debet, accompanied by defendant's affidavit denying his signature to the writing, or by a plea of non est factum. Adams v. Adams, 70 W. Va. 546, 92 S. E. 463.

show either that he never executed the deed in point of fact, or that it is absolutely void in law,[61] but not matters which show that it was merely voidable. Facts of the latter class must be specially pleaded.[62] Execution by married women alone, or a lunatic, or an erasure by an obligee or covenantee, would thus avoid it, but infancy, fraud, or duress would render it voidable only.[63]

By the Hilary Rules it is declared that "in debt on specialty, the plea of non est factum shall operate as a denial of the execution of the deed, in point of fact only; and all other defenses shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." In this action, therefore, the defendant must still plead, as previously to the above rule, payment at or after the day, performance of the condition of the bond, or any matter in excuse of performance, as non damnificatus to a bond of indemnity, and no award to an arbitration bond. The defendant must also plead specially, in discharge of the action, a tender or set-off.[64]

As Tidd points out: "When a specialty was but inducement to the action, and matter of fact the foundation of it, there nil debet was a good plea, as in debt for rent by indenture; for the plaintiff need not have set out the indenture. But when the deed was the foundation, and the fact but inducement, there nil debet was no plea, as in debt for a penalty on articles of agreement, or on a bail bond, etc. In the latter action, however, if the defendant pleaded nil debet, and the plaintiff did not demur, but took issue thereon, it let the defendant into any defense he might have had on the merits." [65]

[61] Yates v. Boen, 2 Strange, 1104; Pigot's Case, 11 Coke, 26b; Anthony v. Wilson, 14 Pick. 303; Van Valkenburgh v. Rouk, 12 Johns. (N. Y.) 337; Landt v. McCullough, 130 Ill. App. 515. At common law the plea of non est factum to a declaration in debt on a bond merely put in issue the execution of the bond. Beggs v. Chicago Bonding & Surety Co., 207 Ill. App. 621.

[62] Collins v. Blantern, 2 Wils. 347. See Marine Ins. Co. v. Hodgson, 6 Cranch, 210, 3 L. Ed. 200.

[63] Whelpdale's Case, 5 Coke, 119a.

[64] Tidd, New Prac. 357, 650.

[65] Tidd, New Prac. 359, 360. See U. S. v. Cumpton, 3 McLean, 163, Fed. Cas. No. 14,902; Crigler v. Quarles, 10 Mo. 324; Hyatt v. Robinson, 15 Ohio, 372; Matthews v. Redwine, 23 Miss. 233; King v. Ramsey, 13 Ill. 619; Bullis v. Giddens, 8 Johns. (N. Y.) 82; Caldwell v. Richmond, 64 Ill. 80; Mix v. People, 92 Ill. 549.

SAME—IN DEBT ON JUDGMENTS

186. The proper general issue in debt on judgments is "nul tiel record," which denies the existence of the record alleged.

Nul tiel record sets up: (1) The defense either that there is no record at all in existence; or (2) one different from that which the plaintiff has declared of; or (3) that the judgment is void on the face of the record.

All other defenses must be specially pleaded.

The plea of "nul tiel record" attacks the existence of the obligation alleged; and under it may be shown that no such record exists as is alleged, which is generally by establishing its invalidity as a judgment, or advantage may be taken of a variance in stating it.[66] As it is a maxim of law that there can be no averment in pleading against the validity of a record, though there may be against its operation, no matter of defense can be pleaded which existed anterior to the recovery of the judgment;[67] and, as this plea merely puts in issue the existence of the record as stated, any matter of release or discharge must be specially pleaded.

Nul tiel record sets up the defense, either (1) that there is no such record at all in existence; or (2) variance, one different from that which the plaintiff has declared of; or (3) that the judgment is void on the face of the record. All other defenses must be specially pleaded.[68]

If extrinsic evidence is necessary to show that the judgment is void, as that it was fraudulently obtained, or that the court had no jurisdiction of the person or subject-matter, the defense must be pleaded

[66] See Bennett v. Morley, 10 Ohio, 100; Stevens v. Fisher, 30 Vt. 200. And see Wright v. Weisinger, 5 Smedes & M. (Miss.) 210; Bullis v. Giddens, 8 Johns. (N. Y.) 82; Warren v. Flagg, 2 Pick. (Mass.) 448, and cases cited; Starbuck v. Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411. In an action of debt on a judgment or recognizance, there is properly no general issue. Nil debet is not a good plea to an action upon a domestic judgment, nor to a judgment rendered in a sister state. Knickerbocker Life Ins. Co. v. Barker, 55 Ill. 241. Cf. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

[67] Cardesa v. Humes, 5 Serg. & R. (Pa.) 65; McFarland v. Irwin, 8 Johns. (N. Y.) 77. And see Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345; Gay v. Lloyd, 1 G. Greene (Iowa) 78, 46 Am. Dec. 499; Cannon v. Cooper, 39 Miss. 784, 80 Am. Dec. 101.

[68] Forsyth v. Barnes, 228 Ill. 326, 331, 81 N. E. 1028, 10 Ann. Cas. 710; Id., 131 Ill. App. 467; Waterbury Nat. Bank v. Reed, 231 Ill. 246, 83 N. E. 188 (scire facias).

specially.[69] Matters in discharge, such as satisfaction of judgment, release, and statute of limitations, must be specially pleaded.[70]

SAME—IN COVENANT

187. The general issue in covenant is "non est factum," which is a formal denial that the deed is the deed of the defendant.

The plea of "non est factum" in covenant only puts the execution and validity of the deed in issue in the same manner as in debt on specialty, and admits the same proof only.[71] Most defenses in covenant must be by specific traverse, or a special plea, when statutes do not provide otherwise, as if it is intended to show performance of the covenant, or to deny the breach, or to establish a justification for nonperformance by matter of excuse.[72]

As Tidd says: "In covenant there is, properly speaking, no general issue; for, though the defendant may plead non est factum, yet that only puts the deed in issue, and not the breach of covenant, and non

[69] Ambler v. Whipple, 139 Ill. 311, 324, 28 N. E. 841, 32 Am. St. Rep. 202; Welch v. Sykes, 3 Gilman (8 Ill.) 197, 44 Am. Dec. 689; Hill v. Mendenhall, 21 Wall (U. S.) 453, 22 L. Ed. 616; 2 Ill. Law Rev. 326; Hopkins v. Woodward, 75 Ill. 62, note. But in Forsyth v. Barnes, 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710, it was held that in an action of debt on a judgment by confession on a note signed by a married woman, the coverture of the defendant may be proved under the plea of nul tiel record, though not specifically put in issue by the pleading or on face of the record. "In debt or scire facias on a judgment or recognizance, the general issue is nul tiel record, which may be properly pleaded, where there is either no record at all, or one different from that which the plaintiff has declared on. But, as this plea only goes to the existence of the record, the defendant must plead payment, or any matter in discharge of the action."

[70] Hellen v. Hellen, 170 Ill. App. 464; Tidd, New Prac. 805.

[71] The rules as to pleas in debt on specialty are applicable also to covenant. Goldstein v. Reynolds, 190 Ill. 124, 60 N. E. 65; City of Chicago v. English, 180 Ill. 476, 479, 54 N. E. 609; Radzinski v. Ahlswede, 185 Ill. App. 513; Norman v. Wells, 17 Wend. (N. Y.) 136; McNeish v. Stewart, 7 Cow. (N. Y.) 474. And see Kane v. Sanger, 14 Johns. (N. Y.) 89; Cooper v. Watson, 10 Wend. (N. Y.) 205.

[72] The special pleas most common in covenant are: "Non infregit conventionem" (covenant not broken) which denies the breach, but not the deed. It is not the general issue, therefore, but a plea in bar. Phelps v. Sawyer, 1 Aikens (Vt.) 160; Roosevelt v. Fulton's Heirs, 7 Cow. (N. Y.) 71. But this will not be a good plea unless the breach is in the affirmative. Bac. Abr. "Covenant," L. "Covenants performed" is proper if the covenants sued on are in the affirmative. This cannot be supported by evidence showing excuse. Cheuning v. Wilkinson, 95 Va. 607, 29 S. E. 680, Whittier, Cas. Com. Law Pl. p. 406; Radzinski v. Ahlswede, 185 Ill. App. 513.

infregit conventionem is a bad plea. In this action, however, the defendant might formerly have given in evidence, on the plea of non est factum, that the deed declared on was delivered as an escrow, on a condition not performed; or that it was void at common law ab initio, as being made by a married woman, lunatic, etc.; or that it afterwards became void by erasure, alteration, or cancelling. But now, by one of the late statutory rules of pleading, it is declared that 'in covenant, the plea of non est factum shall operate as a denial of the execution of the deed, in point of fact only; and all other defenses shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.' In this action, therefore, the defendant must specially controvert the deed, by showing that it is void or voidable, at common law or by statute, or plead that he has performed the covenant, or is legally excused from its performance; or, admitting the breach, that he is discharged by matter ex post facto, as a release."[73]

In an action on a sealed contract of lease, if you sue in covenant for the rent, the defendant must plead to some particular allegation. The defendant may plead non est factum, yet that only puts the execution or validity of the deed in issue, and not the breach of the covenant. If, however, you sue in debt on the lease, though it be sealed, the defendant can plead the general issue of nil debet, as the specialty is considered as but the inducement to the action. In actions of debt on the specialty itself, the general issue is non est factum as in covenant. Under nil debet the defendant may not only put the plaintiff to the necessity of showing the existence of a legal contract, but he may give in evidence the performance of it, or any matter in excuse of performance, or a release, or other matter in discharge. Thus, if plaintiff sues in covenant, the defendant may be compelled to plead his grounds of defense specially.[74]

General Issue in Debt on Bond or Other Specialty, or in Covenant—Non Est Factum

(Title of court and cause.)

And the said C. D., defendant in the above-mentioned action, by X. Y., his attorney, comes and defends the wrong and injury, when, etc.; and says that the said supposed writing obligatory (or "indenture," or "articles of agreement," according to the subject of the action) is not his deed. And of this he puts himself upon the country.

[73] Tidd, New Prac. pp. 356, 357.

[74] Perry, Com. Law Pl. 115.

SAME—IN EJECTMENT

188. The general issue in ejectment is "not guilty," which allows all defenses, affirmative as well as negative. Equitable defenses are still not allowed in ejectment in some jurisdictions.

The general issue in ejectment is not guilty. This plea operates as follows: (1) As a denial of the unlawfulness of the withholding; i. e., of plaintiff's title and right of possession. (2) All defenses in excuse or discharge, including the statute of limitations, are available under the general issue in ejectment.[75]

Specific Traverse

Defendant cannot under the general issue dispute that he held possession. In Illinois the defendant should deny by special plea, verified by affidavit, that he was in possession or claims any title or interest in the premises, or that any demand of possession was made.[76]

Affirmative Defenses

Affirmative defenses are wholly improper in ejectment, as these matters are available under the general issue.[77] Equitable defenses are not permitted in ejectment. It is no defense in ejectment that the deed of plaintiff was procured by fraud going to the consideration, as contrasted with fraud in the execution, though a court of equity might rescind the conveyance.[78]

In ejectment, the legal title prevails, and equitable rights and defenses form no bar to a recovery. It is no defense in ejectment that a deed was procured by the plaintiff's fraud, although a court of equity would rescind the conveyance.[79] Possession of land under a verbal contract, payment of the price, and the making of valuable im-

[75] Bush v. Thomas, 172 Ala. 77, 55 South. 622; Taylor v. Horde, 1 Burr. 60; Roosevelt v. Hungate, 110 Ill. 595, 602; Hogan v. Kurtz, 94 U. S. 773, 24 L. Ed. 317. See as to defenses admissible under the general denial or general issue in ejectment, note in L. R. A. 1918F, 247.

[76] Rev. Stat. Ill. c. 45, § 21. A Chart of Illinois Defensive Pleading, University of Illinois Law Bul. No. 5, pp. 212, 213. See Mullen v. Brydon, 117 Md. 554, 83 Atl. 1025; Perolio v. Doe ex dem. Woodward Iron Co., 197 Ala. 560, 73 South. 197; Jacobson v. Hayday, 83 N. J. Law, 537, 83 Atl. 902.

[77] Edwardsville R. Co. v. Sawyer, 92 Ill. 377.

[78] Dyer v. Day, 61 Ill. 336; Escherick v. Traver, 65 Ill. 379. See also, Fleming v. Carter, 70 Ill. 286; Baltimore & O. & C. R. Co. v. Illinois Cent. R. Co., 137 Ill. 9, 27 N. E. 38. Estoppel in pais is available in equity only.

[79] Dyer v. Day, 61 Ill. 336; Union Brewing Co. v. Meier, 163 Ill. 427, 45 N. E. 264.

provements thereon, will take the case out of the statute of frauds in equity, but not in a court of law, and these facts constitute no defense to an action of ejectment. The defendant must have recourse for relief to a separate proceeding in equity.[80] In Illinois, where the distinction between common law and chancery is maintained, it is not permissible, in an action of ejectment, to attack a deed upon the ground that the grantor was mentally incompetent to execute the deed, as the remedy in such case is in a court of equity. In those states in which the distinction between common-law and equity jurisdiction is not so strictly maintained, the defense of incompetency can be raised in an action of ejectment.[81] In an ejectment suit, the court cannot adjust the equities, if any, between the parties, nor can the defendant rely upon the doctrine of estoppel in pais as a defense.[82]

COMPARISON OF SCOPE OF DIFFERENT GENERAL ISSUES

189. The general issue has a wide scope in case, trover, assumpsit, debt on simple contract, and ejectment. It has the effect of a general denial only in trespass and detinue. In other actions, there is no general issue properly so called.

It will be observed that, by the general issue in assumpsit, in debt on simple contract, in trover, in case, and in ejectment, the defendant puts the plaintiff to the proof of almost all the elements of his cause of action, and at the same time he may prove in his own defense almost all matters in justification and excuse, and, except in trover, most of the matters in discharge. In trespass and detinue, however, the general issue is only a summary denial of the material allegations of the declaration, and matters in confession and avoidance must be specially pleaded, and cannot be admitted under the general issue.

In the actions of covenant, debt on specialty, debt on record, and replevin, there is no general issue, properly speaking, but all pleading consists of specific denials or special affirmative pleas.

[80] Fleming v. Carter, 70 Ill. 286; Herrell v. Sizeland, 81 Ill. 457.

[81] Walton v. Malcolm, 204 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021.

[82] Nichols v. Caldwell, 275 Ill. 520, 526, 114 N. E. 278; Lanum v. Harrington, 267 Ill. 57, 64, 107 N. E. 826. The same rule applies in forcible entry and detainer. Baltimore & O. & C. R. Co. v. Illinois Cent. R. Co., 137 Ill. 9, 27 N. E. 38. "Even in the case of a naked trustee the law is so strenuous for the legal title that it enables the trustee to recover in ejectment against the cestui que trust." Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531.

By the Hilary Rules of 1834, promulgated in England under St. 3 and 4 Wm. IV. c. 42, the scope of the general issue in admitting almost every possible defense in certain actions was limited. All matters in confession and avoidance were required to be specifically denied by a separate traverse to each particular matter of fact. The particular object of these rules was to limit the operation or scope of the general issue, and confine the pleas in denial substituted in lieu thereof, in actions upon contracts to a direct denial of the contract, and in actions for wrongs to a denial only of the breach of duty or wrongful act of the defendant, making the defendant plead specially in denial of any other material fact stated in the declaration, and plead affirmatively all matters in confession and avoidance.[83]

[83] Stephen, Pl. (Williston's Ed.) p. 443, 445.

CHAPTER XIV

THE DIFFERENT VARIETIES OF SPECIAL PLEAS

190–195. The Special Traverse.
196. Form of Declaration and Special Traverse Thereto.
197–199. Pleas in Confession and Avoidance.
200. Giving Color.
201. Implied Color.
202. Express Color.
203. Form of Plea in Confession and Avoidance.
204. Pleadings in Estoppel.
205. Admission by Failure to Deny.
206. Protestation.
207. Notice Under the General Issue.
208. Plea Puis Darrein Continuance.
209–210. Set-Off and Recoupment.

Special Pleas—The Different Varieties

Pleas other than general issues are ordinarily distinguished from them by the name of special pleas; and when resort is had to these, the party is said to plead specially, as contrasted with pleading the general issue. The issues produced upon special pleas, as being usually more specific and particular than those of not guilty, etc., are sometimes described as special issues, as contrasted with what were called general issues; the latter term having been afterward applied, not only to the issues, but to the pleas which tendered and produced them.

Instead of pleading the general issue, the defendant may, in some cases, effectually answer the declaration by a special issue. This is raised by a specific or common traverse directly denying some one material and essential allegation in the declaration, upon which the right of action depends. Many special pleas in bar admit the truth of plaintiff's allegations, but allege new or affirmative matter in avoidance of their legal operation.

A special plea in bar, alleging matter of estoppel, neither confesses nor denies the truth of the declaration, though, like other pleas in bar, it sets up matter which defeats the right of action. Recoupment and set-off assert cross-demands due from the plaintiff to the defendant.

As we have seen, it is in general improper to set up a defense by special plea which can be shown under the general issue. But in many cases the defendant may be at liberty to show specially to the court matters of defense, not merely consisting in a denial, but introductory of new matter, such as coverture or infancy. Although these

may be admissible under the general issue, yet, being matter of justification or excuse, it is convenient to set forth the particular facts relied on as a defense in a special plea, which will apprise the court and the adverse party of the nature and circumstances of the defense, and keep the facts and the law distinct.

Pleas which set up no new affirmative matter, but which merely set up evidential facts inconsistent with the plaintiff's prima facie case, are said to be argumentative denials and improper. But there is a peculiar species of plea, known as a special traverse, which is an exception to the rule.

We have already indicated in the previous chapter what defenses must be specially pleaded in the different forms of actions in considering the scope of the general issue in each action. It remains to discuss the different varieties of special pleas more in detail.

THE SPECIAL TRAVERSE

190. The design of a special traverse as distinguished from the general issue or a common traverse, is to explain or set forth the grounds of the denial. The matter set up in the inducement must be such as amounts to a sufficient answer to the declaration. The essential parts are:

(a) The inducement.
(b) The denial.
(c) The verification.

191. The inducement in a special traverse is that part which alleges affirmative matter, introductory to or explanatory of the denial. It is itself an argumentative or indirect denial. It must in itself amount to a sufficient answer in substance to the opposing pleading; and it must not consist of a direct denial, nor be in the nature of confession and avoidance.

192. The denial in a special traverse is in the direct form pursuing the words of the allegation traversed. Its form is by the use of the words "absque hoc" (without this), that, etc.

193. The special traverse does not tender issue, but concludes with a verification, thus: "And this the said ——— is ready to verify."

194. Where a special traverse is sufficient, the other party must tender issue, to be accepted by the party traversing.

195. The inducement cannot be traversed unless it is bad, for it is a rule that there can be no traverse upon a traverse, unless the first one is bad. Nor, subject to the same exception, can it be answered by a pleading in confession and avoidance.

The sufficiency of the affirmative matter to constitute a defense may be tested by demurrer.

In completing the survey of the different methods by which defenses may be set up, it is necessary to examine the nature and use of that peculiar form of plea known as the "special traverse," though it is now seldom used in practice. A special traverse is a denial, preceded by introductory affirmative matter, of material opposing allegations; and, unlike the other forms of traverse, it does not tender issue, but concludes with a verification.[1]

While it was not ordinarily allowed to plead argumentatively what amounted only to the general issue, yet if the defendant were desirous of raising a question of law, and referring it to the court rather than to the jury, he was allowed, by this curious hybrid plea known as the special traverse, to make an argumentative denial. The inducement to the traverse discloses the real nature of the party's case and shows the grounds upon which the denial proceeds. The plea concludes with a direct denial under the absque hoc clause and an offer to verify.

As an illustration of such a traverse, let us suppose an action is brought by the heir of a lessor against the lessee on a covenant to pay rent, the declaration alleging that the plaintiff's ancestor was seised in fee of the land; that he demised the same to the defendant for a certain term of years; that the defendant covenanted to pay a certain rent; that the ancestor of the plaintiff died, and the reversion descended to the plaintiff; and that rent became due from the defendant to the plaintiff, etc.

Suppose the defendant opposes the declaration by saying "that, after the making of the said indenture, the said reversion of the said premises did not belong to the said E. B. (plaintiff's ancestor) and his heirs in manner and form as the said A. B. hath in his said declaration alleged. And of this the said C. D. puts himself upon the country." This is a common traverse.

[1] See, as to this form of traverse, Brudnell v. Roberts, 2 Wils. K. B. 143; Palmer v. Ekins, 2 Ld. Raym. 1550; Blake v. Foster, 8 Term R. 487; Wilcox v. Kinzie, 3 Scam. (Ill.) 218; People ex rel. Maloney v. Pullman's Palace Car Co., 175 Ill. 125, 135, 51 N. E. 664, 64 L. R. A. 366; Thomas v. Black, 8 Houst. (Del.) 507, 18 Atl. 771; Breck v. Blanchard, 20 N. H. 323, 51 Am. Dec. 222. As to the proper conclusion thereof, see Martin, Civ. Proc. § 286.

Suppose, instead of such a traverse, the defendant pleads that the plaintiff ought not to maintain his action, "because he says that the said E. B. (plaintiff's ancestor), deceased, at the time of the making of the said indenture, was seised in his demesne as of freehold, for the term of his natural life, of and in the said demised premises, and continued so seised thereof until and at the time of his death; and that, after the making of the said indenture, and before the expiration of the said term, to wit, on the ——— day of ———, A. D. ———, at ——— aforesaid, the said E. B. died; whereupon the term created by the said indenture wholly ceased and determined: Without this, that, after the making of the said indenture, the reversion of the said demised premises belonged to the said E. B. and his heirs in manner and form as the said A. B. hath in his said declaration alleged. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action against him."

The substance of this plea is that the plaintiff's ancestor was seised for life only, and therefore that the term terminated at his death, which involves a denial of the allegation in the declaration that the reversion belonged to the father in fee. The defendant's course was therefore to traverse the declaration. Instead of doing so in the common form, he has adopted the special form, first setting out the new affirmative matter, that the plaintiff's ancestor was seised for life, etc., and then annexing to this the denial that the reversion belonged to him and his heirs by that peculiar formula: "Without this, that," etc. The special traverse does not, like a common traverse, tender issue, but concludes with the words: "And this the said C. D. is ready to verify, wherefore he prays judgment," etc., which is called a "verification" and "prayer of judgment," and is the constant conclusion of all pleadings in which issue is not tendered.[2] The affirmative part of the traverse—that is, the part which sets forth the new matter—is called its "inducement"; the negative part is called the "absque hoc"; those being the Latin words formerly used, and from which the modern expression, "without this," is translated.[3] These different parts and properties are all essential to a special traverse, which must always thus consist of an inducement, a denial, and a verification.

The regular method of pleading in answer to a special traverse

[2] There never was any good reason for concluding this plea with a verification and postponing the tender of issue. By the Hilary Rules it was required to conclude to the country; that is, to tender issue. Martin, Civ. Proc. § 286.

[3] The denial may be introduced by other forms of expression besides absque hoc. Et non will suffice. Bennet v. Filkins, 1 Saund. 21; Walters v. Hodges, Lut. 1625.

is to tender issue upon it, with a repetition of the allegation traversed. Thus, to the plea heretofore given by way of illustration, the replication would be: "And, as to the said plea by the said C. D. above pleaded, the said A. B. says that by reason of anything therein alleged he ought not to be barred from having and maintaining his aforesaid action against the said C. D., because the said A. B. says that after the making of the said indenture the reversion of the said demised premises belonged to the said E. B. and his heirs, in manner and form as the said A. B. hath in said declaration above alleged. And this he prays may be inquired of by the country."

It will be perceived, therefore, that the effect of a special traverse is to postpone the issue to one stage of the pleading later than it would be attained by a traverse in the common form, for if the defendant should traverse in the common form without an inducement, and conclude to the country, it would only remain for the plaintiff to add the similiter, and issue would therefore be joined in the replication, whereas, on a special traverse, the issue is not tendered until the next pleading.

Use and Object of Special Traverse

The use and object of the special traverse are thus explained by Mr. Stephen: The general design of a special traverse, he says, as distinguished from a common one, is to explain or qualify the denial, instead of putting it in the direct form; and there were several different views, in reference to one or the other of which the ancient pleaders seem to have been induced to adopt this course:

First. A simple or positive denial may, in some cases, be rendered improper by its opposition to some general rule of law. Thus, in the example of special traverse above given, it would be improper to traverse in the common form, viz. "that after the making of the said indenture the reversion of the said demised premises did not belong to the said E. B. and his heirs," etc., because, by a rule of law, a tenant is precluded (or, in the language of pleading, "estopped") from alleging that his lessor had no title in the premises demised; and a general assertion that the reversion did not belong to him and his heirs would seem to fall within the prohibition of that rule. But a tenant is not by law estopped to say that his lessor had only a particular estate, which has since expired.[4]

In a case, therefore, in which the declaration alleged a seisin in fee in the lessor, and the nature of the defense was that he had a particular estate only (e. g. an estate for life), since expired, the pleader would resort, as in the example, to a special traverse, setting forth the lessor's

[4] Blake v. Foster, 8 Term R. 487.

limited title, by way of inducement, and traversing his seisin of the reversion in fee under the absque hoc. He thus would avoid the objection that might otherwise arise on the ground of estoppel.

Secondly. A common traverse may sometimes be inexpedient, as involving, in the issue in fact, some question which it would be desirable rather to develop and submit to the judgment of the court as an issue in law. Now, it may, for many reasons, be desirable that, without going to a trial, this question should rather be brought before the court in the first instance, and that for that purpose an issue in law should be taken. The pleader, therefore, in such a case, would state the circumstances of the transaction in an inducement, substituting a special for a common traverse. The facts alleged by way of inducement are not subject to traverse, but may be demurred to as insufficient in law to contradict the declaration. This submits the case to the court on the law without the intervention of a jury.[5]

But though these reasons seem to show the purpose of the inducement, they do not account for the two other distinctive features of the special traverse, viz. the absque hoc and the conclusion with a verification. For it will naturally suggest itself that the affirmative matter might, in each of the above cases, have been pleaded per se, without the addition of the absque hoc. So, whether the absque hoc were added or not, the pleading might, consistently with any of the above reasons, have tendered issue, like a common traverse, instead of concluding with a verification. These latter forms were dictated by other principles. The direct denial under the absque hoc was rendered necessary by this consideration: that the affirmative matter, taken alone, would be only an indirect (or, as it is called in pleading, "argumentative") denial of the precedent statement; and by a rule which will be considered in its proper place hereafter, all argumentative pleading is prohibited. In order, therefore, to avoid this fault of argumentativeness, the course adopted was to follow up the explanatory matter of the inducement with a direct denial.[6] With respect to the verification, this conclusion was adopted in a special traverse, in a view to another rule, of which there will also be occasion to speak hereafter, viz. that wherever new matter is introduced in a pleading it is improper to tender issue, and the conclusion must consequently be with a verification. The inducement

[5] If the inducement is insufficient in law to show a defense, the entire plea is bad on general demurrer. People ex rel. Maloney v. Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 604, 64 L. R. A. 366.

[6] 3 Reeves' Hist. Eng. Law, 432; Bac. Abr. "Pleas," etc., H; Courtney v. Phelps, 1 Sid. 301; Herring v. Blacklow, Cro. Eliz. 30; Y. B. 10 Hen. VI, p. 7, pl. 21.

setting forth new matter makes a verification necessary, in conformity with that rule.[7]

Use of Special Traverse at the Present Time

Having now explained the form, the effect, and the use and object of a special traverse, it remains to show in what cases this method of pleading is or ought to be applied at the present day. First, it is said by Stephen, who is the only writer who has given a good explanation of this form of traverse, and from whom this explanation has been taken, it is to be observed that this form was at no period applicable to every case of denial, at the pleasure of the pleader. There are many cases of denial to which the plan of special traverse has never been applied, and which have always been and still are the subjects of traverse in the common form exclusively.[8] These it is not easy to enumerate or define; they are determined by the course of precedent, and in that way become known to the practitioner. On the other hand, in many cases where the special traverse used anciently to occur, it is now no longer practiced. Even when the formula was most in repute, the use of this species does not appear to have been regarded as matter of necessity; and, in cases which admit or require no allegation of new matter, we find the special and the common traverse to have been indifferently used by the pleaders of those days. But in modern times the special traverse, without an inducement of new matter, has been considered, not only as unnecessary, but as frequently improper. As the taste in pleading gradually simplified and improved, the prolix and dilatory effect of a special traverse brought it into disfavor with the courts; and they began, not only to enforce the doctrine that the common form might allowably be substituted in cases where there was no inducement of new matter, but often intimated their preference of that form to the other.[9]

There is a tactical disadvantage to the pleader, in the use of the special traverse, that the inducement tends to open the real nature of the party's case, by giving notice to his adversary of the precise grounds on which the denial proceeds, and thus facilitates to the latter the preparation of his proofs, or enables him to test the grounds of defense by demurrer. And even though the case be such as would admit of an inducement of new matter explanatory of the denial, the usual course is to omit any such inducement, and to make the

[7] But see Martin, Civ. Proc. § 280; 3 Chit. Gen. Prac. 717, 719; Wills' Gould, Pl. §§ 19, 20.

See 1 Saund. 103, n. b, note 3; Bac. Abr. "Pleas," etc., p. 331, note; Smith v. Dovers, 2 Doug. 430.

[8] Horne v. Lewin, 1 Ld. Raym. 641.

[9] Robinson v. Raley, 1 Burr. 320.

denial in an absolute form, with a tender of issue; thus substituting the common for the special formula. The latter, however, appears to be still always allowable when the case is such as admits of an inducement of new matter, except in certain instances before noticed, to which, by the course of precedent, the common form of traverse has always been exclusively applied. And, where allowable, it should still be occasionally adopted, in a view to the various grounds of necessity or convenience by which it was originally suggested.

Form and Requisites of Special Traverse

It is the rule that the inducement in a special traverse must be such as in itself amounts to a sufficient answer, in substance, to the last pleading, for, as we have seen, it is the object of the inducement to give an explained or qualified denial; that is, to state such circumstances as tend to show that the last pleading is not true, the absque hoc being added merely to put that denial in a positive form which had previously been made in an indirect form. Now, an indirect denial amounts, in substance, to an answer; and it follows, therefore, that an inducement, if properly framed, must always in itself contain, without the aid of the absque hoc, an answer, in substance, to the last pleading.[10] Thus, in the example above given, the allegation that E. B. was seised for life, and that that estate is since determined, is in itself, in substance, a sufficient answer, as denying by implication that the fee descended from E. B. to the plaintiff.

It follows, from the same consideration, as to the object and use of a special traverse, that the answer given by the inducement can properly be of no other nature than that of an indirect denial. Accordingly, it has been decided, in the first place, that it must not consist of a direct denial. Thus, the plaintiff, being bound by recognizance to pay J. B. £300 in six years, by £50 per annum, at a certain place, alleged that he was ready every day at that place to have paid to J. B. one of the said installments of £50, but that J. B. was not there to receive it. To this the defendant pleaded that J. B. was ready at the place to receive the £50, absque hoc, that the plaintiff was there ready to have paid it. The plaintiff demurred on the ground that the inducement alleging J. B. to have been at the place ready to receive contained a direct denial of the plaintiff's precedent allegation that J. B. was not there, and should therefore have con-

[10] Com. Dig. "Pleader," G, 20; Bac. Abr. H, 1; Dike v. Ricks, Cro. Car. 336; Thorn v. Sherling, Id. 586; Anon., 3 Salk. 353; Fowler v. Clark, 3 Day (Conn.) 231; Van Ness v. Hamilton, 19 Johns. (N. Y.) 371.

cluded to the country, without the absque hoc, and judgment was given accordingly for the plaintiff.[11] Again, as the answer given by the inducement must not be a direct denial, so it must not be in the nature of a confession and avoidance.[12] Thus, if the defendant makes title as assignee of a term of years of A., and the plaintiff, in answer to this, claims under a prior assignment to himself from A. of the same term, this is a confession and avoidance; for it admits the assignment to the defendant, but avoids its effect, by showing the prior assignment. Therefore, if the plaintiff pleads such assignment to himself by way of inducement, adding, under an absque hoc, a denial that A. assigned to the defendant, this special traverse is bad. The plaintiff should plead the assignment to himself as in confession and avoidance, without the traverse.

Again, it is a rule with respect to special traverses, that the opposite party has no right to traverse the inducement, or (as the rule is more commonly expressed) that there must be no traverse upon a traverse.[13] Thus, in the example we have given above, if the replication, instead of taking issue on the traverse, had traversed the inducement, either in the common or the special form, denying that E. B., at the time of making the indenture, was seised in his demesne as of freehold for the term of his natural life, etc., such replication would have been bad, as containing a traverse upon a traverse. The reason of this rule is formal and technical.[14] By the first traverse a matter is denied by one of the parties which had been alleged by the other, and which, having once alleged it, the latter is bound to maintain, instead of prolonging the series of the pleadings and retarding the issue by resorting to a new traverse. However, this rule is open to an important exception, viz. that there

[11] Hughes v. Phillips, Yelv. 88.

[12] Com. Dig. "Pleader," G, 3; Lambert v. Cook, 1 Ld. Raym. 238; Heller v. Whytler, Cro. Eliz. 650.

[13] Anon., 3 Salk. 353; Com. Dig. "Pleader," G, 17; Bac. Abr. "Pleas," etc., H, 4; King v. Bishop of Worcester, Vaughan, 62; Digby v. Fitzharbert, Hob. 104; Thorn v. Shering, Cro. Car. 586; Gerrish v. Train, 3 Pick. (Mass.) 124; Prosser v. Woodward, 21 Wend. (N. Y.) 205; People v. Strawn, 265 Ill. 202, 207, 106 N. E. 840; People v. Central Union Tel. Co., 232 Ill. 260, 273, 83 N. E. 820.

[14] It has been pointed out by the Illinois Supreme Court that, if the replication were allowed to take issue on the subject-matter of defense contained in the inducement, the defendant would be properly notified as to what averments of the plea were denied, and what he was required to meet at the trial. But the rules of common-law pleading prevent the formation of particular issues and require that the replication take issue on the traverse part of the absque hoc plea, instead of on the inducement. People v. Central Union Tel. Co., 232 Ill. 260, 273, 83 N. E. 820.

may be a traverse upon a traverse when the first is a bad one, or, in other words, if the denial under the absque hoc of the first traverse be insufficient in law, it may be passed by, and a new traverse taken on the inducement.[15] Thus, in an action of prohibition, the plaintiff declared that he was elected and admitted one of the common council of the city of London, but that the defendants delivered a petition to the court of common council, complaining of an undue election, and suggesting that they themselves were chosen; whereas (the plaintiff alleged) the common council had no jurisdiction to examine the validity of such an election, but the same belonged to the court of the mayor and aldermen. The defendants pleaded that the common council, time out of mind, had authority to determine the election of common councilmen; and that, the defendants being duly elected, the plaintiff intruded himself into the office; whereupon the defendants delivered their petition to the common council, complaining of an undue election; without this, that the jurisdiction to examine the validity of such election belonged to the court of the mayor and aldermen. The plaintiff replied by traversing the inducement; that is, he pleaded that the common council had not authority to determine the election of common councilmen, concluding to the country. To this the defendant demurred, and the court adjudged that the first traverse was bad, because the question in this prohibition was not whether the court of aldermen had jurisdiction, but whether the common council had; and that, the first traverse being immaterial, the second was well taken.

As the inducement cannot, when the denial, under the absque hoc, is sufficient in law, be traversed, so, for the same reasons, it cannot be answered by a pleading in confession and avoidance. But, on the other hand, if the denial be insufficient in law, the opposite party has then a right to plead in confession and avoidance of the inducement, or (according to the nature of the case) to traverse it; or he may demur to the whole traverse for the insufficiency of the denial.

As the inducement of a special traverse, when the denial under the absque hoc is sufficient, can neither be traversed nor confessed and avoided, it follows that there is, in that case, no manner of pleading to the inducement. The only way, therefore, of answering a good special traverse is to plead to the absque hoc, which is done by tendering issue on such denial. But, though there can be no pleading to an inducement, when the denial under the absque hoc is suffi-

[15] Com. Dig. "Pleader," G, 18, 19; Thrale v. Bishop of London, 1 H. Bl. 377; Crosse v. Hunt, Carth. 99; Rex v. Bolton, 1 Strange, 117; Hulsh v. Phillips, Cro. Eliz. 754; Breck v. Blanchard, 20 N. H. 323, 51 Am. Dec. 222; Richardson v. Mayor and Commonalty of Orford, 2 H. Bl. 186.

cient, yet the inducement may be open, in that case, to exception in point of law. If it be faulty in any respect, as, for example, in not containing a sufficient answer in substance, or in giving an answer by way of direct denial, or by way of confession and avoidance, the opposite party may demur to the whole traverse, though the absque hoc be good, for this insufficiency in the inducement.

196. FORM OF DECLARATION AND SPECIAL TRAVERSE THERETO

Suppose the following declaration in covenant for nonpayment of rent by the heir of the lessor against the lessee:

C. D. was summoned to answer A. B., son and heir of E. B., his late father, deceased, of a plea that he keep with the said A. B. the covenant made by the said C. D. with the said E. B., according to the force, form, and effect of a certain indenture in that behalf made between them. And thereupon the said A. B., by ———, his attorney, complains: For that whereas, the said E. B., at the time of making the indenture hereinafter mentioned, was seised in his demesne as of fee of and in the premises hereinafter mentioned to be demised to the said C. D.; and, being so seised, he, the said E. B., in his lifetime, to wit, on the ——— day of ———, in the year of our Lord ———, at ———, in the county of ———, by a certain indenture then and there made between the said E. B. of the one part and the said C. D. of the other part (one part of which said indenture, sealed with the seal of the said C. D., the said A. B. now brings here into court, the date whereof is the day and year aforesaid), for the considerations therein mentioned, did demise, lease, set, and to farm let, unto the said C. D., his executors, administrators and assigns, a certain messuage, or dwelling house, with the appurtenances, situate at ———, to have and to hold the same unto the said C. D., his executors, administrators, and assigns, from the ——— day of ——— then last past to the full end and term of ——— years thence next ensuing, and fully to be complete and ended, yielding and paying therefor yearly and every year, to the said E. B., his heirs or assigns, the clear yearly rent or sum of ——— dollars, payable quarterly, at the four most usual feasts or days of payment of rent in the year; that is to say, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in each and every year, in equal portions. And the said C. D. did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the said E. B., his heirs and assigns, that he, the said C. D., his executors, administrators, or assigns should and would well and truly pay, or cause to be paid,

to the said E. B., his heirs or assigns, the said yearly rent or sum of ——— dollars, at the several day and times aforesaid, as by the said indenture, reference being thereunto had, will more fully appear. By virtue of which said demise, the said C. D. afterwards, to wit, on the ——— day of ——— in the year ———, entered into the said premises, and was thereof possessed for the said term, the reversion thereof belonging to the said E. B. and his heirs. And he, the said C. D., being so possessed, and the said E. B. being so seised of the said reversion in his demesne as of fee, he, the said E. B., afterwards, to wit, on the ——— day of ———, in the year aforesaid, at ———, aforesaid, in the county aforesaid died so seised of the said reversion; after whose decease the said reversion descended to the said A. B., as son and heir of the said E. B.; whereby the said A. B. was seised of the reversion of the said demised premises in his demesne as of fee. And the said A. B. in fact says that he, the said A. B., being so seised, and the said C. D. being so possessed as aforesaid, afterwards, and during the said term, to wit, on the ——— day of ———, A. D. 19—, at ———, in the county of ———, a large sum of money, to wit, the sum of ——— dollars, of the rent aforesaid, for divers, to wit, ——— years of the said term then elapsed, became and was due and owing, and still is in arrear and unpaid, to the said A. B., contrary to the form and effect of the said covenant in that behalf. And so the said A. B. in fact saith that the said C. D. (although often requested) hath not kept his said covenant in that behalf, but hath broken the same, and to keep the same hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of ——— dollars; and therefore he brings his suit, etc.

The following plea would be a special traverse:

And the said C. D., by ———, his attorney, comes and defends the wrong and injury, when, etc.; and says that the said A. B. ought not to have or maintain his aforesaid action against him, because he says that the said E. B., deceased, at the time of the making of the said indenture, was seised in his demesne as of freehold, for the term of his natural life, of and in the said demised premises, with the appurtenances, and continued so seised thereof until and at the time of his death; and that, after the making of the said indenture and before the expiration of the said term, to wit, on the ——— day of ———, A. D. 19—, at ———, aforesaid, the said E. B. died; whereupon the term created by the said indenture wholly ceased and determined. *Without this*, that after the making of the said indenture, the reversion of the said demised premises belonged to the said E. B. and his heirs, in manner and form as the said A. B. hath in his said declaration alleged; and this the said C. D. is ready to verify. Wherefore he prays

judgment if the said A. B. ought to have or maintain his aforesaid action against him.

PLEAS IN CONFESSION AND AVOIDANCE

197. If, instead of denying in the direct form, the party wishes to assert a defense in justification or discharge of the matter alleged, he must plead by way of confession and avoidance.

Pleading in confession and avoidance admits the truth of opposing allegations, and avoids their legal effect by alleging other and inconsistent facts.

198. Pleas in confession and avoidance are divided, with reference to their subject-matter, into

(a) Pleas in justification or excuse. Such a plea, while admitting the facts alleged by the plaintiff, shows in effect that he had not at any time a good cause of action, either by reason of some legal right of the defendant justifying his conduct in point of law, or some act or conduct of the plaintiff excusing him from liability in the particular case.

(b) Pleas in discharge. Such a plea admits that a cause of action once existed in the plaintiff, but shows that it has been discharged by some matter subsequent, either of fact or of law.

199. Pleadings in confession and avoidance do not tender issue, but conclude with a verification and prayer of judgment.

A pleading in confession and avoidance, as the terms imply, does not, like the traverse, deny the allegations of fact contained in the opposing pleading, but confesses them, and avoids their legal effect. A plea in confession and avoidance, for instance, confesses the truth of the allegations in the declaration, either expressly or by implication, and then proceeds to allege new matter which deprives the facts admitted of their ordinary legal effect, and so avoids them. Thus, in an action of trespass for assault and battery, a plea admitting facts alleged to have been done by the defendant, but showing that they were done in necessary self-defense against an assault by the plaintiff, is a plea in confession and avoidance.

Affirmative pleas in confession and avoidance are either by way of justification and excuse, showing that, even admitting plaintiff's prima facie case, he never had a cause of action, or by way of discharge, showing that, although a cause of action once existed, yet it has been taken away by some subsequent matter. Pleas of estoppel are another variety of affirmative pleas.[16]

Pleas in Justification or Excuse

A plea in justification or excuse shows that the plaintiff never had at any time a good cause of action, either by reason of some legal right of the defendant justifying his conduct in point of law, or some act or conduct of the plaintiff excusing him (the defendant) from liability in the particular case. The former is a plea in justification; the latter, a plea in excuse. This distinction is supported by authority, though pleas of both classes are usually treated together, as being of the same general effect. Where the defendant, admitting the facts stated by the plaintiff to be true, alleges in contradiction the exercise of a right founded upon matter of title, interest in or respecting land, authority derived either mediately or immediately from the plaintiff, or the operation of some general rule of law applicable to the particular case, the plea is one of justification, the defense being that the doing or omission of the acts complained of was justified in point of law by the existence of such right. Here the facts must be fully set forth, as a justification must be specially pleaded.[17] But where, still admitting the plaintiff's allegations, the defendant pleads, for instance, that his conduct was purely in self-defense, or that the performance by him of a contract obligation was prevented by the plaintiff, the plea is one of excuse, the plaintiff's conduct being relied on as his apology for doing or not doing the act in question; and here, again, the statement must be particular, the reason for all special pleadings being to fully apprise the adversary of what he is to be called upon to meet.[18] Pleas in justification or excuse generally include all pleas in confession and avoidance which are not in discharge of the defendant's liability.

[16] Dana v. Bryant, 1 Gilman (Ill.) 104.

[17] See Smart v. Hyde, 8 Mees. & W. 723; Wise v. Hodsoll, 11 Adol. & E. 816; Glazer v. Clift, 10 Cal. 303; Tomlinson v. Darnall, 2 Head (Tenn.) 538; Briggs v. Mason, 31 Vt. 433. A plea in justification or excuse admits plaintiff's allegations, but in effect denies plaintiff's cause of action, either because defendant is justified, or is excused from liability through some act or conduct of plaintiff. Florida East Coast Ry. Co. v. Peters, 72 Fla. 311, 73 South. 151, Ann. Cas. 1918D, 121.

[18] Per Buller, J., Rex v. Lyme Regis, 1 Doug. 159. It will be interesting here for the student to compare the common-law method of pleading in confession and avoidance with the statement of "new matter constituting a defense," prescribed by the codes. See Bliss, Code Pl. (2d Ed.) pt. 2, c. 17. All matters in confession and avoidance must be pleaded specially. Florida East Coast Ry. Co. v. Peters, 72 Fla. 311, 73 South. 151, Ann. Cas. 1918D, 121.

Pleas in Discharge

A plea in discharge admits that the plaintiff once had a right of action, but shows that it is discharged or released by some matter subsequent, either of fact or law. The most common pleas in discharge are payment; release; tender; set-off; bankruptcy; the statute of limitations.[19]

Conclusion of Pleading

A pleading in confession and avoidance does not tender issue, and, like all other pleadings which do not tender issue, it concludes with a verification and prayer of judgment.

GIVING COLOR

200. A plea in confession and avoidance must give color; that is, admit the apparent truth of the plaintiff's allegations and give him credit for an apparent or prima facie right of action, which the new matter in the plea destroys. Color may be express or implied.

IMPLIED COLOR

201. Implied color is the tacit admission of the plaintiff's prima facie case by failure to deny it.

[19] Statute of Limitations—Permanent or Temporary Injury—Plea of Non-accrevit, 11 Ill. Law Rev. 56 (criticizing Wheeler v. Sanitary Dist. of Chicago, 270 Ill. 401, 110 N. E. 605; Ham. N. P. 118. As to arbitrament and award, see Yingling v. Kohlhass, 18 Md. 148; Brown v. Perry, 14 Ind. 32; as to payment or accord and satisfaction, Goodchild v. Pledge, 1 Mees. & W. 863; Nill v. Comparet, 15 Ind. 243; a release, Brooks v. Stuart, 9 Adol. & E. 854; Hosier v. Ellason, 14 Ind. 523; statute of limitations, Eavestaff v. Russell, 10 Mees. & W. 365; as to set-off, Mitchell v. McLean, 7 Fla. 329; Himes v. Barnitz, 8 Watts (Pa.) 89; McAllister v. Reab, 4 Wend. (N. Y.) 483; bankruptcy, Gould v. Lasbury, 1 Cromp., M. & R. 254. Railway company's plea in action for killing cattle claiming release of liability, but denying negligence charged, was bad; as it sought to avoid liability, but failed to confess negligence. Central of Georgia Ry. Co. v. Williams, 200 Ala. 73, 75 South. 401. In a plea of confession and avoidance the confession is as essential as the avoidance. Id. New matter set up in an answer is either in confession and avoidance or discharge. Parks v. Western Union Telegraph Co. (Nev.) 197 Pac. 580.

EXPRESS COLOR

202. Express color is a fictitious allegation, not traversable, to give an appearance of right to the plaintiff, and thus enable the defendant to plead specially his own title, which would otherwise amount to the general issue. It is a licensed evasion of the rule against pleading contradictory matter specially.

Giving Color

It is a rule that every pleading by way of confession and avoidance must give color. "Color," as a term of pleading, signifies an apparent or prima facie right; and the meaning of the rule that every pleading in confession and avoidance must give color is that it must admit an apparent right in the opposite party, and rely, therefore, on some new matter by which that apparent right is defeated.[20]

Thus, in an action of covenant on an indenture of lease, for not repairing, suppose the defendant pleads a release by way of confession and avoidance, thus: "And the said C. D. by X. Y., his attorney, comes and defends the wrong and injury, when, etc., and says that the said A. B. ought not to have or maintain his aforesaid action against him, the said C. D., because he says that after the said breach of covenant, and before the commencement of this suit, to wit, * * * the said A. B. by his certain deed of release, sealed with his seal and now shown to the court here, did remise, release," etc., all damages from said breach of covenant, etc. This plea gives color to the declaration, for it admits an apparent right in the plaintiff, namely, that the defendant did, as alleged in the declaration, execute the deed, and break the covenant therein contained, and would, therefore, prima facie be chargeable with damages on that ground; but

[20] Gould v. Lasbury, 1 Cromp., M. & R. 254; Hatton v. Morse, 3 Salk. 273; Hallet v. Byrt, 5 Mod. 252; Holler v. Bush, 1 Salk, 394; Brown v. Artcher, 1 Hill (N. Y.) 266; Van Etten v. Hurst, 6 Hill (N. Y.) 311, 41 Am. Dec. 748; Conger v. Johnston, 2 Denio (N. Y.) 96; Margetts v. Bays, 4 Adol. & E. 489; Dibble v. Duncan, 2 McLean, 553, Fed. Cas. No. 3,880; Thayer v. Brewer, 15 Pick. (Mass.) 217; McPherson v. Daniels, 10 Barn. & C. 263; Davis v. Mathews, 2 Ohio, 257; Patrickson v. Barton, Cro. Jac. 229; Taylor v. Eastwood, 1 East. 215; Merritt v. Miller, 13 Vt. 416; Rex v. Johnson, 6 East. 582. But see Wise v. Hodsoll, 11 Adol. & E. 816. Pleas in confession and avoidance must either expressly or impliedly admit that the allegations in the declaration are true, with a statement of matter which destroys their effect, and must confess a prima facie right of action in the opposite party, and then state new matter by which that apparent right is defeated. Bavarian Brewing Co. v. Retkowski (Del. Super.) 113 Atl. 903.

it goes on and shows new matter, not before disclosed, by which that apparent right is shown not to exist, namely, that the plaintiff executed a release. Suppose the plaintiff files a replication to this plea, saying that at the time of making the said supposed deed of release, he was unlawfully imprisoned by the defendant, until, by force and duress of that imprisonment, he made the supposed deed of release, etc. Here the plaintiff in his replication gives color to the plea. He impliedly admits that the defendant has prima facie a good defense, namely, that such release was executed as alleged in the plea, and that the defendant, therefore, is apparently discharged, but he sets up new matter by which the effect of the plea is avoided, namely, that the release was obtained by duress.

Suppose, on the other hand, the plaintiff, instead of replying as above stated, should reply that the release was executed by him, but to another person, and not to the defendant. This replication would be bad as a replication in confession and avoidance, for wanting color, because, if the release were not to the defendant, there would not exist even an apparent defense, requiring the allegation of new matter to avoid it; and the plea might be sufficiently answered by a traverse, denying that the deed stated in the plea is the deed of the plaintiff. So, in an action of trespass quare clausum fregit, where the declaration charges the defendants with breaking and entering the plaintiff's close, a plea by way of confession and avoidance is bad, as wanting color, where it alleges that at the time of the alleged trespass one of the defendants was seised in tail of the said close, and the other defendant in possession of it, as his lessee for years, since, if this be so, it follows that the plaintiff has not even a colorable right to maintain the action as for trespass to his close.[21] In such a case the usual and regular course would be,

[21] So, in trespass de bonis asportatis, a plea that the goods in question were the property of a third person, and that the defendant took them by virtue of an attachment against him, is bad, as amounting to the general issue, for it involves a denial of the plaintiff's possession, and therefore gives no color to the action. The thing to do in such a case, as we shall see, is to give express color. See, in support and illustration of the text, Brown v. Artcher, 1 Hill (N. Y.) 266; Collet v. Flinn, 5 Cow. (N. Y.) 466. In Conger v. Johnston, 2 Denio (N. Y.) 96, it was held that a plea of the statute of limitations averring that "the several causes of action, etc., if any such there were or still are, did not accrue within," etc., was bad for want of color. "Every plea in confession and avoidance," it was said, "must give color, by admitting an apparent or prima facie right in the plaintiff. It must either expressly or impliedly confess that, but for the matter of avoidance contained in the plea, the action could be maintained. This plea makes no such confession, and is therefore bad. Instead of saying, as the pleader should have done, that the several causes of action mentioned in the declaration did not accrue within six years, the words are that the several supposed causes of action mentioned in the declaration, 'if any such there were, or still are,' did not accrue within six years. The defendants do not admit that but for the statute of limitations the plaintiff could have sued." And see Margetts v. Bays, 4 Adol. & E. 489; Gould v. Lasbury, 1 Cromp., M. & R. 254 (where, in an action of debt on simple contract, a plea that the defendant was discharged under the insolvent debtor's act from the debts and causes of action, "if any," etc., was held bad). But see, contra, Wise v. Hodsoll, 11 Adol. & E. 816, where, in an action of trespass for assault and battery, a plea that, "if any hurt or damage happened or was occasioned" to the plaintiff, it was by reason of the defendants acting in self-defense, etc., was sustained.

not to plead in confession and avoidance, but to plead the general issue, not guilty, which puts the plaintiff's possession of the close in issue, as well as the mere fact of the trespass.

The tacit admission, by failure to deny, which we have just been considering, has been called "implied color," to distinguish it from another kind, which is in some instances inserted in the pleading, and is therefore called "express color."[22]

Where the nature of the defense is such that it would contradict the plaintiff's prima facie case, the defendant cannot plead it specially without giving express color in order to have something to avoid.

Express color is defined to be "a feigned matter pleaded by the defendant in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has, in truth, only an appearance or color of cause."[23] It is the setting up of a straw man, in order to have something to knock down. It occurs at present only in trespass, and is very seldom used even in that action. Its use and nature may be thus explained: The necessity of an implied color has evidently the effect of obliging the pleader to traverse in many instances in which his case, when fully stated, does not turn on a mere denial of fact, but involves some consideration of law. In the example first above given of want of color, this would not be so, for if the

[22] "The learned Serjeant Williams, whose notes upon Saunders' Reports are often cited in this work, was a gentleman of very florid complexion, which circumstance gave the irreverent youth of the bar occasion to say that he had much express color. Tradition informs us, also, that the same Serjeant Williams had a country place near London, to which he was wont to resort for the week-end, and that he drove a horse which was given to balking; whereupon it was commented how strange it was that a horse belonging to so learned a pleader should demur when he ought to go to the country." Kelgwin, Precedents of Pleading, p. 555.

[23] Bac. Abr. "Trespass," I, 4. See Leyfield's Case, 10 Coke, 89b; Comyns v. Boyer, Cro. Eliz. 485; Brown v. Artcher, 1 Hill (N. Y.) 266; Fletcher v. Marillier, 9 Adol. & E. 457. See Thayer, Prelim. Treatise Ev. p. 232, on express color as a method of withdrawing questions from the jury by pleading in confession and avoidance.

deed of release were executed, not to the defendant, but to a different person, this, of course, amounts to no more than a mere denial that the deed, as alleged in the plea, is the deed of the plaintiff, and no question of law can be said to arise under this traverse. But, in the second example given above of want of implied color, suppose the plaintiff was in the wrongful possession of the close, without any further appearance of title than the possession itself, at the time of the trespass alleged and that the defendants entered in the assertion of their title. They could not, without more, set forth their title in a plea by way of confession and avoidance, because, as we have seen, it would not give color, and he would therefore be driven to plead the general issue, not guilty. By this plea an issue is produced, whether or not the defendants are guilty of the trespass; but upon trial of the issue it may be found that the question turns entirely upon construction of law. The defendants say they are not guilty of breaking the "close of the plaintiff," as alleged in the declaration, and the reason that they are not guilty is that they had the title and right to possession of the close. Their title involves a legal question, and yet this question, under the plea of not guilty, would be triable by the jury under instructions by the court. The defendants may wish to avoid this, and to bring the question up for decision by the court, instead of by the jury. They can do this if they can set forth their title specially in their plea, for then the plaintiff, if disposed to question the sufficiency of the title, may demur to the plea, and thus refer the legal question to the court. But such a plea, as we have seen, if pleaded simply according to the fact, would be bad for want of color. This difficulty was overcome by the practice of giving express color to the plea in lieu of the implied color which was wanting. It is done by inserting in the plea a fictitious allegation of some colorable but insufficient title in the plaintiff, which was at the same time avoided by showing the preferable title of the defendant. This was called "giving color," and it was held to cure or prevent the objection which would otherwise arise from the want of implied color. Such a plea confessed some apparent title in the plaintiff, as a demise under which he entered and was possessed, and therefore admits that the close was in some sense the close of the plaintiff, but at the same time it avoids this colorable title by showing that of the defendant, and alleging that the plaintiff's title under the demise was defective in point of law, and that nothing passed under the demise.

When express color was thus given, the plaintiff was not allowed, in his replication, to traverse the fictitious matter suggested by way of color; for, its only object being to prevent a difficulty in form,

such traverse would be wholly foreign to the merits of the cause, and would only serve to frustrate the fiction which the law, in such case, allows. The plaintiff would therefore pass over the color without notice, and would either traverse the title of the defendant, if he meant to contest its truth in point of fact, or demur to it, if he meant to contest its sufficiency in point of law; and thus the defendant would obtain his object of bringing any legal question raised upon his title under consideration of the court, and withdrawing it from the jury.

Express color must consist of such matter as, if it were effectual, would maintain the nature of the action.[24] On the other hand, the right suggested must be colorable only, and must not amount to a real or actual right; for otherwise the plaintiff would be entitled to recover on the defendant's own showing, and the plea would be an insufficient answer.[25]

FORM OF PLEA IN CONFESSION AND AVOIDANCE

203. Form of plea in bar by way of confession and avoidance to declaration in covenant.

(Title of court and cause.)

And the said C. D., defendant in the above-mentioned action, by X. Y., his attorney, comes and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have or maintain his aforesaid action against him, the said defendant, because he says that after the said breach of covenant, and before the commencement of this suit, to wit, on the ——— day of ———; A. D. 19—, at ——— aforesaid, in the county aforesaid, the said plaintiff, by his certain deed of release, sealed with his seal and by him delivered to the defendant, and now shown to the court here, did remise, release, and forever quitclaim to the said defendant, his heirs, executors, and administrators, all damages, cause and causes of action, breaches of covenant, debts, and demands whatsoever, which had then accrued to the said plaintiff, or which the said plaintiff then had against the said defendant, as by the said deed of release, reference being thereto had, will fully appear. And this the defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action against him.

[24] Bac. Abr. "Pleas," etc., I, 8; Com. Dig. "Pleader," 3, M, 41; Anon., Keilw. 103b.

[25] Radford v. Harbyn, Cro. Jac. 122.

PLEADINGS IN ESTOPPEL

204. A plea in estoppel is one which neither confesses nor avoids, but pleads a previous inconsistent act, allegation, or denial of the party which precludes him from maintaining his action or defense.

A man is sometimes precluded in law from alleging or denying a fact in consequence of his own previous act, allegation, or denial of a contrary tenor; and this preclusion is called an estoppel. An estoppel may arise either from matter of record,—from the deed of the party,—or from matter in pais; that is, matter of fact. Thus, any matter adjudicated in a court of record will forever preclude the party from afterwards contesting the same fact in any subsequent suit with his adversary. This is an estoppel by matter of record. As an instance of an estoppel by deed may be mentioned the case of a bond reciting a certain fact. The party executing the bond will be precluded from afterwards denying, in any action brought upon that instrument, the fact so recited. An example of an estoppel by matter in pais occurs when one man has accepted rent of another. He will be estopped from afterwards denying, in any action with that person, that he was at the time of such acceptance his tenant. The tenant is likewise estopped to deny his landlord's title.

This doctrine of law gives rise to a kind of pleading that is neither by way of traverse nor confession and avoidance, viz.: a pleading that, waiving any question on the fact, relies merely on the estoppel; and, after stating the previous act, allegation, or denial on the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before did or said.[26] This is called a pleading by way of estoppel. It may be interposed instead of a traverse, without admitting traversable averments on the other side.[27]

[26] Plummer v. Woodburne, 4 Barn. & C. 625; Eastmure v. Laws, 5 Bing. N. C. 444; Doe v. Wright, 10 Adol. & E. 763; City of East St. Louis v. Flannigen, 34 Ill. App. 596; Webster v. State Mut. Fire Ins. Co., 81 Vt. 75, 69 Atl. 819; See G. Stoner, 9 Mich. Law Rev. 484, Pleading Estoppel.

[27] See Dana v. Bryant, 1 Gilman (Ill.) 104.

ADMISSION BY FAILURE TO DENY

205. Every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse.

It is an important rule of pleading that a pleading admits every traversable fact alleged on the other side that it does not traverse.[28] Thus, in an action of covenant on an indenture, a plea of release, as it does not traverse the execution of the indenture, is taken to admit it. And a replication of duress to such a plea, since it does not traverse the release, admits its execution. So, in an action of covenant on an indenture of lease, for failure to repair, a plea traversing the want of repair admits the indenture. The effect of such an admission is to conclude the party, even though the jury should improperly go out of the issue and find the contrary of what is thus confessed on the record.[29]

The rule extends only to such matters as are traversable. Matters of law, therefore, or any other matters which are not fit subjects of traverse, are not so admitted.[30]

[28] Com. Dig. "Pleader," G 2; Bac. Abr. "Pleas," etc., 322, 386; Hudson v. Jones, 1 Salk. 91; Nicholson v. Simpson, 11 Mod. 336; Cheever v. Mirrick, 2 N. H. 376; Carpenter v. Briggs, 15 Vt. 34; Briggs v. Dorr, 19 Johns. (N. Y.) 95; U. S. v. Willard, 1 Paine, 539, Fed. Cas. No. 16,698; Fowler v. Com. to use of Taylor, 1 Dana (Ky.) 358; Dana v. Bryant, 1 Gilm. (Ill.) 104; McCormick v. Huse, 66 Ill. 315; People, to use of Foster, v. Gray, 72 Ill. 343; English v. Arizona ex rel. Griffith, 214 U. S. 359, 29 Sup. Ct. 658, 53 L. Ed. 1030; Buckeye Cotton Oil Co. v. Sloan, 250 Fed. 712, 163 C. C. A. 44.

[29] Bolleau v. Rutlin, 2 Exch. 664, 12 Jur. 899; Hughes, Proc. 748; Bac. Abr. "Pleas," etc., 322; Wilcox v. Servant of Skipwith, 2 Mod. 4; 31 Cyc. Pleading, p. 214. A party is bound by the allegations of fact in his own pleading, and when there is no denial of such allegations they are accepted as true, if material, and that meaning ascribed to the words that is usually intended by their use. Florida East Coast Ry. Co. v. Peters, 80 Fla. 382, 86 South. 217. An admission in pleading is conclusive against the party making it on the trial of the particular issue to which the admission relates. Where the defendant pleads several pleas, the plaintiff cannot use an admission in one plea to establish a fact denied in another. Starkweather v. Kittle, 17 Wend. (N. Y.) 20.

[30] King v. Bishop of Chester, Pierce and Cook, 2 Salk. 561.

PROTESTATION

206. A traversable fact in pleading may be passed over without traverse, and the right to contest it in another action preserved by a protestation in the pleading in the present action. A protestation has no effect in the existing suit. Now that several pleas may be used, there is little, if any, need for protestation.

The practice of protestation of facts not denied arose where the pleader, wishing to avail himself of the right to contest in a future action some traversable fact in the pending action, passes it by without traverse, but at the same time makes a declaration collateral or incidental to his main pleading, importing that the fact so passed over is untrue. The necessity for this arose from the rule that pleadings must not be double, and that every pleading is taken to admit such matters as it does not traverse.[31] Such being its only purpose, it is wholly without effect in the action in which it occurs, as, notwithstanding its use, every traversable fact not traversed is taken as admitted in the existing suit. Now that several pleas may be employed, there seems no reason for not denying every allegation that one does not wish to admit, and no occasion for protestation.

Suppose, in an action of assumpsit for goods sold, the defendant pleads that he gave the plaintiff certain goods in full satisfaction and discharge, etc., and that the plaintiff accepted them in full satisfaction and discharge; and the defendant, while traversing the acceptance, does not wish to admit the delivery of the goods to him, lest the delivery, even though not accepted, might become the subject of dispute in some subsequent action. To accomplish this purpose he takes the delivery by protestation, and traverses the acceptance, in his replication, thus: "And the said A. B. says, that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against the said C. D., because, protesting that the said C. D. did not give or deliver to him, the said A. B., the said goods as the said C. D. hath above in pleading alleged, for replication, nevertheless, in this behalf, the said A. B. says that he, the said A. B., did not accept the said goods in full satisfaction and discharge of the said promises and undertakings, and of

[31] Com. Dig. "Pleader," N; Co. Litt. 124b, 126; Young v. Rudd, Carth. 347; State v. Benson, 40 N. H. 372; Briggs v. Dorr, 19 Johns. (N. Y.) 96; Dills v. Stoble, 81 Ill. 202. This practice was abolished by rule of Hilary Term and the admission ceased to be conclusive in subsequent actions.

all damages accrued to the said A. B. by reason of the nonperformance thereof, in manner and form as the said C. D. hath above alleged; and this the said A. B. prays may be inquired of by the country."

As stated above, the only object and effect of the protestation is to allow the party to pass by a fact without traversing it, and without precluding himself from disputing it in another suit. It is wholly without effect in the action in which it occurs. Under the rule already laid down, every traversable fact not traversed is, notwithstanding the protestation, to be taken as admitted in the existing suit.[32]

It is also given as a rule, that if upon the traverse the issue is found against the party protesting the protestation does not avail; and that it is of no use except in the event of the issue being determined in his favor; with this exception, however, that if the matter taken by protestation be such as the pleader could not have taken issue upon, the protestation in that case shall avail, even though the issue taken were decided against him.[33]

207. NOTICE UNDER THE GENERAL ISSUE

Instead of developing the rules of pleading in the direction of substituting specific pleas for general traverses, as was done in England under the Hilary Rules of 1834, the Common-Law Procedure Act of 1852, and later acts, some American states have gone in the opposite direction. Statutes sometimes permit the setting up of matter in confession and avoidance without a special plea at the option of the pleader, by giving notice in writing under the general issue of the special matters intended to be relied on for defense at the trial.[34]

No issue of fact or of law can be raised on a notice of special matter of defense filed with the general issue.[35] This rule has been criticized as follows by the Illinois Supreme Court in the case of Hunt v. Weir.[36] "Treating the notice as a plea, and open to demurrer, these consequences would be avoided. If a demurrer be sustained to the notice, the defendant can amend it as he can a defective special plea,

[32] Dills v. Stoble, 81 Ill. 202. See Boatman's Sav. Inst. v. Holland, 38 Mo. 49; 31 Cyc. 214, note 45, 215, note 50.

[33] 2 Saund. 103a, note 1.

[34] Hurd's Rev. St. Ill. 1921, c. 110, § 46; Powers v. Rutland R. Co., 83 Vt. 415, 76 Atl. 110.

[35] Rosenbury v. Angell, 6 Mich. 508, Whittier, Cas. Com. Law Pl. p. 501; Bailey v. Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Burgwin v. Babcock, 11 Ill. 30.

[36] 29 Ill. 83, 86.

and he is in no danger of being caught in a trap, which, though he may have set himself by his defective notice, need not, to advance justice, be suddenly sprung upon him on the trial of the cause. The quality of the notice is a preliminary matter, and should be determined before the trial. Like objections to depositions, they are heard and disposed of before the trial, and cannot be started for the first time on the trial."

PLEA PUIS DARREIN CONTINUANCE

208. A plea puis darrein continuance is a plea by the defendant of matter of defense which has arisen since the last continuance of the cause.

Such a plea waives and supersedes all former pleas.

Under the ancient law, there were continuances or adjournments of the proceedings for certain purposes from one day or one term to another; and in such cases there was an entry made on the record expressing the ground of the adjournment, and appointing a day for the parties to reappear. In the intervals between such continuances and the day appointed, the parties were out of court, and therefore not in a situation to plead. But it sometimes happened that after a plea had been pleaded, and while the parties were out of court, in consequence of such a continuance, a new matter of defense arose, which did not exist, and which the defendant had consequently no opportunity to plead, before the last continuance. This new defense he was therefore entitled, at the day appointed for his reappearance, to plead as a matter that had happened after the last continuance—"puis darrein continuance."[37]

Defenses arising after the action has been begun cannot, as a rule, be shown under the general issue, for the reason that they do not deny that a cause of action existed at the commencement of the suit.[38] Such defenses must be pleaded either "to the further maintenance of the action," or, if they do not arise until after plea, they must be pleaded "puis darrein continuance."[39] But in the action on the case an exception to this rule exists, and such defenses as a release executed after suit begun and issue joined may be shown under the general issue, and it is not necessary that they be pleaded puis darrein continuance.[40]

The plea puis darrein continuance may be either in abatement or in bar, like other pleas, according to the matter. It must be certain and definite in every particular, the greatest degree of strictness being required.[41]

A plea puis darrein continuance is a waiver of and substitution for the first plea, and of the latter no advantage can be taken afterwards. When filed, the plea, by operation of law, supersedes all other defenses in the cause, and the parties proceed to settle the pleadings de novo, just as if no plea or pleas had theretofore been filed in the case.[42]

[37] Stephen, Pl. (Tyler's Ed.) 97.

[38] Mount v. Scholes, 120 Ill. 394, 11 N. E. 401.

[39] Le Bret v. Papillon, 4 East, 502; Evans v. Prosser, 3 Term R. 186; Fitzpatrick v. Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681; Rowell v. Hayden, 40 Me. 582; Smithwick v. Ward, 52 N. C. 64, 75 Am. Dec. 453; Hutchinson v. Hendrickson, 29 N. J. Law, 180; Costar v. Davies, 8 Ark. 213, 46 Am. Dec. 311; Gibson v. Bourland, 13 Ill. App. 352; Ross v. Nesbit, 2 Gilman (Ill.) 252. Thus, payment of a debt sued for or a release or compromise, or another judgment for the same cause, etc., since the suit was commenced, cannot be pleaded generally in bar. If the defense has arisen since plea or issue joined, it must be set up by plea puis darrein continuance. Longworth v. Flagg, 10 Ohio, 301; Leggett v. Humphreys, 21 How. 66, 16 L. Ed. 50; Mount v. Scholes, 120 Ill. 394, 11 N. E. 401; Smith v. Carroll, 17 R. I. 125, 21 Atl. 313, 12 L. R. A. 301; Yenton v. Lyon, 5 Pet. 224, 8 L. Ed. 105; Bowne v. Joy, 9 Johns. (N. Y.) 221; Hutchinson v. Hendrickson, 29 N. J. Law, 180; Wade v. Emerson, 17 Mo. 207. "The general rule upon this subject at common law is that any matter of defense arising after the commencement of the suit cannot be pleaded in bar of the action generally. If such matter arise after the commencement of the suit, and before plea, it must be pleaded to the further maintenance of the action. But if it arise after plea, and before replication, or after issue joined, whether of law or fact, then it must be pleaded puis darrein continuance. A plea of this kind involves great legal consequences that do not attach to an ordinary plea. It only questions the plaintiff's right to further maintain the suit. When filed, it, by operation of law, supersedes all other pleas and defenses in the cause, and the parties proceed to settle the pleadings de novo, just as though no plea or pleas had theretofore been filed in the case. By reason of pleas of this kind having a tendency to delay, great strictness is required in framing them. In this respect they are viewed much like pleas in abatement, and, for the same reason, they must, like those pleas, be verified by affidavit." Mount v. Scholes, supra. And see Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060; Harn v. Security Nat. Bank of Oklahoma City (Okl.) 177 Pac. 598 (code).

[40] City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Papke v. G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910.

[41] Mount v. Scholes, 120 Ill. 394, 11 N. E. 401; Cummings v. Smith, 50 Me. 568, 79 Am. Dec. 629; City of Augusta v. Moulton, 75 Me. 551; Vleary v. Moore, 2 Watts (Pa.) 451, 27 Am. Dec. 323; Henry v. Porter, 20 Ala. 619; Gibson v. Bourland, 13 Ill. App. 352; Ross v. Nesbit, 2 Gilman (Ill.) 252; Kenyon v. Sutherland, 3 Gilman (Ill.) 99.

[42] Mount v. Scholes, 120 Ill. 394, 11 N. E. 401; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410; Lincoln v. Thrall, 26 Vt. 304; Wallace v. McConnell, 13 Pet. 136, 10 L. Ed. 95; Dinet v. Pfirshing, 86 Ill. 83; Kimball v. Huntington, 10 Wend. (N. Y.) 679, 25 Am. Dec. 590; Davis v. Burgess, 18 R. I. 85, 25 Atl.

Form of Plea Puis Darrein Continuance

(Title of court and cause.)

And now at this day, that is to say, on ——— next after ———, in this same term, until which day the plea aforesaid was last continued, come as well the said A. B. as the said C. D., by their respective attorneys aforesaid; and the said C. D. says that the said A. B. ought not further to have or maintain his aforesaid action against him, because, he says, that after the last continuance of this cause, that is to say, ——— next after ———, in this same term, from which day this cause was last continued, and before this day, to wit, on the ——— day of ———, A. D. 19—, at ——— aforesaid, in the county aforesaid, the said A. B. by his certain deed of release sealed with his seal (the release may be here stated), and this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought further to have or maintain his aforesaid action against him, etc.

SET-OFF AND RECOUPMENT

209. By statute the defendant is generally permitted in contract actions to set up a counter demand, if liquidated, as an offset to defeat plaintiff's recovery in whole or in part. In some states an affirmative judgment for the defendant is permitted.

210. Recoupment is a cross-demand for damages sustained by defendant in the same transaction, allowed in reduction of damages at common law.

Cross-Actions

Often the best way of defending one's self against an attack in forensic contests, as in others, is by the sword, rather than by the shield;

848, Whittier, Cas. Com. Law Pl. pp. 481, 482. See Rev. St. Ill. c. 110, § 50. People v. Chicago Rys. Co., 270 Ill. 87, 110 N. E. 386, Ann. Cas. 1917B, 821; Id., 270 Ill. 140, 110 N. E. 402 (under Illinois practice act former pleas no longer waived). "It is laid down in Bacon's Abridgment (6 Bac. Abr. [by Gwillim] 377) that if, after a plea in bar, the defendant pleads a plea puis darrein continuance, this is a waiver of his bar; and no advantage shall be taken of anything in the bar. And it is added that it seems dangerous to plead any matter puis darrein continuance unless you be well advised; because, if that matter be determined against you, it is a confession of the matter in issue. This rule was adopted in Kimball v. Huntington, 10 Wend. 679 [25 Am. Dec. 590]. The court say the plea puis darrein continuance waived all previous pleas, and on the record the cause of action was admitted to the same extent as if no other defense had been urged than contained in this plea." Wallace v. McConnell, supra.

in other words, by attacking one's assailant in turn.[43] In common-law pleading a defendant could not defeat an action by attacking the plaintiff on a claim arising in another transaction, or insist that his claim be litigated with that of the plaintiff so that both might be adjusted and a balance struck between them, and the recovery limited to the balance due. Thus, if A. and B. owe each other one thousand dollars, without cross-action, either may sue, and the other will, in effect, be compelled to recover it back again.

Set-Off

The defendant at common law could not pray anything in his pleadings, but to be dismissed from court; if he had any claim against the plaintiff, he must set it up in another suit of his own. But by statute a defendant was allowed in actions upon a debt to set up a liquidated demand of his own to counterbalance that of the plaintiff, either in whole or in part.[44] This answered very nearly to the compensatio of the civil law, where mutual debts compensate each other, and operate as payment, to extinguish so much of the reciprocal demand. But in English law this right of set-off only arises in the course of an action as a plea. A debt is not extinguished pro tanto when the debtor acquires a claim against the creditor by mere operation of law.[45]

Matters of set-off must be pleaded specially or by notice under the general issue.[46] As Tidd states it:[47] "The plea of the general issue is frequently accompanied with a notice of set-off; and therefore it will here be proper to consider the doctrine of setting off mutual debts against each other. At common law, if the plaintiff was indebted to the defendant in as much or even more than the defendant owed to him,

[43] Pomeroy, Code Remedies, pp. 706, 835; Langdell, Eq. Pl. p. 175.

[44] Development of Set-Off, W. H. Loyd, 64 University of Pennsylvania Law Rev. 541, 563. Set-Off, When It Must be Due, 31 Yale Law J. p. 660; Recoupment, Set-Off and Counterclaim, 28 W. Va. Law Quarterly, 139.

[45] Cross-demands do not cancel each other in the common law. 2 Williston, Cont. § 859. Williston, Sales, § 605.

[46] Set-off is not admissible under the general issue. Marlowe v. Rogers, 102 Ala. 510, 14 South. 790; Sawyer v. Van Deren, 74 N. J. Law, 673, 66 Atl. 396; Patterson v. Steele, 36 Ill. 272; McEwen v. Kerfoot, 37 Ill. 530, 536; Cox v. Jordan, 86 Ill. 560 (distress); Kennard v. Secor, 57 Ill. App. 415; Ewen v. Wilbor, 208 Ill. 506, 70 N. E. 575. Prior to the Hilary Rules of 1833 a defendant might give evidence of a set-off under the general issue, if accompanied by notice of set-off. But by the Hilary Rules a defendant was required to plead a set-off specially. Graham v. Partridge, 1 M. & W. 395. In some jurisdictions in the United States a defendant may file with the general issue a mere notice of set-off. Sexton v. C. Aultman & Co., 92 Va. 20, 22 S. E. 838.

[47] 1 Tidd, Prac. (1st Am. Ed.) The Notice of Set-Off, pp. 601, 602.

yet he had no method of striking a balance; the only way of obtaining relief was by going into a court of equity. To remedy this inconvenience, it was enacted by the statute of 2 Geo. II, c. 22, § 13, 'that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due; or otherwise such matter shall not be allowed in evidence upon the general issue.' The actions, in which a set-off is allowable upon these statutes, are debt, covenant, and assumpsit, for the nonpayment of money; and the demand intended to be set off must be liquidated, and such as might have been made the subject of one or other of these actions. A set-off, therefore, is never allowed in actions upon the case, trespass, or replevin, etc.; nor in debt on bond conditioned for the performance of covenants, etc.; nor in covenant, or assumpsit for general damages. And a penalty, or uncertain damages, cannot be made the subject of a set-off." [48]

Under the statutes of set-off the plea is in the nature of a declaration in a cross-action, and does not traverse or confess and avoid. It may be used, not only as a defense to diminish or defeat recovery by the plaintiff, but also, by some statutes, an affirmative judgment may be rendered for the debt against the plaintiff. Each sets up his claim in turn, and both are disposed of by one judgment.[49]

If either claim were one arising from a tort, this could not be set off against the other, nor could a claim for general damages on contract be used as a set-off; but the modern counterclaim extends the principle of cross-actions to other cases than mutual debts.[50]

[48] 1 Tidd, Prac. (1st Am. Ed.) The Notice of Set-Off, pp. 603, 604.

[49] No statute in Illinois requires the defendant to plead a set-off or counterclaim, and an independent action may be brought thereon later, if it is not interposed. Barton v. Southwick, 258 Ill. 515, 101 N. E. 928, 46 L. R. A. (N. S.) 219, Ann. Cas. 1914B, 643; Stauffer v. State Bank of Mansfield, 201 Ill. App. 306. Compare Sale v. Eichberg, 105 Tenn. 333, 59 S. W. 1020, 52 L. R. A. 804. A plea of set-off does not deny the cause of action as alleged, but admits it and seeks to avoid it because of new matter set up. Smith v. Bellrose, 200 Ill. App. 368. Set-off and counterclaim, right to plead in a reply. Green v. Harris, 113 Wash. 259, 193 Pac. 690; 5 Minn. Law Rev. 487.

[50] Set-off is generally limited by statute to actions upon debts and contracts. 64 University of Pennsylvania Law Rev. 563; 34 Cyc. 603; Marlowe v. Rogers, 102 Ala. 510, 14 South. 790. Even in contract actions, set-offs arising out of torts are not allowed. Kingman v. Draper, 14 Ill. App. 577; Williams Patent Crusher & Pulverizer v. Kinsey Mfg. Co. (D. C.) 205 Fed. 875. Counterclaim Founded in Tort, J. M. Kerr, 95 Cent. Law J. 27 (under Codes, tort cannot be set up against contract or tort).

Recoupment of Damages

A cross-demand in favor of the defendant for general damages, by breach of the same contract sued on by the plaintiff, was allowed at common law by judicial decision. This was used solely as a defense to defeat plaintiff's recovery. No judgment for the surplus could be rendered, even though defendant's damages exceeded those proved by the plaintiff. This, too, was formerly confined to contract actions, and to cross-demands arising from the very contract sued on.

The defendant may recoup for damages caused by plaintiff's breach without notice under the general issue.[51]

Recoupment, as distinguished from set-off is confined to matters connected with the transaction or contract upon which the suit is brought. It is not necessary that the claim by way of recoupment be a liquidated debt. In Stow v. Yarwood [52] the court speaks of recoupment as follows: "This doctrine of recoupment tends to promote justice, and to prevent useless litigation. It avoids circuity of action, and multiplicity of suits. It adjusts by one action adverse claims growing out of the same subject-matter. It is not necessary that the opposing claims should be of the same character. A claim originating in contract may be set up against one originating in tort. It is sufficient that the counterclaims arise out of the same subject-matter, and that they are susceptible of adjustment in one action." [53]

[51] Barber v. Rose, 5 Hill (N. Y.) 70, Whittier, Cas. Com. Law Pl. p. 631; Babcock v. Trice, 18 Ill. 420, 68 Am. Dec. 560; Cooke v. Preble, 80 Ill. 881; Peirce v. Sholtey, 190 Ill. App. 341; Murray v. Carlin, 67 Ill. 286; Higgins v. Lee, 16 Ill. 495; Streeter v. Streeter, 43 Ill. 155, 160; Waterman v. Clark, 76 Ill. 428, 431 (note, Special Plea); Baker v. Fawcett, 69 Ill. App. 300; Sullivan v. Boswell, 122 Md. 539, 89 Atl. 940. See 31 Cyc. 698, 24 R. C. L. p. 793. Recoupment under general issue. Franklin v. T. H. Lilly Lumber Co., 66 W. Va. 164, 66 S. E. 225. Cf. set-off, independent items, plea of set-off required. Wilson v. Wilson, 125 Ill. App. 385; Philippi Planing Mill Co. v. Cross, 75 W. Va. 303, 83 S. E. 1004.

[52] 14 Ill. 424 (1853).

[53] See, also, Bennett v. Kupfer Bros. Co., 213 Mass. 218, 100 N. E. 332; Keegan v. Kinnare, 123 Ill. 280, 14 N. E. 14; Jarrett Lumber Co. v. Reese, 66 Fla. 317, 63 South. 581; Houghton & Co. v. Alpha Process Co., 5 Boyce (Del.) 383, 93 Atl. 669 (1915); Waterman, Set-Off, § 464. Whether a special plea in confession and avoidance was a set-off or a recoupment is of no practical importance in view of Acts 1914, c. 393. Fleischmann v. Clark, 137 Md. 171, 111 Atl. 851.

CHAPTER XV

REPLICATIONS

211. Varieties of Replication.
212. Replication De Injuria.
213. Form of Plea and of Replication Thereto.
214. New Assignment.
215. Form of New Assignment.
216. Formal Parts of Replication.
217–219. Departure.

VARIETIES OF REPLICATION

211. A replication must either traverse a plea, or confess and avoid the matter pleaded by the defendant, or present matter of estoppel to the plea. A fourth sort of replication is a new assignment.

When a plea has introduced new matter, and the plaintiff does not demur, he may by replication traverse or deny the truth of the matter alleged in the plea, either in whole or in part, or he may confess and avoid the plea.[1] In some cases he may reply by showing matter of estoppel, and in the case of an evasive plea he may new assign the cause of action.

The requisites of a replication, in a great measure, resemble those of a plea, and are, first, that it must answer so much of the plea as it professes to answer; secondly, that it must not depart from the cause of action set up in the declaration; third, that, like a plea, it should be certain, direct, and positive, and not argumentative; fourth, that it must be single.

[1] Henry v. Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863, Sunderland, Cas. Com. Law Pl. p. 654. Where there is a plea of new matter, concluding with a verification, and the plaintiff fails to reply to it, there may be a judgment of non prosequitur against him, after a rule to reply. See Babcock v. Farmers' & Drovers' Bank, 46 Kan. 548, 26 Pac. 1037, Ames, Cas. Pl. 158, 159, note.

THE REPLICATION DE INJURIA

212. In certain actions, where the defendant pleads matter of excuse, the plaintiff, instead of traversing specially, is permitted to reply by a denial in general and summary terms. This traverse is used only to deny matter of excuse, and occurs only in the replication.

At common law a replication cannot be double or contain two or more answers to the same plea. The statute of 4 Anne, c. 16, as to allowing several pleas, does not extend to replications, except in the instance of a plea in bar to an avowry in replevin, which is in the nature of a replication.

Where a plea sets up a series or group of circumstances which together constitute the defense, the strict theory of pleading requires the plaintiff to select some one of such several matters and take issue upon that single specific allegation alone. The replication de injuria, like the general issue, is an instance of "licensed duplicity," to permit a denial of several matters at once. Before the modern statutes, which allow the filing of more than one replication, the use of the replication de injuria was of great advantage to the plaintiff. It put the defendant to the proof of all the material allegations in his plea, instead of leaving the plaintiff to stand or fall by the denial of one allegation; the others being admitted by failure to deny.[2]

Like the general issue used by the defendant, this is a general mode of pleading available to the plaintiff in his replication when the defendant has pleaded matter of excuse in the actions of trespass, case, assumpsit, covenant, and debt, and such plea is untrue.[3] It is a form of the general traverse, differing from the general issue in that it is restricted to the actions and the pleading named. It differs from the common traverse in that it denies by a brief, general form of expression, instead of in the words of the allegation traversed. This

[2] Keigwin, Precedent of Pl. pp. 467–474; Poe, Pl. § 678; Chit. Pl. (16th Am. Ed.) 633 et seq. Since the statute of 4 and 5 Anne, c. 16, § 4, permitting defendant to plead more than one plea to a single count, did not give plaintiffs the similar privilege of making more than one replication to one plea, the device of the replication de injuria, which was a comprehensive traverse, was of importance. But the mass of learning on this subject is now practically obsolete. Ames Cas. Pl. (2d Ed.) 164, note; (1st Ed.) pp. 143–184.

[3] See Sampson v. Henry, 11 Pick. (Mass.) 379; Gates v. Lounsbury, 20 Johns. (N. Y.) 427. It was formerly allowed only in trespass and trespass on the case. See Jones v. Kitchin, 1 Bos. & P. 76; Isaac v. Farrar, 1 Mees. & W. 65; Coffin v. Bassett, 2 Pick. (Mass.) 357.

traverse is proper where the defendant, in any of the above actions, pleads matter in excuse,[4] provided such matter does not consist of a justification under the process of a court of record,[5] or a claim of title or interest in land in the defendant,[6] or title or authority which the latter derives from the plaintiff.[7] In the latter cases the traverse must be special, and deny in the words of the allegation traversed, unless such matter is alleged by way of inducement or explanation, and not as the essential ground of the justification.[8]

The complete form of this traverse is de injuria sua propria, absque tali causa—"that the defendant, of his own wrong, and without any such cause as in his plea alleged," committed the injury complained of.[9] It is preceded by a general inducement or introduction, and denies, in general and summary terms, and not in the words of the allegation traversed, all that is last before alleged; but neither the form of the denial nor the inducement de injuria, etc., alleges new matter; it simply reaffirms in general terms the wrongs complained

[4] Crogate's Case, 8 Coke, 66; Com. Dig. "Pleader," F 18; Fisher v. Wood, 1 Dowl. (N. S.) 54; Hyatt v. Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; Strong v. Smith, 3 Caines (N. Y.) 164; Hannen v. Edes, 15 Mass. 347. And see Allen v. Crofoot, 7 Cow. (N. Y.) 46; Bardons v. Selby, 3 Tyrwhitt, 430 (replevin), Whittier, Cas. Com. Law Pl. pp. 503, 509. See Erskine v. Hohnbach, 14 Wall. 613, 618, 20 L. Ed. 745.

[5] Crogate's Case, 8 Coke, 66. See Pollock, Genius of the Com. Law, Surrebutter Castle, pp. 27 to 33, where he comments on Justice Geo. Hayes' work, written about 1850, entitled "Crogate's Case, a Dialogue in the Shades on Special Pleading Reform"; "One of the interlocutors is Baron Surrebutter, a transparent disguise for Baron Parke, or rather that half of him which was devoted to the technical side of process and pleading. The other personage is 'the celebrated Crogate, who in his mortal state gave rise to the great case reported in 8 Co. 66, and whose name is inseparably connected with the doctrine of de injuria.' The main part of the Dialogue consists of the learned Baron's hopeless endeavors to make Mr. Crogate understand the necessity and elegance of the decision in his case. Incidentally he explains how the amount of special pleading varies with the form of action."

[6] Cockerill v. Armstrong, Willes, 99; Jones v. Kitchin, 1 Bos. & P. 76; Hyatt v. Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; Great Falls Co. v. Worster, 15 N. H. 412.

[7] Crogate's Case, supra; Purchell v. Salter, 1 Q. B. 197; Selby v. Bardons, 3 Barn. & Adol. 12; Solly v. Neish, 4 Dowl. 254; Bowler v. Nicholson, 12 Adol. & E. 341. See, also, Allen v. Scott, 13 Ill. 80 (1851); Iron Clad Dryer Co. v. Chicago Trust & Savings Bank, 50 Ill. App. 461. In Allen v. Scott, Caton, J, said: "It must be admitted that many of these distinctions are more artificial than substantial, and do not contribute very essentially to the promotion of the ends of justice. So long, however, as we look to the rules of the common law to govern us in pleading we are not at liberty to disregard them."

[8] See Penn v. Ward, 2 Cromp. M. & R. 338.

[9] Crogate's Case, 8 Coke, 66.

of in the declaration, and the traverse absque tali causa is an abridged denial of the special justification in the plea.

The effect of the traverse is to deny all the material allegations of the plea, as it goes to the whole plea, but only where such allegations show matter of excuse for the tort or injury committed.[10] It can never be used when the matter set forth in the plea is insisted on as conferring a positive right.[11] Its import is to insist that the defendant committed the act in question from a different motive than that assigned in the plea.

Suppose, in an action of trespass for assault and battery, the defendant pleads that he beat the plaintiff in self-defense. A replication de injuria would allege: "And as to the said plea by the said defendant last above pleaded in bar to the said trespass, * * * the said A. B. [plaintiff] says that, by reason of anything therein alleged, he ought not to be barred from having and maintaining his aforesaid action against the said C. D., because he says that the said C. D. at the said time when, etc., of his own wrong, and without the cause in his said last-mentioned plea alleged, committed the said trespass; * * * and this he prays may be inquired of by the country."

213. FORM OF PLEA AND OF REPLICATION THERETO.

Suppose that in trespass for assault and battery the defendant pleads self-defense (son assault demesne) in confession and avoidance, as follows:

And for a further plea in this behalf, as to the said assaulting, beating, wounding, and ill-treating, in the said declaration mentioned, the defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because, he says, that the plaintiff, just before the said time, when, etc., to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, with force and arms, made an assault upon him, the said defendant, and would then and there have beaten and ill-treated him, the said defendant, if

[10] Com. Dig. "Pleader," F 19; Coburn v. Hopkins, 4 Wend. (N. Y.) 577; Allen v. Scott, 13 Ill. 80; Iron Clad Dryer Co. v. Chicago Trust & Savings Bank, 50 Ill. App. 461. Where the defense is an excuse for nonperformance of a promise which the defendant made, however many the parts or facts of that excuse may be, the replication de injuria denies them all. Demurrer for duplicity overruled.

[11] Plumb v. McCrea, 12 Johns. (N. Y.) 491.

he had not immediately defended himself against the plaintiff; wherefore the said defendant did then and there defend himself against the plaintiff as he lawfully might, for the cause aforesaid, and in so doing did necessarily and unavoidably a little beat, wound, and ill-treat the plaintiff, doing no unnecessary damage to the plaintiff on the occasion aforesaid; and so the defendant saith, that if any hurt or damage then and there happened to the plaintiff, the same was occasioned by the said assault so made by the plaintiff on him, the said defendant, and in the necessary defense of himself, the said defendant, against the said plaintiff, which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained. And this the defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him.

In such a case a replication de injuria would be as follows:

And as to the said plea by the said defendant last above pleaded, in bar to the said several trespasses in the introductory part of that plea mentioned, the said plaintiff says that, by reason of anything therein alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against the defendant, because, he says, that the defendant, at the said time when, &c., of his own wrong, and without the cause in the said last-mentioned plea alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the plaintiff hath above complained. And this he prays may be inquired of by the country.

NEW ASSIGNMENT

214. A new assignment is a restatement in the replication of the plaintiff's cause of action. Where the declaration in an action is ambiguous and the defendant pleads facts which are literally an answer to it, but not to the real claim set up by the plaintiff, the plaintiff's course is to reply by way of new assignment; that is, to allege that he brought his action, not for the cause supposed by the defendant, but for some other cause, to which the plea has no application.

The necessity for a new assignment arose from the very general mode of statement sometimes permitted in the declaration, as in trespass to land. This made it possible for the defendant to plead an evasive plea, which rendered it necessary for the plaintiff to restate the cause of action intended with greater precision and particularity.

Stephen explains new assignment as follows:[12]

"Another exception to that branch of the general rule which requires the pleader either to traverse, or confess and avoid, arises in the case of what is called a 'new assignment.' Declarations are conceived in very general terms,—a quality which they derive from their adherence to the tenor of those simple and abstract formulæ, the original writs; and the effect of this is that in some cases the defendant is not sufficiently guided by the declaration to the real cause of complaint, and is therefore led to apply his plea to a different matter from that which the plaintiff has in view. A new assignment is a method of pleading to which the plaintiff in such cases is obliged to resort in his replication, for the purpose of setting the defendant right.[13] In an action for assault and battery, for instance, a case may occur in which the plaintiff has been twice assaulted by the defendant; and one of these assaults may have been justifiable, being committed in self-defense, while the other may have been committed without legal excuse. Supposing the plaintiff to bring his action for the latter, it will be found, by referring to the form of declaration for assault and battery, that the statement is so general as not to indicate to which of the two assaults the plaintiff means to refer.[14] The defendant may therefore suppose, or affect to suppose, that the first is the assault intended, and will plead son assault demesne. This plea the plaintiff cannot safely traverse, because, as an assault was in fact committed by the defendant, under the circumstances of excuse here alleged, the defendant would have a right, under the issue joined upon such traverse, to prove those circumstances, and to presume that such assault, and no other, is the cause of action. And it is evidently reasonable that he should have this right; for if the plaintiff were, at the trial of the issue, to be allowed to set up a different assault, the defendant might suffer, by a mistake into which he had been led by the

[12] Stephen, Pl. (Tyler's Ed.) 225. See, also, Chit. Pl. (16th Am. Ed.) 654.

[13] As to new assignment, see the following cases and authorities: 1 Saund. 299a, note 6; Com. Dig. "Pleader," 3 M. 34; Barnes v. Hunt, 11 East. 451; Cheasley v. Barnes, 10 East. 73; Taylor v. Smith, 7 Taunt. 156; Taylor v. Cole, 3 Term R. 292; Lambert v. Hodgson & Prince, 1 Bing. 317; Phillips v Howgate, 5 Barn. & Ald. 220; Norman v. Wescombe, 2 Mees. & W. 360; Brancker v. Molyneux, 1 Man. & G. 710; Seddon v. Tutop, 6 Term R. 607; Scott v. Dixon, 2 Wils. 3; Martin v. Kesterton, 2 W. Bl. 1089, Whittier, Cas. Com. Law Pl. p. 459; Spencer v. Bemis, 46 Vt. 29; Troup v. Smith's Ex'rs, 20 Johns. (N. Y.) 43.

[14] It is true that the day and place of the assault and battery are alleged in the declaration, but this is not always sufficient to identify the assault referred to, for these statements are not deemed material to be proved, and are consequently alleged without much regard to the true state of fact.

generality of the plaintiff's declaration. The plaintiff, therefore, in the case supposed, not being able safely to traverse, and having no ground either for demurrer or for pleading in confession and avoidance, has no course, but by a new pleading, to correct the mistake occasioned by the generality of the declaration, and to declare that he brought his action, not for the first, but for the second, assault; and this is called a 'new assignment.'

"The mistake being thus set right by the new assignment, it remains for the defendant to plead such matter as he may have in answer to the assault last mentioned, the first being now out of the question. By way of further example may be mentioned a case that arises in trespass quare clausum fregit, and was formerly of very frequent and ordinary occurrence. In this action, if the plaintiff declares for breaking his close in a certain parish, without naming or otherwise describing the close—a course which in point of pleading is allowable—if the defendant happen to have any freehold land in the same parish, he may be supposed to mistake the close in question for his own, and may therefore plead what is called the "common bar," viz. that the close in which the trespass was committed is his own freehold. And then, upon the principle already explained, it will be necessary for the plaintiff to new-assign, alleging that he brought his action in respect of a different close from that claimed by the defendant as his freehold.

"The examples that have been given consist of cases where the defendant in his plea wholly mistakes the subject of complaint. But it may also happen that the plea correctly applies to part of the injuries, while, owing to a misapprehension occasioned by the generality of the statement in the declaration, it fails to cover the whole. Thus, in trespass quare clausum fregit, for repeated trespasses, the declaration usually states that the defendant, on divers days and times before the commencement of the suit, broke and entered the plaintiff's close, and trod down the soil, etc., without setting forth more specifically in what parts of the close or on what occasions the defendant trespassed. Now, the case may be that the defendant claims a right of way over a certain part of the close, and, in exercise of that right, has repeatedly entered and walked over it, but has also entered and trod down the soil, etc., on other occasions, and in parts out of the supposed line of way; and the plaintiff, not admitting the right claimed, may have intended to point his action both to the one set of trespasses and to the other. But from the generality of the declaration the defendant is entitled to suppose that it refers only to his entering and walking in the line of way. He may therefore, in his plea, allege, as a complete answer to the whole complaint, that he has a right of way by grant, etc., over the said close; and if he does this, and the plaintiff confines himself in his replication to a traverse of that plea, and the defendant at the trial proves a right of way as alleged, the plaintiff would be precluded from giving evidence of any trespasses committed out of the line or track in which the defendant should thus appear entitled to pass. His course of pleading in such a case, therefore, is both to traverse the plea and also to new-assign, by alleging that he brought his action not only for those trespasses supposed by the defendant, but for others, committed on other occasions and in other parts of the close, out of the supposed way, which is usually called a 'new assignment extra viam'; or, if he means to admit the right of way, he may new-assign simply, without the traverse.

"As the object of a new assignment is to correct a mistake occasioned by the generality of the declaration, it always occurs in answer to a plea, and is therefore in the nature of a replication. It is not used in any other part of the pleading, because the statements subsequent to the declaration are not, in their nature, such, when properly framed, as to give rise to the kind of mistake which requires to be corrected by a new assignment. A new assignment chiefly occurs in an action of trespass, but it seems to be generally allowed in all actions in which the form of declaration makes the reason of the practice equally applicable." [15]

Several new assignments may occur in the course of the same series of pleading. Thus, in the first of the above examples, if it be supposed that three different assaults had been committed, two of which were justifiable, the defendant might plead, as above, to the declaration, and then, by way of plea to the new assignment, he might again justify, in the same manner, another assault, upon which it would become necessary for the plaintiff to new-assign a third, and this upon the same principle by which the first new assignment was required.[16]

[15] Stephen, Pl. (Tyler's Ed.) 225; 1 Chit. Pl. 602; Vin. Abr. "Novel Assignment," 4, 5; 3 Vent. 151; Batt v. Bradley, Cro. Jac. 141. In trespass to land, the plaintiff need not definitely describe in his declaration the locus in quo, but may allege it as "a certain close of the plaintiff, situated in Cook county." But in such case the defendant may plead the "common bar," and upon proof by the defendant of title to any close in Cook county, if the plaintiff fails to "new assign" and designate the close intended, the defendant is entitled to a directed verdict. See 9 Ill. Law Rev. 46, criticizing Marks v. Madsen, 261 Ill. 51, 103 N. E. 625.

