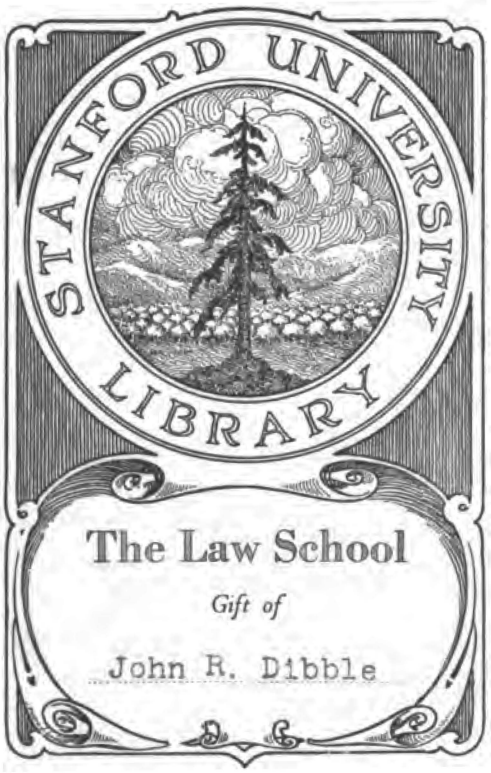

HAND-BOOK

OF

COMMON-LAW PLEADING

BY

BENJAMIN J. SHIPMAN

SECOND EDITION

ST. PAUL, MINN.
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1895

TO MY FATHER,

WILLIAM D. SHIPMAN,

One of whose first successes at the bar was due to his thorough knowledge of Common-Law Pleading,

THIS BOOK IS INSCRIBED.

PREFACE TO THE SECOND EDITION.

Since the publication of the first edition of this book, the test of practical use has shown that it was desirable in a book upon common-law pleading to give, in connection with a statement of the rules, and a description of the forms of pleadings, actual examples of the forms themselves, in order to fully meet the requirements of the student and practitioner of to-day. In the present edition this want has been supplied by adding illustrative forms of all the principal pleadings in use at common law. The illustrations given are not intended to take the place of a form book for the pleader, but are meant to be supplementary to the text, giving to the eye a picture of the artificial forms discussed. These forms have not only been gathered together in an appendix, where they will be found convenient for ready reference by the busy lawyer, but a discussion of them has been incorporated into the body of the text. To do this involved recasting the entire work, and the opportunity has been seized to revise and enlarge it, so as, if possible, to give even a simpler treatment of this difficult branch of the law. Slight changes in arrangement have been made; numerous additional illustrations, showing the application of the various rules have been given; and many additional cases have been cited. It is believed that nearly all of the most important cases from the common-law states have been included.

St. Paul, Minn., Sept. 16, 1895.

PREFACE TO THE 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.

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APPENDIX.

FORMS (Pages 501–527).

CHART OF COMMON-LAW PLEADING.

The Syllogism of Pleadings.

Of the Declaration or Complaint.

First: Against the Defendant who has forcibly entered upon my lands—or who owes me a sum of money and neglects or refuses to pay although due—or who has assaulted me—or broken the conditions of his contract, etc., etc. I have a right by law to recover damages.	MAJOR PROPOSITION understood by the Court.
Second: Statement or allegation of the matters of fact: That is to say, that he did so enter upon my lands, that he owes the debt and neglects or refuses to pay although requested, etc., etc.	MINOR PROPOSITION must be logically stated with simplicity and certainty.
Third: Because of the truthfulness of the major and minor propositions. Demand for judgment.	THE CONCLUSION Must be stated and amount demanded.

Contested by Defendant.

First: Denies the Major Proposition, Declaration or Pleading not sufficient in Law.	Tenders an issue of Law.	Demurrer.
Second: The Minor Proposition is not true as matter of fact.	Tenders an issue of Fact or Law and Fact.	Plea to the Action.
Third: The Conclusion.	Confesses Major and Minor, but avoids because of new matter which excuses—or, applying Syllogism of Defense. First: Major proposition—If he upon whose lands I unlawfully entered has released me, or has legally excused my so entering, he has no right by law to recover damages. Second: He has so released me. Third: Conclusion—He cannot recover.	Confession and Avoidance.

If Plea is by Confession and Avoidance.

First: Major Proposition understood.	Plaintiff may reply. Replication. If avoidance not legally sufficient—Demurrer.
Second: Minor Proposition Tendering issue of Fact.	If denied; Trial of issue of Fact.
Third: Conclusion.	If major and minor or either admitted, action fails—or if minor admitted, may confess and avoid, as for example: The Release or Excuse was obtained by fraud or duress, and so might continue to Rejoinder, Surrejoinder, Rebutter, and Surrebutter.

CHART OF COMMON-LAW PLEADING—Continued.

Defendant's Plea May Be

First: Dilatory Plea.	1st. To the Jurisdiction of the Court.	As for Example: Action brought in wrong Court, or Court no jurisdiction over subject matter, etc.
	2d. To the Disability of the Plaintiff.	For Example: Plaintiff an Alien Enemy. an Infant, a Lunatic, a Married Woman, etc.
	3d. Plea in Abatement to the Writ or Count.	Legal Defect in Writ or Defendant misnamed, or variance between Writ and Declaration.
	4th. Demurrer.	Defect in Count or Declaration, appearing on its face.
Second: Plea to the Action.	1st. The General Issue.	Denies all the Material Allegations in the Declaration.
	2d. Special Plea in Bar.	May be 1st. Confession and Avoidance, or 2d. Estoppel. Neither admits nor denies, but alleges new matter inconsistent with the Allegations of the Declaration which estops or precludes Plaintiff from availing himself of his allegations.
	3d. A Special Issue.	Does not advance new matter but denies some material Allegation, which in effect denies, and goes to entire right of action.

Prepared by

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COMMON-LAW PLEADING.

(SECOND EDITION.)

CHAPTER I.

FORMS OF ACTION.

1. "Action" Defined.
2–5. Classification of Actions.
6–9. Assumpsit.
10. Covenant.
11–13. Debt.
14. Account, or Account Render.

"ACTION" DEFINED.

1. A civil action is any proceeding in a court of justice to establish or enforce a civil right or to redress a civil injury.

The term "action" includes the whole course of legal proceedings to establish or enforce a civil right, or to obtain redress for a civil injury. It is often also applied to criminal prosecutions, but properly it includes civil proceedings only. The name is certainly retained until judgment, and it even seems to include the execution by which the judgment is enforced.[1]

Lord Coke defined an action as being "nothing less than the lawful demand of one's right," [2] and, again, as "nothing less than the right of pursuing, in a court of justice, that which is due to one." [3] But

[1] It was said, however, by Lord Coke, that an action terminated with the giving of judgment, and that the execution formed no part of it. Co. Litt. 289a.

[2] Co. Litt. 285a.

[3] Inst. 4, 6, pr.

it is something more than the mere right. "A modern action is something more than a mere right or demand of right. It includes not only the act of the plaintiff in making a lawful demand, but the act of the defendant in opposition, and the act of the court in passing judgment between the parties. It consists of (1) the process; (2) the pleadings; (3) the trial or hearing of the case presented; (4) the judgment or decree; and (5) the execution by which the judgment is enforced." [4]

The term "action" is sometimes used to designate a proceeding at law, as distinguished from a proceeding by bill in equity; and the word "suit" is sometimes used to designate the proceeding in equity, as distinguished from the proceeding at law. In modern law, however, the terms are nearly, if not entirely, synonymous. They are both generic terms covering proceedings both at law and in equity. They both apply to any proceeding in a court of justice in which a party pursues the remedy which the law affords him for the redress of a civil injury, or the establishment or enforcement of a civil right.[5]

It is the purpose of this work to deal only with actions at common law.

CLASSIFICATION OF ACTIONS.

2. According to their subject-matter, actions are divided into:

(a) Real,

(b) Personal, and

(c) Mixed.

3. REAL ACTIONS—Real actions are those brought for the specific recovery of real property only. There are

[4] 1 Burrill, Law Dict. tit. 3, "Action."

[5] Black, Law Dict. tits. "Action," "Suit"; McPike v. McPike, 10 Ill. App. 333; Weston v. City Council of Charleston, 2 Pet. 449, 464; Appleton v. Turnbull, 84 Me. 72, 24 Atl. 592; Didier v. Davison, 10 Paige (N. Y.) 516; Cohens v. Virginia, 6 Wheat. 264, 407; Ex parte Milligan, 4 Wall. 12; Martin v. McAdams (Tex. Sup.) 27 S. W. 255; Lackawanna Coal & Iron Co. v. Bates, 56 Fed. 737; City of Marion v. Ganby, 68 Iowa, 142, 26 N. W. 40; Dullard v. Phelan, 83 Iowa, 471, 50 N. W. 204.

no strictly real actions now in use. Those formerly in use were:

(a) The writ of right.
(b) The writ of formedon.
(c) The writ of dower.
(d) The writ of right of dower.
(e) The writ of quare impedit.

4. PERSONAL ACTIONS—Personal actions are those brought for the recovery of a debt, or of damages for the breach of a contract, or of specific personal property, or of damages for some injury to the person, or to one's relative rights, or to personal or real property. According to their nature, they are classified as:

(a) Actions in form ex contractu. These are actions based upon a contract, express or implied, and are:
    (1) Assumpsit.
    (2) Covenant.
    (3) Debt.
    (4) Account.
(b) Actions in form ex delicto. These are actions brought for the redress of wrongs, and not based upon a contract, express or implied, and are:
    (1) Trespass.
    (2) Trover.
    (3) Case.
    (4) Detinue.
    (5) Replevin.

5. MIXED ACTIONS—Mixed actions are such as appertain in some degree to both the former classes, and therefore are properly reducible to neither, being brought both for the recovery of real property, and for damages for injury in respect to it. The principal mixed actions are:

(a) Ejectment.
(b) Writ of entry, (in use in very few jurisdictions.)

In England actions were commenced in the court of king's bench or the court of common pleas, to one or the other or to both of which our various courts of common-law jurisdiction correspond, by original writ or by bill. Of these forms of proceeding, the former was the regular and ancient one, and the latter was in the nature of an exception to it.

The original writ was a mandatory letter, issuing at first from the chancellor, and later out of the court of chancery, under the great seal, and in the king's name, directed to the sheriff of the county where the injury was alleged to have been committed, 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. In some cases, it omitted the former alternative, and required the sheriff simply to enforce the appearance.[7]

One object of the original writ, therefore, was to compel the appearance of the defendant in court. But it was also necessary as authority for institution of the suit; for it was a principle, subject only to the exception introduced by the practice of proceeding by bill, 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.[8] To sue out an original writ, therefore, was the first step of the plaintiff in his action.

The original writs differed from each other in their tenor, according to the nature of the plaintiff's complaint, and were conceived in fixed and certain forms. Unless one of the forms would fit the case made by the complaint, the plaintiff could not maintain an action.

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 writs then known in practice. It seems that either the clerks of the chancery, whose duty it was to prepare the original writ for the suitor, had no authority to devise new forms to meet these new

[7] Steph. Pl. (Heard's Ed.) 40. [8] Id. 41.

cases, or that their authority was doubtful or they were remiss. At any rate, legislation was necessary, and the 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," etc. 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.

Since, as we have seen, an original writ was essential to the due institution of an action, the various forms of original writs had the effect of limiting and defining the right of action itself. No cases were 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 that of actions became identical.[9]

The different forms of action have been classified in the black-letter text, and they will be presently treated separately, at some length. It will be well, however, in this place to explain them shortly together, and according to their classification as real, personal, and mixed.

Real Actions.

Real actions were those brought for the specific recovery of real property only. In these the plaintiff or demandant claimed title to lands, tenements, or hereditaments in fee simple, or as tenant in tail, or for years or for life. The principal real actions formerly in use were (1) the writ of right, (2) the writ of entry, (3) the writ of

[9] Steph. Pl. 41–43. For an interesting note as to the origin of the original writ, see Steph. Pl. Append. note 2.

formedon, (4) the writ of dower, (5) the writ of right of dower, and (6) the writ of quare impedit.

The writ of right was the remedy appropriate to a case where the party claimed the specific recovery of corporeal hereditaments in fee simple, founding his title on the right of property, or mere right arising either from his own seisin, or the seisin of his ancestor or predecessor.[10]

The writ of entry was an old common-law remedy by which the owner of land, having been disseised or otherwise wrongfully dispossessed, could establish his title to the land and recover possession.[11]

The writ of formedon was the remedy where the party claimed the specific recovery of lands and tenements as issue in tail, or as remainder-man or reversioner upon the determination of an estate tail.[12]

The writ of dower (unde nil habet) was an action by a widow claiming the specific recovery of her dower, no part of it having yet been assigned to her.[13]

The writ of right of dower was an action by a widow claiming the recovery of the residue of her dower, a portion of it having been assigned to her.[14]

The writ of quare impedit was the remedy by which, where the right of a party to a benefice was obstructed, he recovered the presentation.[15]

The writ of right, the writ of entry, and the writ of formedon were abolished in England by the statute of 3 & 4 Wm. IV. c. 27; and, with the exception of the writ of entry, they have been altogether abolished in this country also. Their place has been taken by the action of ejectment,—a mixed action, which we shall presently explain,—or by some statutory remedy. The writ of entry is still used in a very few states, but as it has become a mixed action,—the recovery including damages, as well as the possession of the land it-

[10] Steph. Pl. (Tyler's Ed.) 43; 3 Bl. Comm. 191.
[11] Post, p. 126.
[12] Steph. Pl. (Tyler's Ed.) 44; Co. Litt. 326b.
[13] Steph. Pl. (Tyler's Ed.) 45; Booth, Real Act. 166.
[14] Steph. Pl. (Heard's Ed.) 9; Booth, Real Act. 166.
[15] Steph. Pl. (Heard's Ed.) 9; Booth, Real Act. 223.

self,—we shall postpone the consideration of it.[16] The writ of quare impedit is, of course, not recognized with us, since it is not applicable to our institutions. 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.[17]

Personal Actions.

Personal actions are those brought for the recovery of a debt, or of damages for the breach of a contract, or for the recovery of specific personal property, or of damages 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, detinue, trespass, trespass on the case, and replevin. Trespass on the case is either in assumpsit, in which case it is now called simply "assumpsit"; in trover, in which case it is called simply "trover," or "trover and conversion"; and trespass on the case for other injuries, as for libel, in which cases it is called simply "case," or "action on the case."

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.

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.

Debt.

The action of debt lies where a party claims the recovery of a debt; that is, a liquidated or certain sum of money alleged to be due him.[18]

[16] Post, p. 126.

[17] See King v. Merritt, 67 Mich. 194, 34 N. W. 689; Drost v. Hall, 52 N. J. Eq. 68, 28 Atl. 81; Parton v. Allison, 111 N. C. 429, 16 S. E. 415; Kenyon v. Kenyon, 17 R. I. 539, 24 Atl. 787; Hart v. Randolph, 142 Ill. 521, 32 N. E. 517; Coburn v. Herrington, 114 Ill. 104, 29 N. E. 478; Percival v. Percival, 56 Mich. 297, 22 N. W. 807; Galbraith v. Fleming, 60 Mich. 408, 27 N. W. 583. The remedy by writ of dower (prescribed by statute) is still the practice in Massachusetts. See O'Gara v. Neylon, 161 Mass. 140, 36 N. E. 743.

[18] This is debt in the debet, which is the principal and only common form.

Covenant.

Covenant lies where a party claims damages for breach of covenant; that is, of a promise under seal.

Account, or Account Render.

Account, or account render, lies in certain cases to compel an accounting and recover the balance due.[19]

Detinue.

The action of detinue lies where a party claims the specific recovery of goods and chattels, or a deed or writing unjustly detained from him.

Trespass.

The action of trespass lies where a party claims damages for a trespass committed against him; a trespass being an injury committed by violence, actual or implied. The law will imply violence, as we shall see, though none is actually used, where the injury is of a direct and immediate kind, and committed on the person or tangible and corporeal property of the plaintiff. Of actual violence, an assault and battery is an instance; of implied, a peaceable but wrongful entry upon another's land.

Trespass on the Case.

It will be noticed that the only actions of those stated above which will lie for damages are covenant and trespass; that the former will only lie for damages for breach of a promise under seal; and that the latter lies only for damages for a trespass, so 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 covenant or 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.[20] Under this statute they constructed many writs for different injuries, which

There is another species, called "debt in the detinet," which lies for the specific recovery of goods, under a contract to deliver them. Post, p. 46.

[19] Post, p. 46.

[20] Ante, p. 5.

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;[21] 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."

Same—Assumpsit.

The action of assumpsit lies where a party claims damages for breach of a simple contract (that is, a contract not under seal), express or implied. It was at one time regarded as an action ex delicto (as was the whole genus of trespass on the case), the breach of the promise being regarded as a wrong or tort; but it is now regarded more properly as an action ex contractu, being based on the contract or promise.

Same—Trover, or Trover and Conversion.

The action of trover is the action usually adopted, by preference to that of detinue, to try a disputed question of property in goods and chattels. In form, it claims damages, and is founded on a suggestion in the writ (which, in general, is a mere fiction) that the defendant found the goods in question, being the property of the plain-

[21] Steph. Pl. (Heard's Ed.) 49; 3 Reeves, 89, 243, 391.

tiff, and proceeds to allege that he converted them to his own use. The action is sometimes spoken of as trover and conversion.

Same—Action on the Case, or Case.

Strictly speaking, as we have stated, action on the case, or case, applies to the whole genus of trespass on the case, but it is generally applied to those actions of trespass on the case other than assumpsit and trover. Excluding, therefore, assumpsit and trover, case lies for damages for any injury to which trespass will not apply,—that is, any injury not committed with express or implied violence, or which, though committed with force or violence, is not direct, but merely consequential.[22] The action on the case in this sense is an action ex delicto. It lies, for instance, for libel or slander, for malicious prosecution, for negligence, etc.

Replevin.

In the action of replevin there was no original writ, as it was not commenced in the superior courts, but was commenced in the county court, and entertained in the superior courts by virtue of an authority which they exercised of removing suits, in certain cases, from an inferior jurisdiction. Where goods had been distrained, a party making plaint to the sheriff might have them replevied,—that is, redelivered to him,—upon giving security to prosecute an action against the distrainer, for the purpose of trying the legality of the distress, and, if the right should be determined in favor of the latter, to return the goods. The action so prosecuted was the action of replevin. It was commenced in the county court, and thence removed into one of the superior courts. In form, it is an action for damages for the illegal taking and detaining of the goods and chattels.[23] The action of replevin was brought upon other kinds of illegal taking besides that by way of distress.[24]

Mixed Actions.

Mixed actions are such as appertain in some degree to both real and personal actions, and therefore are properly reducible to neither,

[22] Ante, p. 8; post, p. 86.

[23] Steph. Pl. (Heard's Ed.) 53.

[24] 2 Selw. N. P. 1053; 1 Chit. Pl. (1st Ed.) 159. This action will be fully explained hereafter.

being brought both for the recovery of real property, and for damages for injury in respect to it.

The principal mixed action is ejectment. This action lies to recover possession of land, and damages for its detention, whenever the plaintiff has the right of entry. The nature of this action, and the fictions upon which it is based, will be explained in another place.[25]

The writ of entry was a common-law real action. It is in use in a few of our states as a mixed action. It lies to establish title to, and recover possession of, land of which the plaintiff, or demandant, has been disseised or otherwise wrongfully dispossessed, and also for damages.[26]

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.

There are other statutory mixed actions of modern origin, like trespass to try title, but it would be beyond the scope of our work to go into an explanation of them.

ASSUMPSIT.

6. The action of assumpsit lies for the recovery of damages for the breach of a parol or simple contract, or to enforce certain quasi contractual obligations. It can only be maintained where there has been an express contract, or where the law will imply a contract, either as a matter of fact or of law. According to its form in pleading, it is divided into actions of:

(a) Special assumpsit.

(b) General assumpsit.

[25] Post, p. 118.

[26] Ante, p. 6; post, p. 126.

7. SPECIAL ASSUMPSIT—Special assumpsit is where the action is brought on a special contract. It is based upon the express promise, and will always lie where an express promise can be shown.

8. GENERAL ASSUMPSIT—General assumpsit is where the plaintiff, instead of declaring on an express promise, declares generally, as for a debt or pecuniary demand, founded upon an executed consideration. The basis of the action is the promise implied by law from the execution of the consideration, or from a legal duty resting upon the defendant. A promise is implied:

(a) Where the law presumes it, as a matter of fact, from acts voluntarily done or suffered by the defendant, which warrant the inference that an agreement actually existed.