[16] Stephen, Pl. (Tyler's Ed.) 226; 1 Chit. Pl. 614; 1 Saund. 299c. Excess of license should be set up by new assignment. Ditcham v. Bond, 3 Campb. 524, Whittier, Cas. Com. Law Pl. p. 462. Compare Ayres v. Kelley, 11 Ill. 17. Contra: Lincoln v. McLaughlin, 74 Ill. 11, 13 (semble).

A new assignment is said to be in the nature of a new declaration.[17] It seems, however, to be more properly considered as a repetition of the declaration, differing only in this: that it distinguishes the true ground of complaint as being different from that which is covered by the plea.[18] Being in the nature of a new or repeated declaration, it is consequently to be framed with as much certainty or specification of circumstances as the declaration itself. In some cases, indeed, it should be even more particular, so as to avoid the necessity of another new assignment. Thus, if the plaintiff declares in trespass quare clausum fregit without naming the close, and the defendant pleads the common bar (liberum tenementum), which, as we have seen, obliges the plaintiff to new-assign, he must, in his new assignment, either give his close its name, or otherwise sufficiently describe it, though such name or description was not required in the declaration.[19]

215. FORM OF NEW ASSIGNMENT

The following replication is a new assignment in a case where the defendant in an action for assault and battery has pleaded in confession and avoidance of trespasses other than those intended to be declared upon by the plaintiff:

And as to the said plea of the said C. D. by him secondly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned and therein attempted to be justified, the said A. B. says that, by reason of anything in that plea alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against the said C. D., because he says that he brought his said action, not for the trespasses in the said second plea acknowledged to have been done, but for that the said C. D. heretofore, to wit, on the ——— day of ———, A. D. 19—, with force and arms, at ——— aforesaid, in the county aforesaid, upon another and different occasion, and for another and different purpose, than in the said second plea mentioned, made another and different assault upon the said A. B. than the assault in the said second plea mentioned, and then and there beat, wounded, and ill-treated him, in manner and form as the

[17] Bac. Abr. "Trespass," 1, 4; 1 Saund. 299c. "A new assignment is not, properly speaking, a replication, since it does not profess to reply to anything contained in the defendant's plea. * * * but restates in a more minute and circumstantial manner the cause of action alleged in the declaration, in consequence of the defendant having, through mistake or design, omitted to answer it in his plea. 1 Chit. Pl. (16) 654.

[18] Stephen, Pl. (Tyler's Ed.) 226.

[19] Stephen, Pl. (Tyler's Ed.) 226.

said A. B. hath above thereof complained; which said trespasses, above newly assigned, are other and different trespasses than the said trespasses in the said second plea acknowledged to have been done. And this the said A. B. is ready to verify. Wherefore, inasmuch as the said C. D. hath not answered the said trespasses above newly assigned, he, the said A. B., prays judgment and his damages by him sustained by reason of the committing thereof to be adjudged to him, etc.

Rejoinders and Subsequent Pleadings

A rejoinder is the defendant's answer to the replication, and is in general governed by the same rules as those which govern pleas. It must be single, and must support and not depart from the plea.

Surrejoinders, rebutters, and surrebutters seldom occur in pleading. They are governed by the same rules in general as pleas.

216. FORMAL PARTS OF REPLICATION

A replication was usually entitled in the court and of the term at which it was pleaded; and the names of the plaintiff and of the defendant were stated in the margin—thus, "A. B. v. C. D." [20]

When the body of the replication only contained an answer to a part of the plea, the commencement should then specify the part intended to be answered, for if the commencement professed to answer the whole, but the body contained an answer to part only, the whole replication was insufficient.

Every replication must conclude either to the country or with a verification and prayer of judgment.

A replication to a plea in bar has this commencement: "* * * Says that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against him, the said C. D., because, he says," etc. This formula is commonly called "precludi non." The conclusion is thus: In debt, "Wherefore he prays judgment, and his debt aforesaid, together with his damages by him sustained by reason of the detention thereof, to be adjudged to him;" in covenant, "Wherefore he prays judgment, and his damages by him sustained by reason of the said breach of covenant, to be adjudged to him;" in trespass, "Wherefore he prays judgment, and his damages by him sustained by reason of the committing of the said trespasses, to be adjudged to him;" in trespass on the case, in assumpsit, "Wherefore he prays judgment, and his damages by him sustained

[20] Chit. Pl. (16th Am. Ed.) p. 628.

by reason of the not performing of the said several promises and undertakings, to be adjudged to him;" in trespass on the case in general, "Wherefore he prays judgment, and his damages by him sustained by reason of the committing of the said several grievances, to be adjudged to him."

And so, in all other actions, the replication concludes with a prayer of judgment for damages, or other appropriate redress, according to the nature of the action.

With respect to pleadings subsequent to the replication, it will be sufficient to observe, in general, that those on the part of the defendant follow the same form of commencement and conclusion as the plea; those on the part of the plaintiff, the same as the replication.

DEPARTURE

217. There must be no departure in pleading. A departure occurs where, in any pleading, the party deserts the ground taken in his last antecedent pleading, and resorts to another, distinct from and not fortifying the first.

218. It may be a desertion of his ground in point of fact, or where he puts the same facts on a new ground in point of law.

219. It is not allowed, because the record would by such means be extended to an indefinite length, and the formation of an issue prevented.

It is obvious from the definition above given that this fault in pleading can never occur until the replication, but it may arise in that or any subsequent pleading. It is a settled rule that the replication or rejoinder must not depart from the allegations of the declaration or plea in any material matter.[21] Its most frequent occurrence is in the rejoinder by the defendant, and the fault may be either in the sub-

[21] Co. Litt. 304a; 2 Saund. 84; Dyer, 253b; Hickman v. Walker, Willes, 27; Tolputt v. Wells, 1 Maule & S. 395; Roberts v. Marlett, 2 Saund. 188; Cutler v. Southern, 1 Saund. 116; Munro v. Alaire, 2 Caines (N. Y.) 320; Sterns v. Patterson, 14 Johns. (N. Y.) 132; Andrus v. Waring, 20 Johns. (N. Y.) 160; Dudlow v. Watchorn, 16 East, 39; Winstone v. Linn, 1 Barn. & C. 460; Prince v. Brunatte, 1 Bing. (N. C.) 435; Meyer v. Haworth, 8 Adol. & E. 467; Green v. James, 6 Mees. & W. 656; Keay v. Goodwin, 16 Mass. 1; Sibley v. Brown, 4 Pick. (Mass.) 137; Haley v. McPherson, 8 Humph. (Tenn.) 104; Tarleton v. Wells, 2 N. H. 308; McGavock v. Whitfield, 45 Miss. 452; McConnel v. Kibbe, 29 Ill. 483; Pressley v. Bloomington & N. Ry. & Light Co., 271 Ill. 622, 625, 111 N. E. 511; Allen v. Colliery Engineers Co., 196 Pa. 512, 46 Atl. 899.

stance of the action or defense, or the law on which it is founded. The pleader must neither abandon a previous ground in his pleading and assume a new one, nor rely on the effect of the common law in his declaration or plea and on a custom or statute in his replication or rejoinder.[22] Matter which maintains, explains, and fortifies the declaration or plea is not a departure;[23] and the same is true of time, place, or other immaterial matter, in the allegation of which in the replication or rejoinder there is a variance from the declaration or plea.[24] "That which is departure in pleading is a variance in evidence; and, if the evidence in support of the replication would sustain the allegation in the declaration, there is no departure."[25] A few illustrations are necessary to make these propositions clear.

Of departure in the replication the following is an example: In assumpsit, the plaintiffs, as executors, declared on several promises alleged to have been made to the testator in his lifetime. The defendant pleaded that she did not promise within six years before the obtaining of the original writ of the plaintiffs. The plaintiffs replied that, within six years before the obtaining of the original writ, the let-

[22] Co. Litt. 304a; Rex v. Larwood, Carth. 306; Mole v. Wallis, 1 Lev. 81; Fulmerston v. Steward, Plow. 102. See Yeatman v. Cullen, 5 Blackf. (Ind.) 240, Whittier, Cas. Com. Law Pl. p. 455; Allen v. Tuscarora Val. R. Co., 229 Pa. 97, 78 Atl. 34, 30 L. R. A. (N. S.) 1096, 140 Am. St. Rep. 714. In a divorce suit, where the petition relied on impotency, additional grounds cannot be set up in the reply, for a reply cannot be used to aid the petition by setting a new cause of action or to ingraft thereon an omitted allegation. Smith v. Smith, 206 Mo. App. 640, 229 S. W. 398. Replication setting up a different cause of action from that alleged in the declaration is a departure. Ward v. Semken, 19 D. C. 475; Burdick v. Kenyon, 20 R. I. 498, 40 Atl. 99; Potts v. Point Pleasant Land Co., 47 N. J. Law, 476, 2 Atl. 242. A replication which avers excuse for nonperformance of a condition precedent is a departure from a declaration which avers due performance on the part of the plaintiff. Departure arises when pleading is not pursuant to the previous pleading of the same party. Union Pac. Ry. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983.

[23] Dye v. Leatherdale, 3 Wils. 20; Darling v. Chapman, 14 Mass. 103; Vere v. Smith, 2 Lev. 5, 1 Vent. 121; Owen v. Reynolds, Fortes. 341; Woods v. Hankshead, Yelv. 14; Fisher v. Pimbley, 11 East, 188. See Virginia Fire & Marine Ins. Co. v. Saunders, 86 Va. 969, 11 S. E. 791, Sunderland, Cas. Com. Law Pl. p. 677. Replication in estoppel is no departure or abandonment of the case stated in the declaration.

[24] Gledstane v. Hewitt, 1 Cromp. & J. 565; Leg v. Evans, 6 Mees. & W. 36; Thompson v. Fellows, 21 N. H. 425; Lee v. Rogers, 1 Lev. 110; Cole v. Hawkins, 10 Mod. 348.

[25] Smith v. Nicolls, 5 Bing. (N. C.) 208. See People v. Walker Opera House Co., 249 Ill. 106, 94 N. E. 159; City of Chicago v. People, 210 Ill. 84, 71 N. E. 816; Tillis v. Liverpool & L. & G. Ins. Co., 46 Fla. 268, 35 South. 171, 110 Am. St. Rep. 89; 62 University of Pennsylvania Law Rev. 232.

ters testamentary were granted to them, whereby the action accrued to them, the said plaintiffs, within six years. The court held this to be a departure, as in the declaration they had laid promises to the testator, but in the replication alleged the right of action to accrue to themselves as executors.[26] They ought to have laid promises to themselves, as executors, in the declaration, if they meant to put their action on this ground.

But a departure does not occur so frequently in the replication as in the rejoinder. In debt on a bond conditioned to perform an award, so that the same were delivered to the defendant by a certain time, the defendant pleaded that the arbitrators did not make any award. The plaintiff replied that the arbitrators did make an award to such an effect, and that the same was tendered by the proper time. The defendant rejoined that the award was not so tendered. On demurrer, it was objected that the rejoinder was a departure from the plea in bar; "for, in the plea in bar, the defendant says that the arbitrators made no award, and now, in his rejoinder, he has implicitly confessed that the arbitrators have made an award, but says that it was not tendered according to the condition; which is a plain departure, for it is one thing not to make an award and another thing not to tender it when made. And although both these things are necessary, by the condition of the bond, to bind the defendant to perform the award, yet the defendant ought only to rely upon one or the other by itself," etc. "But if the truth had been that, although the award was made, yet it was not tendered according to the condition, the defendant should have pleaded so at first in his plea," etc. And the court gave judgment accordingly.[27] So, in debt on a bond conditioned to keep the plaintiffs harmless and indemnified from all suits, etc., of one Thomas Cook, the defendants pleaded that they had kept the plaintiffs harmless, etc. The plaintiffs replied that Cook sued them, and so the defendants had not kept them harmless, etc. The defendants rejoined that they had not any notice of the damnification. And the court held—First, that the matter of the rejoinder was bad, as the plaintiffs were not bound to give notice; and, secondly, that the rejoinder was a departure from the plea in bar; "for in the bar the defendants pleaded that they have saved harmless the plaintiffs, and in the rejoinder confess that they have not saved harmless, but they had not notice of the damnification; which is a plain departure."[28] So, in debt on a bond conditioned to perform the covenants in an indenture of lease, one of which was that the lessee, at every felling of wood, would make a fence, the defendant pleaded that he had not felled any wood, etc. The plaintiff replied that he felled two acres of wood, but made no fence. The defendant rejoined that he did make a fence. This was adjudged a departure.[29]

[26] Hickman v. Walker, Willes, 27.
[27] Roberts v. Marlett, 2 Saund. 188.
[28] Cutler v. Southern, 1 Saund. 116.

These, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also a departure, as we have stated above, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law in his declaration, and on a custom in his replication, or on the effect of the common law in his plea, and a statute in his rejoinder. Thus, where the plaintiff declared in covenant on an indenture of apprenticeship, by which the defendant was to serve him for seven years, and assigned, as breach of covenant, that the defendant departed within the seven years, and the defendant pleaded infancy, to which the plaintiff replied that, by the custom of London, infants may bind themselves apprentices, this was considered as a departure.[30] Again, in trespass, the defendant made title to the premises, pleading a demise for 50 years made by the college of R. The plaintiff replied that there was another prior lease of the same premises, which had been assigned to the defendant, and which was unexpired at the time of making the said lease for 50 years; and alleged a proviso in the act of 31 Hen. VIII. c. 13, avoiding all leases, by the colleges to which that act relates, made under such circumstances as the lease last mentioned. The defendant, in his rejoinder, pleaded another proviso in the statute, which allowed such leases to be good for 21 years, if made to the same person, etc.; and that, by virtue thereof, the demise stated in his plea was available for 21 years at least. The judges held the rejoinder to be a departure from the plea; "for in the bar he pleads a lease of 50 years, and in the rejoinder he concludes upon a lease for 21 years," etc. And they observed that "the defendant might have shown the statute and the whole matter at first."[31]

To show more distinctly the nature of a departure, it may be useful, on the other hand, to give some examples of cases that have been held not to fall within that objection. In debt on a bond conditioned to perform covenants, one of which was that the defendant should account for all sums of money that he should receive, the defendant pleaded performance. The plaintiff replied that £26 came to his hands

[29] Dyer, 253b. Party to a suit cannot, in course of litigation, assert and maintain radically inconsistent positions. Lindsey v. Mitchell & McCauley, 174 N. C. 458, 93 S. E. 955.
[30] Mole v. Wallis, 1 Lev. 81.
[31] Fulmerston v. Steward, Plow. 102.

for which he had not accounted. The defendant rejoined that he accounted modo sequente, viz. that certain malefactors broke into his countinghouse and stole it, wherewith he acquainted the plaintiff. And it was argued on demurrer "that the rejoinder is a departure, for fulfilling a covenant to account cannot be intended but by actual accounting; whereas the rejoinder does not show an account, but an excuse for not accounting." But the court held that showing he was robbed is giving an account, and therefore there was no departure.[32] So, in debt on a bond conditioned to indemnify the plaintiff from all tonnage of certain coals due to W. B., the defendant pleaded non damnificatus; to which the plaintiff replied that for £5 of tonnage of coals due to W. B. his barge was distrained; and the defendant rejoined that no tonnage was due to W. B. for the coals. To this the plaintiff demurred, "Supposing the rejoinder to be a departure from the plea; for, the defendant having pleaded generally that the plaintiff was not damnified, and the plaintiff having assigned a breach, the matter of the rejoinder is only by way of excuse, confessing and avoiding the breach, which ought to have been done at first, and not after a general plea of indemnity. On the other side, it was insisted that it was not necessary for the defendant to set out all his case at first, and it suffices that his bar is supported and strengthened by his rejoinder. And of this opinion was the court." [33] Again, in an action of trespass on the case for illegally taking toll, the plaintiff, in his declaration, set forth a charter of 26 Hen. VI. discharging him from toll. The defendant pleaded a statute resuming the liberties granted by Henry VI. The plaintiff replied that by the statute 4 Hen. VII. such liberties were revived. And this was held to be no departure.[34] Again, in an action of debt on a bond conditioned for the performance of an award, the defendant pleaded that the arbitrators did not make any award. The plaintiff replied that they duly made their award, setting part of it forth; and the defendant, in his rejoinder, set forth the whole award verbatim, by which it appeared that the award was bad in law, being made as to matters not within the submission. To this rejoinder the plaintiff demurred on the ground that it was a departure from the plea; for by the plea it had been alleged that there was no award, which meant no award in fact, but by the rejoinder it appeared that there had been an award in fact. The court, however, held that there was no departure; that the plea of no award meant no legal and valid award, according to the submission; and that consequently the rejoinder, in setting the award forth, and showing that it was not conformable to the submission, maintained the plea.[35]

[32] Vere v. Smith, 2 Lev. 5, 1 Vent. 121.
[33] Owen v. Reynolds, Fortes. 341.
[34] Woods v. Hauksbead, Yelv. 14.

So, in all cases where the variance between the former and the latter pleading is on a point not material, there is no departure. Thus, in assumpsit, if the declaration, in a case where the time is not material, state a promise to have been made on a given day 10 years ago, and the defendant plead that he did not promise within 6 years, the plaintiff may reply that the defendant did promise within 6 years without a departure, because the time laid in the declaration was immaterial.[36]

The rule against departure is evidently necessary to prevent the retardation of the issue. For, while the parties are respectively confined to the grounds they have first taken in their declaration and plea, the process of pleading will, as formerly demonstrated, exhaust, after a few alternations of statement, the whole facts involved in the cause, and thereby develop the question in dispute. But if a new ground be taken in any part of the series, a new state of facts is introduced, and the result is consequently postponed. Besides, if one departure were allowed, the parties might, on the same principle, shift their ground as often as they pleased; and an almost indefinite length of altercation might, in some cases, be the consequence.

The mode of taking advantage of departure is by general demurrer, the fault being an active abandonment of the ground of action or defense first taken by the pleader, and therefore a fault in substance.[37] A verdict in favor of him who makes the departure will cure the fault, however, if the matter pleaded by way of departure is a sufficient answer, in substance, to what is before pleaded by the adverse party; that is, if it would have been sufficient provided he had pleaded it in the first instance.[38]

[35] Fisher v. Pimbley, 11 East, 188; Dudlow v. Watchorn, 16 East, 39; Allen v. Watson, 16 Johns. (N. Y.) 205, Whittier, Cas. Com. Law Pl. p. 456; People v. Walker Opera House Co., 249 Ill. 106, 94 N. E. 159.
[36] Lee v. Rogers, 1 Lev. 110; Cole v. Hawkins, 10 Mod. 348.
[37] Sterns v. Patterson, 14 Johns. (N. Y.) 132; Andrus v. Waring, 20 Johns. (N. Y.) 160; Tarleton v. Wells, 2 N. H. 300; Keay v. Goodwin, 16 Mass. 1. But see Reilly v. Rucker, 16 Ind. 303.
[38] Lee v. Raynes, T. Raym. 86; Richards v. Hodges, 2 Saund. 84d. Burdick v. Kenyon, 20 R. I. 498, 40 Atl. 09, Sunderland, Cas. Com. Law Pl. p. 674. A replication averring a promise to one person, while the declaration avers a promise to another, is clearly a departure in pleading. But if one takes issue on a replication or rejoinder containing a departure, and it is found against him, the verdict cures the fault.

CHAPTER XVI

DILATORY PLEAS

220. Nature of Dilatory Pleas.
221-222. Order of Dilatory Pleas.
223. Pleas to the Jurisdiction.
224. Form of Plea to the Jurisdiction and Venue.
225. Pleas in Abatement.
226. Nonjoinder or Misjoinder of Parties Plaintiff in Contract.
227. Nonjoinder or Misjoinder of Parties Defendant in Contract.
228. Joinder of Parties in Tort Actions.
229. Requisites of Pleas in Abatement.
230. Pleas in Suspension.
231. Judgment on Dilatory Plea.
232. Forms of Pleas in Abatement.
233. Formal Commencement and Conclusion.
234. Imparlance.

NATURE OF DILATORY PLEAS

220. Dilatory pleas are those which do not answer the general right of the plaintiff, either by denial or in confession and avoidance, but assert matter tending to defeat the particular action by resisting the plaintiff's present right of recovery. They may be divided into two main classes:

(1) Pleas to the jurisdiction and venue.

(2) Pleas in abatement.

A minor class, sometimes recognized, is pleas in suspension of the action.

If the defendant does not demur, his only alternative method of defense is to oppose or answer the declaration by matter of fact. In doing so he is said to plead (by way of distinction from demurring), and the answer of fact so made is called the "plea."

Objections to the competency of the parties, or to the return of service of summons, or to misnomer, are not allowed to be mingled with defenses going to the merits of the case, but must be pleaded in abatement.

Pleas are divided into pleas dilatory and pleas peremptory or in bar. In many cases the formal or technical objection raised by a dilatory plea can be remedied by the plaintiff. In modern practice he will usually be allowed to amend and correct his mistake without instituting a fresh action.

The effect of dilatory pleas is to suspend or terminate the particular action. These must be pleaded before pleas in bar, which dispose of the cause of action entirely. They may be divided into two main classes:[1] (1) Pleas to the jurisdiction and venue; and (2) pleas in abatement. The term "plea in abatement" is frequently applied, however, to cover both classes of dilatory pleas, and also so called pleas in suspension. Objections to the jurisdiction of the court, the service of process, and the venue are more favorably regarded than pleas in abatement proper; they do not have to be verified by affidavit, nor give the plaintiff a better writ; and they may be amended like pleas in bar.[2] A mistake in the formal prayer for relief in a plea in abatement is fatal to the plea.[3] A certain order is required as between the different dilatory pleas. A plea to the jurisdiction of the person must be taken before the defendant demurs, moves, or offers any other plea, or he will submit himself to the jurisdiction of the court.

ORDER OF DILATORY PLEAS

221. Dilatory pleas must be pleaded before any others. Matters of defense, which tend only to delay or defeat the particular suit, without destroying the plaintiff's right to sue, must be presented before pleading to the merits of the action.

222. The order of pleading dilatory objections is in general as follows:

(1) Pleas to the jurisdiction.

(2) Pleas in abatement on account of the disability of the plaintiff.

(3) Same for disability of the defendant.

(4) Same for defect of parties.

(5) Same for pendency of another action.

The law has prescribed and settled the order of pleading which the defendant should pursue, and although, in some respects, the di-

[1] Drake v. Drake, 83 Ill. 526. See 1 Saunders, Pl. & Ev. 17. A third class, pleas in suspension of the action, is usually recognized; but these may be classed with pleas in abatement, as their number is small and the suspension of the action is equivalent to the abatement of the suit until some future and contingent event. 1 Chit. Pl. 447.

[2] Hurd's Rev. St. Ill. 1921, c. 1, § 1; Spencer v. Ætna Indemnity Co., 231 Ill. 82, 85, 83 N. E. 102, 12 Ann. Cas. 323. Though a plea to the jurisdiction is not properly a plea in abatement, like such a plea, it should state what

[3] Pitts Sons Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156.

vision has been objected to as more subtle than useful, the arrangement given above is still adhered to.[4] This, it is said, is the natural order, since each subsequent plea admits that there is no foundation for the former, and precludes the defendant from afterwards availing himself of the matter, as will be seen if the order be inverted. A plea to the count or declaration thus admits the jurisdiction of the court, and the ability of the plaintiff to sue and the defendant to be sued; and, after a plea in bar to the action, the defendant cannot plead in abatement, unless for new matter arising after the commencement of the action.[5]

In the above order, the defendant may plead all these kinds of pleas successively, to the end of the series; but he cannot offer two successive pleas of the same class or degree, since, as has been seen, he cannot vary the order. If an issue in fact be taken upon any plea, the judgment on such issue either terminates or suspends the action, so that he is not at liberty in that case to resort to any other kind of plea.

court has jurisdiction. Minch & Eisenbrey Co. v. Cram, 136 Md. 122, 110 Atl. 204. In action of trover defendant's plea to jurisdiction on the ground that it was a foreign corporation without place of business or agent in state was not within the reason discouraging dilatory pleas, or one going merely to a question of venue within state. Bank of Bristol v. Ashworth, 122 Va. 170, 94 S. E. 409.

[4] See Longueville v. Inhabitants of Thistleworth, 2 Ld. Raym. 970, per Holt, C. J.; Co. Litt. 303, 304. This rule can have no application in code pleading, as all defenses are to be covered by the answer, save the objections specified for the use of a demurrer; but in equity the analogy is plain, and a logical sequence of pleas and answers according to their object is still, to a certain extent, maintained. The order of pleading, according to Mr. Tidd, is as follows: 1. To the jurisdiction of the court. 2. To the person: (1) Of the plaintiff. (2) Of the defendant. 3. To the count. 4. To the writ: (1) To the form of the writ. (2) To the action of the writ. 5. To the action itself, in bar thereof. Tidd, Prac. (8th edit.) 680. And it is given in nearly the same manner in the Preface to the Doctrina Placitandi, and in Bacon's Abridgment. Lord Holt states it more generally: "The law has prescribed and settled the order of pleading which the party is to pursue, viz. to the jurisdiction of the court; to the disability of the person; to the count; to the writ; and, lastly, to the action." Longueville v. Inhabitants of Thistleworth, 2 Ld. Raym. 970.

[5] Com. Dig. "Abatement," C, 23, I, 24. See Palmer v. Evertson, 2 Cow. (N. Y.) 417; Potter v. McCoy, 26 Pa. 458; Carlisle v. Weston, 21 Pick. (Mass.) 537; D'Wolf v. Rabaud, 1 Pet. 498, 7 L. Ed. 227; Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114. Pleas in abatement and in bar cannot be pleaded together, Putnam Lumber Co. v. Ellis-Young Co., 50 Fla. 251, 39 South. 193.

PLEAS TO THE JURISDICTION

223. A plea to the jurisdiction is one by which the defendant excepts to the power and authority of the court to entertain the action, either for lack of jurisdiction of the subject-matter or for lack of jurisdiction of the person of the defendant.

This plea denies that the court has jurisdiction of the cause, and may be based on various grounds. There may be a privilege of the defendant by which he is exempted from liability to be sued, or the cause of action may have arisen outside of the territorial jurisdiction of the court, or the court may not have power to take cognizance of the subject-matter of the action from other causes. Courts are divided into those of general and those of limited jurisdiction. The first have cognizance of all transitory actions, wherever the cause of action may have accrued, as all actions of that kind generally follow the person of the defendant. The latter have jurisdiction only over causes of action arising within certain local limits.[6] Courts of general jurisdiction have no authority to try cases of a local nature arising in a foreign country or in any place where the process of the court cannot run. Generally, the want of jurisdiction from any cause may be taken advantage of by this plea, though the objection may often be made under the general issue; and, if the court is totally without power to take cognizance of the subject-matter, the cause will be dismissed on motion, or without motion, ex officio, for the whole proceeding would be coram non judice and utterly void.[7] A plea to the jurisdiction of the person as contrasted with jurisdiction of the subject-matter, must be the first act of the defendant in court, as, if he raises any other question which the court must of necessity pass upon, he admits the jurisdiction, and cannot afterwards deny it.[8]

[6] No fact necessary to confer jurisdiction upon these inferior courts will be presumed, but everything must appear upon the record. Clark v. Norton, 6 Minn. 412 (Gil. 277). But see Diblee v. Davison, 25 Ill. 486. See, also, Ainslie v. Martin, 9 Mass. 462; Flanders v. Atkinson, 18 N. H. 167, Whittier, Cas. Com. Law Pl. p. 597; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439. See Sheppard v. Graves, 14 How. (U. S.) 505, 14 L. Ed. 518.

[7] Black's Ex'r v. Black's Ex'rs, 34 Pa. 354; Oakman v. Small, 282 Ill. 360, 363, 118 N. E. 775. Under Civ. Code Ga. 1910, § 5665, requiring special pleas to jurisdiction unless want of jurisdiction appears on face of proceedings, "want of jurisdiction" refers to subject-matter, not to person. Thurman v. Willingham, 18 Ga. App. 395, 89 S. E. 442.

[8] D'Wolf v. Rabaud, 1 Pet. 498, 7 L. Ed. 227; Farmington v. Pillsbury, 114

This does not apply, of course, where the court has no jurisdiction of the subject-matter. In such a case it cannot acquire jurisdiction either by consent or waiver, and the objection of want of jurisdiction may be raised at any time.[9]

Defects in the service of process not apparent on the face of the record or the return of service should be raised by plea to the jurisdiction of the person, as where the return of service is to be contradicted.[10] If the defendant wishes to object that the court has not acquired jurisdiction of his person, owing to some defect in the service of summons, he should appear in person and not by attorney,[11] and restrict his appearance to the sole purpose of raising this objection; otherwise he waives it.

U. S. 138, 6 Sup. Ct. 807, 29 L. Ed. 114. An objection to the venue on the ground of the defendant's privilege to be sued in his home county is waived if not pleaded in abatement. Gemmill v. Smith, 274 Ill. 87, 113 N. E. 27; Iles v. Heidenreich, 271 Ill. 480, 111 N. E. 524.

[9] Brady v. Richardson, 18 Ind. 1. The question of jurisdiction of a city court must be raised by plea. Buchanan v. Scottish Union & National Ins Co., 210 Ill. App. 523.

[10] Greer v. Young, 120 Ill. 184, 11 N. E. 167; Willard v. Zehr, 215 Ill. 148, 74 N. E. 107.

[11] A plea to the jurisdiction of the person must be pleaded in person and not by attorney. If pleaded by attorney, it is a submission to the jurisdiction of the court. Pratt v. Harris, 295 Ill. 504, 507, 129 N. E. 277; Dec. Dig. "Pleading," § 104(1); Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 Am. Dec. 124; 31 Cyc. 166; 21 R. C. L. 543; Davidson v. Watts, 111 Va. 394, 69 S. E. 328; The Plea to the Jurisdiction, W. H. Moreland, 3 Va. Law Reg. N. S. 249; Culpeper Nat. Bank v. Tidewater Imp. Co., Inc., 119 Va. 73, 89 S. E. 118 (a plea to the jurisdiction of the person by a corporation must be by attorney); Nispel v. Western Union R. Co., 64 Ill. 311. See Bank of Bristol v. Ashworth, 122 Va. 170, 94 S. E. 469. "When we consider the tendency of the times is toward simple, efficient and common-sense procedure; that the dilatory plea is loaded down with technicalities, the reason for which has long since departed, should we not do well to abolish it altogether and substitute therefor the preliminary motion?" W. H. Moreland, The Plea to the Jurisdiction, 3 Va. Law Reg. (N. S.) 249, 256.

224. FORM OF PLEA TO THE JURISDICTION AND VENUE

George T. Sidwell filed his plea in person as follows:[12]

"State of Illinois, County of Vermilion—ss.:

"In the Circuit Court of Said County. To the May Term, A. D. 1897.

"Ella Sandusky v. George H. Sidwell and George T. Sidwell. Gen. No. 11901.

"And the said George T. Sidwell, one of the defendants in the above entitled cause, for the sole purpose of pleading to the jurisdiction of the said court, comes and says that this court ought not to have or take further cognizance of the said action, because the supposed cause or causes of action, and each and every one of them, arose in the county of Cook, in said state of Illinois, and not within the said county of Vermilion, and that the said action is not a local action, and that both he and his codefendant, George H. Sidwell, at the time said suit was begun, and at all times since, have resided in said county of Cook, and not within the said county of Vermilion; that process was served on the said George H. Sidwell while he was on a public railroad train, passing through the said county of Vermilion, and not within the said county of Cook, where he resides, and was served on this defendant in the said county of Cook, and not within the said county of Vermilion; and this the said defendant is ready to verify.

"Wherefore he prays judgment whether this court can or will take further cognizance of this action. George T. Sidwell."

"State of Illinois, County of Cook—ss.:

"George T. Sidwell, being first duly sworn, says that the foregoing plea, by him subscribed, and the statements therein made, are true.

"George T. Sidwell.

"Subscribed and sworn to before me this 17th day of May, A. D. 1897.

"[Seal.] Robert Jeffrey, Notary Public."

[12] Sandusky v. Sidwell, 73 Ill. App. 493, aff'd, 173 Ill. 493, 50 N. E. 1003. Plaintiff demurred to the plea in abatement and therefore admitted that he did not commence the action where the defendant resided. The court ordered the writ of summons quashed and dismissed the suit. See Sherburne v. Hyde, 185 Ill. 582, 57 N. E. 776.

PLEAS IN ABATEMENT

225. A plea in abatement is one that shows some ground for abating or defeating the particular suit, without destroying the right of action itself. Matters in abatement include:

(a) Wrong venue or place of trial.
(b) The personal disability of one of the parties to sue or be sued.
(c) That the action is prematurely brought.
(d) The pendency of another action for the same cause.
(e) Misnomer.
(f) Nonjoinder or misjoinder of parties.

If the defendant perceives no ground for objecting to the jurisdiction of the court, but matters exist by reason of which, though the cause of action is not affected, the present suit cannot be maintained, he should plead such matters in abatement.[13] If ground for abating the action appears on the face of the declaration or record, a plea in abatement is not necessary, for objection may be raised by demurrer or motion to quash; but if the matter does not so appear, and extrinsic facts are necessary to be shown, a plea in abatement is essential.[14] The effect of a plea in abatement, if sustained, is not to dispose of the right of action, either entirely, nor even as far as the particular court is concerned, as is the case with a plea to the jurisdiction; nor, on the other hand, is it merely to temporarily suspend the action, as is the case with a plea in suspension; but its effect is to defeat entirely that particular action, leaving the plaintiff free, however, to assert his right of action in another suit, and in the same court. It is sometimes said that the plea merely tends to delay the action, but this is inaccurate. It entirely defeats the particular action, but it merely delays the enforcement of the right of action, since a new action may be brought.

Mr. Stephen thus explains this plea:

[13] As to the nature and effect of, and the necessity for, pleas in abatement, see Pitts Sons Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 150.

[14] Any defect in the writ, its service or return, which is apparent from an inspection of the record, may properly be taken advantage of by motion; but where the objection is founded upon extrinsic facts, as that the defendant was exempt from service, the matter must be pleaded in abatement, so that an issue may be made thereon, and tried, if desired, by a jury, like any other issue of fact. Greer v. Young, 120 Ill. 184, 11 N. E. 167. Pendency of another action for the same cause must be pleaded in abatement. Moore v. Spiegel, 143 Mass. 413, 9 N. E. 827.

"A plea in abatement of the writ is one which shows some ground for abating or quashing the original writ, and makes prayer to that effect. The grounds for so abating the writ are any matters of fact tending to impeach the correctness of that instrument, i. e. to show that it is improperly framed or sued out, without, at the same time, tending to deny the right of action itself. Thus, if there be variance between the declaration and the writ, this shows that the writ was not properly adapted to the action, and is therefore a ground for abating it. So, if the writ appear to have been sued out pending another action already brought for the same cause, if it name only one person as the defendant, when it should have named several, or if it appear to have been defaced in a material part, it is for any of these reasons abatable.

"Pleas in abatement relate either to the person of the plaintiff, to the person of the defendant, to the count or declaration, or to the writ.

"A plea in abatement to the person of the plaintiff or defendant is such as shows some personal disability in one of these parties to sue or be sued, as that the plaintiff is an alien enemy. With respect to these pleas to the person, it is to be observed that they do not fall strictly within the definition of pleas in abatement, as above given; for they do not pray 'that the writ be quashed,' but pray judgment 'if the plaintiff ought to be answered.' However, as such pleas offer an objection of form, rather than substance, and do not deny the right of action itself, they are considered as in the nature of pleas in abatement, and classed among them. A plea in abatement to the count or declaration is such as is founded on some objection applying immediately to the declaration, and only by consequence affecting the writ. The only frequent case in which this kind of plea has occurred is where the objection is that of a variance in the declaration from the writ, which was always a fatal fault.[15] Even in this case, however, the plea is now out of use, in consequence of a charge of practice relative to the original writ that will be presently explained. A plea in abatement to the writ is such as is founded on some objection that applies to the writ itself; for example, that, in an action on a joint contract, it does not name as defendants all the joint contractors, but omits one or more of them.

"The effect of all pleas in abatement, if successful, is that the particular action is defeated. But, on the other hand, the right of suit itself is not gone; and the plaintiff, on obtaining a better form of writ, may maintain a new action if the objection were founded on

[15] Plea in abatement—variance between summons and declaration. Anderson v. Lewis, 64 W. Va. 297, 61 S. E. 160; Snell v. Stanley, 63 Ill. 391.

matter of abatement; or, if the objection were to disability of the person, he may bring a new action when that disability is removed." [16]

In this country, as we have seen, the original writ is not used in practice, and strictly speaking, it is not proper to speak of a plea in abatement "of the writ." It is a plea in abatement "of the action."

A plea that the action is brought in the wrong county or the wrong district is commonly regarded as a matter of abatement and does not go to the jurisdiction of the court.[17]

As we have no original writs, the modern grounds for abatement of an action are much more limited than they were formerly. They have been, also, still further limited in most states by statute. The principal modern grounds for plea in abatement are: That the action is prematurely brought;[18] the pendency of another action for the same cause;[19] some disability incapacitating the plaintiff from

[16] Stephen, Pl. (Tyler's Ed.) 85–89.

[17] Paige v. Sinclair, 237 Mass. 482, 130 N. E. 177. A plea in abatement claiming the defendant's privilege not to be sued out of the county where she resided or might be found held good. Gemmill v. Smith, 274 Ill. 87, 113 N. E. 27. Plea in abatement setting up defendant's right to be sued in county of his residence, other than that in which action is pending, should specifically aver where cause of action accrued. Williams v. Peninsular Grocery Co., 73 Fla. 937, 75 South. 517. See Roberts v. American Nat. Assur. Co., 201 Mo. App. 239, 212 S. W. 390.

[18] Archibald v. Argall, 53 Ill. 307; Palmer v. Gardiner, 77 Ill. 143; Grand Lodge Brotherhood of Railroad Trainmen v. Randolph, 186 Ill. 89, 57 N. E. 882 (failure to exhaust remedies provided in the contract). That an extension of time has been given after maturity of a debt cannot be pleaded in bar, but only in abatement. Pitts Sons' Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156. That a debt is not yet due has been held to be a plea in bar which should be shown under the general issue rather than under a plea in abatement. Bacon v. Schepflin, 185 Ill. 122, 127, 56 N. E. 1123; Palmer v. Gardiner, 77 Ill. 143.

[19] Smith v. Atlantic Mut. Fire Ins. Co., 22 N. H. 21; Lowry v. Kinsey, 26 Ill. App. 309; Buckles v. Harlan, 54 Ill. 361; Johnson v. Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883. But the pendency of an action in another state is not ground for plea in abatement. Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433; Maule v. Murray, 7 Term R. 470; Imlay v. Ellefsen, 2 East, 457; Bowne v. Joy, 9 Johns. (N. Y.) 221; Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; Allen v. Watt, 69 Ill. 655; Yelverton v. Conant, 18 N. H. 124; Kerr v. Willetts, 48 N. J. Law, 78, 2 Atl. 782. The other action must have been pending when the present action was brought, and this must appear in the plea, or it will be uncertain. Another action afterwards commenced cannot be pleaded in abatement. Nicholl v. Mason, 21 Wend. (N. Y.) 339; Moore v. Spiegel, 143 Mass. 413, 9 N. E. 827; Newell v. Newton, 10 Pick. (Mass.) 470; Garrick v. Chamberlain, 97 Ill. 620; Consolidated Coal Co. of St. Louis v. Oeltjen, 189 Ill. 85, 59 N. E. 600. A plea of prior action pending must allege: (1) Pendency at time the present action was brought; (2) that it is still pending at time of plea; (3) identity of the cause of action and parties; (4) the court in which the prior action is pending (same state); (5) a reference to the record of the prior action. Polsey v. White Rose Mfg. Co., 19 R. I. 492, 34 Atl. 997.

suing;[20] the fact that the plaintiff or one of several plaintiffs was a fictitious person, or dead, when the action was brought;[21] the death of a sole plaintiff, or one of several plaintiffs, since the action was commenced,[22] unless, as is generally the case, it is provided by statute that his personal representatives or heirs, as the case may be, may be substituted as plaintiff; where one of several persons jointly entitled sues alone, instead of jointly with the other parties in interest;[23] where the plaintiff or the defendant is misnamed;[24] where several persons should be joined as defendants, and some of them are omitted;[25] where persons are joined as defendants who should

[20] Infancy of plaintiff suing in his own name, and not by guardian or next friend. Schemerhorn v. Jenkins, 7 Johns. (N. Y.) 373; Smith v. Carney, 127 Mass. 179; 22 Cyc. 503, 685. But infancy is not a dilatory plea, if it goes to the liability or foundation of the action. Greer v. Wheeler, 1 Scam. (2 Ill.) 554. Marriage of feme sole plaintiff since commencement of action, whether she is suing in her own right, or as executrix or administratrix. Swan v. Wilkinson, 14 Mass. 295. That the appointment of a guardian suing for an infant was void. Conkey v. Kingman, 24 Pick. (Mass.) 115. That plaintiff is insane and does not sue by his guardian. Chicago & P. R. Co. v. Munger, 78 Ill. 300. See Isle v. Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513.

[21] Com. Dig. "Abatement," F; Doe v. Penfield, 19 Johns. (N. Y.) 308; Camden v. Robertson, 2 Scam. (Ill.) 507.

[22] Mills v. Bland's Ex'rs, 76 Ill. 381; Stoetzell v. Fullerton, 44 Ill. 108.

[23] Addison v. Overend, 6 Term R. 766; Roberts v. McLean, 16 Vt. 608, 42 Am. Dec. 529; Chicago, R. I. & P. R. Co. v. Todd, 91 Ill. 70; Deal v. Bogue, 20 Pa. 228, 57 Am. Dec. 702; Edwards v. Hill, 11 Ill. 22; Southard v. Hill, 44 Me. 92, 69 Am. Dec. 85; Johnson v. Richardson, 17 Ill. 302, 63 Am. Dec. 369; Hennies v. Vogel, 66 Ill. 401; Shockley v. Fischer, 21 Mo. App. 551.

[24] Moss v. Flint, 13 Ill. 570; Pond v. Ennis, 69 Ill. 341; Springfield Consol. Ry. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884; Proctor v. Wells Bros. Co. of New York, 181 Ill. App. 468; Reid v. Lord, 4 Johns. (N. Y.) 118; Medway Cotton Manufactory v. Adams, 10 Mass. 360; Oates v. Clendenard, 87 Ala. 734, 6 South. 359; Norris v. Graves, 4 Strob. (S. C.) 32. But the action will not be abated on this ground if the defendant is clearly identified; and, further than this, under the present practice the plaintiff will generally be allowed to amend if no prejudice can result. See Adams v. Wiggin, 42 N. H. 553.

[25] McGregor v. Balch, 17 Vt. 562; Southard v. Hill, 44 Me. 92, 69 Am. Dec. 85; Goodhue v. Luce, 82 Me. 222, 19 Atl. 440; Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665; Lasher v. Colton, 225 Ill. 234, 80 N. E. 122, 8 Ann. Cas. 367; Rutter & Co. v. McLaughlin, 257 Ill. 199, 100 N. E. 509; Chicago, R. I. & P. R. Co. v. Todd, 91 Ill. 70.

not be joined;[26] or where a married woman is sued as a feme sole, when it is not allowed by statute.[27]

"Under the head of pleas to the person may also be included coverture, in the plaintiff or defendant; or that the plaintiffs or defendants, suing or being sued as husband and wife, are not married; or any other plea for want of proper parties, as that there is an executor, administrator, or other person, not named, who ought to be made a coplaintiff or codefendant. We have already seen that, if an action be brought for a tort by one of several joint tenants or tenants in common, or against one of several partners, upon a joint contract, the defendant must plead in abatement, and cannot otherwise take advantage of the objection." [28]

The corporate existence of the defendant can be denied only by a plea in abatement. A plea of general issue alone admits the corporate existence of either plaintiff or defendant. The plea of nul tiel corporation is a specific traverse, which as regards the plaintiff is a plea in bar; but as regards defendant it is a plea in abatement and must give the plaintiff information by which he may amend.[29]

[26] Shufeldt v. Seymour, 21 Ill. 524; Town of Harlem v. Emmert, 41 Ill. 319; Lurton v. Gilliam, 1 Scam. (Ill.) 577, 33 Am. Dec. 430; Supreme Lodge A. O. U. W. v. Zuhlke, 129 Ill. 298, 21 N. E. 789; Sinsheimer v. William Skinner Mfg. Co., 165 Ill. 116, 46 N. E. 202; Powell Co. v. Finn, 198 Ill. 569, 64 N. E. 1036.

[27] See Streeter v. Streeter, 43 Ill. 155; Huftalin v. Misner, 70 Ill. 205. At common law a married woman could not sue or be sued without her husband being joined.

[28] Tidd, Prac. (1st Am. Ed.) p. 580.

[29] Bailey v. Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Star Brick Co. v. Ridsdale, 36 N. J. Law, 229; 5 Cyc. 77, 78; 10 Cyc. 1354 (plea of general issue admits corporate existence); Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, 81 N. E. 804 (plea denying that the plaintiff is a corporation is a plea in bar, but a plea denying that the defendant is a corporation is a plea in abatement); 10 Cyc. 1347–1358. Special plea of nul tiel corporation necessary to question corporate capacity of the plaintiff. Gage v. Consumers' Electric Light Co., 194 Ill. 30, 64 N. E. 653; Inhabitants of Orono v. Wedgewood, 44 Me. 49, 69 Am. Dec. 81. See Ames, Cas. Pl. (2d Ed.) p. 41, note. Nul tiel corporation as a plea in bar. Mitch v. United Mine Workers of America, 87 W. Va. 119, 104 S. E. 292; 27 W. Va. Law Quarterly, 355–358.

NONJOINDER OR MISJOINDER OF PARTIES PLAINTIFF IN CONTRACT

226. In actions ex contractu, misjoinder or nonjoinder of plaintiffs may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error, or, where the defect is not apparent on the face of the pleadings, by plea in abatement or motion for a nonsuit.

The rules of the common law were strict as to the persons who should be joined as parties to the action. Since the objection for defect of parties must sometimes be taken by plea in abatement, it is convenient to deal in this chapter with the rules as to parties and the consequences of nonjoinder and misjoinder, and how the objection may be raised.

Nonjoinder of Plaintiffs in Contract

All joint contractors, such as joint promisees, covenantees, or obligees, and all active partners, should join in suits for breach of contract to which they are parties.[30]

All persons who were partners in a firm when a contract was made must be joined, unless some legal excuse for not joining them is alleged, as that a partner is dead. It is no excuse for nonjoinder that one of the partners has sold his interest in a contract to the others.[31]

If one of several joint parties die, the character of the interest is still preserved, and the right of action must be exercised by the survivors as such, or, if all be dead, by the personal representatives of the last survivor,[32] who, though thus excluding the executors or ad-

[30] See Eccleston v. Clipsham, 1 Saund. 153; Anderson v. Martindale, 1 East, 497; Hill v. Tucker, 1 Taunt. 7; Hatsall v. Griffith, 4 Tyrw. 487; Pickering v. De Rochemont, 45 N. H. 77; Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Darling v. Simpson, 15 Me. 175; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456. Nonjoinder and Misjoinder of Parties in Common-Law Actions, H. C. Jones and Leo Carlson, 28 W. Va. Law Quarterly, 197, 266; Sandusky v. West Fork Oil & Natural Gas Co., 63 W. Va. 260, 264, 59 S. E. 1082. In Virginia, in the Code of 1919, the common-law consequences of nonjoinder and misjoinder of parties are practically abolished. Code Va. 1919, § 6102.

[31] Goodhue v. Luce, 82 Me. 222, 19 Atl. 440, Whittier, Cas. Com. Law Pl. p. 619; Dement v. Rokker, 126 Ill. 174, 191, 19 N. E. 33. If a partner be dead, the plaintiff, suing on a firm contract, must allege it as an excuse for not joining him.

[32] See Bernard v. Wilcox, 2 Johns. Cas. (N. Y.) 374; Murray v. Mumford, 6 Cow. (N. Y.) 441; Crocker v. Beal, 1 Low. 416, Fed. Cas. No. 3,396; Smith v. Franklin, 1 Mass. 480; Murphy's Adm'rs v. Branch Bank at Mobile, 5

ministrators of the other deceased parties from maintaining the action, is still liable to them in an equitable proceeding for the proportionate share belonging to the estate represented by each.[33]

When a person who ought to join as plaintiff is omitted in an action of contract, if the defect appears upon the pleadings, the defendant may demur, move in arrest of judgment, or bring a writ of error. If it does not appear upon the pleadings, but is disclosed by the evidence, the plaintiff will be nonsuited. It is not necessary to take the objection by plea in abatement, though this may be done.

A nonjoinder of joint contractors as plaintiffs is a fatal error, unless amended, and may be shown under the general issue, as well as by plea in abatement. But dormant partners need not be joined.[34]

Nonjoinder of parties plaintiff on a joint bond may be taken advantage of on appeal or writ of error, even after judgment by default.[35]

Nonjoinder of executors or persons suing in representative capacity may be raised only by plea in abatement or special plea.

Misjoinder of Plaintiffs in Contract

A misjoinder of plaintiffs is, unless amended, fatal, and defendant may take advantage of it at any time.[36] Where plaintiffs sue as joint contractors, they must show a joint interest. Too few or too many plaintiffs in contract will be fatal to recovery, and the objection may be raised either in abatement or under the general issue.

Joint plaintiffs must show a joint interest in the contract.[37]

Ala. 421; Peters v. Davis, 7 Mass. 257. On survivorship, see 26 W. Va. Law Quarterly, 139.

[33] See The King v. Collector and Comptroller of the Customs at Liverpool, 2 Maule & S. 225.

[34] Lasher v. Colton, 225 Ill. 234, 80 N. E. 122, 8 Ann. Cas. 367, Ames, Cas. Pl. (2d Ed.) p. 138, note; 1 Enc. Pl. and Prac. p. 16.

[35] International Hotel Co. v. Flynn, 238 Ill. 636, 644, 87 N. E. 855, 15 Ann. Cas. 1059. See, also, 15 Enc. Pl. and Prac. 506; 9 Cyc. 703; 30 Cyc. 141; 1 C. J. 125, note 82.

[36] If it appears that too many persons have been made plaintiffs, this may be raised by demurrer, motion in arrest of judgment, or on error, or by motion for nonsuit at the trial. Hennies v. Vogel, 66 Ill. 401; Snell v. De Land 43 Ill. 323; Ames. Cas. Pl. 133, note.

[37] Starrett v. Gault, 165 Ill. 101, 46 N. E. 220.

NONJOINDER OR MISJOINDER OF PARTIES DEFENDANT IN CONTRACT

227. In actions ex contractu, misjoinder may be open to demurrer, motion in arrest of judgment, or writ of error; or, if not apparent on the face of the pleadings, by motion for nonsuit at the trial; nonjoinder only by plea in abatement, unless it appear from the pleadings of the plaintiff that the party omitted jointly contracted and is still living.

Nonjoinder of Defendants in Contract

All persons with whom a contract is made must be joined as defendants in an action for the breach. Where several persons are jointly liable on a contract, they must all be made defendants. Joint contractors must be sued jointly, except that joinder may be excused:

(1) Where a co-contractor has died.

(2) Where a co-contractor has become bankrupt.

(3) Where an action is brought against a firm, and some of the members are nominal or dormant partners.

(4) Where a co-contractor is an infant or a married woman.

(5) Where a co-contractor is resident out of the jurisdiction.

(6) Where a claim is barred against one or more joint debtors, and not against others.

The rule, as laid down by Chitty,[38] is thus stated: "Joint contractors must all be sued, although one has become bankrupt, and obtained his certificate, for, if not sued, the others may plead in abatement."

Nonjoinder of joint contractors as defendants must be pleaded in abatement, unless the joint liability appears on the face of the plaintiff's own pleading.[39]

In Illinois, the fact that plaintiff merely filed the common counts with an affidavit of claim does not change the rule requiring a plea

[38] 1 Chit. Pl. 42, note; Whittier, Cas. Com. Law Pl. pp. 619, 621; Ames, Cas. Pl. p. 140, note. Statutes now generally declare that contracts in terms joint shall be in effect joint and several. Stimson, American Statute Law, § 4113.

In Illinois section 9 of the Practice Act permits judgment against one joint defendant, who is served, but all ostensible members of a partnership must be joined as defendants. Judgment may be had against one or more who are served. Sherburne v. Hyde, 185 Ill. 580, 57 N. E. 776.

[39] Nonjoinder of a joint contractor as defendant must be objected to by plea in abatement. Lasher v. Colton, 225 Ill. 234, 80 N. E. 122, 8 Ann. Cas. 367; David Rutter & Co. v. McLaughlin, 257 Ill. 199, 100 N. E. 509; Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638.

in abatement, since a bill of particulars may be demanded. The general issue admits that there is no foundation for a plea of nonjoinder.[40]

Where the declaration shows on its face a nonjoinder of joint contractors as defendants, defendant may take advantage of the nonjoinder by demurrer, motion in arrest, or by writ of error, without a plea in abatement. There is a presumption that any partner omitted is still living.[41]

A material distinction is to be noted between the case of nonjoinder of plaintiffs and defendants in actions ex contractu, the remedy for nonjoinder of defendants being generally restricted to the use of a plea in abatement,[42] except in the case of an express showing by the plaintiff as above indicated, when the defendant may demur, move in arrest of judgment, or support a writ of error.[43] The more liberal rule prevails where the fault is in making too many parties defendant, though in all cases it is a serious one.

In actions of tort, unless the case is one where, in point of fact and of law, the tort could not have been joint[44] (though even here an objection would be aided by the plaintiff's taking a verdict against one only), the joinder of more than are liable constitutes no objection to a partial recovery;[45] and as a tort is in its nature a separate act of each individual concerned, and the plaintiff may therefore elect to sue one or all, at his pleasure, the omission of one or more does not afford the defendant a ground of objection.[46] This rule, however,

[40] It appears that, even if the proof shows that plaintiff loaned the money to A. and B. jointly, and not jointly and severally, or to A. alone, the nonjoinder of B. can be taken advantage of only by a plea in abatement. Pearce v. Pearce, 67 Ill. 207; Ross v. Allen, 67 Ill. 317; Wilson v. Wilson, 125 Ill. App. 389.

[41] Sinsheimer v. William Skinner Mfg. Co., 165 Ill. 116, 46 N. E. 262; State v. Chandler, 79 Me. 172, 8 Atl. 553.

[42] See Burgess v. Abbott, 1 Hill (N. Y.) 476, Whittier, Cas. Com. Law Pl. p. 604; Williams v. Allen, 7 Cow. (N. Y.) 316; Allen v. Lucket, 3 J. J. Marsh. (Ky.) 165; Hicks v. Cram, 17 Vt. 449; Wilson v. Nevers, 20 Pick. (Mass.) 22; Gove v. Lawrence, 24 N. H. 128; Potter v. McCoy, 26 Pa. 458; Bledsoe v. Irvin, 35 Ind. 293; Gray v. Sharp, 62 N. J. Law, 102, 40 Atl. 771; Prunty v. Mitchell, 76 Va. 169, Whittier, Cas. Com. Law Pl. p. 610.

[43] See Scott v. Godwin, 1 Bos. & P. 73; McGregor v. Balch, 17 Vt. 562. But see Nealley v. Moulton, 12 N. H. 485.

[44] See Russell v. Tomlinson, 2 Conn. 206; Franklin Fire Ins. Co. v. Jenkins, 3 Wend. (N. Y.) 130.

[45] See Govett v. Radnidge, 3 East, 62; Nicoll v. Glennie, 1 Maule & S. 589; Hayden v. Nott, 9 Conn. 367; Jackson ex dem. Haines v. Woods, 5 Johns. (N. Y.) 280.

[46] Even if it appear from the pleadings that the tort was jointly committed by the defendant and another person. See Rose v. Oliver, 2 Johns. (N. Y.) 365.

holds only in cases of actions for torts strictly unconnected with contract; as, if arising out of contract, and, to support them, the contract must be proved and is thus the basis of the suit, different rules apply, and the mere form of the action will not govern.[47] The application of the proper rule, however, will depend upon the statement of the gist of the action, as shown by the declaration.

Misjoinder of Defendants in Contract

A misjoinder of defendants is, unless corrected, fatal. An action against several persons must be established against them all, and, where the evidence shows that defendants are not jointly liable, failure to interpose a plea denying joint liability will not permit a joint recovery.

Misjoinder is open to attack by demurrer, motion in arrest of judgment, or on error, if apparent on the face of the record.[48]

JOINDER OF PARTIES IN TORT ACTIONS

228. The objection of nonjoinder of plaintiffs in an action of tort can be taken only by a plea in abatement. In actions for recovery of property, nonjoinder of parties plaintiff may be shown under the general issue. If there is a misjoinder of parties plaintiff in tort, this is a fatal error. Misjoinder of defendants in actions upon a joint tort is no ground of objection in any mode by those properly made defendants.

Nonjoinder of Plaintiffs in Tort Gives Rise to a Plea in Abatement

The proper plaintiffs in a tort action for injuries to property are all the joint owners; but where the remedy seeks the recovery of damages, and not the specific thing, the nonjoinder of one or more of the joint owners can only be taken advantage of to defeat the action by plea in abatement.[49]

[47] Weall v. King, 12 East, 454. See Pozzi v. Shipton, 8 Adol. & E. 963, and the decisions there referred to; Wright v. Geer, 6 Vt. 151, 27 Am. Dec. 538; Walcott v. Canfield, 8 Conn. 194, Whittier, Cas. Com. Law Pl. p. 613.

[48] Supreme Lodge of A. O. U. W. v. Zuhlke, 129 Ill. 298, 21 N. E. 789; Powell Co. v. Finn, 198 Ill. 569, 64 N. E. 1036. See, also, Hamilton v. Century Mfg. Co., 180 Ill. App. 102; Heidelmeier v. Hecht, 145 Ill. App. 116. See 1 C. J. 131, 132, Ames, Cas. Pl. p. 135. Nonjoinder and Misjoinder of Parties in Common-Law Actions, H. C. Jones and Leo Carlin, 28 W. Va. Law Quarterly, 266 (misjoinder of parties defendant in contract under general issue); Harris v. Worth, 78 W. Va. 76, 79, 88 S. E. 603, 1 A. L. R. 356.

[49] Chicago, R. I. & P. R. Co. v. Todd, 91 Ill. 70; Johnson v. Richardson, 17 Ill. 302, 63 Am. Dec. 369; Edwards v. Hill, 11 Ill. 22. Nonjoinder of plaintiffs in tort, even though appearing on the face of plaintiff's pleadings, can-

If a plea in abatement is not interposed to prevent the severance of the joint cause of action in tort, the plaintiff may recover according to his proportionate interest in the property, and the other joint owners not joined may afterwards sue and recover their proportion of the whole damages.[50]

Misjoinder of Plaintiffs in Tort

A misjoinder of plaintiffs in tort, as well as in contract, is ground for nonsuit on the trial.[51] In Illinois married women must sue alone for personal injuries. Husband and wife sue together only when there is a joint interest.[52] But at common law a married woman could not sue or be sued without having her husband joined with her as a party, and this is still the rule in some states.

Nonjoinder or Misjoinder of Defendants in Tort

A nonjoinder or misjoinder of joint tort-feasors as defendants is no error. "Several persons acting independently, but causing together a single injury, may be sued either jointly or severally, and the injured party may, at his election, sue any of them separately, or he may sue all or any number of them jointly. If he sues all, he may, at any time before judgment, dismiss as to either or any of the defendants, and proceed as to the others." [53]

The legal nature of a tort is such that it may generally be treated as either joint or several, and all the wrongdoers are liable individually and collectively for the consequences of their acts, and all may be sued jointly, or any number less than the whole, or each may be sued separately. Each is liable for himself, as the entire damage sustained was thus occasioned, each sanctioning the acts of the others, so that, by suing one alone, he is not charged beyond his just

not be reached by demurrer or motion in arrest of judgment. May v. Western Union Tel. Co., 112 Mass. 902. See 1 C. J. 126; 30 Cyc. 143. See Cooper v. Grand Trunk Ry. Co., 49 N. H. 209; Lothrop v. Arnold, 25 Me. 136, 43 Am. Dec. 256; Phillips v. Cummings, 11 Cush. (Mass.) 469; Chandler v. Spear, 22 Vt. 388. And see Hart v. Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

[50] Johnson v. Richardson, 17 Ill. 302, 63 Am. Dec. 369. In ejectment, if one of the plaintiffs has no title, no recovery can be had by the other plaintiff, even if he have title. Murphy v. Orr, 32 Ill. 489.

[51] City of Chicago v. Speer, 66 Ill. 154; Gerry v. Gerry, 11 Gray (Mass.) 381, Whittier, Cas. Com. Law Pl. p. 612; 30 Cyc. 142; 14 Cyc. 438.

[52] Cooper v. Cooper, 76 Ill. 57, 64; Chicago, B. & Q. R. Co. v. Dickson, 67 Ill. 122.

[53] Nordhaus v. Vandalia R. Co., 242 Ill. 166, 174, 89 N. E. 974; Heidenreich v. Bremner, 260 Ill. 434-439, 103 N. E. 275; Tandrup v. Sampsell, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. (N. S.) 852, Whittier, Cas. Com. Law Pl. pp. 604, 613, 619, notes.

proportion. It seems, however, that no joint action can be maintained for a joint slander, though it is difficult to see, upon principle, why one uniting with another in an agreement that the slanderous words should be spoken should not be as much liable as any one of several trespassers where the actual blow was given by one alone.[54] Defendants in actions ex delicto can generally be sued jointly only when the wrongful act is the joint act of all.[55]

REQUISITES OF PLEAS IN ABATEMENT

229. Pleas in abatement must be certain and must give the plaintiff a better writ or bill. In pleading a mistake of form in abatement, the defendant must not only point out the plaintiff's error, but must show him how it may be corrected, thus enabling him to avoid the same mistake in another suit regarding the same cause of action.

As pleas in abatement do not deny and yet tend to delay the trial of the merits of the action, great accuracy and precision are required in framing them.[56] They should be certain to every intent, and must, in general, give the plaintiff a better writ by so correcting the mistake objected to as to enable the plaintiff to avoid a repetition of it in forming his new writ or bill.[56] Thus, if a misnomer in the Christian name of the defendant be pleaded in abatement, the de-

[54] Defendants who cause refuse to be discharged into a stream, thereby injuring the lands of a lower riparian owner, cannot be joined as defendants, as they are not jointly liable, in the absence of concert or collusion. Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S. E. 265, 9 A. L. R. 933. But see 18 Mich. Law Rev. 708, note.

[55] Parsons v. Case, 45 Ill. 290; Roberts v. Moon, 5 Term R. 488; Fowler v. Arnold, 25 Ill. 284; Gould v. Smith, 30 Conn. 90; Scott v. Sandford, 19 How. 393, 15 L. Ed. 691; Feasler v. Schriever, 68 Ill. 322. A plea in abatement, for instance, for nonjoinder of a party defendant, is bad if it fails to allege that the party is alive and within the jurisdiction of the court. All facts which would render the joinder unnecessary must be negatived. Goodhue v. Luce, 82 Me. 222, 19 Atl. 440. See 53a. And a plea in abatement that before and at the time suit was brought the plaintiff was and still is insane, etc., without reference to a conservator, is bad. Chicago & P. R. Co. v. Munger, 78 Ill. 300; Knotts v. Clark Const. Co. (Ind.) 131 N. E. 921; Kempton Hotel Co. v. Ricketts (Ind. App.) 132 N. E. 303.

[56] Com. Dig. "Abatement," I, 1; Evans v. Stevens, 4 Term R. 227; Haworth v. Spraggs, 8 Term R. 515; Wilson v. Nevers, 20 Pick. (Mass.) 20; Heyman v. Covell, 36 Mich. 157; East v. Cain, 49 Mich. 473, 13 N. W. 822; American Exp. Co. v. Haggard, 37 Ill. 465, 87 Am. Dec. 257. And see Brown v. Gordan, 1 Greenl. (Me.) 165; Wadsworth v. Woodford, 1 Day (Conn.) 28; Hoffman v.

fendant must in such plea show what his true Christian name is. This requirement of this rule has often been made the test by which to distinguish whether a given matter should be pleaded in abatement or in bar. The latter plea, as impugning the right of action altogether, can, of course, give no better writ, as its effect is to deny that, under any form of writ, the plaintiff should recover in such action. If, therefore, a better writ can be given, it shows that the plea should be in abatement, and not in bar.

Matter in abatement must be set up by plea in abatement, and not by a plea in bar. In other words, whenever the subject-matter to be pleaded is to the effect that the plaintiff cannot maintain any action at any time, it must be pleaded in bar; but matter which merely defeats the present action, and does not show that the plaintiff is forever concluded, must be pleaded in abatement. Matter in abatement set up in a plea in bar cannot be considered in abatement.[57]

In an action on a promissory note the defendant pleaded in bar, not denying that he owed the note, but suggesting that it was not yet due. A demurrer to the plea was sustained, and, on the defendant's election to stand by the plea, final judgment was entered against him. This was held proper, as the matter was in abatement, and could not be set up by a plea in form a plea in bar.[58]

PLEAS IN SUSPENSION

230. A plea in suspension of the action is one which shows some ground for not proceeding in the suit at the present time, and prays that the pleading may be stayed until that ground be removed.

The effect of this plea is not to abate or defeat the writ or action, but is merely to suspend it. When the ground for not proceeding with the action is removed, the plaintiff may go on with it, and need not bring a new action.

Bircher, 22 W. Va. 537; American Exp. Co. v. Haggard, 37 Ill. 465, 87 Am. Dec. 257. This rule is not recognized save at common law, pleas in abatement not being used in code or equity pleading.

[57] Pitts Sons Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; Ilsley v. Stubbs, 5 Mass. 280; Moore v. Spiegel, 143 Mass. 413, 9 N. E. 827.

[58] Pitts Sons Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156. Whittier, Cas. Com. Law Pl. p. 616; Grand Lodge, Brotherhood of Railroad Trainmen v. Randolph, 186 Ill. 91, 57 N. E. 882. Compare Bacon v. Schepflin, 185 Ill. 122, 127, 56 N. E. 1123. An agreement for extension should be pleaded in abatement. See 31 Cyc. 170.

Where an infant heir was sued on a specialty debt of his ancestor, he pleaded his nonage, not as a bar or defense, but merely in suspension of the proceedings until he should arrive at full age, and the plaintiff could then go on with his action. This was called a "parol demurrer," the meaning of which was that the pleading should be stayed.[59]

In Massachusetts it was held that a plea that the plaintiff is an alien enemy, though it may be either in abatement or in bar in a real action, is merely in suspension in a personal action, as it sets up merely a temporary disability of the plaintiff, which ceases with the war. "It is still called a plea in abatement," it was said, "though the effect of it is not to abate the writ, or defeat the process entirely, but to suspend it; and the plea is defective when it concludes either in bar or in abatement of the writ. The form is a prayer whether the plaintiff shall be further answered; and the judgment to be entered upon it, when it shall be confessed or maintained, is that the writ aforesaid remain without day, donec terræ fuerint communes, until the intercourse or the peace of the two countries shall be restored. Where the effect of a plea is a temporary disability of the plaintiff, and nothing more, a prayer of judgment of the writ is bad." [60]

JUDGMENT ON DILATORY PLEA

231. If a demurrer is sustained to a plea in abatement, the judgment is respondeat ouster, and the defendant may plead to the action. If the demurrer is overruled the judgment is final, and plaintiff cannot take issue on the truth of the plea. If an issue of fact is joined, and the jury find against the defendant, they assess damages for the plaintiff. If an issue either of law or fact, upon a plea in abatement, is found for the defendant, the judgment is that the writ be quashed.

Judgment on Dilatory Plea

If judgment is for defendant on plea in abatement upon an issue of fact or law, the writ will be quashed. If a demurrer to such plea is sustained, the defendant may plead to the action. If the demurrer is overruled, judgment is final, and the plaintiff cannot take issue on

[59] 1 Chit. Pl. 463; Stephen Pl. (Tyler's Ed.) 84; Joyce v. McAvoy, 31 Cal. 273, 280, 89 Am. Dec. 172; 2 Kent, Commentaries, 245, note b.

[60] Hutchinson v. Brock, 11 Mass. 119. See Le Bret v. Papillon, 4 East, 502.

the truth of the plea.[61] If an issue of fact is joined on the plea and found in favor of the plaintiff by verdict of a jury, final judgment was awarded in his favor without further trial on the merits.[62] As Tidd says:

"When a plea in abatement is regularly put in, the plaintiff must reply to it, or demur. If he reply, and an issue in fact be thereupon joined, and found for him, the judgment is peremptory, quod recuperet; but if there be judgment for the plaintiff, on demurrer to a plea in abatement, or replication to such plea, the judgment is only interlocutory, quod respondeat ouster. The judgment for the defendant, on a plea in abatement, whether it be on an issue in fact or in law, is that the writ or bill be quashed, or, if a temporary disability or privilege be pleaded, as excommunication, or the king's protection, infancy, etc., that the plaint remain without day, until, etc." [63]

232. FORMS OF PLEAS IN ABATEMENT

Form of Plea in Suspension—Parol Demurrer

(Title of court and cause.)

And the said C. D., defendant in the above-mentioned action, by E. F., who is admitted by the court here as guardian of the said defendant, who is an infant under the age of twenty-one years, to defend for him, comes and defends the wrong and injury, when, etc.; and says that he the said defendant is within the age of twenty-one years, to wit, of the age of ——— years, to wit, at ———, aforesaid, in the county aforesaid. And this he is ready to verify. Wherefore he does not conceive that during his minority the said defendant ought to answer the plaintiff in his said plea. And he prays that the parol may demur until the full age of him, the said defendant.

Form of Plea in Abatement for Nonjoinder of Parties of Defendant

(Title of court and cause.)

And the said C. D., defendant in the above-mentioned action, by X. Y., his attorney, comes and defends the wrong and injury, when, etc.; and prays judgment of the said writ and declaration, because he says that the said several supposed promises and undertakings in the said declaration mentioned, if any such were made, were, and each one of them was, made jointly with one G. H., who is still living, to wit, at ———, and within the jurisdiction of this court, and not by the said defendant alone. And this the defendant is ready to verify. Wherefore, inasmuch as the said G. H. is not named in the said writ together with the defendant, he, the defendant, prays judgment of the said writ and declaration, and that the same may be quashed.

Same—Another Action Pending

(Commence as above.) * * * Because he says that before the commencement of this action, to wit, on the ——— day of ———, A. D. 19—, the plaintiff impleaded the defendant in the ——— court of ——— county, in the state of ———, in a certain plea of trespass on the case in assumpsit for the same promises set forth and declared upon in the declaration in the present action, as by the record thereof in the court last aforesaid more fully appears. And the defendant further says that the parties in this and in the said former action are the same, and that the former action is still pending and undetermined in the court last aforesaid. And this he is ready to verify. (Conclude as above.)

[61] "It was error to give leave to reply after overruling a demurrer to a plea in abatement." Spaulding v. Lowe, 58 Ill. 96; Hill v. Trapp, 206 Ill. App. 272, 275 (duty of court to enter judgment quashing the writ); Cushman v. Savage, 20 Ill. 330; Tidd, Prac. 642; 1 Shinn, Pl. & Pr. § 681; Eddy v. Brady, 16 Ill. 306 (demurrer overruled—judgment final).

[62] Upon determination of issues of fact raised by pleas in abatement, when found in favor of the plaintiff, judgment should be quod recuperet and defendant will not be given an opportunity to plead to the merits. Greer v. Young, 120 Ill. 184, 190, 11 N. E. 167; Paterson Const. Co. v. First State Bank of Thebes, 133 Ill. App. 75, 80; Italian-Swiss Agricultural Colony v. Pease, 194 Ill. 98, 62 N. E. 317; Brown v. Illinois Central Mutual Ins. Co., 42 Ill. 366; Bishop v. Camp, 39 Fla. 517, 22 South. 735; Jericho v. Town of Underhill, 67 Vt. 85, 30 Atl. 690, 48 Am. St. Rep. 804. Pleas in abatement, Myers & Waterson v. Hunter, Erwin & Co., 20 Ohio, 382, 387, note.

[63] 1 Tidd, Prac. (1st Am. Ed.) Pleas in Abatement, pp. 588 and 589.

Myers & Waterson v. Hunter, Erwin & Co., 20 Ohio 382, 387, note: "I. The judgment on a plea in abatement is either (1) that the writ or declaration be quashed (casseter breve, or narratio); (2) respondeat ouster; or (3) final (quod recuperet). Judgment is rendered either (1) without issue taken on the plea; or (2) with issue. Issues are either (1) issues in law; or (2) issues in fact. II. Issues on pleas in abatement are either (1) such as must be tried by the court; or (2) such as may be tried either by the court or jury. The kind or form of judgment, rendered on an issue upon a plea in abatement, depends upon the question whether the issue be found (1) for the plaintiff, and against the plea; or (2) for the defendant, and in favor of the plea."

FORMAL COMMENCEMENT AND CONCLUSION

233. Dilatory pleas must be framed with great strictness and with a formal conclusion.

Whether a plea is in abatement or in bar is to be determined, not from the subject-matter of the plea, but from its form,—its conclusion. The prayer of the plea—the advantage or relief sought—determines its character. "It would be both illogical and absurd, in a plea in bar, to pray, as in a plea in abatement to the count or declaration, 'judgment of the said writ and declaration, and that the same may be quashed'; and, as only the relief asked can be awarded, a mistake in this regard is fatal to the plea. And hence the rule that a plea beginning in bar and ending in abatement is in abatement, and, though beginning in abatement and ending in bar, is in bar; so a plea beginning and ending in abatement is in abatement, though its subject-matter be in bar, and a plea beginning and ending in bar is in bar, though its subject-matter is in abatement. With respect to all dilatory pleas, the rule requiring them to be framed with the utmost strictness and exactness is founded in wisdom. It says to the defendant: 'If you will not address yourself to the justness and merits of the plaintiff's demand, and appeal to the forms of law, you shall be judged by the strict letter of the law.' And so it has been held that a plea in abatement concluding, 'wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him,' etc. (a conclusion in bar), is bad." [64]

Pleas in bar do not require the same degree of certainty as a plea in abatement, for being addressed to the justness of the plaintiff's claim, they are favored by the courts. Certainty to a common intent, therefore, is all that is required. A plea in abatement containing a wrong prayer is bad, but it has been held that the conclusion or prayer of a plea in bar is not material; that "there is a distinction between a plea in bar and a plea in abatement,—in the former a party may have a right judgment on a wrong prayer, but not in the latter." [65]

A plea to the jurisdiction has usually no commencement of the kind in question.[66] Its conclusion is as follows: "* * * the said C. D. prays judgment if the court will or ought to have further cognizance of the plea aforesaid;" [67] or, in some cases, thus: "* * * the said C. D. prays judgment if he ought to be compelled to answer to the said plea here in court." [68]

A plea in suspension seems also to be in general pleaded without a formal commencement.[69] Its conclusion, in the case of a plea of nonage, is thus: "* * * the said C. D. prays that the parol may demur [or that the said plea may stay and be respited] until the full age of him, the said C. D.," etc.[70]

A plea in abatement is also usually pleaded without a formal commencement, within the meaning of this rule.[71] The conclusion is thus: In case of plea to the writ or bill, "* * * prays judgment of the said writ and declaration [or bill], and that the same may be quashed";[72] in case of plea to the person, "* * * prays judgment if the said A. B. ought to be answered to his said declaration." [73]

64 Pitts Sons Mfg. Co. v. Commercial Nat. Bank, supra; Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; Ilsley v. Stubbs, 5 Mass. 280.

65 Atwood v. Davis, 1 Barn. & Ald. 173. And see Withers v. Greene, 9 How. 233, 13 L. Ed. 109; Rex v. Shakespeare, 10 East, 87; Rowles v. Lusty, 4 Bing. 428.

66 1 Chit. Pl. 450.

IMPARLANCE

234. An imparlance is the time allowed by the court to either party, upon request, to answer the pleading of his opponent.

Imparlance, from the French "parler"—to speak—in its most common signification, means time to plead. Formerly the parties, in the course of oral pleadings, were allowed time to speak or confer with one another, so that they might endeavor to settle the matters in dispute, and later, when the pleadings came to be in writing, the court permitted a certain time for each to plead to or answer the pleading of his opponent.[74] In modern practice the term is rarely used, as

67 1 Went. 49; 3 Bl. Comm. 303; Powers v. Cook, 1 Ld. Raym. 63. See Drake v. Drake, 83 Ill. 526; Goldberg v. Harney, 122 Ill. App. 106; Pooler v. Southwick, 126 Ill. App. 264. See Christo v. Nicola, 183 Ill. App. 486.

68 1 Went. 41, 49; Bac. Abr. "Pleas," etc., E 2; Bowyer v. Cook, 5 Mod. 146; Powers v. Cook, 1 Ld. Raym. 63. See Pooler v. Southwick, 126 Ill. App. 264 (plea to jurisdiction—need not be verified—formal conclusion); Goldberg v. Harney, 122 Ill. App. 106, 108 (plea to jurisdiction—form—demurrer).

69 2 Chit. Pl. 472; Plasket v. Beeby, 4 East, 485.

70 2 Chit. Pl. 472; 1 Went. Pl. 43. As to other pleas in suspension, see Lib. Pl. 9, 10; 1 Went. Pl. 15; 1 Saund. 210, note 1; Trollop's Case, 8 Coke, 69; Reg. Plac. 180; Onslow v. Smith, 2 Bos. & P. 384; Hutchinson v. Brock, 11 Mass. 119; Le Bret v. Papillon, 4 East, 502.

71 2 Saund. 209a, note 1.

72 Powers v. Cook, 1 Ld. Raym. 63; 2 Saund. 209a, note 1; Com. Dig. "Abatement," I 12.

73 Co. Litt. 128a; Com. Dig. "Abatement," I 12; 1 Went. Pl. 58, 62.

74 See Tidd, Prac. 418, 419; Gould, Pl. c. 2, §§ 16-20.

in most states the step taken by the defendant at this stage is an appearance, and after that the plea, answer, or demurrer must be filed within a certain time, unless upon motion, for cause shown, the court allows a further time.[75] As formerly used, an imparlance was either general, which was a prayer for an allowance of time to plead, without reserving any benefit of an exception, such as to plead to the jurisdiction of the court or in abatement; or special, when all exceptions were reserved save to the jurisdiction; or general—special, when the defendant reserved all exceptions whatsoever.[76]

[75] See McCormick v. Rusch, 15 Iowa, 127, 83 Am. Dec. 401.
[76] See Black, Law Dict. tit. "Imparlance."

CHAPTER XVII

GENERAL RULES RELATING TO PLEAS

235. Argumentative Pleas.
236. Pleas Amounting to General Issue.
237. Partial Defences.
238. Pleading Bad in Part is Bad Altogether.
239. Several Defenses.
240-241. Plea and Demurrer.
242. Duplicity in Pleas.
243. Immaterial Matter.
244. Matter Ill Pleaded.
245. Matters Forming Connected Proposition.
246. Protestation.
247. General Requisites of Traverse.
248. Materiality of The Traverse.
249. Selection of Issuable Proposition.
250. Denial of the Essentials Only.
251. Negatives and Affirmatives Pregnant.
252. Formal Commencement and Conclusion.
253-254. Tender of Issue.
255. Joinder of Issue.

There are certain general rules as to the requisites of pleas such as the rules against argumentativeness, against duplicity, the rules that the issue shall be taken on material matters, and that the plea shall answer all that it professes to answer, which it is now convenient to consider after our survey of the different kinds of pleas.

ARGUMENTATIVE PLEAS

235. As a pleading is a statement of operative facts, and not of evidence or argument, it must set forth its allegations of fact in a direct and positive form, and not leave them to be collected by inference and argument only.

It is a branch of this rule that two affirmatives do not make a good negative; nor two negatives a good affirmative. The reason for this rule is that not only must precision be observed in allegations of material facts, but the adverse party must be enabled to traverse such allegations by a direct and distinct denial. If, for instance, a defendant, instead of pleading performance of a covenant generally or specially, as might be proper, alleges simply that he has not broken his covenant, he leaves the fact of performance to be inferred from that of the covenants not being broken, so that the former fact cannot be

directly put in issue by a traverse of the plea; and the plea is therefore bad.[1]

In an action of trover for ten pieces of money the defendant pleaded that there was a wager between the plaintiff and one C. concerning the quantity of yards of velvet in a cloak, and the plaintiff and C. each delivered into the defendant's hand ten pieces of money, to be delivered to C. if there were ten yards of velvet in the cloak, and if not, to the plaintiff; and proceeded to allege that, upon measuring of the cloak, it was found that there were ten yards of velvet therein, whereupon the defendant delivered the pieces of money to C. Upon demurrer: "Gawdy held the plea to be good enough, for the measuring thereof is the fittest way for trying it; and when it is so found by the measuring, he had good cause to deliver them out of his hands to him who had won the wager. But Fenner and Popham held that the plea was not good, for it may be that the measuring was false, and therefore he ought to have averred, in fact, that there were ten yards, and that it was so found upon the measuring thereof."[2] So, in an action of trespass, for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. "This is an infallible argument that the defendant is not guilty, and yet it is no plea."[3] Again, in ejectment, the defendant pleaded a surrender of a copyhold by the hand of Fosset, then steward of the manor. The plaintiff traversed that Fosset was steward. All the court held this to be no issue, and that the traverse ought to be that he did not surrender; for, if he were not steward, the surrender is void.[4] The reason of this decision appears to be that to deny that Fosset was steward could be only so far material as it tended to show that the surrender was a nullity; and that it was, therefore, an argumentative de-

[1] Hodgson v. East India Co., 8 Term R. 278; Boone v. Eyre, 2 W. Bl. 1312. On argumentativeness, see Moses v. Allen, 91 Md. 42, 50, 46 Atl. 323. Plea set forth reasons which were properly matters of evidence, and could not have been traversed, except by a replication of the same faulty character; demurrer properly sustained.

[2] Ledesham v. Lubram, Cro. Eliz. 870.

[3] Doct. Plac. 41; Dyer, 43a.

[4] Wood v. Butts, Cro. Eliz. 260. For other illustrations and statements of the rule, see Bac. Abr. "Pleas," etc., I, 5; Com. Dig. E, 8; Co. Litt. 303a; Blackmore v. Tidderley, 11 Mod. 38, 2 Salk. 423; Murray v. East India Co., 5 Barn. & Ald. 215; Spencer v. Southwick, 9 Johns. (N. Y.) 314; Baynes v. Brewster, 1 Gale & D. 674; Watriss v. Pierce, 36 N. H. 236; Goshen & Sharon Turnpike Co. v. Sears, 7 Conn. 92; Dyett v. Pendleton, 8 Cow. (N. Y.) 728; Misner v. Granger, 4 Gilman (Ill.) 69; Spurck v. Forsyth, 40 Ill. 438; Clark v. Lineberger, 44 Ind. 223; Hale v. Dennie, 4 Pick. (Mass.) 503; Fidler v. Delavan, 20 Wend. (N. Y.) 57; Board of Com'rs of Clinton County v. Hill, 122 Ind. 215, 23 N. E. 779; Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162.

nial of the surrender, which, if intended to be traversed, ought to be traversed in a direct form.

It is a branch of this rule that two affirmatives do not make a good issue.[5] The reason is that the traverse by the second affirmative is argumentative in its nature. Thus, if it be alleged by the defendant that a party died seised in fee, and the plaintiff allege that he died seised in tail, this is not a good issue;[6] because the latter allegation amounts to a denial of a seisin in fee, but denies it by argument or inference only. It is this branch of the rule against argumentativeness that gave rise to the form of a special traverse. Where, for any of the reasons mentioned in a preceding part of this work, it becomes expedient for a party traversing to set forth new affirmative matter tending to explain or qualify his denial, he is allowed to do so; but as this, standing alone, will render his pleading argumentative, he is required to add to his affirmative allegation an express denial, which is held to cure or prevent the argumentativeness.[7] Thus, in the example last given, the plaintiff may allege, if he pleases, that the party died seised in tail; but then he must add, absque hoc, that he died seised in fee, and thus resort to the form of a special traverse.[8] The doctrine, however, that two affirmatives do not make a good issue, is not taken so strictly but that the issue will, in some cases, be good, if there is sufficient negative and affirmative in effect, though, in the form of words, there be a double affirmative. Thus, in debt on a lease for years, where the defendant pleaded that the plaintiff had nothing at the time of the lease made, and the plaintiff replied that he was seised in fee, this was held a good issue.[9]

Another branch of the rule against argumentativeness is that two negatives do not make a good issue.[10] Thus, if the defendant plead that he requested the plaintiff to deliver an abstract of his title, but that the plaintiff did not, when so requested, deliver such abstract, but neglected so to do, the plaintiff cannot reply that he did not neglect and refuse to deliver such abstract, but should allege affirmatively that he did deliver.[11]

[5] Com. Dig. "Pleader," R, 3; Co. Litt. 126a; Chandler v. Roberts, 1 Doug. 60; Zouch and Bamfield's Case, 1 Leon. 77; Doct. Plac. 43, 349, 360; Y. B. 5 Hen. VII, 11, 12.

[6] Doct. Plac. 349; Y. B. Hen. VII, 11, 12.

[7] Bac. Abr. "Pleas," etc., H, 3; Courtney v. Phelps, Sid. 301; Herring v. Blacklow, Cro. Eliz. 30; Y. B. Hen. VI, 7, pl. 21.

[8] Doct. Plac. 349.

[9] Co. Litt. 126a, Reg. Plac. 297, 298; Tomlin v. Burlace, 1 Wils. 6.

[10] Com. Dig. "Pleader," R, 3; Ryan v. Vanlandingham, 25 Ill. 128; Martin v. Smith, 6 East, 557.

[11] Martin v. Smith, supra.

PLEAS AMOUNTING TO GENERAL ISSUE

236. When a plea amounts to a general issue, it should be so pleaded. In other words, where the matter of defense may be raised under the general issue in the particular action, it must be so pleaded.

QUALIFICATION—Pleas giving express or implied color. Where express color is given, the plea will not amount to the general issue.

Where the defense goes in confession and avoidance this may be specially pleaded, even though the plea consists of matter which may be given in evidence under the general issue.

It is a well-established rule of pleading that, if facts are alleged specially which can be given in evidence under the general issue, such plea is obnoxious to special demurrer. The point has been frequently urged with success that a special plea amounted to the general issue.[12] If the general issue can be used, then it must be used, and to employ a specific denial would be bad in form. Thus, even if the defendant wishes to deny one of several material elements making up the cause of action, thereby narrowing the issues of fact, he is not allowed to do so. The reason or purpose of insisting upon the general issue seems to have been that of avoiding making of long records and of closing the pleadings at an early stage.[13] It is clear, however, that

[12] J. S. of Dale v. J. S. of Vale, Jenk. Cent. Cas. 133; Co. Litt. 303b; Com. Dig. "Pleader," E, 14; Pac. Abr. "Pleas," etc., 870-876; Y. B. 10 Hen. VI, 16; Y. B. 22 Hen. VI. 37; Holler v. Bush, Salk. 394; Birch v. Wilson, 2 Mod. 277; Lynner v. Wood, Cro. Car. 157; Warner v. Wainsford Hob. 127, 12 Mod. 537; President, etc. of Bank of Auburn v. Weed, 19 Johns. (N. Y.) 300; Wheeler v. Curtis, 11 Wend. (N. Y.) 660; Underwood v. Campbell, 13 Wend. (N. Y.) 78; Collet v. Flinn, 5 Cow. (N. Y.) 466; City of Quincy v. Warfield, 25 Ill. 317, 79 Am. Dec. 330; Cushman v. Hayes, 46 Ill. 155; Wadhams v. Swan, 109 Ill. 54; Governor, to use of Thomas, v. Lagow, 43 Ill. 134; McCord v. Mechanics' Nat. Bank of Chicago, 84 Ill. 49; Knoebel v. Kircher, 83 Ill. 308; Illinois Cent. R. Co. v. Johnson, 34 Ill. 389; Johnston v. Ewing Female University, 85 Ill. 518. See, also, Purinton v. Jamrock, 195 Mass. 187, 80 N. E. 802, 18 L. R. A. (N. S.) 929; 24 L. R. A. (N. S.) 1158, note; Merritt v. Miller, 13 Vt. 416; Thayer v. Brewer, 15 Pick. (Mass.) 217; Martin v. Wood, 6 Mass. 6; Van Ness v. Forrest, 8 Cranch, 30, 3 L. Ed. 478.

[13] Warner v. Wainsford (1603) Hobart, 127. The reason for disallowing specific traverses which merely deny the declaration is not because they tend to inconvenient prolixity, but that they depart from the established modes of pleading. Will's Gould, Pl. (6th Ed.) p. 519.

pleading the circumstances specially has the advantage of presenting the questions of law on which the case turns and of making the issue more specific; yet the rules of common-law pleading defeat their own ends and purposes by insisting on the general issue for the sake of the false appearance of singleness, simplicity, and brevity, and make the plaintiff prove what the defendant cannot actually dispute. This abuse is remedied to some extent under modern statutory systems.[14]

The following cases illustrate the general rule: In an action of trespass for entering the plaintiff's garden, the defendant pleaded that the plaintiff had no such garden. This was ruled to be no plea, as it amounted to nothing more than "Not guilty"; for, if he had no such garden, then the defendant was not guilty. So the defendant withdrew his plea, and said, "Not guilty."[15] So, in trespass for depasturing the plaintiff's herbage, "Non depascit herbas" is no plea; it should be "Not guilty."[16] So, in debt for the price of a horse sold, that the defendant did not buy is no plea, for it amounts to nil debet.[17] Again, in trespass for entering the plaintiff's house and keeping possession thereof for a certain time, the defendant pleaded that J. S. was seised in fee thereof, and, being so seised, gave license to the defendant to enter into and possess the house, till he should give him notice to leave it; that thereupon the defendant entered and kept the house for the time mentioned in the declaration, and had not any notice to leave it, all the time. The plaintiff demurred specially, on the ground that this plea amounted to the general issue, "Not guilty"; and the court gave judgment on that ground for the plaintiff.[18] So, in an action of trover for divers loads of corn, the defendant in his plea entitled himself to them as tithes severed. The plaintiff demurred specially, on the ground that the plea "amounted but to not guilty," and the court gave judgment for the plaintiff.[19] So, in trespass for breaking and entering the plaintiff's close, if the defendant pleads a demise to him by the plaintiff, by virtue whereof he (the defendant) entered and was possessed, this is bad, as amounting to the general issue, "Not guilty."[20] So, in debt on a bond, the defend-

[14] That a special plea amounts to the general issue does not make it objectionable under the practice act in Vermont. Roberts v. Danforth, 92 Vt. 88, 102 Atl. 335. See Boyden v. Fitchburg R. Co., 70 Vt. 125, 39 Atl. 771.

[15] Y. B. 10 Hen. VI, 16.

[16] Doct. Plac. 42; Y. B. 22 Hen. VI, 37.

[17] Vin. Abr. A 15; Y. B. 22 Edw. IV, 29.

[18] Saunder's Case, 12 Mod. 513, 514.

[19] Lynner v. Wood, Cro. Car. 157.

[20] Iaques' Case, Style, 355; Hallet v. Byrt, 5 Mod. 263.

ant, by his plea, confessed the bond, but said that it was executed to another person, and not to the plaintiff. This was held bad, as amounting to non est factum.[21]

These examples show that a special plea thus improperly substituted for the general issue may be sometimes in a negative, sometimes in an affirmative, form. When in the negative, its argumentativeness will often serve as an additional test of its faulty quality. Thus, the plea in the first example, "that the plaintiff had no such garden," is evidently but an argumentative allegation that the defendant did not commit, because he could not have committed, the trespass. This, however, does not universally hold; for in the second and third examples the allegations that the defendant "did not depasture," and "did not buy," seem to be in as direct a form of denial as that of not guilty. If the plea be in the affirmative, the following considerations will always tend to detect the improper construction: If a good plea, it must, as heretofore shown, be taken either as a traverse or as in confession and avoidance. Now, taken as a traverse, such a plea is clearly open to the objection of argumentativeness; for, as we have seen, two affirmatives make an argumentative issue. Thus, in the fourth example, the allegations show that the house in question was the house of J. S., and they therefore deny argumentatively that it was the house of the plaintiff as stated in the declaration. On the other hand, if a plea of this kind be intended by way of confession and avoidance, it is bad for want of color, for it admits no apparent right in the plaintiff. Thus, in the same example, if it be true that J. S. was seised in fee and gave license to the defendant to enter, who entered accordingly, this excludes all title of possession in the plaintiff, and without such title he has no color to maintain an action of trespass.[22] So, in the example where the defendant pleads the plaintiff's own demise, the same observation applies; for if the plaintiff demised to the defendant, who entered accordingly, the plaintiff would then cease to have any title of possession, and he consequently has no color to support an action of trespass.

The fault of wanting color being in this manner connected with that of amounting to the general issue, it is accordingly held that a plea will be saved from the latter fault where express color is given.[23]

[21] Gifford v. Perkins, 1 Sid. 450, 1 Vent. 77. Where matters set up in special plea in an action on a sheriff's bond are provable under the general issue entered, the plea is properly rejected. Raleigh County Court v. Cottle, 79 W. Va. 661, 92 S. E. 110, Ann. Cas. 1918D, 510.

[22] Holler v. Bush, 1 Salk. 394.

[23] Anon., 12 Mod. 537; Saunder's Case, 12 Mod. 513, 514; Lynner v. Wood, Cro. Car. 157; Birch v. Wilson, 2 Mod. 274; Horne v. Lewin, 3 Salk. 273.

Thus, in the example of express color given, in a former part of this work, the plea is cured, by the fictitious color of title there given to the plaintiff, of the objection to which it would otherwise be subject—that it amounts to not guilty. So, where sufficient implied color is given, a plea will never be open to this kind of objection. And it is further to be observed that, where sufficient implied color is given, the plea will be equally clear of this objection, even though it consist of matter which might be given in evidence under the general issue. Defendants are allowed, in certain actions, to prove, under this issue, matters in the nature of confession and avoidance; as, for example, in assumpsit, a release or payment. In such cases the plaintiff, though allowed, is not obliged, to plead non assumpsit, but may, if he pleases, plead specially the payment or release; and, if he does, such plea is not open to the objection that it amounts to the general issue.[24]

It is said that the court is not bound to allow this objection, but that it is in its discretion to allow a special plea amounting to the general issue, if it involve such matter of law as might be unfit for the decision of a jury.[25] It is also said that, as the court has such discretion, the proper method of taking advantage of this fault is not by demurrer, but by motion to the court to set aside the plea and enter the general issue instead of it.[26] By the clear weight of authority, however, the objection is also ground for special demurrer. The objection may and must be raised either by motion or special demurrer.[27]

As a plea amounting to the general issue is usually open also to the objection of being argumentative, or that of wanting color, we sometimes find the rule in question discussed as if it were founded entirely in a view to those objections. This, however, says Stephen, does not seem to be a sufficiently wide foundation for the rule; for there are instances of pleas which are faulty, as amounting to the general issue, which yet do not seem fairly open to the objection of argumenta-

[24] Maggs v. Ames, 4 Bing. 470, Whittier, Cas. Com. Law Pl. pp. 346, 348, note; Holler v. Bush, 1 Salk. 394; Hussey v. Jacob, Carth. 356; Carr v. Hinchliff, 4 Barn. & C. 552; Baltimore & O. R. Co. v. Polly, Woods & Co., 14 Grat. (Va.) 447, Whittier, Cas. Com. Law Pl. p. 343; Morgantown Bank v. Foster, 35 W. Va. 357, 13 S. E. 996; Benes v. Bankers' Life Ins. Co., 282 Ill. 236, 118 N. E. 443.

[25] Bac. Abr. "Pleas," etc., 374; Birch v. Wilson, 2 Mod. 274.

[26] Warner v. Wainsford, Hob. 127; Ward and Blunt's Case, 1 Leon. 178; Whittelsey v. Wolcott, 2 Day (Conn.) 431.

[27] See the cases cited in notes supra. And see Sinclair v. Hervey, 2 Cbit. 642; Saunder's Case, 12 Mod. 513, 514; Lynner v. Wood, Cro. Car. 157; Cushman v. Hayes, 46 Ill. 155; Cook v. Scott, 1 Gilman (Ill.) 333; Curtiss v. Martin, 20 Ill. 557.

tiveness, and which, on the other hand, being of the negative kind or by way of traverse, require no color. Besides, there is express authority for holding that the true object of this rule is to avoid prolixity, for it is laid down that "the reason of pressing a general issue is not for insufficiency of the plea, but not to make long records when there is no cause." [28]

PARTIAL DEFENSES

237. Every pleading must be an answer to the whole of what it professes to answer. Partial defenses must be pleaded as such.

The effect of this rule is that a pleading must fully meet the cause of action stated by answering the whole of it, or all that is material. If it fails in this, it is bad.[29] Thus, in trespass for breaking a close and cutting down 300 trees, if the defendant pleads some matter of justification or title as to all but 200 trees, and says nothing as to the 200, his plea is bad. As to the proper course for the plaintiff to take in such cases there is some doubt, and a conflict in the authorities. It is said by Stephen that there is a distinction in cases where the defendant does not profess to answer the whole, and a case where, by the commencement of his plea, he does profess to do so, but in fact gives a defective and partial answer, applying to part only. He says that in the former case, that is, where the defendant does not profess to answer the whole, the plaintiff is entitled to sign judgment as by nil dicit against him in respect of that part of the cause of action not answered, and to demur or reply to the plea as to the remainder; and, on the other hand, if he demurs or replies to the plea without signing judgment for the part not answered, the whole action is said to be dis-

[28] Warner v. Wainsford, Hob. 127; Com. Dig. "Pleader," E, 13. But, see Will's Gould, Pl. (6th Ed.) p. 519.

[29] Stephen, Pl. (Tyler's Ed.) 215; Com. Dig. "Pleader," E, 1, F, 4; 1 Saund. 28, note 3; Earl of Manchester v. Vale, 1 Saund. 27; Herlakenden's Case, 4 Coke, 62a; Sterling v. Sherwood, 20 Johns. (N. Y.) 204; Riggs v. Denniston, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145; Nevins v. Keeler, 6 Johns. (N. Y.) 63; Boyd v. Weeks, 5 Hill (N. Y.) 393; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Carpenter v. Briggs, 15 Vt. 34; Mitchell v. Sellman, 5 Md. 376; Sprague Nat. Bank v. Erie R. Co., 62 N. J. Law, 474, 41 Atl. 681. Plea undertaking to answer whole complaint when the matter set up answers only part thereof is bad. Jackson v. Bohlin, 16 Ala. App. 105, 75 South. 697; Wageck v. Travelers' Ins. Co., 108 Misc. Rep. 65, 177 N. Y. Supp. 327; Singer Sewing Mach. Co. v. Burger, 181 N. C. 241, 107 S. E. 14; Florida East Coast Ry. Co. v. Peters, 72 Fla. 311, 73 South. 151, Ann. Cas. 1918D, 121.

continued.[30] For the plea, if taken by the plaintiff as an answer to the whole action, it being in fact a partial answer only, is, in contemplation of law, a mere nullity; and there is consequently an interruption or chasm in the pleading, which is called in technical phrase a "discontinuance." And such discontinuance will amount to error on the record.[31] Where, however, the defendant does profess to answer the whole declaration, but in fact gives a defective answer, applying to a part only, this amounts merely to insufficient pleading, and the plaintiff's course, therefore, is not to sign judgment for the part defectively answered, but to demur to the whole plea.[32] Some courts have refused to recognize any such distinction as this, and hold that where the plea does not profess to answer the whole declaration, as well as in cases where it does so profess, the plaintiff may demur to the plea as a whole as insufficient in law, or reply to it, and need not enter judgment, for the part unanswered, as by nil dicit; and that such a course will not amount to a discontinuance.[33]

Where that part of the pleading to which no answer is given is immaterial, or such as requires no separate or specific answer, as, for instance, where it is mere matter of aggravation, the rule does not apply.[34]

[30] On discontinuance by reply to partial plea without taking judgment for the part not answered to upon nil dicit, see Davis v. Burton, 3 Scam. (Ill.) 41, 36 Am. Dec. 511. See, also, Stephen, Pl. (Tyler's Ed.) 215; Com. Dig. "Pleader," E, 1, F, 4; 1 Saund. 28, note 3; Herlakenden's Case, 4 Coke, 62a; Tippet v. May, 1 Bos. & P. 411, Ames, Cas. Pl. (2d Ed.) 64; Flemming v. Mayor, etc., of City of Hoboken, 40 N. J. Law, 270, Whittier, Cas. Com. Law Pl. p. 489; Young v. Fentress, 10 Humph. (Tenn.) 151; Risher v. Wheeling Roofing & Cornice Co., 57 W. Va. 149, 49 S. E. 1016. Cf. Carpenter v. Briggs, 15 Vt. 34.

[31] Cro. Jac. 353; Stephen, Pl. (Tyler's Ed.) 216. But such an error is cured after verdict by the statute of jeofails (32 Hen. VIII, c. 30), and after judgment by nil dicit, confession, or non sum informatus, by the statute of 4 Anne, c. 16. Stephen, Pl. supra, note b.

[32] 1 Saund. 28, note 3; Stephen, Pl. (Tyler's Ed.) 216. See Harpham v. Haynes, 30 Ill. 404; Snyder v. Gaither, 3 Scam. (Ill.) 91; Bonham v. People, to use of Wilson, 102 Ill. 434; Illinois Cent. R. Co. v. Leidig, 64 Ill. 151; People to use of Busch v. McCormack, 68 Ill. 226; Hinton v. Husbands, 3 Scam. (Ill.) 187; Hatfield v. Cheaney, 76 Ill. 488. A plea professing to answer the whole declaration, and which answers but one count, is bad on demurrer. People's Shoe Co. v. Skally, 196 Ala. 349, 71 South. 719. A plea to the entire declaration, omitting to answer a material part, is demurrable. Florida East Coast Ry. Co. v. Peters, 72 Fla. 311, 73 South. 151, Ann. Cas. 1918D, 121.

[33] Sterling v. Sherwood, 20 Johns. (N. Y.) 204; Riggs v. Denniston, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145; Bullythorpe v. Turner, Willes, 475, 480; Hickok v. Coates, 2 Wend. (N. Y.) 419, 20 Am. Dec. 632.

[34] 1 Saund. 28, note 3.

Again, if any pleading be intended to apply to part only of the matter adversely alleged, it must be qualified accordingly in its commencement and conclusion.[36]

PLEADING BAD IN PART IS BAD ALTOGETHER

238. A pleading which is bad in part is bad altogether. In other words, a plea is treated as a unit, and if deficient in any material fact, or in reference to any of the material things which it undertakes to answer, or as to either of the parties answering, though otherwise free from objection, the whole is open to demurrer.

By the proper forms of commencement and conclusion, the matter which any pleading contains is offered either as an entire or as a partial answer to the whole of that which last preceded. If it fails in any material part, it fails altogether.[36] Thus, if in a declaration of assumpsit two different promises be alleged in two different counts, and the defendant plead in bar to both counts conjointly the statute of limitations, viz. that he did not promise within six years, and the plea be an insufficient answer as to one of the counts, but a good bar to the other, the whole plea is bad, and neither promise is sufficiently answered.[37] So, where to an action of trespass for false imprisonment against two defendants they pleaded that one of them, A., having ground to believe that his horse had been stolen by the plaintiff, gave him in charge to the other defendant, a constable, whereupon the constable and A., in his aid and by his command, laid hands on the plaintiff, etc., the plea was adjudged to be bad as to both defendants, because it showed no reasonable ground of suspicion; for A. could not justify the arrest without showing such ground; and though the case might be different as to the constable, whose duty was to act on the charge, and not to deliberate, yet, as he had not pleaded separately, but had joined in A.'s justification, the plea was bad as to him also.[38]

This rule seems to result from that which requires each pleading

[36] Weeks v. Peach, 1 Salk. 179. An item pleaded by the answer in reduction of any judgment recovered by plaintiff was pro tanto a defense. Oregon Engineering Co. v. City of West Linn, 94 Or. 234, 185 Pac. 750.

[36] See Com. Dig. "Pleader," E, 36, F, 25; Webb v. Martin, 1 Lev. 48; Bradley v. Powers, 7 Cow. (N. Y.) 330; Duffield v. Scott, 3 Term R. 374; Ten Eyck v. Waterbury, 7 Cow. (N. Y.) 51; Ferrand v. Walker, 5 Blackf. (Ind.) 424; Shearman v. Fellows, Id. 459.

[37] Webb v. Martin, 1 Lev. 48.

[38] Hedges v. Chapman, 2 Bing. 523; Bradley v. Powers, 7 Cow. (N. Y.) 330.

to have its proper formal commencement and conclusion; for by those forms, it will be observed, the matter which any pleading contains is offered as an entire answer to the whole of that which last preceded. Thus, in the first example above given, the defendant would allege, in the commencement of his plea, that the plaintiff "ought not to have or maintain his action" for the reason therein assigned; and, therefore, he would pray judgment, etc., as to the whole action in the conclusion. If, therefore, the answer be insufficient as to one count, it cannot avail as to the other; because, if taken as a plea to the latter only, the commencement and conclusion would be wrong. It is to be observed that there is but one plea, and consequently but one commencement and conclusion; but if the defendants should plead the statute in bar to the first count separately, and then plead it to the second count with a new commencement and conclusion, thus making two pleas instead of one, the invalidity of one of these pleas could not vitiate the other.

As the declaration, like the general issue, has neither formal commencement nor conclusion of the kind to which the last rule relates, it does not fall within the scope of the one under consideration. A declaration may be good in part, and bad as to another part, relating to a distinct demand divisible from the rest; and if the defendant plead to the whole, instead of to the defective part only, the judgment will be for the plaintiff.[39]

SEVERAL DEFENSES

239. The respective pleadings subsequent to the declaration must not contain several distinct answers to the opposing pleading. But—

(a) Several facts may be pleaded if necessary to constitute a single complete answer.

(b) A defendant in the same plea may plead separately to different matters of claim.

(c) By statute, two or more distinct defenses may be pleaded in separate pleas to the same claim, upon leave of court first obtained. It is to be noted that:

(1) The statute only applies to the pleas of the defendant. It does not apply to the replication or subsequent pleadings.

(2) Leave will not be granted so as to extend the statute to dilatory pleas.

[39] See Webb v. Martin, 1 Lev. 48; Perkins v. Burbank, 2 Mass. 81.

(3) Where several pleas are thus presented, each is to be considered as independent, and to operate as if pleaded alone.

(d) Several defendants may plead separately.

Singleness of Issue

It was the avowed object of common-law pleading to reduce the controversy of the parties to a single material issue decisive of the case. If a defendant had several defenses, the common law required him to make his election between them and rest his case on the one selected. In Whitaker v. Freeman,[40] Chief Justice Marshall says: "The principle in pleading that a special plea must confess and avoid the fact charged in the declaration was introduced at a time when the rigid practice of the courts required that every cause should be placed on a single point, and when it was deemed error to plead specially matter which amounted to the general issue; it was not allowed to deny the fact and also to justify it. The defendant might select his point of defense; but, when selected, he was confined to it. That a single point might be presented to the jury, he was under the necessity of confessing everything but that point. The attention of the jury was not directed to multifarious objects, but confined to one on which alone the cause depended." [41]

The rule is well settled that no plea or traverse can be good which embraces different matters, which cannot be brought within the scope of one issue.[42] A plea or replication, therefore, must contain but one complete answer to the last opposing pleading, the principle being that, as one such answer, if maintained, is sufficient to defeat the action or defense, all others are superfluous.[43] It is not necessary, however, that the single ground of defense or answer to which each plea or replication is thus limited shall consist of a single fact,[44] since several connected or dependent facts or circumstances may be necessary to constitute a single or complete answer. In such a case the fault of duplicity cannot exist, as such facts constitute, in fact, but a single answer.[45]

The rule against duplicity in the plea does not prevent a defendant from giving several distinct answers to different matters of claim in the declaration. A defendant may therefore plead the general issue to one part of the declaration, and matter in confession and avoidance to the residue, or one matter of abatement to one part, and another to another part, or may plead in abatement to one part of the demand, and in bar as to another.[46] To several counts, or to distinct parts of the same count, he may therefore plead several pleas; that is, one to each. Thus, in an action of trespass for three assaults and batteries, the defendant may plead not guilty to the first count; in excuse—self-defense—to the second; and the statute of limitations to the third. The reason is that the different matters so pleaded are not alleged to the same point, and therefore do not tend to produce several issues as to that point.[47] The rule applies equally to the replication and other subsequent pleadings in the series, a severance being always proper when there are several subjects of claim or complaint. This right, however, of thus pleading distinct matters, appears to be subject to the restriction that neither of the separate defenses thus alleged can be such as would alone constitute a sufficient answer to the whole of the opposing claim, since then one only would be necessary.[48]

It may often happen that the defendant may have several distinct answers to give to the same claim or complaint. Thus, in an action of trespass for two assaults and batteries, he may have ground to deny both the trespasses, and also to allege that neither of them was

[40] Whitaker v. Freeman (C. C. 1827) Fed. Cas. No. 17,527a, 29 Fed. Cas. 955, 12 N. C. 271, Whittler, Cas. Com. Law Pl. p. 449.

[41] Originally, at common law, the plaintiff was allowed to plead only one plea in bar, as the great aim of pleading was to reduce the controversy to a single issue for the jury, and thereby simplify the investigation. By use of the general issues singleness of the issue early became a fiction; since the issue, though apparently single in words, was in reality complex.

[42] Com. Dig. "Pleader," E, 2. Every plea must be simple, entire, connected, and confined to a single point, and a plea setting up more than one independent fact or set of facts, either of which is sufficient answer, is bad for duplicity, whether the plea is in bar, in abatement, or both. Florida East Coast Ry. Co. v. Peters, 72 Fla. 311, 73 South. 151, Ann. Cas. 1918D, 121.

[43] See Vivian v. Jenkins, 5 Nev. & M. 14; Watriss v. Pierce, 36 N. H. 232; Bradner v. Demick, 20 Johns. (N. Y.) 405; U. S. v. Gurney, 1 Wash. C. C. 446, Fed. Cas. No. 15,271; Armstrong v. Webster, 80 Ill. 333; Star Brick Co. v. Ridsdale, 84 N. J. Law, 428. A plea of abatement on the ground of wrong venue, and on the ground of defendant being immune from service of process when and where he was served, is bad for duplicity. Fitzgerald v. Southern Farm Agency, 122 Va. 264, 94 S. E. 761.

[44] See, as to the test of duplicity, People ex rel. Attorney General v. River Raisin & L. E. R. Co., 12 Mich. 300, 86 Am. Dec. 64.

[45] Robinson v. Raley, 1 Burr. 316; Kinney v. Turner, 15 Ill. 182; Kipp v. Bell, 86 Ill. 577. And see Strong v. Smith, 3 Caines (N. Y.) 160; Cooper v. Heermance, 3 Johns. (N. Y.) 318; Tubbs v. Caswell, 8 Wend. (N. Y.) 130; Tebbets v. Tilton, 24 N. H. 120; Potter v. Titcomb, 10 Me. 53; Robinson v. St. Johnsbury & L. C. R. Co., 80 Vt. 129, 66 Atl. 814, 9 L. R. A. (N. S.) 1249, 12 Ann. Cas. 1060.

[46] Stephen, Pl. (Tyler's Ed.) 245, 246, 267, 306.

[47] Lowe v. King, 1 Wms. Saunders, 76; Keigwin, Precedent of Pl. 1, 11. Each plea must be addressed and limited to a different element of the cause of action.

[48] Vin. Abr. "Double Pleas," D; Stephen, Pl. (Williston's Ed.) p. 292.

committed within the period of the statute of limitations. Prior, however, to the statutory regulation which we shall presently notice, it was not competent for him to thus plead several answers to the same claim, as that would have been an infringement of the rule against duplicity.[49] He was therefore obliged to elect between his different defenses, where more than one thus happened to present themselves; and to rely on that which, in point of law and fact, he might deem best. But as a mistake in that selection might occasion the loss of the cause, contrary to the real merits of the case, this restriction against the use of several pleas to the same matter, after being for ages observed in its original severity, was at length considered as contrary to the true principles of justice, and the rule was changed by the statute of 4 Anne, c. 16, § 4. That section provides that "it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defense." This statute is old enough to have become a part of our common law, but in most states substantially the same provision has been expressly enacted. Since this act the course has been for the defendant, if he wishes to plead several matters to the same subject of demand or complaint, to apply previously for a rule of court permitting him to do so; and upon this a rule is accordingly drawn up for that purpose.[50]

When several pleas are pleaded, either to different matters, or, by virtue of the statute, to the same matter, the plaintiff may, according to the nature of his case, either demur to the whole, or demur to one plea and reply to the other, or make a several replication to each plea; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of several issues. But, whether one or more issues be produced, if the decision, whether in law or fact, be in the defendant's favor, as to any one or more pleas, he is entitled to judgment, though he fail as to the remainder; that is, he is entitled to judgment in respect of that subject of demand or complaint to which the successful plea relates, and, if it were pleaded to the whole declaration, to judgment generally, though the plaintiff should succeed as to all the other pleas.

By a relaxation similar to that which has obtained with respect to several counts, the use of several pleas, though presumably intended by the statute to be allowed only in a case where there are really several grounds of defense,[51] is, in practice, carried much further. For

[49] See dictum in Auburn & O. Canal Co. v. Leitch, 4 Denio (N. Y.) 65.
[50] Stephen, Pl. (Tyler's Ed.) 263.
[51] Stephen, Pl. (Tyler's Ed.) 264; Clinton v. Morton, 2 Strange, 1008.

it was soon found that, when there was a matter of defense by way of special plea, it was generally expedient to plead that matter in company with the general issue, whether there were any real ground for denying the declaration or not; because the effect of this is to put the plaintiff to the proof of his declaration before it can become necessary for the defendant to establish his special plea; and thus the defendant has the chance of succeeding, not only on the strength of his own case, but by the failure of the plaintiff's proof. Again, as the plaintiff, in the case of several counts, finds it convenient to vary the mode of stating the same subject of claim, so, for similar reasons, defendants were led, under color of pleading distinct matters of defense, to state variously, in various pleas, the same defense; and this either by presenting it in an entirely new view, or by omitting in one plea some circumstances alleged in another. To this extent, therefore, is the use of several pleas now carried. Some efforts, however, were at one time made to restrain this apparent abuse of the indulgence given by the statute; for that leave of the court which the statute requires was formerly often refused where the proposed subjects of plea appeared to be inconsistent, and on this ground leave has been refused to plead to the same trespass "not guilty" and "accord and satisfaction," or "non est factum" and "payment" to the same demand.[52] In modern practice, however, such pleas, notwithstanding the apparent repugnancy between them, are permitted,[53] and the only pleas, perhaps, which have been uniformly disallowed, on the mere ground of

[52] Com. Dig. "Pleader," E, 2. See Gully v. Bishop of Exeter and Dowling, 5 Bing. 42.
[53] 1 Sell. Prac. 299; 2 Chit. Pl. 582; Chitty v. Hume, 13 East, 255; Tidd, Prac. (9th Ed.) 656; Gordon v. Peirce, 11 Me. 213; Jackson v. Stetson, 15 Mass. 54; Peters v. Ulmer, 74 Pa. 402; Buhler v. Wentworth, 17 Barb. (N. Y.) 649; Lansingh v. Parker, 9 How. Prac. (N. Y.) 288; Whitwell v. Wells, 24 Pick. (Mass.) 25; Maclellan v. Howard, 4 Term R. 194; Jenkins v. Edwards, 5 Term R. 97; Thayer v. Rogers, 1 Johns. Cas. (N. Y.) 152; Dow v. Epping, 48 N. H. 75; Merry v. Gay, 3 Pick. (Mass.) 388; Miller v. Stanley, 186 Ill. App. 340, 346; Peirce v. Sholtey, 190 Ill. App. 341, 346. In action on the case, since adoption of rules 71 and 72 of circuit court in common-law actions, defendant may file plea of not guilty with special pleas of confession and avoidance, and to avail himself of certain matters of defense must file such special pleas. Florida East Coast Ry. Co. v. Peters, 72 Fla. 311, 73 South. 151, Ann. Cas. 1918D, 121. A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false. Rawitzer v. Mutual Benefit Health & Accident Ass'n, 101 Neb. 219, 162 N. W. 637; Haight v. Omaha & C. B. St. Ry. Co., 101 Neb. 841, 166 N. W. 248. A defendant is not entitled to notice of a special matter of defense under the general issue and also to a special plea. Aurora Trust & Sav. Bank v. Whildin, 208 Ill. App. 527.

inconsistency, are those of the general issue and a tender.[54] As Tidd states the law:

"But, subject to these exceptions, the defendant may plead as many different matters as he shall think necessary for his defence, though they may appear to be contradictory or inconsistent, as non assumpsit and the statute of limitations, or, in trespass, not guilty, a justification, and accord and satisfaction, etc. So he may plead non assumpsit and infancy, or not guilty and liberum tenementum; though, as infancy may be given in evidence upon non assumpsit, and liberum tenementum upon not guilty, the pleading of these matters specially seems to be unnecessary." [55]

On the subject of several pleas it is to be further observed that the statute extends to the case of pleas only, and not to replications or subsequent pleadings. These remain subject to the full operation of the common law against duplicity, so that, though to each plea there may, as already stated, be a separate replication, yet there cannot be offered to the same plea more than a single replication,[56] nor to the same replication more than one rejoinder; and so to the end of the series. The legislative provision allowing several matters of plea was confined to that case, under the impression, probably, that it was in that part of the pleading that the hardship of the rule against duplicity was most seriously and frequently felt, and that the multiplicity of issues which would be occasioned by a further extension of the enactment would have been attended with expense and inconvenience more than equivalent to the advantage. The effect, however, of this state of law is somewhat remarkable. For example, it empowers a defendant to plead to a declaration in assumpsit for goods sold and delivered (1) the general issue; (2) that the cause of action did not accrue within six years; (3) that he was an infant at the time of the contract. On the first plea the plaintiff has only to join issue, but with respect to each of the two last he may have several answers to give. The case may be such as to afford either of these replications to the statute of limitations, namely, that the cause of action did accrue within six years, or that at the time the cause of action accrued he was beyond sea, and that he commenced his suit within six years after his return. So, to the plea of infancy, he may have ground for replying, either that the defendant was not an infant, or that the goods for which the action is brought were necessaries suitable to the defendant's condition in life. Yet, though the defendant had the advantage of his three pleas cumulatively, the plaintiff is obliged to make his election between these several answers, and can reply but one of them to each plea.

It is also to be observed that the power of pleading several matters extends to pleas in bar only, and not to those of the dilatory class, with respect to which the leave of the court will not be granted.[57]

Again, it is to be remarked that the statute does not operate as a total abrogation, even with respect to pleas in bar, of the rule against duplicity. For, first, it is necessary, as we have seen, to obtain the leave of the court to make use of several matters of defense, the application for leave being addressed to the discretion of the court,[58] and then the several matters are pleaded formally, with the words, "by leave of the court for this purpose first had and obtained." The several defenses must also each be pleaded as a new or further plea, with a formal commencement and conclusion as such; so that, notwithstanding the statute, and the leave of the court obtained in pursuance of it, to plead several matters, it would still be improper to incorporate several matters in one plea in any case in which the plea would be thereby rendered double at common law.[59]

[54] Steph. Pl. (Tyler's Ed.) 265; Omeara v. Cardiff Coal Co., 154 Ill. App. 321 (general issue and tender). But see Shaw v. Lord Alvanley, 2 Bing. 325; 31 Cyc. 148, note 19. On pleading inconsistent defenses, see 10 Cal. Law Rev. p. 251; 23 Yale Law J. 187; 8 Mich. Law Rev. 134.

[55] 1 Tidd, Prac. (1st Am. Ed.) Of Double Pleas, p. 610. See Keigwin, Precedent of Pl. p. 270. "Where a defendant pleads inconsistent pleas, the admissions necessarily made in one plea cannot be used against him upon another, as where the general issue is pleaded with a plea in confession and avoidance, the admission contained in the latter plea does not relieve the plaintiff of proving his whole case against the general issue. Glenn v. Sumner, 132 U. S. 157, 10 Sup. Ct. 41, 33 L. Ed. 301; Whitaker v. Freeman, 12 N. C. 271, Fed. Cas. No. 17,527a. Among the traditions of the bar is the famous Case of the Kettle, in which plaintiff alleged that defendant had borrowed plaintiff's kettle, and had suffered the same while in defendant's possession to become cracked, for which impairment damages were claimed. Defendant pleaded (1) that he did not borrow the kettle; (2) that the kettle was never cracked; and (3) that the kettle was cracked when he borrowed it. And these pleas were held on demurrer to be pleadable together; but, according to a supplemental tradition, the demurrer was sustained on the ground that the pleas amounted only to the general issue."

[56] But see Priest v. Dodsworth, 235 Ill. 613, 619, 85 N. E. 940, 14 Ann. Cas. 340, Whittier, Cas. Com. Law Pl. p. 447.

[57] Stephen, Pl. (Tyler's Ed.) 266.

[58] Jackson v. Stetson, 15 Mass. 48; Watriss v. Pierce, 36 N. H. 232; Clay Fire & Marine Ins. Co. v. Wusterhausen, 75 Ill. 285; Millikin v. Jones, 77 Ill. 872.

[59] Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340; Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, 81 N. E. 864; Mix v. People, 92 Ill. 549, 553. A denial, as such, has no place in an affirmative defense. Bulova v. E. L. Barnett, Inc., 111 Misc. Rep. 150, 181 N. Y. Supp. 247, order modified, 193 App. Div. 161, 183 N. Y. Supp. 495. See 20 Columbia Law Rev. p. 770.

As the several counts in the declaration are required, apparently at least, to be distinct and complete statements of separate causes of action, and are so considered and treated, so, as stated above, each of several pleas, when pleaded together, must be stated as a new or further plea, with formal commencement and conclusion, and must stand and be treated as if pleaded alone. One plea cannot be taken in to help or destroy another, but every plea must stand or fall by itself.[60] Neither can one plea thus offered have the effect of dispensing with the proof of what is denied by another, or, in other words, be used to aid the plaintiff in evidence against the defendant, and thus disprove another.[61]

Several Defendants may Plead Separately

Where there are several defendants, each may plead for himself a single matter of defense to the whole, or different matters to different parts of the opposing pleading, as if he was the only person charged; and, as each defendant may thus use a separate plea, all may join in that, if they so desire.[62] This does not apply, however, when several defendants, jointly charged in an action on contract, all plead the same defense to the action; as, for instance, the general issue, or the same matter in confession and avoidance. Here they cannot sever, but must join in one and the same plea, in presenting the common defense. The reason of this is that if they all agree as to the nature of their defense, as a joint liability is sought to be enforced against them, all are as safe in thus pleading jointly as in presenting their defenses separately. But the exception does not hold, even in actions on contract, if they choose different defenses, and they may then plead separately. Neither does it hold in an action charging a joint liability in tort, as torts committed by more than one person, though charged as joint, are several as well.

[60] Grills v. Mannell, Willes, 378. See Harington v. Macmorris, 5 Taunt. 228; Potter v. Earnest, 45 Ind. 416; Clark v. Holt, 16 Ark. 257.

[61] Whitaker v. Freeman, Fed. Cas. No. 17,527a, 29 Fed. Cas. 955, 12 N. C. 271, Whittier, Cas. Com. Law Pl. p. 449. See Bartlett v. Prescott, 41 N. H. 499; Starkweather v. Kittle, 17 Wend. (N. Y.) 20; West Chicago St. R. Co. v. Morrison, Adams & Allen Co., 160 Ill. 288, 295, 43 N. E. 393.

[62] Co. Litt. 303a; Essington v. Bourcher, Hob. 245. See Cuppledick v. Terwhit, Hob. 250; Stilwell v. Hasbrouck, 1 Hill (N. Y.) 561.

PLEA AND DEMURRER

240. It is not allowable both to plead and demur to the same matter.

241. An issue in fact and an issue in law cannot be produced, at the same time, with reference to the same subject of controversy.

Where there are separate counts or pleas in the same action, the party may plead to one, and demur to another.

Neither at common law, nor under the statute of Anne, hereafter mentioned, can a party both plead and demur to one and the same matter.[63] The statute extends to pleas only, and not to what is really a reason for not pleading; and, as it is not allowable to plead double, thus raising several issues of fact in respect to the same question, so it is not permissible to unite an issue in fact with one in law, more especially, it would seem, as each requires a different mode of trial. The rule applies, however, only where the same matter is to be opposed. A party may therefore plead to one count or one plea, and demur to another.[64]

DUPLICITY IN PLEAS

242. A pleading will be double which contains several answers, whatever their class or quality.

This rule rests upon the principle, already stated, that, where one of two or more facts would constitute a sufficient ground of defense, but one such fact should be stated. A pleading would therefore be double by including several matters in abatement or in bar,[65] or by containing one of each character.[66] The same would be true in

[63] Auburn & O. Canal Co. v. Leitch, 4 Denio (N. Y.) 65, Whittier, Cas. Com. Law Pl. p. 530; Rickert v. Snyder, 5 Wend. (N. Y.) 104, Whittier, Cas. Com. Law Pl. p. 509; Bac. Abr. "Pleas," K 1, 3; Gage v. Melton, 1 Ark. 224; Stocking v. Burnett, 10 Ohio, 137; Edbrooke v. Cooper, 79 Ill. 582; Brawner v. Lomax, 23 Ill. 496. See 10 Ill. Law Rev. 417.

[64] Patterson v. Wilkinson, 55 Me. 42, 92 Am. Dec. 568. In some jurisdictions demurrer and plea to the same count are allowed by statute. Chesapeake & O. Ry. Co. v. American Exch. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

[65] Calhoun v. Wright, 3 Scam. (Ill.) 74; Burrass v. Hewitt, Id., 224.

[66] Com. Dig. "Pleader," E, 2; Bleeke v. Grove, 1 Sid. 176; McConnell v. Stettinius, 2 Gilman (Ill.) 707.

joining several matters in confession and avoidance, or several answers by way of traverse, or a traverse with a plea of the former kind.[67]

SAME—IMMATERIAL MATTER

243. Matter which is wholly immaterial cannot operate to make a pleading double.

This is the result of a general rule that surplusage is to be disregarded. Where matter is pleaded which is wholly foreign to the cause, it is mere surplusage, and will not therefore render a pleading objectionable, under the rule we are considering, even though pleaded in connection with what is material. Such matter will be rejected as impertinent and superfluous, since it requires no answer, and it therefore cannot occasion the fault for which all double pleadings are objectionable, viz. a multiplicity of issues.[68] Thus, in an action by the executors of J. G. on a bond conditioned that the defendant should warrant to J. G. a certain meadow, the defendant pleaded that the said meadow was copyhold of a certain manor, and that there is a custom within the manor that, if the customary tenants fail in payment of their rents and services, or commit waste, then the lord for the time being may enter for forfeiture; and that the said J. G., during his life, peaceably enjoyed the meadow, which descended after his death to one B., his son and heir, who, of his own wrong, entered without the admission of the lord, against the custom of the manor; and, because three shillings of rent were in arrear on such a day, the lord entered into the meadow, as into lands forfeited. On demurrer, it was objected (among other things) that the plea was double; because, in showing the forfeiture to have accrued by the heir's own wrongful act, two several matters are alleged: First, that he entered without admission, against the custom; secondly, that three shillings of rent were in arrear. But the judges held that the only sufficient cause of forfeiture was the nonpayment of rent; that, there being no custom alleged for forfeiture in respect

[67] Com. Dig. "Pleader," E 2; Bleeke v. Grove, 1 Sid. 175. And see Wright v. Watts, 3 Q. B. 89; Vaughan v. Everts, 40 Vt. 526; Priest v. Dodsworth, 285 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340.

[68] Countess of Northumberland's Case, 5 Coke, 98; Lord v. Tyler, 14 Pick. (Mass.) 156; Stewardson v. White, 3 Har. & McH. (Md.) 455; Executors of Grenclife, Dyer, 42b; Panton v. Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; Comstock v. McEvoy, 52 Mich. 324, 17 N. W. 931; Hereford v. Crow, 3 Scam. (Ill.) 423. A plea setting up two defenses, one of them bad, is not demurrable for duplicity. Guest Piano Co. v. Ricker, 274 Ill. 448, 113 N. E. 717.

of entry without admission, the averment of such entry was mere surplusage, and could not, therefore, avail to make the plea double.[69] It is, however, to be observed that the plea seems to rely on the nonpayment of the rent as the only ground of forfeiture, for it alleges that, "because three shillings of the rent were in arrear, the lord entered"; and the court noticed this circumstance. The case, therefore, does not explicitly decide that where two several matters are not only pleaded, but relied upon, the immateriality of one of them shall prevent duplicity, but the manner in which the judges express themselves seems to show that the doctrine goes to that extent; and there are other authorities the same way.[70]

SAME—MATTER ILL PLEADED

244. Material matter, though ill pleaded, will occasion the fault.

Although immaterial matter is to be disregarded, that which is material to the cause of action or defense, though stated in an insufficient manner, will render the pleading open to objection as double, when pleaded in connection with other issuable facts. Such matter cannot be considered as surplusage, and, being material, is therefore issuable, though defectively alleged. It can neither be rejected as superfluous, nor does it render the plea void. It may therefore be stated that any matter which, if well pleaded, would cause duplicity, will have the same effect when defectively stated, especially if, in spite of such faulty statement, it would be aided by a verdict.[71] In an action of trespass for assault and battery, the defendant pleaded that he committed the trespasses in the moderate correction of the plaintiff as his servant, and, further, pleaded that since that time the plaintiff had discharged and released to him the said trespasses, without alleging, as he ought to have done, a release under seal. The court held that this plea was double, the moderate correction and the release being each a matter of defense; and, though the release was insufficiently pleaded, yet, as it was a matter upon which a material issue might have been taken, it was sufficient to make the plea double.[72]

This doctrine, that a plea may be rendered double by matter ill pleaded, but not by immaterial matter, quite accords with the object of the rule against duplicity, as formerly explained. That object

[69] Executors of Grenclife, Dyer, 42b.

[70] Bac. Abr. "Pleas," etc., K, 2.

[71] See Bleeke v. Grove, 1 Sid. 175.

[72] Bac. Abr. "Pleas," etc., K 2; Bleeke v. Grove, supra.

is the avoidance of several issues. Now, whether a matter be well or ill pleaded, yet if it be sufficient in substance, so that the opposite party may go to issue upon it, if he chooses to plead over, without taking the formal objection, such matter tends to the production of a separate issue, and is on that ground held to make the pleading double. On the other hand, if the matter be immaterial, no issue can properly be taken upon it. It does not tend, therefore, to a separate issue, nor, consequently, fall within the rule against duplicity.

SAME—MATTERS FORMING CONNECTED PROPOSITION

245. No matters, however multifarious, will operate to make a pleading double that together constitute but one connected proposition or entire point.

Thus, to an action for assault and imprisonment, if the defendant plead that he arrested the plaintiff on suspicion of felony, he may set forth any number of circumstances of suspicion, though each circumstance may alone be sufficient to justify the arrest; for all of them, taken together, amount to one connected cause of suspicion.[73] This qualification of the rule against duplicity applies, not only to pleadings in confession and avoidance, but also to traverses; and a party may therefore deny, as well as affirm, any number of circumstances that together form but a single point or proposition.[74] Thus, in an action of trespass for breaking the plaintiff's close and depasturing it with cattle, the defendant pleaded a right of common in the close for the said cattle, being his own commonable cattle, levant and couchant upon the premises. The plaintiff in the replication traversed "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle." On demurrer for duplicity, it was objected that there

[73] See, in support of this rule, Vin. Abr. "Double Pleas," A 7; Robinson v. Raley, 1 Burr. 316; Clearwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604; Raymond v. Sturges, 23 Conn. 134, Whittier, Cas. Com. Law Pl. p. 497; Russell v. Rogers, 15 Wend. (N. Y.) 351; Gaffney v. Colvill, 6 Hill (N. Y.) 567; Palmer v. Gooden, 8 Mees. & W. 890; Calhoun v. Wright, 4 Ill. 74; Holland v. Kibbe, 16 Ill. 133; Henry v. Heldmaier, 226 Ill. 152, 80 N. E. 705, 9 Ann. Cas. 150; Dent v. Coleman, 10 Smedes & M. (Miss.) 83; Tucker v. Ladd, 7 Cow. (N. Y.) 450.

[74] Robinson v. Raley, 1 Burr. 316, and notes to this case in 1 Smith. Lead. Cas. 723–726; Harker v. Brink, 24 N. J. Law, 333; Tucker v. Ladd, 7 Cow. (N. Y.) 450; Potter v. Titcomb, 10 Me. 53; Torrey v. Field, 10 Vt. 353; Holland v. Kibbe, 16 Ill. 133.

were three distinct facts put in issue by this replication, any one of which would be sufficient by itself. But the court held that the point of the defense was that the cattle in question were entitled to common; that this point was single, though it involved the three several facts that the cattle were the defendant's own, that they were levant and couchant, and that they were commonable cattle; that the replication traversing these facts, in effect, therefore, only traversed the single point whether the cattle were entitled to common, and was consequently not open to the objection of duplicity.[75]

There is some difficulty in the application of this rule in establishing a test between those cases in which several averments make up a single point, and may therefore be alleged or traversed together, and those in which each constitutes a separate point, though insufficient in itself as a defense without union with the others. The governing principle seems to be that while each successive denial or allegation in pleading must contain no superfluous matter, and must be limited to what is strictly necessary to constitute a good defense or reply to the pleading it seeks to answer, it may still go as far, and cover as much ground, as may be requisite to attain that object. Therefore two distinct facts cannot ordinarily be averred or denied together, if the proof or disproof of one would be sufficient to defeat or maintain the action.[76] A qualification becomes necessary, however, where a number of different facts or averments relate to one thing, or together make up a single proposition; and it seems that the rule above stated will hold where the averment of several connected facts is necessary to make a complete defense, and that under it, where the denial of any one of such facts would not be a perfect answer, a replication will not be double which meets the averments by separate denials of all, or by a single general denial. A traverse thus made is called a "cumulative traverse." The most frequent instance of its use occurs in the replication de injuria, which has been previously noticed, and which alleges that the defendant of his own wrong, and "without the cause alleged," committed the act. This "cause" may consist of several connected circumstances, and the denial in the replication is taken as a traverse of each of the facts stated by denying the cause which they collectively tend to show.[77] There is a restriction upon the use of this form, however, as has been before noticed, where the opposing allegations include matter of title, authority, etc., and in such case matter of that character must be denied separate-

[75] Robinson v. Raley, 1 Burr. 316.

[76] See Tebbets v. Tilton, 24 N. H. 120.

[77] See O'Brien v. Saxon, 2 Barn. & C. 908.

ly; or, if the plaintiff wishes to disregard these and deny other matters in the plea, such other matters must be separately traversed.[78]

General Issues as Double Pleas

In some cases the general issues appear to partake of the nature of these cumulative traverses; for some of them are so framed as to convey a denial, not of any particular fact, but generally of the whole matter alleged, as not guilty in trespass or trespass on the case, and nil debet in debt. And in assumpsit the case is the same in effect, according to a relaxation of practice formerly explained, by which the defendant is permitted, under the general issue, in that action, to avail himself, with some few exceptions, of any matter tending to disprove his liability. The consequence is, that under these general issues the defendant has the advantage of disputing, and therefore of putting the plaintiff to the proof of every averment in the declaration. Thus, by pleading not guilty, in trespass quare clausum fregit, he is enabled to deny, at the trial, both that the land was the plaintiff's and that he committed upon it the trespasses in question, and the plaintiff must establish both these points in evidence. Indeed, besides this advantage of double denial, the defendant obtains, under the general issue, in assumpsit and other actions of trespass on the case, the advantage of double pleading in confession and avoidance. For, as upon the principles formerly explained, he is allowed, in these actions, to bring forward, upon the general issue, almost any matters, though in the nature of confession and avoidance, which tend to disprove his debt or liability; so he is not limited, as he would be in special pleading, to a reliance on any single matter of this description, but may set up any number of these defenses. While such is the effect of many of the general issues in mitigating or evading the rule against duplicity, the remark does not apply to all. Thus, the general issue of non est factum raises only a single question, namely, whether the defendant executed a valid and genuine deed, such as is alleged in the declaration. The defendant may, under this plea, insist that the deed was not executed by him, or that it was executed under circumstances which absolutely annul its effect as a deed, but can set up no other kind of defense.[79]

The replication de injuria is similar to the general issue in being a general traverse, which is allowed where an affirmative defense is set up by way of excuse. Like the general issue, it is an anomaly and a violation of the rule against duplicity, since it permits the party to set up numerous defenses by one plea.

[78] See Bull. N. P. 93.
[79] Stephen, Pl. (Tyler's Ed.) 253.

SAME—PROTESTATION

246. A protestation will not render a pleading double.

The nature of this illogical and unnecessary form in pleading has been heretofore explained, and from its nature and object, in being only a collateral objection or reservation, without effect in the action in which it is used, it is manifest that it cannot cause duplicity. Thus, in the example given on another page, where the defendant pleads the delivery or acceptance of goods in satisfaction of the plaintiff's demand, though the plaintiff cannot reply that the wine was neither delivered nor accepted in satisfaction, for this would be double; yet he may protest that it was not delivered, and at the same time deny the acceptance, without incurring the objection. For a protestation (as already explained) does not tend to issue in the action, but is made merely to reserve to the party the right of denying or alleging the same matter in a future suit. It consequently cannot fall within the object of the rule against duplicity, which is, to avoid a plurality of issues.

GENERAL REQUISITES OF TRAVERSE

247. The following general rules apply to the traverse, without regard to whether, in form, it is common, general, or special:

(a) The traverse should generally deny the opposing allegation in the manner and form in which it is made (modo et forma; i. e. "in manner and form as alleged"); thus putting the opposite party to proof in manner and form, as well as in general effect.

(b) A traverse may be taken upon a mixed allegation of law and fact, but not upon matter of law alone, nor upon matter not alleged. Upon matter of fact it must be where the fact is either expressly alleged, or necessarily implied from what is alleged.

(c) The traverse must not involve an estoppel against the party pleading it.

The different kinds or forms of traverse having been previously explained, we shall here take up certain rules as to the manner of pleading denials.

Form of Denial

It is customary in a traverse to deny the allegation in the manner and form in which it is made, and therefore to put the opposite party to prove it to be true in manner and form, as well as in general effect. Accordingly he is often exposed at the trial to the danger of a variance by a slight deviation in his evidence from his allegation. This doctrine of variance, says Stephen, is founded on the strict quality of the traverse here stated. This strictness is so far modified that it is, in general, sufficient to prove accurately the substance of the allegation, and a deviation in point of mere form or in matter quite immaterial will be disregarded. The general principle is that the traverse brings the fact into question, according to the manner and form in which it is alleged, and that the opposite party must consequently prove that, in substance at least, the allegation is accurately true. The existence of this principle is indicated by the wording of a traverse, which, when in the negative, generally denies the last pleading modo et forma (in manner and form as alleged). This will be found to be the case in almost all traverses, except the general issue non est factum, and the replication de injuria. These words, however, though usual, are said to be in no case strictly essential, so as to render their omission cause of demurrer.[80]

It is naturally a consequence of the principle here mentioned that great accuracy and precision in adapting the allegation to the true state of the fact are observed in all well-drawn pleadings; the vigilance of the pleader being always directed to these qualities, in order to prevent any risk of variance or failure of proof at the trial in the event of a traverse by the opposite party.

Traverse not to be Taken on Matter of Law Alone

Again, in respect to all traverses, it is laid down as a rule that a traverse must not be taken upon matter of law.[81] A denial of the law involved in the precedent pleading is, in other words, an exception to the sufficiency of that pleading in point of law, and is therefore within the scope and proper province of a demurrer, and not of a traverse. Thus, where, to an action of trespass for fishing in plaintiff's fishery, the defendant pleaded that the locus in quo was an arm of the sea, in which every subject of the realm had the liberty and privilege of free

[80] Com. Dig. "Pleader," G, 1; Nevil & Cook's Case, 2 Leon. 5.

[81] 1 Saund. 23, note 5; Kenicot v. Bogan, Yelv. 200; Priddle & Napper's Case, 11 Coke, 10b; Richardson v. Mayor and Commonalty of Orford, 2 H. Bl. 182; Hobson v. Middleton, 6 Barn. & C. 297; Seymour v. Maddox, 16 Q. B. 326; Russell's Case, Dyer, 26b, pl. 171; Grills v. Mannell, Willes, 378; Foshay v. Riche, 2 Hill (N. Y.) 247.

fishing, and the plaintiff, in his replication, traversed that in the said arm of the sea every subject of the realm had the liberty and privilege of free fishing, this was held to be a traverse of a mere inference of law, and therefore bad.[82] Upon the same principle, if a matter be alleged in pleading, "by reason whereof" (virtute cujus) a certain legal inference is drawn, as that the plaintiff "became seised," etc., or the defendant "became liable," etc., this virtute cujus is not traversable, because, if it be intended to question the facts from which the seisin or liability is deduced, the traverse should be applied to the facts, and to those only; and, if the legal inference be doubted, the course is to demur.[83]

Traverse may be Taken on Allegation of Law and Fact

But, on the other hand, where an allegation is mixed of law and fact, it may be traversed.[84] For example, in answer to an allegation that a man was "taken out of prison by virtue of a certain writ of habeas corpus," it may be traversed that he was "taken out of prison by virtue of that writ." [85] So, where it was alleged in a plea that, in consequence of certain circumstances therein set forth, it belonged to the wardens and commonalty of a certain body corporate to present to a certain church, being vacant, in their turn, being the second turn, and this was answered by a special traverse, without this, that it belonged to the said wardens and commonalty to present to the said church, at the second turn, when the same became vacant, etc., in manner and form as alleged, the court held the traverse good, as not applying to a mere matter of law, "but to a matter of law, or rather of right resulting from facts." [86] So it is held, upon the same principle, that traverse may be taken upon an allegation that a certain person obtained a church by simony.[87]

Traverse Not to be Taken on Matter Not Alleged

It is also a rule that a traverse must not be taken upon matter not alleged.[88] The meaning of this rule will be sufficiently explained by

[82] Richardson v. Mayor and Commonalty of Orford, supra.

[83] Doct. Plac. 351; Priddle & Napper's Case, supra.

[84] 1 Saund. 23, note 5; Beal v. Simpson, 1 Ld. Raym. 412; Warden and Commonalty of the Mystery of Grocers v. Archbishop of Canterbury, 3 Wils. 234; Lucas v. Nockells, 4 Bing. 729; Drewe v. Lainson, 11 Adol. & E. 538.

[85] Beal v. Simpson, supra.

[86] Warden and Commonalty of the Mystery of Grocers v. Archbishop of Canterbury, supra.

[87] Id.

[88] 1 Saund. 312d, note 4; Crosse v. Hunt, Carth. 99; Powers v. Cook, 1 Ld.

the following cases: A woman brought an action of debt on a deed, by which the defendant obliged himself to pay her £200 on demand if he did not take her to wife, and alleged in her declaration that, though she had tendered herself to marry the defendant he refused, and married another woman. The defendant pleaded that, after making the deed, he offered himself to marry the plaintiff, and she refused; absque hoc, "that he refused to take her for his wife before she had refused to take him for her husband." The court was of opinion that this traverse was bad, because there had been no allegation in the declaration "that the defendant had refused before the plaintiff had refused," and therefore the traverse went to deny what the plaintiff had not affirmed.[89] The plea in this case ought to have been in confession and avoidance; stating merely the affirmative matter, that before the plaintiff offered the defendant offered, and that the plaintiff had refused him, and omitting the absque hoc. Again, in an action of debt on bond against the defendant, as executrix of J. S., she pleaded in abatement that J. S. died intestate, and that administration was granted to her. On demurrer it was objected that she should have gone on to traverse "that she meddled as executrix before the administration granted," because, if she so meddled, she was properly charged as executrix, notwithstanding the subsequent grant of letters of administration. But the court held the plea good in that respect; and Holt, C. J., said "that, if the defendant had taken such traverse, it had made her plea vicious, for it is enough for her to show that the plaintiff's writ ought to abate, which she has done, in showing that she is chargeable only by another name. Then as to the traverse, that she did not administer as executrix before the letters of administration were granted, it would be to traverse what is not alleged in the plaintiff's declaration, which would be against a rule of law, that a man shall never traverse that which the plaintiff has not alleged in his declaration." [90]

There is, however, the following exception to this rule, viz.: That a traverse may be taken upon matter which, though not expressly alleged, is necessarily implied.[91] Thus, in replevin for taking cattle the defendant made cognizance that A. was seised of the close in question, and, by his command, the defendant took the cattle damage feasant. The plaintiff pleaded in bar that he himself was seised of

Raym. 63, 1 Salk. 298; Worley v. Harrison, 3 Adol. & E. 669; Bird v. Holman, 9 Mees. & W. 761.

[89] Crosse v. Hunt, supra.

[90] Powers v. Cook, supra.

[91] 1 Saund. 312d, note 4; Gilbert v. Parker, 2 Salk. 629, 6 Mod. 158; Merton v. Briggs, 1 Ld. Raym. 89.

one-third part, and put in his cattle absque hoc, "that the said A. was sole seised." On demurrer it was objected that this traverse was taken in matter not alleged, the allegation being that A. was seised, not that A. was sole seised. But the court held that in the allegation of seisin that of sole seisin was necessarily implied, and that whatever is necessarily implied is traversable, as much as if it were expressed. Judgment for plaintiff.[92] The court, however, observed that in this case the plaintiff was not obliged to traverse the sole seisin, and that the effect of merely traversing the seisin modo et forma, as alleged, would have been the same on the trial as that of traversing the sole seisin.

Traverse Involving Estoppel

A traverse must not involve an estoppel against the party using it. An illustration of this rule appears in an action on a deed. A party to a deed, who traverses it, must plead non est factum, and should not plead that he did not grant, did not demise, etc.[93] This rule seems to depend on the doctrine of estoppel. A man is sometimes precluded, in law, from alleging or denying a fact in consequence of his own previous act, allegation, or denial to the contrary, and this preclusion is called an "estoppel." It may arise either from matter of record, from the deed of the party, or from matter in pais; that is, matter of fact.

It is from this doctrine of estoppel, apparently, that the rule as to the mode of traversing deeds has resulted, for though a party against whom the deed is alleged may be allowed, consistently with the doctrine of estoppel, to say "non est factum," viz. that the deed is not his, he is, on the other hand, precluded by that doctrine from denying its effect or operation; because, if allowed to say "non concessit," or "non demisit," when the instrument purports to grant or to demise, he would be permitted to contradict his own deed. Accordingly, it will be found that in the case of a person not a party, but a stranger, to the deed, the rule is reversed, and the form of traverse in that case is "non concessit," etc.;[94] the reason of which seems to be that estoppels do not hold with respect to strangers.

[92] Gilbert v. Parker, supra.

[93] Robinson v. Corbett, 1 Lutw. 662; Taylor v. Needham, 2 Taunt. 278.

[94] Taylor v. Needham, 2 Taunt. 278.

MATERIALITY OF THE TRAVERSE

248. A traverse must not be taken on an immaterial allegation.

This rule prohibits a traverse:

(a) On matter that is irrelevant or insufficient in law.
(b) On matter that is prematurely alleged.
(c) On matter of aggravation.
(d) On mere matter of inducement.

This rule prohibits a pleader from traversing on matter that is either irrelevant or insufficient in law.[95] Thus, in debt for rent against a lessee for years, if the defendant plead that before the rent was due he assigned the term to another, of which the plaintiff had notice, a traverse of the notice would be bad, as producing an immaterial issue; for it is not mere notice of the assignment that discharges the lessee, but the lessor's consent to the assignment, or his acceptance of rent from the assignee.[96] So, in an action of debt on a bond conditioned for the payment of 10 pounds 10 shillings at a certain day, if the defendant should plead payment of 10 pounds, a traverse of such payment would be bad, for, if the whole sum of 10 pounds 10 shillings were not paid, the bond would be forfeited; and the payment of a less sum is wholly immaterial.[97] The plaintiff in such case should demur. So, where, to an action of trespass for assault and battery, the defendant pleaded that a judgment was recovered, and execution issued thereupon against a third person, and that the plaintiff, to rescue that person's goods from the execution, assaulted the bailiffs, and that in aid of the bailiffs, and by their command, the defendant molliter manus imposuit upon the plaintiff, to prevent his rescue of the goods, it was holden that a traverse of the command of the bailiffs was bad; for, even without their command, the defendant might lawfully interfere to prevent a rescue, which is a breach of the peace.[98]

The rule also prohibits a pleader from traversing on matter which, though not immaterial to the case, is prematurely alleged.[99] Thus, if, in debt on bond, the plaintiff should declare that, at the time of

[95] Serjeant v. Fairfax, 1 Lev. 32; Kent v. Hall, Hob. 113; Bridgwater v. Bythway, 3 Lev. 113; Parish v. Stanton, 2 Root (Conn.) 155; Rogers v. Burk, 10 Johns. (N. Y.) 200; Thompson v. Fellows, 21 N. H. 425.

[96] Serjeant v. Fairfax, 1 Lev. 32.

[97] Kent v. Hall, Hob. 113.

[98] Bridgwater v. Bythway, 3 Lev. 113.

[99] Sir Ralph Bovy's Case, 1 Vent. 217; Ricketts v. Loftus, 14 Q. B. 482; Middleton v. Graveley, 12 Price, 513.

sealing and delivery, the defendant was of full age, the defendant should not traverse this, because it was not necessary to allege it in the declaration; though, if in fact he was a minor, this would be a good subject for a plea of infancy, to which the plaintiff might then well reply the same matter, viz. that he was of age.[1]

Again, this rule prohibits the taking of a traverse on matter of aggravation; that is, matter which only tends to increase the amount of damages, and does not concern the right of action itself. Thus, in trespass for chasing sheep, per quod the sheep died, the dying of the sheep, being aggravation only, is not traversable.[2]

And where matter of inducement is alleged, which is not essential to the substance of the case, but only explanatory of the main allegations, a denial would be unnecessary.[3] It is otherwise, however, when such matter is not merely explanatory. If essential, though in the nature of inducement, it may still be traversed.[4]

SELECTION OF ISSUABLE PROPOSITION

249. Where there are several allegations, all of which are material, the party may traverse any one he pleases.

The principle of this rule is that where the case of any party rests upon several allegations, each of which is essential to its support, it may be as effectually destroyed by controverting one part as another.[5]

[1] See Sir Ralph Bovy's Case, 1 Vent. 217.

[2] Leech v. Widsley, 1 Vent. 54, 1 Lev. 283.

[3] Bac. Abr. "Pleas," H 5; Spaeth v. Hare, 9 Mees. & W. 326. Thus, in an action of debt against executors, they pleaded a judgment recovered, and that there were no assets in their hands beyond what was sufficient to satisfy the said judgment. The plaintiff replied that the judgment was satisfied, but kept on foot by fraud and covin. The defendants traversed that the judgment was satisfied, and this was considered a bad traverse, because to allege that it was satisfied was only inducement to the allegation that it was kept on foot by fraud and covin. This was the main point, and this should have been the subject of the traverse. Com. Dig. "Pleader," G 14; Hardr. 70.

[4] Kimersly v. Cooper, Cro. Eliz. 168; Carvick v. Blagrave, 1 Brod. & B. 531. Thus, where the plaintiff declared, in trespass on the case for slander, that he was sworn before the lord mayor, and that the defendant said he was falsely sworn in that oath, it was held that the plaintiff's being sworn before the lord mayor, though in the nature of inducement, was a traversable matter, being of the substance of the action. Kimersly v. Cooper, supra.

[5] Com. Dig. "Pleader," G 10; Moor v. Pudsey, Hardr. 316; Young v. Rudd, Carth. 347; Heydon v. Thompson, 1 Adol. & E. 210; Learmonth v. Grandine, 4 Mees. & W. 658; Hopkins v. Medley, 97 Ill. 402; Read's Case, 6 Coke, 24; Young v. Ruddle, 2 Salk. 627; Baker v. Blackman, Cro. Jac. 682.

Thus, in an action of trespass, if the defendant pleads that A was seised, and demised to him, a traverse of either the seisin or the demise would be sufficient; as in either case, if maintained, it would be effectual to overcome the defense.[6] Again, in trespass, if the defendant pleads that A was seised, and enfeoffed B, who enfeoffed C, who enfeoffed D, whose estate the defendant hath, the plaintiff may traverse whichever of the feoffments he pleases.[7] Great care is necessary, however, in the selection of the allegation to be thus denied, so as to oppose the one most open to objection; for, as we have seen in another place, those not expressly denied are taken as admitted.[8]

DENIAL OF THE ESSENTIALS ONLY

250. A traverse must not be too large, nor, on the other hand, too narrow.

QUALIFICATION—A material allegation of title or estate may be traversed as alleged, though stated with unnecessary particularity.

As a traverse must not be taken on an immaterial allegation, so, when applied to an allegation that is material, it should take in no more and no less of that allegation than is necessary to raise a material issue. If it involves more than some essential proposition of operative fact, it is said to be too large; if less, too narrow.

Traverse Too Large

In the first place, it must not be too large.[9] It may thus be too large by involving in the issue circumstances of time, place, quantity, etc., which are immaterial to the merits of the particular case, though

[6] Moor v. Pudsey, supra; Com. Dig. "Pleader," G 10.

[7] Doct. Plac. 365.

[8] Toland v. Sprague, 12 Pet. 335, 9 L. Ed. 1093.

[9] Colborne v. Stockdale, 1 Strange, 493, 8 Mod. 58; Lane v. Alexander, Cro. Jac. 202, Yel. 122; Goram v. Sweeting, 2 Saund. 206; Osborne v. Rogers, 1 Saund. 267; Id. 268, note 1; Id. 269a, note 2; Com. Dig. "Pleader," G 15, 16; Arlett v. Ellis, 7 Barn. & C. 346; Palmer v. Ekins, 2 Strange, 817; Stubbs v. Lainson, 1 Mees. & W. 728; Caulfield v. Sanders, 17 Cal. 569; Wadhams v. Swan, 109 Ill. 46; Thompson v. Fellows, 21 N. H. 425; Rogers v. Burk, 10 Johns. (N. Y.) 400; Schaetzel v. Germantown Farmers' Mut. Ins. Co., 22 Wis. 412; Thurman v. Wild, 11 Adol. & E. 453; Davison v. Powell, 16 How. Prac. (N. Y.) 467. It is a mistake to cover by denial not only the material allegation, necessary to support the plaintiff's case, but also some immaterial qualification of the allegation. Briggs v. Mason, 31 Vt. 433; Lush v. Russell, 5 Exch. 203.

forming part of the allegation traversed. Thus, in an action of debt on bond, conditioned for the payment of £1,550, the defendant pleaded that part of the sum mentioned in the condition, to wit, £1,500, was won by gaming, contrary to the statute in such case made and provided, and that the bond was consequently void.

The plaintiff replied that the bond was given for a just debt, and traversed that the £1,500 was won by gaming in manner and form as alleged. On demurrer it was objected that the replication was ill, because it made the precise sum parcel of the issue, and tended to oblige the defendant to prove that the whole sum of £1,500 was won by gaming; whereas the statute avoids the bond if any part of the consideration be on that account. The court was of opinion that there was no color to maintain the replication; for that the material part of the plea was that part of the money for which the bond was given was won by gaming, and that the words, "to wit, £1,500," were only form, of which the replication ought not to have taken any notice.[10] So where the plaintiff pleaded that the queen, at a manor court, held on such a day by I. S., her steward, and by copy of court roll, etc., granted certain land to the plaintiff's lessor, and the defendant rejoined, traversing that the queen, at a manor court, held such a day by I. S., her steward, granted the land to the lessor, the court held that the traverse was ill, "for the jury are thereby bound to find a copy on such a day, and by such a steward, which ought not to be." The traverse, it seems, ought to have been that the queen did not grant in manner and form as alleged.[11]

Again, a traverse may be too large by being taken in the conjunctive instead of the disjunctive, where it is not material that the allegation traversed should be proved conjunctively. Thus, in an action of assumpsit the plaintiff declared on a policy of insurance, and averred "that the ship insured did not arrive in safety, but that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture were sunk and destroyed in the said voyage." The defendant pleaded with a traverse: "Without this, that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture were sunk and destroyed in the voyage in manner and form as alleged." Upon demurrer this traverse was adjudged to be bad, and it was held that the defendant ought to have denied disjunctively that the ship or tackle, etc., was sunk or destroyed, because in this action for damages the plaintiff would be entitled to recover compensation for any part of that which was the subject of insurance and had been lost; whereas (it was said), if issue

[10] Colborne v. Stockdale, supra.

[11] Lane v. Alexander, supra.

had been taken in the conjunctive form in which the plea was pleaded, "and the defendant should prove that only a cable or anchor arrived in safety, he would be acquitted of the whole." [12]

Same—Qualification of Rule

On the other hand, however, a party may, in general, traverse a material allegation of title or estate to the extent to which it is alleged, though it need not have been alleged to that extent; and such traverse will not be considered as too large.[13] For example, in an action of replevin, the defendant avowed the taking of the cattle as damage feasant, in the place in which, etc.; the same being the freehold of Sir F. L. To this the plaintiff pleaded that he was seised in his demesne as of fee of B. close, adjoining to the place in which, etc.; that Sir F. L. was bound to repair the fence between B. close and the place in which, etc.; and that the cattle escaped through a defect of that fence. The defendant traversed that the plaintiff was seised in his demesne as of fee of B. close, and on demurrer the court was of opinion that it was a good traverse; for, though a less estate than a seisin in fee would have been sufficient to sustain the plaintiff's case, yet as the plaintiff, who should best know what estate he had, had pleaded a seisin in fee, his adversary was entitled to traverse the title so laid.[14] Again, in an action of trespass for trespasses committed in a close of pasture containing eight acres in the town of Tollard Royal, the defendant pleaded that W., Earl of Salisbury, was seised in fee and of right of an ancient chase of deer called "Cranborn," and that the said chase did extend itself as well in and through the said eight acres of pasture as in and through the said town of Tollard Royal, and justified the trespasses as committed in using the said chase. The plaintiff traversed that the said chase extended itself as well to the eight acres as to the whole town; and, issue being taken thereon, it was tried, and found for the plaintiff. It was then moved, in arrest of judgment that this issue and verdict were faulty, because, if the chase did extend to the eight acres only, it was enough for the defendant; and therefore the finding of the jury that it did not extend as well to the whole town as to the eight

[12] Goram v. Sweeting, supra. And see Stubbs v. Lainson, 1 Mees. & W. 728; Richardson v. Smith, 29 Cal. 529. On negative pregnant, see Jones v. Jones, 16 Mees. & W. 699, 707; 31 Cyc. 203–205; 2 Standard Enc. Proc. Answers, pp. 56–59.

[13] Sir Francis Leke's Case, Dyer, 364b; 2 Saund. 206a, note 22; Id. 207a, note 24; Wood v. Budden, Hob. 119; Tatem v. Perient, Yel. 195; Com. Dig. "Pleader," G 16; Webb v. Ross, 4 Hurl. & N. 111; Smith v. Dixon, 7 Adol. & E. 1.

[14] Sir Francis Leke's Case, supra.

acres did not conclude against the defendant's right in the eight acres, which was only in question. But it was answered by the court that there was no fault in the issue, much less in the verdict (which was according to the issue), but the fault was in the defendant's plea; for he puts in his plea more than he needed, viz. the whole town, which being to his own disadvantage and to the advantage of the plaintiff, there was no reason for him to demur upon it, but rather to admit it, as he did, and so to put it in issue. And so judgment was given for the plaintiff." [15]

Traverse Too Narrow

A traverse must not be too narrow.[16] Of a traverse that is too narrow, the following is an example: In an action of assumpsit brought for a compensation for the plaintiff's service as a hired servant, the plaintiff alleged that he served from March 21, 1647, to November 1, 1664. The defendant pleaded that the plaintiff continued in the service till December, 1658, and then voluntarily quitted the service, without this, that he served until November 1, 1664. This was a bad traverse; for, as the plaintiff in this action for damages is entitled to compensation pro tanto for any period of service, it is obviously no answer to say that he did not serve the whole time alleged.[17] So a traverse may be too narrow by being applied to part only of an allegation which the law considers as in its nature indivisible and entire; such as that of a prescription or grant. Thus, in an action of trespass for breaking and entering the plaintiff's close, called S. C., and digging stones therein, the defendant pleaded that there are certain wastes lying open to one another—one the close called S. C., and the other called S. G.—and so proceeded to prescribe for the liberty of digging stones in both closes, and justified the trespasses under that prescription. The replication traversed the prescriptive right in S. C. only, dropping S. G.; but the court held that the traverse could not be so confined, and must be taken on the whole prescription as laid.[18]

[15] Wood v. Budden, supra.

[16] Osborne v. Rogers, 1 Saund. 267, 268, note 1; Morewood v. Wood, 4 Term R. 157; Bradburn v. Kennerdale, Carth. 164; Richards v. Peake, 2 Barn. & C. 918; Cousins v. Paddon, 4 Dowl. 494.

[17] Osborne v. Rogers, supra.

[18] Morewood v. Wood, supra.

NEGATIVES AND AFFIRMATIVES PREGNANT

251. These are statements of fact, either in a negative or affirmative form, which carry with them or imply within them material contrary, affirmative, or negative statements or inferences in favor of the adverse party. Such a statement renders the pleading bad for ambiguity.

It is under the head of ambiguity or evasiveness that the doctrine of negatives and affirmatives pregnant appears most properly to range itself. A negative pregnant is such a form of negative expression as may imply, or carry within it, an affirmative. An affirmative pregnant is an affirmative allegation implying a negative.[19] This is considered as a fault in pleading; and the reason why it is so considered is that the meaning of such a form of expression is construed most strictly against the pleader. In trespass for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him license to do so, and that he entered by that license. The plaintiff replied that he did not enter by her license. This was considered as a negative pregnant; and it was held that the plaintiff should have traversed the entry by itself, or the license by itself, and not both together.[20] It will be observed that this form of traverse may imply, or carry within it, that a license was given, though the defendant did not enter by that license. It is, therefore, in the language of pleading, said to be pregnant with that admission, viz. that a license was given. At the same time, the license is not expressly admitted; and the effect, therefore, is to leave it in doubt whether the plaintiff means to deny the license or to deny that the defendant entered by virtue of that license. It is this ambiguity which appears to constitute the fault.[21] The following is another example: In trespass for assault and battery, the defendant justified, for that he, being master of a ship, commanded the plaintiff to do some service in the ship; which he refusing to do, the defendant moderately chastised him. The plaintiff traversed, with an absque hoc, that the defendant moderately chastised him; and this traverse was held to be a negative pregnant; for, while it apparently means to put in issue only the question of excess (admitting, by implication, the chastisement) it does not necessarily and distinctly make that admission; and is, therefore, ambiguous in its form.[22] If the plaintiff had replied that the defendant immoderately chastised him, the objection would have been avoided; but the proper form of traverse would have been de injuria sua propria absque tali causa. This, by traversing the whole "cause alleged," would have distinctly put in issue all the facts in the plea; and no ambiguity or doubt as to the extent of the denial would have arisen.

This rule against a negative pregnant, it is said by Stephen, appears in modern times, at least, to have received no very strict construction. For many cases have occurred in which, upon various grounds of distinction from the general rule, that form of expression has been held free from objection. Thus, in debt on a bond, conditioned to perform the covenants in an indenture of lease, one of which covenants was that the defendant, the lessee, would not deliver possession to any but the lessor, or such persons as should lawfully evict him, the defendant pleaded, that he did not deliver the possession to any but such as lawfully evicted him. On demurrer to this plea, it was objected that the same was ill, and a negative pregnant, and that he ought to have said that such a one lawfully evicted him, to whom he delivered the possession, or that he did not deliver the possession to any; but the court held the plea, as pursuing the words of the covenant, good, being in the negative, and that

[19] Blackmore v. Tidderley, 2 Ld. Raym. 1099; Macfadzen v. Olivant, 6 East, 887.

[20] Myn v. Cole, Cro. Jac. 87.

[21] Stephen, Pl. (Tyler's Ed.) 335; Slade v. Drake, Hob. 295.

[22] Aubery v. James, Vent. 70, 1 Sid. 444, 2 Keb. 623. For other illustrations, see Rock Spring Coal Co. v. Salt Lake Sanitarium Ass'n, 7 Utah, 158, 25 Pac. 742; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552. "The principle of the rule against a negative pregnant is not clearly or satisfactorily explained in any of the treatises; and, indeed, very little is said in them upon this subject, though the fault itself is in the older cases a frequent ground of objection. That the author (the statement in the text is taken from Stephen on Pleading) has here suggested the true principle is confirmed, he thinks, by the form in which we find this kind of objection taken in the following case from the Year-Books: In an action for negligently keeping a fire, by which the plaintiff's houses were burned, the defendant pleaded that the plaintiff's houses were not burned by the defendant's negligence in keeping his fire; and it was objected that "the traverse was not good, for it has two intendments,—one, that the houses were not burned; the other, they were burned, but not by negligent keeping of the fire; and so it is a negative pregnant." (Y. B. 28 Hen. VI, 7.) The same ground, viz. that of ambiguity, is taken in 7 Edw. II, 213, 226, which are believed to be the earliest authorities for the rule itself. What is to be found in more modern books on this subject tends to support the same view. Thus we find it laid down: "Therefore the law refuseth double pleading and negative pregnant, though they be true, because they do inveigle, and not settle, the judgment upon one point." Slade v. Drake, Hob. 295. So it is said in another book: "A negative pregnant is when two matters are put in issue in one plea; and this makes the plea to be naught, because the plaintiff cannot tell in which of these matters to join

the plaintiff ought to have replied, and assigned a breach; and therefore judgment was given against him.[23]

A denial that a person "carelessly and negligently did an act" is not a denial that he did the act, and a denial that a person "negligently" failed to look out for danger, is not a denial that he actually failed to do so.

"Material facts alleged conjunctively must be denied disjunctively." [24] The denial must not be in a form that raises an issue of the literal truth of the entire allegation, without indicating whether it is claimed to be entirely or only partially false.

FORMAL COMMENCEMENT AND CONCLUSION

252. Pleadings should have their proper formal commencements and conclusions. The commencement and conclusion should be such in form as to indicate the view in which it is pleaded, as well as to mark its object and tendency.[25]

Formal Parts of Pleas

In framing every plea, the pleader should observe the customary formal parts. It is usual at the head of the plea to state in what court the action is pending. Pleas in bar at common law are entitled to the term in which they are pleaded. The surnames of the parties, as Johnson v. Davis, are usually inserted in the margin.

The commencement describes the defendant's appearance, which might be by attorney or in person, for a defendant is at liberty to appear and defend in person. An infant should appear and plead by his guardian. The plea was introduced by an old form of words known as the "defense."

This formal part of a plea is another instance, like that of alleging production of suit, where a technical formula is still retained, though whatever reason there may have been for its use has long since disappeared. In the language of a learned writer, it can be considered "in no other light than as one of those verbal subtleties by which the science of pleading was, in many instances, anciently disgraced." It appears at the commencement of the plea, after its

issue with the defendant, for the uncertainty upon which of the matters the plaintiff doth insist; and so it is not safe for the plaintiff to proceed upon it." Style, Pract. Reg. tit. "Negative Pregnant"; Steph. Pl. Append. note 67.

[23] Nicholas v. Pullin, 1 Lev. 83; Stephen, Pl. (Tyler's Ed.) 336.

[24] See note 12, supra; White v. East Side Mill Co., 81 Or. 107, 155 Pac. 364, 158 Pac. 173, 527; 83 Cent. Law J. 145.

[25] 2 Standard Enc. Proc. Answers, pp. 56–59.

title, and is a general assertion that the plaintiff has no ground of action, which assertion is afterwards extended and maintained in the body of the plea. As now used, it is in the following form: "And the said A. B., by C. D., his attorney, comes and defends the wrong (or force) and injury when and where it shall behoove him, and the damages and whatsoever else he ought to defend, and says;" or, "And the said A. B., by C. D., his attorney, comes and defends the wrong (or force) and injury where, etc., and says," the "etc." being used for the purpose of abbreviation.[26] A distinction was formerly made between full and half defense, the former applying to all cases but pleas to the jurisdiction or in disability, and the latter to these pleas; but this is now disregarded, the method of taking a defense with an "etc." having been held to operate as whichever may be required.

The commencement indicates whether the plea is to be in abatement or in bar, and whether to the whole or a part of the cause of action. Where the plea is applicable only to a part of the cause of action, the commencement of the plea should be expressly limited to that part.

In peremptory pleas, the commencements and conclusions are matters of form and custom only; but in dilatory pleas, on account of the disfavor felt for them, every requirement is essential, and formal correctness is necessary.

Every plea in bar should have its proper conclusion, either to the country or with a verification, except an avowry or cognizance in replevin, in which the defendant is an actor, which need not have any conclusion. Where the plea contained a verification, it generally concluded with a prayer of judgment in favor of the defendant, as: "Wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him."

While pleadings have thus, in general, formal commencements and conclusions, there is an exception, as already noticed, in the case of all such pleadings as tender issue. These, instead of the conclusion with a prayer of judgment, as in the above forms, conclude, in the case of the trial by jury, "to the country"; or, if a different mode of trial be proposed, with other appropriate formulæ, as heretofore explained. Pleadings which tender issue have, however, the formal

[26] Co. Litt. 127b; Alexander v. Mawman, Willes, 40, 41; Wilkes v. Williams, 8 Term R. 633. The word "defends" is not used here in its popular sense, but imports "denial," being derived from the law Latin "defendere," or the law French "defendre," meaning "to deny." See, also, Hubler v. Pullen, 9 Ind. 273, 68 Am. Dec. 620; 1 Chit. Pl. (16th Am. Ed.) 444, and note z. As this rule relates to formal averments in the plea, and not to the substantial matter of defense itself, it does not apply under the codes nor in equity.

commencements, with the exception of the general issues, which have neither formal commencement nor conclusion, in the sense to which the present rule refers.

TENDER OF ISSUE

253. Upon a traverse, issue must be tendered.

254. All pleadings which form the issue by a negative and affirmative must conclude to the country. But where new matter is introduced, the pleading should always conclude with a verification.

We have before seen that it is the object of all pleadings to bring the parties, in the course of their mutual altercations, to an issue that is a single entire point, affirmed on the one side and denied on the other; and it is to effect this object that the above rule was established. There can be no arrival at this point until one or the other of the parties, by the conclusion of his pleading, offers an issue for the acceptance of his opponent, and this offer is called the "tender of issue." The formulæ of tendering the issue vary according to the mode of trial proposed. Upon a disputed question of fact the issue is tendered by a conclusion to the country—referring the question to a trial by a jury—usually in the following form: "And this the said A. B. prays may be inquired of by the country"—if by the plaintiff; or, "And of this the said C. D. puts himself upon the country"—if by the defendant.[27] Wherever, therefore, a denial or contradiction of fact occurs in pleading, issue ought at the same time to be tendered on the fact denied, by concluding the pleading in one of the above forms. The form of tendering issue to be tried by matter of record is as follows: The party setting up the matter of record (in the plea, for instance) says: "And this the said C. D. is ready to verify by the said record." The other party, after denying the existence of the record (in the replication, for instance), says: "And this he, the said A. B., is ready to verify when, where, and in such manner as the court here shall order, direct, or appoint."

The reason is that, as it sufficiently appears what is the issue or matter in dispute, it is time the pleadings should close and the method of deciding the issue be adjusted; and the conclusion in the above

[27] Heath, Max. 68; Weltale v. Glover, 10 Mod. 166. It is held, however, that there is no material difference between these two modes of expression and that if "ponit se" be substituted for "petit quod inquiratur," or vice versa, the mistake is unimportant. Weltale v. Glover, supra.

form always refers the decision to a trial by jury. The pleadings which should thus conclude "to the country" embrace all forms of the traverse except the special form, and also replications, rejoinders, etc., which do not contain new matter, but present an affirmative or denial in a direct and positive form.

Conclusion by Verification

When the answering pleading contains new matter, introducing statements of fact not previously mentioned by the other side, the latter has the right to be heard in answer if the accompanying denial is immaterial, and a tender of issue by the party pleading such matter would therefore be premature.[28] In such case, unless the new matter is a negative, the pleading concludes with a "verification," as it is termed, generally in the following words: "And this the said A. B. is ready to verify." [29]

To this exception belongs the case formerly noticed, of special traverses. These, as already explained, never tender issue, but always conclude with a verification; and the reason seems to be, that in such of them as contain new matter in the inducement, the introduction of that new matter will give the opposite party a right to be heard in answer to it if the absque hoc be immaterial, and consequently makes a tender of issue premature. And, on the other hand, with respect to such special traverses as contain no new matter in the inducement, they seem in this respect to follow the analogy of those first mentioned, though they are not within the same reason.

Not only in the case of special traverses, but in other instances also, to which that form does not apply, a traverse may sometimes involve the allegation of new matter; and in all such instances, as well as upon a special traverse, and for a similar reason, the conclusion must be with a verification, and not to the country. An illustration of this is afforded by a case of very ordinary occurrence, viz. where the action is in debt on a bond conditioned for performance of covenants. If the defendant pleads generally performance of the covenants, and the plaintiff, in his replication, relies on a breach of them, he must show specially in what that breach consists; for to reply generally that the defendant did not perform them would be too vague and uncertain. His replication, therefore, setting forth, as it necessarily does, the circumstances of the breach, discloses new matter; and consequently, though it is a direct denial or traverse of the plea, it must not tender issue, but must conclude with a verifica-

[28] Hayman v. Gerrard, 1 Saund. 103, note 1; Chandler v. Roberts, 1 Doug. 60; Henderson v. Withy, 2 Term R. 576.

[29] Stephen, Pl. (Tyler's Ed.) 230; 3 Shars. Pl. Comm. 309.

tion.[30] So, in another common case, in an action of debt on bond conditioned to indemnify the plaintiff against the consequences of a certain act, if the defendant pleads non damnificatus, and the plaintiff replies, alleging a damnification, he must, on the principle just explained, set forth the circumstances, and the new matter thus introduced will make a verification necessary.[31] To these it may be useful to add another example. The plaintiff declared in debt, on a bond conditioned for the performance of certain covenants by the defendant, in his capacity of clerk to the plaintiff; one of which covenants was to account for all the money that he should receive. The defendant pleaded performance. The plaintiff replied, that on such a day such a sum came to his hands, which he had not accounted for. The defendant rejoined, that he did account, and in the following manner: that thieves broke into the counting-house and stole the money, and that he acquainted the plaintiff of the fact; and he concluded with a verification. The court held that, though there was an express affirmative that he did account, in contradiction to the statement in the replication that he did not account, yet the conclusion with a verification was right; for new matter being alleged in the rejoinder, the plaintiff ought to have liberty to come in with a surrejoinder, and answer it by traversing the robbery.[32]

The application, however, to particular cases, of this exception, as to the introduction of new matter, is occasionally nice and doubtful; and it becomes difficult sometimes to say whether there is any such introduction of new matter as to make the tender of issue improper. Thus, in debt on a bond conditioned to render a full account to the plaintiff of all such sums of money and goods as were belonging to W. N. at the time of his death, the defendant pleaded that no goods or sums of money came to his hands. The plaintiff replied, that a silver bowl, which belonged to the said W. N. at the time of his death, came to the hands of the defendant, viz. on such a day and year; "and this he is ready to verify," etc. On demurrer, it was contended that the replication ought to have concluded to the country, there being a complete negative and affirmative; but the court thought it well concluded, as new matter was introduced. However, the learned judge who reports the case thinks it clear that the replication was bad; and Mr. Sergeant Williams expresses the same opinion, holding that there was no introduction of new matter such as to render a verification proper.[33]

[30] See Gainsford v. Griffith, 1 Saund. 54.
[31] See Richards v. Hodges, 2 Saund. 82.
[32] Vere v. Smith, 2 Lev. 5, 1 Vent. 121.
[33] Hayman v. Gerrard, 1 Saund. 102.

JOINDER OF ISSUE

255. Issue, when well tendered, must be accepted. The rule applies both to issues—
(a) In fact; and
(b) In law.

If issue be well tendered both in point of substance and in point of form, nothing remains for the opposite party but to accept or join in it; and he can neither demur, traverse, nor plead in confession and avoidance.[34]

The form of accepting or joining in the tender of an issue in fact is by the use of the words "And the said A. B. doth the like." This is called the "similiter." It is only required when the conclusion of the adverse pleading tenders a trial by jury, but is then essential. If omitted by the party, it may be added for him to complete the record, as, when the issue is well tendered, he has no option but to accept it.[35] An issue need never be accepted unless it is well tendered. If the opposite party thinks the traverse is bad in substance or in form, or objects to the mode of trial proposed, in neither case is he obliged to add the similiter; but he may demur, and if it has been added for him he may strike it out and demur. As now used, the similiter serves to mark both the acceptance of the question itself and the manner of trial proposed. As the resort to a jury could in ancient times only be had by consent of both the parties, it appears to have been formerly used only to indicate an expression of such consent.

Joinder in Issue, or Similiter

(Title of court and cause.)

And the said A. B., plaintiff in the above-mentioned action, as to the plea of the defendant pleaded therein, and whereof he hath put himself upon the country, doth the like.

[34] Stephen, Pl. (Tyler's Ed.) 233; Bac. Abr. "Pleas," etc., 863; Digby v. Fitzharbert, Hob. 104; Dawes v. Winship, 16 Mass. 291; Hapgood v. Houghton, 8 Pick. (Mass.) 451.
[35] See Hayman v. Gerrard, 1 Saund. 101; Sayre v. Minns, 2 Cowp. 575; Digby v. Fitzharbert, Hob. 104; Wilson v. Kemp, 2 Maule & S. 549; Stumps v. Kelley, 22 Ill. 140; Davis v. Ransom, 26 Ill. 100.

CHAPTER XVIII

RULES AS TO ALLEGING PLACE, TIME, TITLE, AND OTHER COMMON MATTERS

256-257. Place or Venue.
258. Local and Transitory Actions.
259-260. Local Facts—Venue in Pleadings Subsequent to the Declaration.
261. Consequences of Mistake or Omission.
262. Time.
263. When the Time Must be Truly Stated.
264. When Time Need Not be Truly Stated.
265. Time to be Alleged in the Plea.
266. Time of Continuing Acts.
267. Description of Property.
268. Names of Persons.
269. Persons Other Than Parties.
270-271. Parties to the Action.
272-274. Showing Title.
275. Alleging Derivation of Title.
276. Estates in Fee Simple.
277. Particular Estates.
278. Title by Inheritance.
279. Title by Alienation or Conveyance.
280. Manner of Pleading Conveyance.
281. Written Conveyance.
282. Where a Party Alleges Title in His Adversary.
283. What is a Sufficient Allegation of Liability.
284. Proof of Title as Alleged.
285. Estoppel of Adverse Party.
286. Showing as to Authority.
287-288. Profert of Deeds.
289. Demand of Oyer.
290. Writings Pleaded According to Legal Effect.
291-293. Damages—General and Special.

PLACE OR VENUE

256. In all pleadings, some certain place must be alleged for every affirmative traversable fact, which place is called the "venue" in the action.

257. The venue in all actions is to be laid truly, or at the option of the pleader, according as the same are respectively—
(a) Local, or
(b) Transitory.

LOCAL AND TRANSITORY ACTIONS

258. A local action is one where the transaction upon which it is founded could only occur in a particular place, and may be either for—
(a) The recovery of land; or
(b) The establishment or maintenance of a right arising out of land, or the recovery of damages for its injury.

Transitory actions are those founded on transactions which might have taken place anywhere.

In ancient times, the nature of the trial by jury, while conducted in the form which first belonged to that institution, was such as to render particularity of place absolutely essential in all issues which a jury was to decide. Thus, by a general rule of the common law, which was strictly adhered to in ancient practice, every issue in fact triable by a jury was required to be tried by jurors, not only of the same county, but also of the same venue, vicinage, or immediate neighborhood in which the fact to be tried actually took place.[1] "Consisting, as the jurors formerly did of witnesses, or persons in some measure cognizant of their own knowledge of the matter in dispute, they were, of course, in general, to be summoned from the particular place or neighborhood where the fact happened; and in order to know into what county the venire facias for summoning them should issue, and to enable the sheriff to execute that writ, it was necessary that the issue, and therefore the pleadings out of which it arose, should show particularly what that place or neighborhood was. Such place or neighborhood was called the 'venue,' or 'visne' (from 'vicinetum'), and the statement of it in the pleadings obtained the same name; to allege the place being, in the language of pleading, to lay the venue." [2]

Each affirmative traversable allegation in the original writ, therefore, and also in the declaration, which was required to conform to the writ in this as in other particulars, was to be laid with a venue or place comprising, not only the county, but also the parish, town, or hamlet within the county, in which the fact arose. The rule also applied to actions commenced by bill, instead of by original writ. And in both cases the plea, replication, and subsequent pleadings, were re-

[1] See Co. Litt. 125a, 125b, and the explanation of the doctrine by Lord Mansfield in Mostyn v. Fabrigas, Cowp. 176. See, also, the notes to the latter case, 1 Smith, Lead. Cas. 1027, and the authorities there cited.
[2] Stephen, Pl. (Tyler's Ed.) 268.

quired to lay a venue to each affirmative traversable allegation.[3] Later, the strictness of the rule was relaxed, and a venue laid in the county was held sufficient.

A venue should be laid in the declaration, but failure to lay any venue in a transitory action is regarded as a merely formal defect, which can only be taken advantage of by special demurrer. In Massachusetts it was held that a declaration in a transitory action, without a venue, or with a wrong one, is bad in form if specially demurred to for this cause; but that objection cannot be taken in any other way.[4] In most states it is not considered necessary, as formerly, in a transitory action, to lay every traversable fact affirmatively alleged with a venue. It is sufficient if the name of the county appear in the margin, though it may not be alleged at all in the body of the declaration.[5]

Local and Transitory Actions

What has been thus far said on the subject of venue relates only to the necessity of laying a venue, the form in which it is laid, and its effect as to the venire. There is, however, another important point to be considered, namely, that which relates to the necessity of laying the venue truly. In some cases the venue must be laid truly, in others this is not necessary, but it may be laid at the option of the pleader. This depends, as we shall now see, on the question whether the action is local or transitory.

Local actions embrace all those brought for the recovery of the seisin or possession of lands and tenements, which are purely local subjects. An instance is the action of ejectment. Here the place where the land is situated must be truly stated. If it be misstated, there will be a fatal variance between the pleading and the proof, place being here material as a matter of description of the subject-matter of the suit. The reason of the rule as to all local actions is that, as no court has jurisdiction over local matters arising within a foreign sovereignty,

[3] Stephen, Pl. (Tyler's Ed.) 270; Duyckinck v. Clinton Mut. Ins. Co., 23 N. J. Law, 279; Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co., 51 N. J. Law, 56, 16 Atl. 12, Whittier, Cas. Com. Law Pl. p. 483. See Platz v. McKean Twp., 178 Pa. 601, 36 Atl. 136; Read v. Walker, 52 Ill. 333.

[4] Briggs v. President, etc., of Nantucket Bank, 5 Mass. 94. And see, to the same effect, Pullen v. Chase, 4 Ark. 210; Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co., 51 N. J. Law, 56, 16 Atl. 12; Blackstone Nat. Bank v. Lane, 80 Me. 165, 13 Atl. 683.

[5] Slate v. Post, 9 Johns. (N. Y.) 81. And see County Com'rs of Hartford County v. Wise, 71 Md. 43, 18 Atl. 31; Capp v. Gilman, 2 Blackf. (Ind.) 45; Pullen v. Chase, 4 Ark. 210; Benton v. Brown, 1 Mo. 393. Matter of inducement does not need to be laid with time and place. Thorwarth v. Blanchard, 86 Vt. 296, 85 Atl. 6.

no action will lie in any one sovereign state for the recovery of lands or tenements situated in another.[6]

Generally speaking, all actions which are called "personal," whether they sound in tort[7] or contract,[8] are transitory in their nature, since the facts from which they arise may be supposed to have happened anywhere, and, in contemplation of law, have no natural locality. Place is therefore not material, and the venue may be laid in any county, even though the cause of action arose within a foreign juris-

[6] See Doulson v. Matthews, 4 Term R. 504; Mostyn v. Fabrigas, Cowp. 176; Thomson v. Locke, 66 Tex. 333, 1 S. W. 112; St. Louis, A. & T. Ry. Co. v. Whitley, 77 Tex. 126, 13 S. W. 853. And see Mason v. Warner, 31 Mo. 508, and Henwood v. Cheeseman, 3 Serg. & R. (Pa.) 503, as to the difference between local and transitory actions. The following actions are local, and within this rule: Ejectment, Doulson v. Matthews, 4 Term R. 504; trespass or case for injuries to real property; as for trespass q. c. f., nuisance, waste, etc., Warren v. Webb, 1 Taunt. 379; Jefferies v. Duncombe, 11 East, 226; Graves v. McKeon, 2 Denio (N. Y.) 639; Brisbane v. Pennsylvania R. Co., 205 N. Y. 481, 98 N. E. 752, 44 L. R. A. (N. S.) 279, Ann. Cas. 1913E, 593 (but see 5 Minn. Law Rev. 63); Roach v. Damron, 2 Humph. (Tenn.) 425; Putnam v. Bond, 102 Mass. 370; Sumner v. Finegan, 15 Mass. 284; Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N. E. 4; unless in these cases there was some contract between the parties on which the action is grounded, Warren v. Webb, supra. In actions of debt on a judgment of a court of record, the venue must be laid in the county where the record is. 1 Chit. Pl. 281; Barnes v. Kenyon, 2 Johns. Cas. (N. Y.) 381; Smith v. Clark, 1 Ark. 63. Replevin is purely a local action at common law, but has been made transitory in some states by statute. At common law, debt on a judgment is local, and must be laid in the county where the record remains, Barnes v. Kenyon, 2 Johns. Cas. (N. Y.) 381; Smith v. Clark, 1 Ark. 63; but this is not the general rule under the codes. Trespass to realty is local, not transitory, and cannot be brought in another state than where the land is situated. Taylor v. Sommers Bros. Match Co. (Idaho, 1922) 204 Pac. 472. See notes, 26 L. R. A. (N. S.) 933; 44 L. R. A. (N. S.) 267; 5 Minn. Law Rev. 63; 6 Minn. Law Rev. 516; Taylor v. Sommers Bros. Match Co. (Idaho, 1922) 204 Pac. 472; 20 Mich. Law Rev. 913; 27 W. Va. Law Quarterly, 301; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; 16 Ill. Law Rev. 456. See Local and Transitory Actions in Private International Law, 66 University of Pennsylvania Law Rev. 301, A. K. Kuhn.

[7] Mostyn v. Fabrigas, Cowp. 176; Jefferies v. Duncombe, 11 East, 226; Smith v. Butler, 1 Daly (N. Y.) 508; Gardner v. Thomas, 14 Johns. (N. Y.) 134, 7 Am. Dec. 445; Shaver v. White, 6 Munf. (Va.) 112, 8 Am. Dec. 730; Watts v. Thomas, 2 Bibb (Ky.) 458; Smith v. Bull, 17 Wend. (N. Y.) 323, 1 Chit. Pl. 282.

[8] As in account, assumpsit, and covenant between the original parties to the deed, and generally in debt and detinue. In actions upon leases for nonpayment of rent, etc., whether the action is transitory or not depends upon whether it is founded upon privity of contract. If based upon privity of estate, as where suit is brought by the lessor or his personal representatives, or by the grantee of the reversion against the assignee of the lessee, it is

diction.[9] A remedy is thus afforded, not only in one state or county for an injury to personal property within the limits of another, or without the limits of the United States, but also for the breach of any contract, wherever executed, and even where relating to land.[10] When the cause of action and the action itself are thus transitory in their character, the plaintiff, in laying the venue, may depart as widely from the fact as he thinks fit and as is necessary to give the court in which he sues jurisdiction, without causing a discrepancy between the allegations in the declaration and the proof. The usual way of doing this is by stating the facts constituting the cause of action as occurring at the place where it really happened, and then laying this place under a videlicet, as within the jurisdiction of the court;[11] but the fiction by which matters happening out of the jurisdiction are thus laid as occurring within it cannot be used, even in transitory actions, to give a court jurisdiction in matters which are essentially beyond its cognizance.[12]

local. See White v. Sanborn, 6 N. H. 220; Clarkson v. Gifford, 1 Caines (N. Y.) 5. But see New York Corporation v. Dawson, 2 Johns. Cas. 335. Trespass or injury to land is a local action. Hill v. Nelson, 70 N. J. Law, 376, 57 Atl. 411; British South Africa Co. v. Companhia de Mocambique, [1893] A. C. 602, 633; 1 Chit. Pl. 279; Will's Gould, Pl. 263, 267; 8 Street Foundations Legal Liab. pp. 90, 94; 5 Minn. Law Rev., p. 63.

[9] See Hale v. Lawrence, 21 N. J. Law, 714, 47 Am. Dec. 190; McDuffee v. Portland & R. R. R., 52 N. H. 430, 13 Am. Rep. 72; Read v. Walker, 52 Ill. 383; Brady v. Brady, 101 N. Car. 324, 77 S. E. 235, 44 L. R. A. (N. S.) 279; Lloyd Cas. Civ. Proc. pp. 272, 275, note; Crook v. Pitcher, 61 Md. 510.

[10] Henwood v. Cheeseman, 3 Serg. & R. (Pa.) 501. Compare University of Vermont v. Joslyn, 21 Vt. 52.

[11] Wills v. Church, 5 Serg. & R. (Pa.) 190. But see Lister v. Wright, 2 Hill (N. Y.) 320. The office of a videlicet is to show that the party does not mean to prove the precise time, or, in transitory actions, the precise place, mentioned. This is done by using the words "to wit" or "that is to say"; as, for example, "and the said A. B. afterwards, to wit, on the 1st day of June, 1892," etc. See Will's Gould, Pl. c. 3, §§ 36–41.

[12] See Vermilya v. Beatty, 6 Barb. (N. Y.) 429, to the effect that an allegation contrary to the plain fact will not aid in conferring jurisdiction.

SAME—LOCAL FACTS—VENUE IN PLEADINGS SUBSEQUENT TO THE DECLARATION

259. Local facts must always be truly laid, both in the declaration and subsequent pleadings, whether the action be local or transitory.

260. In transitory actions, where the defendant pleads transitory matters, the venue must follow the declaration, unless his defense requires a different statement.

It has been seen that in all local actions it is necessary to aver all material facts as happening where they actually occurred, and the same is equally true as to the allegation of all local facts in both the declaration and subsequent pleadings, whether the action be local or transitory. But in actions of the latter kind, where the subsequent pleadings allege only matters transitory in their nature, it is a rule that the place of trial laid in the declaration draws to itself the trial of all such matters.[13] The defendant, therefore, in such cases, is obliged to follow the venue that the plaintiff has laid, unless his defense requires the allegation of a different place; as, if allowed to deviate from this, without the necessity arising from a defense founded upon local facts, he would be able to change or oust the venue in transitory actions, and thus to subvert the rule allowing the plaintiff in such actions to bring his suit, and consequently to lay his venue, in any county he pleases. It would seem that the necessity of laying any venue at all in proceedings subsequent to the declarations would be obviated by this rule, and it has been so held;[14] but in practice it is still usual to lay a venue in these as well as in the declaration, and, in point of form, is the proper course.

SAME—CONSEQUENCES OF MISTAKE OR OMISSION

261. A mistake or omission in laying the venue may be taken advantage of—

(a) By demurrer, where the defect is apparent on the face of the declaration.

(b) By plea in bar or motion for nonsuit, where it is not.

By the ancient rule of the common law, a mistake in laying the venue for local matters was ground for nonsuit, by reason of misde-

[13] Com. Dig. "Pleader," E, 4.

[14] See Ilderton v. Ilderton, 2 H. Bl. 145, per Eyre, Ld. C. J.

scription of the subject-matter of the suit,[15] and its omission, when necessary, an incurable defect.[16] But since the establishment of the distinction between local and transitory actions, if the fault appears on the face of the declaration, it will be good cause for special demurrer;[17] and, if it does not so appear, it may be pleaded in bar of the action, or taken advantage of at the trial, by motion for a nonsuit, on the ground of variance.[18] And in transitory actions, also, an omission of the venue, if not demurred to, may be aided by any plea which admits the fact for the trial of which a proper venue should have been laid,[19] or by a judgment by default,[20] or by verdict;[21] but even in transitory actions, as it is necessary that some venue be laid, the omission remains fatal on demurrer.

TIME

262. In personal actions, the pleadings must allege the time—that is, the day, month, and year—when each traversable fact occurred; and, when a continuing act is mentioned, its duration should be shown.

It is a general rule of pleading in personal actions that every traversable fact must be stated as having taken place on some particular day.[22] The rule seems designed merely to promote certainty in the pleadings, and, though but little practical certainty can result from it, is necessary both to show upon the record a material fact afterwards to be sustained by proof, as well as, in the case of the declaration, that the cause of action, upon the plaintiff's own showing, must always appear to have accrued before the commencement of the suit.[23] It has

[15] Santler v. Heard, 2 Wm. Bl. 1033; Brucksbaw v. Hopkins, Cowp. 410.
[16] Com. Dig. "Action," N, 6; Bac. Abr. "Venue," c.
[17] Dumont v. Lockwood, 7 Blackf. (Ind.) 576.
[18] See Haskell v. Inhabitants of Woolwich, 58 Me. 535.
[19] Anonymous, 3 Salk. 381. And see Mellor v. Barber, 3 Term R. 387.
[20] Remington v. Tayler, 1 Lut. 235.
[21] By the express provisions of the statute of 16 & 17 Car. II, c. 5.
[22] Com. Dig. "Pleader," c. 19; Halsey v. Carpenter, Cro. Jac. 359; Denison v. Richardson, 14 East, 291; Ring v. Roxbrough, 2 Tyr. 473; Andrews v. Thayer, 40 Conn. 157; Wellington v. Milliken, 82 Me. 58, 19 Atl. 90; Gordon v. Journal Pub. Co., 81 Vt. 237, 69 Atl. 742, Whittier, Cas. Com. Law Pl. pp. 486, 487, note.
[23] See Swift v. Crocker, 21 Pick. (Mass.) 241; Maynard v. Talcott, 11 Barb. (N. Y.) 509; Cheetham v. Lewis, 3 Johns. (N. Y.) 42; Langer v. Parish, 8 Serg. & R. (Pa.) 134, and cases cited. It is also necessary that no material fact be stated as having occurred after the date or issuance of the writ, that being now regarded as the commencement of the action. See Remis v. Faxon, 4 Mass. 203; Waring v. Yates, 10 Johns. (N. Y.) 119; Bronson v. Earl, 17 Johns. (N. Y.) 63. But in some states the service of the writ is the commencement. Jencks v. Phelps, 4 Conn. 149; Downer v. Garland, 21 Vt. 362; Graves v. Ticknor, 6 N. H. 537.

been laid down as a general principle that, wherever it is necessary to lay a venue, it is also necessary to mention time.[24]

SAME—WHEN THE TIME MUST BE TRULY STATED

263. Whenever time forms a material point in the merits of the case, it is of the substance of the issue, and must be correctly alleged.

When time enters into the terms of a contract, or is involved in any of its essential parts, the true time must be stated in pleading the contract, in order to avoid a variance between the pleading and proof.[25] Thus, where the declaration stated a usurious contract made on the 21st day of December, 1774, for giving day of payment of a certain sum to the 23d day of December, 1776, and the proof was that the contract was on the 23d December, 1774, giving day of payment for two years, it was held that the verdict must be for the defendant; the principle of this decision being that, the time given for payment being of the substance of an usurious contract, such time must be proved as laid.[26] So, where the declaration stated a usurious agreement on the 14th of the month, to forbear and give day of payment for a certain period, but it was proved that the money was not advanced till the 16th, the plaintiff was nonsuited; it being held by Lord Mansfield at the trial, and afterwards by the court in banc, that the day from whence the forbearance took place was material, though laid under a videlicet.[27] So in pleading any written document, as a record, specialty, or promissory note, etc., the day on which it is alleged to bear date must be correctly stated, since there will otherwise be a variance between the writing itself when offered in evidence and the description of it in the

[24] King v. Hollond, 5 Term R. 620; Denison v. Richardson, supra. See Pharr v. Bachelor, 3 Ala. 237. See Opdycke v. Easton & A. R. Co., 68 N. J. Law, 12, 52 Atl. 243; 1 Chit. Pl. (16th Am. Ed.) 272.
[25] See Pope v. Foster, 4 Term R. 590; Carlisle v. Trears, 1 Cowp. 671; Stafford v. Forcer, 10 Mod. 313; Tate v. Wellings, 3 Term R. 531; Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252; Hardy v. Cathcart, 5 Taunt. 2. As to where the instrument bears no date, see Grannis v. Clark, 8 Cow. (N. Y.) 36; Streeter v. Streeter, 43 Ill. 155.
[26] Carlisle v. Trears, supra.
[27] Johnson v. Picket, cited Grimwood v. Barrit, 6 Term R. 463.

pleadings. The same rule applies whenever the time stated in the pleadings on either side is to be proved by record or written instrument referred to in the pleadings. The rule in regard to written instruments is necessary for the further reason that the record should thus show the true date, and thus constitute a bar to another suit on the same instrument by giving a different date; it being one of the objects of the rule as to certainty, so far as the declaration is concerned, that the judgment rendered in the case should be a bar to any subsequent action for the same cause.

SAME—WHEN TIME NEED NOT BE TRULY STATED

264. Wherever the time to be alleged does not constitute a material point in the cause, and is not of the substance of the issue or matter of description, any time may be assigned to a given fact.

In all matters, generally speaking, save those previously mentioned, time is considered as forming no material part of the issue, so that the pleader, when required to allege a time for any traversable fact, is not compelled to allege it truly, and may state a fact as occurring at one time, and prove it as happening at a different time.[28] The reason of the rule is that as a day is not an independent fact or substantive matter, but a mere circumstance or accompaniment of such matter, it obviously cannot in its own nature be material, and can only be made so, if at all, by the nature of the fact or matter in connection with which it is pleaded. Therefore, if a tort is stated to have been committed,[29] or a parol contract made,[30] on a particular day, the plaintiff is in neither case confined in his proof to the day as laid, but may support the allegation by proof of a different day, except that the day as laid in the declaration, and as proved, must both be prior to the commencement of the suit.[31] As the plaintiff is not generally confined in

[28] See Mathews v. Spicer, 2 Strange, 806; Searing v. Butler, 69 Ill. 575; Stafford v. Forcer, supra; Howland v. Davis, 40 Mich. 545; Hill v. Robeson, 2 Smedes & M. (Miss.) 541; Spencer v. Trafford, 42 Md. 1; National Lancers v. Lovering, 30 N. H. 511; Stout v. Rassel, 2 Yeates (Pa.) 334; Kidder v. Bacon, 74 Vt. 263, 271, 52 Atl. 322. See Gordon v. Journal Pub. Co., 81 Vt. 237, 69 Atl. 742, Whittier, Cas. Com. Law Pl. p. 486 (the words "or about" take away all certainty and leave the time indefinite and insufficient).

[29] Time is not material in trespass. Co. Litt. 283a. And see Pierce v. Pickens, 16 Mass. 472; Folger v. Fields, 12 Cush. (Mass.) 93.

[30] See The Lady Shandois v. Simson, Cro. Eliz. 880.

[31] See Ring v. Roxbrough, 2 Tyr. 468; Holmes v. Newlands, 3 Perry & D. 128. Compare International & G. N. R. Co. v. Pape, 73 Tex. 501, 11 S. W. 526; Wellington v. Milliken, 82 Me. 58, 19 Atl. 90. As to the statement of time in code pleading, see Backus v. Clark, 1 Kan. 303, 83 Am. Dec. 437; People v. Ryder, 12 N. Y. 433. The rule still applies, and time, when material, must be strictly laid and proved.

evidence to the time stated in the declaration, so the defendant is not restricted to that laid in his plea; and so on through the subsequent pleadings. A time should not be stated that is intrinsically impossible, or inconsistent with the fact to which it relates. A time so laid would generally be ground for demurrer. There is no ground for demurrer, however, if the time is unnecessarily laid as to a fact not traversable, for an unnecessary statement of time, though impossible or inconsistent, will do no harm.

SAME—TIME TO BE ALLEGED IN THE PLEA

265. Where time is not material to the defense, and the matter of complaint and defense must, from the nature of the case, have occurred at one and the same time, the defendant must follow the day laid in the declaration.