(b) Where the law raises it, as a legal presumption, from a legal obligation resting upon the defendant.

9. General assumpsit will not lie where there has been an express contract, except:

(a) Where the contract 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, not within either party's control, 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 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 the special contract.

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.[28] It is a proper remedy for the breach of any simple or parol 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.[29] And it may be either for a sum certain, or for a sum to be determined by the proof.[30]

In some cases assumpsit is the only remedy. It is generally the only remedy on default in the payment of an installment of a debt payable in installments, the agreement not being under seal; for debt will not lie until the whole is due.[31] And it is the only remedy on a collateral contract, as on a promise to pay the debt of another in consideration of forbearance, etc., or against the indorser of a bill or note, or by an indorsee against the acceptor of a bill.[32] And it is the only remedy to recover on a promise not under seal to pay a sum of money in a particular kind of money or out of a particular fund.[33]

In no case will the action lie unless there has been an express contract or promise, or unless the law will imply one; for a promise either given in fact or implied by law is essential.[34]

[28] 1 Chit. Pl. 111. See forms of declaration in assumpsit, Forms Nos. 2, 3, Append.

[29] 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, 65 Mich. 533, 32 N. W. 664.

[30] Rudder v. Price, supra.

[31] Post, p. 45.

[32] Post, p. 45.

[33] Post, p. 45.

[34] 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; Thornton v. Village of Sturgis, 38 Mich. 30; Stamper v. Temple, 6 Humph. (Tenn.) 113; Clark, Cont. 29, 59.

Whether or not there has been a contract, express or implied, depends upon the substantive law of contract and quasi contract. Having determined, by reference to that law, that a simple contractual or quasi contractual liability exists, this form of action is always a proper remedy to enforce it, though in some cases, as we shall see, debt will also lie, and in some cases the circumstances may be such that the plaintiff may disregard the contract and maintain an action ex delicto independently of it.

Implied Contracts.

The term "implied contracts" is used in two senses. In one sense it means a contract implied by the law 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 says that by his conduct he impliedly promised to pay, and to enforce this implied promise assumpsit is the proper remedy.[35]

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.[36]

Contract or Quasi Contract Essential.

As we have already stated, the plaintiff, to maintain this form of action, must always show a promise, express or implied. Where he relies on an express promise he must of course show one that is binding on the defendant, and one which the law holds valid. He must therefore be able to show, among other things, a consideration,

[35] Clark, Cont. 24, 27, 753; post, pp. 19–37.

[36] Clark, Cont. 752–754; Woods v. Ayres, 39 Mich. 345.

and he must not show a promise springing from an agreement which is unlawful. Whether or not there is a valid and binding simple contract, and whether the particular circumstances are such that a promise, though not given in fact, expressly or impliedly, will be implied as a matter of law, are questions, not of pleading or practice, but of the substantive law of contract and quasi contract. In any case, if a valid parol promise has been made, or if a promise will be implied, assumpsit is a proper remedy to enforce it. And in no other case will it lie. A promise, express or implied, is absolutely essential.

As a Concurrent Remedy with Actions ex Delicto.

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. He may sue in case or in assumpsit at his election.

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.

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." [37]

As we shall see, there are many other cases where a party may at his election sue either in assumpsit or in case.[38]

The Action Applies Only to Simple and Quasi Contracts.

The action of assumpsit must be based upon a simple or parol 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, covenant, or scire facias, and not assumpsit.[39]

Where a party has different securities, of different descriptions, for the same debt or demand, from the same party, he must found his action upon that security which is of the higher nature or efficacy. Thus, where there has been a contract under seal, or of record, covering the same subject-matter, and it is still in force, assumpsit will not lie. The party must proceed in debt or covenant where the contract is under seal, or in debt or scire facias if it be of rec-

[37] Zell v. Dunkle, 156 Pa. St. 353, 27 Atl. 38. And see Reeside's Ex'r v. Reeside, 49 Pa. St. 322; Hunt v. Wynn, 6 Watts (Pa.) 47.

[38] Post, pp. 98, 99.

[39] 1 Chit. Pl. 111; January v. Goodman, 1 Dall. (Pa.) 208; Richards v. Killam, 10 Mass. 239; Codman v. Jenkins, 14 Mass. 93; Andrews v. Callender, 13 Pick. (Mass.) 484; Harley v. Perry, 18 Pa. St. 44; Hamilton v. Hart, 109 Pa. St. 629; and cases hereafter cited. Where a judgment is a specialty, debt or scire facias, and not assumpsit, is the proper remedy. Post, p. 85. 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; Shawneetown v. Baker, 85 Ill. 563; Martin v. Murphy, 16 Ill. App. 283. The fact that there is a contract under seal does not prevent an action of assumpsit, if the action can be and is based, not on the sealed contract, but on an independent simple contract. Thus, a broker may sue in assumpsit for his commissions in procuring a charter party for a vessel, though the instrument recites under seal that such commissions are to be paid him. Bruce v. Parsons, 12 Cush. (Mass.) 591. See McGunigal v. Mong, 5 Pa. St. 269; American Life Ins. Co. v. McAden, 109 Pa. St. 399, 1 Atl. 256. And see further illustrations hereafter given in the text. Assumpsit will lie on an account stated (post, p. 31), though arising out of a contract under seal. Brown v. Bliem, 3 Wkly. Notes Cas. (Pa.) 26.

ord, even though the debtor, after the contract was made, expressly promised to pay it.[40]

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.[41] 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, for instance, as collateral security.[42] 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.[43]

[40] 1 Chit. Pl. 116; 1 Rolle, Abr. 11, 517; Cro. Jac. 506, 598; Bulstrode v. Gilburn, 2 Strange, 1027; Codman v. Jenkins, 14 Mass. 99; Richards v. Killam, 10 Mass. 243; Andrews v. Callender, 13 Pick. (Mass.) 484; Miller v. Watson, 5 Cow. (N. Y.) 195; Andrews v. Montgomery, 19 Johns. (N. Y.) 162; McManus v. Cassidy, 66 Pa. St. 260; Landis v. Urie, 10 Serg. & R. (Pa.) 321; India Rubber Fac. Co. v. Hoit, 14 Vt. 92; Hinckley v. Fowler, 15 Me. 285; Hawkes v. Young, 6 N. H. 300. It seems, however, that where there is a covenant to pay money for services, etc., and only a part of it is paid, the law will imply a promise to pay the balance, upon which assumpsit will lie. Danforth v. Schoharie, etc., Road, 12 Johns. (N. Y.) 227.

[41] Clark, Cont. 685; 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; Jones v. Johnson, 3 Watts & S. (Pa.) 276; Moale v. Hollins, 11 Gill & J. (Md.) 11; Kiefer v. Zimmerman, 22 Md. 274; Wann v. McNulty, 7 Ill. 355; Martin v. Hamlin, 18 Mich. 353; Hammond v. Hopping, 13 Wend. (N. Y.) 505; McCrillis v. How, 3 N. H. 348.

[42] Clark, Cont. 685; Holmes v. Bell, 3 Man. & G. 213; Doty v. Martin, 32 Mich. 462; Whitbeck v. Wayne, 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.

[43] 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.

Where a parol promise (founded, of course, as it must be, upon a sufficient consideration) to perform an existing contract under seal, is given by the obligor or covenantor, or a sealed contract is sought to be varied by parol, the question arises as to whether that promise will support assumpsit. Many of the courts hold that it will.[44] By the weight of authority, however, at common law, a contract must be discharged, if discharged by a substituted agreement, in the same (or a higher) form as that in which it was made; and, subject to certain exceptions, a contract under seal can only be discharged by a substituted agreement where that agreement is under seal.[45] If the parol agreement discharges the contract under seal, assumpsit will lie, but not otherwise. The question therefore belongs to the substantive law of contract.[46]

Assumpsit as General and Special.

The division of this action into general and special assumpsit has reference to the particular form in which the action is brought, as determined by the circumstances from which the right of action arises. Special assumpsit is where the action is founded upon a special contract expressly entered into by the parties, and the right to recover therein is determined by the terms of the contract. In general assumpsit the plaintiff does not count upon a special contract or express promise, but upon a promise implied by law, either as a matter of fact, or as a matter of law, from the receipt by the defendant of a consideration from him.

[44] 1 Chit. Pl. 117; 1 Saund. 210, note 1; Nash v. Armstrong, 10 C. B. (N. S.) 259; White v. Parkin, 12 East, 578; Fenner v. Meares, 2 W. Bl. 1269; Brett v. Read, Cro. Car. 343. See Burn v. Miller, 4 Taunt. 748; Lawall v. Rader, 24 Pa. St. 283; Bates v. Peters, 9 Wheat. 556; McManus v. Cassidy, 66 Pa. St. 260; Hill v. Green, 4 Pick. (Mass.) 114; Hitchcock v. Lukens, 8 Port. (Ala.) 333; Mill-Dam Foundery Co. v. Hovey, 21 Pick. (Mass.) 417; Munroe v. Perkins, 9 Pick. (Mass.) 298; Lawall v. Rader, 24 Pa. St. 283; McGrann v. North Lebanon R. Co., 29 Pa. St. 82; Spangler v. Springer, 22 Pa. St. 454.

[45] West v. Blakeway, 2 Man. & G. 729; Allen v. Jaquish, 21 Wend. (N. Y.) 628; Thompson v. Brown, 7 Taunt. 656; Spence v. Healey, 8 Exch. 868; Cordwert v. Hunt, 8 Taunt. 596; Albrecht v. Kraisinger, 44 Ill. App. 313; Woodruff v. Dobbins, 7 Blackf. (Ind.) 582; Hogencamp v. Ackerman, 24 N. J. Law, 133; McMurphy v. Garland, 47 N. H. 316; Chapman v. McGrew, 20 Ill. 101; Hume v. Taylor, 63 Ill. 43. Cf. Daegling v. Schwartz, 80 Ill. 320.

[46] Clark, Cont. 617.

Special Assumpsit.

If parties enter into a contract by which one of them agrees to perform services for the other for a certain compensation, which the other agrees to pay, and the former, having done the work, sues to recover the compensation, setting forth the contract, the action is special assumpsit, being based upon the special contract. This form of assumpsit is always proper where there is a special contract, and, as a rule, it is the only proper form of assumpsit in such cases. But, as we shall presently see, there are circumstances under which a special contract may be disregarded, and general assumpsit brought.[47]

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, either as a matter of fact or as a matter of law, from the receipt of a consideration by one party from another.

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 a matter 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 it 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.

[47] Post, p. 21.

Same—Classification of Common Counts.

General assumpsit, or the common counts, may be classified [48] as: (I.) Indebitatus assumpsit or indebitatus counts, (II.) quantum meruit counts, and (III.) quantum valebant counts.

(I.) 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.[49] 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; [50] (b) money received by the defendant for the use of the plaintiff, or money had and received; [51] (c) money lent; [52] (d) interest due; [53] (e) balance due on account stated.[54] The most usual counts other than money counts, included in the indebitatus counts, are for: (a) Use and occupation of land; [55] (b) board and lodging furnished; [56] (c) goods sold and delivered; [57] (d) goods bargained and sold; [58] (e) lands sold and conveyed; (f) work, labor, and services; [60] (g) work, labor, and materials; [61] (h) judgment recovered by the plaintiff against the defendant, in cases where assumpsit will lie; [62] (i) liability imposed by statute upon the defendant to pay money to the plaintiff; [63] and (j) any other circumstances upon which a debt may be founded, excluding money transactions.

(II., III.) 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

[48] See Append. Form No. 18, second form, for declaration in general assumpsit.

[49] 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.

[50] Post, p. 27.
[51] Post, p. 28.
[52] Post, p. 31.
[53] Post, p. 31.
[54] Post, p. 31.
[55] Post, p. 31.
[56] Post, p. 32.
[57] Post, p. 32.
[58] Id.
[60] Post, p. 34.
[61] Post, p. 35.
[62] Post, p. 35.
[63] Post, p. 36.

to pay, which is also alleged, so much as the plaintiff deserved (quantum meruit), in the case of services performed,[64] or so much as the goods were worth (quantum valebant), in the case of goods sold.[65] 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 the goods were worth.

Same—General Assumpsit in Case of Special Contract.

Much confusion exists in the books in relation to the subject of general and special assumpsit. It has arisen, as is said by the editors of Smith's Leading Cases, from an erroneous impression that, when there has been a special contract, and the plaintiff brings general assumpsit, the special contract is, in some degree, or to some extent, the ground of the plaintiff's recovery. "This impression arises from an error as to the legal nature and ground of general assumpsit, which rests only on a legal liability springing out of a consideration received; and the difficulty clears away if it is kept always in mind that in no case in which general assumpsit is brought, though there may have been a special agreement, does the plaintiff legally ground his claim at all upon the special agreement or promise, nor derive any right from it, nor make it any part of his case. He proceeds exclusively upon the implied legal engagement or obligation of the defendant to pay the value of services ordered or received by him. In special assumpsit the express promise of the defendant is an integral, essential part of the plaintiff's right and of his declaration, because it fixes the measure of damages to which he is entitled; but in general assumpsit he claims, not the conventional, but the legal, measure of damages, belonging to the consideration which he proves, and that is the actual value of the consideration; and the promise or express contract can have no weight in the proceeding except as evidence of the fact of consideration or of its value." [66]

It is a general rule of law that if there is an existing special contract, general assumpsit will not lie, but the plaintiff must declare in special assumpsit on the contract; for the law will not imply a

[64] Post, p. 34. [65] Post, p. 32.

[66] 2 Smith, Lead. Cas. Eq. (8th Am. Ed.) 48 (notes to Cutter v. Powell).

promise where an express promise is shown. The parties are always at liberty to make their own contract; and, if they do so, they must be governed by its terms. In other words, if the parties have, by mutual agreement, settled upon the measure of damages, the plaintiff cannot cut loose from his agreement, and claim the legal measure of damages. There are some cases, however, in which the courts have determined that the defendant shall not be allowed to set up the special contract to defeat general asumpsit; and in these cases general assumpsit may be maintained, notwithstanding the existence of a special contract. As we have seen, the action is not based on the special contract in any case. Whether the declaration shall be in general or special assumpsit depends upon the circumstances of the particular case. The following rules will generally be found decisive:

(1) Except in the cases hereafter mentioned, where there has been a special contract the plaintiff can only recover according to its terms. He must declare specially, and must show performance on his part and nonperformance on the part of the defendant, and the measure of his recovery is the damages fixed by the contract. Thus, where a sailor, hired for a voyage, took a promissory note from his employer conditioned that he should proceed, continue, and do his duty on board for the voyage, and died before the voyage was completed, it was held that he could not sue in general assumpsit for the services actually rendered.[67]

(2) 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;

[67] Cutter v. Powell, 6 Term R. 320; Id., 2 Smith, Lead. Cas. (8th Am. Ed.) 1, and notes. And see Dermott v. Jones, 23 How. 220, 233; Clark v. Smith, 14 Johns. (N. Y.) 326; Champlin v. Butler, 18 Johns. (N. Y.) 169; Seckel v. Scott, 66 Ill. 106; Towers v. Barrett, 1 Term R. 133; Hulle v. Heightman, 2 East, 245; Stark v. Parker, 2 Pick. (Mass.) 267; Chesapeake & O. Canal Co. v. Knapp, 9 Pet. 541; Wilderman v. Pitts, 29 Ill. App. 528; Angle v. Hanna, 22 Ill. 431; Clark v. Scanlan, 33 Ill. App. 48; McDowell v. Ingersoll, 5 Serg. & R. (Pa.) 101; Knickerbocker Life Ins. Co. v. Seeleman, 83 Ill. 446; Phelps v. Hubbard, 59 Ill. 79; Algeo v. Algeo, 10 Serg. & R. (Pa.) 235; Martus v. Houck, 39 Mich. 431; Larkin v. Mitchell & Rowland Lumber Co., 42 Mich. 296, 3 N. W. 904.

for the defendant, having failed to perform the contract, will not be allowed to set it up to defeat the general assumpsit.[68] 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.[69]

(3) 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.[70]

(4) 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;[71] or if he is so prevented by some act

[68] Felton v. Dickinson, 10 Mass. 287; Knight v. Worsted Co., 2 Cush. (Mass.) 271; Dermott v. Jones, 2 Wall. 1; Perkins v. Hart, 11 Wheat. 234; Bank of Columbia v. Patterson, 7 Cranch, 299; Chesapeake & O. Canal Co. v. Knapp, 9 Pet. 566; Baker v. Corey, 19 Pick. (Mass.) 496; Lane v. Adams, 19 Ill. 167; Combs v. Steele, 80 Ill. 101; Throop v. Sherwood, 4 Gilman (Ill.) 92; Tunnison v. Field, 21 Ill. 108; Everett v. Gray, 1 Mass. 101; Trammell v. Lee Co., 94 Ala. 194, 10 South. 213; Jewell v. Schroeppel, 4 Cow. (N. Y.) 564; Williams v. Sherman, 7 Wend. (N. Y.) 109; Ridgely 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; Manton v. Gammon, 7 Ill. App. 201; Hunneman v. Grafton, 10 Metc. (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.

[69] See the cases above cited.

[70] Baylies v. Fettyplace, 7 Mass. 329; Emerton v. Andrews, 4 Mass. 653; Cochran v. Tatum, 3 T. B. Mon. (Ky.) 405; Mitchell v. Giles, 12 N. H. 390; Ranlett v. Moore, 21 N. H. 336; 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. St. 56. See Thomas Manuf'g Co. v. Watson, 85 Me. 300, 27 Atl. 176.

[71] Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285; Derby v. Johnson, 21 Vt. 17; Moulton v. Trask, 9 Metc. (Mass.) 577; Perkins v. Hart, 11

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;[72] or if, after such partial performance, the contract is abandoned by mutual consent, or waived or rescinded,[73]—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.[74]

(5) Where the plaintiff has, even without fault, failed to perform the special contract within the time or in the manner therein stipulated, and he has not been discharged from a performance according to its terms by act or consent of the defendant, or by operation of law, he cannot maintain special assumpsit on the contract, for he cannot show performance on his part.[75] If he can recover at all, it

Wheat. 234; Jones v. Judd, 4 N. Y. 412; Howell v. Medler, 41 Mich. 641, 2 N. W. 911; Mooney v. York Iron Co., 82 Mich. 263, 46 N. W. 376; Hoagland v. Moore, 2 Blackf. (Ind.) 167; Catholic Bishop v. Bauer, 62 Ill. 188; Bannister v. Read, 1 Gilman (Ill.) 99; Selby v. Hutchinson, Id. 319; Webster v. Enfield, Id. 298; Guerdon v. Corbett, 87 Ill. 272; Sanger v. Chicago, 65 Ill. 506; Kipp v. Massin, 15 Ill. App. 300; Johnson v. Trinity Church, 11 Allen (Mass.) 123; Hall v. Rupley, 10 Pa. St. 231; Algeo v. Algeo, 10 Serg. & R. (Pa.) 235; Greene v. Haley, 5 R. I. 263; Wright v. Haskell, 45 Me. 489.

[72] Wolfe v. Howes, 20 N. Y. 197; Willington v. West Boylston, 4 Pick. (Mass.) 101; Lakeman v. Pollard, 43 Me. 464; Fuller v. Brown, 11 Metc. (Mass.) 440; Fenton v. Clark, 11 Vt. 557; Leonard v. Dyer, 26 Conn. 172; Green v. Gilbert, 21 Wis. 395; Jennings v. Lyons, 39 Wis. 553; Terrington v. Greene, 7 R. I. 589.

[73] Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285; Linningdale v. Livingston, 10 Johns. (N. Y.) 36; Perkins v. Hart, 11 Wheat. 234; Hill v. Green, 4 Pick. (Mass.) 114; Catholic Bishop v. Bauer, 62 Ill. 188; Hunt v. Sackett, 31 Mich. 18; Munroe v. Perkins, 9 Pick. (Mass.) 298; 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. McKibben, 5 Mich. 449; Wildey v. School Dist., 25 Mich. 419.

[74] 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. St. 293; Jewell v. Blandford, 7 Dana (Ky.) 473; Rankin v. Darnell, 11 B. Mon. (Ky.) 31; Davis v. Ayres, 9 Ala. 202.

[75] Hayward v. Leonard, 7 Pick. (Mass.) 181.