This general rule has long been established, and its effect is that the plea must state the matter of defense as having occurred on the day mentioned in the declaration, even though that be not the true day, unless the nature or circumstances of the defense render it necessary for the defendant to vary from the time thus stated. Its object seems to be the prevention of an apparent discrepancy upon the record in respect to time, where the alleged cause of action and the defense pleaded actually occurred at one and the same time, and where the defendant is under no necessity of laying his defense on a different day from that mentioned in the declaration. The rule applies, however, only when time is immaterial, and therefore, if the defense is such as to render it necessary that the true time be stated in the plea, the law allows the defendant to vary from the time mentioned in the declaration. In all such cases the formal objection arising from the apparent discrepancy in time between the declaration and the plea yields to the more important principle that each party must be permitted to frame his allegations according to the exigencies of his case. The principle is the same as laying the true venue by the defendant in transitory actions when the nature of his defense requires it.

Again, the defendant is never required to follow the day named in the declaration in pleading matter of discharge, whether it be material or not, since all matter of discharge must, from its nature, have oc-

curred subsequently to the creation of the duty or liability upon which the action is founded. It is therefore clear that in such case the defendant must state the defense as having occurred after the wrong was done or the contract made; more especially if such discharge was by matter of record, or by a written instrument, since the time must then be laid to conform to the date of such record or instrument.

SAME—TIME OF CONTINUING ACTS

266. Where there is occasion to allege a continuous act in pleading, the time of its duration should be shown.

This rule applies generally where there is only one count in the declaration, and the subject-matter of the suit consists of a continuing act by the defendant, covering many days. Here the act or acts should be alleged to have been committed on a given day and "on divers other days and times" between that and another given day or the commencement of the suit; and the plaintiff will be allowed to offer evidence only in proof of acts committed during the whole or some part of the period covered.[83]

DESCRIPTION OF PROPERTY

267. When the declaration alleges an injury to goods or chattels, or a contract relating to them, their quantity, quality, and value or price should be stated; and, in actions for the recovery of, or for injuries to, real property, quantity and quality should be shown.

It is, in general, necessary, where the declaration alleges any injury to goods and chattels, or any contract relating to them, that their quality, quantity, and value or price should be stated. And in any action brought for recovery of real property, its quality should be shown, as whether it consists of houses, lands, or other hereditaments; and in general it should be stated whether the lands be meadow, pasture, or arable, etc. And the quantity of the lands or other real estate must also be specified. So, in an action brought for injuries to real property, the quality should be shown, as whether it consists of houses,

[83] See Johnson v. Long, 3 Ld. Raym. 260; Monkton v. Pasbley, 2 Salk. 638; Earl of Manchester v. Vale, 1 Saund. 24, note 1; Hume v. Oldacre, 1 Starkie, 351.

lands, or other hereditaments.[83] Thus, in an action of trespass for breaking the plaintiff's close and taking away his fish, without showing the number or nature of the fish, it was, after verdict, objected, in arrest of judgment—First, "that it did not appear by the declaration of what nature the fish were, pikes, tenches, breams, etc.;" and, secondly, that "the certain number of them did not appear." And the objection was allowed by the whole court.[84] So where, in an action of trespass, the declaration charged the taking of cattle, the declaration was held to be bad because it did not show of what species the cattle were.[85] So, in an action of trespass, where the plaintiff declared for taking goods generally, without specifying the particulars, a verdict being found for the plaintiff, the court arrested the judgment for the uncertainty of the declaration.[86] So, in a modern case, where, in an action of replevin, the plaintiff declared that the defendant, "in a certain dwelling house, took divers goods and chattels of the plaintiff," without stating what the goods were, the court arrested the judgment for the uncertainty of the declaration, after judgment by default and a writ of inquiry executed.[87] So, in an action of dower, where blanks were left in the count for the number of acres claimed, the judgment was reversed after verdict.[88] So, in ejectment, the plaintiff declared for five closes of land, arable and pasture, called "Long Furlongs," containing ten acres. Upon "not guilty" pleaded the plaintiff had a verdict, and it was moved in arrest of judgment that the declaration was ill, because the quantity and quality of the lands were not distinguished and ascertained, so as to show how many acres of arable there were and how many of pasture. And for this reason the declaration was held ill, and the judgment arrested.[89]

With respect to value, it is to be observed that it should be specified in reference to the current coin of the realm, thus: "Divers, to wit, three tables of great value, to wit, the value of twenty dollars, of lawful money of the United States." With respect to quantity, it should be specified by the ordinary measures of extent, weight, or ca-

[83] Stephen, Pl. (Tyler's Ed.) 281; Bract. Rom. Law, 431a; Harpur's Case, 11 Coke, 25b; Knight v. Symms, Carth. 204; Doe ex dem. Bradshaw v. Plowman, 1 East, 441; Goodtitle ex dem. Wright v. Otway, 8 East, 357; Andrews v. Whitehead, 13 East, 102; 1 Saund. 333, note 7; 2 Saund. 74, note 1; and cases hereafter cited.

[84] Playter's Case, 5 Coke, 34b.

[85] Dale v. Phillipson, 2 Lut. 1374.

[86] Bertie v. Pickering, 4 Burr. 2455; Wiatt v. Essington, 2 Ld. Raym. 1410.

[87] Pope v. Tillman, 7 Taunt. 642.

[88] Lawly v. Gattacre, Cro. Jac. 498.

[89] Knight v. Symms, Carth. 204.

pacity, thus: "Divers, to wit, fifty acres of arable land;" "divers, to wit, three bushels of wheat."

The rule in question, however, is not so strictly construed but that it sometimes admits the specification of quality and quantity in a loose and general way. Thus, a declaration in trover for two packs of flax and two packs of hemp, without setting out the weight or quantity of a pack, is good after verdict, and, as it seems, even upon special demurrer.[40] So, a declaration in trover, for a library of books, has been allowed, without expressing what they were. So, where the plaintiff declared in trespass for entering his house, and taking several keys for the opening of the doors of his said house, it was objected, after verdict, that the kind and number ought to be ascertained. But it was answered and resolved that the keys are sufficiently ascertained by reference to the house.[41] So it was held, upon special demurrer, that it was sufficient to declare, in trespass for breaking and entering a house, damaging the goods and chattels, and wrenching and forcing open the doors, without specifying the goods and chattels, or the number of doors forced open; for that the essential matter of the action was the breaking and entering of the house, and the rest merely aggravation.[42] The degree of certainty requisite in stating matters of the kind mentioned seems to be such as the facts in each case will conveniently admit of, a general description being allowed where the matter to be described comprehends a multiplicity of particulars, a detailed description of which would either be impracticable or produce great prolixity in the pleadings,[43] and minuteness of description being required where a complete identification might be essential to a recovery.[44]

As quantity and value, when brought in issue, are not generally material, it is sufficient that any quantity or value be alleged without risk of variance in the event of a different amount being proved.[45] The only exceptions to this are where the above facts are alleged in the recital or statement of a record, written instrument, or express contract,

[40] 2 Saund. 94b, note 1.

[41] Layton v. Grindall, 2 Salk. 643.

[42] Chamberlain v. Greenfield, 3 Wils. 292.

[43] Layton v. Grindall, 2 Salk. 643; Cryps v. Baynton, 3 Bulst. 31; Shum v. Farrington, 1 Bos. & P. 640. And see Smith v. Boston, C. & M. R. R., 36 N. H. 458; Hughes v. Smith, 5 Johns. (N. Y.) 173; and Haynes v. Crutchfield, 7 Ala. 189, Whittier, Cas. Com. Law Pl. p. 488, as to the description of property in the different actions.

[44] Dale v. Phillipson, 2 Lut. 440; Bertie v. Pickering, 4 Burr. 2455; Pope v. Tillman, 7 Taunt. 642.

[45] Crispin v. Williamson, 8 Taunt. 107. And see Rubery v. Stevens, 4 Barn. & Adol. 241.

in which cases, as in alleging time regarding the same subjects, number, quantity, etc., must be truly stated as they form part of the substance of the issue. For example, to a declaration in assumpsit for £10 4s., and other sums, the defendant pleaded, as to all but £4 7s. 6d., the general issue, and, as to the £4 7s. 6d., a tender. The plaintiff replied that, after the cause of action accrued, and before the tender, the plaintiff demanded the said sum of £4 7s. 6d., which the defendant refused to pay; and on issue joined it was proved that the plaintiff had demanded not £4 7s. 6d., but the whole £10 4s. This proof was held not to support the issue.[46] The test of the certainty required appears in all cases to be the liability of the pleader to the consequences of a variance when the proof is reached on the trial.[47] The allegation of quality in the subject-matter, since it generally requires strict proof, falls directly within the reason of the rule, and must be truly stated.[48]

NAMES OF PERSONS

268. The pleadings must specify the names of persons. The rule applies to—

(a) Persons not parties to the suit, who are mentioned in the pleadings.

(b) Parties to the action.

SAME—PERSONS OTHER THAN PARTIES

269. The names of all persons mentioned in the pleadings, though not parties to the suit, must be correctly stated.

This rule calls for strict accuracy in describing persons whose names are necessarily mentioned in the statement of the cause of action or defense, though they are in no sense concerned in bringing or defending the action; and the reason is that any error in describing such persons may result in a fatal variance when the proof is reached, since the correct identification of such persons by name becomes a matter of essential description, material to the merits of the case.[49] If, in pleading a contract made by James Smith, the name is incorrectly given as

[46] Rivers v. Griffiths, 5 Barn. & Ald. 630.

[47] See Foster v. Pennington, 32 Me. 178.

[48] See Knight v. Symms, Carth. 204.

[49] See Harvey v. Stokes, Willes, 5; Acerro v. Petrone, 1 Starkie, 100; Mayelstone v. Lord Palmerston, Moody & M. 6; Finch v. Cocken, 3 Dowl. 678; Becker v. German Mut. Fire Ins. Co. of North Chicago, 68 Ill. 412; Elberson v. Richards, 42 N. J. Law, 69. Compare Forman v. Jacobs, 1 Starkie, 46.

John Smith, the strict rule would subject the pleader in fault to the penalty of a variance, though a more liberal practice now generally allows an amendment where it does not substantially change the cause of action.

Some observations may be made here which apply equally whether the name be that of a person not a party to the suit, or that of one who is a party. A person may be described by the name by which he is commonly known, though it is not his true name, and if a man has initials for his Christian name, or is in the habit of using initials therefor, and is known by them, they may be used in describing him.[50] In a few states a middle name or initial is recognized by the law as a part of the name, and its omission, or a mistake in stating it, is a misnomer in the case of a party, and a variance in the case of persons who are not parties, but are necessarily named.[51] In most jurisdictions, however, the law recognizes but one Christian name. The middle name or initial is no part of the name, and need not be stated, or proved, if stated.[52] Where the name of a person is misspelled, this will not constitute a variance, nor a misnomer, if the name as given and the name as proved are idem sonans.[53] Whether names are idem sonans or not depends, of course, on the pronunciation. The words "junior," "senior," etc., are no part of the name, and need not be stated, nor, if stated, proved.[54]

[50] Tweedy v. Jarvis, 27 Conn. 42; In re Jones' Estate, 27 Pa. 336; City Council of Charleston v. King, 4 McCord (S. C.) 487; Kenyon v. Semon, 43 Minn. 180, 45 N. W. 10; Kemp v. McCormick, 1 Mont. 420.

[51] See Com. v. Perkins, 1 Pick. (Mass.) 388; Com. v. Shearman, 11 Cush. (Mass.) 546; Parker v. Parker, 146 Mass. 320, 15 N. E. 902.

[52] Franklin v. Talmadge, 5 Johns. (N. Y.) 84; Roosevelt v. Gardinier, 2 Cow. (N. Y.) 463; Thompson v. Lee, 21 Ill. 242; Erskine v. Davis, 25 Ill. 251; Bletch v. Johnson, 40 Ill. 116; Wood v. Fletcher, 3 N. H. 61; Dilts v. Kinney, 15 N. J. Law, 130; Isaacs v. Wiley, 12 Vt. 674; Allen v. Taylor, 26 Vt. 599; Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597; Bratton v. Seymour, 4 Watts (Pa.) 329; Keene v. Meade, 3 Pet. 1, 7 L. Ed. 581; McKay v. Speak, 8 Tex. 376; Ahitbol v. Beniditto, 2 Taunt. 401; Williams v. Ogle, 2 Strange, 889.

[53] The following names have been held idem sonans: "Segrave" for "Seagrav," Williams v. Ogle, supra; "Benedetto" for "Beneditto," Ahitbol v. Beniditto, supra; "Usrey" for "Usury," Gresham v. Walker, 10 Ala. 370; "Petris" for "Petrie," Petrie v. Woodworth, 3 Caines (N. Y.) 219. The following names have been held not to be idem sonans: "Tarbart" for "Tabart," Bingham v. Dickie, 5 Taunt. 814; "Comyns" for "Cummins," Cruikshank v. Comyns, 24 Ill. 602. For other illustrations, see Clark, Cr. Proc. 341.

[54] De Kentland v. Somers, 2 Root (Conn.) 437; Kincaid v. Howe, 10 Mass. 203; Cobb v. Lucas, 15 Pick. (Mass.) 7; Brainard v. Stilphin, 6 Vt. 9, 27 Am. Dec. 532; Padgett v. Lawrence, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; Headley v. Shaw, 39 Ill. 354; Jameson v. Isaacs, 12 Vt. 611; Clark, Cr. Proc. 235. But see Jackson ex dem. Pell v. Prevost, 2 Caines (N. Y.) 164; State v. Vittum, 9 N. H. 519.

[55] See Lebanon v. Griffin, 45 N. H. 558; Flanders v. Stewartstown, 47 N. H. 549; Herf v. Shulze, 10 Ohio, 263; Brent v. Shook, 36 Ill. 125. And the names of all parties should be disclosed. Wolf v. Binder (Pa. Com. Pl.) 10 Pa. Co. Ct. R. 108.

[56] See In re Jones' Estate, 27 Pa. 336.

[57] City Council of Charleston v. King, 4 McCord (S. C.) 487; Kenyon v. Semon, 43 Minn. 180, 45 N. W. 10; Kemp v. McCormick, 1 Mont. 420; Tweedy v. Jarvis, 27 Conn. 42.

[58] See City of Lowell v. Morse, 1 Metc. (Mass.) 473; President, etc., of Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280.

SAME—PARTIES TO THE ACTION

270. The plaintiff and defendant must be designated by their proper names, and not by words of mere description; and it must be shown whether they appear in the action in an individual or a representative capacity.

271. The parties to an action include all persons who are directly interested in the subject-matter in issue, who have a right to control the proceedings, to make a defense, or to appeal from the judgment. All others are regarded as strangers to the cause.

The effect of this rule is plainly apparent from its terms, as certainty in the pleadings in this respect must necessarily be required for purposes of identification. Both plaintiff and defendant should be described by their Christian names and surnames, and, if either be mistaken or omitted, it is ground for plea in abatement.[55] An error in this respect, however, can now generally be cured by amending the defective pleading. A liberal construction of the rule allows, as we have seen, the use of the names by which such parties are generally known,[56] though not strictly correct, and though the designation thus habitually used includes the person's initials only.[57] Other questions applying both under this head, and also to naming persons not parties, have been noticed above. If a contract or promise sued upon has been made to or by the person by a wrong name, or by an abbreviation of his correct name, an action may be brought by or against him in his true name, setting forth the incorrect style or description, and stating that the parties are the same.[58]

The effect of a mistake in the name of a person not a party will, as above stated, amount to a fatal variance when the proof discloses the true name. It is otherwise where the mistake is in the name of a

party. Here the objection can only be taken by a plea in abatement. It cannot be objected to as a variance at the trial.[59]

Descriptive Words

If a person sues or is sued in a representative capacity, as receiver, executor, trustee, etc., while the representative character in which he appears may be gathered from the body of the pleadings,[60] without a description as such in the title of the action, the fact should appear in both; and it is important that the statement be made in the name recognized as effective, as otherwise the entire object of the complaint or defense may be defeated.[61] It is not generally sufficient to state simply, "A. B., executor," without the use of the word "as," since the omission will cause the word to be disregarded as merely descriptive, and the party will be treated as an individual only for the purpose of the particular action.[62] To show that he is a party in the special capacity, he must be named "as" executor, etc.

Partners and Corporations

When the action is by or against a partnership, it must be in the names of the individual members, where express statutes do not treat the firm as an entity, and allow the use of the name commonly employed in its business, since the designation of a partnership is always arbitrary, and may not contain the proper names of any of its members.[63] But, where a corporation is concerned, the law takes notice of it only by the corporate name, treating it as a single artificial person, and only recognizing its individual members where their rights are in question inter se; and the only method of description is by the use of the corporate name or title.

Repetition of Names

For the same purpose of identification, when the name of either party has been once introduced in the pleadings, a repetition of it

[59] Mayor and Burgesses of Stafford v. Bolton, 1 Bos. & P. 40; Medway Cotton Manufactory v. Adams, 10 Mass. 360; Reid v. Lord, 4 Johns. (N. Y.) 118.

[60] See Knox v. Metropolitan El. Ry. Co., 58 Hun, 517, 12 N. Y. Supp. 848.

[61] Henshall v. Roberts, 5 East, 150; Stilwell v. Carpenter, 62 N. Y. 639; and cases hereafter cited.

[62] Castleberry v. Fennell, 4 Ala. 642; Buffum v. Chadwick, 8 Mass. 103; Barley v. Roosa, 59 Hun, 617, 13 N. Y. Supp. 209; Henshall v. Roberts, 5 East, 150; Stilwell v. Carpenter, 62 N. Y. 639; Beers v. Shannon, 73 N. Y. 292; Brent v. Shook, 36 Ill. 125. Where one sues, describing himself as executor, if the justice of the case requires it the court will consider it as merely descriptio personæ. Grew v. Burditt, 9 Pick. (Mass.) 265; George v. English, 30 Ala. 582; Higgins v. Halligan, 46 Ill. 173.

[63] See Bentley v. Smith, 3 Caines (N. Y.) 170; Brubaker v. Poage, 1 T. B. Mon. (Ky.) 123.

should be accompanied by such terms of reference as will clearly trace the identity as the same, unless there is no danger of confusion. In any case, it is the better plan, and the common practice is, to use the word "said" or "aforesaid," or, if there be two or more persons or subjects, "first aforesaid" or "last aforesaid," or terms of equivalent import.[64]

SHOWING TITLE

272. The pleadings must show title, where it is material. More in detail:
   (a) A person asserting any right to or authority over real or personal property must allege a title to such property either in himself or in some person from whom he derives his authority.
   (b) When a person is to be charged in a pleading with any liability in respect to either real or personal property, his title to such property must be alleged.

273. EXCEPTION—No title need be shown where the opposite party is estopped from denying it.

When, in pleading, any right or authority is set up in respect of property, personal or real, some title to that property must of course be alleged in the party, or in some other person from whom he derives his authority.[65] So, if a party be charged with any liability, in respect of property, personal or real, his title to that property must be alleged.

We shall first consider the case of a party's alleging title in himself, or in another whose authority he pleads; next that of his alleging it in his adversary.

The exception to this rule in cases where the opposite party is estopped from denying title will be presently considered.

274. When title is alleged in the party himself, or in one whose authority he pleads, a title to the subject-matter of the controversy must generally be set forth in the pleadings in its full and precise extent.

[64] See Pollard v. Lock, Cro. Eliz. 267. And see Hildreth v. Harvey, cited in Given v. Driggs, 3 Caines (N. Y.) 150.

[65] Com. Dig. "Pleader," 3 M, 9; Bract. Rom. Law, 372b, 373b.

EXCEPTIONS—(a) When the action is founded on possession only, and not on title or ownership, it is sufficient to allege a title of possession only, a naked allegation of possession being sufficient. This applies to personal actions only.

(b) In some cases, where a title of possession is inapplicable, a general freehold title may be alleged in lieu of stating title in its full and precise extent.

Alleging Title of Possession

It is often sufficient to allege a title of possession only. The form of laying a title of possession, in respect of goods and chattels, is either to allege that they were the "goods and chattels of the plaintiff," or that he was "lawfully possessed of them as of his own property." With respect to corporeal hereditaments, the form is either to allege that the close, etc., was the "close of" the plaintiff, or that he was "lawfully possessed of a certain close," etc. With respect to incorporeal hereditaments, a title of possession is generally laid by alleging that the plaintiff was possessed of the corporeal thing appurtenant to which is the right claimed, and by reason thereof was entitled to the right at the time in question; for example, that he "was possessed of a certain messuage," etc., "and by reason thereof, during all the time aforesaid, of right ought to have had common of pasture," etc.

A title of possession is applicable—that is, will be sufficiently sustained by the proof—in all cases where the interest is of a present and immediate kind. Thus, when a title of possession is alleged with respect to goods and chattels, the statement will be supported by proof of any kind of present interest in them, whether that interest be temporary and special, or absolute, in its nature; as, for example, whether it be that of a carrier or finder, only, or that of an owner and proprietor.[66] So, where a title in possession is alleged in respect of corporeal or incorporeal hereditaments, it will be sufficiently maintained by proving any kind of estate in possession, whether fee simple, fee tail, for life, for term of years, or otherwise. On the other hand, with respect to any kind of property, a title of possession would not be sustained in evidence by proof of an interest in remainder or reversion only; and therefore, when the interest is of that description, the preceding forms are inapplicable, and title must be laid in remainder or reversion, according to the fact, and upon the

[66] Wilbraham v. Snow, 2 Saund. 47a, note 1. See Clay v. City of St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883.

principles that will be afterwards stated, on the subject of alleging title in its full and precise extent.

Where a title of possession is applicable the allegation of it is, in many cases, sufficient, in pleading, without showing title of a superior kind. The rule on this subject is as follows: That it is sufficient to allege possession as against a wrongdoer,[67] or, in other words, that it is enough to lay a title of possession against a person who is stated to have committed an injury to such possession, having, as far as it appears, no title himself. Thus, if the plaintiff declares in trespass, for breaking and entering his close, or in trespass on the case, for obstructing his right of way, it is enough to allege in the declaration, in the first case, that it is the "close of the plaintiff," in the second case, that "he was possessed of a certain messuage," etc., "and, by reason of such possession, of right ought to have had a certain way," etc. For if the case was that, the plaintiff being possessed of the close, the defendant, having himself no title, broke and entered it, or that, the plaintiff being possessed of a messuage and right of way, the defendant, being without title, obstructed it, then, whatever was the nature and extent of the plaintiff's title, in either case the law will give him damages for the injury to his possession; and it is the possession, therefore, only, that needs to be stated. It is true that it does not yet appear that the defendant had no title, and, by his plea, he may possibly set up one superior to that of the plaintiff; but as, on the other hand, it does not yet appear that he had title, the effect is the same, and till he pleads he must be considered as a mere wrongdoer—that is, he must be taken to have committed an injury to the plaintiff's possession, without having any right himself. Again, in an action of trespass for assault and battery, if the defendant justifies on the ground that the plaintiff wrongfully entered his house, and was making a disturbance there, and that the defendant gently removed him, the form of the plea is that "the defendant was lawfully possessed of a certain dwelling house," etc., "and, being so possessed, the said plaintiff was unlawfully in the said dwelling house," etc.; and it is not necessary for the defendant to show any title to the house beyond this of mere possession.[68] For the plaintiff has, at present, set up no title at all to the house; and, on the face of the plea, he has committed an injury to the defendant's possession, without having any right himself. So,

[67] Com. Dig. "Pleader," C 39, C 41; Taylor v. Eastwood, 1 East, 212; Grimstead v. Marlowe, 4 Term R. 717; Greenhow v. Ilsley, Willes, 619; Waring v. Griffiths, 1 Burr. 440; Langford v. Webber, 3 Mod. 132; Carnaby v. Welby, 8 Adol. & El. 872; Skevill v. Avery, Cro. Car. 138.

[68] Skevill v. Avery, Cro. Car. 138.

in an action of trespass for seizing cattle, if the defendant justifies on the ground that the cattle were damage feasant on his close, it is not necessary for him to show any title to his close, except that of mere possession.[69]

It is to be observed, however, with respect to this rule as to alleging possession against a wrongdoer, that it has been held in many cases not to hold in replevin on the ground that in that action it is not sufficient to state a title of possession, even in a case where it would be allowable in trespass, by virtue of the rule above mentioned. Thus, in replevin, where the defendant, by way of avowry, pleaded that he was possessed of a messuage, and entitled to common of pasture, as appurtenant thereto, and that he took the cattle damage feasant, it was held that this pleading was bad, and that it was not sufficient to lay such mere title of possession in this action.[70] According to some of the cases, however, the rule applies also to replevin.[71]

Where this rule as to alleging possession against a wrongdoer does not apply, there, though the interest be present or possessory, it is, in general, not sufficient to state a title of possession, but some superior title must be shown. Thus, in trespass for breaking the plaintiff's close, if the defendant's justification is that the close was his own copyhold estate of inheritance, his plea, as it does not make the plaintiff a wrongdoer, but, on the contrary, admits his possessory title in the close, and pleads in confession and avoidance of it, must allege, not merely a possession, but a seisin in fee of the copyhold. So, in a similar action, if the defendant relies on a right of way over the plaintiff's close, it will not be sufficient to plead that he (the defendant) was lawfully possessed of another close, and, by reason of such possession, was entitled to a right of way over the plaintiff's, but he must set forth some superior title to his close and right of way; as, for example, that of seisin in fee of the close, and a prescription in a que estate to the right of way.[72]

Where a title of possession is, upon the principles above explained, either not applicable or not sufficient, the title should, in general, be stated in its full and precise extent; so that to allege mere seisin,

[69] 1 Saund. 221, note 1; Id. 346e, note 2; 2 Saund. 285, note 3; Anonymous, 2 Salk. 643; Searl v. Bunion, 2 Mod. 70; Osway v. Bristow, 10 Mod. 37; 2 Bos. & P. 361, note a; Langford v. Webber, 3 Mod. 132.

[70] Hawkins v. Eckles, 2 Bos. & P. 359, 361, note a; Dovaston v. Payne, 2 H. Bl. 530; 1 Saund. 346e, note 2; 2 Saund. 285, note 3; Saunders v. Hussey, 2 Lut. 1231; Silly v. Dally, 1 Ld. Raym. 333.

[71] See Adams v. Cross, 2 Vent. 181; Cleaves v. Herbert, 61 Ill. 126.

[72] Stephen, Pl. (Tyler's Ed.) 290.

for instance, without showing whether in fee, or for life, etc., would not be sufficient.[73]

SAME—ALLEGING DERIVATION OF TITLE

275. The derivation of a title, as a term in pleading, is its commencement. As to the necessity of showing the derivation of a title the law makes a distinction between:
(a) Estates in fee simple; and
(b) Particular estates.

SAME—ESTATES IN FEE SIMPLE

276. In pleading title in fee simple, it is in general sufficient to allege the estate in general terms, without stating the time or manner of its commencement.
EXCEPTION—Where, in the pleading, the seisin has already been alleged in a person from whom the pleader claims.

We have shown that in certain cases it is sufficient to allege a title of possession, and that, as a general rule, except in these cases, title must be alleged in its full and precise extent. To this rule there are some exceptions—cases in which, while it would be insufficient to allege a title of possession, a general freehold title may be alleged instead of setting it out in its full and precise extent. In a plea in trespass quare clausum fregit, or an avowry in replevin, if the defendant claim an estate of freehold in the locus in quo, he may plead such title by the general allegation that it is his "close, soil, and freehold" instead of setting up the facts in regard to it.[74] This is called the plea or avowry of liberum tenementum.[75] This allegation of a general freehold title will be sustained by proof of any estate of freehold, whether in fee or for life only, and whether in possession

[73] Sanders v. Hussey, Carth. 9, 2 Lut. 1231; Silly v. Dally, 1 Ld. Raym. 333. See Rawson v. Taylor, 57 Me. 343; Almond v. Bonnell, 76 Ill. 536; Higgins v. Farnsworth, 48 Vt. 512.

[74] Stephen, Pl. (Tyler's Ed.) 296; 1 Saund. 347d, note 6; Fort Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; Martin v. Kesterton, 2 W. Bl. 1089; Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 531, 17 Am. Dec. 98; Tribble v. Frame, 7 J. J. Marsh. (Ky.) 599, 23 Am. Dec. 439; Wilsons v. Bibb, 1 Dana (Ky.) 7, 25 Am. Dec. 113.

[75] Fisher v. Morris, 5 Whart. (Pa.) 358, Whittier, Cas. Com. Law Pl. p. 37; Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; Illinois Central R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751.

or expectant on the determination of an estate for years.[76] The commencement of the estate need not be shown. The plea above mentioned is the only instance, in modern practice, of the allegation of a title of this character.

Under the head of "Allegation of Title," in its full and precise extent, we shall consider the statement of the derivation of the title, and then certain general rules as to the allegation of the titles themselves.

In general it is sufficient to state a seisin in fee simple per se; that is, simply to state, according to the usual form of alleging that title, that the party was "seized in his demesne as of fee of and in a certain messuage," etc., without showing the derivation, or, as it is expressed in pleading, the commencement of the estate;[77] for, if it were requisite to show from whom the present tenant derived his title, it might be required, on the same principle, to show from whom that person derived his, and so ad infinitum. Besides, as mere seisin will be sufficient to give an estate in fee simple, the estate may, for anything that appears, have had no other commencement than the seisin itself which is alleged. Even though the fee be conditional or determinable on a certain event, yet a seisin in fee may be alleged, without showing the commencement of the estate.[78]

To this rule, however, there is this exception: It is necessary to show the derivation of the fee, where, in the pleading, the seisin has already been alleged in another person, from whom the present party claims. In such case it must, of course, be shown how it passed from one of these persons to the other. Thus, in debt or covenant brought on an indenture of lease by the heir of the lessor, the plaintiff, having alleged that his ancestor was seized in fee and made the lease, must proceed to show how the fee passed to himself, viz. by descent.[79] So if, in trespass, the defendant plead that E. F., being seised in fee, demised to G. H., under whose command the defendant justifies the trespass on the land, giving color, and the plaintiff, in his replication, admits E. F.'s seisin, but sets up a subsequent title in himself to the same land, in fee simple, prior to the alleged demise, he must show the derivation of the fee from E. F. to himself, by conveyance antecedent to the lease under which G. H. claims.[80]

[76] See Doe v. Wright, 10 Adol. & E. 763; Ryan v. Clark, 14 Q. B. 65.

[77] Co. Litt. 303b; Scavage v. Hawkins, Cro. Car. 571. A general allegation of ownership is sufficient. Bragg v. City of Chicago, 73 Ill. 152; Buckl v, Cone, 25 Fla. 1, 17, 6 South. 160.

[78] Stephen, Pl. (Tyler's Ed.) 291; Doct. Pl. 287.

[79] Stephen, Pl. (Tyler's Ed.) 291; 21 Enc. Pl. & Prac. 728.

[80] Id. See, as to this exception, Cuthbertson v. Irving, 4 Hurl. & N. 742.

SAME—PARTICULAR ESTATES

277. In pleading a particular estate, its commencement must be shown, except

EXCEPTION—Where title is alleged only as inducement.

With respect to particular estates, the general rule is that the commencement of particular estates must be shown.[81] The meaning of this rule is that, when a party sets up in his own favor an estate for life, a term of years, or a tenancy at will, he must show the derivation of that title from its commencement—that is, from the last seisin in fee simple; and, if derived by alienation or conveyance, the substance and effect of such conveyances should be precisely set forth. The reason for the diversity between this and the rule as to estates in fee appears to be that, as an estate in fee simple may be and often is acquired by means consisting solely of matter of fact, a general allegation of seisin in fee simple is traversable; whereas particular estates, being always derived out of the fee simple, can regularly be created only by conveyance or by operation of law, and a general allegation of such an estate is not traversable, since it improperly blends law and fact. Hence, where title to particular estates is thus alleged, the time and manner of the derivation must be shown, in order that a traverse may be taken upon any particular point in the title.

To the rule that the commencement of a particular estate must be shown there is this exception, namely, that it need not be shown where title is alleged by way of inducement only. Thus, in an action of debt or covenant, brought on an indenture of lease by the executor or assignee of a lessor for a term of years, it is necessary, in the declaration, to state the title of the lessor in order to show the plaintiff's right to sue as assignee or executor; but, as the title is thus alleged only by way of inducement, the particular estate for years may be alleged in the lessor, without showing its commencement.[82]

[81] Co. Litt. 203b; Scilly v. Dally, 2 Salk. 562; Searl v. Bunlon, 2 Mod. 70; Johns v. Whitley, 3 Wils. 72; Hendy v. Stephenson, 10 East, 60; Pyster v. Hemling, Cro. Jac. 103; Shepheard's Case, Cro. Car. 190; Robinson v. Smith, 4 Mod. 346.

[82] Com. Dig. "Pleader," E 19, c. 43; Blockley v. Slater, 1 Lut. 120; Searl v Bunlon, 2 Mod. 70; Scilly v. Dally, 2 Salk. 562; Skevill v. Avery, Cro. Car. 138; Lodge v. Frye, Cro. Jac. 52,

SAME—TITLE BY INHERITANCE

278. Where a party claims by inheritance, he must, in general, show how he is heir; and if he claims by mediate, not immediate, descent, he must show the pedigree.

Thus, in pleading his title by inheritance, he must in general show how he is heir, viz. the seisin and death of the ancestor, after whose decease the title descended to the plaintiff as son and heir; and if he claim by mediate descent he must show the pedigree.[83]

SAME—TITLE BY ALIENATION OR CONVEYANCE

279. When a party claims title by conveyance or alienation, the nature of the conveyance or alienation must, in general, be stated.

In showing a title by conveyance, the nature of the conveyance should be stated, whether it be by devise, feoffment, etc.[84]

SAME—MANNER OF PLEADING CONVEYANCE

280. The nature of the conveyance or alienation should be stated according to its legal effect, rather than its form of words.

This rule depends upon the more general one, hereinafter considered, that "things are to be pleaded according to their legal effect or operation." As the doctrine is applicable here, it means only that, in pleading conveyances, they must be alleged according to the extent of the title which they actually pass; as, in pleading a conveyance for life, it must be alleged as a "demise" for life, or a conveyance in tail, with livery of seisin, as a "gift" in tail, etc. The form of the pleading must still be the same, whatever may be the wording of the conveyance, if the effect of the latter remains unchanged.[85]

[83] Dumsday v. Hughes, 3 Bos. & P. 453; Blackborough v. Davis, 12 Mod. 619. And see Heard v. Baskervile, Hob. 232; Day v. Chism, 10 Wheat. 449, 6 L. Ed. 363, Whittier, Cas. Com. Law Pl. p. 434.

[84] Com. Dig. "Pleader," E 23, E 24.

[85] Co. Litt. 9a.

SAME—WRITTEN CONVEYANCE

281. In pleading title by conveyance, the conveyance need not be alleged to have been by deed or other written instrument, except where a deed or writing was essential to the validity of such conveyance at common law.

EXCEPTIONS—(a) Title pleaded under a written lease for years.

(b) Demise by husband and wife.

At common law, a conveyance in fee, in tail, or for life, when accompanied by livery of seisin, could be made by parol only, and was therefore pleaded without the allegation of any charter or other writing; and this is still true though, by the statute of frauds, such conveyances must now be in writing.[86] On the other hand, a devise, which was not valid at common law, and was authorized only by the statutes 32 Hen. VIII, c. 1, and 34 Hen. VIII, c. 5, must be alleged to have been made in writing, which is the only form in which the statutes authorize it to be made.[87] So, if a conveyance by way of grant be pleaded, a deed must be alleged, for matters that "lie in grant" can pass by deed only.[88]

The first exception above noted is one which exists in practice, at least; and in making title under a lease for years, by indenture, it is usual to plead the indenture, though the lease was good, at common law, by parol, and need now be in writing only where it is for a term of more than three years, and then only by reason of the statute of frauds.[89] There is another excepted case in which it is not necessary to allege a deed, though the common law require one. In pleading a demise by husband and wife, it is not necessary to show that it was by deed, though both by the common law and by statute such a demise can be by deed only.[90]

[86] Stephen, Pl. (Tyler's Ed.) 295; Porter v. Gray, Cro. Eliz. 245; Lathbury v. Arnold, 1 Bing. 217.

[87] 1 Saund. 276a, note 2.

[88] Vin. Abr. tit. "Grants," G (a); Porter v. Gray, Cro. Eliz. 245; 1 Saund. 284, note 3.

[89] Stephen, Pl. (Tyler's Ed.) 295.

[90] 2 Saund. 180b; Wiscot's Case, 2 Coke, 61b; Turney v. Sturges, 1 Dyer, 91b; Bateman v. Allen, Cro. Eliz. 438; Childes v. Wescot, Cro. Eliz. 482.

SAME—WHERE A PARTY ALLEGES TITLE IN HIS ADVERSARY

282. It is not generally necessary to allege title in the opposing party more precisely than is sufficient to show a liability in the party charged, or to defeat his present claim.

Thus far we have been discussing the case of a party alleging title in himself or in some other under whose authority he pleads. It remains for us to consider the case of a party's alleging title in his adversary. The rule on this subject is that it is not necessary to allege title more precisely than is sufficient to show a liability in the party charged, or to defeat his present claim. Except as far as these objects require, a party cannot be compelled to show the precise estate his adversary holds, even in a case where, if the same person were pleading his own title, a full and complete statement would be necessary. The reason of the difference is that a party must be presumed to be ignorant of the particulars of his adversary's title, though he is bound to know his own.[91]

SAME—WHAT IS A SUFFICIENT ALLEGATION OF LIABILITY

283. To show a liability in the party charged, it is generally sufficient to allege a title of possession.

As in the case where a party pleads his own title or that of another through whom he claims, and that title need not be fully and precisely stated, it is also generally sufficient, where the opposite party is to be charged with liability, to allege merely a title of possession in such party. The same distinctions as to the nature of the interest or right, however, are still to be observed; and therefore, if the interest is by way of reversion or remainder, and cannot be sustained by proof of some present interest in chattels or the actual possession of land, this form of pleading title is inapplicable. There are cases in which, to charge a party with mere possession, would not be sufficient to show his liability. Thus, in declaring against a person in debt for rent, as assignee of a term of years, it would not be sufficient to show that he was possessed, but it must be shown that he was

[91] Rider v. Smith, 3 Term R. 766; Derisley v. Custance, 4 Term R. 77; Attorney General v. Meller, Hardr. 459. And see Blake v. Foster, 8 Term R. 487; Denham v. Stephenson, 1 Salk. 355.

possessed as assignee of the term. Where a title of possession is thus inapplicable or insufficient, and some other or superior title must be shown, it is still unnecessary to allege the title of an adversary with the same precision and accuracy as where the party states his own,[93] the requirement being only that the allegation shall be sufficient to show the liability charged. Therefore, though, as we have seen, it is the rule, with respect to a man's own title, that the commencement of particular estates should be shown, unless alleged by way of inducement, yet, in pleading the title of an adversary, it seems that this is, in general, not necessary.[94] So, in cases where it happens to be requisite to show whence the adversary derived his title, this may be done with less precision than where a man alleges his own. And, in general, it is sufficient to plead such title by a que estate; that is, to allege that the opposite party has the same estate, or that the same estate is vested in him, as has been precedently laid in some other person, without showing in what manner the estate passed from the one to the other.[96] Thus, in debt, where the defendant is charged for rent, as assignee of the term, after several mesne assignments, it is sufficient, after stating the original demise, to allege that, "after making the said indenture, and during the term thereby granted, to wit, on the ——— day of ———, in the year ———, at ———, all the estate and interest of the said E. F. [the original lessee] of and in the said demised premises, by assignment, came to and vested in the said C. D."; without further showing the nature of the mesne assignments.[95] But, if the case be reversed, that is, if the plaintiff, claiming as assignee of the reversion, sue the lessee for rent, he must precisely show the conveyances, or other media of title, by which he became entitled to the reversion; and to say, generally, that it came by assignment, will not, in this case, be sufficient, without circumstantially alleging, all the mesne assignments.[96] Upon the same principle, if title be laid in an adversary by descent, as, for example, where an action of debt is brought against an heir on the bond of his ancestor, it is sufficient to charge him as heir, without showing how he is heir, viz. as son, or otherwise,[97] but if a party entitle himself by inheritance, we have seen that the mode of descent must be alleged.

[93] Com. Dig. "Pleader," c. 42.
[94] Blake v. Foster, 8 Term R. 487.
[95] Attorney General v. Meller, Hardr. 459; Com. Dig. "Pleader," E. 23, E, 24; Co. Litt. 121a; 1 Saund. 112, note 1; Duke of Newcastle v. Wright, 1 Lev. 190; Derisley v. Custance, 4 Term R. 77.
[96] 1 Saund., supra; Attorney General v. Meller, supra.
[97] 1 Saund., supra; Pitt v. Russel, 3 Lev. 19.
[97] Denham v. Stephenson, 1 Salk. 355.

SAME—PROOF OF TITLE AS ALLEGED

284. Title is ordinarily of the substance of the issue, and must be strictly proved.

The manner of showing title, both where it is laid in the party himself, or the person whose authority he pleads, and where it is laid in his adversary, having been now considered, it may next be observed that the title so shown must, in general, when issue is taken upon it, be strictly proved. With respect to the allegations of place, time, quantity, and value, it has been seen that, when issue is taken upon them, they, in most cases, do not require to be proved as laid; at least, if laid under a videlicet. But with respect to title, it is, ordinarily, of the substance of the issue, and, therefore, requires to be maintained accurately by the proof. Thus, in an action on the case, the plaintiff alleged in his declaration that he demised a house to the defendant for seven years, and that, during the term, the defendant so negligently kept his fire that the house was burned down. And the defendant having pleaded non demisit modo et forma, it appeared in evidence that the plaintiff had demised to the defendant several tenements, of which the house in question was one; but that, with respect to this house, it was, by an exception in the lease, demised at will only. The court held that though the plaintiff might have declared against the defendant as tenant at will only, and the action would have lain, yet, having stated a demise for seven years, the proof of a lease at will was a variance, and that in substance, not in form only; and, on the ground of such variance, judgment was given for the defendant.[98]

SAME—ESTOPPEL OF ADVERSE PARTY

285. Where the opposite party is estopped from denying a title none need be shown.

The rule which requires that title should be shown having been now explained, it will be proper to notice an exception to which it is subject. This exception is that no title need be shown where the opposite party is estopped from denying the title. Thus, in an action for goods sold and delivered, it is unnecessary, in addition to the allegation that the plaintiff sold and delivered them to the defendant, to state that they were the goods of the plaintiff; for a

[98] See Cudlip v. Rundle, Carth. 202. See Bristow v. Wright, 2 Doug. 665.

buyer who has accepted and enjoyed the goods cannot dispute the title of the seller. So, in debt or covenant brought by the lessor against the lessee on the covenants of the lease, the plaintiff need allege no title to the premises demised, because a tenant is estopped from denying his landlord's title. On the other hand, however, a tenant is not bound to admit title to any extent greater than might authorize the lease; and therefore, if the action be brought, not by the lessor himself, but by his heir, executor, or other representative or assignee, the title of the former must be alleged, in order to show that the reversion is now legally vested in the plaintiff in the character in which he sues. Thus, if he sue as heir, he must allege that the lessor was seised in fee, for the tenant is not bound to admit that he was seised in fee; and, unless he was so, the plaintiff cannot claim as heir.[99]

SHOWING AS TO AUTHORITY

286. In general, where a defendant justifies under a writ, warrant, precept, or other authority, it must be particularly set forth in his pleading; and in such case he should also show that such authority has been substantially pursued.

EXCEPTION—Where an authority may be verbal and general, it may be pleaded in general terms.

This is an instance, under the general rule requiring certainty in the pleadings, where a greater degree is required in the plea than in the declaration. Where, in an action of trespass, the defendant seeks to plead a justification under such an authority as is mentioned above, he must set it forth particularly in his pleading, and it is not sufficient to allege generally that he committed the act complained of by virtue of a writ, warrant, or precept delivered to him.[1] It must not only be specifically described, but the defendant, in order to render his justification complete, should further aver that such authority was substantially pursued. The principle of the rule is that as a plea in bar, to be effective, must answer all that it assumes to answer, so all material allegations which make up the answer it contains must be fully and particularly stated, or the plea will be defective on demurrer.[2] In all cases, therefore, where the defendant justifies under judicial process, he must set forth the facts in detail, though there

[99] See Cuthbertson v. Irving, 4 Hurl. & N. 742; Smith v. Scott, 6 C. B. (N. S.) 771.

[1] Co. Litt. 283a, 303b; Com. Dig. "Pleader," E, 17; Lamb v. Mills, 4 Mod. 377; Collett v. Lord Keith, 2 East, 260; Rich v. Woolley, 7 Bing. 651.

[2] See Lamb v. Mills, supra.

are important distinctions as to the degree of particularity required by the rules of pleading in different cases. These may be stated as follows: (1) It is unnecessary for any person justifying under judicial process to set forth the cause of action in the original suit in which such process issued.[3] (2) If the justification is by an officer executing a writ, he is required to plead such writ only, and not the judgment on which it was founded;[4] but if such justification is by any one except such officer, even a party to the action, the judgment must be set forth as well.[5] (3) Where an officer thus justifies, he must show that the writ was duly returned, if a return is legally necessary.[6] (4) When it is necessary, for the purposes of a justification, to plead the judgment of a court of record, this may be done without setting forth any of the previous proceedings in the suit in which such judgment was rendered.[7] (5) When the justification is founded on process issuing out of an inferior court or a court of foreign jurisdiction, the nature and extent of the jurisdiction of such court should be shown, as well as that the cause of action arose within it.[8] In general, in pleading the judgments of inferior courts, the previous proceedings are stated to some extent, though they may be set forth in a concise and summary manner.

Cognizance in Replevin

An exception to the general rule exists, however, where an authority may be constituted verbally and generally, and it is allowable to plead it in general terms. An instance of this is the case of the entry of a cognizance in an action of replevin, where the defendant, admitting the taking of the goods, may justify simply as an officer, without alleging any warrant for the taking.[9]

[3] Rowland v. Veale, 1 Cowp. 18; Belk v. Broadbent, 3 Term R. 183.

[4] See Andrews v. Marris, 1 Q. B. 8.

[5] Britton v. Cole, Carth. 443; Turner v. Felgate, 1 Lev. 95. And see Morse v. James, Willes, 122.

[6] See Middleton v. Price, 2 Strange, 1184; Cheasley v. Barnes, 10 East, 73; Shorland v. Govett, 5 Barn. & C. 485.

[7] See 9 Went. Pl. 22, 53, 120, 351.

[8] Otherwise if the justification is founded upon the process of a court of record. See Collett v. Lord Keith, 2 East, 274; Moravia v. Sloper, Willes, 30.

[9] Mathews v. Cary, 3 Mod. 138.

PROFERT OF DEEDS

287. In all pleadings where a deed is alleged under which the party claims or justifies, profert of such deed must be made, or the omission excused.

288. The rule is not applicable unless the deed is the foundation of the action or defense, nor where compliance with it is impossible.

If either plaintiff or defendant alleges an instrument under seal,[10] unless in the case of letters testamentary or of administration,[11] and founds his claim or defense directly upon it, he must generally make a statement or profert in his pleading that he brings it into court to be shown to the court and his adversary. The import of the statement is that the party has the deed ready to give the opponent oyer, or an inspection of it, if required.[12] If the instrument was lost or otherwise beyond the power of the party to produce it, an excuse for the omission was necessary, and the party was not required to produce it.[13]

[10] Will's Gould, Pl. (5th Ed.) 411; Mason v. Buckmaster, Breese (1 Ill.) 27; Magee v. Fisher, 8 Ala. 320. See Gatton v. Dimmitt, 27 Ill. 400; Chicago Bldg. & Mfg. Co. v. Talbotton Creamery & Manufacturing Co., 106 Ga. 84, 31 S. E. 809, Sunderland, Cas. Com. Law Pl. p. 310; Lee v. Follensby, 80 Vt. 182, 67 Atl. 197, Sunderland, Cas. Com. Law Pl. p. 312. No right to have oyer of deed referred to in plaintiff's declaration merely by way of inducement. Langhorne v. Richmond Ry. Co., 91 Va. 369, 22 S. E. 159.

[11] Brown v. Jones, 10 Gill & J. (Md.) 334; Thatcher v. Lyman, 5 Mass. 260; Judge of Probate v. Merrill, 6 N. H. 256. The rule requiring profert was extended to letters testamentary and of administration in actions by executors and administrators. 1 Chit. Pl. 365; Will's Gould, Pl. c. 8. The effect of profert was to enable the opposite party to demand oyer, or hearing of the instrument, before he was required to plead.

[12] Austin v. Dills, 1 Tyler (Vt.) 308; Patten v. Heustis, 26 N. J. Law, 293; Bender v. Sampson, 11 Mass. 42. And see Powers v. Ware, 2 Pick. (Mass.) 451; Lester v. People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; Brooke County Court v. United States Fidelity & Guaranty Co., 57 W. Va. 504, 105 S. E. 787 (profert does not introduce it into record); Pleading, 31 Cyc. 553.

[13] See Will's Gould, Pl. (5th Ed.) 415; Barbour's Adm'rs v. Archer, 3 Bibb (Ky.) 8; Powers v. Ware, 2 Pick. (Mass.) 451; Paddock v. Higgins, 2 Root (Conn.) 316, 482. So if pleaded by a stranger to the deed. Birney v. Haim, 2 Litt. (Ky.) 262. This rule applies only at common law, being one relating to purely formal allegations in pleading. An inspection of written instruments upon which an action is founded, or which are in any way material to

Thus, in an action of debt on a bond, the plaintiff must make profert of the bond, and if the defendant in an action were to set up a release under seal he would have to make profert of it.[14] This in ancient times was done by actually producing the deed in court at the time of the oral allegations, but it is now done by an allegation in the declaration or plea, as the case may be, of its production in court,—thus: "By his certain writing obligatory, sealed with his seal, and now shown to the court," etc.[15] A failure to comply with this rule renders the declaration or plea demurrable.

DEMAND OF OYER

289. The demand of oyer is the assertion of the right of a party to hear read (oyer), or, in modern practice, to inspect, a deed of which profert is made by the other party in his pleading.

If profert is made, the other party has a right to demand oyer; that is, the right to have it read, or, in modern practice, to inspect it, before the trial.[16] The opposite party is required to afford this inspection, either by permitting an inspection of the instrument itself, or by showing or serving a copy.

When a deed is pleaded with profert, it is supposed to remain in court during all the term in which it is pleaded, but no longer, unless the opposite party during that term plead in denial of the deed, in which case it is supposed to remain in court till the action is determined. Hence, it is a rule that oyer cannot be demanded in a subsequent term to that in which profert is made.[17]

A party having a right to demand oyer is yet not obliged, in all cases, to exercise that right; nor is he obliged, in all cases, after demanding it, to notice it in the pleading he afterwards files or delivers. Sometimes, however, he is obliged to do both, namely, where he has occasion to found his answer upon any matter contained in the deed of which profert is made, and not set forth by his adversary. In these cases the only admissible method of making such matter appear to the court is to demand oyer, and, from the copy given, set forth the whole deed verbatim in his pleading.[18]

In pleading performance, for example, of the condition of a bond, where, as is generally the case, the plaintiff has stated in his declaration nothing but the bond itself, without the condition, it is necessary for the defendant to demand oyer of the condition and set it forth.[19] And in pleading performance of matters contained in a collateral instrument, it is necessary not only to do this but also to set forth and make profert of the whole substance of the collateral instrument; for otherwise it will not appear that the instrument did not stipulate for the performance of negative or disjunctive matters;[20] and, in that case, the general plea of performance of the matters therein contained would, as above shown, be improper.

it, is provided for by special provisions in all the codes. Judge of Probate v. Merrill, 6 N. H. 256.

[14] "For it is to be observed that the forms of pleading do not, in general, require that the whole of any instrument which there is occasion to allege should be set forth. So much only is stated as is material to the purpose, 'The other party, however, may reasonably desire to hear the whole; and this either for the purpose of enabling him to ascertain the genuineness of the alleged deed, or of founding on some part of its contents not set forth by the adverse pleader, some matter of answer. He is therefore allowed this privilege of hearing the deed read verbatim." Stephen, Pl. (Tyler's Ed.) 100.

[15] That setting out an instrument in full is a sufficient profert, see Regents of the University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138.

[16] Judge of Probate v. Merrill, 6 N. H. 256; Rand v. Rand, 4 N. H. 278. Right to crave oyer of papers mentioned in pleading applies only to specialties and letters of probate and administration, not to other writings, and only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed. Smith v. Wolsiefer, 119 Va. 247, 89 S. E. 115.

[17] Stephen, Pl. (Tyler's Ed.) 102. According to the settled common-law rule of practice in force and effect in this state, the same not having been abrogated or altered by statute, oyer of a bond declared on cannot be craved after the first term succeeding the final proceeding at rules, or after defendant has pleaded, or a rule to plead has expired, as thereafter the bond presumably is not in court. Brooke County Court v. United States Fidelity & Guaranty Co., 87 W. Va. 504, 105 S. E. 787. Oyer must precede defensive matter, whether it be by plea or demurrer. Id.

[18] Stephen, Pl. (Tyler's Ed.) 102, 103; Stibbs v. Clough, 1 Strange, 227. Where declaration contains profert of note sued on, and oyer asked by defendant is granted, defendant may demur or plead at his option, treating note as incorporated in declaration. Waterhouse v. Sterchi Bros. Furniture Co., 139 Tenn. 117, 201 S. W. 150. Oyer makes instrument part of preceding pleading. National Council of Knights and Ladies of Security v. Hibernian Banking Ass'n, 137 Ill. App. 175; State, to Use of Kelley, v. Wilson, 107 Md. 129, 68 Atl. 609, 126 Am. St. Rep. 379; Riley v. Yost, 58 W. Va. 213, 52 S. E. 40, 1 L. R. A. (N. S.) 777 (profert alone does not make writing part of declaration).

[19] 2 Saund. 410, note 2.

[20] See Earl of Kerry v. Baxter, 4 East, 340.

Demand of Oyer, and Setting Forth Deed in Plea

(Plea to Declaration.)

(Title of court and cause.)

And the said C. D., defendant in the above-mentioned action, by X. Y., his attorney, comes and defends the wrong and injury when, etc., and craves oyer of the said writing obligatory, and it is read to him, etc. He also craves oyer of the condition of the said writing obligatory, and it is read to him in these words: "Whereas, (here the condition of the bond, which shall be supposed to be for payment of one hundred dollars on a certain day, is set forth verbatim); which, being read and heard, the defendant says that the plaintiff ought not to have or maintain his aforesaid action against him, because he says that he, the said defendant, on the said ——— day of ———, in the year aforesaid in the said writing obligatory mentioned, paid to the plaintiff the said sum of one hundred dollars in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition, to wit, at ——— aforesaid, in the county aforesaid. And this the defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action against him.

WRITINGS PLEADED ACCORDING TO LEGAL EFFECT

290. Contracts and conveyances are to be pleaded according to their legal effect or operation. As an instrument or other matter alleged in pleading must principally and ultimately be considered with reference to its effect in law, it should therefore be stated according to its legal effect or operation and not according to its terms.

The pleader is ordinarily allowed to set up the instrument in its very words, if he prefers not to construe its legal effect.

Contracts and conveyances are to be pleaded according to their legal effect or operation.[21] The meaning of the rule is that, in stating an instrument or other matter in pleading, it should be set forth, not according to its terms or its form, but according to its effect in law; and the reason seems to be that it is under the latter aspect that it must principally and ultimately be considered, and therefore to plead it in terms or form only is an indirect and circuitous method of allegation. Thus, if a joint tenant conveys to his companion by the words "gives," "grants," etc., his estate in the lands holden in jointure, this, though in its terms a "grant," is not properly such in operation of law, but amounts to that species of conveyance called a "release." It should therefore be pleaded, not that he "granted," etc., but that he "released," etc.[22] So, if a tenant for life grant his estate to him in reversion, this is, in effect, a surrender, and must be pleaded as such, and not as a grant.[23] So, where the plea stated that A. was entitled to an equity of redemption, and, subject thereto, that B. was seised in fee, and that they, by lease and re-lease, granted, etc., the premises, excepting and reserving to A. and his heirs, etc., a liberty of hunting, etc., it was held upon general demurrer, and afterwards upon writ of error, that, as A. had no legal interest in the land, there could be no reservation to him; that the plea, therefore, alleging the right, though in terms of the deed, by way of reservation, was bad; and that if, as was contended in argument, the deed would operate as a grant of the right, the plea should have been so pleaded, and should have alleged a grant, and not a reservation.[24]

While the party must state correctly the contract or instrument on which he relies, and, if the evidence differ from the statement, the whole foundation of his action will fail, he is not compelled to follow the precise form of words in either, and it suffices if he alleges their true legal effect or operation. The rule is thus one of utility, since it enables a party to state his matter briefly and with precision, without setting out the terms of contracts or instruments which often, even in modern conveyancing, reach an interminable length, and to support his allegations by the offer of the contract or instrument itself at the trial. A deed may often be thus pleaded without using a word which it contains, except the names of the parties, the dates, and the sums.[25] In all cases, care must be taken that the legal effect

[21] Bac. Abr. "Pleas," etc., I 7; Com. Dig. "Pleader," C 37; 2 Saund. 97, 97b, note 2; Barker v. Lade, 4 Mod. 150; Moore v. Earl of Plymouth, 3 Barn. & Ald. 66; Stroud v. Lady Gerrard, 1 Salk. 8; Howell v. Richards, 11 East, 633; Hosley v. Black, 28 N. Y. 438; Lent v. Padelford, 10 Mass. 230, 6 Am. Dec. 119; Grannis v. Hooker, 29 Wis. 65; President, etc., of Commercial Bank v. French, 21 Pick. (Mass.) 489, 32 Am. Dec. 280; Andrews v. Williams, 11 Conn. 326; Keyes v. Dearborn, 12 N. H. 52; Crittenden v. French, 21 Ill. 598; Archer v. Claflin, 31 Ill. 317; Curry v. People, 54 Ill. 263; Riley v. Yost, 58 W. Va. 218, 52 S. E. 40, 1 L. R. A. (N. S.) 777; Brown v. Cook, 77 W. Va. 356, 87 S. E. 454, L. R. A. 1916D, 220.

[22] 2 Saund. 97; Barker v. Lade, 4 Mod. 150, 151.

[23] Barker v. Lade, 4 Mod. 151.

[24] Moore v. Earl of Plymouth, 3 Barn. & Ald. 66.

[25] Waugh v. Bussell, 1 Marsh. 216.

of the contract or instrument is accurately stated, or the result will be the same as if the statement of either in detail is incorrect; that is, a variance.

The rule in question is, in its terms, often confined to deeds and conveyances. It extends, however, to all instruments in writing, and contracts, written or verbal; and, indeed, it may be said, generally, to all matters or transactions whatever which a party may have occasion to allege in pleading, and in which the form is distinguishable from the legal effect.[26] Where, however, a written instrument is set out in hæc verba, it will be sufficient, and the pleader need not declare further its legal effect, as the court will construe it for him. If he does aver its legal effect erroneously, the averment will be rejected as surplusage.[27]

It is a technical rule that common-law pleading cannot be done by exhibits. In the case of Pearsons v. Lee,[28] the Illinois court said: "To the declaration is annexed a copy of the agreement, and if the court were permitted to look to the copy, which it cannot see with legal eyes, because it has been constantly decided by this court to form no part of the declaration, it might perceive that the agreement is signed by the defendant only." The rule that a separate writing cannot be made a part of the pleading, by attaching it thereto and referring to it therein, is changed in code pleading.

[26] Stroud v. Lady Gerrard, 1 Salk. 8. Pleading facts according to their legal effect is sufficient. Dobbins v. Delaware, L. & W. R. Co., 177 App. Div. 132, 163 N. Y. Supp. 849; United States Printing & Lithograph Co. v. Powers, 183 App. Div. 513, 170 N. Y. Supp. 314.

[27] Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; North v. Kizer, 72 Ill. 172; Binz v. Tyler, 70 Ill. 248; Smith v. Webb, 16 Ill. 105; Waller v. Village of River Forest, 259 Ill. 223, 230, 102 N. E. 290; Bean v. Ayres, 67 Me. 482. The legal effect of writings attached to the pleadings is for the court, and cannot be controlled by the averments of the party. Robert Grace Contracting Co. v. Norfolk & W. Ry. Co., 259 Pa. 241, 102 Atl. 956.

[28] 1 Scam. (Ill.) 193. An instrument attached to, but not set out in, a declaration is no part thereof. Charles H. Thompson Co. v. Burns, 199 Ill. App. 418. Copy of note not part of declaration. McFadden v. Deck, 193 Ill. App. 178; Sterenberg v. Beach, 219 Ill. App. 68; Milligan v. Keyser, 52 Fla. 331, 42 South. 367; Gulf, C. & S. F. Ry. Co. v. Cities Service Co. (D. C.) 270 Fed. 994.

DAMAGES—GENERAL AND SPECIAL

291. When the object of an action is to recover damages, an essential allegation of the declaration is that the injury is to the damage of the plaintiff, and the amount of that damage must be specified. The recovery cannot, in general, exceed the amount thus stated, though it may be less.

In those cases where damages are the principal object of the action, the amount laid in the declaration should be sufficient to cover the real demand, as the plaintiff cannot generally recover a greater amount than he has declared for and laid in the conclusion of his declaration.[29] If a verdict should be for a greater amount, the surplus must be remitted before judgment entered,[30] but no inconvenience will arise if the amount claimed is greater than that proved, as the jury may find a less sum; and it is to be presumed, after verdict, that the amount of damages ascertained by them was assessed according to the proof.[31] If the declaration, however, expressly avers that the plaintiff has sustained damages from a cause occurring subsequent to the commencement of the action, or previous to the plaintiff having any right of action, and the jury gives entire damages, judgment will be arrested.[32]

At common law, no damages were laid in real actions, since the object of the suit was the recovery, not of damages, but of the land withheld. There may be other instances where the allegation of damages is unnecessary; as in scire facias upon a record, which is merely an action to obtain execution upon an ascertained right of record; and in a penal action, at the suit of a common informer, where the plaintiff's right to the penalty did not accrue until the bringing of the suit, and no damage could therefore have been sustained.

[29] Tidd, Prac. (9th Ed.) 896; McWhorter v. Sayre, 2 Stew. (Ala.) 225; Treat v. Barber, 7 Conn. 274; Morton v. McClure, 22 Ill. 257; Fish v. Dodge, 4 Denio (N. Y.) 311, 47 Am. Dec. 254; Dennison v. Leech, 9 Pa. 164.

[30] Tennant's Ex'r v. Gray, 5 Munf. (Va.) 494; Harris v. Jaffray, 3 Har. & J. (Md.) 546; Holt v. Molony, 2 N. H. 322; Grist v. Hodges, 14 N. C. 203.

[31] Van Rensselaer's Ex'rs v. Platner's Ex'rs, 2 Johns. Cas. (N. Y.) 18.

[32] See Gordon v. Kennedy, 2 Bin. (Pa.) 287; Wilson's Adm'r v. Bowens, 2 T. B. Mon. (Ky.) 87; Mayne, Dam. 33, 38; Warner v. Bacon, 8 Gray (Mass.) 406, 69 Am. Dec. 253; Pierce v. Woodward, 6 Pick. (Mass.) 206.

292. General damages are such as may be regarded as the direct, natural, or probable result of the wrong complained of, and may be stated in a general manner.

293. Special damages are those which the law does not regard as the necessary consequences of the wrongful act, and must be set forth specially and circumstantially, or evidence of them will not be received on the trial.

The force and effect of the ancient rules of pleading in modern times is nowhere better illustrated than by this very rule as to damages and the manner of stating them, and perhaps no better commentary upon the importance of a thorough understanding of those rules can be found. We have above seen that in every personal or mixed action the declaration should allege some damage, and this rule has never been changed, though its force in cases where damages are merely nominal seems rather doubtful. The method of applying the rule is as applicable to-day as at any former time, and the establishment of code practice has made no difference; the distinction above noted being always observed, as the pleader will find to his cost if it be disregarded. This distinction is an important one, as it arbitrarily controls the manner in which the claim for damages must be stated.

When the damage claimed is the necessary and proximate consequence of the act complained of, the law presumes it to have resulted from that act, and it is sufficient to describe it in general terms, for the reason that the opposite party will not be unduly taken by surprise.[33] But, when the plaintiff suffers some peculiar or unusual loss it is essential that the resulting damage, called "special damages," be shown with particularity.[34] Such damages are either superadded to general damages arising from an act injurious in itself, as when some particular loss results from the utterance of slanderous words actionable in themselves, or such as arise from an act indifferent, and not actionable in itself, but injurious only in its consequences, as when

[33] Thus, when a person is slandered in his trade, the law infers that an injury resulted to him, without its being particularly alleged. See Hutchinson v. Granger, 13 Vt. 386; West Chicago St. R. Co. v. Levy, 182 Ill. 525, 55 N. E. 554 (general damages from injury to the back, spine, and brain include atrophy of the optic nerve).

[34] See Jacksonville Electric Co. v. Batchis, 54 Fla. 192, 44 South. 933, Whittier, Cas. Com. Law Pl. p. 410 (loss of earnings); Adams v. Barry, 10 Gray (Mass.) 361; Willey v. Paul, 49 N. H. 307; Hunter v. Stewart, 47 Me. 419; Gilbert v. Kennedy, 22 Mich. 117; Olmstead v. Burke, 25 Ill. 86; Miles v. Weston, 60 Ill. 361; Adams v. Gardner, 78 Ill. 568; Woodworth v. Woodburn, 20 Ill. 184; Mattingly v. Darwin, 23 Ill. 618.

words become actionable only by reason of the special damage ensuing.[35]

[35] Westwood v. Cowne, 1 Starkie, 172; Beach v. Ranney, 2 Hill (N. Y.) 309; Count Joannes v. Burt, 6 Allen (Mass.) 236, 83 Am. Dec. 625; Cook v. Cook, 100 Mass. 194; Swain & Son v. Chicago, B. & Q. R. Co., 252 Ill. 622, 97 N. E. 247, 38 L. R. A. (N. S.) 763 (gist of private action for public nuisance is special damage different in kind from that of general public).

CHAPTER XIX

GENERAL RULES AS TO MANNER OF PLEADING

294. Statements to be Positive.
295. Matters of Evidence and Ultimate Facts.
296. Conclusions of Law and Ultimate Facts.
297-298. Certainty in General.
299-300. When General Mode of Pleading Proper.
301-302. Where General Pleading is Sufficient.
303-304. What Particularity is Generally Required.
305. Facts in Knowledge of Adversary.
306. Inducement or Aggravation.
307-308. Acts Regulated by Statute.
309. What May be Omitted—Matters Judicially Noticed.
310-311. Matters in Anticipation.
312-313. Matters Implied.
314-315. Matters Presumed.
316. Surplusage.
317. Descriptive Averments.
318. Repugnancy.
319-320. Ambiguity or Doubt.
321. Pleadings in Alternative.
322-323. Duplicity in General.
324. Inducement.
325. Consequences of Duplicity.
326. Pleadings to be True.
327. Conformance to Customary Forms.

The rules of pleading may be considered under three main heads: First the facts necessary to be stated; second, by what kind of pleading to be stated; and third, the form and manner of statement. The facts which constitute the cause of action or ground of defense should be stated logically and in their natural order, and with certainty, precision, brevity, and positiveness, avoiding indirect argumentative statements and conclusions of fact or law, on the one hand, and evidential matters and superfluous detail, on the other. Many of the rules evolved in common-law pleading were designed to produce definite and material issues, such as the rules that evidence and conclusions of law should not be pleaded. Such also are the rules that the plaintiff should not anticipate and rebut the defendant's supposed defenses, which are not part of his case (as was done in the charging part of a bill in equity); that facts should be stated positively and directly, not by way of recital, hypothetically, argumentatively, or in the alternative; that facts of which the court will take judicial notice, including matters of law, history, recognized facts of science, and governmental organization, should not be pleaded.

STATEMENTS TO BE POSITIVE

294. Pleadings must be positive in their form, and not by way of recital. The matter of claim or defense must be stated in direct and positive terms, in order that it may be directly and distinctly traversed.

The meaning and reason of this rule would seem sufficiently apparent from its mere statement. Its province is to restrict the parties to such forms of averment as directly assert the facts upon which they rely, in order that the adversary may be able to raise an issue admitting of decision upon his denial or traverse. An act should not therefore be stated under a "whereas" or a "wherefore," but the pleading should allege its commission directly and positively.[1] If, for instance, a declaration in trespass for assault and battery make the charge in the following form of expression, "And thereupon the said A. B., by ———, his attorney, complains, for that whereas the said C. D. heretofore, to wit," etc., "made an assault," etc., instead of "for that the said C. D. heretofore, to wit," etc., "made an assault," etc., this is bad, for nothing is positively affirmed. The fault is bad only on special demurrer, as one of form;[2] and, further than this, it may now generally be remedied by amendment. It was formerly considered a defect in substance.

[1] Spiker v. Bohrer, 37 W. Va. 258, 16 S. E. 575; Battrell v. Ohio River Ry. Co., 34 W. Va. 232, 12 S. E. 699, 11 L. R. A. 290; Gould v. Coal & Coke R. Co., 74 W. Va. 8, 81 S. E. 529; Brown v. Thurlow, 16 Mees. & W. 36, Whittier, Cas. Com. Law Pl. p. 515. Bac. Abr. "Pleas," B 4; Sherland v. Heaton, 2 Bulst. 214; Wettenhall v. Sherwin, 2 Lev. 206; Hore v. Chapman, 2 Salk. 636; Dunstall v. Dunstall, 2 Show. 27; Gourney v. Fletcher, Id. 295; Dobbs v. Edmunds, 2 Ld. Raym. 1413; Wilder v. Handy, 2 Strange, 1151; Marshall v. Riggs, 2 Strange, 1162. Matter of inducement may be so alleged. In assumpsit, the promise is usually stated by way of recital, though the gist of the action. Sheppard v. Peabody Ins. Co., 21 W. Va. 368, 377; Burton v. Hansford, 10 W. Va. 470, 27 Am. Rep. 571. An allegation that plaintiff "claimed" that the organizers of the corporation made a present of the stock to one of the subscribers is not an allegation of a fact. Ritzwoller v. Lurie, 176 App. Div. 100, 162 N. Y. Supp. 475. Allegations must be positive in common-law pleading, not on information and belief. State ex rel. Ballard v. Greene, 87 Vt. 94, 88 Atl. 515.

[2] Hore v. Chapman, 2 Salk. 636; Brown v. Thurlow, 16 Mees. & W. 36, Whittier, Cas. Com. Law Pl. pp. 515, 519, note. But see Coffin v. Coffin, 2 Mass. 358; Gould v. Coal & Coke R. Co., 74 W. Va. 8, 81 S. E. 529.

MATTERS OF EVIDENCE AND ULTIMATE FACTS

295. The ultimate or operative facts should be pleaded, not the probative or evidentiary matter.

Ultimate Facts

The process of differentiating, in the confused history of a case, the ultimate or operative facts from the probative and collateral circumstances, is the first step both in the diagnosis of the case, to discover a right of action, and also for the intelligent statement of the cause of action in the pleadings. Only the essential facts should be alleged, which form the basis of the claim for relief. This excludes the details and particulars of evidence by which these fundamental points are to be established. Some observance of this distinction is necessary if the pleadings are to make the issues clear, simple, and certain. The subordinate facts, which make up the probative matter, the casual details and dramatic circumstances, may vary indefinitely, but the "material" or "issuable" facts cannot fail without destroying the legal result contended for.

It is a well-settled rule of pleading that it is never necessary to set forth mere matter of evidence.[3] In other words, although a particular fact may be of the essence of a party's cause of action or defense, so that a statement of it is indispensable, it is not necessary, in alleging it, to state such circumstances as merely tend to prove the truth of the fact.

The reason of this rule is evident, if we revert to the general object which all the rules, tending to certainty, contemplate, that is, the attainment of a certain issue. This implies, as has been shown, a development of the question in controversy in a specific shape; but, so that that object be attained, there is, in general, no necessity for further minuteness in the pleading; and, therefore, those subordinate facts, which go to make up the evidence by which the affirmative or negative of the issue is to be established, do not require to be alleged, and may be brought forward, for the first time, at the trial, when the issue comes to be decided. Thus, for example, if we suppose an issue joined, whether wheat cut was afterwards suffered to lie on the ground a reasonable time or not, there would have been sufficient certainty, without showing on the pleadings any of those circumstances, such as the number of days, the state of the weather, etc., which ought to enter into the consideration of that question. These circumstances, being matter of evidence only, ought to be proved before the jury, but need not appear on the record.[4]

The ultimate or operative facts are the points which the party needs to establish to win his case.[5] They must be facts, definite and concrete enough to direct attention to the basis and ground of his legal contentions. But at the same time they must reduce the case to its essentials. For instance, if the pleader wishes to allege that the railroad contracted to carry the plaintiff as a passenger on its train with his baggage, he should not go into a historical narrative of how the defendant went to the window and the agent sold the plaintiff a ticket and who checked his trunk. If the pleader wishes to allege that a certain deed was not recorded, he should not allege that he searched in the proper office in vain and failed to find the record, as this would make an immaterial issue. If the plaintiff wishes to set up that he is the owner of certain land, he should not set forth the links in his chain of title, as this is evidentiary matter.

That the defendant signed and delivered a contract in writing is an allegation of the operative facts in executing the contract. The

[3] Dowman's Case, 9 Coke, 9b; Eaton v. Southby, Willes, 131; Jermy v. Jenny, T. Raym. 8; Groenvelt v. Burnell, Carth. 491; Baynes v. Brewster, 1 Gale & D. 674; Williams v. Wilcox, 8 Adol. & El. 331; Watriss v. Pierce, 36 N. H. 232, and cases cited; Smith v. Wiggin, 51 N. H. 156; Church v. Gilman, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82; Fidler v. Delavan, 20 Wend. (N. Y.) 57; State ex rel. Anderson v. Leonard, 6 Blackf. (Ind.) 173; Hartman v. Keystone Ins. Co., 21 Pa. 466. But see Croft v. Rains, 10 Tex. 520, as to a declaration otherwise good. The rule in consideration is not noticed in equity pleading, strictly speaking, it being there often essential that the facts which are the subject of the action be stated in detail. Story, Eq. Pl. (9th Ed.) 265a, note 1. But in code pleading it is fully recognized, though not expressly prescribed; and, as the codes retain but one form of action for both legal and equitable remedies, the application of the rule is sometimes difficult. See Bliss, Code Pl. (2d Ed.) § 206, note 1.

[4] Pomeroy, Code Remedies, (4th Ed.) § 426, pp. 556, 731; Rogers v. City of Milwaukee, 13 Wis. 610. The phrase "ultimate facts" is now commonly used to denote the material allegations that must be made to set out a cause of action or a defense. It is a general rule that the complaint shall state the material, issuable facts showing plaintiff's right to recover. Singer Sewing Mach. Co. v. Teasley, 198 Ala. 673, 73 South. 969; Stein v. Lyon, 98 Misc. Rep. 687, 163 N. Y. Supp. 380.

[5] "For the purposes of pleading only the ultimate fact to be proved need be stated. The circumstances which tend to prove the ultimate fact can be used for purposes of evidence, but they have no place in the pleadings." McAllister v. Kuhn, 96 U. S. 87, 24 L. Ed. 615. See Steuben County Bank v. Mathewson, 5 Hill (N. Y.) 249. Mahaffey v. J. L. Rumbarger Lumber Co., 71 W. Va. 175, 76 S. E. 182. It is the office of a pleading to allege the ultimate facts. A declaration that defendant negligently allowed a fire to start on his own premises need not describe the start of the fire or other circumstances evidential of its origin.

fact that defendant admitted that he executed the contract, or that John Doe saw him execute it, is evidential matter, which is not "issuable." If probative or evidential facts were spread on the record, their denial would usually make an immaterial issue, not decisive of the question in dispute.

CONCLUSIONS OF LAW AND ULTIMATE FACTS

296. Averments should be of the operative facts, and not of mere conclusions of law from such facts. Often the distinction is one of the degree of particularity required in describing the particular matter or transaction involved.

The averments of the operative facts essential to constitute a prima facie cause of action must be specific and set forth the concrete facts from which the legal conclusions follow. A declaration which merely states legal conclusions is insufficient.[6] General allegations of fraud, without stating definite acts constituting fraud, are insufficient.[7] The allegations should be specific, and the facts stated with particularity

[6] It is the duty of the courts to declare the conclusions, and of the parties to state the premises. Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656; 21 R. C. L. 441. A plea alleging mere conclusions of law, without alleging facts from which those conclusions are sought to be drawn, with sufficient detail and certainty to apprise plaintiff of the nature of the defense and to enable the court upon facts admitted or found to decide whether the matter relied on constituted a valid claim to the relief sought, was properly rejected. Cox v. Hagan, 125 Va. 650, 100 S. E. 666. Best pleading is that which states facts and not conclusions of law. Stonegap Colliery Co. v. Hamilton, 119 Va. 271, 89 S. E. 305, Ann. Cas. 1917E, 60; Helman v. Felder, 178 Iowa, 740, 160 N. W. 234; Boston & M. R. R. v. County Com'rs of Middlesex County, 239 Mass. 127, 131 N. E. 283; Campbell v. Walker, 1 Boyce (Del.) 580, 76 Atl. 475; Helmick v. Carter, 171 Ill. App. 25. "Valuable consideration" is a conclusion of law in common-law pleading. Kean v. Mitchell (1865) 13 Mich. 207. Compare California Packing Corporation v. Kelly Storage & Distributing Co. (1920) 228 N. Y. 49, 126 N. E. 269, Pomeroy, Code Remedies (4th Ed.) 562; Friedlander v. Rapley, 38 App. D. C. 208 (scope of employment, a conclusion); Sharp v. State, for Use of Brown, 135 Md. 551, 109 Atl. 454; Boston & M. R. R. v. County Com'rs of Middlesex County, 239 Mass. 127, 131 N. E. 283; People v. Ryder, 12 N. Y. 433; State v. Jersey City, 94 N. J. Law, 431, 111 Atl. 544, 19 A. L. R. 646. An allegation that a municipal corporation "became entitled" to divert water from a river is a conclusion of law. It depends for its soundness upon undisclosed facts, and the court cannot read into the pleading the facts necessary to raise the issue intended to be raised. See 21 R. C. L. 440. For instances of allegations held to be conclusions of law, see Pomeroy, Code Remedies (4th Ed.) § 425, pp. 564, 565, 566, 682; 31 Cyc. 52–65.

[7] Forbes v. Ft. Lauderdale Mercantile Co. (Fla.) 90 South. 821 (facts constituting the fraud should be specifically pleaded). Florida Life Ins. Co. v. Dillon, 83 Fla. 140, 58 South. 643 (fraud).

and certainty. The defendant is entitled to have the grounds specified on which the charge is made.

Statements as to the validity or invalidity of certain transactions, the characterization of acts or conduct as negligent[8] or wrongful,[9] and the existence of a legal duty or obligation are often mere conclusions. A statement that the defendant was indebted to the plaintiff in a certain sum gives no facts to charge the defendant. In common-law pleading it is permitted in an action of debt to state this conclution of indebtedness, but it is accompanied by some general statement of the ground of the debt. Mr. David Dudley Field said of the common counts: "Courts and lawyers make rules and defend them as a means of eliciting the precise point in dispute between the parties, and they then try every means in their power to conceal it." Instead of stating the concrete facts of the claim, a common count states only conclusions of law, the mere averment that the defendant is indebted for this or that. This does not disclose the real nature of the liability, or assist in analyzing and presenting the issues of law and fact upon which the indebtedness depends.

The general issues at common law are usually denials of legal conclusions, instead of denials of the facts from which the liability is inferred; e. g., nil debet, or not guilty.

It is not always easy to distinguish the details of evidence, on the one hand, and conclusions of law, on the other, from the operative or issuable facts, upon which the right to relief depends. It is often a matter of degree.[10] While the pleading must have certainty and par-

[8] Wright v. Atlantic Coast Line R. Co., 110 Va. 670, 66 S. E. 848, 25 L. R. A. (N. S.) 972, 19 Ann. Cas. 439; Wilson v. Guyandotte Timber Co., 70 W. Va. 602, 74 S. E. 870 (act must be shown to be negligent). See Illinois Steel Co. v. Ostrowski, 194 Ill. 376, 384, 62 N. E. 822. A declaration alleging the operative facts specifically, instead of generically charging negligence correctly sustained. Camp. & Bros. v. Hall, 39 Fla. 535, 568, 22 South. 792, 796. See Winheim v. Field, 107 Ill. App. 145, 151.

[9] Lefkovitz v. City of Chicago, 238 Ill. 23, 87 N. E. 58. Averments that obstructions were "wrongfully placed in a street, and permitted to remain there an "unreasonable" time, conclusions of law.

[10] Statements of Fact in Pleading under the Codes, W. W. Cook, 21 Columbia Law Rev. 416; Hohfeld, Fundamental Legal Conceptions (1919) 23 Yale Law J. 25. Statement of ultimate fact in pleading is not objectionable as conclusion of law; as "ultimate fact" is necessarily conclusion from intermediate and evidentiary facts. Williams v. Peninsular Grocery Co., 73 Fla. 937, 75 South. 517. Mair v. Rio Grande Rubber Estates, Ltd., [1913] A. C. 853, 863, 864. Averments must be sufficiently specific, so as to disclose not the minute particulars, but the real substance of the facts making up the case.

ticularity in its averments of facts, a general mode of pleading is often sufficient as to certain matters, and no greater particularity is required than the nature of the sort of thing described will conveniently admit of. "The rules of pleading determining whether allegations must be generic or specific—and if the latter, to what degree—are, like other rules of law, based on considerations of policy and convenience. Thus the facts constituting fraud are frequently required to be alleged in comparatively specific form." [11]

"In many situations a single convenient term is employed to designate (generically) certain miscellaneous groups of operative facts," such as ownership or possession, which is a method of stating their net force and effect in law, without stating the specific circumstances. It is sufficient to allege that the plaintiff is the owner of certain land or that he was possessed of certain chattels.[12] On the other hand, it would be a conclusion of law to allege that the plaintiff was or was not entitled to the possession.[13] So it would be a conclusion of law to allege that it was the defendant's duty to erect guards about a certain excavation; the facts from which that duty might be inferred by the court are lacking.[14] So an allegation that a deed was "procured by fraud," or that a certain sum is now "due," would be a legal conclusion.[15] There is a conflict of authority whether it is proper to

[11] W. N. Hohfeld, Fundamental Legal Conceptions, 33, note, 23 Yale Law J. 25. "Operative Facts Contrasted with Evidential Facts."

[12] A general allegation of ownership is an averment of an ultimate fact, not a conclusion of law. Sheffield Nat. Bank v. Corinth Bank & Trust Co., 196 Ala. 275, 72 South. 127; Beall v. Folmar, 199 Ala. 596, 75 South. 172; Payne v. Treadwell, 16 Cal. 220; Cheda v. Bodkin, 178 Cal. 7, 158 Pac. 1025; Fuller v. Fuller, 176 Cal. 637, 169 Pac. 369; Gartlan v. C. A. Hooper & Co., 177 Cal. 414, 170 Pac. 1115.

[13] An allegation "that the said plaintiff has no right, claim, or title to the said painting or picture, and is not entitled to the ownership or possession of the same," is a conclusion of law. Allen Clark Co. v. Francovich, 42 Nev. 321, 176 Pac. 259.

[14] An allegation that it was defendant's duty to do certain things was an averment of a conclusion, it being necessary in pleading duty to allege facts from which the law will raise the duty. New Staunton Coal Co. v. Fromm, 286 Ill. 254, 121 N. E. 594; Holt v. City of Moline, 196 Ill. App. 235; Jacobson v. Ramey, 200 Ill. App. 96; Sanboeuf v. Murphy Const. Co., 202 Ill. App. 548; Greinke v. Chicago City Ry. Co., 234 Ill. 564, 567, 85 N. E. 327 (passenger); McAndrews v. Chicago, L. S. & E. R. Co., 222 Ill. 232, 236, 78 N. E. 603; Schueler v. Mueller, 193 Ill. 402, 61 N. E. 1044 (facts which raise duty). See 31 Cyc. 52. The existence of a duty must be shown by facts alleged in the declaration, and though the breach of the duty may be averred by way of conclusion, the existence of the duty may not be so alleged. Birmingham Ry., Light & Power Co. v. Littleton, 201 Ala. 141, 77 South. 565; Alabama Fuel & Iron Co. v. Bush, 204 Ala. 658, 86 South. 541.

[15] Doose v. Doose, 300 Ill. 134, 133 N. E. 49; Loomis v. Jackson, 6 W. Va. 613; First Nat. Bank of Sutton v. Grossbans, 61 Neb. 575, 85 N. W. 542 (fraud); Creecy v. Joy, 40 Or. 28, 66 Pac. 295 (money due). "The only real question is whether it is desirable to have a more specific description of the facts upon which the plaintiff relies." 21 Columbia Law Rev. p. 420, W. W. Cook.

[16] It is necessary only to allege negligence by general averment that defendant did the particular act damaging plaintiff. Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687. Clark v. Chicago, M. & St. P. Ry. Co., 28 Minn. 69, 71, 9 N. W. 75. Term facts "must include many allegations which are mixed conclusions of law and statements of fact; otherwise pleadings would become intolerably prolix." Per Mitchell, J. See Pittsburgh, C., C. & St. L. Ry. Co. v. Nichols (Ind. App.) 130 N. E. 546.

Negligence being the ultimate fact to be pleaded, and not mere conclusions of law, a declaration or petition charging defendant with an act injurious to plaintiff, with a general allegation of negligence, etc., is sufficient, at least against general demurrer, without setting forth the details of acts causing injury, unless they could not be negligent under any circumstances. Tatum v. Louisville & N. R. Co., 253 Fed. 898, 165 C. C. A. 378; Freedman v. Denhalter Bottling Co., 54 Utah, 518, 182 Pac. 843; Louis v. Smith-McCormick Const. Co., 80 W. Va. 159, 92 S. E. 249; Savage v. Public Service Ry. Co., 95 N. J. Law, 432, 113 Atl. 252; Robbins v. Baltimore & O. R. Co., 62 W. Va. 535, 59 S. E. 512; 4 Standard Enc. Proc. 833. Negligence, general and particular averments, 21 R. C. L. "Pleading," 499–501. See p. 216, supra.

[17] A plea of contributory negligence is not sufficient if it merely states a conclusion of law, but must aver the facts constituting the negligence, which must be such that the conclusion of negligence follows as matter of law. Dwight Mfg. Co. v. Holmes, 198 Ala. 590, 73 South. 933; Kilgore v. Birmingham Ry Light & Power Co., 200 Ala. 238, 75 South. 996; Southern Cotton Oil Co. v Woods, 201 Ala. 553, 78 South. 907; Fusselman v. Yellowstone Valley Land & Irrigation Co., 53 Mont. 254, 163 Pac. 473, Ann. Cas. 1918B, 420; Valerii v.

plead generally that defendant "negligently" collided with the plaintiff,[16] or whether the special circumstances from which negligence might be inferred should be set out concretely and in detail.[17]

CERTAINTY IN GENERAL

297. In general, whatever is alleged in pleading must be alleged with certainty.

298. A clear, distinct, and complete statement of the facts which constitute the cause of action or ground of defense must be made in all pleadings, in order that due notice may be given to the adverse party, and that a definite and certain issue may be produced for decision.

Certainty in pleading includes both precision and particularity. It consists in alleging the facts necessary so distinctly and explicitly as to

show the legal basis of the right or defense asserted, give notice to adverse party of what he is called upon to answer, and produce clear-cut issues for decision.[18] The varying amount of particularity required has given rise to attempts to define different degrees of certainty. The classic division by Lord Coke, however, does not convey any intelligible idea of the distinctions recognized by the law.

Under Coke's classification, there are three degrees of certainty, namely: (1) Certainty to a common intent; (2) certainty to a certain intent in general; (3) certainty to a certain intent in every particular. A pleading is certain to a common intent when it is clear enough according to reasonable intendment or construction, though not worded with absolute precision.[19] Common intent cannot add to a sentence words which have been omitted, the rule being one of construction only, and not one of addition. This is the lowest form of certainty which the rules of pleading allow, and is sufficient only in pleas in bar, rejoinders, and such other pleadings on the part of the defendant as go to the action.[20] Certainty to a certain intent in general is a higher degree than the last, and means what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts[21] which do not appear except by inference or argument,[22] and is what is required in declarations,[23] replications, and indictments (in the charge or accusation), and in returns to writs of mandamus.[24] Certainty to a certain intent in every particular requires the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, leaving nothing to be supplied

Breakwater Co. 8 Boyce (Del.) 196, 84 Atl. 222 (unsafe cars and tracks, too general).

[18] See Wiatt v. Essington, 2 Ld. Raym. 1411; Bertie v. Pickering, 4 Bur. 2456; Phelps v. Sill, 1 Day (Conn.) 315; White v. Romans, 29 W. Va. 571, 3 S. E. 14 (general demurrer). "The amount of detail necessary to ensure precision naturally varies with the nature of each case. * * * There must be particularity sufficient to apprise the court and the other party of the nature of the question to be tried." Odgers, Pl. & Prac. c. 9, p. 118.

[19] Dovaston v. Payne, 2 H. Bl. 530; Town of Royalton v. Royalton & W. Turnpike Co., 14 Vt. 311.

[20] Rex v. Horne, Cowp. 682; The King v. Mayor and Burgesses of Lyme Regis, 1 Doug. 158; Oystead v. Shed, 12 Mass. 509; Washburn v. Mosely, 22 Me. 160; Morehouse v. Fowler, 69 Ill. App. 50; 4 Standard Enc. Proc. 835.

[21] Dovaston v. Payne, 2 H. Bl. 530; Spencer v. Southwick, 9 Johns. (N. Y.) 317.

[22] Fuller v. Town of Hampton, 5 Conn. 423.

[23] See Hilldreth v. Becker, 2 Johns. Cas. (N. Y.) 339; Coffin v. Coffin, 2 Mass. 363.

[24] King v. Mayor and Burgesses of Lyme Regis, 1 Doug. 158; Andrews v. Whitehead, 13 East, 107; Dovaston v. Payne, 2 H. Bl. 530.

by argument, inference, or presumption, and no supposable answer wanting.[25] The pleader must not only state the facts of his own case in the most precise way, but must add to them such facts as will anticipate the case of his adversary. This degree of certainty is required only in the case of pleas in estoppel and dilatory pleas.[26]

With respect to Coke's tests or degrees of certainty, it may be remarked that this is a matter of relative particularity which does not admit of measurement.[27] Modern cases take as the standard reasonable certainty without an attempt to define the degrees for particular pleadings.[28] Excessive certainty is not required, especially if too great prolixity would result therefrom, unless the law is hostile to the action or defense.

In modern times it comes down to little more than this, that in certain disfavored actions, such as actions for defamation; and in certain disfavored defenses, such as dilatory pleas, more facts must be alleged to make out a prima facie case or repel hostile construction than in ordinary cases.

Illustrations

In pleading the performance of a condition or covenant, it is a rule, though open to exceptions that will be presently noticed, that the party must not plead generally that he performed the covenant or condition, but must show specially the time, place, and manner of performance; and, even though the subject to be performed should consist of several different acts, yet he must show in this special way the performance of each.[29]

[25] Lawes, Pl. 54, 55.

[26] Lawes, Pl. 56, 107. 134; Dovaston v. Payne, 2 H. Bl. 530; King v. Mayor and Burgesses of Lyme Regis, 1 Doug. 158; Casseres v. Bell, 8 Term R. 167. The highest degree of certainty is required only in pleas which do not go to the merits of the action and are therefore not favorably regarded viz., dilatory pleas, which must anticipate possible replies, and pleas in estoppel. National Parlor Furniture Co. v. Strauss, 75 Ill. App. 276; Harvey v. Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. 580.

[27] 4 Standard Enc. Proc. 836, 837.

[28] David v. David's Admr. 66 Ala. 139, 147; Campbell v. Walker, 1 Boyce (Del.) 580, 76 Atl. 475; Weller & Co. v. Camp, 169 Ala. 275, 52 South. 929, 28 L. R. A. (N. S.) 1106; Coughlin v. Blumenthal (C. C.) 98 Fed. 920. See Hains v. Parkersburgs, M. & I. R. Co., 71 W. Va. 453, 76 S. E. 843; Taylor v. New Jersey Title Guarantee & Trust Co., 70 N. J. Law, 24, 56 Atl. 152 (circumstantial details not necessary).

[29] Com. Dig. "Pleader," E, 25, E, 26, 2 W, 83; 1 Saund. 116, note 1; Halsey v. Carpenter, Cro. Jac. 359; Wimbleton v. Holdrip, 1 Lev. 303; Woodcock v. Cole, 1 Sid. 215; Stone v. Bliss, 1 Bulst. 43; Fitzpatrick v. Robinson, 1 Show. 1; Austin v. Jervoyse, Hob. 69; Austen v. Gervas, Hob. 77; Brown v. Rands, 2 Vent. 156; Lord Evers v. Buckton, Benl. 65; Braban v. Bacon, Cro. Eliz. 916; Codner v. Dalby, Cro. Jac. 363; Leneret v. Rivet, Id. 503.

Yet this rule, requiring performance to be specially shown, admits of relaxation where the subject comprehends such multiplicity of matter as would lead to great prolixity; and a more general mode of allegation is in such cases allowable.

When in any of these excepted cases, however, a general plea of performance is pleaded, the rule under discussion still requires the plaintiff to show particularly in his replication in what way the covenant or condition has been broken; for otherwise no sufficiently certain issue would be attained. Thus, in an action of debt on a bond conditioned for performance of affirmative and absolute covenants contained in a certain indenture, if the defendant pleads generally (as in that case he may) that he performed the covenants according to the condition, the plaintiff cannot in his replication tender issue with a mere traverse of the words of the plea, viz. that the defendant did not perform any of the covenants, etc.; for this issue would be too wide and uncertain. But he must assign a breach, showing specifically in what particular, and in what manner, the covenants have been broken.[30]

In an action of debt on bond conditioned to pay so much money yearly while certain letters patent were in force, the defendant pleaded that from such a time to such a time he did pay, and that then the letters patent became void and of no force. The plaintiff having replied, it was adjudged, on demurrer to the replication, that the plea was bad, because it did not show how the letters patent became void.[31]

With respect to all points on which certainty of allegation is required, it may be remarked, in general, that the allegation, when brought into issue, requires to be proved, in substance, as laid; and that the relaxation from the ordinary rule on this subject which is allowed with respect to place, time, quantity, and value, does not, generally speaking, extend to other particulars.

[30] Plomer v. Ross, 5 Taunt. 386; Sayre v. Minns, Cowp. 577; Com. Dig. "Pleader," F, 14. See 1 Chit., Pl. (16th Ed.) 611, on replications in actions on bonds, which deny the effect of the plea of performance, state the breach with particularity, and conclude with a verification.

[31] Lewis v. Preston, 1 Show, 290, Skin. 303.

SAME—WHEN GENERAL MODE OF PLEADING PROPER

299. A general mode of pleading is allowed when great prolixity is thereby avoided.

300. A statement of material facts in a pleading with unnecessary particularity, where a brief and concise allegation would be sufficient, not only tends to cause prolixity and confusion, but may subject the party thus pleading to the penalty of a variance, by his inability to prove it as alleged.

While the form in which the rule above is stated has been objected to as indefinite, its extent and application may be collected with some degree of precision from the decided cases,[32] and by considering the limitations which it necessarily receives from the rules as to certainty heretofore mentioned. It substantially covers the same ground, and rests upon the same principle, as the rule that a pleading must state facts, and not evidence, and may be considered as applicable whenever an allegation of the facts in detail would carry the pleading to an unreasonable length by stating matters proper to be shown in evidence. Besides the benefit derived from thus confining the pleadings to reasonable limits, a general mode of stating the existence of facts involving in themselves matters of detail may often preserve the pleader from exposing his allegation to the danger of a variance, since, if he attempts to state all such matters, he must do so correctly, or his proof will not correspond.

In assumpsit, on a promise by the defendant to pay for all such necessaries as his friend should be provided with by the plaintiff, the plaintiff alleged that he provided necessaries amounting to such a sum. It was moved, in arrest of judgment, that the declaration was not good, because he had not shown what necessaries in particular he had provided. But Coke, C. J., said, "This is good, as is here pleaded, for avoiding such multiplicities of reckonings"; and Doddridge, J., "This general allegation, that he had provided him with all necessaries, is good, without showing in particular what they were." And the court gave judgment unanimously for the plaintiff.[33] So, in as-

[32] Co. Litt. 303b; 2 Saund. 116b, 411, note 4; Jermy v. Jenny, T. Raym. 8; J'Anson v. Stuart, 1 Term R. 753; Cornwallis v. Savery, 2 Burrows, 772; Braban v. Bacon, Cro. Eliz. 916; Cryps v. Baynton, 3 Bulst. 31; Barton v. Webb, 8 Term R. 459; Hill v. Montagu, 2 Maule & S. 378; Friar v. Grey, 15 Q. B. 891; Smith v. Boston, C. & M. R. Co., 36 N. H. 458; Hughes v. Smith, 6 Johns. (N. Y.) 173.

[33] Cryps v. Baynton, 3 Bulst. 31

sumpsit for labor and medicines, for curing the defendant of a distemper, the defendant pleaded infancy. The plaintiff replied that the action was brought for necessaries generally. On demurrer to the replication, it was objected that the plaintiff had not assigned in certain how, or in what manner, the medicines were necessary; but it was adjudged that the replication, in this general form, was good, and the plaintiff had judgment.[34] So, in debt on a bond, conditioned that the defendant shall pay, from time to time, the moiety of all such money as he shall receive, and give account of it, he pleaded generally that he had paid the moiety of all such money, etc. Et per curiam: "This plea of payment is good, without showing the particular sums, and that in order to avoid stuffing the rolls with multiplicity of matter." Also they agreed that, if the condition had been to pay the moiety of such money as he should receive, without saying "from time to time," the payment should have been pleaded specially.[35]

SAME—WHERE GENERAL PLEADING IS SUFFICIENT

301. A general mode of pleading is often sufficient when the allegations on the other side must reduce the matter to certainty.

302. When the nature of the defense to be interposed is such that the opposing party must necessarily state fully all facts essential to the production of a complete issue in the particular action, a party may allege the grounds of his action or defense, or some of them, in general terms.

This rule comes into most frequent illustration in pleading performance in actions of debt on bond. Bonds may be conditioned either for the performance of certain matters set forth in the condition, or of the covenants or other matters contained in an indenture or other instrument collateral to the bond, and not set forth in the condition. In either case, if the defendant has to plead performance of such matters, the law often allows him to do so, in general terms, without setting forth the manner of performance. For by the usual course of pleading, the plaintiff declares upon the bond as single, without noticing the condition, and therefore without alleging any breach of the condition. It follows, therefore, of course, that if the defendant pleads performance, the plaintiff will have to show a breach in his replication; and as this will, in all events, lead to a sufficient certainty of issue, it becomes unnecessary for the defendant to be specific on his part in his plea, or to do more than allege performance in general terms, according to the words of the condition, leaving the plaintiff in his replication to specify the breach that is supposed to have been committed.

[34] Huggins v. Wiseman, Carth. 110.
[35] Church v. Brownewick, 1 Sid. 334.

SAME—WHAT PARTICULARITY IS GENERALLY REQUIRED

303. No greater particularity is required than the nature of the thing pleaded will conveniently admit.

304. When the circumstances constituting a cause of action are so numerous and so minute that the party pleading is not and cannot be acquainted with them, less certainty is required, and pleading in general terms is sufficient.

The effect of this rule is that the certainty required in pleading facts does not require a minute and detailed statement of circumstances which, though material to a party's case, he cannot be presumed to know.[36] Thus, though generally, in an action for injury to goods, the quantity of the goods must be stated, yet if they cannot, under the circumstances of the case, be conveniently ascertained by number, weight, or measure, such certainty will not be required. Accordingly, in trespass for breaking the plaintiff's close, with beasts, and eating his peas, a declaration not showing the quantity of peas has been held sufficient, "because nobody can measure the peas that beasts can eat."[37] So, in an action on the case for setting a house on fire, per quod the plaintiff, among divers other goods, ornatus pro equis amisit, after verdict for the plaintiff, it was objected that this was uncertain, but the objection was disallowed by the court. And in this case Windham, J., said that, if he had mentioned only diversa bona, yet it had been well enough, as a man cannot be supposed to know the certainty of his goods when his house is burnt; and added that, to avoid prolixity, the law will sometimes allow such a declaration.[38]

In actions on contracts, if the case is one where it is held necessary to declare specially on the contract, great strictness and particularity are enforced, and the simplest case involves imminent danger of

[36] See Bac. Abr. "Pleas," etc., B. 5; Buckley v. Thomas, 1 Plow. 118; Wimbish v. Tailbois, Id. 54; Hartley v. Herring, 8 Term R. 130; Elliott v. Hardy, 3 Bing. 61; Partridge v. Strange, 1 Plow. 85. The above rule is one of necessity, applicable in all pleading. See Bliss, Code Pl. (2d Ed.) 309.
[37] Bac. Abr. "Pleas," etc., B, 5.
[38] Bac. Abr. "Pleas," etc., 409.

variance; but if the case admits of the use of general assumpsit or the common counts, which are generally applicable wherever money is due for value received, no particulars or facts are required, and the most complicated cases may be tried on a bare claim of indebtedness.[39]

SAME—FACTS IN KNOWLEDGE OF ADVERSARY

305. Less particularity is required when the facts lie more in the knowledge of the adverse party than of the party pleading.

This rule is exemplified in the case of alleging title in an adversary, where a more general statement is allowed than when it is set up in the party himself.[40]

So, in an action of covenant, the plaintiff declared that the defendant, by indenture, demised to him certain premises, with a covenant that he (the defendant) had full power and lawful authority to demise the same, according to the form and effect of the said indenture; and then the plaintiff assigned a breach, that the defendant had not full power and lawful authority to demise the said premises, according to the form and effect of the said indenture. After verdict for the plaintiff, it was assigned for error that he had not in his declaration shown "what person had right, title, estate, or interest in the lands demised, by which it might appear to the court that the defendant had not full power and lawful authority to demise." But, "upon conference and debate amongst the justices, it was resolved that the assignment of the breach of covenant was good; for he had followed the words of the covenant negatively, and it lies more properly in the knowledge of the lessor what estate he himself has in the land which he demises than the lessee, who is a stranger to it."[41] So, where the defendant had covenanted that he would not carry on the business of a rope maker, or make cordage for any person, except under contracts for government, and the plaintiff, in an action of covenant, assigned for breach that, after the making of the indenture, the defendant carried on the business of a rope maker, and made cordage for divers and very many persons, other than by virtue of any contract for government, etc., the defendant demurred specially, on the ground that the plaintiff "had not disclosed any and what particular person or persons for whom the defendant made cordage, nor any and what particular quantities or kinds of cordage the defendant did so make for them, nor in what manner nor by what acts he carried on the said business of a rope maker, as is alleged in the said breach of covenant." But the court held "that, as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be presumed conusant of his own dealings, than of the plaintiff's, there was no occasion to state them with more particularity," and gave judgment accordingly.[42]

[39] Odgers, Pl. and Prac. (7th Ed.) p. 84; see Pomeroy, Code Remedies (4th Ed.) p. 533–535; 4 Cal. Law Rev. 352.

[40] See ante, p. 476; Merceron v. Dowson, 5 Barn. & C. 482; Andrews v. Whitehead, 13 East, 112; Rider v. Smith, 3 Term R. 766; Denham v. Stephenson, 1 Salk. 355; Bradshaw's Case, 9 Coke, 60b; Gale v. Reed, 8 East, 80; People v. Dunlap, 13 Johns. (N. Y.) 437. This rule is also one of general application. See Bliss, Code Pl. (2d Ed.) 310.

[41] Bradshaw's Case, 9 Coke, 60b.

SAME—INDUCEMENT OR AGGRAVATION

306. Less particularity is necessary in the statement of matter of inducement or aggravation than in the main allegations. As matters alleged merely by way of explanation or introduction to the claim or defense, or set forth only to increase the damages asked for, are not of the gist of the action, and therefore require no distinct answer, they may be alleged in general terms.

Inducement and Gravamen

Whenever a bare statement of the facts constituting the cause of action does not show the right of action with sufficient certainty, the facts necessary to explain them must be shown. This preliminary statement is called the "inducement." It does not enter into the statement of the cause of action proper, but is merely explanatory of such statement, and it does not require the same certainty.[43]

The term "inducement" is sometimes applied to those allegations showing the existence of a right on the part of the plaintiff and a duty on the part of defendant. The allegations showing the wrongful acts of the defendant in violation of the right and duty are known as the gist or gravamen of the action.

As "matter of inducement," as the term is generally used, is that

[42] Gale v. Reed, 8 East, 80.

[43] "Inducement" in pleading is the statement of matter which is introductory to the principal subject of the declaration or plea and which is necessary to elucidate or explain it. Varnes v. Seaboard Air Line Railway Co., 80 Fla. 624, 86 South. 433. The "inducement" of a pleading is but an explanatory introduction to the main allegation in which the cause of action is alleged.—McDonald v. Hall, 203 Mich. 431, 170 N. W. 68.

which is merely introductory to or explanatory of the essential ground of the complaint or defense, and "matter of aggravation" such as is alleged only to show, in actions for forcible injuries, for instance, circumstances of enormity under which the wrong complained of was committed, neither constitutes a material fact essential to recovery or defense, and either, therefore, is sufficiently met by an answer to that which forms the gist of the action; and, as they require no distinct answer, a general mode of stating them is sufficient.[44] This rule is exemplified in the case of the derivation of title, where, though it is a general rule that the commencement of a particular estate must be shown, yet an exception is allowed if the title be alleged by way of inducement only. So where, in assumpsit, the plaintiff declared that in consideration that, at the defendant's request, he had given and granted to him, by deed, the next avoidance of a certain church, the defendant promised to pay £100, but the declaration did not set forth any time or place at which such grant was made. Upon this being objected in arrest of judgment after verdict the court resolved that "it was but an inducement to the action, and therefore needed not to be so precisely alleged," and gave judgment for the plaintiff.[45] So, in trespass, the plaintiff declared that the defendant broke and entered his dwelling house, and "wrenched and forced open, or caused to be wrenched and forced open, the closet doors, drawers, chests, cupboards, and cabinets of the said plaintiff." Upon special demurrer it was objected that the number of closet doors, drawers, chests, cupboards, and cabinets was not specified. But it was answered "that the breaking and entering the plaintiff's house was the principal ground and foundation of the present action, and all the rest are not foundations of the action, but matters only thrown in to aggravate the damages, and, on that ground, need not be particularly specified." And of that opinion was the whole court, and judgment was given for the plaintiff.[46]

[44] Co. Litt. 303a; Wetherell v. Clerkson, 12 Mod. 597; Bishop of Salisbury's Case, 10 Coke, 59b; Riggs v. Bullingham, Cro. Eliz. 715; Com. Dig. "Pleader," E, 43; Doct. Plac. 263; Chamberlain v. Greenfield, 8 Wils. 292; Alsope v. Sytwell, Yel. 18; Woolaston v. Webb, Hob. 18b.

[45] Riggs v. Bullingham, supra.

[46] Chamberlain v. Greenfield, supra.

SAME—ACTS REGULATED BY STATUTE

307. With respect to acts valid at common law, but regulated, as to the mode of performance, by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute.

308. A party pleading a contract, valid by parol at common law, but which a subsequent statute requires to be in writing, need not allege it to be in writing.

The only explanation necessary to be made of this rule is that, as matters are to be pleaded according to their legal effect, a statute does not, in regulating the mode of performance of an act, necessarily prescribe a corresponding method of pleading it, unless the thing to be pleaded is one created by the statute itself. If, therefore, an act valid at common law is subsequently required by a statute to be in writing, it may still be pleaded as at common law without alleging writing.[47] Thus, by the common law, a lease for any number of years might be made by parol only; but, by the statute of frauds, all leases and terms for years made by parol, and not put into writing and signed by the lessors, or their agents authorized by writing, shall have only the effect of leases at will, except leases not exceeding the term of three years from the making. Yet, in a declaration of debt for rent on a demise, it was held sufficient, as it was at common law, to state a demise for any number of years, without showing it to have been in writing.[48] So, in the case of a promise to answer for the debt, default, or miscarriage of another person, which was good by parol, at common law, but, by the statute of frauds, is not valid unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party, etc., the declaration on such promise need not allege a written contract.[49]

On this subject the following difference is to be remarked, namely, that "where a thing is originally made by act of parliament, and required to be in writing, it must be pleaded with all the circumstances required by the act; as in the case of a will of lands, it must be alleged to have been made in writing; but where an act makes

[47] Anonymous, 2 Salk. 519; Birch v. Bellamy, 12 Mod. 540; Challe v. Belshaw, 6 Bing. 529; Ecker v. Bohn, 45 Md. 278; Harris Photographic Supply Co. v. Fisher, 81 Mich. 136, 45 N. W. 661; Speyer v. Desjardins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473; Mullaly v. Holden, 123 Mass. 583. See Bliss, Code Pl. (2d Ed.) 312.

[48] 1 Saund. 276, note 1.

[49] 1 Saund. 211, note 2; Anon., 2 Salk. 519.

writing necessary to a matter where it was not so at the common law, as where a lease for a longer term than three years is required to be in writing by the statute of frauds, it is not necessary to plead the thing to be in writing, though it must be proved to be so, in evidence."[50]

As to the rule under consideration, however, a distinction has been taken between a declaration and a plea; and it is said that though, in the former, the plaintiff need not show the thing to be in writing, in the latter the defendant must. Thus, in an action of indebitatus assumpsit, for necessaries provided for the defendant's wife, the defendant pleaded that before the action was brought the plaintiff and defendant and one J. B., the defendant's son, entered into a certain agreement, by which the plaintiff, in discharge of the debt mentioned in the declaration, was to accept the said J. B. as her debtor for £9, to be paid when he should receive his pay as a lieutenant, and that the plaintiff accepted the said J. B. for her debtor, etc. Upon demurrer, judgment was given for the plaintiff, for two reasons: First, because it did not appear that there was any consideration for the agreement; secondly, that, admitting the agreement to be valid, yet, by the statute of frauds, it ought to be in writing, or else the plaintiff could have no remedy thereon; "and though, upon such an agreement, the plaintiff need not set forth the agreement to be in writing, yet, when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court that an action will lie upon it, for he shall not take away the plaintiff's present action, and not give her another, upon the agreement pleaded." [51]

WHAT MAY BE OMITTED—MATTERS JUDICIALLY NOTICED

309. It is not necessary to state matter of which the court takes judicial notice.

Matters judicially noticed may be either matters of law or facts of a public or general nature.

Certain matters may be omitted. Thus it is not necessary to state in the pleading matters of which the court will take judicial notice.[52]

[50] Duppa v. Mayo, 1 Saund. 276d, 276e, note 2.

[51] Case v. Barber, T. Raym. 450.

[52] Co. Litt. 303b; Com. Dig. "Pleader," C, 78; Deybel's Case, 4 Barn. & Ald. 243; Secrist v. Petty, 109 Ill. 188; Kansas City, M. & B. R. Co. v. Phillips, 98 Ala. 159, 13 South. 65; Goodman v. People, 228 Ill. 154, 81 N. E. 830; Gunning v. People, 189 Ill. 165, 59 N. E. 494, 82 Am. St. Rep. 433; 12 Enc. Pl. and Prac. 1.

It is therefore unnecessary to state matter of law, for this the judges are bound to know, and can apply for themselves to the facts alleged. Thus, where it was stated in a pleading that an officer of a corporation was removed for misconduct, by the corporate body at large, it was held unnecessary to aver that the power of removal was vested in such corporate body, because that was a power by law incident to them, unless given by some charter, by-law, or other authority, to a select part only.[53] The rule is not limited to the principles of the common law. Public statutes fall within the same reason and the same rule. Public domestic statutes and the facts which they recite or state must be noticed by the courts of the particular state, as well as the public acts of congress, without their being stated in pleadings;[54] and it is only necessary to allege facts which will appear to the court to be affected by the statute,[55] though in case of an offense created by statute, where a penalty is inflicted, the mere statement of the facts constituting the offense will be insufficient without an express reference to the statute, showing the intention to bring the case within it.[56] Private acts, however, are not judicially noticed, and therefore such parts of them as may be material to the action or defense must be stated in pleading,[57] and foreign statutes, as those of other states, must also be pleaded.[58]

It may be observed, however, that, though it is in general unnecessary to allege matter of law, yet there is sometimes occasion to make mention of it, for the convenience or intelligibility of the statement of fact. Thus, in an action of assumpsit on a bill of exchange, the form of the declaration is to state that the bill was drawn or accepted by the defendant, etc., according to the nature of the case, and that the defendant, as drawer or acceptor, etc., became liable to pay; and, being so liable, in consideration thereof promised to pay. So, as stated above, it is sometimes necessary to refer to a public statute in general terms, to show that the case is intended to be brought within the statute; as, for example, to allege that the defendant com-

[53] King v. Mayor and Burgesses of Lyme Regis, 1 Doug. 148.

[54] 1 Bl. Comm. 85; Boyce v. Whitaker, 1 Doug. 97, note 12. See The King v. Sutton, 4 Maule & S. 542; Clare v. State, 5 Iowa, 509. And see De Bow v. People, 1 Denio (N. Y.) 9, Levy v. State, 6 Ind. 281 and Pierce v. Kimball, 9 Greenl. (Me.) 54, 23 Am. Dec. 537, as to what is a public or private statute.

[55] Spieres v. Parker, 1 Term R. 145; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178. And see Miller v. Roessler, 4 E. D. Smith (N. Y.) 234.

[56] See Wells v. Iggulden, 8 Barn. & C. 186.

[57] Platt v. Hill, 1 Ld. Raym. 381; Boyce v. Whitaker, 1 Doug. 97, note 12.

[58] The federal courts, however, take notice of all the laws of all the states of the Union, as well as of the territories. See Owings v. Hull, 9 Pet. (U. S.) 607, 9 L. Ed. 246.

mitted a certain act against the form of the statute in such case made and provided; but the reference is made in this general way only, and there is no need to set the statute forth.

This rule, by which matter of law is omitted in the pleadings, by no means prevents the attainment of the requisite certainty of issue; for, even though the dispute between the parties should turn upon matter of law, yet they may evidently obtain a sufficiently specific issue of that description without any allegation of law; for ex facto jus oritur, that is, every question of law necessarily arises out of some given state of facts; and therefore nothing more is necessary than for each party to state, alternately, his case in point of fact; and, upon demurrer to the sufficiency of some one of these pleadings, the issue in law, as we have heretofore shown, must at length arise.

Besides points of law, there are many other matters of a public kind, of which the court takes official notice, and with respect to which it is, for the same reason, unnecessary to make allegation in pleading, such as matters antecedently alleged in the same record,[59] the time and place of holding Congress, or the state Legislature, the time of its sessions, and its usual course of proceeding; the course of the almanac, the division of the state into counties, the meaning of English words, and terms of art; legal weights and measures, and the ordinary measurement of time, matters of public history, affecting the whole people, and many other matters.[60]

SAME—MATTERS IN ANTICIPATION

310. It is not necessary to state matter which would come more properly from the other side.

311. As it is enough for each party to make out his own case or defense, he sufficiently supports his charge or answer, for the purpose of pleading, if such pleading establish a prima facie case in his favor, and is not bound to anticipate matter which his adversary may be at liberty to plead against him.

EXCEPTION—Pleadings in estoppel and dilatory pleas must meet and remove, by anticipation, every possible answer.

[59] Co. Litt. 303b; Rex v. Knollys, 1 Ld. Raym. 13.

[60] See the classification of matters judicially noticed in 1 Greenl. Ev. c. 2, §§ 4-6; Whart. Ev. (3d Ed.) c. 5, §§ 276-340; Steph. Ev. c. 7, arts. 58, 59. And see, also, as to the application of the rule in code pleading, Bliss, Code Pl. (2d Ed.) §§ 187-199, and cases cited.

The ordinary form of this rule, namely, that it is not necessary to state matter which would come more properly from the other side, does not fully express its meaning. The meaning is that it is not necessary to anticipate the answer of the adversary, or, as it is generally expressed, when reference is made to the declaration only, it is not necessary to anticipate defenses.[61] This, according to Hale, C. J., is "like leaping before one comes to the stile."[62] It is sufficient that each pleading should, in itself, contain a good prima facie case, without reference to possible objections not yet urged. Thus, in pleading a devise of land by force of the statute of wills, it is sufficient to allege that such a one was seised of the land in fee, and devised it by his last will, in writing, without alleging that such devisor was of full age. For, though the statute provides that wills made by femes covert, or persons within age, etc., shall not be taken to be effectual, yet, if the devisor were within age, it is for the other party to show this in his answer, and it need not be denied by anticipation.[63] So, in a declaration of debt upon a bond, it is unnecessary to allege that the defendant was of full age when he executed it.[64] So, where an action of debt was brought upon a statute against the bailiff of a town for not returning the plaintiff, a burgess of that town, for the last parliament, the words of the statute being that the sheriff shall send his precept to the mayor, and, if there be no mayor, then to the bailiff, the plaintiff declared that the sheriff had made his precept unto the bailiff, without averring that there was no mayor. And, after verdict for the plaintiff, this was moved in arrest of judgment. But the court was of opinion, clearly, that the declaration was good, "for we shall not intend that there was a mayor except it be showed; and, if there were one, it should come more properly on the other side."[65] So, where there was a covenant in a charter party "that no claim should be admitted, or allowance made for short tonnage, unless such short tonnage were found and made to appear on the

[61] Stephen. Pl. (Tyler's Ed.) 314; Com. Dig. "Pleader," C, 81; Stowel v. Lord Zouch, 1 Plow. 376; Walsingham's Case, 2 Plow. 564; St. John v. St. John, Hob. 78; Hotham v. East India Co., 1 Term R. 638; Weeding v. Aldrich, 9 Adol. & E. 861; Goshen & Sharon Turnpike Co. v. Sears, 7 Conn. 92; Hughes v. Smith, 5 Johns. (N. Y.) 168; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Smalley v. Bristol, 1 Mich. 153; Sands v. St. John, 36 Barb. (N. Y.) 628; Rockford Ins. Co. v. Nelson, 65 Ill. 415.

[62] Sir Ralph Bovy's Case, 1 Vent. 217; Walker v. President, etc., of Michigan State Bank, 2 Doug. (Mich.) 359, Whittier, Cas. Com. Law Pl. p. 465; 31 Cyc. 109.

[63] Stowel v. Lord Zouch, 1 Plow. 376.

[64] Walsingham's Case, 2 Plow. 564; Sir Ralph Bovy's Case, supra.

[65] St. John v. St. John, Hob. 78.

ship's arrival, on a survey to be taken by four shipwrights, to be indifferently chosen by both parties," and in an action of covenant, brought to recover for short tonnage, the plaintiff had a verdict, the defendant moved, in arrest of judgment, that it had not been averred in the declaration that a survey was taken, and short tonnage made to appear. But the court held that, if such survey had not been taken, this was matter of defense, which ought to have been shown by the defendants, and refused to arrest the judgment.[66]

But where the matter is such that its affirmation or denial is essential to the apparent or prima facie right of the party pleading, then it ought to be affirmed or denied by him in the first instance, though it may be such as would otherwise properly form the subject of objection on the other side.

SAME—MATTERS IMPLIED

312. It is not necessary to allege circumstances necessarily implied.

313. Necessary circumstances implied by law from facts alleged are traversable without being pleaded, and need not therefore be alleged.

A fourth subordinate rule is that it is not necessary to allege circumstances necessarily implied from facts that are alleged.[67] The reason of this rule seems to be that as the law will always imply certain facts from the statement of others, and the issue tendered by the allegation of such primary facts alone is therefore sufficient for a traverse by the adverse party, so the facts thus to be implied need no express allegation to render the statement of the case complete on either side. Thus, in an action of debt on a bond, conditioned to stand to and perform the award of W. R., the defendant pleaded that W. R. made no award. The plaintiff replied that after the making of the bond, and before the time for making the award, the defendant, by his certain writing, revoked the authority of the said W. R., contrary to the form and effect of the said condition. Upon demurrer it was held that this replication was good, without averring that W. R. had notice of the revocation, because that was implied in the words "revoked the authority," for there could be no

[66] Hotham v. East India Co., 1 Term R. 638.

[67] Vynior's Case, 8 Coke, 81b; Bac. Abr. "Pleas," etc., I, 7; Com. Dig. "Plender," E, 9; Co. Litt. 303b; 2 Saund. 305a, note 13; Sheers v. Brooks, 2 H. Bl. 120; Handford v. Palmer, 2 Brod. & B. 361; Marsh v. Bulteel, 5 Barn. & Ald. 507; Du Bois' Ex'r v. Van Orden, 6 Johns. (N. Y.) 105.

revocation without notice to the arbitrator; so that, if W. R. had no notice, it would have been competent to the defendant to tender issue "that he did not revoke in manner and form as alleged."[68] So, if a feoffment be pleaded, it is not necessary to allege livery of seisin, for it is implied in the word "enfeoffed."[69] So, if a man plead that he is heir to A., he need not allege that A. is dead, for it is implied.[70]

SAME—MATTERS PRESUMED

314. It is not necessary to allege what the law will presume.

315. Legality in the transactions or conduct of persons is always presumed, but everything is taken as legally done until the contrary is shown.

Thus, it is an intendment of law that a person is innocent of fraud, as well as free from every imputation against his character, and one insisting on the contrary must both plead and prove it.[71] So the performance of an act is presumed where the omission would render one criminally liable, and the burden of alleging and proving the negative is on the party who asserts it.[72] Thus, in debt on a replevin bond, the plaintiffs declared that at the city of C., and within the jurisdiction of the mayor of the city, they distrained the goods of W. H. for rent, and that W. H., at the said city, made his plaint to the mayor, etc., and prayed deliverance, etc., whereupon the mayor took from him and the defendant the bond on which the action was brought, conditioned that W. H. should appear before the mayor or his deputy at the next court of record of the city, and there prosecute his suit, etc., and thereupon the mayor replevied, etc. It was held not to be necessary to allege in this declaration a custom for the mayor to grant replevin and take bond, and show that the plaint was made in court, because all these circumstances must be presumed against the defendant, who executed the bond and had the benefit of the replevin.[73] So, in an action for slander imputing theft, the plaintiff need not aver that he is not a thief, because the law presumes his innocence till the contrary be shown.[74]

[68] Vynior's Case, 8 Coke, 81b; Marsh v. Bulteel, 5 Barn. & Ald. 507.

[69] Co. Litt. 303b; Doct. Plac. 48, 49; 2 Saund. 305a, note 13.

[70] 2 Saund. 305a, note 13; Com. Dig. "Pleader," E, 9; Dal. 67.

[71] Co. Litt. 78b.

[72] Williams v. East India Co., 3 East, 192; King v. Inhabitants of Hallingfield, 2 Maule & S. 561.

[73] Wilson v. Hobday, 4 Maule & S. 125.

[74] Chapman v. Pickersgill, 2 Wils. 147.

SURPLUSAGE

316. Surplusage is to be avoided. The perfection of pleading is to combine the requisite certainty and precision with the greatest possible brevity of statement. "Surplusage," as the term is used in the present rule, includes matter of any description which is unnecessary to the maintenance of the action or defense. The rule requires the omission of such matter in two instances:

(a) Where the matter is wholly foreign and irrelevant to the merits of the case.

(b) When, though not wholly foreign, such matter need not be stated.

The term "surplusage," as used in this chapter, is taken in the broad sense of including all unnecessary matter, whether its irrelevancy arises from the nature of the matter itself, as where it is wholly foreign and impertinent to the case, and may therefore be stricken out on motion, as where a plaintiff, suing upon one of the covenants in a long deed, sets out in his declaration, not only the covenant on which he sues, but all the other covenants, though relating to matters wholly irrelevant to the cause;[75] or in the pleading matter that, while relevant to the case, the pleader is under no necessity of stating, such as matter of evidence, things judicially noticed, matters implied, etc., which fall within the various rules heretofore explained as tending to limit or qualify the degree of certainty. In either case it is a fault to be avoided, as not only tending to cause prolixity in the pleadings, but also frequently affording an advantage to the opposite party, by providing him with an objection on the ground of variance, or by compelling the party pleading to adduce more evidence than would otherwise have been necessary. It is therefore of the utmost importance to avoid both the statement of unnecessary facts and the allegation of facts which, though they may be relevant, are not essential to a proper statement of the claim or defense.[76]

If the matter stated be wholly foreign and impertinent, so that no allegation on the subject was necessary, it does not vitiate the pleading, the maxim being that "utile, per inutile, non vitiatur," nor does

[75] Dundass v. Lord Weymouth, 2 Cowp. 665; Price v. Fletcher, 2 Cowp. 727; Phillips v. Fielding, 2 H. Bl. 131.

[76] Bristow v. Wright, 2 Doug. 667; 1 Smith, Lead. Cas. 1417; 1 Saund. 233, note 2; Yates v. Carlisle, 1 W. Bl. 270; Bell v. Janson, 1 Maule & S. 204.

it require proof, but it will be entirely rejected.[77] If, however, a party take it upon himself to state the particular facts of a claim where a general allegation only is sufficient, he is often bound to prove all items as stated, under penalty of a variance; the rule being well established that matter, though unnecessarily alleged, must be proved if it is descriptive of that which is essential.[78] Again, if material matter is alleged with an unnecessary detail of circumstances, the essential and nonessential parts of the statement may be so interwoven as to expose the allegation to a traverse, and the pleader to an increased burden of proof with its consequent additional danger of failure.[79] So it is a material part of the rule respecting superfluous allegations that if the party introducing them show, on the face of his own pleading, that he has no cause of action, the pleading will necessarily be defective.[80]

When the surplus matter is wholly irrelevant, it may be stricken out on motion;[81] but it is no ground for demurrer, since, as we have just seen, it does not vitiate the pleading. Where, however, inconsistency or discrepancy on the face of the record is created by surplus allegations, this fault is to be taken advantage of by special demurrer.[82]

DESCRIPTIVE AVERMENTS

317. Every descriptive averment, though made with unnecessary particularity, must be proved as laid, or it will be a fatal variance.

The harsh rule by which the courts punish a party who pleads immaterial facts by compelling him to prove them literally as alleged, al-

[77] Broom, Leg. Max. 627; Bristow v. Wright, 2 Doug. 667; Dukes v. Gostling, 1 Bing. N. C. 588; Edwards v. Hammond, 3 Lev. 132; Burnap v. Wight, 14 Ill. 301; Thomas v. Roosa, 7 Johns. (N. Y.) 462; Russell v. Rogers, 15 Wend. (N. Y.) 351; Buddington v. Shearer, 20 Pick. (Mass.) 477; Bequette v. Lasselle, 5 Blackf. (Ind.) 443; Murphy v. McGraw, 74 Mich. 318, 41 N. W. 917; Perry v. Marsh, 25 Ala. 659; Shipherd v. Field, 70 Ill. 438; Knoebel v. Kircher, 83 Ill. 308.

[78] As in an action on a nonnegotiable note, expressed to be for value received, the plaintiff, if he sets out the facts in which the value consisted, instead of simply pleading the note "for value received," will be held to strict proof of what he thus alleges. Jerome v. Whitney, 7 Johns. (N. Y.) 321. And see as to this danger, and the necessity to prove matter unnecessarily alleged, Turner v. Eyles, 3 Bos. & P. 456; Peppin v. Solomons, 5 Term R. 497; Sir Francis Leke's Case, Dyer, 365; Gridley v. City of Bloomington, 68 Ill. 47.

[79] See Commissioners of Treasury v. Brevard, 1 Brev. (S. C.) 11.

[80] Dorne v. Cashford, 1 Salk. 363. See Wall v. Chesapeake & O. R. Co., 200 Ill. 66, 65 N. E. 632, Whittier, Cas. Com. Law Pl. pp. 469, 470, note.

[81] See Wyat v. Aland, 1 Salk. 324.

[82] Gilb. Ch. Prac. 131, 132.

though they need never have been set out to state the cause of action, is shockingly illustrated in negligence cases. New trials have frequently been granted for want of proof of wholly unnecessary allegations. The pleader has to steer his course between Scylla and Charybdis, and is driven to state his case in a confusing variety of counts, which multiply and complicate the issues. He has to learn just how general he may make his allegations, avoiding all unnecessary detail, on the one hand, and the danger of stating mere conclusions of law or fact, on the other. By unnecessary particularity in a descriptive statement, he binds himself to prove this surplusage in addition to the essential facts of the case. Yet it is recognized that averments of mere surplusage, which are not "matter of description," are immaterial and need not be proved.[83] Thus, where a plaintiff, in action for personal injuries against the railroad, alleged that at the time of the injury she was standing at the intersection of a street and the main tracks of the defendant's railroad, the court expressed the opinion that it would be a material variance if the proof showed that she was then standing twenty-five or thirty feet from this point.[84] But the precise place where the personal injury occurs is not ordinarily an element in the cause of action, and it is sufficient to state the county in which the injury took place.[85] It is not necessary for a passenger, who is suing a railroad for injuries, to state the termini between which he was being carried; but, if he does state them, the allegations will require strict proof.[86] These decisions are placed on the ground that the great object of a declaration is to notify the defendant of the nature and character of the plaintiff's demand, so that he may be able to prepare for a defense.

If, however, the pleader make his allegations of particulars under a

[83] Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131; Barnes v. Northern Trust Co., 169 Ill. 112, 118, 48 N. E. 31. The pleader should ascertain what are the vital elements of his action or defense, and then examine the decisions of his own state to learn just how general he may make his allegations; for he is above all to avoid unnecessary detail. As we have already seen, by unnecessary particularizing in a descriptive allegation he binds himself to prove these unnecessary particulars in addition to the essential facts of the description. Thus in an action on the case, where defendant might have been liable as owner of certain premises, and the declaration averred that he was the "owner and occupier" of certain premises, proof tending to show liability as owner alone was held inadmissible.

[84] Lake Shore & M. S. Ry. Co. v. Ward, 135 Ill. 511, 26 N. E. 520.

[85] Carlin v. City of Chicago, 262 Ill. 564, 569, 104 N. E. 905, Ann. Cas. 1915B, 213.

[86] Wabash Western Ry. Co. v. Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111. See, also, Ohio & M. Ry. Co. v. People, 149 Ill. 663, 666, 36 N. E. 989; Wabash R. Co. v. Billings, 212 Ill. 87, 72 N. E. 2.

videlicet, that the injury occurred on a certain day, viz., on March 1, 1916, then the count will not limit the plaintiff to the precise day alleged, but admits proof that the injury occurred at any time within the period of the statute of limitations.[87] There is equal notice in either event, whether the "viz." is used or not.

In Spangler v. Pugh,[88] where a note was received in evidence, and the amount of the note was a half cent larger than the amount alleged in the declaration, this was held a fatal error in matter of substance. The Illinois Supreme Court, although regretting that such a trifling slip should delay a party in the administration of justice, sent the plaintiff back for a new trial, in order that the science of common-law pleading might not be impaired. In another case, the difference between the instrument described and that offered in evidence of a dollar mark after the amount of the subscription was held a fatal variance, although the body of the contract showed what was intended.[89] If the plaintiff had declared on the indebitatus counts, he might have proved the execution of the instrument and established the indebtedness without any details at all. In an action of assumpsit upon a note alleged in the declaration to have been executed by "William" Becker, the plaintiff offered at the trial a note signed by "Wilhelm" Becker. This was admitted in evidence over objection and the judgment for plaintiff was reversed for variance.[90]

REPUGNANCY

318. A pleading is bad for repugnancy when it contains contradictory or inconsistent allegations, which destroy or neutralize each other.

EXCEPTION—Where the allegation creating the fault is superfluous.

Repugnancy is a fault in all pleading, and the reason of the rule is clearly apparent, since, where the declaration or other pleading alleges matter which either contradicts or is inconsistent with matter previously alleged in the same pleading, there can be, on the party's own show-

[87] Collins v. Sanitary District of Chicago, 270 Ill. 108, 110 N. E. 318. On office and effect of videlicet or silicet to separate nonessential details, see Chicago Terminal Transfer R. Co. v. Young, 118 Ill. App. 226; Commonwealth v. Hart, 76 Mass. (10 Gray) 465; Chit. Pl. (16th Am. Ed.) 325; Will's Gould, Pl. 221.

[88] 21 Ill. 85, 74 Am. Dec. 77.

[89] Jacksonville, N. W. & S. E. Ry. Co. v. Brown, 67 Ill. 201.

[90] Becker v. German Mut. Fire Ins. Co. of North Chicago, 68 Ill. 412.

ing, neither a legal cause of action nor defense.[91] Thus, where, in an action of trespass, the plaintiff declared for taking and carrying away certain timber, lying in a certain place, for the completion of a house then lately built, this declaration was considered as bad for repugnancy, for the timber could not be for the building of a house already built.[92] So, where the defendant pleaded a grant of a rent, out of a term of years, and proceeded to allege that, by virtue thereof, he was seised in his demesne, as of freehold, for the term of his life, the plea was held bad for repugnancy.[93] Where the repugnancy is in a material point, it vitiates the pleading, which is ill on special demurrer.[94] When, however, the allegation creating the repugnancy is merely superfluous and redundant, so that it may be rejected from the pleading without materially altering the general sense and effect, it is to be disregarded or stricken out on motion, and will not vitiate the pleading; for the maxim is "Utile, per inutile, non vitiatur." [95]

AMBIGUITY OR DOUBT

319. Pleadings must not be ambiguous or doubtful in meaning; and, when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading.

320. Ambiguity in pleading is when the matter alleged may have several meanings; but a pleading is not objectionable on this ground, if it be clear enough for its true meaning to be ascertained, according to reasonable intendment or construction, though not worded with absolute precision.

The pleader must avoid stating the matter of his claim or defense in such a manner as to render it so doubtful or obscure that, upon its

[91] See Nevil v. Soper, 1 Salk. 213; Butt's Case, 7 Coke, 25a; Hart v. Longfield, 7 Mod. 148; Bynum v. Ewart, 90 Tenn. 655, 18 S. W. 394; Raymond v. People, 9 Ill. App. 344; Barber v. Summers, 5 Blackf. (Ind.) 339; Merrill v. Sheffield Co., 169 Ala. 242, 53 South. 219; Kelshan v. Elgin, Aurora & S. Traction Co., 132 Ill. App. 416; Florida Cent. & P. R. Co. v. Ashmore, 43 Fla. 272, 383, 32 South. 832; Hersey v. Northern Assur. Co., 75 Vt. 441, 446, 56 Atl. 95.

[92] Nevil v. Soper, 1 Salk. 213.

[93] Butt's Case, 7 Coke, 25a.

[94] Com. Dig. "Pleader," C, 23; Wyat v. Aland, 1 Salk. 324; Butt's Case, 7 Coke, 25a; Hart v. Longfield, 7 Mod. 148; Sibley v. Brown, 4 Pick. (Mass.) 137; Barber v. Summers, 5 Blackf. (Ind.) 339; Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940, 14 Ann. Cas. 340, Whittier, Cas. Com. Law Pl. p. 447.

[95] Co. Litt. 303b; Rex v. Stevens, 5 East, 244; Wyat v. Aland, supra.

face, it will be uncertain what he means to allege.[96] Thus, if, in trespass quare clausum fregit, the defendant pleads that the locus in quo was his freehold, he must allege that it was his freehold at the time of the trespass; otherwise, the plea is insufficient.[97] So, in debt on a bond, conditioned to make assurance of land, if the defendant pleads that he executed a release, his plea is bad if it does not express that the release concerns the same land.[98]

In determining which of two meanings that present themselves shall be adopted, that construction is given that is most unfavorable to the party pleading, since it is presumed that every person states his case as favorably as possible for himself.[99] This rule, however, is always subject to this qualification, namely, that when an expression is capable of different meanings the one which will support the pleading is to be taken rather than the one which will defeat it.[1]

PLEADINGS IN ALTERNATIVE

321. Pleadings must not be in the alternative. Where a legal duty imposes the due performance of one thing or another, the pleading must state that one was performed, and specify which one.

Hypothetical or alternative pleading is always bad.[2] While it is competent for a defendant, in a case where he is required to perform

[96] Co. Litt. 303b; Purcell v. Bradley, Yel. 86; Dovaston v. Payne, 2 H. Bl. 530; Thornton v. Adams, 5 Maule & S. 38; Com. Dig. "Pleader," E, 5; Manser's Case, 2 Coke, 3.

[97] Com. Dig. "Pleader," E, 5.

[98] Id.; Manser's Case, 2 Coke, 3.

[99] Co. Litt. 303b; Fuller v. Town of Hampton, 5 Conn. 422; Halligan v. Chicago & R. I. R. Co., 15 Ill. 558; Ware v. Dudley, 16 Ala. 742; President, etc., of City of Natchez v. Minor, 9 Smedes & M. (Miss.) 544, 48 Am. Dec. 727; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Bush v. Dunham, 4 Mich. 339; Henkel v. Heyman, 91 Ill. 96; Ferriss v. North American Fire Ins. Co., 1 Hill (N. Y.) 71; Slocum v. Clark, 2 Hill (N. Y.) 475. Strict construction at common law is superseded by liberal construction under the Codes. Emerson v. Nash, 124 Wis. 369, 380, 102 N. W. 921, 70 L. R. A. 326, 109 Am. St. Rep. 944; Jones v. Monson, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082; Pomeroy Code Remedies (4th Ed.) § 440, p. 590, 592.

[1] Rex v. Stevens, 5 East, 244; Amhurst v. Skynner, 12 East, 263; Foster v. Elliott, 33 Iowa, 216.

[2] Griffiths v. Eyles, 1 Bos. & P. 413, Whittier, Cas. Com. Law Pl. p. 519; King v. Brereton, 8 Mod. 330; Lord Arlington v. Merricke, 2 Saund. 410, note 8; Cook v. Cox, 3 Maule & S. 114; Zeidler v. Johnson, 38 Wis. 335; Ex parte Pain (R. v. Pain) 5Barn. & Cress. 251, 11 Eng. C. L. R., 7 Dowe. & Ry. 674, 15 Rul. Cas. 208; Parsons v. Smith, 164 Ill. App. 509; Anniston Electric

several affirmative acts, to plead generally the due performance of all,[3] if the acts imposed are in the alternative or distinctive, such a general plea will be ambiguous and improper, since it would not enable the court to determine which of the acts had been done, and no definite issue would be formed. The plea must therefore show the performance of one of the acts, and also clearly point out which one was completed. Thus, in an action of debt against a jailer for the escape of a prisoner, where the defendant pleaded that if the said prisoner did, at any time or times after the said commitment, etc., go at large, he so escaped without the knowledge of the defendant, and against his will, and that, if any such escape was made, the prisoner voluntarily returned into custody before the defendant knew of the escape, etc., the court held the plea bad, for "he cannot plead hypothetically that, if there has been an escape, there has also been a return. He must either stand upon an averment that there has been no escape, or that there have been one, two, or ten escapes, after which the prisoner returned." [4] So, where it was charged that the defendant wrote and published, or caused to be written and published, a certain libel, this was considered as bad for uncertainty.[5]

Alternative or hypothetical pleading is a defect in form, objectionable on special demurrer only.[6]

& Gas Co. v. Rosen, 159 Ala. 195, 48 South. 798, 133 Am. St. Rep. 32; Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450, 51 L. R. A. (N. S.) 640; Birmingham, Ry. Light & Power Co. v. Nicholas, 181 Ala. 491, 61 South. 361; Macurda v. Lewiston Journal Co., 104 Me. 554, 72 Atl. 490, Scott, Cas. Civ. Proc. 203. See 33 Harv. Law Rev. 244.

[3] Earl of Kerry v. Baxter, 4 East, 340.

[4] Griffiths v. Eyles, supra.

[5] King v. Brereton, supra.

[6] Oglethorp v. Hyde, Cro. Eliz. 233; Hodgson v. East India Co., 8 Term R. 280; Taylor v. Needham, 2 Taunt. 278. Cases arise where the plaintiff is uncertain against which of several persons he is entitled to relief, as where several corporations operate a line of track, or where a defendant may have been acting either as an agent or as a principal. In such cases some modern rules of procedure allow plaintiff to join any or all of them as defendants in the alternative. It is also deemed convenient under modern rules to allow a party to include in his pleading two or more alternative sets of material facts, even though inconsistent, and to claim relief thereunder in the alternative, upon an alternative construction or ascertainment of his cause of action, without the necessity of making an election. See N. J. Rules, 33, 38; Federal Eq. Rule 30 (201 Fed. v. 118 C. C. A. v).

DUPLICITY IN GENERAL

322. Duplicity, or double pleading, consists in alleging two or more distinct grounds of complaint or defense for a single object, when one only would be sufficient.

323. The fault may exist in, and the rule therefore applies to:
(a) The declaration.
(b) The subsequent pleadings.

The requirement of the common law that pleadings shall not be double has for its object the attainment of the singleness or unity of the issue between the parties, which it is the aim of all pleadings to produce. It precludes both plaintiff and defendant, in their respective pleadings, from stating or relying upon more than one matter, constituting a sufficient ground of action in respect to the same demand, or an effective defense to the same claim, or an adequate answer to the preceding pleading of the opponent.[7] The rule in its terms points to doubleness only, as if it prohibited only the use of two allegations or answers; but its meaning, of course, extends equally to the case of more than two, the term "doubleness" or "duplicity" being applied, though with some inaccuracy, to either case. The effect of the rule is thus to avoid confusion and a multiplication of issues in the action, and it is in all cases founded on the principle that it would be unnecessary and vexatious to cause the adverse party to litigate and prove two or more facts or propositions, when one alone would sufficiently establish the matter in dispute.

Duplicity in a declaration consists in joining, in one and the same count, different grounds of action to enforce a single right of recovery.[8] This is a fault in form, because it tends to prolixity and confusion and a multiplicity of issues.

[7] Com. Dig. "Pleader," C, 33, E, 2, F, 16; Humphreys v. Bethily, 2 Vent 198; Galle v. Betts, 3 Salk. 141; Butcher v. Steuart, 9 Mees. & W. 404; Burrass v. Hewitt, 8 Scam. (Ill.) 224; Scott v. Whipple, 6 Greenl. (Me.) 425; Connelly v. Pierce, 7 Wend. (N. Y.) 129; Rumbarger v. Stiver, 6 Ohio, 99; Tebbets v. Tilton, 24 N. H. 120; Parker v. Parker, 17 Pick. (Mass.) 236; Calhoun v. Wright, 3 Scam. (Ill.) 74; Noetling v. Wright, 72 Ill. 390; Chicago W. D. Ry. Co. v. Ingraham, 131 Ill. 659, 23 N. E. 350. The rule as to duplicity finds its analogy in equity in the prohibition of multifariousness, or the improper joinder of two causes of action in one statement. The fault is also recognized and condemned in code pleading. See Pierce v. Carey, 87 Wis. 232; Brown v. Nichols, Shepard & Co., 123 Ind. 492, 24 N. E. 339.

[8] As to duplicity in the declaration, see, also, Cornwallis v. Savery, 2 Bur. 773; Manser's Case, 2 Coke, 4; Little v. Perkins, 3 N. H. 469. Count seeking to recover damages as in an action on the case for deceit, and also for

SAME—INDUCEMENT

324. No matter will operate to make a pleading double that is pleaded only as necessary inducement to another allegation.

Thus, it may be pleaded, without duplicity, that after the cause of action accrued the plaintiff (a woman) took a husband, and that the husband afterwards released the defendant; for though the coverture is itself a defense, as well as the release, yet the averment of the coverture is a necessary introduction to that of the release.[9] This exception to the general rule is prescribed by an evident principle of justice; for the party has a right to rely on any single matter that he pleases, in preference to another, as, in this instance, on the release in preference to the coverture. But if a necessary inducement to the matter on which he relies, when itself amounting to a defense, were held to make his pleading double, the effect would be to exclude him from this right, and compel him to rely on the inducement only.

SAME—CONSEQUENCES OF DUPLICITY

325. Duplicity is a fault in form, and can only be objected to by special demurrer.

This rule results necessarily from the nature of the fault, which is not in the substance of the matter pleaded, but in the statement of matter in excess of what is necessary to constitute a valid claim or

a breach of contract, Noetling v. Wright, 72 Ill. 390; People's Natl. Bank v. Nickerson, 106 Me. 502, 76 Atl. 987, Whittier, Cas. Com. Law Pl. p. 495; Chicago W. D. Ry. Co. v. Ingraham, 131 Ill. 659, 23 N. E. 350 (negligent damage to person and property from same act); Wilson v. Gilbert, 161 Ill. 49, 43 N. E. 792; Kinney v. Turner, 15 Ill. 182; Duplicity, Schwindt v. Lane-Potter Lumber Co., 40 Mont. 537, 107 Pac. 818, 135 Am. St. Rep. 639; Gore v. Condon, 87 Md. 368, 39 Atl. 1042, 40 L. R. A. 382, 67 Am. St. Rep., 352; Creen v. Michigan Cent. R. Co., 168 Mich. 104, 133 N. W. 956, Ann. Cas. 1913C, 98; Ferguson v. National Shoemakers, 108 Me. 189, 79 Atl. 469 (several distinct independent breaches of duty); Laporte v. Cook, 20 R. I. 261, 38 Atl. 700. See 7 Standard Enc. Proc. 932; 13 C. J. 783.

[9] Bac. Abr. "Pleas," etc., K, 2; Com. Dig. "Plender," E, 2. A plea by an executrix in abatement was not subject to the charge of duplicity in alleging the facts showing that the action did not survive against defendant as executor, where, if the action survived, those facts were necessary under Abatement Act, § 25, to make the plea good. Gemmill v. Smith, 274 Ill. 87, 113 N. E. 27.

answer. Being thus a defect only in form, advantage must be taken of it, under the statute of Elizabeth, only by special demurrer, in which the particular duplicity must be clearly pointed out.[10] If the party demur generally, the objection cannot afterwards be raised. Where the opposite party, instead of demurring to a pleading which contains two distinct and sufficient matters, improperly joined, pleads over instead, the weight of authority seems to be that he must answer both matters, or the one passed over will remain decisive against him.[11] In such case, an answer to each matter, single in itself, does not constitute duplicity; but it must still be remembered that each separate answer, as to its own allegations, is subject to the full operation of the rule.

The rule requiring the demurrer for duplicity to be special, finds no application in the case of misjoinder of causes of action, since a plaintiff who joins in the same declaration different counts, containing separate and incongruous causes of action, as distinct grounds of recovery, commits a radical fault, and his declaration is bad, either on general demurrer or in arrest of judgment or on writ of error.[12]

PLEADINGS TO BE TRUE

326. Every pleading should state only such facts as are true and capable of proof, avoiding false and frivolous allegations tending to deceive the court and the adversary, and to delay the progress of the trial.

At common law, while it is a principle that pleadings ought to be true, yet there are no means of enforcing the rule. Thus the common-

[10] Humphreys v. Bethily, 2 Ven. 198; Saunders v. Crawley, 1 Rolle, 112; Seymour v. Mitchel, 2 Root (Conn.) 145; Onion v. Clark, 18 Vt. 363; Briggs v. Grand Trunk Ry. Co., 54 Me. 375; Carpenter v. McClure, 40 Vt. 108; Franey v. True, 26 Ill. 184; Armstrong v. Webster, 30 Ill. 333; Sims v. Klein, Breese (Ill.) 302; Kipp v. Bell, 86 Ill. 577; Yeazel v. Harber Bros., 106 Ill. App. 410.

[11] See Bolton v. Cannon, 1 Vent. 272; Reynolds v. Blackburn, 7 Adol. & E. 161. And see Gould v. Ray, 13 Wend. (N. Y.) 633; Blome v. Wahl-Henius Institute of Fermentology, 150 Ill. App. 164, 168.

[12] See Cooper v. Bissell, 16 Johns. (N. Y.) 146; Bodley v. Roop, 6 Blackf. (Ind.) 158; Pharr v. Bachelor, 3 Ala. 237; McGinnity v. Laguerenne, 5 Gilman (Ill.) 101. See Mayer v. Lawrence, 58 Ill. App. 194. But a demurrer for misjoinder must be to the whole declaration, and not merely to the defective count or breach. Kingdon v. Nottle, 1 Maule & S. 355; Fernald v. Garvin, 55 Me. 414. And the plaintiff cannot, if a demurrer is interposed, aid his mistake by entering a nolle prosequi, so as to prevent the operation of the demurrer, Rose v. Bowler, 1 H. Bl. 110; though an amendment by striking

law pleadings fail to uncover the real issues in dispute. The Illinois Practice Act (section 52) makes provision that the denial of the execution or assignment of an instrument in writing, when a copy is filed with the pleading, must be verified by affidavit. The Illinois Practice Act (section 55) gives the plaintiff the option in actions on contract for the payment of money to file an affidavit as to the amount due, and thereby require the defendant to file with his plea an affidavit of merits which must specify the nature of the defense. The purpose of this is to give the plaintiff notice of the real defense to be presented and to limit the issues to be tried.

It is usually provided in reformed systems of pleading that the plaintiff may verify his complaint, and then the denials of the answer must be specific, and must also be made under oath with the penalties of perjury for falsehood. This requires the defendant to put in issue only the points on which he means to rely. Thus, in a suit on a fire insurance policy, there may be no dispute as to the execution of the contract sued on; but the company may expect to avoid liability by showing in defense some excuse, such as breach of warranty by the insured. Accordingly, if the complaint be verified, the company cannot deny the signature or due execution of the policy, of which the proof might be difficult for the plaintiff to obtain and produce.[13]

CONFORMANCE TO CUSTOMARY FORMS

327. Pleadings should observe the known and ancient expressions as contained in approved precedents. When there has been a long-established form of pleading, containing allegations of frequent and ordinary occurrence applicable to the facts of a particular case, it should in general be adopted, for the sake of uniformity and certainty.

This rule is not to be taken as an imperative one, except in certain cases where precise technical expressions or terms are required to be used. At the same time it is safer to follow approved precedents, otherwise there is danger of omitting an averment which might, on account of precedent, be considered essential to the particular pleading.

out the objectionable counts may be allowed, Jennings v. Newman, 4 Term R. 348; Fernald v. Garvin, 55 Me. 417; Noble's Adm'r v. Laley, 50 Pa. 281.

[13] Bliss, Code Pl. §§ 138, 422. See Higgins Carpet Co. v. Latimer, 165 Pa. 617, 30 Atl. 1050; English order 21, rule 9. By the rules 83 of the Supreme Court of New Jersey, allegations and denials, made without reasonable cause and found untrue, shall subject the party pleading them to the payment of such reasonable expenses caused to the other party by such untrue pleading,

The general issues are examples of forms of expression, fixed by ancient usage, from which it is improper to depart. And another illustration of this rule occurs in the following English case: To an action on the case, the defendants pleaded the statute of limitations, namely, "that they were not guilty within six years," etc. The court decided, upon special demurrer, that this form of pleading was bad, upon the ground that "from the passing of the statute to the present case the invariable form of pleading the statute to an action on the case for a wrong has been to allege that the cause of action did not accrue within six years," etc.; and that "it was important to the administration of justice that the usual and established forms of pleading should be observed."[14]

The rule stated is of rather uncertain application, for it must be often doubtful whether a given form of expression has been so fixed by the course of precedent as to admit of no variation. In a New York case the lower court held a declaration in case for deceit in the sale of property bad, even after verdict, because it failed to allege the scienter on the part of the defendant in making the sale, which was in accordance with precedent, and was deemed essential. "To dispense with the rule," said Kent, C. J., "would be a dangerous relaxation, and might lead to the loss of certainty and precision in pleading. General rules will sometimes appear harsh and rigorous in their application to particular cases; but I entertain a decided opinion that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought, consequently, to be very cautiously touched by the hand of innovation."[15] On writ of error, this decision was reversed on the ground that the defect was aided or cured by verdict.[16]

[14] Dyster v. Battye, 3 Barn. & Ald. 448. And see Slade v. Dowland, 2 Bos. & P. 570; Dally v. King, 1 H. Bl. 1; Dowland v. Slade, 5 East, 272. See 11 Ill. Law Rev. 56.

[15] Bayard v. Malcolm, 1 Johns. (N. Y.) 453, 471.

[16] Bayard v. Malcolm, 2 Johns. (N. Y.) 550, 3 Am. Dec. 450. And see, to the same effect, Beebe v. Knapp, 28 Mich. 53.

CHAPTER XX

OBJECTIONS TO DEFECTS DURING OR AFTER TRIAL

328-329. Demurrer to Evidence.
330-331. Motion in Arrest of Judgment.
332. Aider by Verdict.
333. Judgment Non Obstante Veredicto.
334. Repleader.
335-336. Review by New Trial.
337-338. Review on Writ of Error and Appeal.
339. Bills of Exceptions.
340. Writ of Certiorari.
341. Writ of Prohibition.

DEMURRER TO EVIDENCE

328. A demurrer to evidence is an exception taken by the party holding the negative of the issue to the legal sufficiency of the whole evidence advanced by the party upon whom the burden of proof rests.

329. It questions the sufficiency of the evidence only, admitting both its existence and the facts which it tends to prove. It must be taken to the whole evidence, and not to a part only.

A demurrer to the evidence is analogous to a demurrer in pleading. It questions the sufficiency of the evidence in law, and calls for the opinion of the court upon the legal effect of the facts shown in evidence. For this purpose it admits all the facts stated in the evidence or which it conduces to prove.[1] If the plaintiff's evidence does not show a prima facie case, the defendant may demur. But if he wishes to contradict it, he must resort to the jury.

This step is taken only in cases in which it is very clear that the evidence has no tendency to prove the case; and naturally it is not often resorted to, for it is generally unsafe for a party to rest his case

[1] Gibson v. Hunter, 2 H. Bl. 187; Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029; Copeland v. New England Ins. Co., 22 Pick. (Mass.) 135, Lloyd, Cas. Civ. Proc. p. 888; Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576. See Fowle v. Alexandria, 11 Wheat. (U. S.) 320, 6 L. Ed. 484; Thayer, Prelim. Treatise Ev. p. 234; Zane, 16 Ill. Law Rev. 402; 4 Va. Law Reg. (N. S.) 833; 27 W. Va. Law Quarterly, 236, anomalous feature of demurrers to the evidence in West Virginia; 6 Va. Law Rev. 276.

solely upon the test of what the evidence tends to prove,—a matter often difficult of determination. The party demurring must obviously be the one holding the negative of the issue, as the result of the case must, as a general rule, be in his favor, unless the affirmative is proved against him; and the effect of the proceeding is a determination of the question whether the plaintiff's evidence shows a prima facie case or right of action.[2]

The demurrer to the evidence withdraws from the jury the application of the law to the facts, as in the case of a special verdict. On a demurrer to the evidence or motion for nonsuit, no objection can be made to the pleadings.[3]

In most states the practice of demurring to the evidence has become obsolete. It is superseded by a motion for a nonsuit or by a motion to direct a verdict for the defendant.[4] At common law a nonsuit was not granted without the consent of the plaintiff, and the court had no power to order a nonsuit where the plaintiff insisted on submission of the case to the jury. But in many jurisdictions a court may now grant a motion for a nonsuit where the plaintiff's evidence fails to make out a prima facie case.

MOTION IN ARREST OF JUDGMENT

330. The court will generally, on motion, refuse to enter judgment upon a verdict, default, or demurrer to evidence, when substantial defects exist in—
(a) The pleadings; or
(b) The verdict.

331. The defect must be at least one which would have been fatal on a general demurrer, and not one which a verdict would cure; and it must be apparent on the face of the record.

As the judgment is a conclusion of law from all the facts ascertained and spread upon the record, so this conclusion must rest upon the whole

[2] A demurrer to plaintiff's evidence raises a question of law whether the evidence in favor of plaintiff, if considered to be true, together with the inferences which may fairly be drawn therefrom, tends to support the cause of action of the plaintiff. Brophy v. Illinois Steel Co., 242 Ill. 55, 89 N. E. 684; Kee & Chapell Dairy Co. v. Pennsylvania Co., 291 Ill. 248, 253, 126 N. E. 179; Libby, McNeill & Libby v. Cook, 222 Ill. 206, 78 N. E. 599.

[3] Lumby v. Allday, 1 Cr. & Jer. 301; Ames, Cas. Pl. (2d Ed.) pp. 270, 272, note; Kelly v. Strouse & Bros., 116 Ga. 872, 882, 43 S. E. 280; Bank of United States v. Smith, 11 Wheat. 171, 173, 6 L. Ed. 443.

[4] Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct.

record. If a declaration shows no cause of action whatever, or a plea is utterly wanting in stating a defense, the entry of a judgment clearly cannot be allowed to represent what has not been established. A motion in arrest of judgment must be made before rendition of the judgment. It is a kind of belated demurrer.[5]

Defects in the Pleadings

It is an invariable rule that no defect in the pleadings which would not have been fatal to them on a general demurrer can be available for arresting a judgment,[6] formal defects being cured by statute or open only to special demurrer. The converse of the rule, however,—that all such substantial defects will support this motion,—is not universally true, as they may consist of the omission of particular facts or circumstances which, in accordance with a rule we shall hereafter consider, the court will presume, after a verdict, to have been duly proved.[7] This distinction furnishes the true criterion as to what defects in a declaration or plea are grounds for arresting judgment. If they come within the rule of aider by verdict, the motion cannot be sustained.[8] As Smith says:

"A motion in arrest of judgment is the exact reverse of that for judgment non obstante veredicto. The applicant in the one case in-

478, 35 L. Ed. 55; Hopkins v. Nashville, C. & St. L. R. R., 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354; Bass v. Rublee, 76 Vt. 395, 57 Atl. 965; Lomer v. Meeker, 25 N. Y. 361; Finch v. Conrade's Ex'r, 154 Pa. 326, 26 Atl. 368, Lloyd, Cas. Civ. Proc. pp. 389, note, 403, note.

[5] Hitchcock v. Haight, 2 Gilman (Ill.) 604; Bedell v. Stevens, 28 N. H. 118, Whittier, Cas. Com. Law Pl. p. 542; Sawyer v. Boston, 144 Mass. 470, 11 N. E. 711; 5 Reeves, Hist. Eng. Law, 20. The relief must be applied for before final judgment. Keller v. Stevens, 66 Md. 132, 6 Atl. 533. See Miller v. Gable, 80 Ill. App. 578. Smith v. Biesiada, 174 Ind. 134, 90 N. E. 1009, Lloyd, Cas. Civ. Proc. p. 470. And the errors must be apparent on the record. Jordan v. State, 22 Fla. 528. The evidence is no part of the record. Bond v. Dustin, 112 U. S. 604, 608, 5 Sup. Ct. 296, 28 L. Ed. 835.

[6] Pittsburg, C., C. & St. L. R. Co. v. City of Chicago, 144 Ill. App. 293. Misjoinder of causes of action or of parties is ground for arrest of judgment. Bull v. Mathews, 20 R. I. 100, 37 Atl. 536, Whittier, Cas. Com. Law Pl. p. 549; Guinnip v. Carter, 58 Ill. 296. Compare Chicago & A. R. Co. v. Murphy, 198 Ill. 462, 64 N. E. 1011.

[7] See Lane v. Maine Mut. Fire Ins. Co., 12 Me. 44, 28 Am. Dec. 150; Avery v. Inhabitants of Tyringham, 3 Mass. 160, 3 Am. Dec. 105; Read v. Inhabitants of Chelmsford, 16 Pick. (Mass.) 128.

[8] Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680. A verdict will not mend the defect, where an essential element of the case is not alleged in the declaration, but it will cure an ambiguity or generality of statement. In a contract action, judgment will be arrested for failure to allege performance of conditions precedent. Rushton v. Aspinall (1781) 2 Doug. 679; Ames, Cas. Pl. (2d Ed.) p. 257, note; Hughes, Proc. 728.

sists that the plaintiff is entitled to the judgment of the court, although a verdict has been found against him. In the other case, that he is not entitled to the judgment of the court, although a verdict has been delivered in his favor. Like the motion for judgment non obstante veredicto, that in arrest of judgment must always be grounded upon something apparent on the face of the pleadings; for instance, if, in an action against the indorser of a bill of exchange, the plaintiff were to omit to allege in his declaration that the defendant had notice of dishonor, judgment would be arrested even after a verdict in the plaintiff's favor.

"The power to make these respective motions, coupled with the inability to demur and plead at the same time, led to a practice of passing over objections to the pleadings until after the trial, when it was too late to amend, and the successful litigant was often deprived of the fruits of a verdict according to the merits by a slip in the pleadings, which might have been remedied if brought to his notice by demurrer." [9]

An utter failure to keep in view the proper functions of pleading is strikingly shown when a fair trial on the merits of a case is set at naught by a motion in arrest of judgment, by judgment notwithstanding the verdict, or even on error, because of a lack of some allegation in the declaration. Such a perversion of justice by the rules of procedure results from the blind and mechanical application of rules for their own sake. Astute practitioners, instead of giving gratuitous instruction to their opponents, often permit them to go through the trial on defective pleadings, and then wipe out all the results of the trial if it goes against them, by motion in arrest of judgment, or a similar motion. Such technicalities cast disrepute on the law.

In Gillman v. Chicago Rys. Co.,[10] Mr. Justice Craig says in his dissenting opinion: "The defendant, if not sufficiently informed of the statement of claim, had the right to demand a more specific statement, but instead of that it filed an affidavit of merits, in which it reserved the right to object to any insufficiency of plaintiff's claim, went to trial, and had a fair trial on the merits, and, having been unsuccessful in the trial, now asks that the judgment be reversed because the statement of claim did not set out a complete cause of action." [11]

The majority of the court evidently failed to appreciate that the

[9] J. W. Smith, Action at Law (11th Ed.) p. 183. See Kelly v. Chicago City R. Co., 283 Ill. 640, 119 N. E. 622.

[10] 268 Ill. 305, 109 N. E. 181.

[11] See also, Enberg v. City of Chicago, 271 Ill. 404, 411, 111 N. E. 114.

main function of pleading is to clear the ground preparatory to the trial. The need of a formal "basis for the judgment" is not a sufficient reason for permitting such objections to pleadings to be raised and be availed of after a trial on the merits, unless it is shown that the defendant was actually prevented from having a fair trial by the defect.

In some states, a defendant, whose demurrer has been erroneously overruled, may not move in arrest of judgment; yet he may move for judgment non obstante veredicto, and may procure a reversal of the judgment on writ of error.[13] But it has been well said that "a court, by ruling wrongly on a demurrer, does not preclude itself from afterwards ruling rightly upon a motion in arrest of judgment." [13]

Defects in the Verdict

From the logical nature of the rules governing all common-law pleading, it is apparent that, if a verdict is to be effective as a finding upon the issues presented, it must conform to and include all matters of substance covered by such issues. Judgment will consequently be arrested when a general verdict, awarding entire damages, is given on a declaration containing several counts, some of which are bad, but not when it is silent as to matters which, though submitted, can have no effect upon the merits of the controversy.[14]

[13] Chicago & E. I. R. Co. v. Hines, 132 Ill. 161, 166, 23 N. E. 1021, 22 Am. St. Rep. 515; Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680; Reavely v. Harris, 239 Ill. 526, 88 N. E. 238. See People v. Powell, 274 Ill. 224, 113 N. E. 614; 4 Ill. Law Rev. 174, 284; 10 Ill. Law Rev. 417, 423, 426; Whittier, Cas. Com. Law Pl. p. 543, note. Ames, Cas. Pl. (2d Ed.) 259. "The Illinois rule is almost fantastically technical, for although a defendant whose demurrer has been erroneously overruled may not move in arrest of judgment, he may move for judgment non obstante veredicto, Chicago & E. I. R. Co. v. Hines, 132 Ill. 161, 166, 23 N. E. 1021, 22 Am. St. Rep. 515; or may procure a reversal on writ of error.

[13] Hyde's Ferry Turnpike Co. v. Yates, 108 Tenn. 428, 430, 67 S. W. 69. Compare Warren v. Badger Lead & Zinc Co., 255 Mo. 138, 146, 164 S. W. 206.

[14] Leach v. Thomas, 2 Mees. & W. 427, Ames, Cas. Pl. (2d Ed.) pp. 260, 261, note; Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 11 L. R. A. 162, 22 Am. St. Rep. 126, Whittier, Cas. Com. Law Pl. p. 547. In most states if there is one good count by which a general verdict can be supported, judgment will not be arrested because some of the counts are defective. Ames, Cas. Pl. (2d Ed.) 260; Langan v. Enos Fire Escape Co., 233 Ill. 308, 84 N. E. 267; Klofski v. Railroad Supply Co., 235 Ill. 146, 85 N. E. 274; Varn v. Pelot, 55 Fla. 357, 45 South. 1015. See White v. Bailey, 14 Conn. 272 (absence of finding on immaterial issues); Patterson v. United States, 2 Wheat. 221, 4 L. Ed. 224.

AIDER BY VERDICT

332. Wherever a pleading states the essential requisites of a cause of action or ground of defense, it will be held sufficient after a general verdict in favor of the party pleading, though the statement be informal or inaccurate; but a verdict will never aid the statement of a title or cause of action inherently defective.

It is well settled that faults in pleading may in some cases be aided or cured by verdict. Thus, where the plaintiff, in alleging a grant which must have been by deed, fails to expressly state in the declaration that it was by deed, and the defendant, instead of demurring, as he would be entitled to do, and in case of which the declaration would be held bad, pleads over, and issue is taken upon the grant, and a verdict rendered for the plaintiff, the verdict cures the defect in the declaration, and no objection on that ground can be taken by motion in arrest of judgment, or writ of error.[15] The doctrine of aider by verdict is founded on the common law, and is entirely independent of any statutory enactment. The expression "cured" or "aided by verdict" signifies that the court will, after verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated, or omitted, was duly proved at the trial so as to support the verdict.

The extent and principle of this doctrine is thus stated in an English case: "Where a matter is so essentially necessary to be proved that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms

[15] Lightfoot v. Brightman, Hut. 54; 1 Saund. 228b. And see Merrick v. Trustees of Bank of Metropolis, 8 Gill (Md.) 59; Addington v. Allen, 11 Wend. (N. Y.) 375; White v. Concord R. Co., 30 N. H. 188; Colt v. Root, 17 Mass. 229; Harding v. Craigie, 8 Vt. 501; Garland v. Davis, 4 How. 131, 11 L. Ed. 907; Knight v. Sharp, 24 Ark. 602; Reeves v. Forman, 26 Ill. 313; Barnes v. Brookman, 107 Ill. 317; Commercial Ins. Co. v. Treasury Bank, 61 Ill. 482, 14 Am. Rep. 73; Compton v. People, 86 Ill. 176. Failure to aver demand before suit, Lusk v. Cassell, 25 Ill. 209. Failure to aver full performance by plaintiff in action on contract, Warren v. Harris, 2 Gilman (Ill.) 307. Defective statement in action for rent against tenant holding over, Clinton Wire-Cloth Co. v. Gardner, 99 Ill. 151. Failure to count on the statute under which action is brought, Pearce v. Foot, 113 Ill. 228, 55 Am. Rep. 414. Want of venue, Toledo, P. & W. Ry. Co. v. Webster, 55 Ill. 338; Roberts v. Corby, 86 Ill. 182. Want of a sum in the ad damnum where the body of the declaration shows a claim of damages to an amount exceeding the verdict, Burst v. Wayne, 13 Ill. 599. Want of formal joinder in issue, Strohm v. Hayes, 70 Ill. 41; Imperial Fire Ins. Co. v. Shimer, 96 Ill. 580. See 10 Ill. Law Rev. 417, 423, 6 Va. Law Rev. 285.

in the declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may be reasonably presumed, after verdict, that it was so restrained at the trial.[16] And it was said by Mr. Sergeant Williams: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict." [17]

It is only where a "fair and reasonable intendment" can be applied that a verdict will cure the objection. The intendment must arise not from the verdict alone, but from the combined effect of the verdict, and the issue upon which the verdict was given, as shown by the record. It is essential that the particular thing that is to be presumed to have been proven shall be such as can reasonably be implied from the allegations on the record. The criterion by which to distinguish between defects in a declaration which are and such as are not cured by verdict may therefore be laid down as follows: Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor; because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial, and it is therefore a fair presumption that they were so proved. But, where no cause of action is shown, the omission is not cured; and if a necessary allegation is altogether omitted from the pleading, or if the latter contains matter adverse to the right of the party pleading it, and so clearly expressed that no reasonable construction can alter its meaning, a verdict will afford no help. A more simple statement of the rule is that a verdict will cure the defective statement of a title, but not the statement of a defective title.[18]

[16] Jackson v. Pesked, 1 Maule & S. 234. And see Smith v. Eastern R. R., 35 N. H. 363; Flanders v. Town of Stewartstown, 47 N. H. 540; Wallace v. Curtiss, 86 Ill. 156; Helman v. Schroeder, 74 Ill. 158; Ladd v. Pigott, 114 Ill. 647, 2 N. E. 503.

[17] 1 Saund. 228a; City of Elgin v. Thompson, 98 Ill. App. 358, Whittier, Cas. Com. Law Pl. p. 546.

[18] Rushton v. Aspinall, 2 Doug. 683 (see Hughes, Proc. 728); Jackson v. Pesked, 1 Maule & S. 234; Nerot v. Wallace, 3 Term R. 25; Weston v. Mason, 8 Burr. 1725; White v. Concord R. Co., 30 N. H. 188; Town of Colebrook v. Merrill, 46 N. H. 160; Miles v. Oldfield, 4 Yeates (Pa.) 423, 2 Am. Dec. 412; Richardson v. Farmer, 36 Mo. 35, 88 Am. Dec. 129; Roper v. Clay, 18 Mo. 383, 59 Am. Dec. 314; Bowman v. People, 114 Ill. 474, 2 N. E. 484; Barnes v. Brookman, 107 Ill. 317; Smith v. Curry, 16 Ill. 147. See the cases previously cited under this rule. As to the assignment of a general instead of a special breach, see Minor v. Mechanics' Bank of Alexandria, 1 Pet. (U. S.) 68, 7 L. Ed. 47. Compare Abrahams v. Jones, 20 Ill. App. 83. Statement of a wrong venue, Barlow v. Garrow, Minor (Ala.) 1; a defective consideration, Hendrick v. Seely, 6 Conn. 176; a joinder of good and bad counts in the same declaration, Payson v. Whitcomb, 15 Pick. (Mass.) 212; the defective statement of a good title or cause of action, Gardner v. Lindo, 1 Cranch, C. C. 78, Fed. Cas. No. 5,231; New Hampshire Mut. Fire Ins. Co. v. Walker, 30 N. H. 324; Clark v. Fairley, 24 Mo. App. 429; want of special demand, Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467. See, also, Andros v. Childers, 14 Or. 447, 13 Pac. 65; McCune v. Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278; Moline Plow Co. v. Anderson, 24 Ill. App. 364; Blair v. Chicago & A. Ry. Co., 89 Mo. 383, 1 S. W. 350; Palmer v. Arthur, 131 U. S. 60, 9 Sup. Ct. 649, 33 L. Ed. 87. And see Western Union Tel. Co. v. Longwill, 5 N. M. 308, 21 Pac. 339.

The verdict must be for the party in whose favor the implication is to be made, for it is in consequence of the verdict, and to support it, that the court is induced to put a liberal construction upon the allegations on the record.[19]

JUDGMENT NON OBSTANTE VEREDICTO

333. Where a plea is good in form, but shows no valid answer to the merits of the action, the court will order judgment for the plaintiff, notwithstanding a verdict for the defendant. The motion will now be granted in favor of a defendant, where plaintiff's pleadings are not sufficient to support a judgment upon a verdict in his favor.[20]

The granting of judgment non obstante veredicto is another instance of the application of the general principle in pleading that a judgment

[19] Easton v. Pratchett, 4 Tyrw. 472; Kelleher v. Chicago City R. Co., 256 Ill. 454, 100 N. E. 145.

[20] Where the defendant has obtained a verdict upon an insufficient affirmative plea, judgment may be rendered for the plaintiff, notwithstanding the verdict for the defendant on the confession of the declaration by the plea, either express or constructive. Plunkett v. Detroit Electric Co., 140 Mich. 299, 103 N. W. 620, Whittier, Cas. Com. Law Pl. pp. 552, 553, note. So defendant, where plaintiff's pleadings are not sufficient to support judgment on verdict for plaintiff. 11 Enc. Pl. and Prac. 912 et seq. In many states the plaintiff may move for judgment on the pleadings, either before verdict or after verdict for the defendant, and whether the bad plea of the defendant is affirmative or negative. Ames, Cas. Pl. (2d Ed.) p. 266.

can only be given for one who, upon record, is entitled to it. This is in effect a motion for judgment on the pleadings. A plea in bar may confess the action, but not sufficiently avoid it to make out a legal defense; and here, although the jury have found in favor of the party offering it, judgment must necessarily go against him on his own showing.

Formerly the motion could be granted only where it appeared on the record that the plaintiff was entitled to judgment notwithstanding the verdict for the defendant, but later the motion could be granted in favor of a defendant, where the plaintiff's pleadings were not sufficient to support a judgment in his favor.[21]

A distinction is to be noted here between a judgment of this character and a repleader; the first being given when a plea is good in form, but bad in showing a defense without merit upon which issue is joined and found for the party pleading; while the latter is awarded when the defect lies rather in the manner of statement than the matter pleaded, upon which an immaterial issue is joined. A judgment non obstante veredicto is always upon the merits of the action; a repleader is upon the form and manner of pleading.[22] If a plea is defective, and the defendant succeeds at the trial, the question is whether the plea confesses the cause of action. If it does, and the matter pleaded in avoidance is insufficient, the plaintiff will be entitled to judgment notwithstanding the verdict. If not, there should be a repleader.

REPLEADER

334. When the court, from the whole record, is unable to determine for whom judgment should be given, by reason of the issue having been an immaterial one, it may order the parties to plead de novo.

The above proposition, it is conceived, sufficiently explains the nature of this proceeding, which, as a general rule, is only ordered after

[21] Cruikshank v. St. Paul Fire & Marine Ins. Co., 75 Minn. 266, 77 N. W. 958; Tooker v. Arnoux, 76 N. Y. 397, Ames, Cas. Pl. 269, p. 270 note; Plunkett v. Detroit Electric R. Co., 140 Mich. 209, 103 N. W. 620, Whittier, Cas. Com. Law Pl. p. 552; Shives v. Eno Cotton Mills, 151 N. C. 290, 66 S. E. 141, Lloyd, Cas. Civ. Proc. 486, 487, note.

[22] Otis v. Hitchcock, 6 Wend. (N. Y.) 433, Whittier, Cas. Com. Law Pl. p. 554; Bac. Abr. "Pleader," R 18; Archb. Civ. Pl. 358; Lambert v. Taylor, 4 Barn. & C. 138. See Buckley v. Duff, 111 Pa. 223, 3 Atl. 823; Inquirer Printing & Publishing Co. v. Rice, 106 Pa. 623; Adams v. Munter, 74 Ala. 338. And see Wilkes v. Broadbent, 1 Wils. 63; 23 Cyc. 780.

verdict, for the obvious reason that until then the question for whom the judgment should be rendered cannot well arise, and which, when directed, requires the parties to begin their new pleading from the first defect, without regard to the side on which it appears, and to replace each faulty pleading with a correct one.[23] It will only be awarded where the pleadings are so defective that no valid judgment can be rendered upon them, and when it will be the means of effecting substantial justice between the parties. It will not be granted when the only material fact has been passed upon by the jury, but may be, it seems, in furtherance of justice, after argument on demurrer, though not after judgment on a material issue.[24]

REVIEW BY NEW TRIAL

335. A new trial is a re-examination by the court and a jury of an issue of fact which has once been tried before the same court and a jury.

336. It may be granted for matters arising before, in the course of, or after the original trial, by which either party has been prevented from having his rights fairly and impartially determined.

New Trial

Proceedings leading to a decision may be reviewed and corrected, either by new trial, the re-examination of the case afresh in the same court, or by removal of the cause on writ of error to a higher court. At common law motion for a new trial was to be made and disposed of before the entry of judgment, and pending the motion judgment was suspended.

Motion for a new trial is not the procedure to review defects in the pleadings, but is the remedy for any misconduct, error or slip occurring in the progress of the trial itself, which might endanger its fairness, and which indicates the probability of a different result.

[23] The courts might well have given judgment for plaintiff notwithstanding the verdict where there was a single immaterial traverse to the declaration upon which the defendant had obtained a verdict. See McKelvey, Com. Law Pl. pp. 179–182; Ex parte Pearce, 80 Ala. 195; Sunderland, Cas. Com. Law Pl. p. 722; 23 Cyc. 780, notes 2, 3, 4.

[24] Ex parte Pearce, 80 Ala. 195. And see Goodburne v. Bowman, 9 Bing. 532; Doogood v. Rose, 9 C. B. 132; Andre v. Johnson, 6 Blackf. (Ind.) 375 as to who is not entitled to apply for a repleader. See Rodriguez v. Merriman, 138 Ill. App. 382.

Grounds for New Trial

At common law there was a wide discretion in the judge as to the causes for granting a new trial, and the statutory grounds laid down by our codes of procedure should not be held exclusive of all others.[25] They generally include such errors and irregularities in the conduct of the trial as errors in impaneling the jury, or bribes and private communications of the prevailing party to the jury, which may have influenced their verdict, or misbehavior of the jury in their deliberations, as by intoxication, separation, private investigations, or casting lots for the verdict, or if the jury bring in a verdict contrary to the weight of the evidence, so that the judge is reasonably dissatisfied therewith, or if the jury has given excessive damages indicating passion and prejudice, or if the judge has erroneously excluded or admitted evidence, or misdirected the jury on the law, so that they may have found an unjustifiable verdict: for these, and other reasons, it is the duty of the court to award a retrial if a fair hearing has not been had in the former trial.[26]

Another matter for which new trials are sometimes granted is surprise, where a party using all diligence and care is placed in a situation injurious to his interests, without his own default.[27] One may regularly subpœna a material witness, and he may be actually in attendance, but absent himself at the time when needed, without the knowledge or consent of the party or his attorney. But, to avail himself of this ground for a new trial, the surprise must be such that there was no opportunity to move for a continuance of the cause, and this fact must appear by the record. If he had the opportunity and

[25] New Trial—Exclusiveness of Statutory Grounds, 5 Minn. Law Rev. 564. See Valerius v. Richard, 57 Minn. 443, 59 N. W. 534, per Canty, J., dissenting.

[26] In order to bring the question of sufficiency of evidence to sustain the verdict before the Supreme Court for review, it is necessary for the losing party to make a motion for a new trial, and to include the motion, the order overruling it, and the exceptions in a bill of exceptions. Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 N. E. 928, Hinton, Cas. Trial Prac. 745.

[27] Ruggles v. Hall, 14 Johns. (N. Y.) 112. See State v. Morgan, 80 Iowa, 413, 45 N. W. 1070; Solomon v. Norton, 2 Ariz. 100, 11 Pac. 108; Albert v. Seiler, 31 Mo. App. 247. A proceeding which has for its object the obtaining of a new trial is the writ of venire facias de novo, which is not mentioned in the text, as it is the same in substance as a motion for a new trial, and is generally superseded by the latter unless the unsuccessful party objects to the verdict by reason of some irregularity or error in the practical course of the proceeding rather than on the merits. It is generally awarded when proceedings have been reversed on error for some irregularity or error committed by the court, but never when the cause of the reversal is a defect in the plaintiff's right to recover. In form and effect it is a writ directing the impaneling of a new jury to try the action again; in other words, directing a retrial. See Potter v. Hiscox, 30 Conn. 508; Reed v. Collins, 5 Serg. & R. (Pa.) 351.

neglected it, he cannot take the chances of a verdict in his favor, and afterwards claim the benefit of a rehearing.[28]

REVIEW ON WRIT OF ERROR AND APPEAL

337. A writ of error is a process of a court of appellate or supervisory jurisdiction, issued at the instance of a party for or against whom a judgment has been rendered in an inferior court, to remove the record for review for error of fact or law in the proceedings as recorded.

338. Review on appeal is a statutory proceeding more in the nature of a writ of error than of an appeal in chancery.

Appellate review may be divided into (1) revisory appellate jurisdiction, by which the proceedings of a lower court are reviewed, confirmed, revised or modified accordingly as they are correct or erroneous; (2) supervisory appellate jurisdiction, to check the usurpation of power by inferior tribunals exercising judicial functions.

Appeal and Error

The principal method of review for erroneous judgments at common law was by writ of error to some superior court of appeal. It only lay to reverse a judgment for some error of law appearing on the face of the record or judgment roll. An appeal, in the technical sense, was unknown to common law, and was the name of proceedings for the review of cases in equity, and in the ecclesiastical and admiralty courts. Appeal was not regarded as a new proceeding, but as a continuation of the old, by removal into a higher court, where the whole merits of the case were reviewed on the evidence taken and certified to it from the lower court. The facts, as well as the law, were retried, while the writ of error brings up only the law for re-examination. At common law there was no method of reversing an error in the determination of facts, but by a new trial to correct the mistakes of the former verdict, and the order granting or refusing the motion for a new trial was not originally subject to review by the appellate court.

Writs of Error

Proceedings for review by writ of error were commenced by an original writ, sued out of chancery as in other actions, directed to the judges of the court in which judgment had been given, command-

[28] See McClure v. King, 15 La. Ann. 220; Grant v. Popejoy, 15 Ind. 311; Klein v. Gibson (Ky.) 2 S. W. 116.

ing them to send the record to another court of appellate jurisdiction to be examined, in order that some alleged error in the proceedings might be reviewed and corrected. Error was thus regarded as in the nature of an independent action or remedy, having for its subject-matter the proceedings ending in the judgment of which complaint was made. The merits of the original controversy were not in question, except so far as included in the record and ruled upon by the lower court.

Appellate courts cannot look outside the record,[29] but are generally confined to reviewing the acts of the lower court in passing on the evidence and questions of law as presented for decision at the trial. The primary function of appellate courts is that of holding lower courts and tribunals to compliance with the law, and so regulating the action of the state through its courts of justice. Appellate proceedings are now commonly regarded, however, merely as continuations of the same litigation between the parties.

The writ of error is the most common of all the forms of remedial process available to an unsuccessful party after a final determination of the merits of the action, and is in common use in this country at the present time, where the common-law modes of procedure are followed.[30] Its object, as above stated, is to obtain a reversal of the judgment, either by reason of some error in fact affecting the validity and regularity of the legal decision itself,[31] or on account of some mistake or error in law, apparent upon the face of the record, from which the judgment appears to have been given for the wrong party.[32] If one of the parties to an action dies at the commencement of the suit, or an infant appears in a personal action by attorney instead of by guardian, it is error in fact, for which a form of this proceeding called the "writ of error coram nobis" may be brought, by which the court rendering the judgment is authorized to correct the defect, the record remaining in that court.[33] But if the court

[29] The record includes the original writ and summons, all the pleadings, declaration, plea, replication, etc., the demurrer and other proceedings which have been entered on the judgment roll. Atkinson v. People's Nat. Bank, 85 Me. 368, 27 Atl. 255, Lloyd, Cas. Civ. Proc. p. 860.

[30] The judgment to be tested must be a final one. See Wallace v. Middlebrook, 28 Conn. 464. And see Lovell v. Kelley, 48 Me. 263; Griffiths v. Monongahela R. Co., 232 Pa. 639, 81 Atl. 713, Ann. Cas. 1912D, 13, note; Smith v. Dellitt, 244 Ill. 75, 91 N. E. 94. Pleading to a writ of error is governed by common-law rules. Berry v. Turner, 279 Ill. 338, 116 N. E. 633.

[31] See King v. Jones, 2 Ld. Raym. 1525; Wiscart v. D'Auchey, 3 Dall. (Pa.) 321, 1 L. Ed. 619.

[32] See Gregg v. Bethea, 6 Port. (Ala.) 9. And here the defects must be apparent on the face of the record. Tyler v. Erskine, 78 Me. 91, 2 Atl. 845.

[33] See Fellows v. Griffin, 9 Smedes & M. (Miss.) 362; Chapman v. North American Life Ins. Co., 292 Ill. 180, 185, 126 N. E. 732. At common law the writ of error coram nobis could be sued out of the same court in which a judgment was rendered to reverse the judgment for an error of fact, as that the nominal defendant was dead, an infant without a guardian, a feme covert, or a person insane at the time of trial, or error in the process not appearing on the face of the record.

has committed an error in law of a substantial nature, and which is disclosed by the record itself, the proceeding is by what is called a "writ of error" simply, which requires the whole record to be sent to the higher court for examination and correction.[34]

Vital defects in the declaration, as where case instead of trespass is brought, may be reached either by demurrer, or motion to arrest judgment, or on error.[35] As a general rule, no person is entitled to either form of this remedy who is not a party or privy to the record, or who is not prejudiced by it;[36] and the right must appear from the record itself, as it cannot be supplied by proof.[37] The proceeding corresponds to the appeal in code practice.

The Modern Statutory Appeal

Review on appeal is now generally a statutory proceeding, with the characteristics of the old common-law writ of error, rather than of appeals in equity, by which the whole cause was removed from a lower to an appellate court, and there tried de novo without reference to the conclusion of the inferior court.[38] The modern appeal is in the nature of a writ of error, in that the appellate court does not try the cause afresh or hear evidence. It is regarded as a continuation of the original litigation, but in one aspect is the commencement of a new action in another court, with new process, new pleadings (assignment of errors), based on the transcript of the record. Bills of exceptions taken to rulings or other action in the trial, incorporating the evidence, instructions, documents, and irregularities, are employed to present the cause. The technical appeal, removing the whole cause, facts as well as law, for retrial, which was the exclusive remedy for review of cases in equity by a higher court, is sometimes employed to review decisions of justice courts.

[34] Gregg v. Bethea, 6 Port. (Ala.) 9. And see American Baptist Missionary Union v. Peck, 9 Mich. 445; 2 Tidd, Prac. (9th Ed.) 1134.

[35] Maher v. Ashmead, 30 Pa. 344, 72 Am. Dec. 708, Whittier, Cas. Com. Law Pl. p. 555.

[36] See Porter v. Rummery, 10 Mass. 64; Finney v. Crawford, 2 Watts (Pa.) 294; Johnson v. Thaxter, 12 Gray (Mass.) 198.

[37] Townsend v. Davis, 1 Ga. 495, 44 Am. Dec. 675. See Watson v. Willard, 9 Pa. 89.

[38] See Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379; Wingfield v. Neall, 60 W. Va. 106, 54 S. E. 47, 10 L. R. A. (N. S.) 443, 116 Am. St. Rep. 882, 9 Am. Cas. 982; Kingsbury v. Sperry, 119 Ill. 279, 10 N. E. 8.

BILLS OF EXCEPTIONS

339. A bill of exceptions is a statement of objections or exceptions taken by a party to the rulings of the court on points of law, signed by the judge who made the decision, and sealed with the seal of the court.

Bills of Exceptions

The record at common law included only the judgment roll, which was a parchment roll upon which all pleadings, demurrers, the original writ and summons, the verdict, and judgment were transcribed and recorded by the attorneys. The writ of error only lay for some error assigned and arising on the face of the record. In order to complete the record of proceedings in the cause, a bill of exceptions was provided for by the statute of Westm. II, 13 Edw. I, by which, if counsel should conceive that the judge, in his instructions or rulings on the evidence, had mistaken the law, they might require him publicly to seal a bill of exceptions, stating the point wherein he was supposed to err. This bill of exceptions could then be removed with the judgment roll upon a writ of error, after judgment in the court below, to be examined in the next Superior Court. Thus authenticated by allowance and sealing, it becomes a part of the record in the cause, and brings up questions of law for revision in the higher court which would not otherwise appear in the record.[39]

Bills of exceptions are employed in all statutory schemes for the correction of error, to preserve of record all proceedings in the course of the trial, including motions, objections, and exceptions to evidence, instructions, and motions for a new trial, to show what took place and what was done in the lower court. They are now usually made up after the trial rather than during its progress, and may include the stenographer's transcript of the testimony, or merely the substance of the evidence in condensed form. This makes possible a review of the motion for a new trial on the ground of insufficiency of the evidence to support the findings or verdict. The judge makes his certificate that it is a full, true, and correct statement of the evidence or other matters in the case, including offers of evidence, instructions, motions, orders, affidavits, etc. Formerly

[39] Formerly separate bills for each exception had to be presented and settled at the trial, but modern statutes and rules permit one bill of exceptions to be drawn up and settled within a limited time after the trial, incorporating all the alleged errors. Lees v. United States, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150, Lloyd, Cas. Civ. Proc. pp. 851, 854, note.

writs of error only lay to correct errors of law, but now they have been extended by bills of exceptions to review the sufficiency of the evidence to support the ruling on motion for a new trial.

WRIT OF CERTIORARI

340. A certiorari is generally a writ issued by a supreme or superior to an inferior court, directing the return of the records of a cause depending before the latter in a particular case.

The established method by which the Court of King's Bench from the earliest times exercised superintendence over the due observance of their limitations by inferior courts, checked the usurpation of jurisdiction, and maintained the supremacy of the royal courts, was by writs of prohibition and certiorari. A proceeding by writ of certiorari (cause to be certified) is a special proceeding by which a superior court requires some inferior tribunal, board, or judicial officer to transmit the record of its proceedings for review, for excess of jurisdiction. It is similar to a writ of error, in that it is a proceeding in a higher court to superintend and review judicial acts, but it only lies in cases not appealable by writ of error or otherwise. It does not review proceedings within the jurisdiction of the lower court, but inquires into the jurisdiction and regularity of the proceedings. Review of rulings made in the trial may only be had by new trial, appeal, or error. Certiorari does not lie to review executive, ministerial, or legislative action of the other departments of government, but merely corrects encroachments of jurisdiction, where some judicial officer has exceeded his authority, and there is no other remedy for review by appeal or writ of error.[40]

It is granted by the court at its discretion, upon motion or petition,[41] and generally only upon security given for its due prosecution, and is first used to bring up the record and proceedings in the court below. When returned to the higher court, the party respondent is notified to appear by a notice similar to a summons, and the court proceeds to act according to law and justice in the decision of the

[40] People v. El Dorado County Supervisors, 8 Cal. 58; In re Robinson's Estate, 6 Mich. 137; Auditor v. Woodruff, 2 Ark. 73, 33 Am. Dec. 368. See Davis County v. Horn, 4 G. Greene (Iowa) 94; Lees v. Drainage Com'rs, 24 Ill. App. 487; Bourland v. Snyder, 224 Ill. 478, 79 N. E. 568; Logue v. Clark, 62 N. H. 184.

[41] See Farrell v. Taylor, 12 Mich. 113; Adams v. Abram, 88 Mich. 302; People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285.

case. It lies at any stage of the proceedings in the inferior court, and not only on the ground of an error in the judgment of the latter, but also to examine the proceedings in order to see if any irregularity has taken place or the jurisdiction has been exceeded. The return is conclusive as to the facts,[42] and is generally the only thing to be considered by the higher court, though in some states the proceeding is a trial of the whole matter de novo. The writ also lies to review the proceedings of municipal boards or officers whose proceedings are of a quasi judicial character.

WRIT OF PROHIBITION

341. Prohibition is a kind of common-law injunction to prevent an unlawful assumption of jurisdiction.

This is a remedy provided by the common law to prevent injuries resulting from encroachments of jurisdiction. It is a common-law injunction against governmental usurpation, as where one is called coram non judice (before a judge unauthorized to take cognizance of the affair), to answer in a tribunal that has no legal cognizance of the cause. It arrests the proceedings of any tribunal, board, or person exercising judicial functions in a manner or by means not within its jurisdiction or discretion.[43]

While certiorari lies to review and reverse a judicial action, prohibition prevents beforehand the unlawful assumption of jurisdiction. It is restricted to cases of a judicial nature, and does not extend to ministerial and administrative acts, against which the remedy is by injunction. It lies from a superior tribunal with superior or appellate jurisdiction, and, ignoring the parties, goes directly against the judge or court itself, commanding them to cease from the prosecution of the case, upon the suggestion that cause or matter arising therein does not belong to that jurisdiction, or that in the handling of matters within their cognizance they transgress the bounds prescribed to them by the law. And if either the judge or party shall proceed after such prohibition, an attachment may be had against them to punish them for their contempt, and an action will lie against them to repair the party injured in damages.

[42] Starr v. Trustees of Village of Rochester, 6 Wend. (N. Y.) 564; Low v. Galena & C. U. R. Co., 18 Ill. 324; Central Pac. R. Co. v. Board of Equalization of Placer County, 46 Cal. 668.

[43] State v. Whitaker, 114 N. C. 818, 19 S. E. 876; Kump v. McDonald, 64 W. Va. 823, 61 S. E. 909.

This is the instrument by which the king's superior courts of common law controlled the inferior courts, the county courts and courts baron, the courts Christian, the court of admiralty, and other courts, and confined them to their limited fields, according to the views of the common-law judges.

APPENDIX A

EXTRACTS FROM THE RULES OF CIVIL PROCEDURE, BULLETIN XIV OF THE AMERICAN JUDICATURE SOCIETY, 1919

Certain of the Rules of Civil Procedure, drafted under the auspices of the American Judicature Society in 1919, are appended for purposes of comparative study. These model rules are the result of scientific study and drafting by competent experts, and were prepared to serve as a guide and help to draftsmen of rules of procedure, particularly where rule-making power is conferred upon the courts.

Only those rules have been included here which have some bearing on the subjects discussed in the body of the text. It will be of interest and benefit to observe how such a problem as pleading or suing in the alternative is dealt with at common law, under the codes, and under these rules. The law can best be understood by watching it in the process of development, and considering what is the best solution of a problem in the light of the methods now practiced in various jurisdictions, or those which may be devised or suggested to facilitate a fair and speedy trial on the merits. Some of these solutions could even be adopted by judicial decision, as in the case of article 18, section 4, on Amendments and the Statute of Limitations.—[Editor.]

"The directors expressly disclaim any expectation of inventing a code of procedure. Until a survey is made few persons realize the wealth of experience available in methods already practiced in the various Anglo-American jurisdictions. It has not been necessary to devise any untried expedient. The work is largely one of comparison, of sifting, choosing, rejecting and harmonizing.

"The work of the Society is in accord with present efforts to bring about the adoption of a model code of court-made rules to govern federal court procedure, a movement which promises to attain success at an early date and to influence profoundly the trend of procedural reform in the courts of the several states."

ARTICLE 1. ACTIONS AND THEIR COMMENCEMENT

Sec. 1. *Actions.* Every proceeding instituted in the General Court of Judicature, not a prosecution for crime, shall, except as otherwise provided in these rules, be called an action.

Sec. 2. *Forms Abolished.* All forms of actions, writs, and proceedings are hereby abolished, except as otherwise provided in these rules.

Writs. Certain writs (habeas corpus, error, certiorari, etc.) are preserved by being named in many state Constitutions, and they should in local application be excepted by specific reservation from any general abolition. Otherwise, this section clears the ground for the construction of the uniform action.

Sec. 3. *Commencement.* Every action shall be commenced by the filing of a notice of action or a complaint in the office of the clerk of the court, upon which the time of filing shall be endorsed by the clerk.

ARTICLE 2. PARTIES

Sec. 1. *Joinder.* All persons in whom or against whom any right to relief is alleged to exist, whether jointly, severally, or in the alternative, may, except as otherwise provided in these rules join as plaintiffs or be joined as defendants in one action, where if separate actions were brought, any question of law or fact would arise which might conveniently be determined in a single proceeding.

Compare New York Code Civ. Proc. §§ 446, 447; Rodenbeck Act, § 20; Rodenbeck rules 110, 123; Missouri Rev. St. 1919, §§ 1157, 1158; California Code Civ. Proc. §§ 378, 379, 389; federal equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii); New Jersey Act, §§ 4, 6 (Laws 1912, p. 378); Ontario rules 66, 67; English Order 16, rules 1, 4.

The words "Rodenbeck Act" and "Rodenbeck rules" refer to the work of the New York Board of Statutory Consolidation, published in 1915.—[Editor.]

Sec. 4. *Misjoinder.* The court shall at any stage of an action order its dismissal as to any parties improperly joined.

Sec. 5. *Nonjoinder.* The court may at any stage of an action order that any person be added as a party whose presence may be necessary or proper to enable the court to determine any and all questions involved therein.

Sec. 7. *Abatement.* No action shall be defeated solely by reason of the misjoinder or nonjoinder of parties, but the court may deal with the controversy as may be just, so far as regards the rights and interests of the parties before it.

Compare New York Code Civ. Proc. § 452; Rodenbeck rule 95; Kansas Code Civ. Proc. § 40 (Gen. St. 1915, § 6930); California Code Civ. Proc. § 389; federal equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix); New Jersey Act, § 9 (Laws 1912, p. 379); Ontario rule 89; English Order 16, rule 11.

Defeated: Instead of technical pleas in abatement, the remedies for misjoinder or nonjoinder are motions to add, dismiss, substitute, sever or stay, under article 16, section 2.

Sec. 10. *Joint Contracts.* In actions on a joint contract, whether partnership or otherwise, the representatives of a deceased co-contractor may join as plaintiffs and be joined as defendants with the survivor.

Compare Connecticut rule 118; New Jersey rule 15; Rodenbeck rule 111.

Sec. 12. *Alternative Defendants.* Where the plaintiff is uncertain against which of several persons he is entitled to relief, he may join any or all of them as defendants in the alternative, although a right to relief against one may be inconsistent with a right to relief against the other.

Compare New Jersey rule 18; Rodenbeck rule 114; English Order 16, rule 7.

Alternative: The defendant found not liable is protected in the article on costs by a rule requiring the plaintiff to pay him his costs.

Sec. 15. *Unwilling Coplaintiff.* If the consent of any party who should be joined as plaintiff cannot be obtained, he may be made a defendant and the reason therefor shall be stated in the complaint.

Compare New York Code Civ. Proc. § 448; Rodenbeck rule 96; Missouri Rev. St. 1919, § 1159; California Code Civ. Proc. § 382; New Jersey Act, § 5 (Laws 1912, p. 378).

Sec. 16. *Class of Parties.* When so large a number of persons have similar interests in one subject-matter as to make the joinder of all of them either as plaintiffs or as defendants impracticable and likely to defeat the ends of justice, one or more may, by leave of court, sue or be sued on behalf of all.

Compare New York Code Civ. Proc. § 448; Federal equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix); California Code Civ. Proc. § 382; Rodenbeck rule 97; Ontario rule 75; English Order 16, rule 9.

Sec. 23. *Associations.* When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may sue and be sued by such common name.

Compare New York Code Civ. Proc. § 1919; Missouri Rev. St. 1919, § 1201; California Code Civ. Proc. § 388; Ontario rule 100; English Order 48A, rule 1.

Associated: This includes partnerships and any other form of unincorporated association.

ARTICLE 3. JOINDER OF CLAIMS

Sec. 1. *Classes.* The plaintiff may unite several claims in the same action, whether they be such as have heretofore been termed legal or equitable, when they are included in any one of the following classes:

(1) Claims in contract express or implied;

(2) Claims in tort;

(3) Claims affecting title to or for recovery of possession of property, real or personal;

(4) Claims for the recovery of statutory penalties;

(5) Claims arising out of the same transaction or occurrence, or out of a series of transactions or occurrences connected with the same subject-matter.

Compare New York Code Civ. Proc. § 484; Rodenbeck Act, § 19; Rodenbeck rule 180; Missouri Rev. St. 1919, § 1221; Kansas Code Civ. Proc. § 88 (Gen. St. 1915, § 6979); California Code Civ. Proc. § 427; federal equity rule 26 (201 Fed. v, 118 C. C. A. v); New Jersey Act, § 11 (Laws 1912, p. 379); Ontario rule 69; English Order 18, rule 1; Connecticut Gen. St. 1918, § 5638.

Claims: It was thought advisable to use this term throughout the rules in place of "cause of action," because of the mass of decisions clustered about the manner of pleading a cause of action completely, and because if the forms of action are abolished it is better to depart altogether from the traditional manner of alleging a formal cause of action. Article 12, section 4, permits amendments to cure any defect in the stating of a cause of action necessary to perfect a substantive right to relief.

ARTICLE 5. NOTICE OF ACTION

Sec. 1. *Contents.* The notice of action shall name the parties plaintiff and defendant and shall contain a brief statement of the nature of the claim made and the relief sought, but need not state the facts constituting the cause of action, and shall contain a statement that a complaint will be filed within ——— days.

Compare Ontario rule 32; English Order 2, rule 1, and Order 3, rule 2.