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 only question is whether the law will imply or create 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.[76]

(6) 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.[77]

[76] See Clark, Cont. 781. For cases in which a recovery in general assumpsit has been allowed, see Hayward v. Leonard, 7 Pick. (Mass.) 181; Dermott v. Jones, 23 How. 220; Blood v. Wilson, 141 Mass. 25, 6 N. E. 362; Bragg v. Town of Bradford, 33 Vt. 35; Pinches v. Lutheran Church, 55 Conn. 183, 10 Atl. 264; McMillan v. Malloy, 10 Neb. 228, 4 N. W. 1004; 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. 773; Parker v. Steed, 1 Lea (Tenn.) 206; Taylor v. Williams, 6 Wis. 363; Wadleigh v. Town of Sutton, 6 N. H. 15; Norris v. School Dist., 12 Me. 293. 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; Catlin v. Tobias, 26 N. Y. 217; Myrick v. Slason, 19 Vt. 122; St. Albans S. Co. v. Wilkins, 8 Vt. 54; Champlin v. Rowley, 18 Wend. (N. Y.) 187; Bozarth v. Dudley, 44 N. J. Law, 304; Miller v. Phillips, 31 Pa. St. 218; Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845. 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; Hayward v. Leonard, 7 Pick. (Mass.) 181; Dermott v. Jones, 2 Wall. 1; M'Millan v. Vanderlip, 12 Johns. (N. Y.) 165; Jennings v. Camp, 13 Johns. (N. Y.) 94; Lantry v. Parks, 8 Cow. (N. Y.) 63; Badgley v. Heald, 4 Gilman (Ill.) 64; Angle v. Hanna, 22 Ill. 431; 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; Hapgood v. Shaw, 105 Mass. 276; Catlin v. Tobias, 26 N. Y. 217; 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; Gillespie Tool Co. v. Wilson, 123 Pa. St. 19, 16 Atl. 36; Scheible v. Klein, 89 Mich. 376, 50 N. W. 857; Gill v. Vogler, 52 Md. 663; Kriger v. Leppel, 42 Minn. 6, 43 N. W. 484.

[77] Thurston v. Percival, 1 Pick. (Mass.) 415. Thus, where an infant per-

(7) 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

forms 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; Price v. Furman, 27 Vt. 268; 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. 764, 780, 785; Palanche v. Colburn, 8 Bing. 14; Ex parte McClure, L. R. 5 Ch. App. 737; Seipel v. Insurance Co., 84 Pa. St. 47; Gaffney v. Hayden, 110 Mass. 137; Medbury v. Watrous, 7 Hill (N. Y.) 110; Williams v. Bemis, 108 Mass. 91; Brown v. Railway 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. Foree, 6 Johns. (N. Y.) 110; Toledo, W. & W. R. Co. v. Chew, 67 Ill. 378; Aldine Manuf'g Co. v. Barnard, 84 Mich. 632, 28 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; 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 parties, if in pari delicto, can recover from the other for a partial performance. See Clark, Cont. 470–502, 784, where the cases are collected, and the law is stated at length. 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; Nugent v. Teachout, 67 Mich. 571, 35 N. W. 254; Whipple v. Parker, 29 Mich. 369; Patten v. Hicks, 43 Cal. 509; Rebman v. Water Co., 95 Cal. 390, 30 Pac. 564; Cadman v. Markle, 76 Mich. 448, 43 N. W. 315; Ellis v. Cory, 74 Wis. 176, 42 N. W. 252; 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. Eldredge, 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.

should be special, as far as the express contract goes, and general as to the extras.[78]

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.[79] 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.

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.[80] 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

W. 887; 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; Montague v. Garnett, 3 Bush (Ky.) 297; Wonsettler v. Lee, 40 Kan. 367, 19 Pac. 862; 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. 785, and cases there cited.

[78] Dubois v. Delaware & H. Canal Co., 4 Wend. (N. Y.) 285, 12 Wend. (N. Y.) 334; McCormick v. Connoly, 2 Bay (S. C.) 401.

[79] Clark, Cont. 760; 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; 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. St. 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.

[80] Cross v. Cheshire, 7 Exch. 43.

feigned, in order to entitle him to the remedy by action of assumpsit.[81] And the same is true where a surety pays the debt of his principal.[82]

Same—Money Received for the Use of Another, or Money Had and Received.

Whenever one person has money to which another person, in equity 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 because of the fictitious promise.[83] 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.

[81] Kemp v. Fender, 12 Mees. & W. 421; Doremus v. Selden, 19 Johns. (N. Y.) 213; Wilton v. Tazewell, 86 Ill. 29; Nickerson v. Wheeler, 118 Mass. 295; Harvey v. Drew, 82 Ill. 606; Steckel v. Steckel, 28 Pa. St. 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.

[82] Alexander v. Vane, 1 Mees. & W. 511; Pownal v. Ferrand, 6 Barn. & C. 439; Crisfield v. State, 55 Md. 192.

[83] See Clark, Cont. 764, for a collection of the cases, and a discussion of the doctrine. See, also, Atkinson v. Scott, 36 Mich. 18; Catlin v. Birchard, 13 Mich. 110; Lawson v. Lawson, 16 Grat. (Va.) 230; Vrooman v. McKaig, 4 Md. 150; McCrea v. Purmort, 16 Wend. (N. Y.) 460; Loomis v. O'Neal, 73 Mich. 582, 41 N. W. 701; Swift Co. v. U. S., 111 U. S. 22, 4 Sup. Ct. 224; Johnson v. Jennings, 10 Grat. (Va.) 1; Devine v. Edwards, 101, Ill. 138; Walker v. Conant, 65 Mich. 194, 31 N. W. 786; Wright v. Dickenson, 67 Mich. 580, 35 N. W. 164; Trumbull v. Campbell, 3 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; Bowen v. Rutland School Dist., 36 Mich. 149; Floyd v. Day, 3 Mass. 403; Mason v. Waite, 17 Mass. 560; Arms v. Ashley, 4 Pick. (Mass.) 71; Barr v. Craig, 2 Dall. (Pa.) 151; Miller v. Ord, 2 Bin. (Pa.) 382. "The obligation thus created from the receipt of money can arise only in respect of money, or what is equivalent to money. Goods received by the defendant, for instance, cannot be treated as money, so as to support such an action, so long as they are undisposed of, and remain in the defendant's hands; but it is otherwise where they have been sold and converted into money by him. In such a case the right to recover is based on the receipt by the defendant of money belonging to the plaintiff; and the amount of money received, and not the value of the goods, is the measure of recovery. It follows from this that if the money,

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.[84]

The action will also lie to recover money paid by mistake,[85] as

or an equivalent, is not received for the goods, even though they may have been sold; or if they have been merely exchanged for other goods; or if the amount cannot be ascertained,—the action will not lie. The plaintiff must seek some other remedy." Clark, Cont. 765, and cases there collected; Creel v. Kirkham, 47 Ill. 344; Johnston v. Salisbury, 61 Ill. 316; Stearns v. Dillingham, 22 Vt. 624; Thurston v. Mills, 16 East, 254; Tuttle v. Campbell, 74 Mich. 652, 42 N. W. 384; Watson v. Stever, 25 Mich. 386; Tolan v. Hodgeboom, 38 Mich. 624; Stockham v. Stockham, 1 Wkly. Notes Cas. (Pa.) 84; Bethlehem v. Perseverance Fire Co., 81 Pa. St. 445. But see post, p. 33. 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; Lewis v. Robinson, 10 Watts (Pa.) 338.

[84] Clark, Cont. 766 (where the cases are collected); Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892; 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; Kiewert v. Rindskopf, 46 Wis. 481, 1 N. W. 163; Gilmore v. Wilbur, 12 Pick. (Mass.) 120; Hindmarch v. Hoffman, 127 Pa. St. 284, 18 Atl. 14; Cory v. Freeholders, 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; Gray v. Griffith, 10 Watts (Pa.) 431; Pearsall v. Chapin, 44 Pa. St. 9; Staat v. Evans, 35 Ill. 455; McDonald v. Brown, 16 Ill. 32; Alderson v. Ennor, 45 Ill. 128; Stiles v. Easley, 51 Ill. 275; Dickinson v. Whitney, 4 Gilman (Ill.) 406. "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. 767, and cases there collected; Keener, Quasi Cont. 160; Horne v. Mandelbaum, 13 Ill. App. 607.

[85] Clark, Cont. 771, where the cases are collected. See Bize v. Dickason, 1

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.[86]

And the action will lie to recover money paid on a consideration which has failed,[87] as in a case where the purchaser of goods has paid the price and the seller fails to deliver the goods;[88] or where the purchaser has paid for goods which did not belong to the seller, and which have been reclaimed by the real owner;[89] 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.[90]

And, where a person has paid money under a contract which he has a right to avoid because of infancy, or for any other reason, or which is void, or unenforceable, and is repudiated by the other party, the payment may be recovered back, if at all, in this form of action.[91]

Term R. 285; Citizens' Bank v. Graffiin, 31 Md. 507; Mayer v. City of New York, 63 N. Y. 455; Hazard v. Insurance Co., 7 R. I. 429; Holtz v. Schmidt, 59 N. Y. 253; Stuart v. Sears, 119 Mass. 143; Devine v. Edwards, 101 Ill. 138; 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; Chambers v. Union Bank, 78 Pa. St. 205; Thomas v. Brady, 10 Pa. St. 164.

[86] Dails v. Lloyd, 12 Q. B. 531; Townsend v. Crowdy, 8 C. B. (N. S.) 477; Stuart v. Sears, supra.

[87] Claflin v. Godfrey, 21 Pick. (Mass.) 1; Laflin v. Howe, 112 Ill. 253; Raney v. Boyce, 39 Ill. 24; Graffenreid v. Kundert, 31 Ill. App. 394; Town v. Wood, 37 Ill. 512; Ripley v. Case, 86 Mich. 261, 49 N. W. 46; Wright v. Dickenson, 67 Mich. 580, 35 N. W. 164; Earle v. Bickford, 6 Allen (Mass.) 549; Newsome v. Graham, 10 Barn. & C. 234; Johnson v. Jennings, 10 Grat. (Va.) 1; Schwinger v. Hickok, 53 N. Y. 280; Kauffelt v. Leber, 9 Watts & S. (Pa.) 93; Clark, Cont. 774, and cases there collected.

[88] Giles v. Edwards, 7 Term R. 181.

[89] Eicholz v. Bannister, 34 Law J. C. P. 105; Hook v. Robison, Add. (Pa.) 271.

[90] 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; Laflin v. Howe, 112 Ill. 253.

[91] Phillpson v. Bates, 2 Mo. 116; Clark, Cont. 768, 770, and cases there referred to.

Same—Money Lent.

Whenever money is lent, and there is no express promise to repay it, or, though there is such a promise, it cannot, for some reason, be set up by the borrower, the lender may recover the money in general assumpsit on a count for money lent.[92] Money lent on the credit of the borrower, for instance, may be recovered in assumpsit for money lent, though the lender received a negotiable promissory note from a third person, where the note has not been paid or negotiated, and is surrendered at the trial.[93]

Same—Interest Due.

General assumpsit lies to recover the legal interest due on the loan or forbearance of money when there is no express promise to pay it.

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.[94]

Same—Action on Award.

Assumpsit is a proper remedy to recover a sum of money awarded under a parol submission to arbitration.[95]

Same—Use and Occupation of Land.

Whenever there is a contract, express or implied, creating the relation of landlord and tenant, and imposing a duty to pay rent, and there is no express promise to pay it, assumpsit for use and occupation of the land will lie.[96]

[92] Marston v. Boynton, 6 Metc. (Mass.) 127; Shaw v. Lowell Methodist Soc., 8 Metc. (Mass.) 223; Baxter v. Paine, 16 Gray (Mass.) 273; Robbins v. Potter, 98 Mass. 532; Currier v. Davis, 111 Mass. 480; Brown v. Campbell, 1 Serg. & R. (Pa.) 176.

[93] Marston v. Boynton, supra.

[94] Clark, Cont. 758; Hopkins v. Logan, 5 Mees. & W. 241; Marshall v. Lewark, 117 Ind. 377, 20 N. E. 253; Warren v. Caryl, 61 Vt. 331, 17 Atl. 741; Irving v. Veitch, 3 Mees. & W. 106; Watkins v. Ford, 69 Mich. 357, 37 N. W. 300; Mackin v. O'Brien, 33 Ill. App. 474; Hoyt v. Wilkinson, 10 Pick. (Mass.) 31; Stevens v. Tuller, 4 Mich. 387.

[95] Bates v. Curtis, 21 Pick. (Mass.) 247.

[96] Dwight v. Cutler, 3 Mich. 566; Hogsett v. Ellis, 17 Mich. 351; Dalton v. Laudahn, 30 Mich. 349; Warner v. Hale, 65 Ill. 395; Dudding v. Hill, 15 Ill. 61; Eppes v. Cole, 4 Hen. & M. (Va.) 161; Crouch v. Briles, 7 J. J. Marsh. (Ky.) 257; Gould v. Thompson, 4 Metc. (Mass.) 227; Walker v. Furbush, 11

Where a person had been let into possession of land under a valid contract of purchase, which was afterwards abandoned, he was held liable to an action for use and occupation, at the suit of the vendor, for the period during which he continued in possession after the abandonment of the contract.[97]

Same—Board and Lodging Furnished.

General assumpsit is the proper form of action to recover for board and lodging furnished, whenever there has been no express promise to pay therefor, and the circumstances are such that the law will imply a promise to pay.[98]

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 special assumpsit on that contract, unless for some reason the buyer cannot set up the contract to defeat general assumpsit.[99] If there is no special promise as to the price, as where a man orders goods, and they are sent, or where a man delivers goods,

Cush. (Mass.) 366; Stebbins v. Peck, 8 Gray (Mass.) 553; Gunn v. Scovil, 4 Day (Conn.) 228; Howard v. Ransom, 2 Aik. (Vt.) 252. But see Featherstonhaugh v. Bradshaw, 1 Wend. (N. Y.) 135. The action will not lie where the plaintiff's title has not been established, and is legally in issue, since the title to realty cannot be tried in this form of action. Miller v. Miller, 7 Pick. (Mass.) 136; Bigelow v. Jones, 10 Pick. (Mass.) 161; King v. Mason, 42 Ill. 223; Codman v. Jenkins, 14 Mass. 93; Lewis v. Robinson, 10 Watts (Pa.) 338. The rule that the title to land cannot be tried in this action applies only where the parties to the suit claim by adverse titles. Pickman v. Trinity Church, 123 Mass. 1. The action does not lie where the holding is adverse, or where there is no obligation to pay rent by virtue of an express or implied contract relation, as of landlord and tenant. Dwight v. Cutler, 3 Mich. 566; Ward v. Warner, 8 Mich. 508; Hogsett v. Ellis, 17 Mich. 351; Henderson v. City of Detroit, 61 Mich. 378, 28 N. W. 133; Lockwood v. Thunder Bay, etc., Co., 42 Mich. 536, 4 N. W. 292; Dudding v. Hill, 15 Ill. 61; McNair v. Schwartz, 16 Ill. 24; Greenup v. Vernor, Id. 26; Boston v. Binney, 11 Pick. (Mass.) 1; McCloskey v. Miller, 72 Pa. St. 151. In some jurisdictions the use of this remedy has been extended by statute. See Hadley v. Morrison, 39 Ill. 392.

[97] Howard v. Shaw, 8 Mees. & W. 118.

[98] Thompson v. Reed, 48 Ill. 118; Raymond v. Eldridge, 111 Mass. 390; Smith v. Milligan, 43 Pa. St. 107.

[99] Ante, p. 21; Seckel v. Scott, 66 Ill. 106; Brand v. Henderson, 107 Ill. 141; Burnham v. Roberts, 70 Ill. 19.

and they are accepted, without any agreement as to the price, or where, though there has been a special contract, the buyer, because of a breach, or for some other reason, cannot set it up, the price of the goods, which the law implies to be their value, may be recovered in general assumpsit.

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.[100] 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.[101] 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.[102]

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.[103] Whether assumpsit in any form will lie in the latter case is not clear. Some courts hold that the only remedy is in tort, as by action of trover and conversion.[104] Other courts, however, hold that the owner of the goods may waive the tort, and

[100] Shearer v. Jewett, 14 Pick. (Mass.) 232; Bemis v. Charles, 1 Metc. (Mass.) 440; Goodrich v. Laffiin, 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. Morse, 3 Mich. 55; Wilson v. Wagar, 26 Mich. 452; Knight v. Worsted Co., 2 Cush. (Mass.) 271; Aldine Manuf'g Co. v. Barnard, 84 Mich. 632, 28 N. W. 280; Toledo, W. & W. R. Co. v. Chew, 67 Ill. 378; Willson v. Foree, 6 Johns. (N. Y.) 110; Larkin v. Mitchell & R. L. Co., 42 Mich. 296, 3 N. W. 904.

[101] Ante, p. 20.

[102] Ante, p. 20.

[103] Ante, p. 28, note.

[104] Jones v. Hoar, 5 Pick. (Mass.) 285; Galloway v. Holmes, 1 Doug. (Mich.) 330 (but see Aldine Manuf'g Co. v. Barnard, 84 Mich. 632, 28 N. W. 280); Winchell v. Noyes, 23 Vt. 303; Strother v. Butler, 17 Ala. 733; Androscoggin Water Power Co. v. Metcalf, 65 Me. 40; Allen v. Ford, 19 Pick. (Mass.) 217; Bethlehem Borough v. Insurance Co., 81 Pa. St. 445; Sandeen v. Railroad Co., 79 Mo. 278; Clark, Cont. 780. And in such jurisdictions, where the goods

maintain assumpsit for the value of the goods, as upon a fictitious sale, and promise to pay for them.[105]

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 of land was to pay the same in money, such price could be recovered under a general count for lands sold and conveyed.[106]

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 for some reason cannot be set up, general assumpsit will lie to recover compensation therefor. As in the case of goods sold, and as explained in treating of such cases,[107] the action may be in indebitatus assumpsit,[108] or on the quantum meruit.[109]

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.

[105] Russell v. Bell, 10 Mees. & W. 340; Willson v. Foree, 6 Johns. (N. Y.) 110; Toledo, W. & W. R. Co. v. Chew, 67 Ill. 378; Aldine Manuf'g Co. v. Barnard, 84 Mich. 632, 28 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; McCullough v. McCullough, 14 Pa. St. 295; Finney v. McMahon, 1 Yeates (Pa.) 248; Clark, Cont. 780. But see Creel v. Kirkham, 47 Ill. 344; Johnston v. Salisbury, 61 Ill. 316; Stearns v. Dillingham, 22 Vt. 624; Thurston v. Mills, 16 East, 254; Tuttle v. Campbell, 74 Mich. 652, 42 N. W. 384; Boyer v. Bullard, 102 Pa. St. 555; Weiler v. Kershner, 109 Pa. St. 219.

[106] Nugent v. Teachout, 67 Mich. 571, 35 N. W. 254; Stiltzell v. Michael, 3 Watts & S. (Pa.) 329; Nelson v. Swan, 13 Johns. (N. Y.) 483; Bowen v. Bell, 20 Johns. 338; Whitbeck v. Whitbeck, 9 Cow. (N. Y.) 266; Goodwin v. Gilbert, 9 Mass. 510; Felch v. Taylor, 13 Pick. (Mass.) 133; Pike v. Brown, 7 Cush. (Mass.) 133; Bassford v. Pearson, 9 Allen (Mass.) 387; Elder v. Hood, 38 Ill. 533.

[107] Ante, pp. 20, 33.

[108] 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. St. 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.

[109] King v. Welcome, 5 Gray (Mass.) 41; Atkins v. Barnstable Co., 97 Mass.

Same—Work, Labor, and Materials.

What has just been said applies to actions for work, labor, and materials, done and furnished, as in building a house, repairing a chattel, etc.[110]

Same—Action on Judgment.

A judgment of a court directing the payment of money, if rendered in invitum, clearly cannot be regarded as a true contract, for the element of agreement is wanting.[111] For the purpose, however, of allowing a remedy by action ex contractu, as by assumpsit or debt, the law has created a fictitious promise on the part of a judgment debtor to pay the judgment, thus clothing the judgment with a semblance of contract, and making it a quasi contractual obligation. 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 not only will not lie on a contract under seal, but it will not lie 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.[112]

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.[113] The action will also lie on a

428; Summers v. McKim, 12 Serg. & R. (Pa.) 405; Frazer v. Gregg, 20 Ill. 299; Allen v. McKibben, 5 Mich. 449; Mooney v. Iron Co., 82 Mich. 263, 46 N. W. 376.