Notice of action: In most states actions are now begun by the filing of a complaint, petition or statement. But the notice of action is also useful as it permits commencement of an action in a hurry when the statute of limitations or the impending departure of a defendant makes it essential. For these reasons it was decided to give plaintiffs the option of commencing action by notice if they so desired. The name notice of action was chosen, instead of writ or summons, to signify the real function of the paper. This paper corresponds to the New York summons, which is merely signed by counsel.

ARTICLE 6. COMPLAINT

Sec. 1. *Contents.* The complaint shall name the parties plaintiff and defendant and shall contain a concise statement of the ultimate facts upon which the plaintiff seeks relief, and of the relief sought.

Compare New York Code Civ. Proc. § 481; Rodenbeck rule 178; Missouri Rev. St. 1919, § 1220; California Code Civ. Proc. § 426; federal equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv); New Jersey rule 51; Ontario rule 109; English Order 19, rule 2.

Complaint: This term was adopted because it is in use in most of the code states. Where local opinion prefers the term petition, statement, or declaration, such a change can be made.

ARTICLE 7. SERVICE

Sec. 1. *Time.* Within ——— days after the commencement of an action the notice of action or the complaint shall be served on each defendant.

Compare English Order 16, rule 12.
Commencement: Filing either a notice of action or a complaint commences the action. Article 1, section 4.

Sec. 8. *Personal Service.* The notice of action or the complaint shall, except as otherwise provided in these rules, be served by handing a copy thereof to the defendant in person, or, if he refuses to receive it, by tendering it to him.

Compare Missouri Rev. St. 1919, § 1126; California Code Civ. Proc. §§ 1011, 1012; federal equity rule 13 (198 Fed. xxii, 115 C. C. A. xxii).
Handing: This is personal service. See section 9 for substituted service.

Sec. 9. *Substituted Service.* If the defendant cannot be promptly served as required in section 8, substituted service may be effected.

(a) Upon some person apparently not less than sixteen years old at the defendant's place of residence; or

(b) Upon some person apparently in charge of defendant's office or regular place of business; or

(c) By leave of court, upon the defendant by registered mail; or

(d) In any other manner the court may order.

Compare New York Code Civ. Proc. § 436; Missouri Rev. St. 1919, § 1126; California Code Civ. Proc. § 411; Ontario rule 18; English Order 9, rule 2.

Sec. 22. *Extraterritorial Service.* In the following cases: when the defendant neither resides, maintains an office or regular place of business, nor is regularly employed within the state, and

(a) The subject-matter being within the jurisdiction of the court, the action is properly commenced within the state; or

(b) Property of the defendant has been attached within the state at the commencement of the action; or

(c) A plaintiff resident within the state commences an action affecting the matrimonial status between the plaintiff and the defendant;

—service may, by leave of court, be effected out of the state

(1) By personal service as under section 8; or

(2) By registered mail; or

(3) By publication in such places and for such time as the court may order, in which case a copy of the notice shall be sent by ordinary mail to the last known address of the defendant; or

(4) In any other manner the court may deem sufficient.

Any order granting such leave shall specify a reasonable time within which the defendant must deliver a notice of defense.

Compare New York Code Civ. Proc. §§ 438, 443; Missouri Rev. St. 1919, §§ 1196, 1204; Kansas Code Civ. Proc. § 76 (Gen. St. 1915, § 6969); California Code Civ. Proc. § 413; Ontario rule 25; English Order 11, rule 1.
Neither resides, etc.: Roughly, this covers nonresident defendants.
Subject-matter: These three subsections limit the rule to cases where the court has jurisdiction over the person or property of the defendant, or over the res, as an extraterritorial service alone does not confer jurisdiction over the person of a nonresident.

Sec. 23. *Residents.* When an action is commenced against a defendant who ordinarily resides within the state, but who is temporarily out of it, service may, by leave of court, be effected out of the state, as under the preceding section.

Compare English Order 11, rule 1 (c).
Temporarily out: This enables the plaintiff to use all the facilities provided by section 23 without having to wait for the defendant's return.

ARTICLE 8. NOTICE OF DEFENSE

Sec. 1. *Time For.* Within ——— days after service or delivery of the complaint the defendant shall file with the clerk of the court and deliver to the plaintiff a notice signifying an intention to defend the action; but, if an answer is filed within the same period, no notice of defense shall be necessary.

Compare section 86, English County Courts Act, 1888 (51 and 52 Vict. c. 43).
Notice of defense: This name was adopted to replace the former word "appearance," as a step toward making procedure intelligible to litigants. The "appearance," in fact, is never more than a notice of defense, and might well be so called.

Sec. 7. *Abatement, etc.* The notice of defense may state any objection to the jurisdiction of the court, venue, service, or capacity or joinder of parties, or other matter of abatement, and shall then operate as a special appearance and a motion to dismiss the action or vacate the service or other proceeding, as the case may be.

Compare English Order 12, rule 30.
Objection: Under these rules the plea in abatement is superseded by a motion (see article 16) and time is saved if the defendant desires to take advantage of this rule.

ARTICLE 9. ANSWER

Sec. 1. *Time—Contents.* Within ——— days after delivering a notice of defense each defendant shall, except as otherwise provided in these rules, file with the clerk of the court a concise statement of the ultimate facts on which he relies for his defense to the action, which shall be called the answer.

Compare California Code Civ. Proc. § 437; Missouri Rev. St. 1919, § 1233; New York Code Civ. Proc. § 500.

Sec. 6. *New Defenses.* Any ground of defense which has arisen after the commencement of the action may be included in the answer or amended answer.

Sec. 9. *Set-Off.* Any set-off relied on by the defendant shall be stated after the answer under a separate heading.

Set-off: See next article for counterclaim. Set-off is purely a matter of defense, not entitling defendant to an excess judgment.

ARTICLE 10. COUNTERCLAIM

Sec. 1. *Scope.* The defendant may set up by way of counterclaim any claim against the plaintiff which, if in favor of the plaintiff, might properly have been joined with the plaintiff's claim under article 3 of these rules.

ARTICLE 11. REPLY

Sec. 1. *Necessity.* No reply shall be necessary if the answer or answer to counterclaim raises no affirmative defense.

Sec. 7. *Further Pleadings.* No further pleading after a reply shall be necessary unless ordered by the court. The allegation of new matter in a reply

or a reply by counterclaimant shall be deemed denied by the adverse party unless expressly admitted.

Compare Missouri Rev. St. 1919, § 1256; Rodenbeck rule 197; New York Code Civ. Proc. § 522; English Order 23, rule 3, and Order 27, rule 13; Ontario rule 119.

ARTICLE 15. RULES OF PLEADING

Sec. 1. *Pleadings.* The following rules of pleading shall be observed in framing the complaint, answer, reply, counterclaim, answer to counterclaim, reply by counterclaimant, third party notice, and such other pleadings as may be ordered in an action.

Sec. 2. *Contents.* Every pleading shall contain a concise statement of the ultimate facts on which the party pleading relies for his claim or defense, as the case may be, omitting mere evidence.

Sec. 8. *Oath.* Every pleading shall be verified by the oath of the party pleading or of some person on his behalf, but the court may grant leave to omit the oath for good cause shown; and where alternative claims are pleaded, under section 15, the statement of the party under oath shall be that he has not sufficient knowledge or information to determine which of the alternatives is true.

Compare California Code Civ. Proc. § 446; New York Code Civ. Proc. § 523.
Verified by the oath: This is a question of policy upon which practice and opinions differ sharply, but the oath is required in the greater number of jurisdictions.

Sec. 10. *Actionable Document.* In pleading any document upon which the action or defense is founded, the original or a copy thereof may be attached to the pleading and referred to therein with like effect as if it were set forth at length.

Compare New Jersey rule 37; Missouri Rev. St. 1919, § 1270; New York Code Civ. Proc. § 534.

Sec. 11. *Material Document.* Whenever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof.

Compare English Order 19, rule 21; Ontario rule 147; Rodenbeck rule 155.

Sec. 14. *Departure.* Except by way of amendment, no pleading shall contain any allegation of fact inconsistent with previous pleadings by the same party.

Inconsistent: The old rule against departure is still binding under these rules. This is necessary to make the res judicata clear, and also to limit the issues.

Sec. 15. *Alternative Claims.* Either party may include in his pleading two or more alternative sets of material facts, even though inconsistent, and may claim relief thereunder in the alternative, or may claim alternative relief based upon an alternative construction or ascertainment of the nature of his claim.

Compare Ontario rule 145; New Jersey rule 53; Missouri Rev. St. 1919, § 1254.
Alternative relief: This is one of the most striking improvements in pleading in actions at law. One aspect of it has already been touched on with respect to parties, in article 2, section 12. The present rule relieves a plaintiff of the necessity for making an election in cases where his claim might fall within two different substantive classes, according as the testimony did or did not bear out the allegations. He asks for relief of one sort if the first state of fact is found to exist, and for relief of another if the second is the case.

Sec. 16. *Alternative Defenses.* A pleading in answer or reply may contain inconsistent alternative averments, such as denial, and confession and avoidance, of allegations in the opponent's pleading.

Compare federal equity rule 30 (201 Fed. v, 116 C. C. A. v); New Jersey rule 33; Phillipps v. Phillipps, 4 Q. B. D. 127 (1878); California Code Civ. Proc. § 441.

Sec. 17. *Conditions Precedent.* In any pleading a general averment of the performance or occurrence of all conditions precedent shall be sufficient.

Compare California Code Civ. Proc. § 457; Missouri Rev. St. 1919, § 1262; Rodenbeck rule 152; New York Code Civ. Proc. § 533; English Order 19, rule 14; Ontario rule 146.
General averment: His adversary must, under section 27, deny specifically the omission of any condition precedent, and issue would then be joined by the pleading in response.
Conditions precedent: Local rules as to the pleading of provisos and exceptions are not disturbed by this section.

Sec. 18. *Fraud.* In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, the facts must be stated with full particularity, but whenever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred.

Compare Rodenbeck rule 145, 159; English Order 19, rules 6 and 22; Ontario rule 148.
Full particularity: This is a class of allegations concerning the morality of the defendant's conduct, in which he is entitled to know fully the grounds on which the allegations are made, so he may have every opportunity to prepare his case to clear himself at the trial. Particulars are details of the case alleged, but not the evidence to prove it.
Circumstances: These would not be ultimate facts, but merely evidence, which is not properly pleadable.

Sec. 19. *Notice.* Whenever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstnces from which such notice is to be inferred, are material.

Compare Rodenbeck rule 161; English Order 19, rule 23; Ontario rule 149.
Notice: This is another case, like that of conditions precedent, in which it is easier for the defendant to deny than for the plaintiff to cover every point in affirming.
Form: As in the case of special statutory requirements.

Sec. 20. *Judgment.* In pleading a judgment or other determination of an officer or board, or of a court, whether of record or not, and whether of general, special, or limited jurisdiction, it shall be sufficient to allege that such judgment or determination was duly rendered, and the jurisdiction of such officer, board, or court shall be presumed, unless specifically denied.

Compare Kansas Code Civ. Proc. § 123 (Gen. St. 1915, § 7015); California Code Civ. Proc. § 456; Rodenbeck rule 157; New York Code Civ. Proc. § 532.

Sec. 23. *Implied Admission.* Every allegation of fact in any pleading, except as provided in the next section and in article 11, section 7, unless denied specifically or by necessary implication, or stated to be not admitted, in the pleading of the opposite party, shall be taken to be admitted.

Compare New Jersey rule 34; California Code Civ. Proc. § 462; Missouri Rev. St. 1919, § 1256, Rodenbeck rule 149; New York Code Civ. Proc. § 522; English Order 19, rule 13; Ontario rule 144.
Denied specifically: Irrespectively of the arrangement of paragraphs, which is merely for purposes of identification, the pleader must deal specifically with each allegation of fact in his adversary's pleading.

Sec. 24. *Damages.* Allegations of unliquidated damages, special or general, need not be specifically denied, but shall be deemed to be put in issue in all cases unless expressly admitted.

Compare English Order 21, rule 4; Rodenbeck rule 184.

Sec. 25. *Argumentativeness.* Express admissions and denials must be direct and specific, not argumentative.

Compare New Jersey rule 47; Connecticut Rules, § 163.
Argumentative: See, further, section 28, as to denials.

Sec. 26. *Joinder.* The denial of any material allegation shall constitute an issue, no other joinder of issue being necessary.

Sec. 27. *Affirmative Matter.* All such grounds of defense or reply as would raise issues of fact not arising upon the preceding pleadings must be specifically pleaded, including fraud, statute of limitations, release, payment, illegality, statute of frauds, estoppel, former recovery, discharge in bankruptcy, and all other matter by way of confession and avoidance.

Compare Rodenbeck rule 147; English Order 19, rule 15; Connecticut Rules, § 160.

Sec. 28. *Specific Denials—General Issue.* It shall not be a sufficient denial in an answer or reply to deny generally the grounds for relief alleged by the complaint or counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth; but the court may grant leave, where it may be just, to plead a general denial.

Compare New Jersey rule 58; English Order 19, rule 17; Ontario rule 142.
General denial: Ought to be allowed in cases where the defendant could not, from the circumstances of the case, have full or sufficient knowledge to plead, and the plaintiff ought to be put to his proof.

Sec. 29. *Liquidated Sum.* When the claim is for a liquidated sum of money, it shall not be sufficient to deny the obligation generally. The defense shall deny such matters of fact, from which the obligation is alleged to arise, as the party pleading disputes.

Sec. 30. *Evasive Denial.* When a pleading denies an allegation of fact in an opponent's pleading, it must not do so evasively, but must answer the point of substance; if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances.

Compare English Order 19, rule 19; New Jersey rule 46; Rodenbeck rule 148.
Divers circumstances: The negative pregnant is an evasive denial.

Sec. 31. *Right to Sue.* If a party seeks to controvert the right of another to sue as executor, or as trustee, or in any other representative capacity, or as a corporation or a partnership, he shall do so by specific denial.

Compare Connecticut Rules, § 609; Rodenbeck rule 163; English Order 21, rule 6; Ontario rule 153.

Sec. 32. *Unreasonable Allegations.* Allegations or denials made without reasonable cause and found untrue shall subject the offending party to the payment of such reasonable expenses as may have been necessarily incurred by the other party by reason of such untrue pleading. The amount of expenses so payable shall be fixed by the judge at the trial, and taxed as costs.

Compare New Jersey rule 33; Connecticut Rules, § 619; English Order 21, rule 9.

ARTICLE 16. PRELIMINARY ISSUES OF LAW

Sec. 1. *Defects in Form.* A defect in form shall be remediable upon motion, by an order to amend.

Compare English Order 19, rule 26.
Defect in form: Under article 18, section 11, the court has power to disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party.

Sec. 2. *Nonjoinder—Misjoinder.* Nonjoinder or misjoinder of parties or claims shall be dealt with upon motion, by an order to add, dismiss, substitute, sever or stay.

Sec. 3. *Other Objections.* Incapacity of a party, lack of jurisdiction over the person or the subject-matter, venue, service, or other matter of abatement, shall be dealt with by motion to dismiss the action or vacate the service or other proceeding, as the case may be.

Compare Missouri Rev. St. 1919, § 1226; New York Code Civ. Proc. § 488; California Code Civ. Proc. § 430; New Jersey rule 56.

Sec. 7. *Objection in Law.* Invalidity in law of a claim or defense shall be dealt with by objection in law as provided in these rules.

Objection in law: This is the substitute for the common-law demurrer. It has been considered desirable, in all recent attempts to improve civil procedure, to avoid the name "demurrer," even though retaining in some form, as must of necessity be done, the procedural step of argument on the validity in law of a claim or defense. Such a device frees the new practice from the mass of rules and precedents that accompany the name "demurrer" and makes it possible to alter the manner in which points of law are disposed of. The principal changes that have been made are to permit a party to raise a point of law and to plead at the same time, and to permit the court to hear the facts before passing on the point of law. Both of these changes are made on the theory that only a small proportion of claims or defenses are, in practice, pleaded, which cannot either by amendment or by proof be made "valid in law," and that it is desirable to eliminate lengthy arguments of law early in an action which have no result except an amendment, and which are often repeated after the facts have been heard. The name "objection in law" was chosen here as being shorter than the English "objection in point of law," and more accurate than the new Federal equity "defense in law" (which would not be true where raised by a plaintiff in his reply to a defendant's answer).

Sec. 8. *Time.* Such objection in law shall be raised by a defendant:

(1) In his answer, as provided in article 9; or

(2) By motion, after the answer, on leave of court and subject to payment of costs to date; and in either of these cases the objection in law shall be heard before the trial, unless the court shall otherwise order; or

(3) By motion before answer, on leave of court, which shall be heard before further proceeding with the action; but such leave shall not be granted unless in the opinion of the court the objection in law, if sustained, would substantially dispose of the whole action or of any distinct claim.

Compare English Order 25, rule 2.
(1) In his answer: This permits a party, in effect, to answer and demur in the same pleading.
(2) After the answer: A party who waited until the actual trial to raise the point of law would have to obtain leave of court under this section.
Payment of costs: To provide an incentive for raising questions of sufficiency early in the action.

ARTICLE 17. PARTICULARS

Sec. 1. *Scope.* If a pleading is uncertain or indefinite the court may, on motion, order that it be made specific or that further and better particulars of any material allegation be furnished.

Compare New Jersey rule 31; federal equity rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv); Missouri Rev. St. 1919, § 1241; Rodenbeck rule 169; New York Code Civ. Proc. § 546; English Order 19, rule 7; Ontario rule 138.
Uncertain or indefinite: The rule of article 15, section 12, which forbids a party to prove at the trial a material fact not pleaded, will be insufficient to prevent vague or general statements which would leave it open to the pleader to present the case in several different ways at the trial. But a party is entitled to know in advance the case he must meet at the trial; and he is entitled to see in his adversary's pleading sufficient material facts to make it clear and definite, without, however, the evidence by which those facts are to be proved. See section 3, below.
Specific: When the entire pleading is based upon mere general assertion and offers no particulars at all, the application would be in this form.

ARTICLE 18. AMENDMENT

Sec. 1. *Before Answer.* The plaintiff may at any time before delivery of the answer, without leave of court, amend his notice of action or complaint.

Compare New York Code Civ. Proc. § 542; federal equity rule 28 (198 Fed. xxvi, 115 C. C. A. xxvi); Kansas Code Civ. Proc. § 127 (Gen. St. 1915, § 7022); California Code Civ. Proc. § 472; Missouri Rev. St. 1919, § 1278; English Order 28, rule 2; Ontario rule 127.

Before answer: This section, together with sections 3 and 4, makes it possible for a plaintiff to commence his action, if necessary, by filing a hurried complaint, and supplementing it later by amendment without having to obtain leave of court. After the answer is in, leave to amend must be obtained, under section 2.

Sec. 2. *By Leave.* The court may, upon motion at any stage of an action, order or give leave to either party to alter or amend any pleading, process, affidavit, or other document in the cause, to the end that the real matter in dispute and all matters in the action in dispute between the parties may, as far as possible, be completely determined in a single proceeding. But such order or leave shall be refused if it appears to the court that the motion was made with intent to delay the action.

The real matter: Under this section objections in law under article 16 could usually be cured by amendment. See footnote to article 16, section 10. The effect of this section, as amplified throughout these rules by references to the power of amendment, is to substitute an intelligent and flexible procedure for the rigid "sporting rules" so eloquently denounced by Dean Roscoe Pound in his address to the American Bar Association at St. Paul in 1906.

Sec. 4. *Statute of Limitations.* A claim which would not have been barred by the statute of limitations if stated in the original complaint or counterclaim shall not be so barred if introduced by amendment at any later stage of the action if the adverse party was fairly apprised of its nature by the original pleading, provided no new party is added thereby.

Fairly apprised: This section deals especially with the situation where a pleading omits some material fact necessary to establish the pleader's right to relief, and without which the claim set up is invalid; later, either by discovery or at the trial, but after the statute of limitations has run against the claim, the pleader discovers the necessity for inserting the missing allegation. This section saves him from being barred by the statute if his adversary was "fairly apprised" by the original pleading of the nature of the claim.

Sec. 8. *At Trial.* Any amendment may be ordered to be made in a summary manner by the court, at the trial, provided the adverse party is not thereby prejudiced in his conduct of his case.

Sec. 9. *After Trial.* At any time after trial, whether before or after judgment, the trial or appellate court may allow any amendment necessary to make any pleading conform to the proof, so far as may be just.

After trial: This section is intended to reach the situation where, in spite of article 15, section 12, proof is heard at the trial which is sufficient to support a claim not properly stated on the pleadings. By use of this power the court can save the party from having to start all over and be defeated by the statute of limitations.

Sec. 11. *Substantial Rights.* Any error or defect in the proceedings which does not affect the substantial rights of the adverse party shall be disregarded, but all necessary amendments shall be made or allowed by the court to secure the giving of judgment according to the very right and justice of the cause.

Compare federal equity rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii); New Jersey Act, § 23 (Laws 1912, p. 331); California Code Civ. Proc. § 475; Missouri Rev. St. 1919, § 1276; Rodenbeck Act, § 10; Rodenbeck rule 2 and rule 16; Statute of Elizabeth; English Order 28, rule 12; Ontario rule 183.

Substantial rights: This section enunciates the general principle by which the court should be guided in exercising the wide powers of amendment here conferred.

ARTICLE 27. REPLEVIN

Sec. 1. *Right.* The plaintiff in an action to recover possession of personal property may, at any time before answer, or later by leave of court, obtain the delivery to him of such property before judgment in the manner provided in these rules.

Sec. 1. In spite of the abolition of the writs of assumpsit, trespass, etc., together with the consolidation of all the old forms of action, there are certain ministerial writs by which the sheriff is ordered by the court to perform special duties which may be changed in name, but are bound to retain their character because of their very nature. Such are writs of replevin and of attachment. If we retain the practice of ordering an officer to seize property at the opening or early stages of a civil action it is immaterial what name is given to the order. These measures of ancillary relief are so well imbedded in our American practice and the steps for obtaining them are on the whole so satisfactory and fair to both sides, that these rules have incorporated them. The directors have, however, defined the procedure in what they believe to be the simplest terms though comprehending the entire subject.

Before answer: This section recognizes the distinction between the replevin and the action itself. The action for a final judgment of recovery proceeds according to the forms established in these rules for all actions irrespective of their nature. The anticipation of the remedy is separate and distinct. The latter need not be applied for simultaneously with commencement of the action, but ought to be at an early stage to give the defendant fair notice of what he is to prepare for.

Later by leave: This is in accord with the general spirit of these rules to make no hard and fast lines that cannot be held aside by the court.

Sec. 2. *Writ.* Upon filing with the clerk of the court a bond approved as required by these rules, in double the value of the property, the plaintiff shall be entitled to a writ directed to the sheriff to take from the defendant the property described in the complaint, preserve it, and deliver it to the party entitled thereto as herein provided.

Double the value: Whether the value of the property is alleged in the plaintiff's complaint or not, it is perfectly safe to permit the plaintiff to fix its value for purposes of the bond, as he is faced with section 5, under which the defendant may retain the property by filing a bond in the same amount. It is therefore to the plaintiff's interest not to undervalue the property.

APPENDIX B

A CHART OF ILLINOIS DEFENSIVE PLEADING[1]

INTRODUCTORY NOTE

The idea of the chart of Illinois defensive pleading is as follows: (1) To furnish an outline for the aid of students; (2) to provide a convenient and suggestive tabulation for reference by the busy lawyer; (3) to let the exhibit speak for itself as to the need of pleading reform in this state.

The irregularities and eccentricities of our "system" may, it has seemed to the writer, best be displayed as a whole in the graphic form of a chart or outline showing how various defenses are raised in different forms of action. This chart will be confined to the tabulation of the various pleas, with a view particularly to what may be raised by the general issue and what must be pleaded specially.

DILATORY PLEAS

I. Pleas to the Jurisdiction and Venue

1. Lack of Jurisdiction of Subject-Matter

Oakman v. Small, 283 Ill. 360, 363, 118 N. E. 775.

(Jurisdiction of the subject-matter may be questioned at any time or place.)

2. Wrong Venue

(1) Privilege of being sued in home county of defendant is waived, if not pleaded in abatement.

Kenney v. Greer, 13 Ill. 432, 450, 54 Am. Dec. 439; Farmers' & Merchants' Ins. Co. v. Buckles, 49 Ill. 432; Humphrey v. Phillips, 57 Ill. 132; Scott v. Waller, 65 Ill. 181; Drake v. Drake, 83 Ill. 526; Commissioners of Mason & Tazewell Special Drainage Dist. v. Griffin, 184 Ill. 320, 25 N. E. 995; Iles v. Heidenreich, 271 Ill. 480, 111 N. E. 524; Gemmill v. Smith, 274 Ill. 87, 113 N. E. 27; Mt. Olive Coal Co. v. Hughes, 45 Ill. App. 568.

3. Lack of Jurisdiction of the Person of the Defendant

(1) That the persons served were not officers or agents of the corporation defendant.

Mineral Point R. Co. v. Keep, 23 Ill. 9, 74 Am. Dec. 124; American Spirits Mfg. Co. v. Peoria Belt Ry. Co., 154 Ill. App. 330.

(2) Defects in service of process not apparent on the face of the record; contradicting return of service.

Waterman v. Tuttle, 13 Ill. 293; Diblee v. Davison, 25 Ill. 488; Wallace v. Cox, 71 Ill. 548; Union National Bank v. First Nat. Bank of Centreville, 90 Ill. 56; Chicago Sectional Electric Underground Co. v. Congdon Brake Shoe Mfg. Co., 111 Ill. 309; Greer v. Young, 120 Ill. 184, 11 N. E. 167; Willard v. Zehr, 215 Ill. 143, 74 N. E. 107 (exempt from service).

(3) Foreign corporation not doing business in Illinois.

Midland Pac. Ry. Co. v. McDermid, 91 Ill. 170.

[1] From 1 University of Illinois Law Bulletin, page 239, April, 1913; by Henry W. Ballantine.

II. Pleas in Abatement—Principal Grounds for Pleas in Abatement in the General Order in Which They are Supposed to be Pleaded

1. Disability or Incapacity of the Party Plaintiff or Defendant to Sue or Be Sued

(1) That plaintiff is an infant and sues in his own name, and not by guardian or next friend.

1 Enc. Pl. & Pr. pp. 3, 9; 22 Cyc. 503, 635.
(Note.—Infancy is not a dilatory plea, if it goes to the liability or foundation of the action.
Greer v. Wheeler, 1 Scam. [3 Ill.] 554).

(2) That plaintiff is insane and does not sue by his guardian.

Chicago & Pac. R. Co. v. Munger, 78 Ill. 300.
(Until a conservator is appointed suit is properly brought in the name of the lunatic. A plea in abatement is bad which does not state the appointment of a conservator and thus give plaintiff a better writ.)

(3) Failure of foreign corporation to comply with provisions of statutes before doing business in the state.

Hurd's Rev. St. Ill. 1917, c. 32, § 67g; Guest Piano Co. v. Ricker, 274 Ill. 448, 113 N. E. 717 (plea in bar apparently); Delta Bag Co. v. Kearns, 180 Ill. App. 93, 103.

(4) Plaintiff an alien enemy.

Seymour v. Bailey, 66 Ill. 288.

(5) Death of a plaintiff since or before action was commenced.

Stoetzell v. Fullerton, 44 Ill. 103; Mills v. Bland's Ex'rs, 76 Ill. 331.

2. Lack of Corporate or Representative Capacity

(1) The corporate existence of defendant can be denied only by a plea in abatement. A plea of general issue alone admits the corporate existence of either party.

The plea nul tiel corporation is a specific traverse used to deny the corporate existence either of plaintiff or defendant. As regards the lack of corporate capacity of the plaintiff this is a plea in bar, but as regards that of the defendant it is a plea in abatement and must give the plaintiff a better writ.

Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, 81 N. E. 864.

(2) Lack of representative character of plaintiff or defendant is set up by the plea "ne unques executor" or "administrator," concluding with a verification. This, however, is regarded as a special plea in bar and not in abatement.

Collins v. Ayers, 13 Ill. 358, 362; Chicago Legal News Co. v. Browne, 103 Ill. 317, 320 (the general issue is a waiver of all exceptions to the person of plaintiff); Fischer v. Stiefel, 179 Ill. 59, 61, 53 N. E. 407 (rule same in chancery as at law).

3. Want of Authority to Bring Suit

People v. Hamill, 259 Ill. 506, 102 N. E. 1052.

4. Misnomer of Plaintiff or Defendant Waived by Pleading in Bar

Salisbury v. Gillett, 2 Scam. (Ill.) 290; Springfield Consol. Ry. Co. v. Hoeffner, 175 Ill. 624, 51 N. E. 884; Chicago & A. R. Co. v. Heinrich, 157 Ill. 328, 41 N. E. 860; Proctor v. Wells Bros. Co. of New York, 181 Ill. App. 468; Moes v. Flint, 13 Ill. 571; Pond v. Ennis, 69 Ill. 341; Davids v. People, 192 Ill. 176, 61 N. E. 887.

5. Nonjoinder of Necessary Parties

(1) Contracts.—The omission of a joint contractor as defendant must be pleaded in abatement, unless the joint liability appears on the face of the plaintiff's own pleadings. Nonjoinder of defendants cannot otherwise be taken advantage of under the general issues.

Lasher v. Colton, 225 Ill. 234, 80 N. E. 122, 8 Ann. Cas. 367; Lurton v. Gilliam, 2 Ill. (1 Scam.) 577, 33 Am. Dec. 439; Puschel v. Hoover, 16 Ill. 340; Sinsheimer v. William Skinner Mfg. Co., 165 Ill. 116, 46 N. E. 262; Pearce v. Pearce, 67 Ill. 207; Ross v. Allen, 87 Ill. 517; Wilson v. Wilson, 125 Ill. App. 389; Greene v. Masten, 68 Ill. App. 345; Rutter & Co. v. McLaughlin, 257 Ill. 199, 100 N. E. 509.

(Note.—The nonjoinder or misjoinder of parties plaintiff in contract actions may be taken advantage of by plea in abatement or at any later time. Hennies v. Vogel, 66 Ill. 401.)

(2) Torts.—The nonjoinder of joint owners as plaintiffs in a tort action for injuries to property can only be taken advantage of by plea in abatement.

Edwards v. Hill, 11 Ill. 22; Johnson v. Richardson, 17 Ill. 302, 63 Am. Dec. 369; Chicago, R. I. & P. R. Co. v. Todd, 91 Ill. 70.

(3) Nonjoinder of executors or administrators as plaintiffs or defendants must be raised by plea in abatement.

1 Enc. Pl. & Pr. p. 16.

6. Misjoinder of Parties

(1) Misjoinder of parties plaintiff or defendant in contract or of parties plaintiff in tort may be pleaded in abatement, but need not be.

Supreme Lodge of A. O. U. W. v. Zuhlke, 129 Ill. 298, 21 N. E. 789; Sinsheimer v. William Skinner Mfg. Co., 165 Ill. 116, 46 N. E. 262; Snell v. De Land, 43 Ill. 323; Cooper v. Cooper, 76 Ill. 64; Chicago, B. & Q. R. Co. v. Dickson, 67 Ill. 122; Powell Co. v. Finn, 193 Ill. 568, 64 N. E. 1036; Hurd's Rev. St. Ill. 1921, c. 110, § 54.

(2) Misjoinder of defendants in tort is usually no defense.

Tandrup v. Sampsell, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. (N. S.) 852; Town of Harlem v. Emmert, 41 Ill. 319; Nordhaus v. Vandalia R. R. Co., 242 Ill. 166, 174, 89 N. E. 974; Heidenreich v. Bremner, 260 Ill. 439, 103 N. E. 275.

7. Denial of the Existence of Partnership of Defendants or Their Joint Liability

Shufeldt v. Seymour, 21 Ill. 524; King v. Haines, 23 Ill. 340; Hurd's Rev. St. Ill. 1921, c. 110, § 54. (See also assumpsit II, 2, infra.)

8. Variance Between the Writ and the Declaration may be Pleaded in Abatement

Prince v. Lamb, Breese (1 Ill.) 378; Carpenter v. Hoyt, 17 Ill. 529; Simons v. Waldron, 70 Ill. 231; Fonville v. Monroe, 74 Ill. 126.

9. That the Action is Prematurely Brought

(1) That the action is brought before exhausting the remedies provided in the contract is a plea in abatement.

Grand Lodge, Brotherhood of Railroad Trainmen, v. Randolph, 186 Ill. 89, 57 N. E. 882.

(2) That an extension of time has been given after maturity cannot be pleaded in bar, but only in abatement.

Pitts Sons' Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 158; 1 Enc. Pl. & Pr. 22; Culver v. Johnson, 90 Ill. 91; Archibald v. Argall, 53 Ill. 307.

(3) That the debt is not yet due has been held to be a plea in bar, which should be shown under the general issue rather than under a plea in abatement.

Bacon v. Schepflin, 185 Ill. 122, 127, 56 N. E. 1123; Collins v. Montemy, 3 Ill. App. 184 (compare, however, Grand Lodge, Brotherhood of Railroad Trainmen, v. Randolph, 186 Ill. 89, 91, 57 N. E. 832); Palmer v. Gardiner, 77 Ill. 143.

10. Pendency of Another Prior Action for the Same Cause in This State Should be Pleaded in Abatement

Johnson v. Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883; Buckles v. Harlan, 54 Ill. 361; Allen v. Watt, 59 Ill. 655 (pendency of suit in another state no defense); Garrick v. Chamberlain, 97 Ill. 620; Consolidated Coal Co. of St. Louis v. Oeltjen, 189 Ill. 85, 59 N. E. 600 (pendency of suit subsequently brought is no defense); Shepardson v. McDole, 49 Ill. App. 350; O'Donnell v. Raymond, 106 Ill. App. 146; Lowry v. Kinsey, 26 Ill. App. 309; 1 Enc. Pl. & Pr. 757, 763.

DEFENSES IN BAR

A. Trespass.

I. General Issue

In the action of trespass, whether to the person, to personal or real property, the general issue is not guilty. This plea operates as follows:

1. As a denial that the defendant committed the act of trespass, to wit, the application of force to the plaintiff's person, the entry on his land, or the taking or damaging of the goods.

2. As a denial of the plaintiff's possession, title, or right of possession of the land or goods.

Ebersol v. Trainor, 81 Ill. App. 645, 652; Smith v. Edelstein, 92 Ill. App. 38.
But see dictum contra, Harris v. Miner, 28 Ill. 135, that it does not deny right of possession or property in chattels. It is so under Hilary rules.

3. The case of Kapischki v. Koch, 180 Ill. 44, 54 N. E. 179, which was an action in its nature case for malicious abuse of process, is erroneous in so far as it intimates that affirmative defenses are admissible under not guilty in trespass, or that the scope of the general issue is the same in trespass and in case, under the statute abolishing distinctions between them.

Chicago Title & Trust Co. v. Core, 223 Ill. 58, 63, 79 N. E. 108; George v. Illinois Cent. R. Co., 197 Ill. App. 153, 157.

II. Specific Traverse

It is necessary to deny specifically, as in all actions, corporate or representative capacity in which plaintiff sues or in which defendant is sued.

III. Affirmative Defenses

All defenses in justification and excuse, or in discharge, must be specially pleaded in confession and avoidance in trespass.

1. Leave and license. Matters of justification or excuse cannot be proved under a plea of not guilty, in spite of the statute purporting to abolish the distinctions between trespass and case. Leave and license would, however, be admissible in mitigation of damages, but not as a defense in bar of the action under not guilty.

Sturman v. Colon, 48 Ill. 463; Chicago Title & Trust Co. v. Core, 223 Ill. 58, 63, 79 N. E. 108. Compare Kapischki v. Koch, 180 Ill. 44, 54 N. E. 179.

2. Self-defense (son assault demesne).

Thomas v. Riley, 114 Ill. App. 520.

3. Defense of property.

Illinois Steel Co. v. Novak, 184 Ill. 501, 56 N. E. 968.

4. Forcible ejection of passenger who fails to pay fare or other wrongdoer from car.

Chicago & E. I. R. Co. v. Casazza, 83 Ill. App. 421.

5. Necessity for landlord to enter to make repairs.

Comstock v. Oderman, 12 Ill. App. 326.

6. Entry or seizure by virtue of judicial process.

Olsen v. Upsahl, 69 Ill. 273; McNall v. Vehon, 22 Ill. 499; Bryan v. Bates, 15 Ill. 87; Ilg v. Burbank, 59 Ill. App. 291; Blalock v. Randall, 76 Ill. 224, 228.

7. Liberum tenementum; that the land was the soil and freehold of the defendant. This plea admits possession in plaintiff such as would enable him to sue a stranger, but asserts a freehold in the defendant, and a right to immediate possession against plaintiff. It admits that defendant did the act complained of against the possession of plaintiff, but justifies it. The general issue disputes both possession and title, but this plea shows defendant's title on the record, and compels plaintiff to make a new assignment of the locus in quo with more specific description.

Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 187, 3 N. E. 272, 56 Am. Rep. 173; Marks v. Madsen, 261 Ill. 51, 103 N. E. 625; Ward v. Mississippi River Power Co., 265 Ill. 496, 107 N. E. 115; Boyd v. Kimmel, 161 Ill. App. 206.

8. Superior possessory title—e. g., leasehold in defendant—may be specially pleaded in avoidance of fictitious title imputed to plaintiff by way of express color to support the defense as a plea in confession and avoidance, instead of by way of the general issue.

Perry Com. Law Pl., p. 274-276.

9. All matters in discharge, such as release, statute of limitations, arbitration and award, satisfaction of judgment, accord and satisfaction (Kenyon v. Sutherland, 8 Ill. [3 Gilman] 99), or former recovery (Hahn v. Ritter, 12 Ill. 80).

B. Action on the Case

I. General Issue

In the action on the case the general issue is not guilty. This plea operates as follows:

1. As a denial of the wrongful act or breach of duty alleged to have been committed by the defendant, together with its injurious consequences.

Wetherell v. Chicago City R. Co., 104 Ill. App. 357, 362.

2. As a denial of plaintiff's title or right of possession, or the facts stated to show the existence of a duty toward the plaintiff.

The rules of Hilary term, 4 Wm. IV, limiting the general issue to a denial of the breach of duty or wrongful act, have not been adopted in Illinois.

(1) In an action for a nuisance to the occupation of a house by change of grade and consequent flooding, the plea of not guilty will operate as a denial that the defendant did the wrongful act, and also as a denial of the plaintiff's legal title or occupation of the house.

City of Champaign v. McMurray, 76 Ill. 353.

(2) In an action for obstructing a right of way or easement, such plea will operate as a denial not only of the obstruction, but also of the plaintiff's right of way or other easement.

Gerber v. Grabel, 16 Ill. 217; Plowman v. Foster, 6 Cold. (Tenn.) 53.

(3) In an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate not only in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed and in reference to the plaintiff's office, profession, or trade, but also it will operate as a denial of the fact of the plaintiff's holding the office or being of the profession or trade alleged.

Reeves v. Roth, 179 Ill. App. 95 (denies publication); La Monte v. Kent, 163 Ill. App. 1 (conditional privilege and want of malice); Spolek Denni Hlasatel v. Hoffman, 204 Ill. 533, 68 N. E. 400.

(4) In an action against a carrier, a plea of not guilty will operate as a denial, not only of the loss or damage, but also of the receipt of the goods by the defendant as a common carrier for hire or of the existence of the relation of passenger and carrier.

Carroll v. Chicago City Ry. Co., 180 Ill. App. 309 (passenger relation and negligence).

3. As a general plea in confession and avoidance of all matters in excuse and in discharge. Under the general issue, not only is the plaintiff put to the proof of his whole case, but the defendant may give in evidence almost any defense by way of justification or excuse, or matter in discharge.

(1) Contributory negligence.

Wiggins Ferry Co. v. Blakeman, 54 Ill. 201.

(2) Fellow servant.

Chicago City R. Co. v. Leach, 206 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 214.

(3) Accord and satisfaction.

City of Chicago v. Babcock, 143 Ill. 358, 365, 32 N. E. 271.

(4) Former recovery.

Kapischki v. Koch, 120 Ill. 44, 54, 54 N. E. 179.

(5) Release.

Papke v. G. H. Hammond Co., 192 Ill. 631, 643, 61 N. E. 810.

(6) Election to come under Compensation Act.

Von Boeckmann v. Corn Products Refining Co., 274 Ill. 605, 611, 113 N. E. 902.

(7) Conditional privilege in defamation cases.

Cooper v. Lawrence, 204 Ill. App. 261.

(8) Probable cause in action for malicious prosecution.

(9) Assumption of risk by servant.

4. "Matters of Inducement," such as those indicated under "Specific Traverse," are not denied by the general issue, but apparently the general issue admits ownership and operation only of such instrumentalities as are ordinarily used in defendant's business, and denies the rest.

Clark v. Wisconsin Cent. Ry. Co., 261 Ill. 407, 103 N. E. 1041; 9 Illinois Law Rev. 44, 443.

5. Matters of defense arising after suit brought may, by an exception to the general rule, be shown under the general issue in case and need not be pleaded puis darrein continuance.

City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Mount v. Scholes, 120 Ill. 394, 11 N. E. 401.

II. Specific Traverse

The following "matters of inducement" must be specifically denied:

1. The representative character of parties, as that defendant is a receiver, executor, or administrator, or that plaintiff is a corporation.

McNulta v. Lockridge, 137 Ill. 270, 27 N. E. 453, 31 Am. St. Rep. 362; Eckels v. Bryant, 137 Ill. App. 234.

2. That the defendant was operating the particular line of railroad mentioned in the declaration, or was owner of the car or instrumentalities causing the injury.

Chicago Union Traction Co. v. Jerka, 227 Ill. 95, 81 N. E. 7; Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050; Brunhild v. Chicago Union Traction Co., 239 Ill. 621, 88 N. E. 199; Carlson v. Johnson, 263 Ill. 556, 560, 105 N. E. 712.

3. That the operatives in charge of the train being run on said road were its servants or employés acting in the course of their employment.

Pennsylvania Co. v. Chapman, 220 Ill. 428, 77 N. E. 248.

4. These denials may be presented by notice in writing under the general issue.

Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 N. E. 542; Campbell v. Millar, 84 Ill. App. 208, 214, contra.

III. Affirmative Defenses

All matters in justification and excuse, or in discharge, must be shown under the general issue, and cannot be pleaded in confession and avoidance, except as follows:

1. Statute of limitations must be specially pleaded.

Wall v. Chesapeake & O. R. Co., 200 Ill. 66, 65 N. E. 633; Gunton v. Hughes, 131 Ill. 132, 134, 54 N. E. 895.

2. Truth in slander and libel must be specially pleaded; and the defendant must give specific instances of the misconduct charged with time and place.

Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243, 3 Ann. Cas. 528; Stowell v. Beagle, 57 Ill. 97; Gilmore v. Litzelman, 41 Ill. App. 541.

Note.—But the defense that the slander or libel was published or spoken upon a privileged occasion may be shown under the general issue; e. g., fair comment in a newspaper on the public acts of a public man.

Cooper v. Lawrence, 204 Ill. App. 261.

C. Trover

I. General Issue

In the action of trover for converting the plaintiff's goods, the general issue is not guilty. This plea operates as follows:

1. As denial of the plaintiff's possession and right of possession or property in the goods.

Gates v. Thede, 91 Ill. App. 608.

2. As denial of the defendant's act of conversion, the taking or detention of the goods mentioned.

3. As denial of the value of the property.

4. As denial that the defendant's act was wrongful; so permits justification by lien, process, or superior title.

Fisher v. Meek, 38 Ill. 92; Fulton v. Merrill, 23 Ill. App. 599.
(Any special plea showing no conversion is bad on special demurrer.)

II. Specific Traverse

Allegations of corporate and representative capacity, etc., should be specifically denied.

III. Affirmative Defenses

Matters of defense in justification and excuse must be shown under the general issue, which denies the wrongfulness of the taking or detention; they cannot be pleaded specially in confession and avoidance.[2] The only affirmative pleas in confession and avoidance, seem to be those in discharge, such as:

1. Statute of limitations.
2. Release.
3. Accord and satisfaction.
4. Former recovery.
5. Award of arbitrators.
6. Defenses arising after the commencement of the action.

D. Detinue

I. General Issue

In the action of detinue for detaining goods the general issue is non detinet. This plea operates as follows:

1. As a denial of the detention of the goods by the defendant.
2. As a denial of the right of possession or property of the plaintiff in the goods claimed.

II. Specific Traverse

Representative and corporate capacity must be specifically denied.

III. Affirmative Defenses

All defenses tending to show that the detention was justifiable or rightful and all matters in discharge must be specially pleaded:

1. Accidental destruction of the property; in general, any lawful excuse for the detention.

Robinson v. Peterson, 40 Ill. App. 152; 1 Chitty's Pleading, p. 483.

2. Special property in defendant, as by pledge, must be specially pleaded.
3. Statute of limitations.
4. Release and other matters in discharge.

E. Replevin

I. General Issue and Specific Traverse

There is properly no general issue in replevin, but the customary traverses are specific.

Dole v. Kennedy, 33 Ill. 232.

1. The plea non cepit only denies the taking in the place alleged, but admits the plaintiff's right of possession.

Van Namee v. Bradley, 69 Ill. 299; Mt. Carbon Coal & R. Co. v. Andrews, 53 Ill. 176.

2. The plea non detinuit denies the detention, but admits the right of possession in the plaintiff.

Under pleas 1 and 2 defendant cannot recover possession of the goods, as plaintiff's right is admitted.

Bourk v. Riggs, 38 Ill. 321; Chandler v. Lincoln, 52 Ill. 74.

3. Plea of not guilty amounts to non detinuit.

Dyer v. Brown, 71 Ill. App. 317.

---

[2] Superior title or right of possession in defendant may, however, be pleaded in avoidance of express color of title; i. e., fictitious apparent right pleaded for the purpose of having something to avoid.

II. Special Traverse

1. A denial of the right or the title of the plaintiff is properly made by a special traverse. This plea consists of two parts: (1) The inducement sets up facts and circumstances inconsistent with the title or right of plaintiff, such as title in the defendant or in a third person. (2) The absque hoc clause follows this argumentative denial with a direct denial of the title of the plaintiff.

Van Namee v. Bradley, 69 Ill. 299; Atkins v. Byrnes, 71 Ill. 326; Reynolds v. McCormick, 62 Ill. 412; Pease v. Ditto, 189 Ill. 456-468, 59 N. E. 933; Lamping Bros. v. Payne, 82 Ill. 463; Chandler v. Lincoln, 52 Ill. 74.

2. Upon such pleas the plaintiff has the burden of proof, and the defendant, if he succeeds, is entitled to a return of the goods without making avowry or cognizance, because the plaintiff must recover on the strength of his own title and right to immediate possession.

Atkins v. Byrnes, 71 Ill. 326; Reynolds v. McCormick, 62 Ill. 412, 415.

III. Affirmative Defenses

1. Matter in justification and excuse for the taking, such as levy on execution or attachment, or on distress, or seizure for taxes must be specially pleaded.

Lowry v. Kinsey, 26 Ill. App. 309; Mt. Carbon Coal & R. Co. v. Andrews, 53 Ill. 176; Lammers v. Meyer, 59 Ill. 214; Wheeler v. McCorristen, 24 Ill. 41; Schemerhorn v. Mitchell, 15 Ill. App. 412.

2. Statute of limitations, satisfaction, or release.

Anderson v. Talcott, 1 Gilman, 365, 371; Simmons v. Jenkins, 76 Ill. 479.

3. Estoppel to claim goods.

Looper v. Hersman, 58 Ill. 213; Colwell v. Brower, 75 Ill. 516; Mann v. Oberne, 13 Ill. App. 35.

4. Avowry or cognizance admits that plaintiff is owner of the goods, but alleges a right to take or detain them, somewhat in the nature of a cross-action. By avowry the defendant justifies taking the goods in his right, and by cognizance he claims them in the right of another. This is more in the nature of a cross-action than of a plea and asks the return of the goods. The usual ground is taking on distress warrant for rent in arrear or taking under legal process.

James v. Dunlap, 2 Scam. (2 Ill.) 481; Krause v. Curtis, 78 Ill. 459; Dayton v. Fry, 29 Ill. 525.

Note.—A replication is necessary to an avowry, or to a plea of justification. Defendant by his avowry takes upon himself the burden of proving the special right to take the goods from the owner.

Amos v. Sinnott, 4 Scam. (5 Ill.) 440.

5. That plaintiff is an unlicensed foreign corporation, which has not complied with the laws authorizing it to do business in Illinois, wherefore it cannot maintain the action.

Guest Piano Co. v. Ricker, 274 Ill. 448, 113 N. E. 717.

C. Ejectment

I. General Issue

The general issue in ejectment is not guilty. This plea operates as follows:

1. As a denial of the unlawfulness of the withholding; i. e., of plaintiff's title and right of possession,

2. Statute of limitations. All defenses in excuse or discharge, including the statute of limitations, are available under the general issue in ejectment.

Taylor v. Horde, 1 Burr, 60; Roosevelt v. Hungate, 110 Ill. 595, 602; Hogan v. Kurtz, 94 U. S. 773, 24 L. Ed. 317. See, as to defenses admissible under the general issue in ejectment, note in L. R. A. 1918F, 347.

II. Specific Traverse

The defendant should deny by special plea, verified by affidavit, that he was in possession or claims any title or interest in the premises, or that any demand of possession was made. Hurd's Rev. St. Ill. 1921, c. 45, § 22.

III. Affirmative Defenses

1. Affirmative defenses are wholly improper in ejectment, as these matters are available under the general issue.

Edwardsville R. Co. v. Sawyer, 92 Ill. 377.

2. Equitable defenses are not permitted in ejectment. It is no defense in ejectment that the deed of plaintiff was procured by fraud going to the consideration, as contrasted with fraud in the execution, though a court of equity might rescind the conveyance.

Dyer v. Day, 61 Ill. 336; Escherick v. Traver, 65 Ill. 379. See, also, Fleming v. Carter, 70 Ill. 236; Baltimore & O. & C. R. Co. v. Illinois Cent. R. Co., 137 Ill. 9, 27 N. E. 28 (estoppel in pais is available in equity only); Kirkpatrick v. Clark, 123 Ill. 343, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 581. Compare Replevin III, 3.

D. Special Assumpsit

I. General Issue

In special assumpsit the general issue is non assumpsit. This plea operates as follows:

1. As a denial of the making of such a promise or contract, as set forth, upon the consideration alleged.

Cobb v. Heron, 130 Ill. 49, 53, 54 N. E. 139; Ingraham v. Luther, 65 Ill. 446; B. S. Green Co. v. Blodgett, 49 Ill. App. 180, 184 (consideration).

(1) Denial of assignment or execution of instruments sued on must be verified, by section 52 of Practice Act (Hurd's Rev. St. Ill. 1921, c. 110), if copy is filed with the pleading.

Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896; Bailey v. Valley National Bank, 127 Ill. 232, 19 N. E. 695; Martin v. Culver, 87 Ill. 49; Lockridge v. Nuckolls, 25 Ill. 178 (159); Davis v. Cleghorn, 25 Ill. 212; Puterbaugh's Pl. (9th Ed.) 197, 239.

2. As a denial of the breach of the contract by defendant. (Under Hilary Rules, specific traverse required for 2 and 3.)

3. As a denial of the performance of conditions precedent on the part of the plaintiff.

Hoffmann v. World's Columbian Exposition, 55 Ill. App. 290; Warner v. Crane, 20 Ill. 148 (presentment and notice of dishonor).

4. To raise excuses for nonperformance, showing that defendant never violated the duty of performance, such as breach of implied conditions; or impossibility of performance by act of law, etc., or conditions subsequent to the obligation.

Hamlin, Hale & Co. v. Race, 78 Ill. 422.

5. To raise defenses showing the contract to be void or voidable:

(1) Coverture.

Streeter v. Streeter, 43 Ill. 155, 164; Work v. Cowhick, 21 Ill. 217.

(2) Fraud in execution or in consideration.

Strong v. Linington, 8 Ill. App. 436 (fraud in procuring execution of sealed instrument by surreptitious interpolation or alteration under general issue); Spring Valley Coal Co. v. Buzis, 213 Ill. 341, 348, 72 N. E. 1060; Cole v. Joliet Opera House Co., 79 Ill. 96 (special plea); Robinson v. Yetter, 238 Ill. 320, 325, 87 N. E. 363 (fraud is a defense at law to simple contracts, and resort to a court of equity to set aside the contract is not necessary unless the contract is under seal).

(3) Illegality, except by usury.

McDonald v. Trea, 69 Ill. App. 134; Price v. Burns, 101 Ill. App. 418.

(4) Infancy (?). See III, 2, infra.

6. To permit matters in discharge to be shown.

(1) Conditions subsequent.

American Cent. Ins. Co. v. Birds Building & Loan Ass'n, 81 Ill. App. 258 (proof of loss).

(2) Release of surety by giving time to principal.

Harrison v. Thackaberry, 248 Ill. 512, 94 N. E. 172; Wiley v. Temple, 85 Ill. App. 69.

(3) Other defenses in discharge available under the general issue are payment, performance, release, former recovery, accord and satisfaction, rescission, alteration, etc.

Ward v. Athens Mining Co., 98 Ill. App. 227; Gilfillan v. Farrington, 13 Ill. App. 107 (composition with creditors); Conkling v. Olmstead, 68 Ill. App. 649.

7. Estoppel may be shown under the general issue in assumpsit.

Campbell v. Goodall, 54 Ill. App. 24 (this is a special plea in replevin, Mann v. Oberne, 45 Ill. App. 35); Western Cottage Piano & Organ Co. v. Burrows, 188 Ill. App. 120, 129; City of East St. Louis v. Flannigen, 34 Ill. App. 596.

8. To set up failure of consideration and matters of recoupment; e. g., delay in completion.

Cooke v. Preble, 80 Ill. 881; Peirce v. Sholtey, 190 Ill. App. 341, 347; Murray v. Carlin, 67 Ill. 286; Higgins v. Lee, 16 Ill. 495; Streeter v. Streeter, 43 Ill. 155, 160; Waterman v. Clark, 76 Ill. 428, 431 (note, special plea); Baker v. Fawcett, 69 Ill. App. 300.

II. Specific Traverse

1. Matters of corporate and representative capacity must be specifically denied.

2. Joint liability. The denial of joint liability or partnership of the defendants, under section 54, Practice Act, should be special, verified by affidavit, in order to put burden of proof on plaintiff in first instance.

McKinney v. Peck, 28 Ill. 174; Heintz v. Cahn, 29 Ill. 308; Davis v. Scarritt, 17 Ill. 202; Kennedy v. Hall, 68 Ill. 165; Supreme Lodge of A. O. U. W. v. Zuhlke, 129 Ill. 298, 303, 21 N. E. 789; Powell Co. v. Finn, 198 Ill. 567, 64 N. E. 1036; Capitol Food Co. v. Smith, 155 Ill. App. 123 (failure to file such plea does not prevent interposition of such defense under general issue by defendant); Martin v. Nelson, 53 Ill. App. 517, 520.

III. Affirmative Defenses

Matters in excuse and in discharge may be shown under the general issue. There are the following exceptions:

1. Statute of limitations.

Jockisch v. Hardtke, 50 Ill. App. 202; Hellen v. Hellen, 170 Ill. App. 464 (debt); Gebhart v. Adams, 23 Ill. 397, 76 Am. Dec. 702 (debt); Thompson v. Reed, 48 Ill. 118.

2. Infancy, it is said, must be specially pleaded (but query).

Curry v. St. John Plow Co., 55 Ill. App. 82. Cf. 22 Cyc. 683.

3. Usury must be specially pleaded unless it appears by the declaration.

Osborn v. McCowen, 25 Ill. 218; Drake v. Latham, 50 Ill. 270; Frank v. Morris, 97 Ill. 185, 141, 11 Am. Rep. 4; Mosier v. Norton, 83 Ill. 521 (chancery).

4. Tender.

Warth v. L. Loewenstein & Sons, 219 Ill. 222, 228, 76 N. E. 379; Drake v. Latham, 50 Ill. 270.

5. Discharge in bankruptcy.

6. Statute of frauds must be specially pleaded in special assumpsit.

Meyers v. Schemp, 67 Ill. 469; Chicago & W. Coal Co. v. Liddell, 69 Ill. 639; Chicago Attachment Co. v. Davis Sewing Mach. Co., 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754; Booker v. Wolf, 195 Ill. 365, 370, 63 N. E. 265; Beard v. Converse, 84 Ill. 512; 49 L. R. A. (N. S.) 43, note.

7. Failure or lack of consideration for promissory notes and negotiable bonds must be specially pleaded. Sheldon v. Lewis, 97 Ill. 640.

Hurd's Rev. St. Ill. 1921, c. 98, §§ 9 and 10; Rose v. Mortimer, 17 Ill. 475; Topper v. Snow, 20 Ill. 434; Sheldon v. Lewis, 97 Ill. 640; Wadhams v. Swan, 109 Ill. 46; Wilson v. King, 83 Ill. 232; Waterman v. Clark, 76 Ill. 428, 431; Columbia Heating Co. v. O'Halloran, 144 Ill. App. 74; Wineman v. Oberne, 40 Ill. App. 269.

8. Fraud in procuring the execution of a promissory note must be pleaded specially.

Munson v. Nichols, 62 Ill. 111; Hays v. Ottawa, O. & F. R. V. R. Co., 61 Ill. 423; Black v. McLagan, 15 Ill. 242, 250; Anderson v. Jacobson, 68 Ill. 523; Jones v. Albee, 70 Ill. 34; Taft v. Meyerscough, 92 Ill. App. 560.

Note.—A sealed instrument can be impeached for fraud only in equity unless the fraud goes to the execution.

Jackson v. Security Mut. Life Ins. Co., 223 Ill. 161, 165, 84 N. E. 198.

9. Matters of set-off must be pleaded specially or by notice under the general issue.

Patterson v. Steele, 38 Ill. 272; McEwen v. Kerfoot, 37 Ill. 530, 538; Cox v. Jordan, 86 Ill. 560 (distress).

10. Forfeiture of an insurance policy reason of failure to pay premiums or violation of other condition subsequent.

Benes v. Bankers' Life Ins. Co., 282 Ill. 236, 243, 118 N. E. 443.

11. Matters of defense arising after action brought are not admissible under the general issue, but must be plead puis darrein continuance.

Mount v. Scholes, 120 Ill. 394, 11 N. E. 401.

E. General Assumpsit

I. General Issue

The general issue in the action of general assumpsit is nonassumpsit. This plea operates similarly to the general issue in special assumpsit and in debt on simple contract, but with certain peculiarities.

1. It is, in the first place, a denial of the indebtedness and of all the matters of fact from which the debt and the promise alleged may be implied by law; such as the bargain, sale, and delivery, the performance of work, or the receipt of money to the use of the plaintiff.

2. All defenses in excuse and in discharge may, for the most part, be shown under the general issue. Matters in discharge need not be specially pleaded.

Gilfillan v. Farrington, 13 Ill. App. 101, 107.

3. The statute of frauds may be shown under the general issue without pleading it, contrary to the rule in special assumpsit.

Meyers v. Schemp, 67 Ill. 469; Chicago & W. Coal Co. v. Liddell, 69 Ill. 639; Beard v. Converse, 84 Ill. 512; Starr Piano Co. v. Lawrence, 190 Ill. App. 351.

4. The defense of want or failure of consideration of negotiable instruments may be shown under the general issue where the defendant has no notice describing the instrument relied on for recovery.

Wilson v. King, 83 Ill. 232, 238; Clarke v. Newton, 235 Ill. 530, 534, 85 N. E. 747.

5. Recoupment of damages for breach of warranty.

Babcock v. Trice, 18 Ill. 420, 68 Am. Dec. 560.

6. All defenses which show the transaction to be void or voidable, including illegality, fraud, duress, and incapacity, may be shown under the general issue.

II. Specific Traverse

See action of Special Assumpsit, II.

III. Affirmative Defenses

Matters in discharge, such as payment, novation, accord and satisfaction, conditions subsequent, may be shown under the general issue, with the following exceptions:

1. Statute of limitations.
2. Discharge in bankruptcy.
3. Infancy (query).
4. Set-off. Kennard v. Secor, 57 Ill. App. 415.
5. Failure and lack of consideration of negotiable notes, if a copy is filed with the common counts.

Columbia Heating Co. v. O'Halloran, 144 Ill. App. 74; Wilson v. King, 83 Ill. 232, 238.

6. Usury.

F. Action of Debt on Simple Contract

I. General Issue

In the action of debt on simple contract the general issue is nil debet. The scope of this plea is practically the same as the general issue in assumpsit. It operates as follows:

1. As a denial of the indebtedness and all facts giving rise to the indebtedness, such as the receipt of quid pro quo, that the goods were delivered, or that the work was done as ordered.

Chicago Sash, Door & Blind Mfg. Co. v. Haven, 196 Ill. 474, 479, 63 N. E. 158.

2. As a denial that the debt was due at the time suit was brought.

Collins v. Montemy, 8 Ill. App. 182.

3. As a denial that conditions precedent have been performed by plaintiff.

4. As a denial of the existence of a legal debt or contract; permits defense that the transaction is void or voidable in law, as by coverture or insanity or fraud.

5. It raises defenses in excuse and in discharge of the action, such as payment, release, accord and satisfaction, or novation.

People, to Use of Sexton, v. Seelye, 146 Ill. 129, 32 N. E. 458.

6. Recoupment may be shown under general issue.

II. Specific Traverse

See action of Special Assumpsit, II.

III. Affirmative Defenses

The rules as to special pleas in debt on simple contract are, for the most part, the same as in assumpsit. The following defenses must be specially pleaded:

1. Statute of limitations.

Gebhart v. Adams, 22 Ill. 337, 76 Am. Dec. 702.

2. Discharge in bankruptcy.
3. Statute of frauds.
4. Fraud in case of promissory notes.
5. Want and failure of consideration on a note.
6. Tender.
7. Infancy (?).
8. Set-off.

G. Action of Debt on Bond or Specialty

I. General Issue

The general issue in the action of debt on specialty is non est factum. This plea operates as a denial that the deed stated in the declaration is in fact or in law the deed of the defendant, but does not deny the alleged breach or set up any other matter of defense.

This plea permits the following defenses:

1. That the defendant did not in fact sign, seal, or deliver any such instrument as that sued upon. The plea non est factum, if verified by affidavit, raises the issue of the execution of the bond by the parties denying execution; there must be an oath to the plea to raise the defense as to execution.

Home Flax Co. v. Beebe, 48 Ill. 133; Gaddy v. McCleave, 59 Ill. 182; Fitzsimmons v. Hall, 84 Ill. 528; Kitner v. Whitlock, 88 Ill. 513; Mix v. People, 92 Ill. 549; Horner v. Boyden, 27 Ill. App. 573.

2. Variance. That the deed is not correctly described in the declaration.

Mix v. People, 92 Ill. 549.

3. That the deed was deposited as an escrow and that the conditions of the escrow have not yet been performed.

1 Chitty, Pleading, 483.

4. That the deed is a void instrument, because of some disability of the maker, such as coverture, insanity, or drunkenness.

5. Fraud in the procuring of the deed by which the defendant was induced to sign a different instrument from that intended to be signed; but fraud going to the consideration of a deed is no defense at law.

Strong v. Linington, 8 Ill. App. 436; Escherick v. Traver, 65 Ill. 379, 381; Jackson v. Security Mut. Life Ins. Co., 233 Ill. 161, 165, 84 N. E. 198; Turner v. Manufacturer's & Consumer's Coal Co., 254 Ill. 187, 193, 98 N. E. 234; Papke v. G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910 (1901).

6. Illegality.

May v. Magee, 66 Ill. 112; Strong v. Linington, 8 Ill. App. 436; Collins v. Blantern, 2 Wilson, 341; 1 Smith Leading Cases, 715.

7. Alteration, erasure, interpolation, etc.

Governor, to Use of Thomas, v. Lagow, 48 Ill. 134, 143.

8. Non est factum puts in issue only the making and validity of the deed and admits the breaches assigned. Under this plea it is not necessary for plaintiff to prove the breaches or other material allegations.

Rudesill v. Jefferson County Court, 85 Ill. 446; Landt v. McCullough, 130 Ill. App. 615; Governor, to Use of Thomas, v. Lagow, 43 Ill. 134, 143.

9. Nil debet to debt on a bond or specialty is bad on demurrer, where there are no common counts in the declaration; but if issue is joined the informality is waived and the plaintiff is thereby put to the proof of every allegation and the defendant can avail himself of any defense as in debt on simple contract.

Price v. Farrar, 5 Ill. App. 536; Kilgour v. Drainage Com'rs, 111 Ill. 242, 248; Mix v. People, 86 Ill. 329.

10. The plea of nil debet is good, where the bond is mere inducement, as in debt for rent on a sealed lease, but bad where it is the gist of the action.

King v. Ramsay, 12 Ill. 619; Miller v. Blow, 68 Ill. 204, 210; 1 Tidd, Practice, 650.

II. Specific Traverse

1. Non damnificatus. The plea of non damnificatus is good only when the condition of the bond is in general terms to indemnify and save harmless; when performance of particular acts or the payment of specific sums is called for, performance must be averred.

Terre Haute & I. Ry. Co. v. Peoria & P. U. Ry. Co., 182 Ill. 501, 503, 55 N. E. 377; Fidelity Deposit Co. v. Cooney, 127 Ill. App. 523; Sears v. Nagler, 18 Ill. App. 547; Mix v. People, 86 Ill. 329; Id., 92 Ill. 549; Fidelity & Deposit Co. v. West Chicago St. Ry. Co., 99 Ill. App. 466; 3 Encyc. Pl. & Pr. 632.

2. Denial of performance of conditions precedent by plaintiff.

3. No rent in arrear may be pleaded in debt for rent, though not in covenant.

III. Affirmative Defenses

1. Defenses showing sealed instrument voidable must be pleaded specially and cannot be given in evidence under non est factum.

Dunbar v. Bonesteel, 3 Scam. (4 Ill.) 22.

(1) Fraud in consideration, if available at law.

May v. Magee, 66 Ill. 112; Sims v. Klein, 1 Ill. (Breese) 302; Gould, Pl. c. VI, § 40.

(2) Want or failure of consideration of negotiable bond.

Gage v. Lewis, 68 Ill. 604; Nye v. Raymond, 16 Ill. 153; Bullen v. Morrison, 98 Ill. App. 669.

(3) Infancy (?).

2. Statute of limitations.

Gebhart v. Adams, 23 Ill. 237, 76 Am. Dec. 702.

3. Payment or performance. Performance may be alleged in general terms when one is sued upon an obligation binding him to perform an indefinite number of acts; but otherwise performance must be specifically alleged, and a plea of general performance is not sufficient.

People v. McHatton, 2 Gilman, 731; Mix v. People, 86 Ill. 329; Id., 92 Ill. 549; Terre Haute & I. Ry. Co. v. Peoria & P. U. Ry. Co., 182 Ill. 501, 503, 55 N. E. 377.

A breach cannot be denied, but performance must be alleged.

Fidelity Deposit Co. v. Cooney, 127 Ill. App. 523.

4. Discharge in bankruptcy.

5. Illegality by statute as for usury and gaming.

Goodwin v. Bishop, 50 Ill. App. 145.

6. Matters in discharge, such as release, accord and satisfaction, former recovery.

Bailey v. Coles, 86 Ill. 332.

7. Set-off.

Meyer v. Wiltshire, 92 Ill. 395.

8. Excuses for nonperformance of conditions.

(1) No award to an arbitration bond.

(2) Merits not determined and title in defendant to an action on replevin bond.

O'Donnell v. Colby, 153 Ill. 324, 38 N. E. 1065; Weber v Mick, 181 Ill. 520, 23 N. E. 646; Hanchett v. Gardner, 138 Ill. 571, 28 N. E. 788; Magerstadt v. Harder, 199 Ill. 271, 65 N. E. 225; King v. Ramsay, 12 Ill. 619.

H. Covenant

The rules as to pleas in debt on specialty are applicable also to covenant.

Goldstein v. Reynolds, 190 Ill. 124, 60 N. E. 65; City of Chicago v. English, 180 Ill. 478, 479, 54 N. E. 609; Radzinski v. Ahlswede, 135 Ill. App. 512.

I. Action of Debt on a Judgment or Recognizance

I. General Issue

There is properly no general issue. Nil debet is not a good plea to an action upon a domestic judgment, nor to a judgment rendered in a sister state.

Knickerbocker Life Ins. Co. v. Barker, 55 Ill. 241; Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

II. Specific Traverse

Nul tiel record sets up the defense, either:

1. That there is no such record at all in existence; or

2. Variance; one different from that which the plaintiff has declared of; or

3. That the judgment is void on the face of the record.

All other defenses must be specially pleaded.

Forsyth v. Barnes, 228 Ill. 326, 331, 81 N. E. 1028, 10 Ann. Cas. 710; Id., 131 Ill. App. 467; Waterbury Nat. Bank v. Reed, 231 Ill. 246, 83 N. E. 183 (scire facias).

III. Affirmative Pleas

1. If extrinsic evidence is necessary to show that the judgment is void, as that it was fraudulently obtained, or that the court had no jurisdiction of the person or subject-matter, the defense must be pleaded specially.

Ambler v. Whipple, 139 Ill. 311, 324, 28 N. E. 841, 32 Am. St. Rep. 202; Welch v. Sykes, 3 Gilman (8 Ill.) 197, 44 Am. Dec. 689; Hill v. Mendenhall, 21 Wall. (U. S.) 453, 22 L. Ed. 616; 3 Ill. Law. Rev., 326; Hopkins v Woodward, 75 Ill. 62.

Note.—But in Forsyth v. Barnes, 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710, it was held that in an action of debt on a judgment by confession on a note signed by a married woman, the coverture of the defendant may be proved under the plea of nul tiel record, though not specifically put in issue by the pleading or on face of the record.

2. Matters in discharge, such as satisfaction of judgment, release, and statute of limitations, must be specially pleaded.

Hellen v. Hellen, 170 Ill. App. 464.

TABLE OF CASES CITED

[THE FIGURES REFER TO PAGES]

A

Abbott v. Kimball, 97.
Abe Lincoln Mut. Life & Accident Soc. v. Miller, 155.
Aber v. Bratton, 130.
Abercrombie v. Parkhurst, 236.
Abington v. Lipscombe, 113.
Abrahams v. Jones, 533.
Acerro v. Petrone, 463.
Acme Food Co. v. Older, 260.
Acton v. Symon, 152.
Adair v. Lott, 178.
Adair's Adm'r v. Rogers' Adm'r, 169.
Adam v. Arnold, 142.
Adams v. Abram, 541.
Adams v. Adams, 328, 329.
Adams v. Barry, 488.
Adams v. Clark, 111.
Adams v. Columbian Steamboat Co., 165.
Adams v. Crosby, 157.
Adams v. Cross, 470.
Adams v. Filer, 361.
Adams v. Freeman, 73.
Adams v. Gardner, 488.
Adams v. Goddard, 109.
Adams v. Hemmenway, 67, 70, 85, 87.
Adams v. Munter, 534.
Adams v. O'Connor, 80, 248.
Adams v. Richardson, 97.
Adams v. Wiggin, 391.
Adams v. Wood, 131.
Adams v. Woods, 138.
Adamson v. Jarvis, 95.
Addams v. Tutton, 143.
Addington v. Allen, 531.
Adderley v. Evans, 323.
Addison v. Overend, 391.
Adler v. Prestwood, 116.
Admiralty Com'rs v. The Amerika, 69.
Ætna Ins. Co. v. Phelps, 250.
Ætna Ins. Co. v. Swift, 50.
Ætna Life Ins. Co. v. Hoppin, 176, 182.
Ahitbol v. Beniditto, 464.
Ainslie v. Martin, 385.
Ainsworth v. Partillo, 109.
Aireton v. Davis, 97.
Akerley v. Haines, 69.
Alabama Consol. Coal & Iron Co. v. Heald, 297.
Alabama Fuel & Iron Co. v. Bush, 496.
Alamada v. Vandecar, 235.
Albert v. Seiler, 536.
Albin v. Talbott, 203.
Alderman v. Way, 78.
Alderson v. Ennor, 163.
Aldine Mfg. Co. v. Barnard, 159, 165, 166.
Aleberry v. Walby, 252.
Alexander v. Capital Paint Co., 156.
Alexander v. Mawman, 445.
Alexander v. Shalala, 186.
Alexander v. Vane, 162.
Algeo v. Algeo, 157, 167.
A. L. Gosselin Corporation v. Mario Tapparelli fu Pietro of America, 56.
Allen v. Breusing, 161.
Allen v. Colliery Engineers Co., 376.
Allen v. Crofoot, 368.
Allen v. Crary, 129.
Allen v. Ford, 166.
Allen v. Gray, 73.
Allen v. Hartfield, 248.
Allen v. Lucket, 396.
Allen v. McKibbin, 157, 167.
Allen v. Scott, 6, 368, 369.
Allen v. Smith, 103, 268.
Allen v. Taylor, 464.
Allen v. Thayer, 79.
Allen v. Tuscarora Val. R. Co., 296, 377.
Allen v. Watson, 381.
Allen v. Watt, 390.
Allen Clark Co. v. Francovich, 496.
Allis-Chalmers Mfg. Co. v. Chicago, 297.
Almond v. Bonnell, 184, 471.
Almy v. Harris, 97, 138.
Alsope v. Sytwell, 506.
Altes v. Hinckler, 100.
Ambler v. Whipple, 331, 571.

Ambrose v. Roe, 257.
American Baptist Missionary Union v. Peck, 539.
American Exp. Co. v. Haggard, 399, 400.
American Express Co. v. State, 9.
American Spirits Mfg. Co. v. Peoria Belt R. Co., 556.
Amerika, The, 69.
Amhurst v. Skynner, 519.
Amory v. Flyn, 101.
Amos v. Cosby, 273.
Anderson v. Boneman, 130.
Anderson v. Courtright, 180.
Anderson v. Hapler, 122, 124.
Anderson v. Lewis, 389.
Anderson v. Martindale, 393.
Anderson v. Talcott, 320.
Anderson v. Tedesco, 100.
Andre v. Johnson, 535.
Andrews v. Allen, 146.
Andrews v. Callender, 152.
Andrews v. Hoeslich, 130.
Andrews v. Ives, 242.
Andrews v. Marris, 480.
Andrews v. Montgomery, 168, 169.
Andrews v. Thayer, 456.
Andrews v. Whitehead, 242, 461, 498, 504.
Andrews v. Williams, 484.
Andros v. Childers, 533.
Androscoggin Water Power Co. v. Metcalf, 166.
Andrus v. Waring, 376, 381.
Angle v. Hanna, 159.
Anniston Electric & Gas Co. v. Rosen, 519.
Anonymous, 81, 292, 344, 412, 456, 470, 507.
Anthony v. Wilson, 329.
Applebee v. Rumery, 96.
Appleby v. Brown, 145, 146.
Appleton v. Barrett, 131.
Arasmith v. Temple, 69, 90.
Archer v. Claflin, 484.
Archibald v. Argall, 390.
Arizona Commercial Min. Co. v. Iron Cap Copper Co., 100, 163, 453.
Arlett v. Ellis, 438.
Arlington (Lord) v. Merrick, 519.
Arms v. Ashley, 162.
Armstrong v. Cooley, 90.
Armstrong v. Webster, 418, 523.
Arnold v. Dodson, 163.
Arnold v. Foot, 89.
Arnold v. Jefferson, 103.
Arthur v. Griswold, 221.
Arthur v. Ingels, 233.
Ash v. Childs Dining Hall Co., 57.
Ashley v. Root, 94.
Aslin v. Parkin, 187.
Atkins v. Barnstable County, 167.
Atkins v. Byrnes, 320.
Atkins v. Lewis, 178.
Atkinson v. Baker, 117.
Atkinson v. Banker, 101.
Atkinson v. People's Nat. Bank, 538.
Atkinson v. Scott, 162.
Atlanta & W. P. R. Co. v. Jacobs' Pharmacy Co., 250.
Atlantic Coast Line R. Co. v. State, 2.
Atlantic Mut. Fire Ins. Co. v. Sanders, 457.
Atlantic Mut. Fire Ins. Co. v. Young, 251.
Atlantic Refining Co. v. Feibberg, 120.
Atlas Shoe Co. v. Bechard, 102, 108.
Atlee v. Backhouse, 163.
Attersoll v. Stevens, 96.
Attorney General v. Meller, 476, 477.
Atwood v. Davis, 404.
Atwood v. Lucas, 260.
Aubery v. James, 443.
Auburn & O. Canal Co. v. Leitch, 284, 420, 425.
Auditor v. Woodruff, 278, 541.
Auld v. Hepburn, 283.
Aurora Trust & Sav. Bank v. Whildin, 421.
Austen v. Gervas, 499.
Austin v. Dills, 481.
Austin v. Jervoyse, 499.
Avery v. Tyringham, 244, 528.
Axford v. Mathews, 105.
Ayer v. Bartlett, 76, 93.
Ayes v. Hewett, 128.
Ayliff v. Archdale, 152.
Ayres v. Kelley, 378.
Azparren v. Ferrel, 124, 125.

B

Baals v. Stewart, 227.
Babb v. Mackay, 97.
Babcock v. Farmers' & Drovers' Bank, 366.
Babcock v. Trice, 365.
Bach v. Owen, 247.
Backus v. Clark, 459.
Bacon v. Davis, 130.
Bacon v. Schepflin, 390, 400.
Badger v. Batavia Paper Mfg. Co., 109.
Badgley v. Heald, 159.
Badkin v. Powell, 308.
Badlam v. Tucker, 103.
Bagaglio v. Paolino, 149.
Bailey v. Adams, 107,

Bailey v. Bussing, 241.
Bailey v. Clay, 247, 249.
Bailey v. Cowles, 327.
Bailey v. Ellis, 234.
Bailey v. Freeman, 241.
Bailey v. Valley Nat. Bank, 359, 392.
Baillie v. Columbia Gold Min. Co., 23.
Bain v. Hunt, 109.
Baker v. Beers, 112.
Baker v. Blackman, 437.
Baker v. Corey, 156.
Baker v. Dumbolton, 202.
Baker v. Fales, 125, 129.
Baker v. Fawcett, 365.
Baker v. Fuller, 248.
Baker v. Howell, 105.
Baker v. Jameson, 245.
Baker v. King, 79.
Baker v. Lauterbach, 160.
Baker v. Lothrop, 112.
Baker v. Morphew, 221.
Balcom v. Craggin, 242.
Baldridge v. Allen, 71.
Baldwin v. Cole, 109, 111.
Baldwin v. Whittier, 74.
Ball v. Patterson, 228.
Ball v. Roane, 220.
Ballance v. Flood, 178.
Ballou v. O'Brien, 130.
Baltimore & O. & C. R. Co. v. Illinois Cent. R. Co., 333, 334.
Baltimore & O. R. Co. v. Polly, Woods & Co., 156, 413.
Bane v. Detrick, 111.
Bank of Bristol v. Ashworth, 384, 386.
Bank of Buffalo v. Crouch, 126.
Bank of Columbia v. Hagner, 248.
Bank of Columbia v. Patterson, 156.
Bank of Illinois v. Brady, 292.
Bank of New South Wales v. O'Connor, 119.
Bank of Orange County v. Brown, 94.
Bank of United States v. Smith, 527.
Banks v. Whetstone, 117.
Bannister v. Read, 157.
Bannister v. Victoria Coal & Coke Co., 244, 258.
Banorgee v. Hovey, 152.
Banyer v. Empie, 180.
Barber v. Chester County, 134.
Barber v. Rose, 305.
Barber v. Summers, 518.
Barber v. Vincent, 282.
Barbour's Adm'rs v. Archer, 481.
Barclay v. Howell, 184.
Bardons v. Selby, 368.
Barger v. Hobbs, 181.
Barkeloo v. Randall, 73.
Barker v. Braham, 73.
Barker v. Chase, 80.
Barker v. Justice, 295.
Barker v. Lade, 434, 485.
Barker v. Miller, 103.
Barley v. Roosa, 466.
Barlow v. Garrow, 533.
Barnard v. Duthy, 252.
Barnard v. Poor, 90.
Barnes v. Bartlett, 127.
Barnes v. Brookman, 531, 533.
Barnes v. Cole, 88.
Barnes v. Hunt, 371.
Barnes v. Hurd, 69, 91.
Barnes v. Kenyon, 453.
Barnes v. Northern Trust Co., 516.
Barnett v. Barnett, 284.
Barnett v. Phelps, 221.
Barnett v. Reed, 91.
Barney v. Dewey, 95.
Barnitz v. Casey, 180.
Barnum v. Landon, 146, 275.
Barnum v. Rullihan, 56.
Barnum v. Stone, 101, 109.
Barr v. Craig, 162.
Barrett v. Douglas Park Bldg. Ass'n 263.
Barrett v. Carden, 265.
Barrett v. McAllister, 325.
Barrons v. Ball, 220.
Barrow v. Burbridge, 292.
Barry v. Peterson, 67, 70, 85, 87.
Bartholomew v. Jackson, 148.
Bartlett v. Perkins, 78.
Bartlett v. Prescott, 424.
Barton v. Dunning, 102.
Barton v. Southwick, 364.
Barton v. Webb, 501.
Barwick v. Barwick, 103.
Bascom v. Dempsey, 75.
Basford v. Pearson, 167.
Bass v. Rublee, 528.
Bateman v. Allen, 475.
Bates v. Campbell, 178.
Bates v. Conkling, 111.
Bates v. Cort, 284.
Bates v. Lane, 161.
Batt v. Bradley, 373.
Batterton v. Yoakum, 177.
Battin v. Bigelow, 186.
Battrell v. Ohio River R. Co., 491.
Bauer v. Roth, 49, 50.
Baum v. Tonkin, 133, 139.
Bauman v. Bean, 292.
Bavarian Brewing Co. v. Retkowski, 351.
Baxter v. Jackson, 252.
Bayard v. Inglis, 186.
Bayard v. Malcolm, 525.

[The figures refer to pages]

Bay County v. Bradley, 177.
Bayley v. Bryant, 112.
Baylies v. Fettyplace, 156, 322.
Baylis v. Cronkite, 111.
Baynes v. Brewster, 408, 492.
B. B. Ford & Co. v. Atlantic Compress Co., 151.
Beach v. Beach, 179.
Beach v. Hotchkiss, 145, 146.
Beach v. Ranney, 489.
Beal v. Simpson, 433.
Beall v. Folmar, 496.
Beals v. See, 156.
Bean v. Atwater, 247.
Bean v. Ayres, 486.
Bearcamp River Co. v. Woodman, 97.
Beard v. Converse, 325, 326.
Beatty v. Parsons, 320.
Beaty v. Perkins, 74, 91.
Beauchamp v. Bosworth, 257.
Beavely v. Harris, 530.
Becker v. German Mut. Fire Ins. Co. of North Chicago, 463, 517.
Becker v. Smith, 76.
Beckwith v. Shordike, 71, 90.
Bedell v. Stevens, 528.
Beebe v. Knapp, 95, 102, 108, 202, 525.
Beers v. Shannon, 466.
Beggs v. Chicago Bonding & Surety Co., 329.
Begole v. Stimson, 19.
Behr v. Gerson, 118, 119.
Beirne v. Dunlap, 140.
Beitler v. Ziegler, 146.
Belasyse v. Hester, 285.
Belden v. Laing, 125.
Belford v. Woodward, 141, 168.
Belk v. Broadbent, 91, 480.
Bell v. Janson, 514.
Bell v. Wood, 94.
Bellant v. Brown, 82, 92.
Belton v. Fisher, 245.
Bemis v. Charles, 165.
Bemis v. Faxon, 207, 457.
Benalleck v. People, 137.
Benbridge v. Day, 281.
Benden v. Manning, 241, 242, 251.
Bender v. Sampson, 264, 265, 481.
Benes v. Bankers' Life Ins. Co., 322.
Benjamin v. Bank of England, 105.
Benjamin v. Stremple, 110.
Benjamin Wagon & Car Co. v. Merchants' Exch. Bank, 230.
Benje v. Creagh's Adm'r, 118.
Benes v. Bankers' Life Ins. Co., 322, 325, 413.
Bennet v. Filkins, 339.
Bennett v. Appleton, 75.
Bennett v. Connelly, 162.
Bennett v. Holloway, 319.
Bennett v. Kupfer Bros. Co., 365.
Bennett v. Morley, 330.
Bennett v. Pixley's Ex'rs, 246.
Bennett v. Union Cent. Life Ins. Co., 282, 288.
Benson v. Matsdorf, 181.
Bentley v. Smith, 466.
Benton v. Brown, 452.
Bequette v. Lasselle, 515.
Bernard v. Herbert, 118.
Bernard v. Saul, 323.
Bernard v. Wilcox, 393.
Berry v. Hamill, 91.
Berry v. Harper, 241.
Berry v. State, 43.
Berry v. Stinson, 267.
Berry v. Turner, 538.
Bethea v. Jeffres, 100.
Bethen v. McLennon, 117.
Bertie v. Beaumont, 76, 78.
Bertie v. Pickering, 461, 462, 493.
Bethlehem Borough v. Perseverance Fire Co., 166.
Bertwhistle v. Goodrich, 130.
Beverley v. Holmes, 241.
Biddle v. Wilkins, 266.
Bieri v. Fonger, 79.
Bigelow v. Cambridge, etc., Turnpike Corporation, 138.
Bigelow v. Stearns, 73.
Bilderback v. Pouner, 271.
Billings v. Lafferty, 97.
Bimeler v. Dawson, 21.
Bingham v. Dickie, 464.
Binz v. Tyler, 486.
Birch v. Bellamy, 507.
Birch v. Wilson, 312, 410, 412, 413.
Bird v. Hempstead, 76
Bird v. Holman, 434.
Bird v. Randall, 312.
Birmingham Ry., Light & Power Co. v. Littleton, 496.
Birmingham Ry., Light & Power Co. v. Nicholas, 520.
Birney v. Haim, 481.
Bishop v. Baker, 202.
Bishop v. Camp, 402.
Bishop v. Quintard, 284.
Bishop v. Young, 139, 140.
Bishop of Salisbury, Case of, 506.
Bissell v. Briggs, 136.
Bissell v. Spring Valley Twp., 288.
Bize v. Dickason, 164.
Blackborough v. Davis, 474.
Blackburn v. Baker, 138.
Blackmore v. Tidderley, 408, 442.
Black's Ex'x v. Black's Ex'rs, 385.
Black's Lessee v. Hepburne, 176, 177.

[The figures refer to pages]

Blackstone Nat. Bank v. Lane, 452.
Blackwell v. Irvin's Adm'rs, 245.
Blades v. Arundale, 103.
Blair v. Chicago & A. R. Co., 533.
Blair v. Williams, 118.
Blake v. Foster, 338, 340, 476, 477.
Blakeslee v. Holt, 158.
Blakey v. Douglas, 113.
Blalock v. Randall, 67, 74, 86, 810.
Blankenship v. Berry, 118.
Blattner v. Frost, 136.
Bleddsoe's Ex'r v. Wadsworth, 272.
Bledsoe v. Irvin, 396.
Bleeke v. Grove, 425, 426, 427.
Blenkhorn v. Penrose, 295.
Bletch v. Johnson, 464.
Blick v. Brigg, 245.
Blin v. Campbell, 89.
Bliss v. Arnold, 533.
Blockley v. Slater, 473.
Blome v. Wahl-Henius Institute of Fermentology, 523.
Blood v. Wilson, 158.
Bloomfield v. Hancock, 141.
Bloss v. Holman, 77, 104.
Bloxam v. Sanders, 102, 105.
Blumenthal v. Nussbaum, 183.
Blunt v McCormick, 82, 92.
Board of Com'rs of Clinton County v. Hill, 408.
Board of Highway Com'rs v. Bloomington, 148, 164.
Board of Sup'rs of Sangamon County v. Springfield, 169.
Boatman's Sav. Inst. v. Holland, 359.
Bocock v. Leet, 8.
Bodley v. Roop, 202, 523.
Bogardus v. Phœnix Mfg. Co., 249.
Bogardus v. Trinity Church, 509.
Bolleau v. Rutlin, 357.
Boles v. Pinkerton, 75.
Bolton v. Cannon, 523.
Bomeisler v. Dobson, 156.
Bond v. Dustin, 528.
Bond v. Mitchell, 335.
Bond v. Ward, 112.
Bonham v. People, 415.
Boone v. Eyre, 246, 408.
Booth v. Farmers' & M. Nat. Bank of Rochester, 244, 258.
Boraston v. Green, 99.
Boss v. Litten, 211, 308.
Bostick v. Brittain, 125.
Boston India Rubber Factory v. Holt, 136, 168, 169.
Boston & M. R. R. v. Com'rs of Middlesex County, 494.
Bolton v. Cannon, 523.
Bouchaud v. Dias, 287.
Boulden v. Estey Organ Co., 117.
Bourk v. Riggs, 318.
Bourland v. Snyder, 541.
Bovy (Sir Ralph) Case of, 436, 437, 511.
Bowen v. Bell, 167.
Bowen v. School Dist. No. 9 of Rutland, 162.
Bowler v. Nicholson, 368.
Bowlin v. Nye, 109, 110.
Bowman v. People, 533.
Bowne v. Joy, 361, 390.
Bowyer v. Cook, 405.
Boyce v. Whitaker, 509.
Boyd v. Kimmel, 310.
Boyd v. Weeks, 414.
Boyden v. Fitchburg R. Co., 411.
Boyer v. Bullard, 166.
Boyle v. Townes, 117.
Boynton v. Reynolds, 328.
Bozarth v. Dudley, 159.
Bracelin v. McLaren, 99.
Bradburn v. Kennerdale, 441.
Bradford v. Ball, 71, 88.
Bradford v. Chicago, 162.
Bradford v. Stewart, 141.
Bradley v. Chicago-Virden Coal Co. 297.
Bradley v. Federal Life Ins. Co., 196.
Bradley v. Jenkins, 208.
Bradley v. Powers, 416.
Bradley v. Wyndham, 312.
Bradner v. Demick, 418.
Bradshaw, Case of, 504.
Brady v. Brady, 454.
Brady v. Richardson, 386.
Brady v. Spurck, 143, 202.
Bragg v. Chicago, 472.
Brahan v. Bacon, 499, 501.
Brainard v. Stilphin, 464.
Brancker v. Molyneux, 371.
Brand v. Henderson, 156, 165.
Brandmeier v. Pond Creek Coal Co., 181.
Branham v. San Jose, 283.
Branwell v. Penneck, 73.
Braswell v. McDaniel, 295.
Bratton v. Seymour, 464.
Brawner v. Lomax, 425.
Bray v. Bray, 111.
Breck v. Blanchard, 338, 345.
Bredin v. Dwen, 145, 146.
Bredin v. Kingland, 145.
Brent v. Shook, 465, 466.
Brettun v. Anthony, 221.
Brewer v. Strong's Ex'rs, 119.
Brickhead v. Archbishop of York, 252.
Bridge v. Austin, 245, 250.
Bridgwater v. Bythway, 436.

Brierly v. Kendall, 80.
Briggs v. Boston & L. R. Co., 109.
Briggs v. Dorr, 357, 358.
Briggs v. Grand Trunk R. Co., 523.
Briggs v. Mason, 349, 438.
Briggs v. President, etc. of Nantucket Bank, 256, 452.
Brind v. Dale, 322.
Brisbane v. Pennsylvania R. Co., 453.
Bristol v. Burt, 109.
Bristow v. Wright, 240, 478, 514, 515.
British South Africa Co. v. Companhia de Mocambique, 454.
Britton v. Bishop, 322.
Britton v. Cole, 480.
Broadbent v. Ledward, 114.
Brock v. Headen, 119.
Brolaskey v. McClain, 179.
Bronson v. Earl, 457.
Brooke County Court v. U. S. Fidelity & Guaranty Co., 481, 483.
Brooks v. Olmstead, 71.
Brooks v. Scott's Ex'r, 156.
Brooks v. Stuart, 350.
Brophy v. Illinois Steel Co., 527.
Broughton v. Whallon, 69, 90.
Brown v. Artcher, 309, 351, 352, 353.
Brown v. Baltimore & Ohio R. Co., 313.
Brown v. Barnes, 245.
Brown v. Brown, 317.
Brown v. Bussey, 139.
Brown v. Caldwell, 124.
Brown v. Cook, 112, 482.
Brown v. Cornish, 323.
Brown v. Dixon, 202.
Brown v. Edgington, 94.
Brown v. Ellison, 117.
Brown v. Gordan, 399.
Brown v. Harmon, 267.
Brock v. Headen, 119.
Brown v. Hearon, 273.
Brown v. Holbrook, 166.
Brown v. Illinois Cent. Mutual Ins. Co., 402.
Brown v. Jones, 287, 288, 481.
Brown v. Kendall, 211.
Brown v. Nichols, Shepard & Co., 521.
Brown v. Perry, 350.
Brown v. Rands, 490.
Brown v. St. Charles, 101.
Brown v. St. Paul, M. & M. Ry. Co., 159.
Brown v. Sheedy, 125.
Brown v Smith, 268.
Brown v. Stackhouse, 68.
Brown v. Thurlow, 491.
Brown v. Wallis, 99, 123.
Brown v. Waterman, 110.
Brown v. White Deer Tp., 97.
Browne v. Joy, 390.
Browne v. Knill, 250.
Brownell v. Manchester, 103.
Browning v. Bancroft, 128.
Browning v. Cover, 111.
Brubaker v. Poage, 466.
Bruce v. Beall, 292.
Bruckshaw v. Hopkins, 456.
Brudnell v. Roberts, 338.
Brumbach v. Flower, 96.
Brumleve v. Cronan, 8.
Bruner v. Dyball, 102, 112.
Bryan v. Bates, 310.
Bryan v. Spurgin, 248.
Bryant v. Herbert, 115.
Bryant v. Sparrow, 81.
Bryce v. Brooks, 111.
Buchanan v. King's Heirs, 180.
Buchanan v. Rucker, 168.
Buchanan v. Scottish Union & Nat. Ins. Co., 386.
Buckeye Cotton Oil Co. v. Sloan, 357.
Buckl v. Cone, 75, 76, 93, 472.
Buckles v. Harlan, 390.
Buckley v. Duff, 534.
Buckley v. Thomas, 503.
Buckmaster v. Grundy, 162.
Buckstaff v. Russell & Co., 249.
Buddington v. Shearer, 515.
Buell v. Irwin, 178.
Buffum v. Chadwick, 466.
Bugner v. Chicago Title & Trust Co., 189.
Buhler v. Wentworth, 421.
Bulckley v. Dolbeare, 76, 77, 79.
Bulkley v. Landon, 242.
Bulkley v. Storer, 95.
Bull v. Mathews, 528.
Bullard v. Young, 109.
Bullis v. Giddens, 327, 329, 330.
Bullythorpe v. Turner, 415.
Bulova v. E. L. Barnett, Inc., 281, 423.
Bunker v. Shed, 207.
Buntin v. Danville, 45.
Burbank v. Crooker, 111.
Burdick v. Green, 207.
Burdick v. Kenyon, 377, 381.
Burdick v. Tum-A-Lum Lumber Co., 123.
Burges v. Souther, 136.
Burgess v. Abbott, 396.
Burgwin v. Babcock, 359.
Burk v. Webb, 103.
Burke v. Daley, 69, 87.
Burke v. Savage, 80.
Burkee v. Great Northern R. Co., 129.
Burnap v. Wight, 515.
Burnett v. Lynch, 94, 95, 96.

Burnham v. Roberts, 165.
Burnham v. Webster, 327.
Burnley v. Lambert, 117, 119.
Burns v. Curran, 178.
Burns v. Dockray, 96.
Burns v. Morrison, 117, 119.
Burrass v. Hewitt, 425, 521.
Burst v. Wayne, 531.
Burton v. Hansford, 259, 491.
Burton v. McClellan, 90.
Busch v. Nester, 127.
Bush v. Bender, 125.
Bush v. Bush, 122, 235.
Bush v. Dunham, 519.
Bush v. Glover, 184.
Bush v. Lyon, 105.
Bush v. Thomas, 333.
Buskirk v. Strickland, 71, 89.
Bussey v. Barnett, 327.
Butcher v. Steuart, 521.
Butler v. Borroum, 177, 182.
Butler v. Frontier Telephone Co., 176.
Butler v. Miller, 152.
Butler v. Tucker, 245.
Butrick v. Tilton, 183.
Butt, Case of, 518.
Butterfield v. Seligman, 259.
Butterworth v. Soper, 308.
Buttrick v. Allen, 168.
Butts v. Collins, 80.
Byers v. Ferguson, 236.
Bynum v. Ewart, 518.
Byrd v. Knighton, 143.
Byrne v. McNulty, 272.

C

Cadman v. Markle, 160.
Cadwell v. Farrell, 94.
Cadwell v. Pray, 131.
Cairnes v. Bleecker, 110.
Cairo & St. L. R. Co. v. Woosley, 79, 82.
Cairo & V. R. Co. v. Fackney, 161.
Caldbeck v. Simanton, 151.
Caldwell v. Cowan, 102, 105.
Caldwell v. Eaton, 103.
Caldwell v. Fenwick, 117.
Caldwell v. Heltshu, 207.
Caldwell v. Lowden, 179.
Caldwell v. Richmond, 265, 329.
Calhoun v. Wright, 425, 428, 521.
California Packing Corporation v. Kelly Storage & Distributing Co., 494.
Camden v. Robertson, 391.
Calumet Iron & Steel Co. v. Martin, 217.
Camp v. Bank of Owego, 140.
Camp v. Douglas, 272.
Camp & Bros. v. Hall, 495.
Campbell v. Arnold, 75, 78, 79.
Campbell v. Campbell, 111.
Campbell v. Phelps, 69.
Campbell v. St. John, 289.
Campbell v. Walker, 2, 494, 499.
Candler v. Rossiter, 258.
Canfield v. Merrick, 256.
Cannon v. Cooper, 330.
Cannon v. Kinney, 77.
Canton National Bldg. Ass'n v. Weber, 203.
Cantwell v. Harding, 221.
Caperton v. Schmidt, 175.
Capp v. Gilman, 452.
Cardesa v. Humes, 330.
Carl v. McGonigal, 125.
Carleton v. Haywood, 163.
Carleton v. Lovejoy, 112.
Carlin v. Chicago, 296, 516.
Carlisle v. Trears, 457.
Carlisle v. Weston, 384.
Carlson v. Johnson, 315.
Carnaby v. Welby, 469.
Carney v. Rease, 110.
Carpenter v. Briggs, 357, 414, 415.
Carpenter v. Butterfield, 207.
Carpenter v. Joiner, 179.
Carpenter v. McClure, 523.
Carpenter v. Smith, 78.
Carpenter v. Smithey, 156.
Carr v. Hinchliff, 413.
Carrier v. Esbaugh, 75.
Carrol v. Green, 149.
Carson v. Prater, 80.
Carter v. Glass, 95.
Carter v. Kingman, 111.
Carter v. Ring, 247.
Carter v. Simpson, 76.
Carter v. White, 149.
Carterville Coal Co. v. Abbott, 516.
Caruth v. Allen, 309.
Carvick v. Blagrave, 437.
Carvill v. Garrigues, 322.
Cary v. Hewitt, 127.
Case v. Barber, 508.
Case v. Mark, 71.
Casey v. Cleveland, 288.
Casey v. Kimmel, 178.
Casey v. Walker & Mosby, 148.
Casey Pure Milk Co. v. Booth Fisheries Co., 520.
Cassady v. Laughlin, 141.
Casseres v. Bell, 499.
Cassidy v. Leitch, 22.
Cast v. Roff, 161.
Castleberry v. Fennell, 466.
Castor v. McShaffery, 102.