[110] Van Deusen v. Blum, 18 Pick. (Mass.) 229; Hayward v. Leonard, 7 Pick. (Mass.) 181; Thompson v. Purcell, 10 Allen (Mass.) 426; Lord v. Wheeler, 1 Gray (Mass.) 282; Wildey v. School Dist., 25 Mich. 419; Howell v. Medler, 41 Mich. 641, 2 N. W. 911; Martus v. Houck, 39 Mich. 431; Day v. Caton, 119 Mass. 513.

[111] Clark, Cont. 755, and cases cited. See State of Louisiana v. Mayor, etc., of City of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211; O'Brien v. Young, 95 N. Y. 428; Rae v. Hulbert, 17 Ill. 572.

[112] Andrews v. Montgomery, 19 Johns. (N. Y.) 162.

[113] 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; Hubbell v. Coudrey, 5 Johns. (N. Y.) 132; Boston India Rubber Co. v.

domestic judgment of an inferior court not of record, since it is not a specialty.[114] 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.[115]

It was at one time held in some states and is perhaps still held in a few, 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;[116] but by the weight of authority, 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.[117]

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

Holt, 14 Vt. 92; Grant v. Easton, L. R. 13 Q. B. Div. 302; Mellin v. Horlick, 31 Fed. 865; McFarlane v. Derbishire, 8 U. C. Q. B. 12.

[114] Dictum in Williams v. Jones, 13 Mees. & W. 631.

[115] Pease v. Howard, 14 Johns. (N. Y.) 479; Bain v. Hunt, 3 Hawkes (N. C.) 572; Adair v. Rogers, Wright (Ohio) 428. The judgment of a justice in another state is not a specialty debt of record. Collins v. Modiset, 1 Blackf. (Ind.) 60. See Robinson v. Prescott, 4 N. H. 450; Mahurin v. Bickford, 6 N. H. 567.

[116] Hitchcock v. Aicken, 1 Caines (N. Y.) 460; Lambkin v. Nance, 2 Brev. (S. C.) 99; Pawling v. Willson, 13 Johns. (N. Y.) 192.

[117] Andrews v. Montgomery, 19 Johns. (N. Y.) 162 (but see Shumway v. Stillman, 6 Wend. [N. Y.] 447); Garland v. Tucker, 1 Bibb (Ky.) 361; 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 M'Rae, v. Mattoon, 13 Pick. (Mass.) 53.

pauper; or under any other circumstances declares that one person may recover from another money paid out by him for the benefit of the latter; 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.[118]

COVENANT.

10. 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.[119]

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

[118] Clark, Cont. 757, and cases there cited; Inhabitants of Milford v. Com., 144 Mass. 64, 10 N. E. 516; Pacific M. S. Co. v. Jolliffe, 2 Wall. 450; Woods v. Ayres, 39 Mich. 345; Town of Woodstock v. Hancock, 62 Vt. 348, 19 Atl. 991; McCoun v. Railroad Co., 50 N. Y. 176; Sangamon Co. v. City of Springfield, 63 Ill. 66; Bath v. Freeport, 5 Mass. 325; Watson v. Cambridge, 15 Mass. 286. At common law a penalty given by statute may be recovered either in debt or assumpsit. Ewbanks v. Town of Ashley, 36 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, 39 Mich. 733.

[119] Gale v. Nixon, 6 Cow. (N. Y.) 445; Simonton v. Winter, 5 Pet. 141; Tribble v. Oldham, 5 J. J. Marsh. (Ky.) 137; Rockford, etc., R. Co. v. Beckemeier, 72 Ill. 267; Wilson v. Brechemin, Brightly, N. P. (Pa.) 445; Maule v. Weaver, 7 Pa. St. 329; Jackson v. Waddill, 1 Stew. (Ala.) 579; U. S. v. Brown, 1 Paine, 422, Fed. Cas. No. 14,670. See Append. Form No. 9, for declaration

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.[120]

Whenever the defendant has executed and delivered a contract under seal, and has broken it, covenant is a proper remedy,[121] though, as we shall see, debt may also lie, if the damages are liquidated.[122] 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 deed;[123] and whether it be for something that has been done

in covenant. In some states, even where the common-law procedure 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.

[120] Gale v. Nixon, supra.

[121] 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 v. Wanner, 24 Ill. App. 357; Moore v. Vail, 17 Ill. 185; Goodrich v. Leland, 18 Mich. 110; New Holland Turnpike Co. v. Lancaster Co., 71 Pa. St. 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. 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. St. 447; or upon a bond with a penalty, New Holland Turnpike Co. v. Lancaster Co., supra; U. S. v. Brown, 1 Paine, 422, Fed. Cas. No. 14,670.

[122] Post, p. 40.

[123] Dexter v. Manley, 4 Cush. (Mass.) 14; Grannis v. Clark, 8 Cow. (N. Y.) 36; Frost v. Raymond, 2 Caines (N. Y.) 188; Vanderkarr v. Vanderkarr, 11 Johns. (N. Y.) 122; Kent v. Welch, 7 Johns. (N. Y.) 258; Gates v. Caldwell, 7 Mass. 68; Roebuck v. Duprey, 2 Ala. 535; Crouch v. Fowle, 9 N. H. 219. 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.

in the past, or something in præsenti, or for the performance of something in the future.[124]

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.[125] Indeed, since, as we have seen, assumpsit will not lie for breach of a contract under seal; and, as we shall presently see, debt will only lie where the damages are liquidated, it follows that covenant is not only a proper remedy, but the only remedy, to recover unliquidated damages for the breach of a contract under seal.

DEBT.

11. The action of debt lies only 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 where it is based:

(a) Upon simple contracts express or implied in fact.

(b) Upon quasi-contractual obligations having the force and effect of simple contracts.

(c) Upon contracts under seal.

[124] Illustrations of covenants for something in praesenti 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. 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.

[125] Jackson v. Waddill, 1 Stew. (Ala.) 579; Byrd v. Knighton, 7 Mo. 443; Taylor v. Wilson, 5 Ired. (N. C.) 214; Wilson v. Hickson, 1 Blackf. (Ind.) 230; Scott v. Conover, 6 N. J. Law, 222.

(d) Upon contracts or quasi-contractual obligations of record.

(e) Upon quasi-contractual obligations imposed by statute.

12. The action will not lie:

(a) To recover an unliquidated or uncertain sum.

(b) Nor, generally, to recover an installment of a debt payable in installments before the whole is due.

(c) Nor on a collateral contract.

(d) Nor on a promise to pay out of a particular fund, or in a particular kind of money, or in property or services.

13. DEBT IN THE DETINET—There is a common-law action, called "debt in the detinet," which lies to recover goods under a contract to deliver them; but the action is not now used to any extent.

This action is so called because it is, in legal consideration, for the recovery of a debt eo nomine and in numero, and not for the recovery of damages.[126] 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 or quasi 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 it may readily be reduced to a certainty; and the action of

[126] 1 Chit. Pl. 121. 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. Note 130, infra. See Append. Forms Nos. 5–8, for declarations in debt.

debt lies for the recovery thereof, eo nomine, without regard to the manner in which the obligation is incurred or is evidenced." [127]

Simple Contracts and Quasi-Simple Contracts.

Debt will lie on any simple contract to recover money, where the amount is certain, whether the contract is verbal or written, express or implied.[128] It also lies to enforce a quasi contractual obligation to pay a sum certain.[129] 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;[130] to recover interest due on the loan or forbearance of money;[131] for work and labor;[132] work, labor, and materials;[133] for goods sold and delivered, or bargained and sold;[134] for use and occupation of land;[135] on an award to pay money on submission to arbitration.[136] Debt is also a concurrent remedy with assumpsit to

[127] Baum v. Tonkin, 110 Pa. St. 569, 1 Atl. 535.

[128] Respublica v. Lacaze, 2 Dall. (Pa.) 118, 1 Yeates, 55, Add. 59; Gift v. Hall, 1 Humph. (Tenn.) 480. Against drawer of bill of exchange or maker of prómissory note at the suit of the payee or indorsee. Dunlap v. Buckingham, 16 Ill. 109; Willmarth v. Crawford, 10 Wend. (N. Y.) 343; Camp v. Bank of Oswego, 10 Watts (Pa.) 130. See post, p. 42. On parol promise by mortgagor to pay mortgage debt. Tonkin v. Baum, 114 Pa. St. 414, 7 Atl. 185. On a policy of insurance not under seal. Miller v. Insurance Co., 34 Leg. Int. (Pa.) 339. (And, as we shall see, when under seal, post, p. 42.)

[129] 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. County, 1 Chest. (Pa.) 162, it was said that debt will lie wherever indebitatus assumpsit (ante, p. 20) is maintainable.

[130] 1 Chit. Pl. 122; Speake v. Richards, Hob. 207; Young v. Hawkins, 4 Yerg. (Tenn.) 171.

[131] Herries v. Jamieson, 5 Term R. 553; Sparks v. Garrigues, 1 Bin. (Pa.) 152.

[132] Com. Dig. "Debt," B; Thompson v. French, 10 Yerg. (Tenn.) 452.

[133] Smith v. Lowell, 8 Pick. (Mass.) 178.

[134] Emery v. Fell, 2 Term R. 28; Dillingham v. Skein, 1 Hempst. 181, Fed. Cas. No. 3,912a.

[135] Egler v. Marsden, 5 Taunt. 25; Wilkins v. Wingate, 6 Term R. 62; King v. Fraser, 6 East, 348; McKean v. Whitney, 3 Denio (N. Y.) 452. And see Trapnall v. Merrick, 21 Ark. 503; McEwen v. Joy, 7 Rich. Law (S. C.) 33; Davis v. Shoemaker, 1 Rawle (Pa.) 135.

[136] Stanley v. Chappell, 8 Cow. (N. Y.) 235; Ex parte Wallis, 7 Cow. (N. Y.) 522.

recover on foreign judgments and judgments of inferior courts not of record, which are considered in law as having the force and effect of simple contract debts.[137]

On Specialties.

Debt lies, also, to recover money due on any specialty or contract under seal to pay money,[138] as on single bonds,[139] charter parties,[140] policies of insurance under seal,[141] or on bonds with a penalty conditioned for the payment of money, or any other act.[142]

On Records.

Debt also lies on any obligation of record to pay money.[143] 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.[144] We have already seen that it

[137] Williams v. Jones, 13 Mees. & W. 631; Cole v. Driskell, 1 Blackf. (Ind.) 16; McDonald v. Butler, 3 Mich. 558; Jordan v. Robinson, 15 Me. 167; Pease v. Howard, 14 Johns. (N. Y.) 479; Hubbell v. Coudrey, 5 Johns. (N. Y.) 132; Andrews v. Montgomery, 19 Johns. (N. Y.) 192; Mills v. Duryee, 7 Cranch, 481; Dubois v. Dubois, 6 Cow. (N. Y.) 494; James v. Henry, 16 Johns. (N. Y.) 233. As we shall see, it lies also on judgments of record which are specialties, and would not support assumpsit.

[138] 1 Chit. Pl. 124; Hooper v. Shepherd, 2 Strange, 1089; White v. Parkin, 12 East. 583; Evans v. Jones, 5 Mees. & W. 295; Hoy v. Hoy, 44 Ill. 469; Nash v. Nash, 16 Ill. 79; Larmon v. Carpenter, 70 Ill. 549; Goodrich v. Leland, 18 Mich. 110; Stewart v. Sprague, 71 Mich. 50, 38 N. W. 673; Partridge v. Clarke, 4 Pa. St. 166.

[139] Hooper v. Shepherd, supra; Ingram v. Hall, Mart. (N. C.) 1.

[140] Hooper v. Shepherd, supra.

[141] Ellicott v. United States Ins. Co., 8 Gill & J. (Md.) 166; Marine Ins. Co. v. Young, 1 Cranch, 332; People's Ins. Co. v. Spencer, 53 Pa. St. 353; Franklin Fire Ins. Co. v. Massey, 33 Pa. St. 221.

[142] Bishop v. Freeman, 42 Mich. 533, 4 N. W. 290; Safford v. Miller, 59 Ill. 205; Rhyne v. Wacaser, 63 N. C. 36; Fraser v. Little, 13 Mich. 195; Coverly v. Nichols, 4 Johns. (N. Y.) 189; Woods v. Rowan, 5 Johns. (N. Y.) 42.

[143] Woods v. Pettis, 4 Vt. 556.

[144] Bissell v. Briggs, 9 Mass. 462; Creathouse v. Smith, 3 Scam. (Ill.) 541; 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. As we have seen, assumpsit does not lie in these cases. Ante, p. 35. 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.

is a concurrent remedy with assumpsit on judgments which are not regarded as specialties, as judgments of a foreign court, or an inferior court not of record.[145]

Debt is also a common remedy to recover on a forfeited recognizance of bail, or for appearance in court as a witness or otherwise.[146]

The action also lies on a sheriff's return of fieri feci, which is in the nature of a record, to recover the money which he has received,[147] though assumpsit for money had and received would be a concurrent remedy.

On Statutes.

Debt is also a proper remedy, generally concurrent with the remedy by assumpsit,[148] to recover a specific sum of money due by virtue of a statute, where the statute prescribes no particular form of action.[149] 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,[150] and prescribes no particular mode of recovery, debt will lie.[151] It will lie to recover, under a

580. It does not lie on a judgment if a levy of an execution thereon has been made, unless the levy was irregular, or produced no satisfaction of the debt. Fish v. Sawyer, 11 Conn. 545. It lies before the limit of time for issuing execution has been reached. Field v. Sims, 96 Ala. 540, 11 South. 763; McDonald v. Butler, 3 Mich. 558; Smith v. Mumford, 9 Cow. (N. Y.) 26. 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.

[145] Ante, p. 41.

[146] 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.

[147] 1 Chit. Pl. Cockram v. Welbye, 2 Show. 79; Speake v. Richards, Hob. 206.

[148] Ante, p. 36.

[149] Com. Dig. "Action on Statute," E; Bac. Abr. "Debt," A; Tilson v. Warwick Gas Light Co., 4 Barn. & C. 962.

[150] 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. 126; 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.

[151] 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

statute, money lost and paid on a wager, or to recover usury paid, or to recover a delinquent tax.[152] And whenever a statute gives the right to recover damages for 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.[153]

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.[154]

When Debt will not Lie.

Debt cannot in any case be maintained at common law,[155] unless the demand is for a sum certain, or is a pecuniary demand which can be readily reduced to a certainty by computation.[156] It will not lie, for instance, for a refusal to convey shares in a building according

Ala. 31, 11 South. 753; Vaughan v. Thompson, 15 Ill. 39; Jacksonville v. Block, 36 Ill. 507; Ewbanks v. Ashley, 36 Ill. 177; Bennalleck v. People, 31 Mich. 200. Note 7, supra, and cases there cited.

[152] People v. Davis, 112 Ill. 272; Ryan v. Gallatin Co., 14 Ill. 78.

[153] "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., T. 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; Israel v. Jacksonville, 1 Scam. (Ill.) 291; 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.

[154] Ante, p. 37; Stevens v. Evans, 2 Burrows, 1157; Underhill v. Ellicombe, 1 McClel. & T. 450; Confrey v. Stark, 73 Ill. 187; Almy v. Harris, 2 Johns. (N. Y.) 175; Smith v. Drew, 5 Mass. 514; Gedney v. Tewksbury, 3 Mass. 307; Smith v. Woodman, 28 N. H. 520.

[155] It seems otherwise where the action is expressly authorized by statute. Reed v. Davis, 8 Pick. (Mass.) 514.

[156] Baum v. Tonkin, 110 Pa. St. 569. 1 Atl. 535; Gregory v. Bewly, 5 Pike (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 Manuf'g Co. v. Reeves, 68 Ill. 403; Knowles v. Eastham, 11 Cush. (Mass.) 429.

to the terms of a contract under seal, where the contract fixes no value. The remedy is by action of covenant.[157]

The action cannot generally be supported for one entire debt, payable in installments, till all are due;[158] 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.[159] And even where one sum is payable by installments, if the payment is secured by a penalty, debt may be maintained for the penalty.[160]

Debt will not lie on a collateral contract, as on a promise to pay the debt of another in consideration of forbearance, etc.,[161] or in some jurisdictions against the indorser of a bill or note, or by an indorsee against the acceptor of a bill.[162]

Nor will it lie to recover on a promise, express or implied, to pay a debt out of a particular fund, or in property, or in services, or in a particular kind of money.[163] It does not lie, for instance, on a note

[157] Fox River Manuf'g Co. v. Reeves, 68 Ill. 403.

[158] Rudder v. Price, 1 H. Bl. 554; Fontaine v. Aresta, 2 M'Lean, 127, Fed. Cas. No. 4,905; Farnham v. Hay, 3 Blackf. (Ind.) 167; Sparks v. Garrigues, 1 Bin. (Pa.) 152; Hoy v. Hoy, 44 Ill. 469.

[159] Rudder v. Price, supra; Hoy v. Hoy, 44 Ill. 469.

[160] Fontaine v. Aresta, supra; 1 Chit. Pl. 127; Coates v. Hewit, 1 Wils. 80.

[161] 1 Chit. Pl. 127; Bishop v. Young, 2 Bos. & P. 83; Gregory v. Thomson, 31 N. J. Law, 166; Tappen v. Campbell, 9 Yerg. (Tenn.) 436. But see Brown v. Bussey, 7 Humph. (Tenn.) 573; Hall v. Rodgers, Id. 536.

[162] Bishop v. Young, 2 Bos. & P. 78; Cloves v. Williams, 3 Bing. N. C. 868; Smith v. Segar, 3 Hen. & M. (Va.) 394; Stovall v. Woodson, 2 Munf. (Va.) 302. Quaere, Hilborn v. Artus, 3 Scam. (Ill.) 344. Contra, Raborg v. Peyton, 2 Wheat. 385; Kirkman v. Hamilton, 6 Pet. 20; Home v. Semple, 3 McLean, 150, Fed. Cas. No. 6,658; Planters' Bank v. Galloway, 11 Humph. (Tenn.) 342. In Watkins v. Lake, 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 Oswego, 10 Watts (Pa.) 130; Willmarth v. Crawford, 10 Wend. (N. Y.) 343. And in Loose v. Loose, 36 Pa. St. 538, it was maintained by the indorsee against a remote indorser. And see Onondaga Co. Bank v. Bates, 3 Hill (N. Y.) 53. But see Weiss v. Mauch Chunk Iron Co., 58 Pa. St. 295, 303.

[163] Wilson v. Hickson, 1 Blackf. (Ind.) 230; Osborne v. Fulton, Id. 234; Illinois State Insane Hospital v. Higgins, 15 Ill. 185; Mix v. Nettleton, 29 Ill. 245; Snell v. Kirby, 3 Mo. 21; Hudspeth v. Gray, 5 Ark. 157; Deberry v.

or writing obligatory for the payment of a certain sum in "United States bank notes, or its branches," or in notes of a particular bank,[164] or in lumber,[165] or in county orders.[166]

In the cases mentioned the only remedy is by assumpsit or covenant.

Debt in the Detinet.

At common law an action called "debt in the detinet" lies to recover specific goods, upon a contract to deliver them.[167] This action differs from detinue in that here the property in the goods need not necessarily be vested in the plaintiff at the time the action is brought, while in detinue, as we shall see, this is essential.[168] The action is not commonly used now.

ACCOUNT, OR ACCOUNT RENDER.

14. The action of account render lies where one has received goods or money for another, to ascertain and recover the balance due. It can only be maintained where there has been an express or implied contract between the parties, on which the action may be founded, 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

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 to pay in property "or" in money. Dorsey v. Lawrence, Hardin (Ky.) 508; Minnick v. Williams, 77 Va. 758; Henry v. Gamble, Minor (Ala.) 15; Bradford v. Steward, Id. 44.

[164] Wilson v. Hickson, supra; Osborne v. Fulton, supra.

[165] 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 Manuf'g Co. v. Reeves, 68 Ill. 403.

[166] Mix v. Nettleton, 29 Ill. 245.

[167] Dyer, 24b; 1 Chit. Pl. 122; Com. Dig. "Debt, A," 5; Bac. Abr. "Debt," F; Bloomfield v. Hancock, 1 Yerg. (Tenn.) 101; Young v. Hawkins, Id. 171.

[168] Post, p. 103.

into disuse, by reason of the fact that matters within its scope may generally be the subject of an action of assumpsit, or a proceeding in a court of equity. It is still in use, however, in some of the states, and is therefore entitled to consideration here, as it is properly one of the different forms of action at common law which arise ex contractu.[169]

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,[170] or where two persons are partners in a mercantile adventure.[171] "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." [172] "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

[169] In some states the action has been abolished by statute, while in others it has fallen into disuse. In others the common-law action is still in force, and in others it, 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; Neal v. Keel, 4 T. B. Mon. (Ky.) 162; Griffith v. Willing, 3 Bin. (Pa.) 317; Harker v. Whitaker, 5 Watts (Pa.) 474; Closson v. Means, 40 Me. 337.

[170] Harrington v. Deane, Hob. 36; Bredin v. Dwen, 2 Watts (Pa.) 95; Bredin v. Kingland, 4 Watts (Pa.) 420; Shriver v. Nimick, 41 Pa. St. 91; Lee v. Abrams, 12 Ill. 111.

[171] 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.

[172] Appleby v. Brown, 24 N. Y. 143; Co. Litt. 172a.

as partners, trustees, guardians, and all who could be specially described as above."[173] At common law the action could be maintained between mercantile partners where there were two of them only, and not when the firm consisted of more than two.[174] But in most states where the action is in use this has been changed by statutes.[175] Indeed, in many respects the scope of this action has been very much extended by statute, both in England and in this country.[176]

The action is in form an action arising ex contractu, and will only lie where there is a contract, express or implied, between the parties, upon which it can be founded.[177] The administrator of a widow, for instance, cannot maintain the action against a grantee of the husband under a deed in which she did not join.[178]

The action will only lie where the amount sought to be recovered is uncertain and unliquidated.[179] If the mutual debits and credits of the parties have been ascertained, or an account has been stated

[173] 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. Fitzimmons, 1 Watts & S. (Pa.) 530; Shriver v. Nimick, 41 Pa. St. 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 v. Wade, 53 Pa. St. 146. And the action lies by a landlord against his tenant, who is bound to render a portion of the profits as rent. Long v. Fitzsimmons, 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. And it lies by a cestui que trust against a trustee who has received the profits of lands, Dennison v. Goehring, 7 Pa. St. 175; or against a testamentary trustee for an account of his receipts and expenditures, Bredin v. Dwen, 2 Watts (Pa.) 95.

[174] Beach v. Hotchkiss, 2 Conn. 425; Appleby v. Brown, 24 N. Y. 143.

[175] See Park v. McGowan, 64 Vt. 173, 23 Atl. 855.

[176] 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; McPherson v. McPherson, 11 Ired. (N. C.) 391.

[177] Conklin v. Bush, 8 Pa. St. 514.

[178] Conklin v. Bush, supra.

[179] Foster v. Allanson, 2 Term R. 479; Andrews v. Allen, 9 Serg. & R. (Pa.) 241; Beitler v. Zeigler, 1 Pen. & W. (Pa.) 135; Morgan v. Adams, 37 Vt. 233; Crousillat v. McCall, 5 Bin. (Pa.) 433; Gratz v. Phillips, Id. 568.

between them, assumpsit or debt, and not account, is the proper remedy to recover the definite balance due.[180] 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, like that of replevin, which will be presently explained, 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 fact of liability, quod computet, which is an interlocutory judgment only. The court thereupon appoints auditors or arbitrators, whose business it is to take and report the account between the parties, with the balance for or against the plaintiff, or one or more of the defendants, as the evidence may warrant, and upon their report the final judgment is rendered. 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.

180 Id.

CHAPTER II.

FORMS OF ACTION (Continued).

15. Trespass.
16. Trover.
17–19. Action on the Case.
20. Detinue.
21. Replevin.
22–23. Ejectment.
24. Writ of Entry.
25. Forcible Entry and Detainer.

TRESPASS.

15. 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.

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; and, in the case of injury to property, the property was in the possession of the person complaining at the time of the injury,—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 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]

[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; 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. 263, 12 N. W. 181; Smith v. Webster, 23 Mich. 298; Winslow v. Beal, 6 Call (Va.) 44. See Append. Forms Nos. 11–13, for declarations in trespass.

[2] See the cases just cited. And see Ward v. Macauley, 4 Term R. 489; Gordon v. Harper, 7 Term R. 9; Adams v. Hemenway, 1 Mass. 145; Barry v. Peterson, 48 Mich. 263, 12 N. W. 181; Eaton v. Winnie, 20 Mich. 156; 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 distinction between the actions of 'trespass' and 'trespass on the case' is 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. Ill. c. 110, § 22. See Blalock v. Randall, 76 Ill. 224. In some states the statute allows trespass on the case wherever trespass will lie, but not vice versa. See post, p. 87, note 182.

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

[4] Guille v. Swan, 19 Johns. (N. Y.) 381.

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.

In many cases where it is clear that there was no actual force, the law will imply force, and the effect will be the same as if there had been actual force, in so far as regards the form of action.

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. Where a wife, daughter, or servant is enticed away, or seduced or debauched, even with her or

[5] Fouldes v. Willoughby, 8 Mees. & W. 544; Brown v. Stackhouse, 155 Pa. St. 582, 26 Atl. 669. 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; Guille v. Swan, Id. 381; Daniels v. Pond, 21 Pick. (Mass.) 369.

[7] Dolph v. Ferris, 7 Watts & S. (Pa.) 367. 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. Post, p. 57; 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; Erbes v. Wehmeyer, 69 Iowa, 85, 28 N. W. 447.

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

his consent, the law implies force, and the husband, father, or master may maintain trespass against the wrongdoer.[9]

If a fire is started, and, as an immediate consequence, the property of another is destroyed, there is constructive force, and trespass will lie.[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]

[9] Chamberlain v. Hazelwood, 5 Mees. & W. 515; Akerly v. Haines, 2 Caines (N. Y.) 292; Ditcham v. Bond, 2 Maule & S. 436; Macfodsen v. Olivant, 6 East, 387; Hubbell v. Wheeler, 2 Aik. (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. Post, pp. 89, 96.

[10] Jordan v. Wyatt, 4 Grat. (Va.) 151

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

[12] 2 Saund. 47k, 47l.

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

[14] Cate v. Cate, 50 N. H. 144; Star v. Rookesby, 1 Salk. 335; Booth v. Wilson, 1 Barn. & Ald. 59; Powell v. Salisbury, 2 Younge & J. 391; Saxton v. Brown, 31 Vt. 540; Burke v. Daley, 32 Ill. App. 326.

[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; Havens v. Hartford, etc., R. Co., 28 Conn. 69; Johnson v. Castleman, 2 Dana (Ky.) 378; Barnes v. Hurd, 11 Mass. 57.

[16] Gregory v. Piper, 9 Barn. & C. 591; Arasmith v. Temple, 11 Ill. App. 39; Grinnell v. Phillips, 1 Mass. 530; Campbell v. Phelps, 17 Mass. 244; Yerger v. Warren, 31 Pa. St. 319; McCoy v. McKowen, 26 Miss. 487; Howe v. New-

The degree of violence with which the wrongful act was done is altogether immaterial in so far as regards the form of action. If a log is put down on a man's foot in the most quiet way, the action must be trespass; but if it is thrown into the road, with whatever violence, and a person afterwards falls over it, the action must be case and not trespass.[17]

Intangible Property or Right.

Where the property or right injured is intangible, as a franchise, 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. Trespass, therefore, will not lie; but the remedy must be by an action on the case.[18] 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.[19] Nor will it lie for obstructing a public highway,[20] or a navigable river,[21] 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.[22] Case and not trespass is the

march, 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 could be maintained against the master. And in Strohl v. Levan, 39 Pa. St. 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.

[17] 1 Chit. Pl. 141; Leame v. Bray, 3 East, 602; Reynolds v. Clarke, 1 Strange, 636; Day v. Edwards, 5 Term R. 649.

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

[19] Dietrich v. Berk, 24 Pa. St. 470; Jones v. Park, 10 Phila. 165, 31 Leg. Int. 372; Okeson v. Patterson, 29 Pa. St. 22; Lansing v. Wiswall, 5 Denio (N. Y.) 213; Lambert v. Hoke, 14 Johns. (N. Y.) 383.

[20] Greasley v. Codling, 9 Moore, 489; Pekin v. Brereton, 67 Ill. 477; Lansing v. Wiswall, supra.

[21] Rose v. Miles, 4 Maule & S. 101; Bellant v. Brown, 78 Mich. 294, 44 N. W. 326.

[22] Shadwell v. Hutchinson, 2 Barn. & Adol. 97. And see Blunt v. McCor-

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.[23]

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.[24]

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.[25] "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."[26]

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 of the house.[27] And the same is true where an officer has made a lawful levy on goods, but sells without giving the notice required by law.[28]

Trespass will also lie where a battery or imprisonment was in the

mick, 3 Denio (N. Y.) 283. But see Trauger v. Sassaman, 14 Pa. St. 514; Hart v. Hill, 1 Whart. (Pa.) 124.

[23] Post, pp. 92, 93, and cases there cited.

[24] Wilson v. Smith, 10 Wend. (N. Y.) 324. As to this point and this case, see post, p. 93.

[25] Van Brunt v. Schenck, 13 Johns. (N. Y.) 414; Malcolm v. Spoor, 13 Metc. (Mass.) 279; Smith v. Gates, 21 Pick. (Mass.) 55; Taylor v. Jones, 42 N. H. 25; Drew v. Spaulding, 45 N. H. 472.

[26] Six Carpenters' Case, 8 Coke, 146.

[27] Malcolm v. Spoor, 13 Metc. (Mass.) 279.

[28] Carrier v. Esbaugh, 70 Pa. St. 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. St. 238; Freeman v. Smith, 30 Pa. St. 264. And a landlord who lawfully distrains goods, but sells without a previous appraisement

first instance lawful, but the party, by an unnecessary degree of violence, became a trespasser ab initio.[29]

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. 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 trespass will not lie.[30]

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.[31]

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.[32] 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.[33] 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

and advertisement, is a trespasser ab initio. Kerr v. Sharp, 14 Serg. & R. (Pa.) 399.

[29] 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.

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

[31] Leame v. Bray, 3 East, 602. 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.

[32] Leame v. Bray, 3 East, 593. Setting afire, and burning another's property. Jordan v. Wyatt, 4 Grat. (Va.) 151.

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

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.[34] And where a person makes an excavation so near his neighbor's land, that the land, from its own weight and of necessity, falls, trespass will lie.[35] 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.[36]

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.[37] The same is true where a collision between vessels is caused by carelessness or unskillfulness in navigation.[38] 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.[39] Some of the courts, however,

[34] Guille v. Swan, 19 Johns. (N. Y.) 381.

[35] Buskirk v. Strickland, 47 Mich. 389, 11 N. W. 210. Or case will lie. Pekin v. Brereton, 67 Ill. 477.

[36] Brooks v. Olmstead, 17 Pa. St. 24.

[37] Leame v. Bray, 3 East, 593; Strohl v. Levan, 39 Pa. St. 177; Turner v. Hawkins, 1 Bos. & P. 472; Claflin v. Wilcox, 18 Vt. 605; Wilson v. Smith, 10 Wend. (N. Y.) 324; McAllister v. Howard, 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; Post v. Munn, 4 N. J. Law, 61. For willful injury so caused, trespass is the only remedy.

[38] Percival v. Hickey, 18 Johns. (N. Y.) 257; Simpson v. Hand, 6 Whart. (Pa.) 311; New Haven Steamboat Co. v. Vanderbilt, 16 Conn. 420.

[39] Baldridge v. Allen, 2 Ired. (N. C.) 206; Dalton v. Favor, 3 N. H. 465; Per-

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.[40]

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.[41]

In a leading, and often cited, case, the defendant had thrown a lighted squib in a market place, and, being thrown about by others in self-defense, it ultimately injured the plaintiff. The injury was held to have been immediately and forcibly inflicted by the defendant, the new direction and new force given to the squib by the other bystanders not being a new trespass, but merely a continuation of the original force.[42]

In another case, in which the question of immediate or 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.[43]

Where a person commits a forcible and wrongful act, 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. If he did not know, and

cival v. Hickey, 18 Johns. (N. Y.) 257; Simpson v. Hand, 6 Whart. (Pa.) 311; Kennard v. Burton, 25 Me. 39; New Haven Steamboat Co. v. Vanderbilt, 16 Conn. 420; Claflin v. Wilcox, 18 Vt. 605.

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

[41] Leame v. Bray, 3 East, 596; Mason v. Keeling, 12 Mod. 333; Beckwith v. Shordike, 4 Burrows, 2092. As to the circumstances under which the remedy is by action on the case, see post, p. 97, and cases there cited.

[42] Scott v. Shepherd, 3 Wils. 403, 2 W. Bl. 892, 1 Smith, Lead. Cas. (8th Am. Ed.) 797.

[43] Ricker v. Freeman, 50 N. H. 420.

should not reasonably have known, of the proximity of the horses, or if, though he did know this, it was not natural or probable that his act would frighten them, trespass would not lie, but the action would have to be case.[44]

If a man starts a fire, and, as an immediate consequence, the property of another is destroyed by it, trespass is a proper remedy for the injury.[45]

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.[46] 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.[47]

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, wrongful attachment of goods, etc. Whether or not an officer or private person is liable at all in such cases is to be determined by reference to the substantive law of torts, and is not properly a question for us. We have only to deal with the question as to the form of action when a tort of some sort has been determined to have been committed. The rules may be shortly stated as follows:

Generally no action at all will lie for an act, however erroneous, if sanctioned by the judgment or order of a court or magistrate having jurisdiction over the subject-matter.[48]

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

[44] Post, p. 97.

[45] Jordan v. Wyatt, 4 Grat. (Va.) 151.

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

[47] Post, p. 96, and cases there cited.

[48] 1 Chit. Pl. 203; 10 Coke, 76a; Perkin v. Proctor, 2 Wils. 384; Cave v. Mountain, 1 Man. & G. 257; Dicas v. Lord Brougham, 1 Moody & R. 309; Shoemaker v. Nesbit, 2 Rawle (Pa.) 201.

the process, would sustain such an action.[49] If goods have been taken, trover also will lie.[50]

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.[51]

When process has been misapplied, as where one person has been arrested under a warrant against another, or the goods of one person have been taken under process against another's goods, trespass, and not case, is the remedy.[52]

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.[53]

No person who acts upon a regular writ or warrant issued by a court having jurisdiction can be liable in trespass, however malicious his conduct; but case for the malicious motive, and want of probable cause for the proceeding, is the only remedy.[54]

[49] 1 Chit. Pl. 204; 10 Coke, 76a; Perkin v. Proctor, 2 Wils. 385; Branwell v. Rennick, 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; Griswold v. Sedgwick, 6 Cow. (N. Y.) 456; Vail v. Lewis, 4 Johns. (N. Y.) 450; Adams v. Freeman, 9 Johns. (N. Y.) 117; Bigelow v. Stearns, 19 Johns. (N. Y.) 39; Horton v. Auchmoody, 7 Wend. (N. Y.) 200.

[50] Post, p. 68.

[51] Parsons v. Lloyd, 3 Wils. 341; Barker v. Braham, Id. 376; Barkeloo v. Randall, 4 Blackf. (Ind.) 476; 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. St. 344; 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.

[52] 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; Lathrop v. Arnold, 25 Me. 136.

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

[54] Beaty v. Perkins, 6 Wend. (N. Y.) 382; Savacool v. Bougton, 5 Wend. (N. Y.) 170; Plummer v. Dennett, 6 Greenl. (Me.) 421; Churchill v. Churchill, 12

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 [55] or personal,[56] was in the actual or constructive possession of the plaintiff at the time of the injury. He must have had the actual possession, or the right to immediate actual possession. If his right was merely in reversion, his remedy is by action on the case, and not trespass.[57]

If the owner of personal property contracts to sell it at a future time, and in the meantime to give the vendee possession, and it is attached as the vendee's property, case is the vendor's remedy for the injury to his reversionary interest, and trespass will not lie.[58]

Vt. 661; Parker v. Smith, 1 Gilman (Ill.) 411; Barnes v. Barber, Id. 401; Miller v. Grice, 1 Rich. (S. C.) 147; Owens v. Starr, 2 Litt. (Ky.) 234.

[55] 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. 409, 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. Zahner, 162 Pa. St. 468, 29 Atl. 778; Wilkinson v. Connell, 158 Pa. St. 126, 27 Atl. 870; Moon v. Avery, 42 Minn. 405, 44 N. W. 257; Stout v. Keyes, 2 Doug. (Mich.) 184; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62; Ripka v. Sergeant, 7 Watts & S. (Pa.) 9; Schnable v. Koehler, 28 Pa. St. 181; United Copper Mining & Smelting Co. v. Franks, 85 Me. 321, 27 Atl. 185.

[56] 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.) 337; 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 meat 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.

[57] If the plaintiff was in possession at the time of the injury, the circumstance of his having relinquished or quitted possession before the commencement of the action is immaterial. Bac. Abr. "Trespass," C, 3; Stultz v. Dickey, 5 Bin. (Pa.) 285.

[58] Ayer v. Bartlett, 9 Pick. (Mass.) 156.

And case, not trespass, is the remedy of a chattel mortgagee who is not in possession, and has no right of possession until default by the mortgagor, for wrongful seizure and conversion of the property by an officer under process against the mortgagor.[59]

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.[60] 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.[61] 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.[62] In these cases there is a constructive possession, which is sufficient to support the action.[63]

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

[59] Forbes v. Parker, 16 Pick. (Mass.) 462.

[60] Gordon v. Harper, 7 Term R. 9; Bertie v. Beaumont, 16 East, 33; Gillett v. Ball, 9 Pa. St. 13; Putnam v. Wyley, 8 Johns. (N. Y.) 435; Thorp v. Burling, 11 Johns. (N. Y.) 285; Williams v. Lewis, 3 Day (Conn.) 498; Hart v. Hyde, 5 Vt. 328; Becker v. Smith, 59 Pa. St. 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; Bird v. Clark, 3 Day (Conn.) 272; Bulkley v. Dolbeare, 7 Conn. 235.

[61] Lotan v. Cross, 3 Camp. 464; Hall v. Pickard, Id. 187; Bertie v. Beaumont, 16 East, 33; Edwards v. Edwards, 11 Vt. 587.

[62] 1 Chit. Pl. 190; 2 Saund. 47d; Fowler v. Down, 1 Bos. & P. 45; Gordon 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, 3 Wils. 332; post, p. 66.

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

right to its use, the owner's right is merely in reversion, and his remedy is by action on the case, and not trespass.[64]

A mere servant, acting professedly as such, and having the bare custody of the goods at the time they are injured, cannot maintain trespass, for he has no possession, either actual or constructive.[65]

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 maintain trespass.[66] 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.[67] 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;[68] but in New York the contrary was held on the

[64] 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; 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.

[65] See Bloss v. Holman, Owen, 52.

[66] 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; Addleman v. Way, 4 Yeates (Pa.) 218; Mather v. Trinity Church, 3 Serg. & R. (Pa.) 514; 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.

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

[68] Jackson v. Starr, 11 Mass. 520; Daniels v. Pond, 21 Pick. (Mass.) 367.

ground that, in the opinion of the court, possession in fact was necessary,[69] and the same ruling has been made in other states.[70]

The remedy of a mortgagee of land out of possession, against a stranger, for forcibly entering the house mortgaged and removing fixtures, is case, and not trespass.[71]

The mere occupancy of land by a hired servant of the owner, without paying rent, is not possession. The possession is constructively in the owner, and he may maintain trespass as if he had been in actual possession himself.[72]

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.[73] In most of our states the rule is otherwise, and the owner of land not in the possession of another is regarded as having a constructive possession which will enable him to maintain the action.[74]

If no one has actual possession, the owner of the legal title has constructive possession; but there cannot be constructive possession

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

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

[71] Gooding v. Shea, 103 Mass. 360.

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

[73] 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. Branamon, 2 B. Mon. (Ky.) 379; Walton v. Clarke, 4 Bibb (Ky.) 218; Rex v. Watson, 5 East, 485; Sparhawk v. Bagg, 16 Gray (Mass.) 583; Allan v. Thayer, 17 Mass. 299.