Cate v. Cate, 69, 87.
Catholic Bishop of Chicago v. Bauer, 157, 158.
Catlin v. Birchard, 162.
Catlin v. Tobias, 158, 159.
Catteris v. Cowper, 81.
Caulfield v. Sanders, 438.
Cave v. Mountain, 73.
Cearnes v. Irving, 275.
Central of Georgia Ry. Co. v. Williams, 350.
Central Pac. R. Co. v. Board of Equalization of Placer County, 542.
Central Transp. Co. v. Pullman's Palace Car Co., 527.
Cernahan v. Chrisler, 230.
Chalie v. Belshaw, 507.
Chamberlain v. Greenfield, 462, 506.
Chamberlain v. Hazlewood, 69, 86, 89.
Chamberlain v. Porter, 253.
Chamberlin v. Shaw, 111.
Chamberlin v. Donahue, 180.
Chambers v. Donaldson, 81.
Chambers v. Handley's Heirs, 177.
Chambers v. Union Nat. Bank, 164.
Champlin v. Rowley, 159.
Chance v. Carter, 177.
Chandler v. Byrd, 280.
Chandler v. Colcord, 131.
Chandler v. Lincoln, 318, 320.
Chandler v. Roberts, 409, 447.
Chandler v. Spear, 398.
Chandler v. State, 257.
Channon v. Lusk, 111.
Chapin v. Jenkins, 131.
Chapman v. North American Life Ins. Co., 538.
Chapman v. Pickersgill, 513.
Charles v. Elliott, 118, 119.
Charles H. Thompson Co. v. Burns, 486.
Charnley v. Winstanley, 252.
Chatterton v. Saul, 123.
Cheasley v. Barnes, 81, 371, 480.
Cheda v. Bodkin, 496.
Cheetham v. Lewis, 456.
Cheever v. Mirrick, 357.
Chelsea Exch. Bank v. Travelers' Ins. Co., 284.
Cheney v. Cheney, 179.
Cheney v. Ricks, 146, 275.
Cheney v. Straube, 272.
Chesapeake & O. Canal Co. v. Knapp, 156.
Chesapeake & O. R. Co. v. American Exch. Bank, 425.
Cheuning v. Wilkinson, 331.
Chicago, A. R. Co. v. O'Brien, 253.
Chicago Bldg. & Mfg. Co. v. Talbotton Creamery & Manufacturing Co., 481.
Chicago, B. & Q. R. Co. v. Dickson, 398.
Chicago City Ry. v. Leach, 313.
Chicago City R. Co. v. Jennings, 216.
Chicago City R. Co. v. Shreve, 216.
Chicago, M. & St. P. R. Co. v. Hoyt, 272.
Chicago, R. I. & P. Ry. Co. v. Barrett, 94.
Chicago, R. I. & P. R. Co. v. Todd, 391, 397.
Chicago Terminal Transfer R. Co. v. Young, 517.
Chicago Title & Trust Co v. Core, 67, 86, 808, 809.
Chicago Union Traction Co. v. Jerka, 315.
Chicago W. D. R. Co. v. Ingraham, 202, 521, 522.
Chicago & A. R. Co. v. Clausen, 292, 528, 530.
Chicago & A. R. Co. v. Murphy, 528.
Chicago & A. R. Co. v. O'Brien, 253.
Chicago & E. I. R. Co. v. Hines, 530.
Chicago & N. W. v. Peacock, 90.
Chicago & P. R. Co. v. Munger, 391, 399.
Chicago & W. Coal Co. v. Liddell, 326.
Chickering v. Raymond, 101, 102, 105, 108, 109.
Childes v. Wescot, 475.
Chiles v. Davis, 178.
Chinn v. Russell, 125.
Chirac v. Reinicker, 187.
Chitty v. Hume, 421.
Chobanian v. Washburn Wire Co., 296.
Choctaw Coal & Mining Co. v. Lillich, 220.
Christenson v. Hanna, 124.
Christo v. Nicola, 405.
Christopher v. Detroit, L. & N. R. Co., 179.
Christy v. Farlin, 142.
Church v. Brownewick, 502.
Church v. Gilman, 492.
Church v. Mumford, 94, 202.
Churchill v. Churchill, 74.
Citizens' Bank of Baltimore v. Graffin, 164.
Citizens' Gaslight & Heating Co. v. Granger, 159.
City Council of Charleston v. King, 464, 465.
City of Augusta v. Moulton, 361.

City of Camden v. Allen, 97.
City of Chicago v. Babcock, 313, 361.
City of Chicago v. English, 331.
City of Chicago v. McDonough, 214.
City of Chicago v. McLean, 223.
City of Chicago v. People, 287, 377.
City of Chicago v. Selz, Schwab & Co., 215, 216.
City of Chicago v. Speer, 398.
City of Columbus v. Anglin, 296.
City of East St. Louis v. Flannigen, 356.
City of Elgin v. Joslyn, 158.
City of Elgin v. Thompson, 532.
City of Grand Rapids v. Whittlesey, 177.
City of La Salle v. Kostka, 217.
City of Lowell v. Morse, 465.
City of Newport News v. Potter, 258.
City of Orlando v. Heard, 217.
City of Pekin v. Brereton, 71, 82, 89, 92.
City of Quincy v. Warfield, 410.
City of Redding v. Shasta County, 242.
City of Shawneetown v. Baker, 152.
City of Springfield v. Postal Telegraph Cable Co., 137.
Claflin v. Boston, 109.
Claflin v. Godfrey, 164.
Claflin v. Wilcox, 67, 71, 85, 88.
Claggett v. Simes, 284.
Clare v. State, 509.
Clark v. Chamberlain, 113.
Clark v. Chicago, M. & St. P. R. Co., 497.
Clark v. Clark, 184.
Clark v. Draper, 105.
Clark v. Fairley, 533.
Clark v. Hale, 113.
Clark v. Holt, 424.
Clark v. Huntington, 56.
Clark v. Lewis, 130.
Clark v. Lineberger, 408.
Clark v. Maloney, 103.
Clark v. Moore, 157, 165.
Clark v. Norton, 385.
Clark v. Reed, 258.
Clark v. Smith, 78.
Clark v. Van Cleef, 148.
Clark v. Wels, 248.
Clark v. Wisconsin Cent. R. Co., 315.
Clark v. Zeigler, 273.
Clark Co. v. Trancovich, 496.
Clarke v. Crandall, 248.
Clarkson v. Gifford, 454.
Clay v. St. Albans, 468.
Clay Fire & Marine Ins. Co. v. Wasterhausen, 288, 423.
Clayton v. Lemen, 325.
Clearwater v. Meredith, 428.
Cleaves v. Herbert, 126, 127, 470.
Clement v. Boone, 107.
Clementi v. Goulding, 92.
Cleveland v. Rodgers, 264.
Clifford v. Cony, 288.
Clink v. Gunn, 112.
Clinton v. Morton, 420.
Clinton Wire-Cloth Co. v. Gardner, 531.
Closson v. Means, 144.
Clough v. Tenney, 80.
Cloves v. Williams, 140.
Clue v. Baily, 280.
Coates v. Hewit, 140.
Cobb v. Lucas, 464.
Coburn v. Hopkins, 369.
Cochran v. Scott, 281.
Cochran v. Tatum, 156.
Cockerill v. Armstrong, 368.
Cockrell v. Henderson, 56.
Codman v. Jenkins, 152.
Codner v. Dalby, 499.
Coffin v. Anderson, 103.
Coffin v. Bassett, 367.
Coffin v. Hall, 258.
Coffin v. Coffin, 491, 498.
Cohoon v. Simmons, 79.
Colborne v. Stockdale, 438, 439.
Cole, Case of, 73.
Cole v. Fisher, 72.
Cole v. Hawkins, 377, 381.
Cole v. Hindson, 74.
Cole v. Maunder, 280, 283.
Cole v. Terry, 110.
Coles v. Carter, 309.
Collet v. Flinn, 352, 410.
Collett v. Lord Keith, 479, 480.
Collins v. Ballow, 183.
Collins v. Blantern, 329.
Collins v. Evans, 125.
Collins v. Gibbs, 248, 249, 283.
Collins v. Lynch, 79.
Collins v. Modisett, 169.
Collins v. Montemy, 324.
Collins v. Sanitary District of Chicago, 517.
Collins v. Trotter, 323.
Colt v. How, 252.
Colt v. Root, 249, 531.
Colt & Glover v. Bishop of Coventry and Lichfield, 278.
Columbia Heating Co. v. O'Halloran, 327.

Columbian Granite Co. v. W. C. Townsend & Co., 283.
Colwell v. Brower, 320.
Colwill v. Reeves, 80.
Combs v. Steele, 156.
Commercial City Bank v. Mitchell, 150.
Commercial Ins. Co. v. Treasury Bank, 531.
Commissioners of Treasury v. Brevard, 515.
Com v. Green, 137.
Com. v. Hart, 517.
Com. v. Perkins, 464.
Com. v. Shearman, 464.
Compher v. People, 282, 283.
Compton v. People, 531.
Comstock v. McEvoy, 426.
Comstock v. Oderman, 308, 310.
Comyns v. Boyer, 353.
Connah v. Hale, 109.
Conant v. Barnard, 281.
Conaway v. Pepper, 166.
Concord Apartment House Co. v. O'Brien, 158.
Condict v. Erie R. Co., 177.
Confrey v. Stark, 138, 169.
Conger v. Johnston, 351, 352.
Conkey v. Kingman, 391.
Conklin v. Bush, 146.
Connah v. Hale, 68, 109, 111.
Connelly v. Pierce, 521.
Connoss v. Meir, 228.
Conservation Co. v. Stimpson, 156.
Consolidated Coal Co. of St. Louis v. Oeltjen, 390.
Continental Ins. Co. v. Rogers, 247. 249, 486.
Conwell v. Clifford, 265.
Cook v. Cook, 489.
Cook v. Cox, 519.
Cook v. Dade, 155.
Cook v. Hopper, 108, 109.
Cook v. Howard, 77, 80.
Cook v. Scott, 9, 280, 413.
Cook County v. Calumet & C. Canal & Dock Co., 182.
Cooke v. England, 253.
Cooke v. Preble, 365.
Cooke v. Simms, 244.
Cooley v. Penfield, 180.
Coomalt v. Stanley, 123.
Cooper v. Bissell, 203, 523.
Cooper v. Cooper, 104, 163, 393.
Cooper v. Grand Trunk R. Co., 398.
Cooper v. Heermance, 419.
Cooper v. Landon, 244, 258.
Cooper v. Lawrence, 313.
Cooper v. Monke, 108.
Cooper v. Newman, 112.
Cooper v. Watson, 116, 331.
Coopwood v. Bolton, 94.
Copeland v. Flowers, 202.
Copeland v. New England Ins. Co., 526.
Corbett v. Packington, 94, 95, 258.
Corbett v. Pond, 122.
Corbitt v. Brong, 114.
Corey v. Bath, 223.
Corley v. Pentz, 180.
Cornwallis v. Savery, 501, 521.
Corwin v. Wallace, 158.
Cory v. Board of Chosen Freeholders of Somerset County, 163, 255.
Costar v. Davies, 360.
Cotteral v. Cummins, 67, 85.
Cotterill v. Starkey, 308.
Cotterill v. Cuff, 240, 245.
Couch v. Ingersoll, 245, 247.
Coughlin v. Blumenthal, 499.
Count Joannes v. Burt, 489.
Countess of Northumberland, Case of, 426.
County v. Pacific Coast Borax Co., 20.
County Com'rs of Hartford County v. Wise, 452.
Coupledike v. Coupledike, 116.
Courtis v. Cane, 112.
Courtney v. Phelps, 341, 409.
Cousins v. Paddon, 441.
Covell v. Carpenter, 323.
Cover v. Armstrong, 280.
Covington v. Lide's Ex'rs, 253.
Cox v. Cooper, 207.
Cox v. Hagan, 308, 494.
Cox v. Jordan, 363.
Coxe v. Robbins, 97.
Coyle v. Coyle, 207.
Craig v. Missouri, 322.
Crain v. Hutchinson, 162.
Crane v. Grassman, 256.
Crawford v. Slade, 285.
Creecy v. Joy, 497.
Creel v. Kirkham, 162, 166.
Creen v. Michigan Cent. R. Co., 522.
Creigh v. Shatto, 178.
Crenshaw v. Moore, 202.
Cresson v. Stout, 123.
Cribbs v. Stiver, 86.
Crigler v. Quarles, 329.
Crisfield v. State, 162.
Crispin v. Williamson, 462.
Crittenden v. French, 484.
Crocker v. Atwood, 104.
Crocker v. Beal, 393.
Crooker v. Hutchinson, 94.
Crooker v. Willard, 202.
Crockett v. Lashbrook, 471.

Crockett v. Moore, 141.
Croft v. Rains, 492.
Crogate, Case of, 368.
Cromeilen v. Brink, 124.
Crook v. Pitcher, 454.
Cross v. Barber, 113.
Cross v. Cheshire, 161, 162.
Cross v. Chicago, 292.
Cross v. Moore, 258.
Cross v. U. S., 137, 267.
Crosse v. Hunt, 345, 433, 434.
Croston v. McVicker, 186.
Crouch v. Fowle, 143.
Crousillat v. McCall, 146.
Crow v. Mark, 146.
Cruikshank v. Brown, 203.
Cruikshank v. Comyns, 464.
Cruikshank v. St. Paul Fire & Marine Ins. Co., 534.
Crum v. Elliston, 234.
Crump v. Mims, 4.
Cryps v. Baynton, 462, 501.
Cubbins v. Mississippi River Commission, 139, 155.
Cudlip v. Rundle, 478.
Cullen v. O'Hara, 103.
Culpeper Nat. Bank v. Tidewater Imp. Co., 386.
Culver v. Avery, 95, 96.
Culver v. Johnson, 323.
Cumberland Valley R. Co. v. McLanahan, 180.
Cummings v. Smith, 861.
Cummins v. Holmes, 127.
Cunningham v. Dean, 178.
Cunningham v. Morrell, 246.
Cuppledick v. Terwhit, 424.
Curl v. Lowell, 81.
Curley v. Dean, 241, 245.
Curry v. People, 485.
Curtiss v. Martin, 413.
Cushing v. Dill, 138.
Cushman v. Hayes, 410, 413.
Cushman v. Savage, 288, 402.
Cuthbertson v. Irving, 472, 479.
Cutler v. Southern, 376, 378.
Cutter v. Powell, 155, 158.
Cutts v. Spring, 181.

D

Dacy v. Clinch, 220.
Daggett v. Davis, 101, 108, 113.
Dahill v. Booker, 230.
Dails v. Lloyd, 164.
Dale v. Phillipson, 461, 462.
Daley v. Gates, 296.
Dallam v. Fitler, 77.
Daily v. King, 525.
Dalson v. Bradberry, 203.
Dalton v. Favour, 71.
Dalton v. Rhode Island Co., 217.
Dame v. Dame, 114, 117, 118, 119, 128.
Dana v. Bryant, 349, 356, 357.
Daniel v. Holland, 76.
Daniels v. Ball, 104.
Daniels v. Clegg, 71.
Daniels v. Foster & Kleiser, 106, 229.
Daniels v. Pond, 68, 78, 80, 100.
Danser v. Mallonee, 258.
Danziger v. Boyd, 186.
Darby v. Boucher, 323.
Darling v. Chapman, 377.
Darling v. Simpson, 393.
Darrah v. Baird, 99.
Dartmouth College v. Clough, 327.
Dartnall v. Howard, 240, 241, 242.
David v. David's Adm'r, 499.
David Rutter & Co. v. McLaughlin. 395.
Davidson v. Waldron, 102.
Davidson v. Watts, 386.
Davies v. Penton, 284.
Davis v. Ayres, 158.
Davis v. Burgess, 361.
Davis v. Burton, 415.
Davis v. Clancy, 78, 79.
Davis v. Duncan, 112.
Davis v. Easley, 123.
Davis v. Hurt, 110.
Davis v. Jones, 100.
Davis v. Judge, 184.
Davis v. Mathews, 351.
Davis v. Ransom, 449.
Davis v. Shoemaker, 134, 271.
Davis v. Taylor, 100.
Davis v. Wood, 79.
Davis County v. Horn, 541.
Davison v. Gill, 73.
Davison v. Powell, 438.
Davisson v. Ford, 246.
Dawes v. Gooch, 205.
Dawes v. Winship, 449.
Day v. Chism, 272, 474.
Day v. Lamb, 207.
Day v. Leal, 152.
Day v. Muskett, 210.
Day v. Pickett, 284.
Day v. Whitney, 101.
Dayton v. Fry, 321.
Deal v. Bogue, 391.
Dean v. Comstock, 79.
Dean v. Walker, 152.
Dearborn v. Dearborn, 94.
De Arman v. Massey, 23.
Deavitt v. Corry, 144.
Deberry v. Darnell, 140.
Debow v. Colfax, 102.

[The figures refer to pages]

De Bow v. People, 509.
Decker v. Gammon, 68, 90.
Deeley v. Dwight, 102.
Deering Co. v. Barzak, 297.
De Jarnette v. Cox, 45.
De Kentland v. Somers, 464.
Delaney v. Root, 111.
Delano v. Curtis, 112.
Dement v. Rokker, 393.
Demesmey v. Gravelin, 164.
Den ex dem. Bray v. McShane, 188.
Den ex dem. Johnson v. Morris, 171, 175.
Den ex dem. Carson's Heirs v. Smart, 177.
Den Adel v. Casualty Co. of America, 56.
Dench v. Walker, 108, 110.
Denham v. Stephenson, 476, 477, 504.
Denison v. Richardson, 456, 457.
Denison v. Williams, 266.
Dennison v. Goehring, 146.
Dennison v. Leech, 487.
Denton v. Smith, 131,
Derby v. Johnson, 157.
Derisley v. Custance, 476, 477.
Dermott v. Jones, 156, 158, 159.
Dernier v. Rutland Ry. Light & Power Co., 3.
Detroit Post Co. v. McArthur, 97.
Deuchatell v. Robinson, 180.
Deut v. Coleman, 428.
Devereux v. Barclay, 109, 110, 119.
Devine v. Chicago City R. Co., 299.
Devine v. Edwards, 102, 164.
Dewell v. Moxon, 106, 112.
De Wolff v. Morino, 129.
Dexter v. Manley, 143.
Deybel, Case of, 508.
Dezell v. Odell, 126.
Dibble v. Duncan, 351.
Diblee v. Davison, 385.
Dicas v. Baron Brougham, 73.
Dickerson v. Hendryx, 184.
Dickerson v. Winslow, 282.
Dickinson v. Goodspeed, 81.
Dickson v. Clifton, 94.
Dietrich v. Berk, 82.
Dietus v. Fuss, 228.
Digby v. Fitzharbert, 344, 449.
Dike v. Ricks, 343.
Dillenback v. Jerome, 102, 103, 104.
Dillingham v. Skein, 134.
Dillon v. Craig, 259.
Dills v. Stobie, 358, 359.
Dilts v. Kinney, 464.
Di Marcho v. Builders' Iron Foundry, 218.
Dinet v. Pfirshing, 361.
Disbrow v. Creamery Package Mfg. Co., 56.
Distilling & Cattle Feeding Co. v. People, 284.
District of Columbia v. Washington & G. R. Co., 134.
Ditcham v. Bond, 69, 373.
Dixon v. Watkins, 91.
Dob v. Halsey, 393.
Dobbins v. Delaware, L. & W. R. Co., 486.
Dobbs v. Edmunds, 491.
Dobbs v. Gullidge, 79.
Dodge v. Adams, 242.
Dodge v. Coddington, 247.
Doe v. Dyeball, 178.
Doe v. Penfield, 391.
Doe v. Wright, 356, 472.
Doe ex dem. Alabama State Land Co. v. McCullough, 176.
Doe ex dem. Bradshaw v. Plowman, 461.
Doe ex dem. Butcher v. Musgrave, 176.
Doe ex dem. Campbell v. Fletcher, 178.
Doe ex dem. Da Costa v. Wharton, 178.
Doe ex dem. Harding v. Cooke, 178.
Doe ex dem. Moore v. Hill, 178.
Doe ex dem. Shewin v. Wrott, 179.
Doe ex dem. Townsend v. Roe, 176.
Doe ex dem. Whatley v. Telling, 179.
Doebler v. Fisher, 156.
Dole v. Kennedy, 125, 318.
Dole v. Weeks, 244.
Dolph v. Ferris, 68.
Donahoe v. Emery, 143.
Donlin v. McQuade, 111.
Donnelly v. Foote, 207.
Doody v. Collins, 125.
Doogood v. Rose, 535.
Doolittle v. Selectmen of Branford, 283.
Doose v. Doose, 496.
Doremus v. Selden, 162.
Dorman v. Kane, 110.
Dorne v. Cashford, 515.
Dorr v. Dudderar, 123.
Dorsey v. Eagle, 78, 81.
Dorsey v. Lawrence, 141.
Doswell v. Impey, 73.
Doty v. Martin, 152.
Douglas v. Hennessy, 142, 268.
Douglass v. Libbey, 178.
Douglass v. Satterlee, 281.
Doulson v. Matthews, 453.
Dovaston v. Payne, 470, 498, 499, 518.
Dow v. Epping, 421.

[The figures refer to pages]

Dowd v. Wadsworth, 118.
Dowie v. Priddle, 314.
Dowland v. Slade, 525.
Dowlin v. Standifer, 137.
Dowman, Case of, 492.
Downer v. Garland, 457.
Doyle v. Wilkinson, 134.
Dozier v. Joyce, 317.
Drake v. Drake, 383, 405.
Drew v. Spaulding, 74, 79, 108.
Drewe v. Lainson, 433.
Dubois v. Delaware & H. Canal Co., 156, 157, 160.
Du Bois v. Seymour, 168.
Du Bois' Ex'r v. Van Orden, 512.
Dudley v. Lee, 188.
Dudlow v. Watchorn, 376, 381.
Duffield v. Scott, 416.
Dugan v. Nichols, 129.
Dugas v. Hammond, 185.
Duggan v. Wright, 229.
Dugger v. Oglesby, 271.
Duke of Newcastle v. Wright, 477.
Dukes v. Gostling, 515.
Dumont v. Lockwood, 456.
Dumsday v. Hughes, 474.
Duncan v. Journey, 186.
Duncan v. Lyon, 144.
Duncan v. Spear, 103, 104, 106, 316.
Dundass v. Lord Weymouth, 514.
Dunford v. Trattles, 314.
Dunham v. Western Union Telegraph Co., 313.
Dunham v. Wyckoff, 126.
Dunlevy v. Fenton, 286.
Dunstall v. Dunstall, 491.
Dupee v. Blake, 284.
Duppa v. Mayo, 508.
Durden v. Barnett, 90.
Duvivier v. French, 220.
Duyckinck v. Clinton Mut. Ins. Co., 452.
Dwight Mfg. Co. v. Holmes, 497.
D'Wolf v. Rabaud, 384, 385.
Dye v. Leatherdale, 377.
Dyer v. Brown, 318.
Dyer v. Day, 179, 333.
Dyer v. Pearson, 119.
Dyett v. Pendleton, 408.
Dyson v. Collick, 81.
Dyster v. Battye, 525.

E

Eames v. Salem & L. R. Co., 87.
Earle v. Bickford, 164.
Earl of Kerry v. Baxter, 483, 520.
Earl of Manchester v. Vale, 414, 460.
East v. Cain, 399.
East India Co. v. Glover, 283.
Eastmure v. Laws, 356.
Easton v. Pratchett, 533.
East St. Louis Connecting Ry. v. Wabash, St. L. & P. R. Co., 216.
Eaton v. Lynde, 103, 104.
Eaton v. Southby, 492.
Eaton v. Winnie, 67, 85, 89.
Eavestaff v. Russell, 350.
Ebersol v. Trainor, 309.
Eccleston v. Clipsham, 393.
Ecker v. Bohn, 507.
Edbrooke v. Cooper, 425.
Eddy v. Brady, 402.
Eddy v. Chace, 271.
Edgcomb v. Dee, 135, 136.
Edgerly v. Emerson, 228.
Edgerly v. Whalan, 108.
Edson v. Weston, 322.
Edwards v. Edwards, 76.
Edwards v. Frank, 109.
Edwards v. Hammond, 515.
Edwards v. Hill, 391, 397.
Edwards v. Hooper, 112, 113.
Edwards v. Nichols, 256.
Edwardsville R. Co. v. Sawyer, 333.
Edward Thompson Co. v. Kollmeyer, 155.
Eggleston's Lessee v. Bradford, 178.
Egler v. Maraden, 134.
Eibel v. Von Fell, 221.
Eicholz v. Bannister, 164.
Elmer v. Richards, 137.
Elsendrath v. Knauer, 102, 103, 105.
Elberson v. Richards, 463.
Elder v. Hood, 167.
Elder's Ex'rs v. Harris, 205.
Elliott v. Caldwell, 159.
Elliott v. Hardy, 503.
Elliot v. Stuart, 202.
Ellis v. Cary, 160.
Ellis v. Ellis, 285.
Ellis v. Fletcher, 19.
Ellis v. Waldron, 217.
Elsee v. Gatward, 95, 244.
Elwes v. Maw, 100.
Emerson v. Nash, 519.
Emerton v. Andrews, 156.
Emery v. Fell, 134, 141.
Emigh v. Pittsburg, Ft. W. & C. R. Co., 95.
Emmett v. Lyne, 68.
Enberg v. Chicago, 207, 529.
Enfield v. Stewart, 129.
Engel v. Scott & Holston Lumber Co., 104.
England v. Slade, 179.
English v. Arizona, 357.
Ensley R. Co. v. Chewning, 215.

Enterprise Oil & Gas Co. v. National Transit Co., 144, 146.
Entsminger v. Jackson, 126.
Erbes v. Wehmeyer, 68.
Ernst v. Bartle, 247.
Erskine v. Davis, 464.
Erskine v. Hohnbach, 368.
Erwin v. Clark, 110.
Escherick v. Traver, 333.
Essington v. Bourcher, 424.
Esson v. Tarbell, 125, 126.
Etter v. Bailey, 109.
Evans v. Howell, 158.
Evans v. Hudson, 183.
Evans v. Kloeppel, 122.
Evans v. Miller, 159, 166.
Evans v. Prosser, 360.
Evans v. Stevens, 399.
Eveleth v. Blossom, 129.
Everett v. Coffin, 109.
Everett v. Gray, 156.
Everett v. Saltus, 103.
Evers (Lord) v. Buckton, 499.
Evertson's Ex'rs v. Miles, 95.
Ewbanks v. Ashley, 137, 169.
Ewen v. Wilbor, 363.
Exall v. Partridge, 161.
Expanded Metal Fireproofing Co. v. Boyce, 158, 248.

F

Faget v. Brayton, 236.
Fairbank v. Phelps, 103, 105.
Falconer v. Smith, 322.
Fankboner v. Fankboner, 281.
Farley v. Crystal Coal & Coke Co., 399.
Farley v. Lincoln, 112, 128, 131.
Farmers' Nat. Bank v. Fonda, 148.
Farmers' State Guaranty Bank v. Pierson, 228.
Farmers' & Mechanics' Bank v. Israel, 296.
Farmington v. Pillsbury, 384, 385.
Farnaham v. Hay, 140, 202.
Farr v. Smith, 110.
Farrand v. Hurlburt, 109.
Farrar v. Rollins, 113.
Farrell v. Taylor, 541.
Farrington v. Payne, 108.
Farwell v. Hanchett, 125.
Farwell v. Myers, 163.
Faulkner v. Alderson, 81.
Faulkner v. Brown, 103, 104.
Favor v. Philbrick, 240.
Faxon v. Mansfield, 159.
Fay v. Goulding, 245.
Feasler v. Schriever, 399.
Felch v. Taylor, 167.
Fellows v. Griffin, 538.
Felton v. Dickinson, 156.
Fenlason v. Rackliff, 316.
Fenton v. Clark, 157.
Ferguson v. Cappeau, 249, 250.
Ferguson v. Carrington, 96, 102.
Ferguson v. National Shoemakers, 522.
Ferguson v. Tucker, 240.
Fernald v. Garvin, 523, 524.
Ferrand v. Walker, 416.
Ferriss v. North American Fire Ins. Co., 519.
Ferry v. Williams, 249.
Fetter v. Beal, 253.
Fexwist v. Tremaine, 281.
Fidler v. Delavan, 408, 492.
Fidler v. Hershey, 327.
Fike v. Stratton, 250.
Filler v Joseph Schlitz Brewing Co., 56.
Final v. Backus, 100.
Finch v. Brian, 76.
Finch v. Cocken, 463.
Finch v. Conrade's Ex'r, 528.
Finch's Ex'rs v. Alston, 309.
Finney v. Crawford, 539.
Finney v. McMahon, 166.
Finney v. Studebaker Corp. of America, 165.
Fiquet v. Allison, 111.
First Congregational Meetinghouse Society v. Rochester, 142.
First Nat. Bank v. Dunbar, 110.
First Nat. Bank v. Grosshans, 497.
First Nat. Bank v. Kimberlands, 323.
First Nat. Bank v. Kreuzberg, 125.
Fish v. Branamon, 79.
Fish v. Dodge, 487.
Fish v. Farwell, 287.
Fisher v. Cobb, 80.
Fisher v. Kyle, 110.
Fisher v. Meek, 316.
Fisher v. Morris, 471.
Fisher v. Pimbley, 377, 381.
Fisher v. Wood, 368.
Fisher Sons & Co. v. Crowley, 24.
Fitch v. Heise, 207.
Fitch v. Leitch, 258.
Fitler v. Shotwell, 76, 77.
Fitzgerald v. Quinn, 189.
Fitzgerald v. Southern Farm Agency, 419.
Fitzpatrick v. Fitzpatrick, 360.
Fitzpatrick v. Robinson, 499.
Flanagan v. Camden Mut. Ins. Co., 139.
Flanders v. Atkinson, 385.

Flanders v. Cobb, 296.
Flanders v. Stewartstown, 465, 532.
Fleischmann v. Clark, 365.
Fleming v. Bailey, 137.
Fleming v. Carter, 333, 334.
Flemming v. Mayor, etc., of City of Hoboken, 286, 415.
Flessher v. Carstens Packing Co., 95.
Fletcher v. Marillier, 353.
Fletcher v. Peck, 408.
Fletcher v. Pogson, 291.
Flexner v. Farson, 23.
Flint & Walling Mfg. Co. v. Beckett, 95.
Flores v. Smith, 50.
Florida Cent. & P. R. Co. v. Ashmore, 518.
Florida East Coast Ry. Co. v. Peters, 349, 357, 414, 415, 418, 421.
Florida Life Ins. Co. v. Dillon, 495.
Floyd v. Day, 162.
Flynn v. Staples, 200.
Folger v. Fields, 458.
Follett v. Edwards, 109.
Fonda v. Van Horne, 130.
Fontaine v. Aresta, 140.
Forbes v. Ft. Lauderdale Mercantile Co., 494.
Ford v. Logan, 308.
Ford v. Schliessman, 79.
Ford & Co v. Atlantic Compress Co., 151.
Foreman v. Sawyer, 223.
Forman v. Jacobs, 463.
Forrestell v. Wood, 823.
Forsdick v. Collins, 111.
Forsyth v. Barnes, 330, 331.
Forsyth v. Wells, 100.
Forsythe v. Washtenaw Circuit Judge, 53.
Ft. Dearborn Lodge v. Klein, 78, 284, 309, 310, 471.
Forth v. Pursley, 105, 107.
Foshay v. Riche, 432.
Foss v. Stewart, 74.
Foster v. Allanson, 146.
Foster v. Browning, 220.
Foster v. Elliott, 519.
Foster v. Jackson, 284.
Foster v. Lumbermen's Min. Co., 105.
Foster v. Pennington, 463.
Foster v. St. Luke's Hospital, 296.
Foster v. Woodward, 272.
Foulder v. Willoughby, 63, 107, 108.
Foulds v. Watson, 247.
Fowble v. Rayberg, 295.
Fowle v. Alexandria, 526.
Fowle v. Kirkland, 145.
Fowler v. Arnold, 399.
Fowler v. Clark, 343.
Fowler v. Com., 357.
Fowler v. Down, 76.
Fox v. Holcomb, 81.
Fox River Mfg. Co. v. Reeves, 139, 141.
Franey v. True, 280, 523.
Frankenthal v. Camp, 67, 85, 87.
Franklin v. Talmadge, 464.
Franklin v. T. H. Lilly Lumber Co., 365.
Franklin Fire Ins. Co. v. Jenkins, 396.
Frankum v. Earl of Falmouth, 314.
Frazer v. Gregg, 167.
Fredericks v. Tracy, 120.
Freedman v. Denhalter Bottling Co., 497.
Freeman v. Smith, 75.
French v. Merrill, 106.
French v. Robb, 175.
Friar v. Grey, 501.
Frick v. Miller, 127.
Friedlander v. Rapley, 196, 494.
Friend v. Dunks, 97, 169.
Frink v. Pratt, 102, 105.
Frost v. Raymond, 143.
Fry v. Baxter, 228.
Fuller v. Acker, 125, 126.
Fuller v. Brown, 157, 167.
Fuller v. Fuller, 496.
Fuller v. Hampton, 498, 519.
Fuller v. Rounceville, 308.
Fulmerston v. Steward, 877, 879.
Fulton v. Merrill, 316.
Fulton v. Whalley, 102.
Furman v. A. C. Tuxbury Land & Timber Co., 56.
Fusselman v. Yellowstone Valley Land & Irr. Co., 497.

G

Gaff v. Harding, 129.
Gaffney v. Colvill, 428.
Gaffney v. Hayden, 159.
Gage v. Consumers' Electric Light Co., 392.
Gage v. Melton, 425.
Galle v. Betts, 521.
Gainsford v. Griffith, 448.
Gale v. Nixon, 141, 142.
Gale v. O'Bryan, 267.
Gale v. Reed, 504, 505.
Galloway v. Holmes, 166.
Galt v. Chicago & N. W. R. Co., 67.
Galusha v. Butterfield, 318.
Galvin v. Galvin Brass & Iron Works, 118.

[The figures refer to pages]

Gambling v. Prince, 308.
Gardiner v. Corson, 272.
Gardiner v. Croasdale, 253.
Gardner v. Armstrong, 251.
Gardner v. Dutch, 127.
Gardner v. Humphrey, 236.
Gardner v. Lindo, 533.
Gardner v. Meeker, 86.
Gardner v. Thomas, 453.
Gargan v. School Dist., 328.
Garland v. Davis, 531.
Garland v. Tucker, 169.
Garmire v. McDonough & Co., 258.
Garner v. Jones, 186.
Garrett v. Hitchcock, 251.
Garrick v. Chamberlain, 390.
Garrity v. Hamburger Co., 144.
Garrity v. State Board of Administration of Educational Institutions, 163.
Gartin v. Draper Coal & Coke Co., 200.
Gartlan v. C. A. Hooper & Co., 496.
Garvey v. Metropolitan West Side Elevated R. Co., 223.
Gates v. Caldwell, 143, 271.
Gates v. Lounsbury, 308, 367.
Gates v. Miles, 71.
Gates v. Neal, 97.
Gates v. Thede, 316.
Gatton v. Dimmitt, 481.
Gauche v. Mayer, 105.
Gay v. De Werff, 91.
Gay v. Lloyd, 330.
Geary v. Barecroft, 81.
Gedney v. Tewksbury, 138.
Geiges v. Greiner, 178.
Gemmill v. Smith, 386, 390, 522.
George v. English, 466.
George v. Fisk & Norcross, 214.
George v. Illinois Cent. R. Co., 56, 67, 86, 313.
George v. Thomas, 280.
German Fire Ins. Co. of Peoria v. Grunert, 248.
German Nat. Bank of Chicago v. Meadowcroft, 101.
Gerrish v. Train, 344.
Gerry v. Gerry, 398.
Getchell v. Boyd, 288.
Gibbons v. Farwell, 108, 109.
Gibbons v. Pepper, 211, 308.
Gibbs v. Chase, 109.
Gibbs v. Jones, 111.
Gibson v. Bourland, 360, 361.
Gibson v. Hunter, 526.
Gibson v. Reiselt, 36.
Gibson v. Wells, 96.
Gifford v. Perkins, 412.
Gift v. Hall, 140.
Gilbert v. Dickerson, 110.
Gilbert v. Kennedy, 488.
Gilbert v. Parker, 434, 435.
Gilbert v. Williams, 94.
Gildas v. Crosby, 129.
Giles v. Edwards, 164.
Gilfillan v. Farrington, 326.
Gill v. Vogler, 159.
Gillaspie v. Wesson, 278.
Gillespie v. Dew, 79, 82.
Gillespie v. Pennsylvania Co., 315.
Gillespie v. Smith, 290.
Gillespie Tool Co. v. Wilson, 159.
Gillett v. Ball, 76.
Gillett v. Treganza, 178.
Gilfillan v. Farrington, 326.
Gillman v. Chicago R. Co., 215, 529.
Gilman v. Hill, 109.
Gilmore v. Newton, 111, 113.
Gilmore v. Wilbur, 163.
Gilson v. Stewart, 258.
Girard v. Taggart, 156.
Given v. Driggs, 467.
Gladwell v. Steggall, 96.
Glascok v. Morgan, 291.
Glass v. Basin & Bay State Mining Co., 235.
Glaze v. McMillion, 102.
Glazer v. Clift, 349.
Gledstane v. Hewitt, 114, 115, 377.
Glenn v. Garrison, 108, 228.
Glenn v. Sumner, 422.
Glover v. Tuck, 243.
Gloyd v. Hotel La Salle Co., 162.
Godfrey v. Saunders, 144.
Goetchins v. Sanborn, 75.
Goff v. Gott, 118.
Gogol v. Baltimore & O. R. Co., 196.
Goldberg v. Harney, 405.
Goldey v. Morning News, 23.
Goldsby v. Robertson, 242.
Goldschmidt v. Berry, 125, 130.
Goldstein v. Reynolds, 331.
Good v. Board of Police Com'rs of City of Baltimore, 124.
Goodburne v. Bowman, 535.
Goodchild v. Pledge, 350.
Goodhue v. Luce, 391, 393, 399.
Goodman v. People, 508.
Goodman v. Walker, 94.
Goodrich v. Jones, 100.
Goodrich v. Laffin, 157, 165.
Goodrich v. Leland, 142, 152.
Goodrich v. Reynolds, 414.
Goodridge v. Lord, 161.
Goodright v. Rich, 180.
Goodtitle v. Baldwin, 178.
Goodtitle v. Otway, 461.

[The figures refer to pages]

Goodtitle v. Wilson, 177.
Goodwin v. Gilbert, 167.
Goodwin v. Griffis, 159, 166.
Goodwin v. Lynn, 247, 272.
Goram v. Sweeting, 438, 440.
Gordon v. Bankard, 280.
Gordon v. Harper, 67, 76, 77, 85, 93, 100, 105, 106, 117, 125.
Gordon v. Jenney, 126.
Gordon v. Journal Pub. Co., 456, 458.
Gordon v. Kennedy, 487.
Gordon v. Peirce, 421.
Gore v. Condon, 522.
Gorman v. Lenox, 284.
Goshen & Sharon Turnpike Co. v. Sears, 408, 511.
Goslin v. Wilcock, 91.
Gossett v. Morrow, 115.
Gould v. Aurora, E. & C. R. Co., 217.
Gould v. Banks, 246.
Gould v. Coal & Coke R. Co., 491.
Gould v. Jacobson, 126.
Gould v. Lasbury, 350, 351, 353.
Gould v. Ray, 523.
Gould v. Smith, 399.
Gourney v. Fletcher, 491.
Gove v. Lawrence, 396.
Governor, to Use of Thomas, v. Lagow, 307, 410.
Govett v. Radnidge, 396.
Gower v. Quinlan, 180.
Grace Contracting Co. v. Norfolk & W. R. Co., 486.
Graffenreid v. Kundert, 164.
Graham v. Partridge, 363.
Graham v. Peat, 81.
Graham v. Sime, 80.
Grand Island Banking Co. v. First Nat. Bank of Grand Island, 233.
Grand Lodge Brotherhood of Railroad Trainmen v. Randolph, 390, 400.
Grand Trunk Western Ry. Co. v. Thrift Trust Co., 56.
Grannis v. Clark, 143, 271, 457.
Grannis v. Hooker, 484.
Grant v. Easton, 168.
Grant v. King, 106, 109, 112.
Grant v. Popejoy, 537.
Gratz v. Phillips, 146, 276.
Graves v. McKeon, 453.
Graves v. Ticknor, 457.
Gray v. Gray, 287.
Gray v. Griffith, 163.
Gray v. Johnson, 202.
Gray v. Pingry, 330.
Gray v. Sharp, 396.
Greasly v. Codling, 82, 92.
Great Falls Co. v. Worster, 368.
Greathouse v. Dunlap, 281.
Greathouse v. Smith, 186.
Greeley v. Stilson, 99, 100.
Green v. Ashland Iron Co., 123, 124.
Green v. Belitz, 70, 87.
Green v. Biddle, 188.
Green v. Covillaud, 519.
Green v. Dana, 137.
Green v. Dunn, 113.
Green v. Fry, 168.
Green v. Gilbert, 157.
Green v. Goddard, 68.
Green v. Harris, 364.
Green v. James, 376.
Green v. Morse, 73.
Green v. Ovington, 266.
Green v. Russell, 102.
Green v. Sperry, 230.
Greene v. Haley, 157.
Greene v. L. Fish Furniture Co., 196.
Greenhow v. Ilsley, 469.
Greening v. Wilkinson, 98.
Greenvelt v. Burnell, 492.
Greenwalt v. Horner, 312.
Greenwood v. Curtis, 247.
Greer v. Wheeler, 391.
Greer v. Young, 386, 388, 402.
Gregg v. Bethea, 538, 539.
Gregoir v. Leonard, 87.
Gregory v. Bewly, 139.
Gregory v. Piper, 67, 69, 70, 85, 88, 90.
Gregory v. Thomson, 139.
Greinke v. Chicago City R. Co., 216, 496.
Grenclife's Ex'rs, In re, 426, 427.
Gresham v. Walker, 464.
Grew v. Burditt, 466.
Gridley v. Bloomington, 515.
Griffin v. Reynolds, 272.
Griffin v. Rising, 97.
Griffith v. Willing, 144, 145, 275.
Griffiths v. Eyles, 519, 520.
Griffiths v. Monongahela R. Co., 538.
Grills v. Mannell, 424, 432.
Grimstead v. Marlow, 469.
Grimwood v. Barrit, 457.
Grinnell v. Phillips, 69.
Grist v. Hodges, 487.
Griswold v. Plumb, 112.
Griswold v. Sedgwick, 73, 74.
Grossetti v. Sweasey, 497.
Grosvenor v. Phillips, 126.
Grove v. Wise, 103, 111.
Guerard v. Jenkins, 185.
Guerdon v. Corbett, 157.
Guest Piano Co. v. Ricker, 428.
Guille v. Swan, 68, 70.

Guinnip v. Carter, 203, 528.
Gulf, C. & S. F. Ry. Co. v. Cities Service Co., 486.
Gully v. Bishop of Exeter and Dowling, 421.
Gunning v. People, 508.
Gunsolus v. Lormer, 76, 81.
Gunter v. Dale County, 267.
Gunton v. Hughes, 314.
Gunzburger v. Rosenthal, 103.
Guptill v. Richardson, 73, 74.
Gutsch v. McIlhargey, 130.
Guttmer v. Pacific Steam Whaling Co., 104.

H

Haddix v. Einstman, 110.
Hagar v. Randall, 112, 113.
Hagen Paper Co. v. East St. Louis Pub. Co, 299.
Hahn v. Ritter, 309.
Haight v. Omaha & C. B. St. R. Co., 421.
Hall v. Reed, 118.
Hains v. Parkersburgs, M. & I. R. Co., 499.
Halton v. Jeffreys, 278, 288, 289.
Hake v. Buell, 112.
Hale v. Dennie, 408.
Hale v. Lawrence, 287, 454.
Haley v. McPherson, 376.
Haley v. Rowan, 119.
Hall v. Boston & W. R. Co., 109.
Hall v. Bumstead, 267.
Hall v. Chaffee, 81.
Hall v. Corcoran, 110.
Hall v. Daggett, 105.
Hall v. Durham, 234.
Hall v. Fearnley, 308.
Hall v. Gittings' Lessee, 178.
Hall v. Ligon, 127.
Hall v. Odber, 168.
Hall v. O'Neil Turpentine Co., 281.
Hall v. Pickard, 76, 77, 93, 105.
Hall v. Rodgers, 130.
Hall v. Rupley, 157.
Hall v. White, 129.
Hallenbake v. Fish, 113.
Hallet v. Byrt, 351, 411.
Hallett v. Fowler, 124.
Halligan v. Chicago & R. I. R. Co., 76, 519.
Hallock v. Powell, 96, 202.
Halsey v. Carpenter, 456, 499.
Halsey v. Matthews, 212.
Halsey v. Simmons, 127.
Hambly v. Trott, 99.
Hamilton v. Century Mfg. Co., 397.
Hamilton v. Hart, 152.
Hamilton v. Lusk, 272.
Hamilton v. Plainwell Water-Power Co., 89.
Hamilton v. Singer Mfg. Co., 131.
Hamilton v. Smith, 91.
Hammond v. Hopping, 152.
Hammond v. Plimpton, 77.
Hance v. Tittabawassee Boom Co., 102.
Handford v. Palmer, 512.
Haney v. Townsend, 89.
Hanmer v. Wilsey, 80.
Hannen v. Edes, 75, 368.
Hansell v. Erickson, 159.
Hapgood v. Houghton, 449.
Hapgood v. Shaw, 159.
Harding v. Craigie, 241, 242, 531.
Harding v. Larkin, 142.
Hardy v. Beaty, 182, 183.
Hardy v. Cathcart, 457.
Harington v. Macmorris, 424.
Harker v. Brink, 428.
Harker v. Whitaker, 144.
Harkness v. Hyde, 24.
Harlan v. Harlan, 123.
Harley v. Parry, 152.
Harlow v. Thomas, 142.
Harmon v. Owden, 252.
Harn v. Security Nat. Bank, 361.
Harper v. Charlesworth, 81.
Harper v. Scott, 98.
Harphan v. Haynes, 415.
Harpur, Case of, 461.
Harret v. Kinney, 179.
Harrington v. Deane, 145.
Harrington v. Scott, 189.
Harris v. Christian, 167.
Harris v. Cocoanut Grove Development Co., 194.
Harris v. Jaffray, 253, 487.
Harris v. Mantle, 251.
Harris v. Smith, 126, 127, 235.
Harris v. Worth, 397.
Harris Photographic Supply Co. v. Fisher, 507.
Harrison v. Luke, 156.
Harrison v. McCormick, 893.
Harrison v. Taylor, 247, 272.
Hart v. Boston & M. R. R., 125.
Hart v. Cleis, 267.
Hart v. Fitzgerald, 127, 128, 398.
Hart v. Hill, 82.
Hart v. Hyde, 76.
Hart v. Lindsey, 464.
Hart v. Longfield, 206, 518.
Hart v. Skinner, 230.
Hartford v. Smith, 55.
Hartley v. Herring, 503.
Hartley State Bank v. McCorkell, 230.

Hartman v. Keown, 126.
Hartman v. Keystone Ins. Co., 492.
Hartnett v. Boston Store of Chicago, 217.
Harvey v. Drew, 162.
Harvey v. Parkersburg Ins. Co., 499.
Harvey v. Stokes, 463.
Haskell v. Inhabitants of Woolwich, 456.
Hassinger v. Solms, 161.
Hastrop v. Hastings, 285.
Hatch v. Spofford, 300.
Hatfield v. Cheaney, 415.
Hatsall v. Griffith, 393.
Hatton v. Morse, 351.
Havens v. Hartford & N. H. R. Co., 69, 90, 283.
Haverstick v. Fergus, 125.
Haward v. Bankes, 89.
Hawkins v. Eckles, 470.
Hawkins v. Hoffman, 109, 110.
Hawkins v. Johnson, 231.
Hawn v. Norris, 184.
Haworth v. Spraggs, 399.
Hayden v. Nott, 396.
Hayden v. Shed, 91.
Hayes v. Livingston, 179.
Hayes v. Massachusetts Mut. Life Ins. Co., 101, 111, 229.
Hayes v. Shattuck, 24.
Hayes v. Warren, 242.
Hayman v. Gerrard, 447, 448, 449.
Haynes v. Crutchfield, 231, 462.
Haynes v. Lucas, 133, 139, 284.
Hays v. Massachusetts Mut. Life Ins. Co., 111.
Haythorn v. Rushforth, 128.
Hayward v. Leonard, 158, 159.
Hazard v. Franklin Mut. Fire Ins. Co., 164.
Hazelton v. Locke, 228.
Hazen v. Essex Co., 97.
Hazen v. Pierson, 299.
Head v. Baldrey, 286.
Headley v. Shaw, 464.
Heard v. Baskerville, 252, 280, 474.
Heath v. White, 21.
Hedges v. Chapman, 416.
Hedrick v. People, 284.
Heenan v. Evans, 97.
Heffner v. Betz, 177.
Heffron v. Rochester German Ins. Co., 139, 155.
Hefner v. Fidler, 117, 232.
Heidelmeier v. Hecht, 397.
Heidenreich v. Bremner, 398.
Heilbronn v. Herzog, 96.
Heiman v. Felder, 494.
Heiman v. Schroeder, 532.
Heimberger v. Elliot Frog & Switch Co., 284.
Heineman v. Steiger, 102, 108.
Heinmiller v. Hatheway, 180.
Heller v. Whytier, 344.
Hellen v. Hellen, 331.
Heller v. Hufsmith, 110.
Helmick v. Carter, 494.
Henderson v. Lauck, 248.
Henderson v. Stringer, 282.
Henderson v. Withy, 447.
Hendrick v. Seely, 533.
Hendricks v. Decker, 80.
Hendrickson v. Walker, 126.
Hendy v. Stephenson, 473.
Henkel v. Heyman, 519.
Hennies v. Vogel, 391, 394.
Henniker v. Contoocook Val. R. R. Co., 97, 267.
Henry v. Allen, 266.
Henry v. Gamble, 141.
Henry v. Heldmaier, 428.
Henry v. Ohio River R. Co., 299, 366.
Henry v. Porter, 361.
Henry v. Sowles, 228.
Henry v. Spitler, 194.
Henry Inv. Co. v. Semonian, 4.
Henshall v. Roberts, 466.
Hensley v. Orendorff, 232.
Henwood v. Cheeseman, 453, 454.
Hereford v. Crow, 8, 426.
Herf v. Shulze, 405.
Herlakenden, Case of, 414, 415.
Herne v. Bembow, 96.
Herrell v. Sizeland, 334.
Herreshoff v. Tripp, 186.
Herrick v. Manly, 308.
Herrick v. Swomley, 313, 323.
Herries v. Jamison, 134.
Herring v. Blacklow, 341, 409.
Hersey v. Northern Assur. Co., 518.
Hess v. Griggs, 128.
Heydon v. Thompson, 437.
Heydon & Smith, Case of, 80, 81.
Heyman v. Covell, 399.
Hibbert v. Courthope, 256, 257.
Hickey v. Hinsdale, 130.
Hickingbottom v. Lehman, 124.
Hickman v. Walker, 376.
Hickok v. Coates, 278, 415.
Hicks v. Cram, 396.
Hicks v. Lyle, 101, 109.
Hicks v. Meadows, 118.
Hicks v. Rogers, 177.
Higgins v. Bogan, 271.
Higgins v. Farnsworth, 471.
Higgins v. Halligan, 466.
Higgins v. Hayward, 210.
Higgins v. Highfield, 186, 187.

Higgins v. Lee, 365.
Higgins Carpet Co. v. Latimer, 524.
Higgon v. Mortimer, 100.
Highland Foundry Co. v. N. Y., N. H. & H. R. Co., 45.
Hilborn v. Artus, 140.
Hildreth v. Becker, 498.
Hildreth v. Harvey, 467.
Hill v. Belasco, 113.
Hill v. Brennan, 106.
Hill v. Chipman, 295.
Hill v. Green, 157.
Hill v. Hill, 177.
Hill v. Mendenhall, 331.
Hill v. Montagu, 501.
Hill v. Nelson, 454.
Hill v. Robeson, 458.
Hill v. Trapp, 402.
Hill v. Tucker, 393.
Hill v. Wallace, 165.
Hillyer v. Eggers, 128.
Hilton v. Burley, 322.
Hilton v. Guyot, 330.
Himes v. Barnitz, 350.
Hinckley v. Baxter, 100.
Hindmarch v. Hoffman, 163.
Hines, Ex parte, 285.
Hines v. McMillan, 285.
Hines v. Rutherford, 295.
Hinks v. Hinks, 69, 86.
Hinton v. Husbands, 415.
Hitchcock v. Aicken, 169.
Hitchcock v. Covill, 102.
Hitchcock v. Haight, 528.
Hitchcock v. Munger, 206.
Hoagland v. Moore, 157.
Hobbs v. Ray, 74, 91.
Hobbs v. Smith, 151.
Hobson v. McArthur, 282.
Hobson v. Middleton, 432.
Hodges v. Steward, 280, 283.
Hodgson v. Barrett, 248.
Hodgson v. East India Co., 408, 520.
Hoey v. Furman, 178.
Hoffman v. Bircher, 399.
Hoffman v. Harrington, 81.
Hoffmann v. World's Columbian Exposition, 314.
Hogan v. Kurtz, 333.
Holt v. Molony, 487.
Holbrook v. Brenner, 178.
Holden v. Rutland & B. R. Co., 87.
Holland v. Kibbe, 428.
Holler v. Bush, 351, 410, 412, 413.
Holler v. Coleson, 124.
Holliday v. Camsell, 110.
Holliday v. McKinne, 319.
Holman v. Criswell, 259.
Holmes v. Bell, 152.
Holmes v. Davis, 181.
Holmes v. Newlands, 458.
Holmes v. Peck, 94.
Holroyd v. Breare, 74.
Holt v. Howard, 325.
Holt v. Moline, 496.
Holt v. Molony, 253.
Holt v. Rees, 185.
Holtz v. Schmidt, 164.
Home v. Semple, 140.
Home Ins. Co. of New York v. Duke, 248.
Homer v. Ashford, 272.
Homer v. Thwing, 110.
Hook v. Robison, 164.
Hooker v. Smith, 73.
Hooper, Case of, 152.
Hopkins v. Burney, 318.
Hopkins v. Logan, 165.
Hopkins v. Medley, 437.
Hopkins v. Nashville, C. & St. L. R. R., 528.
Hopkins v. Ward, 178.
Hopkins v. Woodward, 331.
Hopkins v. Young, 142.
Hopkinson v. Sears, 21.
Hopper v. Covington, 283.
Hore v. Chapman, 491.
Horn v. Zimmer, 127.
Horne v. Lewin, 341, 412.
Horne v. Mandelbaum, 163.
Horrel v. McAlexander, 252.
Horsefield v. Cost, 112, 113.
Horton v. Auchmoody, 73.
Horton v. Hensley, 80.
Hosier v. Ellason, 350.
Hosley v. Black, 484.
Hotchkiss v. McVickar, 102.
Hotham v. East India Co., 511, 512.
Hotiz v. Schmidt, 164.
Hough v. Rawson, 243, 248.
Houghton & Co. v. Alpha Process Co., 365.
Hovey v. Smith, 143.
Howard v. Tyler, 89.
Howe v. Newmarch, 69.
Howell v. Medler, 157.
Howell v. Richards, 484.
Howell v. Young, 223.
Howitt v. Estelle, 111, 112.
Howland v. Davis, 458.
Howton v. Mathias, 228.
Hoy v. Hoy, 139, 140.
Hoyt v. Gelston, 77, 80.
Hoyt v. Wilkinson, 165, 258.
H. S. Benjamin Wagon & Car Co. v. Merchants' Exch. Bank, 230.
Hubbard v. Davis, 266.
Hubbard v. Lyman, 80.

Hubbell v. Coundrey, 168.
Hubbell v. Wheeler, 69.
Hubler v. Pullen, 209, 445.
Huddleston v. Garrott, 178.
Huddleston v. Huey, 118.
Hudson v. Jones, 357.
Hudspeth v. Gray, 140.
Huebschmann v. McHenry, 123.
Huff v. Campbell, 272.
Huftalin v. Misner, 392.
Huggins v. Wiseman, 502.
Hughes v. Jones, 117.
Hughes v. Phillips, 344.
Hughes v. Smith, 462, 501, 511.
Hughes v. Woosley, 275.
Hughes Trust & Banking Co. v. Consolidated Title Co., 122.
Hulsh v. Phillips, 345.
Hull v. Blaisdell, 73.
Hull v. Southworth, 98.
Hulme v. Renwick, 241.
Hume v. Oldacre, 460.
Humiston v. Smith, 95.
Humphreys v. Bethily, 286, 287, 521, 523.
Hundley v. Buckner, 118.
Hunneman v. Grafton, 156.
Hunt, Case of, 140.
Hunt v. Holton, 111.
Hunt v. Sackett, 157.
Hunt v. Strew, 125.
Hunt v. Test, 322.
Hunt v. Wynn, 151.
Hunter v. Bilyeu, 285.
Hunter v. Cochran, 178.
Hunter v. Stewart, 488.
Huntington v. Attrill, 453.
Huntsville Knitting Co. v. Butner, 308.
Hurd v. Darling, 111.
Hurst v. Carlisle, 68.
Hurst v. Cook, 316.
Huson v. Dale, 313.
Hussey v. Jacob, 323, 413.
Hussey v. King, 211.
Huston v. Wickersham, 188.
Hutchinson v. Brock, 401, 405.
Hutchinson v. Dubois, 128.
Hutchinson v. Granger, 488.
Hutchinson v. Hendrickson, 360, 361.
Hutton v. Arnett, 104.
Huyck v. Andrews, 272.
Hyatt v. Robinson, 329.
Hyatt v. Wood, 81, 308, 368.
Hyde v. Moffat, 282.
Hyde v. Noble, 111.
Hyde v. Stone, 111.
Hyde's Ferry Turnpike Co. v. Yates, 530.
Hylton v. Brown, 181.

I

Iaques, Case of, 411.
Iasigi v. Shea, 228.
I. H. Pitts & Son Co. v. Bank of Shiloh, 229.
Ilderton v. Ilderton, 455.
Iles v. Heidenreich, 386.
Ilg v. Burbank, 310.
Illinois Cent. R. Co. v. Aland, 216.
Illinois Cent. R. Co. v. Hatter, 310, 471.
Illinois Cent. R. Co. v. Johnson, 410.
Illinois Cent. R. Co. v. Leidig, 415.
Illinois Cent. R. Co. v. Parks, 109.
Illinois Cent. R. Co. v. Reedy, 90, 91.
Illinois Fire Ins. Co. v. Stanton, 284, 292.
Illinois Land & Loan Co. v. Bonner, 142.
Illinois State Hospital for Insane v. Higgins, 140.
Illinois Steel Co. v. Novak, 310.
Illinois Steel Co. v. Ostrowski, 495.
Illinois & St. L. Railroad & Coal Co. v. Cobb, 80.
Ilsley v. Stubbs, 400, 404.
Imlay v. Ellefsen, 390.
Imperial Fire Ins. Co. v. Shimer, 531.
Independent Order of Mut. Aid v. Paine, 247.
Indianapolis & St. L. R. Co. v. Herndon, 109.
Ingersoll v. Barnes, 100.
Ingersoll v. Van Bokkelin, 104.
Ingraham v. Luther, 565.
Ingraham v. Martin, 126.
Inhabitants of Barnstable v. Thacher, 81.
Inhabitants of Bath v. Inhabitants of Freeport, 169.
Inhabitants of First Parish in Sudbury v. Stearns, 101.
Inhabitants of Milford v. Bangor Ry. & Electric Co., 150.
Inhabitants of Milford v. Com., 169.
Inhabitants of Orono v. Wedgewood, 392.
Innis v. Crawford, 177.
Inquirer Printing & Pub. Co. v. Rice, 534.
International Harvester Co. v. Commonwealth, 23.
International Hotel Co. v. Flynn, 394,

International & G. N. R. Co. v. Pape, 458.
Iron Clad Dryer Co. v. Chicago Trust & Savings Bank, 368, 369.
Irvine v. Hanlin, 145.
Irving v. Veitch, 165.
Isaac v. Farrar, 367.
Isaack v. Clark, 117, 119.
Isaacs v. Wiley, 464.
Isle v. Cranby, 391.
Isley v. Stubbs, 404.
Israel v. Jacksonville, 138.
Israel v. Reynolds, 299.
Italian-Swiss Agr. Colony v. Pease, 402.

J

Jackson v. Anderson, 101, 109.
Jackson v. Baker, 204.
Jackson v. Bohlin, 310, 414.
Jackson v. Buel, 176, 177.
Jackson v. Chase, 179.
Jackson v. Givin, 178.
Jackson v. Hakes, 180.
Jackson v. Harder, 178.
Jackson v. Hazen, 178.
Jackson v. Loomis, 181, 188.
Jackson v. May, 176.
Jackson v. Pesked, 214, 532.
Jackson v. Pike, 180.
Jackson v. Prevost, 465.
Jackson v. Randall, 187.
Jackson v. Schoonmaker, 179.
Jackson v. Sisson, 179.
Jackson v. Stetson, 421, 423.
Jackson v. Tribble, 184.
Jackson v. Virginia Hot Springs Co., 196.
Jackson v. Waddill, 141, 143.
Jackson v. Woods, 396.
Jackson & Sharp Co. v. Fay, 223.
Jacksonville Electric Co. v. Batchis, 488.
Jacksonville, N. W. & S. E. R. Co. v. Brown, 517.
Jacobs v. Humphrey, 97.
Jacobson v. Hayday, 333.
Jacobson v. Ramey, 496.
James v. Adams, 244.
James v. Caldwell, 72.
James v. Dunlap, 321.
James v. Fowks, 323.
James v. Henry, 168.
James & Mitchell v. Adams, 242.
Jameson v. Board of Education, 140, 253.
Jameson v. Isaacs, 464.
J'Anson v. Stuart, 501.
January v. Goodman, 152.
January v. Henry, 140.
Jarrett Lumber Co. v. Reese, 363.
Jarvis v. Rogers, 101.
Jefferies v. Duncombe, 453.
Jell v. Douglas, 245.
Jencks v. Phelps, 457.
Jenkins v. Edwards, 421.
Jenkins v. Pepoon, 400, 404.
Jenkins v. Thompson, 157.
Jennings v. Camp, 159.
Jennings v. Lyons, 157.
Jennings v. Newman, 524.
Jennings v. Peoria County, 282.
Jericho v. Underhill, 402.
Jermy v. Jenny, 492, 501.
Jerome v. Ortman, 142.
Jerome v. Whitney, 241, 515.
Jewell v. Blandford, 157.
Jewell v. Schroeppel, 156.
Joannes (Count) v. Burt, 489.
Jobbins v. Kendall Mfg. Co., 272.
Jockisch v. Hardtke, 324.
Johns v. Whitley, 473.
Johnson v. Barber, 90.
Johnson v. Castleman, 69, 91.
Johnson v. Clark, 240.
Johnson v. Couillard, 113.
Johnson v. Johnson, 390.
Johnson v. Long, 460.
Johnson v. Neale, 124.
Johnson v. Pensacola & P. R. Co., 287.
Johnson v. Picket, 457.
Johnson v. Prussing, 128.
Johnson v. Richardson, 391, 397, 398, 558.
Johnson v. Thaxter, 539.
Johnson v. Trinity Church Soc., 157.
Johnson v. Von Kettler, 74.
Johnson v. Weedman, 110.
Johnson v. Wollyer, 318.
Johnson's Ex'x v. Jennings' Adm'r, 162, 164.
Johnston v. Ewing Female University, 410.
Johnston v. Jackson, 178.
Johnston v. Salisbury, 143, 162, 166.
Johnston v. Whittemore, 109.
John W. Waldeck Co. v. Emmart, 271.
Jones v. Ashburnham, 241.
Jones v. Axen, 267.
Jones v. Dowle, 119.
Jones v. Dugan, 108.
Jones v. Fort, 112.
Jones v. Green, 119.
Jones v. Hill, 96.
Jones v. Hoar, 163, 166.
Jones v. Johnson, 152.
Jones v. Jones, 440.

Jones v. Judd, 157.
Jones v. Kitchin, 367, 368.
Jones v. McNeil, 80.
Jones v. Monson, 519.
Jones v. Owen, 245.
Jones v. Park, 82, 92.
Jones v. Robinson, 253.
Jones v. Smith, 131.
Jones v. Strong, 118.
Jones v. Tevis, 89.
Jones v. Warner, 142, 143.
Jones v. Welling, 295.
Jones' Estate, In re, 464, 465.
Jordan v. State, 528.
Jordan v. Wyatt, 70, 72, 86, 90.
Joseph v. Henderson, 91.
Joy v. Berdell, 178.
Joyce v. McAvoy, 401.
J. S. of Dale v. J. S. Vale, 279, 282, 410.
Judge of Probate v. Merrill, 481, 482.
Juliand v. Burgott, 251.
Justice v. Moore, 118.

K

Kane v. Hood, 243, 246.
Kane v. Sanger, 331.
Kankakee & S. R. Co. v. Horan, 78.
Kankakee & S. W. R. Co. v. Fitzgerald, 87, 94.
Kansas City, M. & B. R. Co. v. Phillips, 503.
Kapischki v. Koch, 67, 310, 313.
Karthaus v. Owings, 251.
Kauffelt v. Leber, 164.
Kean v. Mitchell, 241, 242, 494.
Keay v. Goodwin, 376, 381.
Kee & Chapell Dairy Co. v. Pennsylvania Co., 320, 527.
Keefer v. Zimmerman, 152.
Keegan v. Kinnare, 365.
Keeler v. Shears, 206.
Keene v. Meade, 404.
Keith v. Howard, 97.
Keith v. Tilford, 81.
Kelleher v. Chicago City R. Co., 533.
Keller v. Stevens, 528.
Kellogg v. Holly, 113.
Kellogg v. Turple, 96.
Kelly v. Armstrong, 8.
Kelly v. Bradford, 158.
Kelly v. Chicago City R. Co., 529.
Kelly v. Foster, 156, 167.
Kelly v. Kelly, 145.
Kelly v. Strouse & Bros., 527.
Kelshan v. Elgin, Aurora & S. Traction Co., 518.
Kelso v. Youngren, 124.
Kemp v. Fender, 162.
Kemp v. McCormick, 464, 465.
Kemp v. Merrill, 144, 276.
Kempton Hotel Co. v. Ricketts, 399.
Kenege v. Elliot, 177.
Kenicot v. Bogan, 432.
Kennard v. Burton, 71.
Kennard v. Secor, 326, 368.
Kennedy v. Barnett, 91.
Kennedy v. Fury, 179.
Kennedy v. Stallworth, 203.
Kennedy v. Strong, 316.
Kennedy v. Terrill, 91.
Kennet v. Robinson, 112.
Kenney v. Greer, 385.
Kennon v. Western Union Tel. Co., 281.
Kent v. Hall, 436.
Kent v. Welch, 143.
Kenyon v. Cameron, 220.
Kenyon v. Semon, 464, 465.
Kenyon v. Sutherland, 361.
Keokuk & Hamilton Bridge Co. v. Wetzel, 392, 423.
Kerby v. Quinn, 106.
Kern v. Zeigler, 249.
Kerr v. Sharp, 75.
Kerr v. Willetts, 390.
Kerr, Evans & Co. v. Co-operative Imp. Co., 271, 307.
Kerry (Earl) v. Baxter, 483, 520.
Kershaw's Ex'rs v. Boykin, 119.
Kerwin v. Balbatchett, 228.
Kettle v. Bromsall, 118.
Keyes v. Dearborn, 484.
Keyser v. Shafer, 256.
Keyworth v. Hill, 98.
Kidd v. Beckley, 265.
Kidder v. Bacon, 458.
Kierbow v. Young, 130.
Kiewert v. Rindskopf, 163.
Kilgore v. Birmingham Ry. Light & Power Co., 497.
Kille v. Ege, 296.
Kimball v. Cunningham, 102.
Kimball v. Huntington, 361, 362.
Kimersly v. Cooper, 437.
Kincaid v. Howe, 464.
Kindy v. Green, 127.
King v. Bishop of Chester, 357.
King v. Bishop of Worcester, 344.
King v. Brereton, 519, 520.
King v. Collector & Comptroller of Customs at Liverpool, 394.
King v. Fraser, 134.
King v. Haslingfield, 513.
King v. Holland, 457.
King v. Jones, 538.
King v. Lyme Regis, 498, 499, 509.

[The figures refer to pages]

King v. Mason, 163.
King v. Ramsay, 329.
King v. Rotham, 280.
King v. Sutton, 509.
King v. Watson, 79.
King v. Welcome, 167.
King v. Wilmington & N. C. Electric R. Co., 216.
Kingdon v. Nottle, 523.
Kingman v. Draper, 365.
Kingman v. Pierce, 101.
Kingman & Co. v. Reinemer, 124.
Kingsbury v. Buchanan, 125.
Kingsbury v. Smith, 230.
Kingsbury v. Sperry, 539.
Kingsley v. Bill, 258.
Kinlyside v. Thornton, 96.
Kinney v. Harrett, 180.
Kinney v. McNabb, 155.
Kinney v. Turner, 419, 522.
Kipp v. Bell, 419, 523.
Kipp v. Massin, 157.
Kirkland v. Pilcher, 116.
Kirkman v. Hamilton, 140.
Kirkpatrick v. Clark, 179, 334.
Klein v. Gibson, 537.
Kline v. Husted, 316.
Klofski v. Railroad Supply Co., 530.
Knapp v. Salsbury, 308.
Knapp v. Winchester, 103, 118.
Knepper v. Kurtz, 272.
Knickerbocker Life Ins. Co. v. Barker, 136, 330.
Knight v. Keech, 252.
Knight v. Low, 24.
Knight v. New England Worsted Co., 156, 165.
Knight v. Sharp, 531.
Knight v. Symms, 461, 463.
Knoebel v. Kircher, 410, 515.
Knott v. Clements, 285.
Knotts v. Clark Const. Co., 399.
Knowles v. Eastham, 139.
Knowles v. Harris, 146.
Knowles v. Michel, 257.
Knowlton v. Johnson, 99.
Knox v. Metropolitan El. R. Co., 466.
Knox v. Rinehart, 272.
Koch v. Williams, 160.
Korbly v. Loomis, 249.
Kraft v. Porter, 73.
Kramer v. Mathews, 126.
Kran v. Case, 163.
Krause v. Curtis, 321.
Kribbs v. Downing, 180.
Kriger v. Leppel, 159.
Kump v. McDonald, 542.
Kyle v. Gray, 112.
Kyle v. Swem, 119.

L

Ladd v. Billings, 127.
Ladd v. Pigott, 532.
Lady Shandois, The v. Simson, 468.
Laflin v. Howe, 164.
Laing v. Fidgeon, 241.
Laing v. Nelson, 80.
Lakeman v. Pollard, 157.
Lake Shore & M. S. R. Co. v. Enright, 297.
Lake Shore & M. S. R. Co. v. Hessions, 201.
Lake Shore & M. S. R. Co. v. Ward, 516.
Lamb v. Mills, 479.
Lambert v. Cook, 344.
Lambert v. Hodgson & Prince, 371.
Lambert v. Hoke, 82, 92.
Lambert v. Strother, 81.
Lambert v. Taylor, 534.
Lambkin v. Nance, 169.
Lammars v. Chicago, Great Western R. Co., 297.
Lammers v. Meyer, 320.
Lamphear v. Buckingham, 197, 282.
Lamping v. Payne, 320.
Lampleigh v. Brathwait, 242.
Landt v. McCullough, 329.
Lane v. Adams, 156.
Lane v. Alexander, 438, 439.
Lane v. Maine Mut. Fire Ins. Co., 528.
Lane v. Thompson, 76.
Langan v. Enos Fire Escape Co., 530.
Langdon v. Templeton, 81.
Langer v. Parish, 256, 456.
Langford v. Webber, 460, 470.
Langhorne v. Richmond Ry. Co., 481.
Lansing v. McKillip, 242.
Lansing v. Wiswall, 82, 92.
Lansingh v. Parker, 421.
Lantry v. Parks, 159.
Lantz v. Drum, 105.
Lanum v. Harrington, 334.
Lapham v. Osborne, 160.
Laporte v. Cook, 522.
Larkin v. Mitchell & Rowland Lumber Co., 165.
Lasher v. Colton, 391, 394, 395.
Lashlee v. Wily, 207.
Lassiter v. Norfolk & C. R. R. Co., 297.
Lassiter v. Ward, 151.
Latham v. Rutley, 322.
Lathbury v. Arnold, 475.
Lathrop v. Blake, 109.
Laurissini v. Doe ex dem. Corquette, 179.
Law v. Grommes, 22.

[The figures refer to pages]

Lawly v. Gattacre, 461.
Lawrence v. Ballou, 180.
Lawson v. Crane & Hall, 151.
Lawson's Ex'r v. Lawson, 162.
Layton v. Grindall, 462.
Lazar v. Caston, 184.
Leach v. Thomas, 530.
Leame v. Bray, 67, 70, 71, 85, 87, 90.
Learmonth v. Grandine, 437.
Lebanon v. Griffin, 465.
Le Bret v. Papillon, 284, 360, 401, 405.
Ledbetter v. Fitzgerald, 79.
Ledesham v. Lubram, 408.
Lee v. Abrams, 145, 146.
Lee v. Ashbrook, 257.
Lee v. Follensby, 481.
Lee v. Raynes, 381.
Lee v. Rogers, 377, 381.
Leech v. Widsley, 437.
Leeper, Graves & Co. v. First Nat. Bank of Hobart, 120.
Leeper v. Hersman, 320.
Lees v. Drainage Com'rs, 541.
Lees v. U. S., 540.
Leffingwell v. White, 249.
Lefkovitz v. Chicago, 495.
Leg v. Evans, 377.
Legaux v. Feasor, 89.
Leggett v. Humphreys, 361.
Lehman v. Kellerman, 123.
Lehr v. Taylor, 99.
Leinhart v. Kirkwood, 147.
Leke, Case of, 440, 515.
Leman v. Best, 99, 113.
Leneret v. Rivet, 499.
Lent v. Padelford, 244, 265, 271, 484.
Leonard v. Diamond, 178.
Leonard v. Dyer, 157.
Leonard v. Leonard, 145.
Leoncini v. Post, 229.
Leport v. Todd, 178.
Le Roy v. East Saginaw City R. Co., 130.
Lesher v. U. S. Fidelity & Guaranty Co., 268.
Leslie v. Harlow, 284.
Lester v. Jewett, 247, 248.
Lester v. McDowell, 125.
Lester v. People, 481.
Levy v. State, 509.
Levy & Hipple Motor Co. v. City Motor Cab Co., 158.
Lewis v. Alcock, 314.
Lewis v. Culbertson, 256, 257.
Lewis v. Hoover, 117.
Lewis v. Mobley, 102.
Lewis v. Preston, 500.
Lewis v. Robinson, 163.
Lewis v. Shortledge, 101.
Leyfield, Case of, 353.
Libby, McNeill & Libby v. Cook, 527.
Libby, McNeill & Libby v. Scherman, 215.
Lichtenhein v. Boston & P. R. Co., 109.
Lienow v. Ritchie, 75, 78.
Lifford, Case of, 81.
Lightfoot v. Brightman, 531.
Lincoln v. McLaughlin, 373.
Lincoln v. Thrall, 361.
Lindeman v. Lindsey, 82, 92, 95.
Linder v. Monroe's Ex'rs, 268.
Lindley v. Downing, 109.
Lindo v. Gardner, 327.
Lindsay v. Stout, 290.
Lindsey v. Mitchell & McCauley, 379.
Lindsey v. Perry, 117.
Linningdale v. Livingston, 157.
Lion v. Burtis, 187.
Lister v. Wright, 454.
Litchfield v. Ferguson, 81.
Little v. Martin, 160.
Little v. Mercer, 139.
Little v. Perkins, 287, 521.
Little York Gold-Washing & Water Co. v. Keyes, 494.
Livingston v. Anderson, 272.
Livingston v. Ruff, 185.
Lloyd v. Nourse, 181.
Lobdell v. Hopkins, 247.
Lockhart v. Little, 234.
Lockwood v. Bull, 94, 109, 110.
Lockwood v. Drake, 180.
Lodge v. Frye, 473.
Loehr v. Dickson, 158.
Logan v. Fidelity-Phenix Fire Ins. Co., 56.
Logan v. Houlditch, 113.
Logue v. Clark, 541.
Lomer v. Meeker, 528.
Long v. Fitzimmons, 145, 146.
Long v. Greene, 101.
Longueville v. Thistleworth, 384.
Longworth v. Flagg, 361.
Loomis v. Jackson, 496.
Loomis v. O'Neal, 162, 163.
Loose v. Loose, 140.
Lord v. Tyler, 426.
Lord Arlington v. Merricke, 519.
Lord Electric Co. v. Barber Asphalt Paving Co., 151.
Lord Evers v. Buckton, 499.
Loring v. Gurney, 156, 165.
Loring v. Mulcahy, 108.
Lorman v. Benson, 81.
Lotan v. Cross, 76, 93.

Lothrop v. Arnold, 74, 398.
Loubz v. Hafner, 72.
Louis v. Smith-McCormick Const. Co., 497.
Louisville, E. & St. L. R. Co. v. Harlan, 253.
Louisville & N. R. Co. v. Bartee, 74, 309.
Love v. Pusey & Jones Co., 137.
Lovell v. Kelley, 538.
Lovell v. Martin, 111.
Lovier v. Gilpin, 91.
Low v. Galena & C. U. R. Co., 542.
Lowe v. King, 419.
Lower v. Winters, 245.
Lowry v. Houston, 119.
Lowry v. Kinsey, 320, 390.
Lowthorp v. Smith, 111.
Lubbock v. Inglis, 109.
Lucas v. Godwin, 158.
Lucas v. Nockells, 433.
Lucas v. Trumbull, 110.
Ludden v. Leavitt, 104.
Luddington v. Peck, 91.
Lumby v. Allday, 527.
Lumpkin County v. Williams, 280.
Lundy v. Lundy, 180.
Lunn v. Payne, 251.
Lunt v. Brown, 76, 77.
Lunt v. Wrenn, 164.
Lurton v. Gilliam, 392.
Lush v. Russell, 438.
Lusk v. Cassell, 267, 531.
Lyall v. Higgins, 322.
Lynch v. Beecher, 131.
Lynch v. Com., 94.
Lynch v. Johnson, 323.
Lynch v. Lynch, 182.
Lynner v. Wood, 410, 411, 412, 413.
Lyons v. Farm Property Mut. Ins. Ass'n of Iowa, 281.
Lyons v. Stickney, 186.

M

McAdams v. Bailey, 39.
McAllister v. Hammond, 71, 88.
McAllister v. Kuhn, 493.
McAllister v. Reab, 350.
McAndrews v. Chicago, L. S. & E. R. Co., 496.
McArthur v. Oliver, 128.
McArthur Bros. Co. v. Whitney, 156.
McAuliffe v. Mann, 123.
McBrian v. Morrison, 130.
McCann v. Rathbone, 180.
Maclure, Ex parte, 159.
McClure v. King, 537.
McClure's Ex'rs v. Miller, 89.
M'Combie v. Davies, 109, 110.
McConnel v. Kibbe, 376.
M'Connell v. Maxwell, 104.
McConnell v. Stettinius, 425.
McCord v. Mechanics' Nat. Bank of Chicago, 307, 410.
McCormick v. Connoly, 160.
McCormick v. Huse, 357.
McCormick v. Rusch, 406.
McCoun v. New York Cent. & H. R. R. Co., 169.
McCoy v. Hill, 272.
McCoy v. McKowen, 69.
McCrary v. Brown, 256.
McCrea v. Parsons, 323.
McCrea v. Purmort, 162.
McCrillis v. How, 152.
McCullough v. McCullough, 166.
McCune v. Norwich City Gas Co., 533.
McDaniels v. Reed, 180.
McDonald v. Brown, 163.
McDonald v. Hall, 505.
McDonald v. Mabee, 22.
McDuffee v. Portland & R. R. R., 454.
McEwen v. Joy, 134.
McEwen v. Kerfoot, 363.
McEwen v. Morey, 256.
McFadden v. Crawford, 116.
McFadden v. Deck, 486.
McFadden v. Fortier, 284.
Macfadzen v. Olivant, 69, 442.
McFall v. Kirkpatrick, 178.
McFarland v. Irwin, 330.
McFarlane v. Derbishire, 168.
McFaul v. Ramsey, 5, 57.
McGanahan v. East St. Louis & C. R. Co., 217.
McGavock v. Puryear, 327.
McGavock v. Whitfield, 376.
McGehee v. Childress, 252.
McGehee v. Hill, 247.
McGinnis v. Fernandes, 160.
McGinnity v. Laguerenne, 135, 203, 244, 264, 523.
McGlamery v. Jackson, 223.
McGregor v. Balch, 391, 396.
McInerney v. Western Packing & Provision Co., 218.
McIntire v. Clark, 247.
McIntire v. Wing, 180.
Mackay v. Reynolds, 309.
McKay v. Speak, 404.
M'Kenna v. Fisk, 292.
McKeon v. Whitney, 134.
Mackey v. Northern Mill Co., 215.
McKim v. Odom, 169.
Mackin v. O'Brien, 165.
McKinney v. Jones, 295.
McKinnie v. Lane, 141, 156.

McKinnon v. Meston, 124.
McKyring v. Bull, 327.
MacLaughlin v. Fisher, 221.
McLaughlin v. Salley, 111.
McLaughlin v. Waite, 103.
McLean v. Walker, 111.
McLean's Ex'rs v. Wade, 145.
Maclellan v. Howard, 421.
McLeod v. Powe & Smith, 255.
Maclure, Ex parte, 159.
McManus v. Crickett, 69, 90.
McMillan v. Malloy, 158.
McMillan v. Vanderlip, 159.
McMorris v. Simpson, 110.
McMullin v. Church, 203.
McMurray v. Rawson, 275.
McNail v. Ziegler, 125.
McNall v. Vehon, 310.
McNear v. Atwood, 106.
McNeill v. Arnold, 292.
McNeish v. Stewart, 331.
McNulta v. Lockridge, 315.
McPartland v. Read, 108.
McPherson v. Daniels, 351.
McPherson v. McPherson, 146, 147.
McRae v. Mattoon, 169.
Macurda v. Lewiston Journal Co., 520.
McVoy v. Wheeler, 141.
McWhorter v. Sayre, 487.
Madox v. Eden, 323.
Maenner v. Carroll, 215.
Magee v. Fisher, 481.
Magee v. Siggerson, 234.
Maggs v. Ames, 325, 418.
Maguire v. Xenia, 268.
Mahaffey v. J. L. Rumbarger Lumber Co., 403.
Mahan v. Smitherman, 206.
Maher v. Ashmead, 6, 73, 539.
Maher v. Bull, 22.
Mahurin v. Bickford, 169.
Mahurin v. Harding, 95.
Mair v. Rio Grande Rubber Estates, Ltd., 495.
Malcolm v. Spoor, 74, 75.
Manby v. Scott, 53.
Manchester (Earl) v. Vale, 414, 460.
Mann v. Oberne, 320.
Mannan v. Merritt, 112.
Manser, Case of, 519, 521.
Manton v. Gammon, 156.
Mantz v. Hendley, 288.
Margetts v. Bays, 351, 353.
Marietta Mining Co. v. Armstrong, 166.
Marine Ins. Co. v. Hodgson, 329.
Mark v. Stuart-Howland Co., 304.
Markey v. Griffin, 91.
Markley v. Duncan, 253.
Marks v. Madsen, 309, 310, 373.
Marlowe v. Rogers, 363, 364.
Maronen v. Anaconda Copper Min. Co., 55, 56.
Marquette, H. & O. R. Co. v. Atkinson, 123.
Marsh v. Bulteel, 284, 286, 512, 513.
Marshall v. Davis, 111, 129.
Marshall v. Lewark, 165.
Marshall v. Riggs, 491.
Marshall v. Stalnaker, 178.
Marshalsea, The, 97.
Martin v. Bartow Iron Works, 287.
Martin v. Hamlin, 152.
Martin v. Kesterton, 371, 471.
Martin v. Murphy, 152.
Martin v. Payne, 89.
Martin v. Smith, 409.
Martin v. Thornton, 323.
Martin v. Wood, 410.
Martini v. Coles, 103.
Martyn v. Knowllys, 111.
Mason v. Buckmaster, 481.
Mason v. Cater, 278.
Mason v. Cheney, 20.
Mason v. Keeling, 68, 71, 90.
Mason v. Paynter, 97.
Mason v. Waite, 102.
Mason v. Warner, 453.
Massachusetts Mut. Life Ins. Co. v. Green, 256.
Massachusetts Mut. Life Ins. Co. v. Kellogg, 247.
Massengill v. Boyles, 178.
Mast v. Goodson, 95.
Masters v. Stratton, 93.
Masterson v. Cheek, 178.
Mather v. Ministers of Trinity Church, 78, 100.
Mathews v. Cary, 480.
Mathews v. Sniggs, 63.
Mathews v. Spicer, 458.
Matthews v. Redwine, 329.
Matthews v. Tower, 282.
Mattingly v. Darwin, 230, 488.
Maule v. Murray, 390.
Maule v. Weaver, 141.
Maury v. Olive, 257.
Maxler v. Hawk, 118.
Maxon v. Perrott, 130.
May v. Harvey, 112.
May v. Western Union Tel. Co., 398.
Mayelstone v. Lord Palmerston, 463.
Mayer v. Lawrence, 203, 523.
Mayer v. New York, 164.
Maynard v. Talcott, 456.
Mayor and Burgesses of Stafford v. Bolton, 466.

Mead v. Haws, 74.
Mead v. Kilday, 126.
Mead v. Thompson, 109.
Meader v. Stone, 81.
Mechanics & Metals Nat. Bank of City of New York v. Angel, 2.
Medbury v. Watrous, 159.
Medway Cotton Manufactory v. Adams, 391, 466.
Meeker v. Boylan, 178.
Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co., 452.
Meier v. Hilton, 189.
Mellen v. Western R. Corp., 97.
Mellin v. Horlick, 168.
Mellor v. Barber, 456.
Melville v. Brown, 74.
Melvin v. Fisher, 74.
Menifee v. Higgins, 246.
Mennie v. Blake, 120, 121.
Mercer v. Jones, 98.
Merceron v. Dowson, 504.
Meriton v. Briggs, 434.
Merrick v. Trustees of Bank of Metropolis, 531.
Merrill v. Sheffield Co., 518.
Merrit v. Warmouth, 119.
Merritt v. Miller, 351, 410.
Merry v. Gay, 421.
Merryman v. Wheeler, 136, 142, 152, 328.
Mersereau v. Norton, 110.
Mertens v. Adcock, 119.
Metcalf v. Williams, 391.
Metz v. Albrecht, 243, 248.
Metzner v. Bolton, 322.
Meyer v. Haworth, 376.
Meyers v. Schemp, 156, 161, 326.
Miami County Bank v. State, 56.
Middlebrook v. Corwin, 100.
Middleton v. Graveley, 436.
Middleton v. Price, 480.
Midvale Steel Works v. Hallgarten & Co., 125.
Miles v. Allen, 119.
Miles v. Caldwell, 181.
Miles v. Moodie, 156, 167.
Miles v. Oldfield, 202, 533.
Miles v. Sheward, 245.
Miles v. Weston, 488.
Millard v. Baldwin, 283.
Miller v. Adsit, 126.
Miller v. Ambrose, 2, 149.
Miller v. Drake, 245.
Miller v. Eldridge, 160.
Miller v. Frick's Adm'r, 127.
Miller v. Gable, 528.
Miller v. Goddard, 159.
Miller v. Grice, 74.
Miller v. Kingsbury, 284.
Miller v. Ord, 162.
Miller v. Phillips, 159.
Miller v. Pollock, 295.
Miller v. Roessler, 509.
Miller v. Stanley, 421.
Miller v. Warden, 125, 126.
Miller v. Wesson, 124.
Miller v. Whittier, 248.
Milligan v. Keyser, 486.
Milliken v. Brown, 73.
Millikin v. Jones, 423.
Mills v. Ball, 113.
Mills v. Bland's Ex'rs, 391.
Mills v. Carpenter, 292.
Mills v. Duryee, 330.
Mills v. Graham, 98, 107.
Milward v. Ingram, 257, 258.
Minard v. Lawler, 324.
Minch & Fisenbrey Co. v. Cram, 334.
Mineral Point R. Co. v. Keep, 336.
Minge v. Clark, 117.
Mink v. Shaffer, 266.
Minnick v. Williams, 133, 141.
Minor v. Mechanics' Bank of Alexandria, 533.
Minter v. Mower, 92.
Misner v. Granger, 408.
Missouri, K. & T. Trust Co. v. Norris, 22.
Mitch v. United Mine Workers of America, 302.
Mitchell v. Gile, 156.
Mitchell v. McLean, 350.
Mitchell v. Roberts, 129.
Mitchell v. Sellman, 414.
Mitchell v. Williams, 113.
Mitchinson v. Hewson, 241.
Mitsakos v. Morrill, 150.
Mix v. Nettleton, 139, 140, 141.
Mix v. People, 328, 329, 423.
Mizell v. Watson, 324.
Moale v. Hollins, 152.
Mobley v. Mobley, 296.
Mogart v. Smouse, 325.
Mole v. Wallis, 377, 379.
Moline Plow Co. v. Anderson, 533.
Monell v. Colden, 96.
Monkton v. Pashley, 460.
Monroe v. Whipple, 111.
Montague v. Garnett, 160.
Montgomerie v. Ivers, 258.
Montgomery v. Brush, 106.
Montgomery County v. New Farley Nat. Bank, 156.
Moody v. Amazon Ins. Co., 250.
Mooers v. Wait, 100.

Moon v. Avery, 76.
Mooney v. York Iron Co., 157, 158, 167.
Moor v. Pudsey, 437, 438.
Moore v. Baylies, 212.
Moore v. Earl of Plymouth, 245, 484, 485.
Moore v. Hitchcock, 104.
Moore v. Jones, 265, 271.
Moore v. Moore, 78, 81, 125.
Moore v. Spiegel, 388, 390, 400.
Moore v. Vail, 142.
Moorhead v. Scofield, 107.
Moorman v. Barton, 304.
Moran v. Dawes, 89.
Moran v. Dennis, 259.
Moravia v. Sloper, 480.
Morehead v. Grisham, 169.
Morehouse v. Fowler, 498.
Moreton v. Hardern, 69, 88, 91.
Morewood v. Wood, 441.
Morford v. Mastin, 246.
Morgan v. Adams, 146.
Morgan v. Hughes, 91.
Morgan v. Vienna, 310.
Morgantown Bank v. Foster, 418.
Moriarty v. Stofferan, 127.
Moritz v. Larsen, 159.
Morris v. Pugh, 113.
Morris Canal & Banking Co. v. Van Voorst, 265, 267.
Morrison v. Berry, 99.
Morrison v. Lumbard, 130.
Morrison v. Robinson, 181.
Morse v. Aldrich, 142.
Morse v. James, 480.
Morse v. Sherman, 156, 245.
Morse v. Whitcher, 296.
Morton v. Frick Co., 230.
Morton v. Lamb, 243, 244, 248.
Morton v. McClure, 253, 487.
Morton v. Preston, 101.
Moseley v. Jones, 241.
Moses v. Allen, 408.
Moses v. Macferlan, 162.
Moses v. Norris, 100, 110.
Moses v. Stevens, 159.
Moss v. Flint, 391.
Mostyn v. Fabrigas, 451, 453.
Moulton v. Trask, 157.
Mount v. Scholes, 360, 361.
Mount Carbon Coal & R. Co. v. Andrews, 284, 287, 318, 320.
Mountford v. Horton, 244.
Moxley's Adm'rs v. Moxley, 251.
Muggridge v. Eveleth, 77.
Muldrow v. Tappan, 258.
Mulford v. Tunis, 179.
Mulgrave v. Ogden, 109.
Mullaly v. Holden, 507.
Mullan v. Belbin, 88.
Mullen v. Brydon, 333.
Mumford v. Fitzhugh, 281.
Mumford v. McKay, 111.
Munday v. Britton, 227.
Munday v. Vail, 299.
Munro v. Alaire, 376.
Munroe v. Perkins, 157.
Munson v. Munson, 184.
Murdock v. Caldwell, 241.
Murphy v. Guion, 181.
Murphy v. McGraw, 515.
Murphy v. Orr, 398.
Murphy's Adm'rs v. Branch Bank at Mobile, 393.
Murray v. Carlin, 365.
Murray v. East India Co., 408.
Murray v. Mumford, 393.
Muse v. Vidal, 91.
Mutual Acc. Ass'n of Northwest v. Tuggle, 244.
Myers & Waterson v. Hunter, Erwin & Co., 402.
Myn v. Cole, 442.
Myrick v. Bishop, 81.
Myrick v. Slason, 158.

N

Nachtrieb v. Stoner, 76.
Naftzger v. Gregg, 247.
Nagle v. Schnadt, 36.
Nash v. Nash, 265, 281.
National Council of Knights and Ladies of Security v. Hibernian Banking Ass'n, 483.
National Lancers v. Lovering, 458.
National Parlor Furniture Co. v. Strauss, 499.
National Surety Co. v. Nazzaro, 137.
National Surety Co. v. U. S., 104.
Nations v. Hawkins' Adm'rs, 105.
Neal v. Keel's Ex'rs, 144.
Nealley v. Moulton, 396.
Neate v. Harding, 163.
Needham v. Hill, 111.
Neller v. Kelley, 102.
Nelson v. Burt, 100.
Nelson v. Chicago, B. & Q. R. Co., 22.
Nelson v. Dubois, 245.
Nelson v. Ford, 141.
Nelson v. Swan, 107.
Nerot v. Wallace, 532.
Neubeck v. Lynch, 297.
Nevil v. Soper, 518.
Nevil & Cook, Case of, 432.
Nevin v. Pullman Palace Car Co., 94.
Nevins v. Keeler, 309, 414.

[The figures refer to pages]

Nevins v. Peoria, 89, 91.
Newby v. Mason, 204.
Newcomb v. Brackett, 248.
Newcombe v. Irwin, 81.
Newell v. Newton, 390.
New Hampshire Mut. Fire Ins. Co. v. Walker, 533.
New Haven Steamboat & Transportation Co. v. Vanderbilt, 71.
New Holland Turnpike Co. v. Lancaster County, 142, 143.
New Market Iron Foundry v. Harvey, 241.
New Orleans v. Gaines, 188.
Newsome v. Graham, 104.
New Staunton Coal Co. v. Fromm, 496.
Newsum v. Newsum, 111.
Newton v. Creswick, 312.
Newton v. Marshall, 81.
Newton Rubber Works v. Graham, 249.
New York Corporation v. Dawson, 454.
New York, L. E. & W. R. Co. v. New Jersey Electric Ry. Co., 93.
Nicholas v. Pullin, 444.
Nicholl v. Mason, 390.
Nichols v. Bucknam, 161.
Nichols v. Caldwell, 179, 334.
Nichols v. Dewey, 123.
Nichols v. Lewis, 176.
Nichols v. Michael, 130.
Nicholson v. Chapman, 110.
Nicholson v. Simpson, 357.
Nickerson v. Thacher, 81.
Nickerson v. Wheeler, 162.
Nicoll v. Glennie, 112, 396.
Nielsen v. Hyland, 129.
Nielsen v. Rebard, 129.
Nill v. Comparet, 350.
Nirdlinger v. American Dist. Tel. Co., 87.
Nispel v. Laparle, 282.
Nispel v. Western Union R. Co., 386.
Noble v. Adams, 102.
Noble's Adm'r v. Laley, 624.
Noetling v. Wright, 521, 522.
Nordhaus v. Vandalia R. Co., 292, 398.
Norman v. Beekman, 186.
Norman v. Wells, 331.
Norman v. Wescombe, 371.
Norris v. Graves, 391.
Norris v. School Dist. No. 1 in Windsor, 139, 158, 167, 247, 257.
North v. Kizer, 244, 486.
North v. Nichols, 296.
North v. Turner, 77.
Northern Pac. R. Co. v. Paine, 102.
Northern Transp. Co. of Ohio v. Sellick, 111.
Northumberland (Countess) Case of, 420.
Northwestern Ben. & Mut. Aid Ass'n of Illinois v. Wanner, 142.
Norton v. Colgrove, 161.
Nottingham v. Ackiss, 265.
Nowlan v. Geddes, 288.
Nowlen v. Colt, 111.
Nugent v. Teachout, 156, 160, 167.

O

Oakman v. Small, 385.
Oates v. Clendenard, 391.
Oatman v. Fowler, 78.
Obermyer v. Nichols, 246.
O'Brien v. Cavanaugh, 79, 81.
O'Brien v. Saxon, 429.
O'Brien v. Young, 168.
O'Connor v. Gidday, 130.
Ogden v. Stock, 123, 124.
Ogle v. Barnes, 88.
Oglethorp v. Hyde, 520.
Ohio & M. R. Co. v. Brown, 292.
Ohio & M. R. Co. v. Noe, 131.
Ohio & M. R. Co. v. People, 9, 278, 516.
Okeson v. Patterson, 82, 92.
Olmstead v. Beale, 159.
Olmstead v. Burke, 488.
Olsen v. Upsahl, 308, 310.
Olson v. Kelly Coal Co., 201.
Omeara v. Cardiff Coal Co., 422.
O'Neal v. Baker, 117.
Onion v. Clark, 523.
Onondaga County Bank v. Bates, 140.
Onslow v. Smith, 405.
Opdycke v. Easton & A. R. Co., 457.
Oregon Engineering Co. v. West Linn, 410.
Ortmann v. Sovereign, 123.
Orton v. Butler, 101.
Osborne v. Butcher, 92.
Osborne v. Fulton, 140, 141.
Osborne v. Rogers, 438, 441.
Osgood v. Skinner, 248.
Osway v. Bristow, 470.
Otis v. Hitchcock, 534.
Otis v. Smith, 176.
Ott v. Schroeppel, 307.
Ottawa Gaslight & Coke Co. v. Thompson, 82, 92.
Outlaw v. Davis, 73.
Outtoun v. Dulin, 142.
Overdeer v. Lewis, 81.
Overton v. Williston, 99.

[The figures refer to pages]

Owen v. Reynolds, 377, 380.
Owens v. Starr, 74, 91.
Owens v. Weedman, 102.
Owings v. Frier, 118.
Owings v. Hull, 509.
Ownbey v. Morgan, 20.
Oystead v. Shed, 498.

P

Pacific Mail S. S. Co. v. Joliffe, 169.
Packard v. Getman, 109.
Packard v. Lienow, 161.
Paddock v. Higgins, 481.
Padgett v. Lawrence, 464.
Page v. Crosby, 129.
Page v. De Puy, 74.
Page v. Jones, 127.
Paige v. Sinclair, 300.
Pain, Ex parte, 519.
Painter v. Baker, 67, 72, 85.
Palmer v. Arthur, 533.
Palmer v. Ekins, 338, 438.
Palmer v. Evertson, 384.
Palmer v. Gardiner, 390.
Palmer v. Gooden, 428.
Pangburn v. Partridge, 128.
Panton v. Holland, 426.
Papke v. G. H. Hammond Co., 313, 361.
Paramore v. Johnson, 323.
Parcell v. McComber, 257.
Pardridge v. Ryan, 144.
Parish v. Stanton, 436.
Park v. McGowen, 146.
Parker v. Crane, 242.
Parker v. Elliott, 89.
Parker v. Hall, 74.
Parker v. Lee, 165.
Parker v. Macomber, 157, 257.
Parker v. Parker, 202, 404, 521.
Parker v. Parmele, 248.
Parker v. Steed, 158.
Parker & Son v. Clemons, 165.
Parks v. Western Union Tel. Co., 350.
Parmly v. Farrar, 158.
Parr v. Van Horn, 184.
Parsley v. Nicholson, 4.
Parsons v. Case, 399.
Parsons v. Dickinson, 76, 77.
Parsons v. Hill, 17, 58.
Parsons v. Lloyd, 73.
Parsons v. Smith, 519.
Partridge v. Strange, 503.
Pasley v. Freeman, 95.
Pate v. People, 137.
Paterson Const. Co. v. First State Bank of Thebes, 402.
Patrick v. Rucker, 203, 265, 268.
Patrickson v. Barton, 351.
Patten v. Heustis, 481.
Patten v. Hicks, 160.
Patterson v. Jones, 251.
Patterson v. Steele, 363.
Patterson v. U. S., 530.
Patterson v. Wilkinson, 425.
Pattison v. Adams, 124.
Paul v. Graves, 194.
Pawling v. Wilson, 169.
Payne v. Smith, 71, 88.
Payne v. Treadwell, 496.
Payson v. Whitcomb, 533.
Peabody v. Hayt, 169, 267.
Peacock v. Harris, 257.
Pearce, Ex parte, 535.
Pearce v. Foot, 531.
Pearce v. Pearce, 396.
Pearcy v. Walter, 308.
Pearpoint v. Henry, 228.
Pearsall v. Chapin, 163.
Pease v. Burt, 75.
Pease v. Ditto, 77, 104, 125, 127, 826.
Pease v. Howard, 168.
Pease v. Phelps, 283.
Pensley v. Boatwright, 244.
Peck v. Brewer, 96.
Peck v. Carmichael, 178.
Peck v. Houghtaling, 143.
Peck v. Methold, 247.
Peck v. Sill, 296.
Pedan v. Hopkins, 157.
Pedrick v. Kuemmell, 120, 129.
Peirce v. Hill, 118.
Peirce v. Sholtey, 365, 421.
Pell v. Lovett, 203.
Peltier v. Sewall, 156.
Penley v. Whitney, 267.
Penn v. Ward, 368.
Pennington v. Gibson, 266.
Pennington's Ex'rs v. Yell, 94.
Pennoyer v. Neff, 21, 22, 23.
Pennsylvania Co. v. Chapman, 315.
Penny v. Porter, 246.
Penobscot R. Co. v. Mayo, 102.
People v. American Life Ins. Co., 292.
People v. Central Union Tel. Co., 344.
People v. Chicago Rys. Co., 302.
People v. Cummings, 541.
People v. Davis, 137.
People v. Dummer, 134, 137.
People v. Dunlap, 504.
People v. El Dorado County Sup'rs, 541.
People v. Glann, 247.
People v. Gray, 357.
People v. Hatch, 283.
People v. Holten, 28, 278.