[74] Dobbs v. Gullidge, 4 Dev. & B. (N. C.) 68; Cahoon v. Simmons, 7 Ired. (N. C.) 189; Van Brunt v. Schenck, 11 Johns. (N. Y.) 385; Wickham v. Freeman, 12 Johns. (N. Y.) 184; Ledbetter v. Fitzgerald, 1 Pike (Ark.) 448; Baker v. King, 18 Pa. St. 138; Davis v. Wood, 7 Mo. 162; Davis v. Clancy, 3 McCord (S C.) 422; Skinner v. McDowell, 2 Nott & McC. (S. C.) 68; Gleason v. Edmunds, 2 Scam. (Ill.) 448; Webb v. Sturtevant, 1 Scam. (Ill.) 181; Van Valkenburgh v. Peyton, 2 Gilman (Ill.) 44; Wilcox v. Kinzie, 3 Scam. (Ill.) 218; Bulkley v. Dolbeare, 7 Conn. 232; Wheeler v. Hotchkiss, 10 Conn. 225.

of land by the holder of the legal title where third persons are in the actual adverse possession.[75]

A mere license or right to enter upon land, without an actual entry and possession, will not support the action where the plaintiff does not show that he had such a title as gave him constructive possession.

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.[77]

If a tenant at will commits waste it is a determination of the tenancy, and trespass quare clausum fregit may be maintained against him by the landlord or reversioner.[78]

Title to Support Trespass.

Trespass, being an injury to the possession as distinguished from 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." [79]

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

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

[78] Cro. Eliz. 784; 1 Chit. Pl. 200; Daniels v. Pond, 21 Pick. (Mass.) 367; Philips v. Covert, 7 Johns. (N. Y.) 1; Suffern v. Townsend, 9 Johns. (N. Y.) 35.

[79] Hoyt v. Gelston, 13 Johns. (N. Y.) 141; 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; Welch v. Jenks, 58 Iowa, 694, 12 N. W. 727; Horton v. Hensley, 1 Ired. (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; 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. A person in

And, of course, a bailee who has an authority coupled with an interest, may maintain trespass against a stranger, or even the general owner, for an injury to the property while in his possession,[80] 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.[81] The quantity or certainty of the bailee's interest is immaterial.[82] The action will lie by a factor or consignee of goods in which he has an interest in respect of his commission.[83] And a bailee with a mere naked authority, coupled only with an interest as to remuneration, may maintain trespass for an injury done while he was in the actual possession of the thing,—as a carrier, factor, pawnee, sheriff, etc.[84] Even a mere gratuitous bailee may maintain the action against a stranger.[85] As we have seen, a person professedly in possession as a mere servant cannot maintain trespass.[86]

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 into question, but it is not essential that it should.[87] Actual and exclusive possession without a legal title is sufficient against a wrongdoer, or a person who cannot make out a title prima facie entitling him to the possession or show any right or authority from the real owner.[88]

possession of property under an assignment which is fraudulent as to creditors may maintain trespass against a creditor of the assignor who seizes it without right. Young v. Wright, 2 J. J. Marsh. 233.

[80] George v. Claggett, 7 Term R. 359.

[81] Ante, p. 62.

[82] 1 Chit. Pl. 190; Colwill v. Reeves, 2 Camp. 575; Rooth v. Wilson, 1 Barn. & Ald. 59.

[83] George v. Claggett, 7 Term R. 359; Grove v. Dubois, 1 Term R. 113; Williams v. Millington, 1 H. Bl. 81.

[84] 1 Chit. Pl. 191; Brownell v. Manchester, 1 Pick. (Mass.) 234; Gibbs v. Chase, 10 Mass. 129; Barker v. Miller, 6 Johns. (N. Y.) 195.

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

[86] Ante, p. 63.

[87] 1 Chit. Pl. 195; Lambert v. Stroother, Willes, 221; Graham v. Peat, 1 East, 244; Cheeseley v. Barnes, 10 East, 74.

[88] Graham v. Peat, 1 East, 244; Catteris v. Cowper, 4 Taunt. 547; Shoup v.

Trespass, for instance, has been sustained by a tenant in possession under an illegal lease; [89] by an intruder on public land, who had not been treated as such by the government.[90]

A tenant for years,[91] at will, [92] or, according to some of the authorities, at sufferance,[93] 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.[94]

Where the plaintiff was not in actual possession, whether the property was real or personal, but relies upon a constructive possession to maintain his action, title becomes very material. He

Shields, 116 Ill. 488, 6 N. E. 502; Nickerson v. Thatcher, 146 Mass. 609, 16 N. E. 581; Dyson v. Collick, 5 Barn. & Ald. 600; Litchfield v. Ferguson, 141 Mass. 97, 6 N. E. 721; Inhabitants of Barnstable v. Thacher, 3 Metc. (Mass.) 239; Hoffman v. Harrington, 44 Mich. 183, 6 N. W. 225; Fox v. Holcomb, 32 Mich. 494; Newcomb 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, 1 Hawks (N. C.) 485; Chambers v. Donaldson, 11 East, 65; Richardson v. Murrill, 7 Mo. 333.

[89] Graham v. Peat, 1 East, 244.

[90] Harper v. Charlesworth, 4 Barn. & C. 574; Keith v. Tilford, 12 Neb. 271, 11 N. W. 315.

[91] 2 Rolle, Abr. 551; Geary v. Bearcroft, Sid. 347; Stultz v. Dickey, 5 Bin. (Pa.) 285; Lorman v. Benson, 8 Mich. 18; Dorsey v. Eagle, 7 Gill & J. (Md.) 321; Van Doren v. Everitt, 5 N. J. Law, 460.

[92] 2 Rolle, Abr. 551; Geary v. Bearcroft, supra; O'Brien v. Cavanaugh, 61 Mich. 368, 28 N. W. 127; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62.

[93] 2 Rolle, Abr. 551; Geary v. Bearcroft, supra; 13 Coke, 69; Graham v. Peat, 1 East, 245, note a.

[94] Anon., 11 Mod. 209; 11 Coke, 48; Dickenson 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; Sampson v. Henry, 13 Pick. (Mass.) 36; Meader v. Stone, 7 Metc. (Mass.) 147; Overdeer v. Lewis, 1 Watts & S. (Pa.) 90.

must show such a title as draws to it the constructive possession. He must at least show a right to immediate possession. A conditional sale, for instance, does not give the vendee the right to maintain trespass against the sheriff for levying on the goods as the property of the vendor, if the condition has not been complied with.[95]

TROVER.

16. 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, in which, at the time of the conversion, the plaintiff had a general or special property, and of which he was in the actual possession, or to which he was entitled to the immediate possession. In detail:

(a) 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.

(b) It lies for the conversion of property which was:

(1) Personal and

(2) Specific.

(c) The plaintiff must have had a general or special property in the thing, and he must have been in the actual possession, or entitled to the immediate possession.

(d) 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 property in, or dominion over, or right to dispose of, or misusing, goods, of which actual possession has been lawfully obtained.

[95] Creps v. Dunham, 69 Pa. St. 456.

(3) By merely wrongfully detaining goods lawfully obtained, without an actual conversion, as explained above, after a demand of possession by the person entitled.

(4) In the latter case, and in that case only, a demand and a refusal to restore the goods are necessary before bringing the action, for without a demand the detention is no conversion.

In its origin, the action of trover, or trover and conversion, was an action of trespass on the case [96] 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.[97] As the action of detinue was subject to disadvantages (the defense 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 the same without the consent of the owner, or refused to deliver the same when demanded. The injury lies in the conversion and deprivation of the property, which is the gist of the action, and the statement of the finding, or trover, is not material or traversable.[98]

The object of the action is not the recovery of the property itself,—it can be recovered only by detinue or replevin,—but to recover damages to the extent of the value of the property.[99]

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

[96] Ante, p. 9.

[97] The action was therefore called "trover" from the French "trouver,"—to find. See Append. Form No. 14, for declaration in trover.

[98] 1 Chit. Pl. 164; 3 Bl. Comm. 152; Mills v. Graham, 1 Bos. & P. (N. R.) 140.

[99] 1 Chit. Pl. 164; Mercer v. Jones, 3 Camp. 477; Greening v. Wilkinson, 1 Car. & P. 626; Keyworth v. Hill, 3 Barn. & Ald. 687.

waives the trespass. No damages are recoverable for the act of taking, but all must be for the act of converting.[100]

The Nature of the Property.

The action of trover is confined to the conversion of personal property. It does not lie, therefore, for the appropriation of fixtures still annexed [101] 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.[102] In these cases the action should be trespass where the plaintiff's right was in possession, and case if his right was merely in reversion. 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 trover will lie.[103] It must be remembered that not everything that is fastened to real property thereby becomes real.[104] A building erected under an agree-

[100] 1 Chit. Pl. 164, 165.

[101] 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; Bracelin v. McLaren, 59 Mich. 327, 26 N. W. 533; Overton v. Williston, 31 Pa. St. 155; Darrah v. Baird, 101 Pa. St. 270; Brown v. Wallis, 115 Mass. 156.

[102] Boraston v. Green, 16 East, 77, 79; Lehr v. Taylor, 90 Pa. St. 381. See, however, Sanderson v. Haverstick, 8 Pa. St. 294, where it was held that the action would lie for cutting timber without carrying it away.

[103] 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; Nelson v. Burt, 15 Mass. 204; Greeley v. Stilson, 27 Mich. 153; Altes v. Hinckler, 36 Ill. 275. 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; 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; Whidden v. Seelye, 40 Me. 247; or where mineral or earth or manure is dug and taken away, Higgon v. Mortimer, 6 Car. & P. 616; Riley v. Boston Water P. Co., 11 Cush. (Mass.) 11; Daniels v. Pond, 21 Pick. (Mass.) 367; Goodrich v. Jones, 2 Hill (N. Y.) 142; Forsyth v. Wells, 41 Pa. St. 291. 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.

[104] Where machinery is sold to be set up in a mill, but with a stipulation

ment that it shall remain personal property, remains so, and trover will lie for its conversion.[105] 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.[106]

It is also necessary, in order to maintain this action, that the plaintiff shall have the right to some specific property.[107] The action will lie for so many pieces of money taken and converted by the defendant,[108] but it will not lie for money had and received generally.[109]

The fact that the plaintiff's interest in the property is in common

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.

[105] 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.

[106] Elwes v. Mawe, 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. St. 106.

[107] Orton v. Butler, 5 Barn. & Ald. 654. As we shall presently see, although a contract for the sale of goods is complete and binding, yet the vendee acquires no property in them which can enable him to maintain trover, if any acts remain to be done before delivery to ascertain or distinguish the quantity of goods or the particular goods to be delivered. Thus, if a portion of an entire bulk of goods be sold, and be not in its nature ascertainable without weighing, or other act separating and distinguishing it from the rest, the vendee cannot maintain trover until his portion is ascertained and set apart. The same rule applies in the case of a contract to manufacture goods,—as to build a carriage. No property passes until the goods are finished, or treated by the parties as finished; and the vendee cannot maintain trover for their conversion, though he may have paid for them. Chitty treats these cases as illustrations of the rule that the goods must be specific. 1 Chit. Pl. 165. But they are not so, strictly speaking. The vendor may maintain the action in these cases. Therefore it is better to base the rule that the action will not lie at the suit of the vendee on the ground that he has no property in the goods. Post, p. 72.

[108] 1 Chit. Pl. 166; Jackson v. Anderson, 4 Taunt. 24.

[109] Orton v. Butler, 5 Barn. & Ald. 652.

will not defeat the action. It will lie for an undivided interest in a specific chattel.[110]

The conversion of any specific personal property whatever, in so far as regards the character of the thing itself, will give rise to an action of trover.[111] 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.[112]

Title and Possession to Support Trover.

In order to maintain this form of action the plaintiff must, at the time of the conversion, have had a complete property, either general or special, in the chattel, and also the actual possession, or the right to the immediate possession.[113]

It may be stated here that the action does not lie to try a disputed title to land, and therefore it will not lie for stone or gravel dug from land, where the defendant has the actual adverse possession of the land, and claims title to it.[114]

Same—Absolute or Special Property.

Without an absolute or special property the action cannot be maintained. The plaintiff must, at the time of the conversion, have had at least the right to immediate possession.[115]

[110] Watson v. King, 4 Camp. 272; German Nat. Bank v. Meadowcroft, 4 Ill. App. 630, 95 Ill. 124.

[111] For animals feræ naturæ converted after being tamed or killed. Armory v. Flyn, 10 Johns. (N. Y.) 102.

[112] 1 Chit. 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; Chickering v. Raymond, 15 Ill. 362; Rose v. Lewis, 10 Mich. 483; Morton v. Preston, 18 Mich. 60; Daggett v. Davis, 53 Mich. 35, 18 N. W. 548; 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 Sudburye Parish v. Stearns, 21 Pick. (Mass.) 148. Contra, as to shares of bank stock, Sewall v. Lancaster Bank, 17 Serg. & R. (Pa.) 285; Neiler v. Kelley, 69 Pa. St. 403.

[113] 1 Chit. Pl. 166.

[114] Mather v. Trinity Church, 3 Serg. & R. (Pa.) 509.

[115] 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

A sheriff, for instance, cannot maintain trover for goods taken out of the possession of a party against whom he had an execution before a levy of the execution, though by statute the execution may have bound the goods from the time of its delivery to the sheriff, since the property in the goods is not altered, so that the sheriff may have a special property in them, until the levy.[116]

So, where goods are sold under an execution, without any particular designation at the time of sale, the purchaser cannot maintain trover for them, for no property passes to him.[117]

And, although a contract for the sale of goods may be complete and binding, the vendee cannot maintain trover for the goods, either against the vendor or a third person, unless the contract has been so far executed that he has acquired the property in the goods. Thus, if a portion of an entire bulk of goods be sold, and be not ascertainable until weighed, or otherwise separated and distinguished from the mass, and set apart or appropriated to the contract, they must be so appropriated before a conversion can entitle the vendee to maintain trover, for until then he acquires no property in the goods.[118]

In such a case, if the property is converted by a third person, trover may be maintained by the vendor. Whether the conversion is by a third person, or whether the vendor uses the goods, or sells them to another, the only remedy of the vendee is by assumpsit against

v. Waldron, 31 Ill. 120; Owens v. Weedman, 82 Ill. 409; Glaze v. McMillion, 7 Port. (Ala.) 279; Purdy v. McCullough, 3 Pa. St. 466; Traylor v. Horrall, 4 Blackf. (Ind.) 317; Barton v. Dunning, 6 Blackf. (Ind.) 209; Castor v. McShaffery, 48 Pa. St. 437; Lewis v. Mobley, 4 Dev. & B. (N. C.) 323; 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; Debow 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. 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. And see Stewart v. Bright, 6 Houst. (Del.) 344; Rexroth v. Coon, 15 R. I. 35, 23 Atl. 37.

[116] Hotchkiss v. McVickar, supra.

[117] Sheldon v. Soper, 14 Johns. (N. Y.) 352.

[118] Busk v. Davis, 2 Maule & S. 397; White v. Wilks, 5 Taunt. 176; Wallace v. Breeds, 13 East, 522; Simmons v. Swift, 5 Barn. & C. 857.

the vendor on his contract. The rule also applies in the case of a contract to manufacture goods, as a carriage. No property in the goods passes until the goods are finished, or considered and treated by the parties as finished, although the price has been paid, and the vendee cannot maintain trover.[119] The authorities are not entirely in accord as to when title passes in these and similar cases, but that is not a question for us to consider here.[120]

The absolute and general owner of goods, who has sold or bailed them under a void contract, still retains the property in them, and may bring trover for their conversion.[121]

And, 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.[122] 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.[123]

A person having a special property in goods may maintain trover against a stranger who takes them out of his possession.[124] 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;[125] or by a carrier,[126] a warehouseman,[127] a con-

[119] Mucklow v. Mangles, 1 Taunt. 318; Carruthers v. Payne, 2 Bing. 270; Williams v. Jackman, 16 Gray (Mass.) 517.

[120] Tiff. Sales, 94.

[121] Smith v. Plomer, 15 East, 607.

[122] 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; 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.

[123] Clark, Cont. 348; Kimball v. Cunningham, 4 Mass. 502; Peters v. Ballister, 3 Pick. (Mass.) 495.

[124] Burk v. Webb, 32 Mich. 173; Grove v. Wise, 39 Mich. 161.

[125] 2 Saund. 47; Blades v. Arundale, 1 Maule & S. 711; Witherspoon v.

[126] 1 Rolle, Abr. 4; Arnold v. Jefferson, 1 Ld. Raym. 276; Dillenback v. Jerome, 7 Cow. (N. Y.) 297.

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

signee,[128] a gratuitous bailee,[129] or by any agent who is responsible over to his principal.[130] The finder of goods has a special property in them which will enable him to maintain trover against any one but the true owner.[131] And mere possession, even though wrongfully obtained, gives the possessor sufficient property to maintain the action against a mere stranger.[132]

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.[133]

A mere servant, however, acting professedly as such, and having

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; Pettes v. Marsh, 15 Vt. 454; Thayer v. Hutchinson, 13 Vt. 504; Weidensaul v. Reynolds, 49 Pa. St. 73.

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

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

[130] 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.

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

[132] 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, 11 Ired. (N. C.) 80; Allen v. Smith, 10 Mass. 308; Fairbank v. Phelps, 22 Pick. (Mass.) 535; Vining v. Baker, 53 Me. 544.

[133] 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. An attachment levied on chattels by collusion of the mortgagor is a breach of the condition in the mortgage against attachment, and vests in the mortgagee such an immediate right of possession as to enable him to bring trover against the purchaser at the attachment sale. Crocker v. Atwood, supra.

only the custody of the goods, cannot maintain the action, but, if brought at all, it must be brought by the master.[134]

Where the property was, at the time of the conversion, subject to a special as well as a general ownership, trover may, in most cases, be maintained either by the general or the special owner, though a judgment obtained by one of them will be a bar to an action by the other.[135]

The plaintiff, as already stated, must have generally or specially owned the property at the time of the conversion. Ownership before or afterwards is not enough.[136]

If the owner bails goods to another, and sells them to a third person before they are converted by the bailee, or otherwise ceases to be the owner, he cannot maintain trover against the bailee, but the action must be brought in the name of the person who was the owner at the time of the conversion.[137]

The property right, whether general or special, need only have existed at the time of the conversion. It is not necessary that the plaintiff's interest shall have continued up to the commencement of the action.[138]

Same—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.[139]

[134] Bloss v. Holman, Owen, 52; Ludden v. Leavitt, 9 Mass. 104; Dillenback v. Jerome, 7 Cow. (N. Y.) 294; Faulkner v. Brown, 13 Wend. (N. Y.) 63.

[135] Smith v. James, 7 Cow. (N. Y.) 328.

[136] Horwood v. Smith, 2 Term R. 750; Philips v. Robinson, 4 Bing. 106.

[137] Philips v. Robinson, 4 Bing. 106.

[138] Hunter v. Rice, 15 East, 100; Floyd v. Day, 3 Mass. 403; Fairbank v. Phelps, 22 Pick. (Mass.) 535; Barton v. Dunning, 6 Blackf. (Ind.) 209; Grady v. Newby, Id. 442; Kennedy v. Strong, 14 Johns. (N. Y.) 132.

[139] Benjamin v. Bank of England, 3 Camp. 417; Bloxam v. Saunders, 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; 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

Therefore, where goods leased as furniture with a house were taken in execution, 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.[140]

A landlord, however, generally has such a constructive possession of timber wrongfully cut down during the lease as to enable him to maintain trover if it is removed.[141]

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 ownership with the right to possession creates a constructive possession.[142] 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, and so parted with the actual possession, he may nevertheless maintain trover for conversion by a stranger, for the owner has the constructive possession.[143] So an executor or administrator has constructive possession of the goods of his testator or intestate from the time of his death;[144] and a trustee of goods has constructive possession, though they are in the actual possession of the cestui que trust;[145] and a consignee of

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.

[140] Gordon v. Harper, 7 Term R. 9; Hall v. Pickard, 3 Camp. 187. And see Nations v. Hawkins, 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. Mosely, 10 Vt. 208; Caldwell v. Cowan, 9 Yerg. (Tenn.) 262.

[141] Gordon v. Harper, 7 Term R. 13; Mather v. Trinity Church, 3 Serg. & R. (Pa.) 509; Baker v. Howell, 6 Serg. & R. (Pa.) 476; Shult v. Barker, 12 Serg. & R. (Pa.) 272.

[142] 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.

[143] 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.