People v. McCormack, 415.
People v. Mauran, 176.
People v. Powell, 287, 530.
People v. Pullman's Palace Car Co., 338, 341.
People v. River Raisin & L. E. R. Co., 419.
People v. Ryder, 459, 494.
People v. Strawn, 344.
People v. Walker Opera House Co., 377, 381.
People v. Wood, 163.
People's Ins. Co. v. Spencer, 139.
People's Nat. Bank v. Nickerson, 522.
People's Sav. Bank of Tallassee v. Jordan, 307.
People's Shoe Co. v. Skally, 415.
Pepper v. Haight, 246.
Peppin v. Solomons, 515.
Percival v. Hickey, 71, 88.
Perham v. Coney, 110.
Perin v. Parker, 161.
Perkin v. Proctor, 73.
Perkins v. Burbank, 417.
Perkins v. Hart, 156, 157.
Perkins v. Moore, 287.
Perkins v. Reeds, 271.
Perley v. Foster, 126.
Perollo v. Doe ex dem. Woodward Iron Co., 333.
Perry v. Marsh, 515.
Perry v. Skinner, 92.
Peters v. Ballister, 102.
Peters v. Davis, 394.
Peters v. Ulmer, 421.
Peterson v. Mayer, 159.
Peterson v. Pusey, 158.
Petrie v. Woodworth, 464.
Pettes v. Marsh, 103.
Pettigru v. Sanders, 112.
Pettingell v. Boynton, 183.
Pfistner v. Bird, 78.
Pforzheimer v. Selkirk, 221.
Pharr v. Bachelor, 457, 523.
Phelps v. Hughes, 250.
Phelps v. Morse, 212.
Phelps v. Sawyer, 331.
Phelps v. Sill, 498.
Philadelphia, B. & W. R. Co. v. Gatta, 17, 58, 206.
Philadelphia W. & B. R. Co. v. Constable, 95.
Philippi Planing Mill Co. v. Cross, 365.
Philips v. Robinson, 112, 117, 118, 317.
Phillips v. Covert, 80.
Phillips v. Cummings, 398.
Phillips v. Fielding, 514.
Phillips v. Howgate, 371.
Phillips & C. Const. Co. v. Seymour, 141.
Pickering v. De Rochemont, 393.
Pierce v. Benjamin, 108, 112.
Pierce v. Carey, 521.
Pierce v. Kimball, 509.
Pierce v. Pickens, 458.
Pierce v. Schenck, 109.
Pierce v. Woodward, 253, 487.
Piercy v. Sabin, 314.
Pierson v. Spaulding, 156.
Pierson v. Wallace, 282.
Piggot, Case of, 284.
Pigot, Case of, 329.
Pike v. Brown, 167.
Pike v. Zadig, 255.
Pinches v. Swedish Evangelical Lutheran Church, 158.
Pinkham v. Gear, 100.
Pippet v. Hearn, 222.
Pitkin v. Yaw, 179.
Pitt v. Russel, 477.
Pitt v. Shaw, 100.
Pitts Sons' Mfg. Co. v. Commercial Nat. Bank, 2, 5, 383, 388, 390, 400, 404.
Pitts & Son Co. v. Bank of Shiloh, 229.
Pittsburg, C., C. & St. L. R. Co. v. Chicago, 528.
Pittsburgh, C., C. & St. L. R. Co. v. James, 56.
Pittsburgh, C., C. & St. L. R. Co. v. Nichols, 497.
Planche v. Colburn, 159.
Planters' Bank v. Galloway, 140.
Plasket v. Beeby, 405.
Platt v. Hill, 509.
Platz v. McKean Tp., 452.
Playter, Case of, 461.
Plomer v. Ross, 500.
Plowman v. Foster, 312.
Plumb v. McCrea, 369.
Plummer v. Dennett, 74.
Plummer v. Woodburne, 356.
Plunkett v. Detroit Electric R. Co., 533, 534.
Poindexter v. Cherry, 181.
Pollak v. Electric Ass'n, 323.
Pollard v. Lock, 467.
Pollard v. Lyon, 91, 197, 223.
Polsey v. White Rose Mfg. Co., 391.
Pomeroy v. Trimper, 234.
Pond v. Ennis, 391.
Poole v. Symonds, 102, 103.
Pooler v. Southwick, 405.
Pope v. Foster, 457.
Pope v. Tillman, 461, 462.
Porter v. Drennan, 201.

Porter v. Gray, 475.
Porter v. Hildebrand, 295.
Porter v. Rummery, 539.
Portland Dry Dock & Insurance Co. v. Portland, 138.
Posnett v. Marble, 530.
Post v. Campau, 161.
Post v. Munn, 71.
Post v. Neafie, 136.
Potomac Laundry Co. v. Miller, 258.
Potter v. Bacon, 272.
Potter v. Brown, 93.
Potter v. Earnest, 241, 424.
Potter v. Gronbeck, 139, 155.
Potter v. Hiscox, 536.
Potter v. John Hutchison Mfg. Co., 19.
Potter v. McCoy, 384, 396.
Potter v. North, 122, 318.
Potter v. Titcomb, 419, 428.
Potter v. Washburn, 80.
Potts v. Point Pleasant Land Co., 377.
Powdick v. Lyon, 281.
Powell v. Bradlee, 125.
Powell v. Salisbury, 69, 87.
Powell v. Smith, 124.
Powell Co. v. Finn, 392, 397.
Power Equipment Co. v. Gale Installation Co., 157.
Powers v. Cook, 405, 433, 434.
Powers v. Rutland R. Co., 359.
Powers v. Ware, 481.
Pownal v. Ferrand, 162.
Pozzi v. Shipton, 94, 397.
Pratt v. Harris, 386.
Pratt v. Parkman, 125.
Presbyterian Congregation v. Johnston, 179.
Prescott v. Wright, 108.
President, etc., of Bank of Auburn v. Weed, 410.
President, etc., of Bank of New Brunswick v. Arrowsmith, 18.
President, etc., of City of Natchez v. Minor, 519.
President, etc., of Commercial Bank v. French, 465, 484.
President, etc., of Town of Jacksonville v. Block, 137.
President & College of Physicians v. Salmon, 97.
Pressey v. Snow, 18.
Pressley v. Bloomington & N. Ry. & Light Co., 376.
Price v. Easton, 245.
Price v. Farrar, 328.
Price v. Fletcher, 514.
Price v. Furman, 159.
Price v. Grand Rapids & I. R. Co., 285.
Price v. Moulton, 152.
Priddle & Napper, Case of, 432, 433.
Priddy v. Thompson, 177.
Priest v. Dodsworth, 422, 423, 426, 518.
Prince v. Brunatte, 376.
Prince v. Lamb, 208.
Proctor v. Wells Bros. Co. of New York, 391.
Producers' Oil Co. v. Hanszen, 171.
Proprietors of Fryeburg Canal Co. v. Frye, 97.
Proprietors of Monumoi Great Beach v. Rogers, 309.
Proprietors of Sudbury Meadows v. Proprietors of Middlesex Canal, 97.
Prosser v. Woodward, 344.
Provident Inst. for Sav. v. Burnham, 181.
Provident Life & Trust Co. v. Fiss, 273.
Prunty v. Mitchell, 396.
Pugh v. Robinson, 194.
Pullen v. Bell, 100.
Pullen v. Chase, 452.
Purcell v. Bradley, 519.
Purchell v. Salter, 368.
Purdy v. McCullough, 102.
Purinton v. Jamrock, 410.
Putnam v. Bond, 453.
Putnam v. Wyley, 76, 77.
Putnam Lumber Co. v. Ellis-Young Co., 384.
Pyster v. Hemling, 473.

Q

Quarles v. Waldron, 278.
Quincy v. Hall, 320.
Quinn v. Schmidt, 126.

R

Raborg v. Peyton, 140.
Race v. Chandler, 109, 113.
Race v. Easton & A. R. Co., 216.
Rackham v. Jesup, 77, 80.
Radford v. Harbyn, 355.
Radzinski v. Ahlswede, 141, 331.
Rae v. Hulbert, 168, 286.
Raher v. Raher, 22.
Raleigh County Court v. Cottle, 412.
Ralph v. Bayley, 81.
Ramsay v. Barcroft, 117.
Ramsey v. Hurley, 230.
Rand v. Rand, 482.

Randel v. President, etc., of Chesapeake & D. Canal, 272.
Randolph v. Singleton, 49.
Raney v. Boyd, 164.
Rankin v. Darnell, 157.
Ranlett v. Moore, 156, 245.
Rann v. Hughes, 241.
Rathbun v. Payne, 88.
Rawitzer v. Mutual Benefit Health & Accident Ass'n, 421.
Rawson v. Taylor, 471.
Raxworthy v. Helsen, 215.
Ray v. Haines, 159.
Raymond v. Andrews, 181.
Raymond v. People, 518.
Raymond v. Sturges, 428.
Read, Case of, 437.
Read v. Brookman, 271.
Read v. Brown, 196.
Read v. Chelmsford, 528.
Read v. Smith, 2, 243.
Read v. Walker, 452, 454.
Ream v. Rank, 89.
Reavely v. Harris, 530.
Rebman v. San Gabriel Valley Land & Water Co., 160.
Red Men's Fraternal Acc. Ass'n v. Rippey, 250.
Redstrake v. Cumberland Mut. Fire Insurance Co., 296.
Reeb v. Bronson, 260.
Reed v. Collins, 536.
Reed v. Davis, 138.
Reed v. Guessford, 87.
Reed v. Peoria & O. R. Co., 212.
Reed v. Shepley, 178.
Reed v. Tyler, 180.
Reeder v. Purdy, 189.
Rees v. Storms, 13.
Reeside's Ex'r v. Reeside, 151.
Reeve v. Palmer, 119.
Reeves v. Forman, 531.
Regents of University of Michigan v. Detroit Young Men's Soc., 482.
Reichenbach v. McKean, 126.
Reid v. Lord, 391, 466.
Reilly v. Rucker, 381.
Reinkey v. Findley Electric Co., 57,
Remington v. Tayler, 456.
Rennyson v. Reifsnyder, 245.
Rex v. Bolton, 345.
Rex v. Horne, 408.
Rex v. Johnson, 351.
Rex v. Knollys, 282, 510.
Rex v. Larwood, 377.
Rex v. Lyme Regis, 349.
Rex v. Malland, 137.
Rex v. Mellor, 177.
Rex v. Shakespeare, 404.
Rex v. Stevens, 518, 519.
Rex & Regina v. Knollys, 283.
Rexroth v. Coon, 102.
Reynolds v. Blackburn, 523.
Reynolds v. Clarke, 67, 73, 85, 89.
Reynolds v. Hurst, 265, 267.
Reynolds v. McCormick, 320.
Reynolds v. Shuler, 109.
Ribble v. Lawrence, 102, 103.
Rice v. Clark, 109, 110.
Rich v. Ryder, 126.
Rich v. Woolley, 479.
Richards v. Frankum, 317.
Richards v. Hodges, 381, 448.
Richards v. Killam, 152.
Richards v. Peake, 441.
Richardson v. Atkinson, 110.
Richardson v. Farmer, 533.
Richardson v. Murrill, 81.
Richardson v. Orford, 345, 432, 433.
Richardson v. Reed, 129.
Richardson v. Rice, 111.
Richardson v. Smith, 440.
Richardson v. York, 123.
Richey v. Hathaway, 257.
Richter v. Chicago & E. R. Co., 218.
Riciotto v. Clement, 130.
Ricker v. Freeman, 67, 68, 72, 85, 88.
Rickert v. Snyder, 425.
Ricketts v. Loftus, 436.
Riddle v. Driver, 100.
Rider v. Robbins, 234, 259.
Rider v. Smith, 476, 504.
Ridgeley v. Crandall, 156.
Riford v. Montgomery, 112.
Rigeway, Case of, 284.
Riggs v. Bullingham, 506.
Riggs v. Denniston, 414, 415.
Right v. Beard, 179.
Right v. Board, 180.
Rightmyer v. Raymond, 109.
Riley v. Boston Water Power Co., 100, 112.
Riley v. Yost, 483, 485.
Rinfret & Arruda v. Morrisey, 186,
Ring v. Roxbrough, 245, 456, 458.
Ringhouse v. Keener, 181.
Ripka v. Sergeant, 76.
Ripley v. Case, 104.
Ripley v. Davis, 111.
Ripley v. Dolbier, 110.
Ripley v. Yale, 78.
Risher v. Wheeling Roofing & Cornice Co., 415.
Ritchie v. Van Gelder, 295.
Ritzwoller v. Lurie, 491.
Rivers v. Griffiths, 463.
Roach v. Damron, 453.
Roades v. Barnes, 323.

Robb v. Cherry, 119.
Robb v. Montgomery, 240.
Robbins v. Baltimore & O. R. Co., 497.
Robert Grace Contracting Co. v. Norfolk & W. Ry. Co., 486.
Roberts v. American Nat. Assur. Co., 390.
Roberts v. Corby, 531.
Roberts v. Dame, 202.
Roberts v. Danforth, 411.
Roberts v. Dauphin Deposit Bank, 123.
Roberts v. McLean, 391.
Roberts v. Mariett, 376, 378.
Roberts v. Moon, 399.
Roberts v. Wyatt, 104.
Robertson v. Hooton, 228.
Robinson v. Austin, 110.
Robinson v. Corbett, 435.
Robinson v. Hartridge, 113.
Robinson v. Peterson, 114, 117, 118, 317.
Robinson v. Prescott, 169.
Robinson v. Raley, 5, 342, 419, 428, 429.
Robinson v. Roberts, 177.
Robinson v. St. Johnsbury & L. C. R. Co., 419.
Robinson v. Smith, 473.
Robinson v. Woodford, 231.
Robinson's Estate, In re, 541.
Robson v. Godfrey, 156.
Rocker v. Perkins, 210.
Rockford Ins. Co. v. Nelson, 249, 511.
Rockford, R. I. & St. L. R. Co. v. Beckemeier, 141.
Rockhill v. Congress Hotel Co., 526.
Rock Spring Coal Co. v. Salt Lake Sanitarium Ass'n, 443.
Rodgers v. Brittain, 112.
Rodriguez v. Merriman, 535.
Roebuck v. Duprey, 143.
Rogers v. Brooks, 137, 267,
Rogers v. Burk, 436, 438.
Rogers v. Imbleton, 88.
Rogers v. Jenkins, 207.
Rogers v. Milwaukee, 493.
Rogers v. Windoes, 106.
Rolt v. Watson, 324.
Rolte v. Sharp, 245.
Romani v. Shoal Creek Coal Co., 215.
Rooke v. Rooke, 257.
Roosevelt v. Fulton's Heirs, 331.
Roosevelt v. Gardinier, 464.
Roosevelt v. Hungate, 333.
Root v. Woodruff, 234.
Rooth v. Wilson, 69, 80, 87, 103.
Roper v. Clay, 533.
Rose v. Bowler, 523.
Rose v. Lewis, 101.
Rose v. Miles, 82, 92.
Rose v. Oliver, 396.
Roseboom v. Mosher, 178.
Rosenbury v. Angell, 359.
Ross v. Allen, 396.
Ross v. Johnson, 110.
Ross v. Nesbit, 360, 361.
Rotan v. Fletcher, 316.
Rotch v. Hawes, 94, 110.
Rountree v. Little, 178, 179.
Roussin v. Benton, 78.
Routh v. Weddell, 285.
Rowell v. Hayden, 360.
Rowland v. Veale, 480.
Rowles v. Lusty, 404.
Roworth v. Wilkes, 92.
Royce v. Oakes, 101, 228.
Royse v. May, 296.
Rubery v. Stevens, 462.
Rubin v. Huhn, 107.
Rucker v. Hamilton, 119.
Rucker v. McNeely, 78.
Rudder v. Price, 139, 140, 148,
Rugg v. Minett, 106.
Ruggles v. Fay, 110.
Ruggles v. Hall, 536.
Ruggles v. Lesure, 309.
Ruggles v. Sands, 79.
Rumbarger v. Stiver, 521.
Rupert v. Mark, 178.
Rushton v. Aspinall, 528, 532,
Rushworth v. Taylor, 113.
Russell, Case of, 432.
Russell v. Bell, 159, 166.
Russell v. Chicago, 268.
Russell v. Clark's Ex'rs, 95.
Russell v. Hamilton, 328.
Russell v. Irwin's Adm'r, 178,
Russell v. Rogers, 428, 515.
Russell v. Scott, 77.
Russell v. Slade, 243.
Russell v. Tomlinson, 396.
Rutter & Co. v. McLaughlin, 391, 395.
Ryan v. Brant, 102, 112.
Ryan v. Clark, 472.
Ryan v. Gallatin County, 137.
Ryan v. May, 285.
Ryan v. Vanlandingham, 409,
Ryder v. Flanders, 178, 179.
Rynders v. Coxie, 267.

S

Sabourin v. Marshall, 96.
Sackett v. Thompson, 295.
Sadler v. Robins, 168.
Safford v. Basto, 79.
Safford v. Miller, 203.

[The figures refer to pages]

St. Albans Steam Boat Co. v. Wilkins, 158.
St. John v. St. John, 158, 511.
St. John v. Standring, 110.
St. Louis A. & C. R. Co. v. Dalby, 90.
St. Louis, A. & T. H. R. Co. v. Miller, 136.
St. Louis, A. & T. Ry. Co. v. Whitley, 453.
St. Louis, V. & T. H. R. Co. v. Summit, 86.
Sale v. Eichberg, 364.
Salinas v. Wright, 244, 271.
Salmon v. Jenkins, 247.
Sampson v. Henry, 81, 308, 367.
Samuel v. Judin, 95.
Samuel v. Morris, 108.
Sanboeuf v. Murphy Const. Co., 496.
Sandeen v. Kansas City, St. J. & C. B. R. Co., 166.
Sanders v. Hussey, 471.
Sanderson v. Baker, 74.
Sanderson v. Haverstick, 99.
Sanderson's Ex'rs v. Marks, 234.
Sandford v. Halsey, 271.
Sands v. St. John, 511.
Sandusky v. Sidwell, 387.
Sandusky v. West Fork Oil & Natural Gas Co., 393.
Sanford v. Millikin, 127.
Sanger v. Chicago, 157.
Santler v. Heard, 456.
Sarch v. Blackburn, 90.
Sargent v. Gile, 113.
Sargent Co. v. Baublis, 215.
Saunder, Case of, 411, 412, 413.
Saunders v. Crawley, 523.
Saunders v. Hussey, 470.
Savacool v. Boughton, 74.
Savage v. Public Service R. Co., 497.
Savignac v. Roome, 6.
Sawtelle v. Rollins, 128, 129.
Sawyer v. Boston, 528.
Sawyer v. Van Deren, 363.
Saxton v. Bacon, 69, 87.
Sayre v. Minns, 449, 500.
Scarborough v. Lucas, 126.
Scavage v. Hawkins, 472.
Schaetzel v. Germantown Farmers' Mut. Ins. Co., 433.
Schanbacher v. Payne, 56.
Schauber v. Jackson, 178.
Scheible v. Klein, 159.
Schemerhorn v. Jenkins, 391.
Schemerhorn v. Mitchell, 320.
Schillinger Bros. Co. v. Smith, 218.
Schlosburg v. Willingham, 228.
Schmidt v. Glade, 142.
Schnable v. Koehler, 76.
School Dist. in Medfield v. Boston, H. & E. R. Co., 94.
Schoonover v. Vachon, 160.
Schroeder v. Merchants' & Mechanics' Ins. Co., 20.
Schueler v. Mueller, 496.
Schuer v. Veeder, 71, 88.
Schultz v. Sohrt, 220.
Schwartz v. King Realty & Investment Co., 122.
Schwarz Bros. Co. v. Evening News Pub. Co., 4.
Schwindt v. Lane-Potter Lumber Co., 522.
Schwinger v. Hickok, 164.
Scidmore v. Smith, 97.
Scilly v. Daily, 473.
Scott v. Colson, 181, 186.
Scott v. Conover, 140, 143.
Scott v. Curd, 264.
Scott v. Dixon, 371.
Scott v. Godwin, 396.
Scott v. Hull, 24.
Scott v. Leiber, 265, 271.
Scott v. Parlin & Orendorff Co., 200.
Scott v. Sandford, 399.
Scott v. Shepherd, 67, 68, 72, 85, 90.
Scott v. Whipple, 521.
Scovill v. Seeley, 283.
Scudder v. Anderson, 109.
Scudder v. Worster, 127.
Scurfield v. Gowland, 152.
Sea v. Taylor, 323.
Seare v. Prentice, 96.
Searing v. Butler, 458.
Searl v. Bunion, 470, 473.
Seckel v. Scott, 165, 260.
Secrist v. Petty, 508.
Seddon v. Tutop, 371.
Seeley v. Howard, 184.
Seipel v. International Life Ins. & Trust Co., 159.
Selby v. Bardons, 368.
Selby v. Hutchinson, 157, 202.
Senecal v. Labadie, 309.
Seretto v. Rockland, S. T. & O. H. R. Co., 134, 139.
Serjeant v. Fairfax, 436.
Serra v. Wright, 252.
Severin v. Keppel, 110, 112.
Sewall v. Lancaster Bank, 102.
Sexton v. A. C. Aultman & Co., 863.
Sexton v. Holmes, 244, 258.
Sexton v. McDowd, 120.
Sexton v. Miles, 242.
Seymour v. Maddox, 215, 432.
Seymour v. Mitchel, 523.
Shadwell v. Hutchinson, 82, 92.
Shafer v. Security Trust Co., 208.

[The figures refer to pages]

Shafer v. Smith, 92.
Shandois (Lady) v. Simson, 458.
Shane v. Smith, 159.
Sharp v. State, 494.
Shaver v. McCraw, 180.
Shaver v. White, 453.
Shaw v. Alvanley (Lord), 422.
Shaw v. Chambers, 177.
Shaw v. Dutcher, 288.
Shaw v. Hoffman, 189.
Shaw v. Lewistown & K. Turnpike Co., 248.
Shaw v. Lord Alvanley, 422.
Shaw v. Redmond, 242, 258.
Shaw v. Woodcock, 163.
Shearer v. Jewett, 156, 165.
Shearman v. Fellows, 416.
Sheers v. Brooks, 512.
Sheffield Nat. Bank v. Corinth Bank & Trust Co., 496.
Sheldon v. Hopkins, 266.
Shelton v. Bruce, 241.
Shenandoah Valley R. Co. v. Griffith, 296.
Shepard v. Palmer, 245.
Shepheard, Case of, 473.
Shepherd v. Butcher Tool & Hardware Co., 808.
Sheppard v. Furniss, 91, 203.
Sheppard v. Graves, 385.
Sheppard v. Peabody Ins. Co., 491.
Sherburne v. Hyde, 387, 395.
Sherland v. Heaton, 491.
Shinn v. Shinn, 13.
Shipherd v. Field, 95, 515.
Shipley v. Shipley, 23.
Shives v. Eno Cotton Mills, 534.
Shockley v. Fischer, 391.
Shoemaker v. Nesbit, 73.
Shorland v. Govett, 480.
Short v. Wilson, 96.
Shoup v. Shields, 81.
Shreeve v. Adams, 94.
Shriver v. Nimick, 145.
Shufeldt v. Seymour, 392.
Shult v. Barker, 105.
Shum v. Farrington, 462.
Shumway v. Phillips, 178.
Shumway v. Stillman, 169.
Sibley v. Brown, 370, 518.
Siboni v. Kirkman, 324.
Sick v. Michigan Aid Ass'n, 295.
Sill v. Rood, 322.
Silly v. Daily, 470, 471.
Siltzell v. Michael, 167.
Silver v. Jordan, 296.
Silver v. Rhodes, 287.
Simmons v. Jenkins, 128, 820, 564.
Simonton v. Winter, 141.
Simpkins v. Rogers, 100.
Simpson v. Alexander, 230.
Simpson v. Hand, 71.
Simpson v. McFarland, 129, 818.
Simpson v. Wrenn, 125.
Sims v. Klein, 523.
Sinclair v. Hervey, 413.
Sinclair v. Jackson, 179.
Sinclair v. Piercy, 140.
Singer Sewing Mach. Co. v. Burger, 414.
Singer Sewing Mach. Co. v. Teasley, 493.
Sinnott v. Felock, 129.
Sinsheimer v. William Skinner Mfg. Co., 392, 396.
Sir Francis Leke, Case of, 440, 515.
Sir Ralph Bovy, Case of, 436, 437, 511.
Six Carpenters, Case of, 69, 74.
Skevill v. Avery, 469, 473.
Skinner v. McDowell, 79.
Slack v. Lyon, 292.
Slade v. Dowland, 525.
Slade v. Drake, 442, 443.
Slate v. Post, 452.
Slater v. Fehlberg, 207, 296.
Sleeper v. World's Fair Banquet Hall Co., 203.
Slocum v. Clark, 519.
Slocum v. New York Life Ins. Co., 526.
Smalley v. Bristol, 511.
Smart v. Hyde, 349.
Smith v. Archer, 100.
Smith v. Atlantic Mut. Fire Ins. Co., 390.
Smith v. Bellrose, 364.
Smith v. Benson, 100.
Smith v. Bleslada, 528.
Smith v. Boston, C. & M. R. Co., 240, 245, 462, 501.
Smith v. Brady, 158.
Smith v. Bull, 453.
Smith v. Butler, 453.
Smith v. Carney, 391.
Smith v. Carroll, 361.
Smith v. Clark, 453.
Smith v. Curry, 533.
Smith v. Delitt, 538.
Smith v. Dixon, 440.
Smith v. Dovers, 342.
Smith v. Drew, 138.
Smith v. Eastern R. R., 532.
Smith v. Edelstein, 309.

Smith v. Franklin, 893.
Smith v. Gates, 74.
Smith v. Goodwin, 202.
Smith v. Jacksonville Oil Mill Co., 8.
Smith v. James, 103, 105, 106.
Smith v. Lathrop, 390.
Smith v. Lewis, 248.
Smith v. Lorillard, 178.
Smith v. McCann, 178, 179.
Smith v. Moore, 267.
Smith v. Nicolls, 377.
Smith v. Parsons, 322, 324.
Smith v. Philadelphia B. & W. R. Co., 201.
Smith v. Plomer, 77.
Smith v. Proprietors of First Congregational Meetinghouse in Lowell, 134, 202.
Smith v. Rutherford, 67.
Smith v. Ryan, 179.
Smith v. Scott, 479.
Smith v. Segar, 140.
Smith v. Smith, 377.
Smith v. Snyder, 318.
Smith v. Stokes, 110.
Smith v. Townes' Adm'r, 317.
Smith v. U. S., 267.
Smith v. Webb, 244, 486.
Smith v. Webster, 67, 240, 246.
Smith v. White, 95.
Smith v. Wiggin, 492.
Smith v. Williamson, 125.
Smith v. Wolsiefer, 482.
Smith v. Woman's Medical College of Baltimore City, 55.
Smith v. Wooding, 160.
Smith v. Woodman, 138.
Smith v. Young, 113.
Smith's Adm'r v. Lloyd's Ex'r, 248.
Smith's Heirs v. Christmas, 247.
Smithwick v. Ward, 360.
Sneider v. I. Schwenk, Inc., 186.
Snell v. Deland, 394.
Snell v. Kirby, 140.
Snell v. Stanley, 389.
Snell v. Weir, 107.
Snow v. Roy, 130.
Snyder v. Gaither, 415.
Snyder v. Harper, 296.
Snyder v. President, etc., of State Bank of Illinois, 284.
Snyder v. Vaux, 123.
Snyder v. Wheeling Electrical Co. 216.
Sogn v. Koetzle, 279.
Solly v. Neish, 368.
Solomon v. Norton, 536.
Solomon v. Vinson, 4.
Somerville v. Grim, 256.
Soper v. Sumner, 77.
Southard v. Hill, 391.
Southern Cotton Oil Co. v. Woods, 497.
Southern Exp. Co. v. McVeigh, 94.
Southern Hardware & Supply Co. v. Lester, 114.
Southern Home Ins. Co. v. Putnal, 281.
Southwest Hay & Grain Co. v. Young, 56.
Sovereign Camp, W. O. W., v. MacDonald, 8.
Sowter v. Seekonk Lace Co., 204.
Spaeth v. Hare, 437.
Spaids v. Barrett, 91.
Spangler v. Pugh, 517.
Spann v. Baltzell, 248.
Sparhawk v. Bagg, 78, 79.
Sparks v. Garrigues, 134, 140.
Spaulding v. Lowe, 402.
Speake v. Richards, 134.
Spear v. Cummings, 97.
Spence v. McMillan, 117.
Spencer v. Aetna Indemnity Co., 888.
Spencer v. Bemis, 371.
Spencer v. Court of Honor, 24.
Spencer v. Southwick, 408, 498.
Spencer v. Trafford, 458.
Speyer v. Desjardins, 507.
Spieres v. Parker, 509.
Spiker v. Bohrer, 491.
Spooner v. Warner, 266.
Sprague v. Morgan, 259.
Sprague Nat. Bank v. Erie R. Co., 414.
Spring v. Fidelity Mut. Life Ins. Co., 56.
Springfield Consol. R. Co. v. Hoeffner, 391.
Spurck v. Forsyth, 408.
Staat v. Evans, 163.
Stafford v. Forcer, 457, 458.
Stagg v. Munro, 248.
Stahl v. Grover, 81.
Stallings v. Gottschalk, 257.
Stamper v. Temple, 148.
Stamps v. Graves, 207, 208.
Standard Fashion Co. v. Lopinsky, 155.
Stanley v. Neale, 124.
Stansbury v. Marks, 322.
Stanton v. Embry, 390.
Staples v. Smith, 76.
Star v. Rookesby, 68, 69, 87, 90.
Star Brick Co. v. Ridsdale, 392, 418.
Starbuck v. Murray, 330.
Stark v. Parker, 159.
Starke v. Cheeseman, 244.

Starkweather v. Kittle, 357, 424.
Starr v. Jackson, 78.
Starr v. Pease, 181.
Starr v. Rochester, 542.
Starr Piano Co. v. Lawrence, 826.
Starrett v. Gault, 394.
State v. Atlantic Coast Line R. Co., 281.
State v. Beasom, 358.
State v. Chandler, 396.
State v. Folsom, 137.
State v. Greene, 491.
State v. Heaphy, 184.
State v. Jersey City, 494.
State v. Leonard, 492.
State v. Morgan, 536.
State v. New Orleans, 168.
State v. Peck, 280, 287.
State v. Seaboard Air Line Ry., 281.
State v. Vittum, 465.
State v. Whitaker, 542.
State v. Wilson, 483.
Staton v. Pittman, 117, 119.
Stauffer v. State Bank, 364.
Stearnes v. Raymond, 123.
Stearns v. Barrett, 240.
Stearns v. Dillingham, 163, 166.
Steckel v. Steckel, 162.
Steed v. McIntyre, 205.
Steffe v. Old Colony R. Co., 280.
Stehman v. Crull, 178.
Stein v. Lyon, 493.
Steiner v. Priddy, 188.
Stempel v. Thomas, 164.
Stephens v. Graham, 245.
Stephens v. Steckdaub, 123.
Stephens v. Sweeney, 268.
Stephenson v. Cady, 243.
Stephenson v. Hart, 109.
Stephenson v. Little, 102.
Sterenberg v. Beach, 486.
Sterling v. Sherwood, 414, 415.
Stearns v. Patterson, 376, 381.
Steuben County Bank v. Mathewson, 493.
Stevens v. Austin, 102, 112.
Stevens v. Clark, 539.
Stevens v. Dunbar, 288.
Stevens v. Evans, 138.
Stevens v. Fisher, 330.
Stevens v. Proprietors of Middlesex Canal, 97.
Stevens v. Tuller, 165.
Steven's Ex'rs v. Lee, 160.
Stewardson v. White, 426.
Stewart v. Bright, 102.
Stewart v. Camden & A. R. Co., 184, 188.
Stewart v. Walker, 157.
Stibbs v. Clough, 483.
Stiles v. Easley, 163.
Stiles v. Stewart, 266.
Stillman v. Squire, 130.
Stilson v. Tobey, 827.
Stilwell v. Carpenter, 466.
Stilwell v. Hasbrouck, 424.
Stinchfield v. Twaddle, 228.
Stinson v. Gardiner, 283.
Stirling v. Garritee, 230.
Stirling v. Vaughan, 103.
Stockdale v. Buckingham, 24.
Stocking v. Burnett, 425.
Stoetzell v. Fullerton, 391.
Stoever v. Stoever, 242.
Stoker v. Yerby, 117.
Stone v. Bliss, 499.
Stone v. Codman, 230.
Stone v. Knowlton, 245.
Stone v. Perry, 130.
Stone v. White, 244.
Stonegap Colliery Co. v. Hamilton, 494.
Storm v. Livingston, 113.
Story v. Atkins, 257.
Stout v. Keyes, 28, 76, 278.
Stout v. Rassel, 458.
Stovall's Ex'r v. Woodson, 140.
Stow v. Yarwood, 365.
Stowel v. Lord Zouch, 511.
Stowell v. Beagle, 314.
Stoyel v. Westcott, 95, 202.
Strain v. Strain, 217.
Strange v. Durham, 309.
Strange v. Powell, 138.
Stratton v. Hill, 140.
Street v. Nelson, 102.
Streeter v. Streeter, 323, 365, 392, 457.
Strickler v. Todd, 92, 95.
Stringer v. Mitchell, 184.
Strobl v. Levan, 69, 71, 88.
Strohm v. Hayes, 531.
Strong v. Adams, 76.
Strong v. Smith, 368, 419.
Strother's Adm'r v. Butler, 166.
Stroud v. Lady Gerrard, 244, 484, 486.
Stuart v. Dutton, 178.
Stuart v. Sears, 164.
Stuart v. Wilkins, 95.
Stubbs v. Lainson, 438, 440.
Stultz v. Dickey, 81.
Stumps v. Kelley, 90, 449.
Sturges v. Bush, 276.
Sturges v. Keith, 110, 112.
Sturman v. Colon, 309.
Stuyvesant v. Tompkins, 78.
Suffern v. Townsend, 80.
Sullivan v. Boswell, 365.

Sullivan v. Jones, 78.
Sullivan v. Waterman, 223.
Summers v. McKim, 167.
Sumner v. Finegan, 453.
Sundberg v. Goar, 395.
Supreme Lodge A. O. U. W. v. Zuhlke, 392, 397.
Swain & Son v. Chicago, B, & Q. R. Co., 197, 489.
Swan v. Wilkinson, 391.
Swift v. Crocker, 456.
Swift v. Moseley, 102, 105.
Swift Co. v. Gaylord, 218.
Swift & C. & B. Co. v. U. S., 162.
Syhurn v. Slade, 179.

T

Taft v. Brewster, 259.
Talbert v. Cason, 322.
Talmadge v. Scudder, 77.
Tandrup v. Sampsell, 393.
Tanner v. Allison, 317.
Tappan v. Campbell, 139.
Tarleton v. Wells, 376, 381.
Tarver v. Smith, 177.
Tate v. Wellings, 457.
Tatem v. Perient, 440.
Tatum v. Louisville & N. R. Co., 497.
Taylor v. Cole, 371.
Taylor v. Eastwood, 351, 469.
Taylor v. Gladwin, 177.
Taylor v. Gould, 161.
Taylor v. Hanlon, 113.
Taylor v. Horde, 333.
Taylor v. Jones, 74, 79.
Taylor v. Laird, 148.
Taylor v. Morgan, 228.
Taylor v. Needham, 435, 520.
Taylor v. New Jersey Title Guarantee & Trust Co., 499.
Taylor v. Pope, 272.
Taylor v. Robinson, 313.
Taylor v. Russell, 178, 179.
Taylor v. Smith, 371.
Taylor v. Sommers Bros. Match Co., 453.
Taylor v. Wells, 231.
Taylor v. Williams, 158.
Taylor v. Wilson, 142, 143.
Tebbets v. Tilton, 419, 429, 521.
Ten Eyck v. Waterbury, 416.
Tennant's Ex'r v. Gray, 253, 487.
Terry v. Munger, 166.
Thatcher v. Lyman, 481.
Thayer v. Brewer, 351, 410.
Thayer v. Hutchinson, 103.
Thayer v. Rogers, 421.
Theis v. Svoboda, 155.
Thomas v. Anthony, 315.
Thomas v. Black, 338.
Thomas v. Brady, 164.
Thomas v. Hall, 2.
Thomas v. Mott, 155.
Thomas v. Riley, 310.
Thomas v. Roosa, 252, 515.
Thomas v. Spofford, 124, 234.
Thomas v. Van Ness, 249.
Thomas Mfg. Co. v. Watson, 156.
Thomasson v. Agnew, 97.
Thome v. Haley, 272.
Thompson v. Adams, 179.
Thompson v. Bell, 207.
Thompson v. Fellows, 377, 436, 438.
Thompson v. French, 133, 134, 139.
Thompson v. Howard, 163.
Thompson v. Lee, 464.
Thompson v. Lyon, 178.
Thompson v. Moore, 97.
Thompson v. Rose, 112.
Thompson Co. v. Burns, 486.
Thompson Co. v. Kollmeyer, 155.
Thomson v. Locke, 453.
Thorn v. Shering, 343, 344.
Thorne v. Fox, 323.
Thornton v. Adams, 519.
Thornton v. Smith, 256.
Thornton v. Sturgis, 148.
Thorp v. Burling, 76, 106.
Thorpe & Uxor v. Booth, 247.
Thorwarth v. Blanchard, 452.
Thouron v. Paul, 144.
Thrale v. Bishop of London, 345.
Thrall v. Wright, 323.
Thrift v. Payne, 159.
Throop v. Sherwood, 156, 165.
Thurber v. Conners, 182.
Thurman v. Wild, 438.
Thurman v. Willingham, 385.
Thurston v. Blanchard, 102, 108, 112.
Thurston v. Mills, 166.
Thurston v. Percival, 159.
Tillis v. Liverpool & L. & G. Ins. Co., 377.
Tillotson v. Stipp, 202.
Tilson v. Town of Warwick Gaslight Co., 137.
Tinney v. Ashley, 248.
Tippet v. May, 6, 284, 286, 415.
Titus v. Johnson, 182.
Tobey v. Berly, 248.
Tobey v. Webster, 75, 78.
Todd v. Bettingen, 56.
Tolan v. Hodgeboom, 111.
Toland v. Sprague, 438.
Toledo, P. & W. R. Co. v. Webster, 531.
Toledo, W. & W. R. Co. v. Chew, 159, 165, 166.
Toledo, W. & W. R. Co. v. Harmon, 90.
Toledo, W. & W. R. Co. v. Jacksonville Depot Building Co., 202.
Tolputt v. Wells, 376.
Tomkins v. Ashby, Moody & M., 283.
Tomlin v. Burlace, 409.
Tomlinson v. Darnall, 349.
Tompkins v. Halle, 111.
Tooker v. Arnoux, 534.
Topping v. Evans, 75.
Torrance v. Gibbins, 314.
Torrence v. Irwin, 78.
Torrey v. Field, 428.
Touchard v. Keyes, 177.
Towle v. Lovet, 101, 106.
Town v. Wood, 164.
Town of Barkhamsted v. Parsons, 267.
Town of Colebrook v. Merrill, 228, 533.
Town of Geneva v. Cole, 137.
Town of Harlem v. Emmert, 392.
Town of Royalton v. Royalton & W. Turnpike Co., 498.
Townsend v. Crowdy, 164.
Townsend v. Davis, 539.
Townsend v. Jemison, 284, 289.
Tracy v. Warren, 124.
Trammell v. Lee County, 156.
Tranger v. Sassaman, 82.
Trapnall v. Merrick, 134.
Traylor v. Horrall, 102.
Treat v. Barber, 487.
Tresham v. Ford, 280, 283.
Treusch v. Kamke, 197.
Tribble v. Frame, 471.
Tribble v. Oldham, 141.
Triggs v. Sun Printing & Publishing Ass'n, 221.
Trinkle v. Reeves, 164.
Tripp v. Grouner, 109.
Trollop, Case of, 405.
Trotter v. Taylor, 318.
Troup v. Smith's Ex'rs, 371.
Trovillo v. Tilford, 103.
Troy Laundry Machinery Co. v. Carbon City Laundry Co., 121.
Trudo v. Anderson, 130.
Trueman v. Hurst, 257.
Truett v. Legg, 50.
Trumbull v. Campbell, 162.
Trustees of Dartmouth College v. Clough, 327.
Tubbs v. Caswell, 419.
Tubbs v. Richardson, 111.
Tucker v. Ladd, 428.
Tullidge v. Wade, 69, 89.

Tunnison v. Field, 158.
Turner v. Eyles, 515.
Turner v. Felgate, 480.
Turner v. Hawkins, 69, 71, 88.
Turner v. Reynolds, 177.
Turner v. Waldo, 106, 109.
Turney v. Sturges, 475.
Tuttle v. Campbell, 166.
Tuttle v. Gilbert Mfg. Co., 95.
Tuttle v. Robinson, 130.
Tweedy v. Jarvis, 464, 465.
Tyler v. Bailey, 164.
Tyler v. Erskine, 538.
Tyler v. Freeman, 126.

U

Underhill v. Ellicombe, 137, 138.
Underwood v. Campbell, 410.
Underwood v. Parks, 312.
Union Brewing Co. v. Meier, 179, 333.
Union Cotton Manufactory v. Lobdell, 202.
Union Pac. R. Co. v. Wyler, 377.
Union Petroleum Co v. Bliven Petroleum Co., 82, 91.
Union Stockyard & Transit Co. v. Mallory Son & Zimmermann Co., 111.
United Copper Mining & Smelting Co. v. Franks, 76.
U. S. v. Brown, 141, 143.
U. S. v. Colt, 139.
U. S. v. Cruikshank, 10.
U. S. v. Cumpton, 329.
U. S. v. Gurney, 418.
U. S. v. Morris, 291.
U. S. v. Willard, 357.
U. S. Fidelity & Guaranty Co. v. District Grand Lodge No. 27 of Grand United Order of Odd Fellows, 265.
U. S. Printing & Lithograph Co. v. Powers, 486.
U. S. Tire Co. v. Kirk, 56.
University of Vermont v. Joslyn, 454.
Upton v. Craig, 74.
Upton v. Vail, 95.

V

Vail v. Lewis, 73, 74.
Valentine v. Northrop, 180.
Valerii v. Brenkwater Co., 497.
Valerius v. Richard, 536.
Van Alen v. Rogers, 181.
Van Baalen v. Dean, 127.
Van Brunt v. Schenck, 74, 76, 77, 79.
Van Buren Light & Power Co. v. Van Buren, 143, 152.

[The figures refer to pages]

Vanderkarr v. Vanderkarr, 143.
Van Deusen v. Blum, 134, 160.
Van Doren v. Everitt, 81.
Van Etten v. Hurst, 351.
Van Horn v. Freeman, 89.
Vanlandingham v. Ryan, 288.
Van Namee v. Bradley, 127, 318, 320.
Van Ness v. Forrest, 410.
Van Ness v. Hamilton, 343.
Van Norman v. Young, 361.
Van Rensselaer's Ex'rs v. Platner's Ex'rs, 253, 487.
Van Santwood v. Sandford, 265.
Van Vacter v. McKillip, 89.
Van Valkenburgh v. Rouk, 329.
Van Vleet v. Blackwood, 179.
Varley v. Zahn, 91.
Varn v. Pelot, 530.
Varnes v. Seaboard Air Line R. Co., 315, 505.
Varnum v. Martin, 94.
Vasse v. Smith, 95, 322.
Vaughan v. Everts, 426.
Vaughan v. Thompson, 187, 188.
Vaughn v. Brown, 22.
Vausse v. Russel, 123.
Vavasour v. Ormrod, 250.
Vere v. Smith, 377, 380, 448.
Vermilya v. Beatty, 454.
Verschures Creameries, Ltd., v. Hull & Netherlands S. S. Co., 163.
Vicary v. Moore, 361.
Vickery v. Sherburne, 318.
Victors v. Davies, 256.
Viles v. Barre & M. Traction & Power Co., 158, 257.
Vincent v. Cornell, 112.
Vining v. Baker, 103.
Virginia Fire & Marine Ins. Co. v. Saunders, 377.
Vivian v. Jenkins, 418.
Vogrin v. American Steel & Wire Co., 215.
Von Boeckmann v. Corn Products Refining Co., 286.
Vrooman v. McKaig, 162.
Vynior, Case of, 512, 513.

W

Wabash R. Co. v. Billings, 516.
Wabash, St. L. & P. R. Co. v. McCasland, 94.
Wabash Western R. Co. v. Friedman, 516.
Waddell v. Phillips, 155.
Wade v. Emerson, 361.
Wadhams v. Swan, 307, 323, 410, 438.
Wadleigh v. Janvrin, 100, 108.
Wadleigh v. Katahdin Pulp & Paper Co., 149, 214.
Wadleigh v. Sutton, 158, 257.
Wadsworth v. Gay, 165.
Wadsworth v. Woodford, 399.
Wageck v. Travelers' Ins. Co., 414.
Waid v. Dixon, 244, 258.
Wailing v. Toll, 322.
Wait v. Baldwin, 123.
Walcott v. Canfield, 397.
Waldeck Co. v. Emmart, 271.
Walden v. Feller, 124.
Walden v. Holman, 280, 288.
Wales v. Bogue, 179.
Walker v. Conant, 162, 164.
Walker v. Duncan, 159, 166.
Walker v. Fenner, 118, 119.
Walker v. Goodman, 94.
Walker v. President, etc., of Michigan State Bank, 511.
Walker v. Richards, 245.
Walker v. Shackelford, 160.
Walker v. Tirrell, 245.
Walker v. Winn, 323.
Walker v. Witter, 168.
Wall, Ex parte, 443.
Wall v. Chesapeake & O. R. Co., 314, 515.
Wallace v. Curtiss, 291, 292, 532.
Wallace v. Dixon, 220.
Wallace v. Holly, 28, 278.
Wallace v. McConnell, 361, 362.
Wallace v. Middlebrook, 538.
Waller v. Bowling, 229.
Waller v. River Forest, 486.
Wallis v. Doe ex dem. Smith's Heirs, 180.
Wallis v. Frazier, 245.
Walpole v. Smith, 125, 126.
Walser v. Moran, 151.
Walsh v. North American Cold Storage Co., 248.
Walsh v. Sisson, 96.
Walsingham, Case of, 511.
Walter v. Laughton, 195.
Walters v. Hodges, 339.
Walters v. Ottawa, 217, 297.
Walters v. Sheffield, 177.
Walton v. Clarke, 79.
Walton v. Follansbee, 178.
Walton v. Malcolm, 179, 334.
Wann v. McNulty, 152.
Ward v. Athens Mining Co., 324.
Ward v. Bell, 204.
Ward v. Blunt, 316, 413.
Ward v. Harris, 242, 243.
Ward v. Huff, 54.
Ward v. Macauley, 67, 76, 77, 85, 93.

[The figures refer to pages]

Ward v. Mississippi River Power Co., 309, 310.
Ward v. Patton, 296.
Ward v. Semken, 377.
Ward v. Warner, 148.
Ward v. Wiman, 95.
Wardell v. Fosdick, 95, 96.
Warden and Commonalty of the Mystery of Grocers v. Archbishop of Canterbury, 433.
Ware v. Dudley, 519.
Warfield v. Walter, 91.
Waring v. Griffiths, 469.
Waring v. Yates, 457.
Warn v. Bickford, 252.
Warner v. Bacon, 253, 487.
Warner v. Carlton, 235.
Warner v. Dunnavan, 94.
Warner v. Wainsford, 307, 410, 413, 414.
Warren v. Badger Lead & Zinc. Co., 530.
Warren v. Caryl, 165, 257.
Warren v. Consett, 328.
Warren v. Dwyer, 227.
Warren v. Flagg, 330.
Warren v. Harris, 531.
Warren v. Leiter, 122.
Warren v. Leland, 126, 127.
Warren v. McCarthy, 186.
Warren v. Webb, 453.
Washburn v. Mosely, 498.
Washington v. Baltimore & O. R. Co., 223.
Washington Ice Co. v. Webster, 236.
Waterbury Nat. Bank v. Reed, 330.
Waterhouse v. Sterchi Bros. Furniture Co., 483.
Waterman v. Clark, 365.
Waterman v. Robinson, 124, 126.
Waters v. Lilley, 308.
Watkins v. Ford, 165.
Watkins v. Wake, 140.
Watriss v. Pierce, 408, 418, 423, 492.
Watson v. Cambridge, 169.
Watson v. Jones, 221.
Watson v. King, 101.
Watson v. Willard, 539.
Watson v. Woolverton, 162.
Wattles v. Du Bois, 127.
Watts v. Lehman, 100.
Watts v. Thomas, 453.
Waugh v. Bussell, 485.
Weall v. King, 397.
Weaver v. Bush, 68.
Weaver v. Lawrence, 129.
Webb v. Fox, 316.
Webb v. Mann, 111.
Webb v. Martin, 416, 417.
Webb v. Ross, 440.
Webb v. Sturtevant, 81.
Webber v. Davis, 109.
Webster v. Enfield, 157.
Webster v. Hill, 178.
Webster v. State Mut. Fire Ins. Co., 356.
Weed v. Hall, 125.
Weeding v. Aldrich, 511.
Weedon v. Timbrell, 69, 89.
Weeks v. Peach, 416.
Weeton v. Woodcock, 100.
Wegersloffe v. Keene, 244.
Weidensaul v. Reynolds, 103.
Weigley's Adm'rs v. Weir, 252.
Weiler v. Kershner, 166.
Weiss v. Binnian, 287.
Weiss v. Mauch Chunk Iron Co., 140.
Welch v. Durand, 211.
Welch v. Jenks, 80, 81.
Welch v. Sykes, 331.
Weld v. Hubbard, 207.
Weld v. Oliver, 111.
Weldon v. Lytle, 100.
Welker's Lessee v. Coulter, 178.
Weller v. Weyand, 97.
Weller & Co. v. Camp, 499.
Wellington v. Milliken, 456, 459.
Wells v. Howell, 68, 90.
Wells v. Iggulden, 267, 509.
Wells v. Kanawha & M. R. Co., 208.
Wells v. Knight, 89.
Wells v. Porter, 161.
Weltale v. Glover, 446.
West v. Hughes, 187.
West v. Ratledge, 18.
West v. Troles, 206.
West Chicago, St. R. Co. v. Levy, 488.
West Chicago St. R. Co. v. Morrison, Adams & Allen Co., 424.
Western Const. Co. v. Smithmeier, 56.
Western Loan & Savings Co. v. Butte & B. Consol. Min. Co., 24.
Western Union Tel. Co., Ex parte, 281.
Western Union Tel. Co. v. Bowen, 151.
Western Union Tel. Co. v. Longwill, 533.
Western Union Tel. Co. v. Morrison, 281.
Weston v. Mason, 532.
Westropp v. Solomon, 164.
Westwood v. Cowne, 489.
Wetherell v. Clerkson, 506.
Wetherell v. Spencer, 127.
Wetmore v. Baker, 256.
Wettenhall v. Sherwin, 491.
Wetzel v. Hancock County, 24.
W. F. Parker & Son v. Clemons, 166.

Wheeler v. Curtis, 410.
Wheeler v. Hotchkiss, 79.
Wheeler v. McCorristen, 320.
Wheeler v. Sanitary Dist. of Chicago, 350.
Wheeler v. Train, 105, 125.
Wheeler v. Wheeler, 161.
Wheeler v. Wilson, 258.
Wheeler & Wilson Mfg. Co. v. Heil, 111.
Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co., 244.
Wheelock v. Wheelright, 110.
Whelan v. Massachusetts Bonding & Ins. Co., 249.
Whelpdale, Case of, 329.
Whidden v. Seelye, 100.
Whipple v. Fuller, 202.
Whipple v. Gilpatrick, 109.
Whipple v. McGinn, 185.
Whipple v. Parker, 160.
Whitaker v. Freeman, 418, 422, 424.
Whitall v. Morse, 248.
Whitbeck v. Whitbeck, 167.
White v. Bailey, 530.
White v. Bourquin, 281.
White v. Brantley, 76.
White v. Concord R. Co., 531, 538.
White v. Delavan, 292.
White v. Demary, 112, 113.
White v. East Side Mill Co., 444.
White v. Hapeman, 180.
White v. Oliver, 158.
White v. Romans, 498.
White v. Sanborn, 454.
White v. Sheffield & T. St. R. Co., 233.
White v. Street, 273.
White v. Thomas, 265.
White v. White, 176.
White v. Wilson, 242, 243.
White Co. v. Union Transfer Co., 127.
Whitecraft v. Vanderver, 267.
Whitehead v. Harrison, 115, 232.
Whitfield v. Whitfield, 117.
Whitford v. Drexel, 180.
Whiting v. Cochran, 209.
Whitley v. Bramble, 179.
Whitman v. Merrill, 129.
Whitney v. Spencer, 205.
Whitney v. Wright, 178.
Whittelsey v. Wolcott, 413.
Whittington v. Christian, 181, 187.
Whitwell v. Wells, 318, 421.
Wiard v. Semken, 115.
Wiatt v. Essington, 461, 498.
Wickham v. Freeman, 78, 79.
Wickliffe v. First Nat. Bank, 8.
Wickliffe v. Hill, 242.
Wiggins Ferry Co. v. Blakeman, 313.
Wilbraham v. Snow, 80, 468.
Wilbur v. Gilmore, 288.
Wilby v. Bower, 93.
Wilcox v. Cohn, 251.
Wilcox v. Kinzie, 79, 338.
Wilcox v. Servant of Skipwith, 357.
Wilde v. Centillon, 81.
Wilder v. Handy, 491.
Wildey v. Fractional School Dist. No. 1 of Paw Paw and Antwerp, 157.
Wildman v. Norton, 318.
Wilkerson v. McDougal, 117.
Wilkes v. Broadbent, 534.
Wilkes v. Williams, 445.
Wilkins v. Wingate, 134.
Wilkinson v. Connell, 76.
Wilkinson v. Verity, 115, 119.
Willard v. Missani, 207.
Willard v. Zebr, 386.
Willey v. Carpenter, 280.
Willey v. Paul, 488.
Williams v. Allen, 396.
Williams v. Bemis, 159.
Williams v. East India Co., 513.
Williams v. Gesse, 110.
Williams v. Holland, 71, 88.
Williams v. Jones, 168.
Williams v. Lewis, 76.
Williams v. Morland, 82, 92.
Williams v. Ogle, 464.
Williams v. Peninsular Grocery Co., 56, 390, 495.
Williams v. Preston, 136.
Williams v. Sherman, 156.
Williams v. Smith, 247, 318.
Williams v. Staton, 252.
Williams v. Wilcox, 492.
Williams Patent Crusher & Pulverizer v. Kinsey Mfg. Co., 365.
Williamson v. Allison, 95.
Willington v. West Boylston, 157.
Willmarth v. Crawford, 140.
Wills v. Barrister, 129.
Wills v. Church, 454.
Wills v. Noyes, 127.
Willson v. Foree, 159, 165, 166.
Wilmington & R. R. Co. v. Robeson, 250.
Wilson v. Alexander, 164.
Wilson v. Brechemin, 141.
Wilson v. Ellis, 75.
Wilson v. Gilbert, 522.
Wilson v. Guyandotte Timber Co., 495.
Wilson v. Hickson, 140, 141, 143.
Wilson v. Hobday, 513.
Wilson v. Kemp, 449.
Wilson v. King, 327.
Wilson v. Martin, 77, 93.

Wilson v. Nevers, 396, 399.
Wilson v. Ray, 288.
Wilson v. Reed, 111.
Wilson v. Royston, 125.
Wilson v. Smith, 71, 82, 88, 93.
Wilson v. Wagar, 165.
Wilson v. Wilson, 92, 365, 396.
Wilson's Adm'r v. Bowens, 487.
Wilson's Lessee v. Inloes, 179.
Wilsons v. Bibb, 471.
Wilt v. Ogden, 156, 822.
Wilt v. Vickers, 89.
Wilton v. Tazwell, 162.
Wimberly v. Hurst, 178.
Wimbish v. Tailbois, 503.
Wimbleton v. Holdrip, 499.
Winchell v. Noyes, 166.
Wincher v. Shrewsbury, 81.
Winchester v. Rounds, 228.
Wing v. Milliken, 110.
Wingate v. Smith, 234.
Wingfield v. Neall, 539.
Wingo v. Brown, 244, 258.
Winheim v. Field, 495.
Winkler v. Meister, 89.
Winship v. Neale, 76, 105.
Winslow v. Beal, 67, 85.
Winstone v. Linn, 376.
Winston's Ex'r v. Francisco, 242.
Wintle v. Freeman, 97.
Wire v. Slocum, 228.
Wiscart v. D'Auchey, 538.
Wisconsin Cent. R. Co. v. Wieczorek, 6.
Wiscot, Case of, 475.
Wise v. Hodsoll, 349, 351, 353.
Witbeck v. Waine, 152.
Withers v. Greene, 404.
Withers v. Knox, 251.
Witherspoon v. Clegg, 103.
Witt v. St. Paul & N. P. R. Co., 81.
Witteman Co. v. Goeke, 299.
Wolf v. Beaird, 164.
Wolf v. Binder, 495.
Wolfe v. Howes, 157, 511.
Wolkau v. Wolkau, 146.
Wonsettler v. Lee, 160.
Wood v. Budden, 440, 441.
Wood v. Butts, 408.
Wood v. Darnell, 234.
Wood v. Fletcher, 464.
Wood v. Morton, 179.
Wood v. Papendick, 278.
Wood v. Weimar, 126, 127.
Woodcock v. Cole, 499.
Wooderman v. Baldock, 106.
Woodgate v. Knatchbull, 74.
Woodham v. Hill, 55.
Woodruff v. Zaban & Son,
Woods v. Ayres, 154, 189.
Woods v. Haukshead, 377, 380.
Woods v. Lane, 178.
Woods v. Nixon, 126.
Woods v. Pettis, 130.
Woodstock v. Hancock, 169.
Woodward v. Grand Trunk R. Co., 128.
Woodworth v. Kissam, 102.
Woodworth v. Woodburn, 488.
Woolaston v. Webb, 506.
Wooster v. Butler, 184.
Worley v. Harrison, 434.
Worley v. Johnson, 155.
Worsley v. Wood, 247.
Wright v. Armstrong, 128.
Wright v. Atlantic Coast Line R. Co., 495.
Wright v. Carter, 176.
Wright v. Dickinson, 162, 164.
Wright v. Dunn, 183.
Wright v. Freeman, 92.
Wright v. Geer, 397.
Wright v. Guy, 275.
Wright v. Haskell, 157.
Wright v. Johnson, 252.
Wright v. Lainson, 314.
Wright v. Tuttle, 249.
Wright v. Watts, 420.
Wright v. Weisinger, 330.
Wright v. Wilcox, 69, 91.
Wyant v. Crouse, 88.
Wyat v. Aland, 515, 518.
Wyld v. Pickford, 109.
Wyman v. Brown, 183.

Y

Yale v. Saunders, 113, 230.
Yarber v. Chicago & A. R. Co., 536.
Yates v. Boen, 320.
Yates v. Carlisle, 514.
Yeager v. Wallace, 112.
Yeatman v. Cullen, 377.
Yeaton v. Lynn, 361.
Yeazel v. Harber Bros., 523.
Yelverton v. Conant, 390.
Yerger v. Warren, 60.
Yerrington v. Greene, 157.
Yingling v. Kohlhass, 350.
Yocum v. Zahner, 75.
Yong Den v. Hitchcock, 259.
York v. Marshall, 124.
York v. Texas, 24.
Young v. Ashburnham, 139.
Young v. Black, 322.
Young v. Cooper, 136.
Young v. Edwards, 114.
Young v. Fentress, 415.
Young v. Hawkins, 134, 141.

[The figures refer to pages]

Young v. Herdic, 123.
Young v. Kimball, 126.
Young v. Rudd, 358, 437.
Young v. Ruddle, 437.
Young v. Scott, 140.
Young v. Stevens, 323.
Younglove v. Knox, 236.

Z

Zeidler v. Johnson, 519.
Zell v. Dunkle, 151.
Zerger v. Sailer, 247.
Ziebarth v. Nye, 212.
Zouch & Bamfield, Case of, 409.

INDEX

[THE FIGURES REFER TO PAGES]

A

ABATEMENT,
Demurrer to plea in, does not open record, 285.
Pleas in, 388–392.
Commencement and conclusion, 404, 405.
Grounds of abatement, 388.
Judgment on, 401, 402.
Matter in abatement pleaded in bar, 400.
Must give plaintiff a better writ or bill, 399.
Forms of, 402, 403.
See Dilatory Pleas.

ABSQUE HOC,
Nature and use, 338, 343.
See Special Traverse.

ACCIDENT,
Affirmative defense in trespass, 211.

ACCOUNT,
Declaration in, essential allegations, 275, 276.
The breach, 276.
The damages, 276.
The statement, 275.
Method of procedure, 146, 147.
When the action lies, 144–146.

ACCOUNT STATED,
General assumpsit upon, 164, 165.

ACTION ON THE CASE,
See Case.

ACTIONS,
Classification of, 62.
Local and transitory, 451–454.
Mixed actions, 64.
Personal actions, 65.
Proprietary actions, 64, 65.
Real actions, 62, 63, 64.

ADMISSION,
By demurrer, 277, 278, 282, 283.
By failure to deny, 357.
Protestation to prevent, 431.

[The figures refer to pages]

ADVERSE POSSESSION,
Severance of chattels during, 180.
See Trespass for Mesne Profits.

AFFIRMATIVE DEFENSES,
How pleaded, 565.
See Confession and Avoidance; also the different forms of action.

AFFIRMATIVES PREGNANT,
See Negatives and Affirmatives Pregnant.

AGGRAVATION,
Certainty and particularity in, 505, 506.
Matter in, should not be traversed, 343.

AIDER,
By pleading over, 291, 292.

AIDER BY VERDICT,
Informal pleading cured by verdict, 531, 532.
Will not supply necessary allegations, 532.

ALTERNATIVE PLEADING,
Alternative claims, proposed rules, 550.
Alternative defenses, 551.
Bad on special demurrer, 519, 520.

AMBIGUITY,
Pleadings must not be ambiguous or doubtful, 442, 443, 518, 519.
See Negatives and Affirmatives Pregnant; Construction of Pleadings.

AMENDMENT,
Changing form of action, 296.
Changing cause of action, 296.
Effect of statute of limitations, 296, 297.
Adding essential averment, 297.
Leave to amend, 295.
Limitations on right, 296, 297.
Time for making, 294, 295.

ANOTHER ACTION PENDING,
See Dilatory Pleas.

ANTICIPATING DEFENSES,
Matter of opposition need not be anticipated, 510, 511.
Exception, pleadings in estoppel and plea of alien enemy, 499, 511.

APPEARANCE,
Definition, 24.
General or special, 386.
Voluntary or compulsory, 24.
Waiver of objections to process by, 24, 385.
What constitutes, 24.

ARGUMENTATIVENESS,
Pleading must not be argumentative, 407–409.
Two affirmatives or negatives may cause, 409.

ARGUMENTS OF COUNSEL,
Appeal to reason and emotion, 42, 43.

[The figures refer to pages]

ARREST OF JUDGMENT,
For defects in pleadings, 528, 529.
For defects in verdict, 530.
When motion lies, 527–530.

ASSUMPSIT,
Concurrent with case, 150, 151.
Contracts of record, 168, 169.
Declaration in special assumpsit, 239–253.
Breach, 251, 252.
Conditions precedent, 246–249.
Conditions subsequent, 249–251.
Damages, 253.
Essential allegations, 239.
Explanatory inducement, 240.
Consideration, 240–243.
Promise, 244, 245.
Form of, 259.
Provisos and exceptions, 250, 251.
Defenses, how pleaded,
General issue, 322–325, 565, 566.
Affirmative defenses, 324, 325, 566, 567.
Forms, general issue, 325.
Plea of statute of limitations, 325.
When action lies, 148–150.
Merger of simple contract in specialty, 152.
Origin of remedy, 149.
Statutory liability, 169.

ASSUMPSIT (GENERAL),
Scope of general assumpsit, 153.
Special contract fully executed by plaintiff, 155.
Debt payable in specific articles, 156.
Complete performance prevented by defendant, 157.
Partial performance by plaintiff, 158, 159.
Declaration in general assumpsit, 254–259.
Indebitatus assumpsit, 255, 256.
Quantum meruit and quantum valebant, 256, 257.
Account stated, 257.
Forms of declaration, 260–263.
Defenses, how pleaded,
General issue, 326, 567, 568.
Affirmative defenses, 326, 327, 568.

ASSUMPTION OF RISK,
When declaration must negative defense, 217, 218.

ATTACHMENT,
As security, 20.
At common law, to compel appearance, 20.

AUTHORITY,
Certainty of showing, 479, 480.
By cognizance in replevin, 480.

B

BAIL,
Special or common, 19, 20.

BILLS OF EXCEPTIONS,
Nature of, 540.

BOND,
Action of debt on, 135, 142.
Assumpsit not the proper remedy on, 152.
Bail, 19, 20.
Breach of condition of, 500.
Performance of condition of, 499, 502.

BREACH,
Assignment of, in general assumpsit, 258, 259.
In declaration in debt, 267.
In covenant, 272.
In account, 276.
Special assumpsit, 251, 252.

BURDEN OF PROOF,
Affirmative of issue has, 37.
Burden of rebuttal, 38.
Function of judge and jury, 38.
Indicated by pleadings, 38.
Prima facie case, 37.

CAPIAS AD RESPONDENDUM,
When allowed, 19.

CASE,
Declaration in, anticipating defenses, 217, 218.
Breach of duty, 216.
Damages, 223.
Duty of defendant, 214, 215.
Essential allegations, 214.
Forms of declaration, 223.
Libel, 223, 224, 225.
Malicious prosecution, 226, 227.
Plaintiff's right, 214, 215.
Defenses in, affirmative defenses, 314, 562.
General issue, 312, 313, 560, 561.
Form of, 315.
Specific traverse, 314, 315, 561, 562.
Scope of action, 83, 84.
Consequential injury, 87, 88.
Distinctions from trespass, 85, 86.
Election of trespass or case for negligence, 88.
Intangible property, 91, 92.
Loss of services, 89.
Malicious prosecution or abuse of process, 91.
Neglect of official duty, 96.

CASE—Continued,
Reversionary rights, 93, 96.
Statutory liability, 97.
Torts in connection with contract, 93–96.
Trespass and case compared, 83.
Wrongs by servant, master's liability, 90.

CAUSE OF ACTION,
Defined, 196.

CERTAINTY,
In pleading, general rules, 497.
As to names of persons, 463.
As to place, 455.
In showing title, 467.
In showing authority, 479.
As to time, 456–460.
As to quantity, quality, and value, 460.
Degrees of, to common intent, 498, 499.
To certain intent in general, 498.
To certain intent in every particular, 498.
Performance of condition, 499, 500.
Subordinate rules limiting and qualifying degree of, 501–508.
See, also, Conclusion of Law; Evidence; General Pleading; Judicial Notice; Particularity; Presumptions.

CERTIORARI,
Writ of, 541.

CODE PLEADING,
Basis in common law, 3, 4.
Forced issue in, 301.

COGNIZANCE,
See Replevin.

COLOR,
In pleading, defined, 351.
Classification, 353.
Express color, 352–355.
Implied color, 350–352.

COMMENCEMENT AND CONCLUSION,
Conclusion of affirmative pleadings, 445.
Of pleadings, should mark their object and tendency, 404, 444, 445.
Of plea in abatement, 405.
Of plea in bar, 445.
Of plea in suspension, 405.
Of plea to the jurisdiction, 404.
Of replication to plea in abatement, 405.
Of replication to plea in bar, 375.

COMMENCEMENT OF ACTION,
Capias, 19.
Præcipe, 19.
Summons, 18–20, 456, 457, 545.

COMMON BAR, PLEA OF,
Liberum Tenementum, 311.

COMMON COUNTS,
Forms of declaration, 260-263.
In debt, 264.
In general assumpsit,
See Assumpsit (General).

COMMON-LAW PLEADING,
As a system, 1.
Criticism of, 6.
History of, 1.
Importance of study, 7.
Merits of, 5, 7.

COMMON-LAW STATES,
Enumeration of, 2.

CONCLUSION OF LAW,
Conversion not, 229.
Duty as, 496.
Fraud as, 494, 551.
Negligence as, 216, 497.
Ultimate or operative facts, 494, 495.

CONDITIONS,
Averment of performance in special assumpsit, 239.
Consideration of covenant, averment of performance, 271, 272.
General allegation insufficient, 248, 249.

CONFESSION AND AVOIDANCE,
Classification of pleas, 80, 300.
Pleas in discharge, 350.
Pleas in justification or excuse, 349.
Form of plea in release, 355.
Pleadings in, nature and effect of, 348.
Conclusion of, 350.
Must give color, 351.

CONSIDERATION,
Alleging consideration in declaration in special assumpsit, 240-244.
Averment of in general assumpsit, 255, 256, 257.

CONSTRUCTION OF PLEADINGS,
Dilatory pleas, 399, 400, 404, 498.
Strict, 442, 518, 519.
See Certainty; Ambiguity.

CONSTRUCTIVE POSSESSION,
Sufficient when, trespass, 76-79.
Trover, 105, 106.

CONTINUANCE,
Adjournment as, 26.

CONTRACT,
Statement of in special assumpsit, 239-250.
Allegation of breach in special assumpsit, 251, 252.
Declaration in debt on simple contract, 264-265.
Declaration on specialty, statement of contract, 265, 271.
See Assumpsit; Covenant; Debt.

CONTRIBUTORY NEGLIGENCE,
When declaration must negative defense, 217, 218.

CONVERSION,
Demand and refusal when necessary, 112, 113.
Detention as, 111, 112.
Nature of, 107.
Nonfeasance is not, 110.
Varieties of, 108, 109.
See Trover.

CONVEYANCE,
Manner of pleading, 474, 475, 484, 485.

CORAM NOBIS,
Writ of error coram nobis, 538.

COUNTS,
Several joined, in same declaration, 200-206.
See Duplicity.

COURT AND JURY,
Province of, 38, 43, 44.

COVENANT,
Debt and covenant, 142, 143.
Declaration, essential allegations, 270-278.
Execution of the covenant, 271.
The breach, 272.
The damages, 273.
Form of declaration in, 273, 274, 346.
General issue, defenses raised by, 331, 332.
Scope of action, when it lies, 141.

CURATIVE STATUTES,
Formal defects in pleading cured by statutes of jeofails and amendments, 292.

D

DAMAGES,
Averment of, in declaration in special assumpsit, 253.
In declaration in general assumpsit, 259.
In debt, 268.
In covenant, 273.
In account, 276.
In case, 223.
In detinue, 232.
In trover, 229.
In trespass, 211.

DAMAGES—Continued,
In replevin, 236.
In ejectment, 187.
In trespass for mesne profits, 180, 187.
General and special, 487, 488, 489.
Gist of action, when, 197, 228.

DEBT,
Declaration in, forms of, 268–270.
Necessary allegations, 263–268.
On simple contracts, 264.
On specialties, 264, 265.
On judgments, 266.
On statutes, 266, 267.
Defenses, affirmative pleas in, 329–331, 569.
General issue, debt on simple contracts, 327, 568.
General issue, debt on specialty, 328, 329, 569.
In debt on judgments, 330, 571.
Scope of action, 132.
As a proprietary action, 134, 135.
Certainty of amount, 138, 139.
Debts of record, 136.
Detinue and debt, 133.
Guaranty contracts, 139, 140.
Payable in installments, 140.
Payable in property, 140, 141.
Recognizance, 137.
Specialty debts, 135.
Statute debts, 137, 138.
When action lies, 132–134.

DECEIT,
Essential allegations in case for, 221, 222.

DECLARATION,
Conformance to process, 206, 207.
General form of, 193.
Joinder of counts, 200.
Different causes of action, 201–203.
Different versions of same cause of action, 203–206.
Form of, 206.
Statement of cause of action, 196.
Consequent damages, 197.
Facts only alleged, 198.
Exceptions, 198, 199, 495.
Prima facie case in contract actions, 238, 239.
In tort actions, 208.
The injury by defendant, 197.
The plaintiff's right, 196.
The formal parts of, venue, 193, 194.
The body, 195.
The commencement, 194.
The conclusion, 195.
The production of suit, 195.

DECLARATION—Continued,
Title of court and term, 194.
See, also, for essential allegations, Account; Assumpsit; Covenant; Debt; Detinue; Ejectment; Replevin; Trespass; Trespass for Mesne Profits; Trover.

DEEDS,
Profert of, 481, 482.
See Bond; Conveyance.

DEFENSE,
Old formula of, 444, 445.

DEMAND,
Allegation of, in declaration in detinue, 232.
In declaration in replevin, 236.
In trover and conversion, 229.

DEMAND OF OYER,
Form of, 484.
Nature of, 482, 483.

DEMURRER,
Admission by, 282, 283.
Defined, 28.
Effect in opening the record, 284, 285.
Exceptions, 285, 286.
Election to demur or plead, 293, 294.
Expediency of, 293, 294.
Form of general demurrer, 289.
General or special, 279, 280.
For alternative pleading, special, 520.
For departure, general, 381.
For duplicity must be special, 523.
For misjoinder may be general, 523.
For misjoinder or nonjoinder of parties, 394, 396, 397.
Issue tendered by demurrer must be accepted, 261, 336.
Joinder in, 288, 289.
Judgment on, 287, 288.
Nature and office of, 277, 278.
Proposed rules as to, 552, 553.
To particular count or part of declaration, 280, 281.

DEMURRER TO EVIDENCE,
Tests legal sufficiency of evidence, 527.
No objection to the pleadings by, 527.

DENIAL,
Evasive denial, 552.
See Traverse.

DEPARTURE,
Mode of objection to, 381.
By general demurrer, 381.
Purpose of rule against, 381.
Rule against, 376–378.
Examples of, 378–380.

DESCRIPTION,
Chattels described by quantity, quality, and value, 460–462.
Descriptive averments must be proved, 515–517.
Of premises in ejectment, 184.
Of property in declaration, in detinue, 231.
In trover, 228.
In trespass, 209–210, 372.
In replevin, 284.
See Variance.

DETINUE,
Damages, 282.
Declaration in, essential allegations, 231, 232.
Defects in action, 116.
Description of property, 231.
Detention, 232.
Form of declaration, 233.
General issue in, 316, 317.
Form of, 317.
Plaintiff's right, 232.
Scope of action, 114, 115.
Contract or tort action, 115n, 116.
Defendant's wrongful act, 118, 119.
For what property, 116, 117.
Plaintiff's right, 117, 118.

DILATORY PLEAS,
Classes of, 382, 383, 400.
In abatement, 388–392.
Another action pending, 390.
Corporate existence, 392.
Misjoinder, 391, 397.
Misnomer, 391.
Non-joinder, 391, 393, 394.
Personal disability to sue, 389.
Wrong venue, 386, 390.
Defined, 29.
Formal commencement and conclusion, 404, 405.
In Illinois, 556–559.
Judgment on, 401, 402.
Order of, 383, 384.
Requisites of, 399, 400.
In suspension, 400.
See Abatement.

DISCONTINUANCE,
By neglect to enter judgment on part not answered, 286.
By replying to partial pleas, 414, 415.

DUPLICITY,
Consequences of, defect in form, special demurrer, 522, 523
Duplicity in declaration not allowed, 200–206.
Inducement, 522.
Several counts, 200–206, 260.

DUPLICITY—Continued,
Several grounds of action, 201, 521.
Duplicity in pleas, 418–427.
Bad and good defenses in one plea, 426, 427.
General issue as double plea, 430.
Replication de injuria, 429, 430.
Several pleas allowed, 419–424.
Singleness of issue, 418, 419, 426.

DUTY,
Facts showing existence must be alleged, 214–216.
See Conclusion of Law.

E

EJECTMENT,
Declaration, damages, 185.
Description of premises, 184.
Essential allegations, 183–185.
Fictions abolished, 175, 176.
Forms of, 190, 191.
Ouster by defendant, 185.
Plaintiff's right, 184.
Defenses in, how pleaded, 333.
Affirmative defenses, 333, 334.
Equitable title insufficient, 178, 179n.
General issue, 333, 564, 565.
Specific traverse, 333.
Scope of, 173.
Extension to freeholders, 174, 175.
Origin in trespass, 173, 174.
Title to support, 177–179.
Statutory substitutes, 182, 183.
Trespass for mesne profits, 180, 181.
Trespass to try title, 182.
When it lies, 176.

ELECTION,
To demur or plead, 293, 294.

ENTRY, WRIT OF,
See Real Actions.

EQUITY PLEADING,
Nature of, 11.

ERROR, WRIT OF, 537–539.

ESTOPPEL,
Plea in, 356.
Special traverse, avoidance by, 340, 435.
Title, estoppel of adverse party to deny, 435, 478, 479.

EVIDENCE,
Demurrer to, 526, 527.
Need not be pleaded, 492, 493.
Reception of, order of proof, 36, 39.

EXCEPTIONS,
Bills of, 540.
EXCUSE,
See Confession and Avoidance.
EXECUTION,
Imprisonment for debt, 52, 58.
Nature of, 50.
Varieties of writs, 51, 52.
EXHIBITS,
Pleading cannot be done by exhibits, 496.

F

FELLOW SERVANT RULE,
When declaration must negative defense, 217.
FORCIBLE ENTRY AND DETAINER,
Statutory remedy, 188, 189.
FOREIGN JUDGMENTS,
Debt on, allegation of jurisdiction, 266.
FORMAL DEFECTS,
Cured by statute, 292.
FORMS OF ACTION,
Abolished by code, 57.
Defined, 55.
Development of law through, 55.
Mode of pleading not necessarily dependent on, 56.
System of, 54.
Theory of action under codes, 56, 57.
See Account; Assumpsit; Case; Covenant; Debt; Detinue; Ejectment; Forcible Entry and Detainer; Real Action; Replevin; Trespass; Trover.
FRAUDS, STATUTE OF,
Defense of, how pleaded, 325, 327.
Necessity to allege writing, 507, 508.
FUNCTION OF PLEADINGS,
Issue raising, 9.
Necessity of analysis of issues, 8, 9.
Notice to adversary, 9, 10.

G

GENERAL ASSUMPSIT,
Common counts, 154, 160–167.
Indebitatus counts, 161–167.
Quantum meruit and quantum valebant counts, 160, 167, 256.
Declaration in, essentials, the executed consideration, 255.
The promise, 258.
The breach, 259.
The damages, 259.
Form of, 260–263.
See Assumpsit.

GENERAL ASSUMPSIT—Continued,
Scope of action, 153–167.
Where there is an express contract, 153–160.
GENERAL ISSUE,
Compared to general denial, 304n.
Defects of, 305, 306.
Irregularity of, 306, 307.
Form of in debt on specialty or on covenant, 332.
Notice under, 359, 360.
Pleas amounting to, 410–413.
Not allowed, 410–414.
Except pleas giving color, 412, 413.
Specific traverse improper if defense admissible under, 307.
Scope, comparison of scope in different actions, 334, 335.
In case, 312, 313.
In covenant, 331, 332.
In debt on judgments, 330.
In debt on simple contract, 327.
In debt on specialty, 328.
In ejectment, 333, 334.
In general assumpsit, 326.
In replevin, 318, 319.
Form of, 319.
In special assumpsit, 322–325.
In trespass, 307, 309.
In trover, 315, 316.
GENERAL PLEADING,
Allowed to avoid prolixity, 493–496, 501–506.
Allowed when adverse pleadings will supply facts, 504.

H

HILARY RULES,
General issue, limited by, in case, 313, 314.
Limited by, covenant, 332.
In detinue, 317.
In debt on simple contract, 328.
In debt on specialty, 329.
In special assumpsit, 324.
In trover, 316.
In trespass, 309.
In general, 335.
HYPOTHETICAL PLEADING,
Defect in form, 519, 520.

I

ILLINOIS DEFENSIVE PLEADING,
Chart of, 556, 571.
IMPARLANCE,
Nature of, 405, 406.

[The figures refer to pages]

INCONSISTENCY,
Between defenses, 421, 422.
Between allegations of same pleading, 517, 518.

INDUCEMENT,
Definition and necessity, 195, 505.

INSPECTION,
Of deeds, profert and oyer, 481–484.

INSTRUCTIONS,
Charging the jury, 43.
Requests to charge, 44.
Restrictions on the judge, 43, 44.

ISSUES,
Function of pleading to produce, 9.
Necessity of joinder, 298, 299, 449.
Not tendered by plea in confession and avoidance, 350, 447.
Not tendered by special traverse, 341.
Process of arriving at, 299–301.
Tendered by demurrer, 278.
Tendered by demurrer must be accepted, 288, 289.
Tendered by traverse, 446.

J

JOINDER,
Of actions, proposed rules, 547.
Of different causes of action, test, 201–203.
In demurrer, 288.
In issue, necessity, 299, 449.
In issue of fact, similiter, 449.

JOINDER OF PARTIES,
In actions ex contractu, 393.
Parties plaintiff, 393, 394.
Parties defendant, 395–397.
In actions ex delicto, 397.
Parties plaintiff and defendant, 397–399.
Misjoinder and nonjoinder, 393–399.

JUDGMENT,
Action of debt on, 136.
Assumpsit on judgment, 168, 169.
At law, compared with decrees in equity, 48.
Award of relief, 48.
Declaration in debt on, 266.
Defined, 47.
On demurrer, effect, 287, 288.
Final, 49.
Interlocutory judgments, 49.
Motion in arrest of, for defects in pleadings, 528, 529.
For defects in verdict, 530.

JUDGMENT NON OBSTANTE VEREDICTO,
Motion for, 533, 534.

[The figures refer to pages]

JUDICIAL NOTICE,
Matters judicially noticed need not be pleaded, 508–510.

JURISDICTION,
Of person, appearance, 24.
Personal service, 21.
Substituted service, 22.
Pleas to, 385, 386.
Form of plea to, 387.
Quasi in rem, attachment necessary, 23.
In rem, constructive service, 22.
Subject-matter, 10, 385.

JURY TRIAL,
Examination of jurors, 35.
No coercion allowed, 45.
See Verdict.

L

LEASE,
Sealed lease, debt or covenant, 332.

LEGAL EFFECT,
Matters should be pleaded according to, 484–486.
Specific words in libel and slander, 220.

LIBEL AND SLANDER,
How alleged, 219–221.

M

MALICIOUS PROSECUTION,
Essential allegations in case for, 222.

MATERIALITY,
Traverse must deny material allegations, 436–444.

MESNE PROFITS,
Recovery in ejectment, 180, 185.
Trespass for mesne profits after ejectment, 180, 186.

MISJOINDER,
Objections may be taken by general demurrer, 202, 393, 398, 523.

MONEY HAD AND RECEIVED,
Assumpsit for, 162.

MONEY LENT,
Assumpsit for, 161.

MONEY PAID TO ANOTHER'S USE,
Assumpsit for, 161.

MOTION IN ARREST OF JUDGMENT,
Comparison to motion for judgment non obstante veredicto, 528, 529.
Defects in pleadings reached by, 528–530.
Defects in the verdict, 530.
Misjoinder or nonjoinder, 394, 397.
Nature of, 527, 528.

MOTION TO STRIKE OUT,
Method of objection to part of pleading, 281.

N

NAMES,
Description of,
Parties, 465.
Partners and corporations, 466.
Persons other than parties, 463, 464.

NEGATIVES AND AFFIRMATIVES PREGNANT,
Definition and effect, 439, 440, 442–444.

NEGLIGENCE,
Whether to be alleged generally or specifically, 216, 217, 497.

NEW ASSIGNMENT,
Form of, 374, 375.
Use of, 370–375.

NEW TRIAL,
Grounds for, 535, 536.
Motion for, no review of pleadings by, 535.

NIL DEBET,
General issue in debt on simple contracts and statutes, 827, 828.

NIL DICIT,
Judgment of, 286, 414, 415.

NON ASSUMPSIT,
General issue in assumpsit, 822.

NON CEPIT,
General issue in replevin, 818.

NON DETINET,
General issue in detinue, 817.

NON EST FACTUM,
General issue in covenant, 832.
General issue in debt on specialty, 828.

NON OBSTANTE VEREDICTO,
Judgment distinguished from repleader, 534, 535.
When judgment given, 533, 534.

NONSUIT,
Motion for, 39, 527.

NUL TIEL RECORD,
General issue in debt on judgment, 830.

O

ORAL PLEADING,
History of, 25.

ORDER OF PROOF,
Regular order, 39, 40.

ORIGINAL WRITS,
Commencement of action by, 17.
Effect on substantive law, 60, 61.
Form, 18.
Form in trespass, 58.
New varieties, 59, 60.

OUSTER,
Necessity of alleging, in ejectment, 185.

OYER,
Demand of, 482, 483.
Form of, 484.

P

PAROL DEMURRER,
Form of, 402, 403.
Plea in suspension of nonage of heir, 401.

PARTICULARITY,
In pleading, what generally required, 497–500.
Facts in knowledge of adversary, 504.
Matters of inducement and aggravation, 505, 506.
Conclusions of law, 494.
Evidential facts, 492.
Effect of unnecessary, 438, 516.

PARTICULARS,
Bill of particulars, 553.

PARTIES,
Nonjoinder and misjoinder,
In actions ex contractu, 393–397.
Coplaintiffs, 393, 394.
Codefendants, 395–397.
In actions ex delicto, 397–398.
Codefendants, 398.
Coplaintiffs, 397.
Proposed rules, 546.
Representative capacity, 466, 562.
Specification of, to the action, 465, 466.
Partners and corporations, 466.

PLEA AND DEMURRER,
Both not allowed to same matter, 425.
Party may plead to one and demur to another count, 425.

PLEADINGS,
Demurrers, 28.
Functions and objects of, 298, 299.
Names, manner, and order of pleadings, 25.
Pleas in bar, 30.
Replication and subsequent pleadings, 31.
The declaration, 27.
See Function of Pleadings.

PLEAS,
In abatement, requisites of, 399, 400.
In bar, 30.
Confession and avoidance, 348, 349.
Discharge, 350.
Justification or excuse, 349.
Dilatory pleas, 382.
In estoppel, 356.
Partial defenses must be pleaded as such, 414, 415.
Puis darrein continuance, 324, 360–362.
Several defenses, 417–424.
See Traverse.

POSSESSION,
Averment of in declaration in trespass, 209, 210.

PRACTICE,
Appearance and pleadings at early common law, 25, 26.

PRECEDENTS,
Pleadings should conform to established forms, 524, 525.

PROCEEDINGS AFTER VERDICT,
See Bills of Exceptions; Error; Judgment; Motion In Arrest of Judgment; New Trial; Non Obstante Veredicto; Repleader.

PROCESS,
Declaration must correspond with, 206-207.
Definition and usual forms, 17–20.
Service, 21–24.

PRODUCTION OF ISSUES,
Function of pleadings, 9.
Process of, 32.

PRODUCTION OF SUIT,
Declaration should conclude with, 195.

PROFERT,
Must be made of deeds relied on, 481, 482.
See Oyer.

PROHIBITION,
Writ of, 542, 543.

PROMISE,
Allegation of, in special assumpsit, 244, 245.
Necessity of alleging, in general assumpsit, 258.

PROTESTATION,
Purpose to avoid admission, 358, 359.

PROVISO,
Like condition subsequent, 250, 251.

PROXIMATE CAUSE,
Allegation of, 217.

PUIS DARREIN CONTINUANCE,
Nature, operation, and effect of plea, 360–362.
Not under general issue, 324.

Q

QUANTITY, QUALITY, AND VALUE,
Necessity for alleging, 460–463.

QUANTUM MERUIT COUNTS,
See General Assumpsit.

QUANTUM VALEBANT COUNTS,
See General Assumpsit.

R

REAL ACTIONS,
Ancient remedies to recover seisin, 170.
Limitations on, 172.
Proprietary and possessory, 171.
Varieties, 171, 172.

REBUTTER,
Definition, 31.

RECITAL,
Objection to be taken by special demurrer only, 491.
Pleadings must be positive, and not by way of recital, 491.

RECOGNIZANCE,
Action of debt on, 137.

RECORDS,
Action on, debt, 136.

RECOUPMENT,
Nature of, 365.
What may be set up in, under general issue, 365.

REFORM OF PLEADING,
Methods of, 11, 12, 13, 14.
Rules for, Appendix A, 545.

REGISTER OF WRITS,
Explained, 60.

REJOINDER,
Definition, 31.

RELEASE,
Plea of, 352, 355.

REPLEADER,
When awarded, 534, 535.

REPLEVIN,
Declaration in, damages, 236.
Demand and refusal, 236.
Description of property, 234.
Essential allegations, 233.
Form of declaration, 237.
Plaintiff's right, 234, 235.
Wrongful act of defendant, 235, 236.

REPLEVIN—Continued,
Defenses in, affirmative defenses in, 320, 321, 564.
Form of avowry and cognizance, 321.
General issue in, 318, 319, 563.
Special traverse, 320, 564.
Mode of procedure, 121, 122.
Proposed rules, 555.
Scope of action, 120, 121.
Demand and refusal, 130.
Specific personal property, 123.
Taking or detention, 128, 129.
Title to support, 124–127.
When title to land involved, 123, 124.

REPLICATION,
Formal parts of, 375, 376.
Pleadings subsequent to plea, 31.
Varieties of, 366.
Replication de injuria, 367–369.
See Departure; New Assignment.

REPLICATION DE INJURIA,
Purpose of, 367–369.
Form of, 370.

REPUGNANCY,
Inconsistent allegations bad, 517, 518.

RIGHT OF ACTION,
Legal syllogism of, 196, 197.

RULES OF CIVIL PROCEDURE,
American Judicature Society's proposed rules, Appendix A, 545–555.
Regulation by court rules, 12, 13.

RULES OF PLEADING,
Classified, 490.
Production of the issue, 299–301.
Must demur, traverse, or confess and avoid, 299.
Traverse must tender issue, 446.
Issue well tendered must be accepted, 288, 449.
Materiality in pleading, only material matter should be traversed, 436–444.
Singleness or unity, pleadings must not be double, 521, 522.
Certainty in pleading,
Must have certainty of place, 455.
Must have certainty of time, 456–460.
Must specify quantity, quality, and value, 460.
Must specify names of persons, 463.
Must show title, 467.
Must show authority, 479.
Generally whatever is alleged must be stated with certainty, 497, 498.
Legal conclusions, 494–496.
Evidence and ultimate facts, 492.

RULES OF PLEADING—Continued,
Facts only alleged, 198.
General mode, when proper, 501, 502.
Legal effect, pleading by, 198–200.
Operative or ultimate facts, 493, 494.
Particularity required, 503, 504.
Facts in knowledge of adversary, 504.
Inducement or aggravation, 505, 506.
Acts regulated by statute, 507, 508.
Must not be double, 521, 522.
Must not be insensible or repugnant, 517, 518.
Must not be ambiguous or doubtful, 518, 519.
Must not be argumentative, 407, 408.
Must not be in the alternative, 519, 520.
Must be positive and not by way of recital, 491.
Should conform to precedent, 524.
Pleading bad in part is bad altogether, 416.
There must be no departure, 381.
Surplusage should be avoided, 514, 515.
Dilatory pleas must be pleaded at preliminary stage, 383, 384.
What may be omitted,
Matters judicially noticed, 508, 509.
Matters in anticipation, 510–512.
Matters implied, 512, 513.
Matters presumed, 513.

RULE NISI,
Order to show cause, 47.

S

SERVANT,
Cannot bring replevin, 127.
Cannot bring trover, 104.
Duty of master, 214, 215.

SERVICE OF PROCESS,
Extraterritorial service, 22, 23, 548
Proposed rules, 548.
Publication by, 22, 23.
Substituted service, 22, 548.

SET-OFF,
Nature of, 362, 363, 364.

SIMILITER,
Joinder in issue of fact, form, 299, 449.
Use and object, 449.

SINGLENESS OF ISSUE,
Of issue, 418, 426.
Party cannot both plead and demur to same matter, 425.
Pleadings must not be double, 423, 425, 521, 522.
See Duplicity; Pleas and Demurrer.

(The figures refer to pages)

SLANDER AND LIBEL,
Declaration, colloquium, 220.
Essentials of, 219-221.
Innuendoes, 221.
Publication of, specific words must be alleged, 220,
Strictness of pleading, 219, 220.

SPECIAL ASSUMPSIT,
Forms of declaration, 193, 259.
See Assumpsit.

SPECIAL PLEAS,
Different varieties, 336, 337.
Set-off and recoupment, 362, 365.

SPECIALTIES,
See Covenant; Debt; Assumpsit.

SPECIAL TRAVERSE,
Conclusion with verification, 339, 341.
Demurrer to, 345, 346.
Expediency of use, 340-342.
Form of, 347.
Object and nature of, 337-342, 409.
Reply to, 344, 345.
Requisites of, 343, 344.

SPECIFIC TRAVERSE,
Use of specific or common traverse, 303, 410, 432, 437, 438.
See Traverse.

STATEMENT OF CAUSE OF ACTION,
A legal syllogism, 197.

STATUTE OF LIMITATION,
Effect of, on amendment, 554.
How pleaded,
See Confession and Avoidance.

SUMMONS,
Defined, 19, 20.
Service and return, 21-23.

SURPLUSAGE,
Unnecessary matter to be avoided, 514, 515.

SURREBUTTER,
Definition, 31.

SURREJOINDER,
Definition, 31.

SUSPENSION,
Pleas in, 400, 401.

T

TECHNICALITIES,
Errors not affecting substantial rights disregarded, 13, 292, 554.

(The figures refer to pages)

TENDER,
Of issue, 278, 446.
See, also, Issues.

TIME,
Continuing acts, 460.
Pleadings must allege the time of every material fact, 456.
Plea follows declaration, 459, 460.
When must be truly stated, 457, 458.
When time need not be truly stated, 458, 459.

TITLE,
Alleging derivation of title, 471.
Estates in fee simple, 471, 472.
Particular estates, 473.
Of court in declaration, 192-194.
Derivation of title by inheritance, 474.
Derivation of title by alienation or conveyance, 474.
General freehold title alleged in lieu of title in full, 468-470.
Manner of pleading conveyance, 474, 475.
Must be proved as alleged, 478.
Need not be alleged when opposite party is estopped, 478, 479.
Of possession need not be fully stated, 468-470.
Of possession, sufficient to show liability, 476, 477.
When and how alleged in adversary, 476, 477.
When to be fully stated, 470.

TRANSITORY ACTIONS,
Contrasted with local, 451-454.
See Actions.

TRAVERSE,
Common or specific, 303, 437, 438.
Conclusion by verification, when, 339, 341, 447, 448.
Denial of essentials only, 438, 439.
Estoppel involved, denial precluded, 435.
Formal commencement and conclusion, 444, 445,
Forms of, 301, 302.
General issue, its nature and use, 304-307.
General requisites of, 431, 432.
Joinder of issue, 449.
Materiality of, 436.
Matter necessarily implied, 434.
Matter of aggravation, 437.
Matter of inducement, 437.
Matter of law and fact, mixed, 433.
Matter not alleged, 433, 434.
Must not be too large, 438, 439.
Negative pregnant, 439, 440, 442, 443.
Special traverse, 337-346, 409, 447.
Title or estate as alleged, 440, 441.
Tender of issue, 446.

TRAVERSE—Continued,
Too narrow, 441.
See General Issue; Negatives and Affirmatives Pregnant; Special Traverse; Specific Traverse.
TRESPASS,
Declaration, damages, 211.
Essential allegations, 209.
Forms of declaration, 211–213.
Right of plaintiff, 209, 210.
Wrongful acts of defendant, 210.
Defenses, confession and avoidance in, 309, 310.
Form of plea in self-defense, 369, 370,
General issue, 307, 310, 559.
Liberum tenementum, 311.
Self-defense, 311, 559, 560.
Scope of action, 66.
Ab initio, 74.
By bailee, 76, 77.
Bailor, 77.
Bare naked possession, 80, 81.
Constructive possession, 79.
Force element, 67–69.
Immediate injury to person or possession, 70.
Injuries under color of legal proceedings, 73.
Intangible property, 82.
By lessee, 78.
By lessor, 78.
Negligent injury, 71.
Plaintiff's right to support, 75, 76, 209, 210.
By servant, 78.
Squib case, 72.
TRESPASS FOR MESNE PROFITS,
Declaration, title of the plaintiff, 186.
Ejection by the defendant, 187.
Value and receipt of profits, 187, 188.
TRESPASS ON THE CASE,
See Assumpsit; Case; Trover,
TRESPASS TO TRY TITLE,
Texas remedy, 182.
TRIAL,
Issues of fact, 34.
Issues of law, 33.
Right to open and close, 35, 36.
TROVER,
Declaration in, conversion by defendant, 228.
Damages, 229, 230.
Demand and refusal, 229.
Description of property, 228.
Essential allegations, 227–229.
Form of declaration, 230, 231.

TROVER—Continued,
Plaintiff's right, 227.
Defenses, general issue, 315, 316, 562.
Scope of action, 98.
Against bailee, 106.
Constructive possession, 105.
Kinds of property converted, 99, 100.
Servant has only custody, 104.
Substitute for a property action, 99.
Tenants in common, 101.
Title and possession to support, 101–104.

V

VALUE,
Necessity for alleging, 460–462.
VARIANCE,
Danger of, 245, 432, 438.
Descriptive averments must be proved as alleged, 245, 246, 515–517.
Failure of declaration to conform to process, 206, 207.
By plea in abatement, 208.
General mode of pleading to avoid, 205, 454.
Strict proof required when, 245, 246, 432, 438, 457, 462–465, 478, 486, 500.
VENUE,
Consequences of mistake or omission, 455, 456.
How laid, 450–455.
In declaration, 193, 452.
In local actions must be truly stated, 451.
In pleadings subsequent to the declaration, 456.
In transitory actions not material, 453, 454,
Local facts must be truly laid, 455.
VERDICT,
Aider by, 531, 532.
General and special verdicts, 45, 46.
Motion in arrest of judgment for defects in, 530.
Must correspond with issue and be certain and positive, 530.
Special verdict in the alternative, 46.
VERIFICATION,
Pleading containing new matter must conclude with verification, 445–447
Of special traverse, 339, 341, 447.
VIDELICET,
Office of, to avoid danger of variance, 454, 517.

W

WAIVER,
Of defects by failure to demur, 291, 292,
Of objections to process, 24, 385.
WITNESSES,
Cross-examination, 41, 42.
Examination of, 41.

WORK AND LABOR,
Action for, assumpsit, 167, 261.
Debt, 264.
Quantum meruit counts in assumpsit, 160, 167, 256.
WRIT OF ENTRY,
See Real Actions.
WRIT OF ERROR,
Nature of, 537–539.
See Error, Writ of.
WRIT OF RIGHT,
See Real Actions.
WRITINGS,
Pleading according to legal effect, 484–486.
WRITS,
Of certiorari, 541.
Of execution, 50–52.
Original writs, 17, 57–59.
Issuance, execution, and return, 18.
Register of writs, 60.
Of prohibition, 542.
See Execution; Process.