[144] Gordon v. Harper, 7 Term R. 13; Rogers v. Windoes, 48 Mich. 628, 12 N. W. 882; Kerby v. Quinn, 1 Rice (S. C.) 264; Hill v. Brennan, Id. 285; French v. Merrill, 6 N. H. 456; Towle v. Lovet, 6 Mass. 394.

[145] Wooderman v. Baldock, 8 Taunt. 676.

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;[146] 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.[147]

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.[148]

It has been said that in the case of special property the plaintiff must have had actual possession at the time of the conversion, in order to maintain trover;[149] but this is not true, at least in this country, nor, it seems, even in England.[150] A factor, to whom goods have been consigned, for instance, may maintain trover for a conversion of the goods before their receipt by him,[151] and the indorsee of a bill of lading may maintain the action against the wharfingers, or others, converting the goods, though the indorsement was merely to enable him to exercise the consignor's right of stoppage in transitu.[152]

[146] 1 Chit. Pl. 171.

[147] Rugg v. Minett, 11 East, 210.

[148] Grant v. King, 14 Vt. 367. And see Turner v. Waldo, 40 Vt. 51.

[149] Coxe v. Hardin, 4 East, 214.

[150] Fowler v. Down, 1 Bos. & P. 47; Morrison v. Gray, 2 Bing. 260; Weidensaul v. Reynolds, 49 Pa. St. 73; Smith v. James, 7 Cow. (N. Y.) 329; Everett v. Saltus, 15 Wend. (N. Y.) 474.

[151] Fowler v. Down, supra; Smith v. James, supra; Everett v. Saltus, supra.

[152] Morrison v. Gray, supra.

The Nature of the Injury—Demand and Refusal.

A conversion of the property is the gist of the action of trover, and is always essential to support it.[153] 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 not necessary that the defendant shall have acquired a property in the goods,[154] but it is necessary that he shall have, in some sense, converted them to his own use, and deprived the owner of them.[155] A conversion may take place in the following ways:

(1) The wrongful taking, if followed by a complete 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.[156] 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,[157] but not otherwise. A conversion is not necessary to support trespass, but it

[153] 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.

[154] Keyworth v. Hill, 3 Barn. & Ald. 687.

[155] Fouldes 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. St. 584, 5 Atl. 732.

[156] 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; Daggett v. Davis, 53 Mich. 35, 18 N. W. 548; 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; 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.

[157] Wadleigh v. Janvrin, 41 N. H. 520; Drew v. Spaulding, 45 N. H. 472; Prescott v. Wright, 6 Mass. 20; Pierce v. Benjamin, 14 Pick. (Mass.) 356, 360.

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.[158] 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.[159]

Trover lies to recover the value of goods obtained by the defendant from the plaintiff by fraud.[160]

Ratification of an unlawful taking and conversion of goods destroys the right to bring trover.[161]

(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 lawfully, or not obtained at all.[162] The mere taking of an assignment of goods from a person who has no right or authority to dispose

In other words, trover is a concurrent remedy with trespass "de bonis asportatis." See cases supra.

[158] Samuel v. Norris, 6 Car. & P. 620; Fouldes v. Willoughby, 8 Mees. & W. 540; Loring v. Mulcahy, 3 Allen (Mass.) 575. See Dench v. Walker, 14 Mass. 500.

[159] Cooper v. Monke, Willes, 56; Drew v. Spaulding, 45 N. H. 472.

[160] Beebe v. Knapp, 28 Mich. 53; Heineman v. Steiger, 54 Mich. 232, 19 N. W. 965; ante, p. 74, and cases there cited.

[161] Hewes v. Parkman, 20 Pick. (Mass.) 90; Briggs Iron Co. v. North Adams Iron Co., 12 Cush. (Mass.) 114.

[162] M'Combie v. Davies, 6 East, 540; Everett v. Coffin, 6 Wend. (N. Y.) 603; 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; Follett v. Edwards, 30 Ill. App. 386; Webber v. Davis, 44 Me. 147; 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

of them, has been held a conversion.[163] 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.[164]

enough that he disposes or assumes to dispose of it. Mead v. Thompson, 78 Ill. 62.

[163] 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.

[164] 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; Bristol v. Burt, 7 Johns. (N. Y.) 254; 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; Etter v. Bailey, 8 Pa. St. 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; Bowlin v. Nye, 10 Cush. (Mass.) 147; Hall v. Boston & W. R. Co., 14 Allen (Mass.) 443; 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; Wild 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, 6 Cow. (N. Y.) 757; Hawkins v. Hoffman, 6 Hill (N. Y.) 586; Indianapolis, etc., R. Co. v. Herndon, 81 Ill. 143; Illinois, etc., 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; 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. 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. 109; Lockwood v. Bull, 1 Cow. (N. Y.) 322; 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 v. Dunbar, 19 Ill. App. 558; 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

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.[165] In such cases there must, as we shall see, be a demand and refusal.

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.[166] But, if one tenant in common destroy the chattel, or commit an act which is equivalent thereto, as selling or otherwise disposing of it, his cotenant may maintain trover for the value of his share.[167]

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; Lucas v. Trumbull, 15 Gray (Mass.) 306; Hall v. Corcoran, 107 Mass. 251; Perham v. Coney, 117 Mass. 102; Fisher v. Kyle, 27 Mich. 454; Ruggles v. Fay, 31 Mich. 141. Or against the pledgee of property as collateral security for a sale of the property before maturity of the debt secured. Berg v. Foster, 42 Leg. Int. 313.

[165] M'Combie v. Davies, 6 East, 540; Devereux v. Barclay, 2 Barn. & Ald. 704; Ross v. Johnson, 5 Burrows, 2825; Williams v. Gesse, 3 Bing. (N. C.) 849; Bowlin v. Nye, 10 Cush. (Mass.) 416; Sturges v. Keith, 57 Ill. 451; Brown v. Waterman, 10 Cush. (Mass.) 117, 118; Hawkins v. Hoffman, 6 Hill (N. Y.) 586; 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.

[166] 1 Chit. Pl. 175; 2 Saund. 47h; Holliday v. Camsell, 1 Term R. 658; Smith v. Stokes, 1 East, 363; Hiller v. Huffsmith, 102 Pa. St. 534; Cole v. Terry, 2 Dev. & B. (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; Farr v. Smith, 9 Id. 338. Contra by statute, Benjamin v. Stremple, supra. And see cases contra in the following note.

[167] 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; Id., 7 Wend. (N. Y.) 354; Mumford v. McKay, 8 Wend. (N. Y.) 442; Nowlen v. Colt, 6 Hill (N. Y.) 461; Browning v. Cover, 108 Pa. St. 595; Tubbs v. Richardson, 6 Vt. 442; Hurd v. Darling, 14 Vt. 214; Weld v. Oliver, 21 Pick. (Mass.) 559; Delaney v. Root, 99 Mass. 546; Burbank v. Crooker, 7 Gray (Mass.) 158;

(3) Again, the mere detention of goods, without right, may constitute a conversion.[168] 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.[169] In other cases, where the defendant had the rightful 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.

Webb v. Mann, 3 Mich. 139; Tolan v. Hodgeboom, 38 Mich. 624; Lowthorp v. Smith, 1 Hayw. (N. C.) 255; Campbell v. Campbell, 2 Murph. (N. C.) 65; Baylis v. Cronkhite, 39 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; 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. 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. 61. But see the cases in the preceding note.

[168] 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. v. Sellick, 52 Ill. 249. And see Chamberlin v. Shaw, 18 Pick. (Mass.) 278; Adams v. Clark, 9 Cush. (Mass.) 215; Richardson v. Rice, 104 Mass. 156; 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. St. 487, 8 Atl. 616; McLean v. Walker, 10 Johns. (N. Y.) 471; Marshall v. Davis, 1 Wend. (N. Y.) 109; Bryce v. Brooks, 26 Wend. (N. Y.) 367.

[169] Lovell v. Martin, 4 Taunt. 801; Baldwin v. Cole, 6 Mod. 212; Fosdick v. Collins, 1 Starkie, 173; Gibbs v. Jones, 46 Ill. 319; Baue v. Detrick, 52 Ill. 19; Howitt v. Estelle, 92 Ill. 218; Hayes v. Massachusetts Ins. Co., 125 Ill. 626, 18 N. E. 322; Hyde v. Noble, 13 N. H. 494; Hunt v. Holton, 13 Pick. (Mass.) 216; Gilmore v. Newton, 9 Allen (Mass.) 171; Carter v. Kingman, 103 Mass. 517; Tompkins v. Haile, 3 Wend. (N. Y.) 406; Bates v. Conklin, 10 Wend. (N. Y.) 389; Connah v. Hale, 23 Wend. (N. Y.) 462; Newsum v. Newsum, 1 Leigh (Va.) 86; Horsefield v. Cost, Add. (Pa.) 152; Riford v. Montgomery, 7 Vt. 418;

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 actual conversion.[170] 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.[171]

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;[172] and it must be made upon the party (or parties where there are several) who, at the time, has the possession of the goods by himself or his agent or servant, or the general controlling power over them.[173] Where a demand is necessary, it must

Courtis v. Cane, 32 Vt. 232; 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. 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; Stevens v. Austin, 1 Metc. (Mass.) 557; Riley v. Boston W. P. 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.

[170] 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; Bond v. Ward, 7 Mass. 123; Carleton v. Lovejoy, 54 Me. 445; Thompson v. Rose, 16 Comm. 71; Yeager v. Wallace, 57 Pa. St. 365; Rodgers v. Brittain, 39 Mich. 477; Farley v. Lincoln, 51 N. H. 580; 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. A demand and refusal are necessary to support an action against an execution creditor sued with the officer for property taken in execution. Mulheisen v. Lane, 82 Ill. 117.

[171] 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.

[172] Philips 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.

[173] Nicoll v. Glennie, 1 Maule & S. 588; White v. Demary, 2 N. H. 546;

be made before the action is brought.[174] 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.[175] It need not be made on the party personally. A demand in writing left at his house is sufficient.[176] It must be absolute in its terms, and not qualified with conditions,[177] and it must not be excessive.[178]

Where a demand is necessary, there must also be a refusal.[179] 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.[180]

Sturges v. Keith, 57 Ill. 451; 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. (Mass.) 294; Edwards v. Hooper, 12 Law J. Exch. 304; Knapp v. Winchester, 11 Vt. 351; Mitcaell v. Williams, 4 Hill (N. Y.) 13. It must be remembered that, if a party who has legally received goods unlawfully sells or otherwise disposes of them, this in itself is an actual conversion, and dispenses with the necessity of any demand. Ante. pp. 80, 81. A person may by his conduct when demand is made on him estop himself to afterwards set up that he did not then have possession. Hall v. White, 3 Car. & P. 136.

[174] Morris v. Pugh, 3 Burrows, 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. Iron Works, 81 Mich. 16, 45 N. W. 654.

[175] 1 Chit. Pl. 178.

[176] Logan v. Houlditch, 1 Esp. 22.

[177] Rushworth v. Taylor, 12 Law J. Q. B. 80.

[178] Abington v. Lipscombe, 1 Gale & D. 233.

[179] Taylor v. Hanlon, 103 Pa. St. 504.

[180] 1 Chit. Pl. 179, and authorities and illustrations there given; Smith v. Young, 1 Camp. 439; Green v. Dunn, 3 Camp. 215; Johnson v. Couillard, 4 Allen (Mass.) 446; Gilmore v. Newton, 9 Allen (Mass.) 171; Hagar v. Randall, 62 Me. 439; Clark v. Hale, 34 Conn. 398; Daggett v. Davis, 53 Mich. 35, 18 N. W. 548; 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.

ACTION ON THE CASE.

17. 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 matter affected was not tangible; or

(2) The injury was not immediate, but consequential.

(3) The interest in the property injured was only in reversion.

18. Torts of this nature are—

(a) To the absolute rights of persons.

(b) To the relative rights of persons.

(c) To personal property in possession or reversion.

(d) To real property, corporeal or incorporeal, in possession or reversion.

19. The injuries may be caused either—

(a) By nonfeasance, or the omission of some act which the defendant ought to perform.

(b) By misfeasance, or the improper performance of some act which might lawfully be done.

(c) By malfeasance, or the doing of something that ought not to be done at all.

Douglas (Pa. Sup.) 6 Atl. 398; Hallenblake v. Fish, 8 Wend. (N. Y.) 547; 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, 2 Dev. (N. C.) 130; Blankenship v. Berry, 28 Tex. 448.

As we have already seen,[181] the action of trespass on the case, in the broadest sense, which lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not apply, originated in the power given by the statute of Westminster 2 (13 Edw. I. c. 24) to the clerks of the chancery to frame new writs in consimili casu with writs already known. In the broadest sense, the term "trespass on the case" includes, as we have seen, the actions of trespass on the case in assumpsit and trespass on the case in trover; but these actions are now known, respectively, as "assumpsit" and "trover" or "trover and conversion," and the other actions of trespass on the case,—which are actions ex delicto; that is, for damages caused by torts,—are known generally by the designation of "trespass on the case," "action on the case," or simply "case." It is of this form of action that we are to deal here.

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.[182] If, on the other hand, a tort is

[181] Ante, p. 8, where the origin of the action is shown.

[182] 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; Gregory v. Piper, 9 Barn. & C. 591; Reynolds v. Clarke, 2 Ld. Raym. 403; 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, p. 51.

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. 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 maintained. See, as to this statute, and its effect, Blalock v. Randall, 76 Ill. 224.

The Michigan statute is different. It provides: "Where, by the wrongful act of any person, an injury is produced, either to the person, personal prop-

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.[183]

Torts of this nature are to the absolute or relative rights of persons, or to personal property in possession or reversion, or to real property, corporeal or incorporeal, in possession or reversion. The injuries may be either by nonfeasance, or the omission of some act which the wrongdoer ought to perform; or by misfeasance, or the improper performance of some act which might lawfully be done if properly done; or by malfeasance, or the doing of some act which it is unlawful to do at all. And these respective torts are commonly the performance or omission of some act contrary to the general obligation of the law, or the particular rights or duties of the parties, or of some express or implied contract between them.[184]

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.[185]

Force is either actual or implied. Assault and battery, tearing down a fence, or breaking into a house are examples of actual force,

erty, or rights of another, or to his servant, child or wife, for which an action of trespass may by law be brought, an action of trespass on the case may be brought to recover damages for such injury, whether it was wilful, or accompanied by force or not; and whether such injury was a direct and immediate consequence from such wrongful act, or whether it was consequential and indirect." 2 How. St. § 7759. This section, while it allows trespass on the case wherever trespass will lie, does not allow trespass wherever trespass on the case will lie. See, as to this statute, Smith v. Webster, 23 Mich. 298.

183 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. Hemenway, 1 Mass. 145; Barry v. Peterson, 48 Mich. 263; Eaton v. Winnie, 20 Mich. 156; Cotteral v. Cummins, 6 Serg. & R. (Pa.) 343. See Appendix, Form No. 15, for declaration in case.

184 1 Chit. Pl. 148.

185 See the cases above cited.

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.[186] 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.[187] Force is also implied in every false imprisonment, and the proper remedy is trespass, and not case.[188] 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.[189] And where a fire is started, and, as an immediate consequence, another's property is destroyed, there is constructive force.[190]

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.[191] There is no force, for instance, in a mere detention of goods without an unlawful taking;[192] or in neglect to repair the bank of a stream, whereby another's land is overflowed;[193] or in neglect to repair a fence whereby another's animal escapes on to the land of the person so negligent or elsewhere, and is injured;[194] and in these instances case, and not trespass, must be the remedy.

[186] Ante, p. 52. [187] Ante, p. 52. [188] Ante, p. 52.

[189] Chamberlain v. Hazelwood, 5 Mees. & W. 515; ante, p. 52. As we shall see, he may waive the trespass and declare in case for the consequential injury,—loss of society or services.

[190] Jordan v. Wyatt, 4 Grat. (Va.) 151.

[191] 1 Chit. Pl. 141; Six Carpenters' Case, 8 Coke, 146; Turner v. Hawkins, 1 Bos. & P. 476.

[192] 2 Saund. 47k, l.

[193] 1 Chit. Pl. 141; Hinks v. Hinks, 46 Me. 423.

[194] Cate v. Cate, 50 N. H. 144; Star v. Rookesby, 1 Salk. 335; Booth v. Wilson, 1 Barn. & Ald. 59; Powell v. Salisbury, 2 Younge & J. 391; Saxton v. Brown, 31 Vt. 540; Burke v. Daley, 32 Ill. App. 326. For failure of railroad company to fence track. Eames v. Salem & L. R. Co., 98 Mass. 560; Holden v. Rutland, etc. R. Co., 30 Vt. 297; Kankakee, etc., Co. v. Fitzgerald, 17 Ill. App. 525.

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,[195]—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.[196] If the process or proceeding was irregular and void, case will not lie, but the action must be trespass.[197]

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.;[198] and it will lie against an officer for making a false return;[199] or against an election officer for refusal to allow a vote;[200] and, generally, against an officer for any neglect of duty.[201]

[195] 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; 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. St. 190; Owens v. Starr, 2 Litt. (Ky.) 234; Kennedy v. Barnett, 64 Pa. St. 141; Joseph v. Henderson, 95 Ala. 213, 10 South. 843; ante, p. 59.

[196] 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.

[197] 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; ante, p. 59.

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

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

[200] 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.

[201] Spear v. Cummings, 23 Pick. (Mass.) 224; Abbott v. Kimball, 19 Vt. 551; Jacobs v. Humphrey, 2 Cromp. & M. 413; Ayreton v. Davis, 9 Bing. 741.

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;[202] but, under some circumstances, the master also may be liable in trespass.[203] Where an injury arises from the want of care or negligence of the servant, the remedy against the master is in case;[204] 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.[205]

As stated in another connection, the degree of violence with which the act is done is immaterial, in so far as regards the form of action.[206] If a log were put down in the most quiet way on a man's foot, the action would be trespass; but if thrown into the road, with whatever violence, and one afterwards fell over it, the action would be case, and not trespass.[207]

In some cases, though the injury is forcible and immediate, the person injured may waive the trespass and sue in trover or in case for the consequential damage.[208] As already stated a husband, parent or master may maintain trespass for the seduction or enticing away of his wife, daughter, or servant, since the injury was committed with force, in the eye of the law. But he may, at his election, bring an action on the case, for the consequential loss of

[202] McManus v. Crickett, 1 East, 108; Havens v. Hartford & N. H. R. Co., 28 Conn. 69; Broughton v. Whallon, 8 Wend. (N. Y.) 474.

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

[204] 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.

[205] Ante. p. 53.

[206] 1 Chit. Pl. 141; Leame v. Bray, 3 East, 602; Reynolds v. Clarke, 1 Strange, 636; Day v. Edwards, 5 Term R. 649.

[207] Leame v. Bray, supra; 1 Chit. Pl. 141. Trespass is the remedy where rubbish is laid so near another's wall that as a natural consequence some of it rolls against and comes in contact with it. Gregory v. Piper, 9 Barn. & C. 591.

[208] 1 Chit. Pl. 156; Branscomb v. Bridges, 1 Barn. & C. 145; Dalton v. Favor, 3 N. H. 465; Baldridge v. Allen, 2 Ired. (N. C.) 206; Gilson v. Fisk, 8 N. H. 404; Frankenthal v. Camp, 55 Ill. 169.

the services or society of the servant, daughter, or wife.[209] And, generally, where there is an immediate injury to person or property, from force attributable to the negligence of another, other than mere nonfeasance, and not to willfulness, the party injured may 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.[210]

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.[211] An action on the case is the remedy for libel or slander;[212] for injury to health or comfort from a nuisance;[213] for obstructing a private right of way,[214] or a public highway,[215] or navigable river, [216] 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.[217] 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.[218] And it will

[209] Ante, pp. 52, 89.

[210] Ante, p. 57, where the cases are collected, and a conflict shown.

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

[212] Pollard v. Lyon, 91 U. S. 226.

[213] Nevins v. Peoria, 41 Ill. 502.

[214] 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, 29 Pa. St. 22; Lansing v. Wiswall, 5 Denio (N. Y.) 213; Lambert v. Hoke, 14 Johns. (N. Y.) 383; Wilson v. Wilson, 2 Vt. 68.

[215] Greasley v. Codling, 9 Moore, 489; Pekin v. Brereton, 67 Ill. 477; Lansing v. Wiswall, supra; Wilson v. Wilson, 2 Vt. 68.

[216] Rose v. Miles, 4 Maule & S. 101; Bellant v. Brown, 78 Mich. 294, 44 N. W. 326.

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

[218] Williams v. Morland, 2 Barn. & C. 910; Lindeman v. Lindsey, 69 Pa. St.

lie for infringing a copyright, patent, or trade-mark,[219] 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 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." [220]

Property in Reversion.

The action of trespass, as we have seen, cannot be maintained for an injury to property, real or personal, unless the property was in the plaintiff's actual or constructive possession at the time of the injury; and case is therefore the proper remedy for an injury to per-

93; Strickler v. Todd, 10 Serg. & R. (Pa.) 63. See Ottawa Gas-Light & Coke Co. v. Thompson, 39 Ill. 598; Shafer v. Smith, 7 Har. & J. (Md.) 67.

[219] 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.

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

sonal[221] or real[222] property in reversion, however forcibly or immediately it may have been caused.

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.[223]

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.[224]

If a person forcibly takes another's goods, the action must generally be trespass. An action on the case, however, will lie at the suit of a seller of goods against a person other than the buyer, 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 not immediate, but consequential.[225]

If a person lays rubbish so near another's wall that, as a neces-

[221] Gordon v. Harper, 7 Term R. 9; Hall v. Pickard, 3 Camp. 187; Ward v. Macauley, 4 Term R. 489; Ayer v. Bartlett, 9 Pick. (Mass.) 156; Bucki v. Cone, 25 Fla. 1, 6 South. 160; ante, p. 61.

[222] Lienow v. Ritchie, 8 Pick. (Mass.) 235; Ward v. Macauley, 4 Term R. 489; Bucki v. Cone, supra; Tobey v. Webster, 3 Johns. (N. Y.) 468; Campbell v. Arnold, 1 Johns. (N. Y.) 511; Topping v. Evans, 58 Ill. 209; Stout v. Keyes, 2 Doug. (Mich.) 184; Ripka v. Sergeant, 7 Watts & S. (Pa.) 9; Schnable v. Koehler, 28 Pa. St. 181; Cooper v. Randall, 59 Ill. 317; ante, p. 61.

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

[224] 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.

[225] Frankenthal v. Camp, 55 Ill. 169.

sary or natural consequence, some of it rolls against the wall, the injury is immediate, and the remedy is in trespass.[226]

If a blow be given directly to the person or property of another, the action must be trespass, and not case.[227] And if a person willfully drives his horse or carriage against another's person or property, trespass and not case is the remedy.[228] 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.[229] Trespass would also lie in such a case.[230] 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.[231] 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 con-

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

[227] Ante, pp. 51, 56. In Ricker v. Freeman, 50 N. H. 420, 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.

[228] Ante, p. 57.

[229] 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; Bradford v. Ball, 38 Mich. 673; Payne v. Smith, 4 Dana (Ky.) 497.

[230] 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. St. 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. See the cases above cited.

[231] Rogers v. Imbleton, 5 Bos. & P. 117; Ogle v. Barnes, 8 Term R. 188; Turner v. Hawkins, 1 Bos. & P. 472; Mcreton v. Hardern, 4 Barn. & C. 226; Percival v. Hickey, 18 Johns. (N. Y.) 257; Rathbun v. Payne, 19 Wend. (N. Y.) 399; Barnes v. Cole, 21 Wend. (N. Y.) 188.

fined 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 of action, and to declare in case, or to consider the act itself as the injury, and to declare in trespass.[232]

If a person pours water directly upon another's person or land, the injury is immediate, and trespass is the proper remedy.[233] 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.[234] 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.[235] And it lies for injury to person or property communicated by infection.[236]

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.[237] 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.[238]

[232] Blin v. Campbell, 14 Johns. (N. Y.) 432; Howard v. Tyler, 46 Vt. 687.

[233] Reynolds v. Clarke, 2 Ld. Raym. 403.

[234] 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; Howard v. Bankes, 2 Burrows, 1114; Arnold v. Foot, 12 Wend. (N. Y.) 330; Nevins v. Peoria, 41 Ill. 502; Hamilton v. Plainwell Water Power Co., 81 Mich. 21, 45 N. W. 648.

[235] Pekin v. Brereton, 67 Ill. 477. Or the party may bring trespass. Buskirk v. Strickland, 47 Mich. 389, 11 N. W. 210.

[236] Eaton v. Winnie, 20 Mich. 156.

[237] Chamberlain v. Hazelwood, 5 Mees. & W. 515; Tullidge v. Wade, 3 Wils. 18.

[238] 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; Ream v. Rank, 3 Serg. & R. 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,

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 immediate, and trespass, not case, is the remedy.[239] 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.[240]

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.[241]

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.[242] 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;[243] or he may sue in trespass as in other cases, treating the trespass as his cause of action.[244]

Where a person by his wrongful and forcible act frightens another's horses, and causes injury, the remedy may sometimes be

322; Haney v. Townsend, 1 McCord (S. C.) 207; Jones v. Tevis, 4 Litt. (Ky.) 25; McClure v. Miller, 4 Hawks (N. C.) 133; Moran v. Dawes, 4 Cow. (N. Y.) 412.

[239] Leame v. Bray, 3 East, 596; Mason v. Keeling, 12 Mod. 333; Beckwith v. Shordike, 4 Burrows, 2092; Decker v. Gammon, 44 Me. 322. 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.) 797.

[240] 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.

[241] Barnard v. Poor, 21 Pick. (Mass.) 378; Burton v. McClellan, 2 Scam. (Ill.) 434; Johnson v. Barber, 10 Ill. 425; Armstrong v. Cooley, Id. 509; Jordan v. Wyatt, 4 Grat. (Va.) 151.

[242] Ante, p. 52; Wells v. Howell, 19 Johns. (N. Y.) 385.

[243] Star v. Rookesby, 1 Salk. 335. And see Mason v. Keeling, 12 Mod. 335; Decker v. Gammon, 44 Me. 322.

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

case, and sometimes trespass. In an action of trespass for such an injury, the principle was thus stated: "If the horse and chaise were in plain sight, and near enough to be supposed to excite any attention or caution on the part of the defendant, or if it was in evidence that he had noticed their being there, exposed to the consequences of his firing the gun, and the distance was such as that, by common experience, there might be a reasonable apprehension of frightening the horse by a discharge of the gun, I should think the defendant, although no purpose of mischief was proved, and even if it was not a case of very gross negligence, liable in an action of trespass. On the other hand, if the plaintiff's horse and chaise were out of his sight, and had not been noticed by the defendant, and the distance was such as that no reasonable apprehension of frightening the horse could arise, supposing the horse and chaise to have been observed by the defendant, the injury is hardly to be considered as sufficiently immediate upon the act of the defendant to render him liable in this form of action [trespass]; although undoubtedly liable, in an action on the case, to the extent of the damage actually sustained by the plaintiff." [245]

Torts in Connection with Contract—Case and Assumpsit, Debt, or Covenant as Concurrent Remedies.

Mere breach of contract, without more, will not sustain an action on the case, but the remedy is assumpsit, covenant, or debt.[246] But 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,[247] though it is more usual to declare in assumpsit. Assumpsit is the

[245] Cole v. Fisher, 11 Mass. 137. Frightening horses by beating a drum. Loubz v. Hafner, 1 Dev. (N. C.) 185 (trespass, not case).

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

[247] Ashley v. Root, 4 Allen (Mass.) 504; Dearborn v. Dearborn, 15 Mass. 316; Gilbert v. Williams, 8 Mass. 51; Varnum v. Martin, 15 Pick. (Mass.) 450; Walker v. Goodman, 21 Ala. 647, 30 Ala. 482; Pennington v. Yell, 11 Ark. 212; Holmes v. Peck, 1 R. I. 242; Crooker v. Hutchinson, 1 Vt. 73; Lynch v. Com., 16 Serg. & R. 368; Shreeve v. Adams, 6 Phila. (Pa.) 260; Coopwood v. Bolton, 26 Miss. 129; Church v. Mumford, 11 Johns. (N. Y.) 479.

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.[248] For any misfeasance by a party in a public trade or employment which he professes, an action on the case will lie by the party injured, as where a blacksmith injures a horse in shoeing him.[249]

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.[250] "If the 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." [251] Thus, case will lie for not

[248] 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, etc., R. Co. v. McCasland, 11 Ill. App. 491; Chicago, etc., R. Co. v. Barrett, 16 Ill. App. 17; School Dist. v. Boston, H. & E. R. Co., 102 Mass. 552; Nevin v. Pullman Palace Car Co., 106 Ill. 222; Bank of Orange v. Brown, 3 Wend. (N. Y.) 158; Lockwood v. Bull, 1 Cow. (N. Y.) 322; 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.

[249] 1 Saund. 312a, and note 2. And see Nevin v. Pullman Palace Car Co., 106 Ill. 222. 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.

[250] Dickon v. Clifton, 2 Wils. 319; Burnett v. Lynch, 5 Barn. & C. 605; Nevin v. Pullman Palace Car Co., 106 Ill. 222; Kankakee, etc., 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, whereby 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. St. 93. And see Strickler v. Todd, 10 Serg. & R. (Pa.) 63.

[251] 1 Chit. Pl. 152. In Mast v. Goodson, 3 Wils. 348, it was held that a

accounting for, and for converting to his own use, bills delivered to a person to be discounted, or the proceeds of such bills.[252] 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.[253]

Though covenant or assumpsit is a concurrent remedy, case will lie for a false warranty on the sale of land or goods.[254] 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.[255] It is also

count in case, setting out an agreement by which the plaintiff was to build a yard in defendant's close, and lay out not less than £20, and was to enjoy it for life, and averring that plaintiff built the yard and enjoyed it for some years as an easement, but defendant afterwards wrongfully obstructed him in the enjoyment of it, was good. In this case the action was founded on a contract, but the obstruction to the plaintiff's right, for which the action was brought, was ex delicto, although the right arose out of the contract. 1 Chit. Pl. 152; Corbett v. Packington, 6 Barn. & C. 273. "Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in assumpsit, in which the promise is stated as the gist of the action. But where, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach." 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; Stoyel v. Westcott, 2 Day (Conn.) 422; Bulkley v. Storer, Id. 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.

[252] 1 Chit. Pl. 152; Samuel v. Judin, 6 East, 333; Smith v. White, 6 Bing. N. C. 218.

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

[254] 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; Mahurin v. Harding, 28 N. H. 128; Evertson's Ex'rs v. Miles, 6 Johns. (N. Y.) 138; Carter v. Glass, 44 Mich. 154, 6 N. W. 200; Beebe v. Knapp, 28 Mich. 53.

[255] Upton v. Vail, 6 Johns. (N. Y.) 181; Russell v. Clark's Ex'rs, 7 Cranch, 92.

the proper remedy for any other fraud or deceit independently of and without relation to any contract between the parties,[256] and for fraudulent representations, not introduced into a written contract between the parties respecting the subject-matter of the representations.[257]

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.[258]

Whether a particular action is in tort or contract is to be determined by the nature of the grievance, rather than by the form of the declaration.[259]

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.[260]

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.[261] 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

[256] Pasley v. Freeman, 3 Term R. 51; Adamson v. Jarvis, 4 Bing. 73; Culver v. Avery, 7 Wend. (N. Y.) 380; Barney v. Dewey, 13 Johns. (N. Y.) 226; Wardell v. Fosdick, Id. 325; Monell v. Colden, Id. 325.

[257] Culver v. Avery, supra; Wardell v. Fosdick, 13 Johns. (N. Y.) 325; Hallock v. Powell, 3 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; Burns v. Dockray, 156 Mass. 135, 30 N. E. 551.

[258] Ferguson v. Carrington, 9 Barn. & C. 59.

[259] New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660; Coggswell v. Baldwin, 15 Vt. 404; Howe v. Cooke, 21 Wend. (N. Y.) 29.

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

[261] 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.

does not lie, and that the only remedy is on the covenants in the lease.[262]

On a Statute.

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[263]) will lie.[264] 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.[265] 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.[266]

[262] 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.

[263] Ante, pp. 86, 43.

[264] 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, 39 Mich. 733.

[265] Scidmore 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 R. Co. v. Woodman, 2 Greenl. (Me) 404; Fryeberg Canal Co. v. Frye, 5 Greenl. (Me.) 38.

[266] 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 (Va.) 103; Brown v. White Deer Tp., 27 Pa. St. 109; Henniker v. Contoocook 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. Canal, 12 Mass. 466; Proprietors Sudbury Meadows v. 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. 477; Thomasson v. Agnew, 24 Miss. 93.

DETINUE.

20. 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. If the chattel cannot be returned, the plaintiff may recover its value, with damages for its detention. To maintain the action—

(a) The chattel must be

(1) Personal, and

(2) Specific.

(b) The plaintiff must have either a general or special property in the chattel, and the right to immediate possession.

(c) The defendant must be, or must have been, in the actual possession of the chattel.

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.[267] In trespass[268] or trover[269] for wrongfully taking or detaining goods, or in assumpsit[270] for not delivering them, damages only, and not the specific property, can be recovered.[271] 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 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.[272]

[267] Post, p. 107. 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. See Append. Form No. 10, for declaration in detinue.

[268] Post, p. 50.

[269] Post, p. 68.

[270] Ante, p. 11.

[271] 1 Chit. Pl. 136.

[272] Gledstane v. Hewitt, 1 Cromp. & J. 565; Broadbent v. Ledward, 11 Adol. & E. 209. This is an action somewhat peculiar in its nature, and it may be

In some of the states where the common-law mode of procedure is generally used, the action of detinue has been abolished, and its place supplied by a statutory extension of the action of replevin

difficult to decide whether it should be classed amongst forms of action ex contractu, or should be ranked with actions ex 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,—for which reason, although a declaration in detinue has stated a bailment to the defendant, and his engagement to redeliver on request, and the defendant has pleaded that the bailment was a security for a loan, the plaintiff may, without being guilty of a departure, reply that he tendered the debt, and that the defendant afterwards wrongfully withheld the goods. Gledstane v. Hewitt, 1 Cromp. & J. 565, 1 Tyrw. 450. So the action of detinue is so far considered an action of tort that, if one joint tenant bring the action, the objection of nonjoinder of the others can only be taken by plea in abatement. Broadbent v. Ledward, 11 Adol. & E. 209, 3 Perry & D. 45. 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

to cases of wrongful detention of property lawfully obtained, or by some other remedy.[273]

For what Property.

Detinue lies for the recovery of a specific chattel only, and not for the recovery of fixtures, or other real property.[274] The goods for which it is brought must be distinguishable from other property, and their identity ascertainable by some certain means.[275] It lies to recover any chattel that is so identified that it may be recovered in specie.[276] The chattel, of course, must be in existence. The action cannot be maintained after its destruction.[277]

The Plaintiff's Interest.

To maintain this action, the plaintiff must have either a general or special property in the chattel, and the right to the immediate possession thereof, at the time the action is commenced.[278] If his

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.

[273] Post, p. 115.

[274] Coupledike v. Coupledike, Cro. Jac. 39. See McFadden v. Crawford, 36 W. Va. 671, 15 S. E. 408. 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.

[275] 1 Chit. Pl. 137; Comyn, Dig. "Detinue," B, C; Co. Litt. 286b; 3 Bl. Comm. 152; Isaack v. Clark, 2 Bulst. 308; Banks v. Whetstone, Moore, 394.

[276] 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; Stoker v. Yerby, 11 Ala. 322. To recover an insurance policy, Robinson v. Peterson, 40 Ill. App. 132.

[277] Caldwell v. Fenwick, 2 Dana (Ky.) 332; Lindsay v. Perry, 1 Ala. 203.

[278] Gordon v. Harper, 7 Term R. 9; Philips v. Robinson, 4 Bing. 106; Burnley v. Lambert, 1 Wash. (Va.) 308; Staton v. Pittman, 11 Grat. (Va.) 99; O'Neal v. Baker, 2 Jones (N. C.) 168; Burns v. Morrison, 36 W. Va. 423, 15 S. E. 62; Robinson v. Peterson, 40 Ill. App. 132; Ramsey v. Barcraft, 2 Mo. 151;

right is merely in reversion, the action will not lie.[279] The action may be brought by either the general [280] or special [281] owner, if entitled to the immediate possession, although he never has had the actual possession.[282] And, as against a mere trespasser, prior possession alone will be sufficient to support the action.[283]

The Injury.

The gist of this action is the wrongful detention of the goods, and not the original taking.[284] 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,[285] or tortiously, as by fraud or trespass.[286]

Demand before bringing the action is necessary if the detention is not in itself unlawful, but not otherwise.[287]

Hughes v. Jones, 2 Md. Ch. 178; Boulden v. Organ Co., 92 Ala. 182, 9 South. 283. 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.

[279] Gordon v. Harper, supra; O'Neal v. Baker, supra.

[280] Philips v. Robinson, 4 Bing. 111.

[281] Brooke, Abr. "Detinue"; 1 Saund. 47b, c, d; Philips v. Robinson, 4 Bing. 111; Boyle v. Townes, 9 Leigh (Va.) 158.

[282] 2 Saund. 47a, note; 1 Brooke, Abr. "Detinue," pls. 30, 45; 1 Rolle, Abr. 606; Comyn, Dig. "Detinue" A; Philips v. Robinson, 4 Bing. 111; Robinson v. Peterson, 40 Ill. App. 132; Hundley v. Buckner, 6 Smedes & M. (Miss.) 70; Jones v. Strong, 6 Ired. (N. C.) 367.

[283] Huddleston v. Huey, 73 Ala. 215; Behr v. Gerson, 95 Ala. 438, 11 South. 115.

[284] 1 Chit. Pl. 137; 3 Bl. Comm. 152; Co. Litt. 286b; Walker v. Fenner, 20 Ala. 192; Benje v. Creagh, 21 Ala. 151; Charles v. Elliott, 4 Dev. & B. (N. C.) 468.

[285] Co. Litt. 286b; Bac. Abr. "Detinue"; Kettle v. Bromsall, Willes, 118; Dame v. Dame, 43 N. H. 37.

[286] 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; Owings v. Frier, 2 A. K. Marsh. (Ky.) 268; Hail 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; but this is not now, and never has been, the law. See 1 Chit. Pl. 137, 138.

[287] Brock v. Headen, 13 Ala. 370; Miles v. Allen, 6 Ired. (N. C.) 88; Jones v. Green, 4 Dev. & B. (N. C.) 354.

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.[288] Nor does it lie against a bailee who has lost the chattel by accident before demand;[289] but if he has wrongfully and elusively sold and delivered, or otherwise disposed of, the chattel to another, he remains liable.[290] 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.[291]

REPLEVIN.

21. The action of replevin lies where specific personal property has been wrongfully taken and is wrongfully detained, or, in most states, by statute, also where it has been lawfully taken, but 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 have a general or special property in the chattel, entitling him 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 ac-

[288] 1 Chit. Pl. 138; Isaack v. Clark, 2 Bulst. 308; Brewer v. Strong, 10 Ala. 961; 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, 4 Dev. & B. (N. C.) 468.

[289] 1 Chit. Pl. 138; Brooke, Abr. "Detinue," pls. 1, 33, 40.

[290] 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; Merritt v. Warmouth, 1 Hayw. (N. C.) 12; Lowry v. Houston, 3 How. (Miss.) 394; Haley v. Rowan, 5 Yerg. (Tenn.) 301; Burns v. Morrison, 36 W. Va. 423, 15 S. E. 62; Rucker v. Hamilton, 3 Dana (Ky.) 36; Kershaw v. Boykin, 1 Brev. (S. C.) 301.

[291] Dyer v. Pearson, 3 Barn. & C. 38.

tion 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.

At common law, where goods had been distrained, the owner, by making plaint to the sheriff, could have them replevied,—that is, redelivered to him upon giving security to prosecute an action against the distrainer for the purpose of trying the legality of the distress,—and, if the right should be determined against him, and in favor of the distrainer, to return the goods. The action so prosecuted was the common-law action of replevin.[202]

At first, the action was applicable only where the goods sought to be recovered had been taken by illegal distress; but, at a very early day, it was extended, so as to embrace, as it does now, any case in which the owner of goods had them unlawfully taken from him.

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.[203]

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.

[202] This action, though entertained in the superior courts of common law was not, like the other common-law actions, commenced there. It was commenced in the county court and entertained in the superior courts by virtue of an authority which they exercised of removing suits from an inferior jurisdiction.

[203] Cobbey, Repl. §§ 23, 24.

Mode of Procedure—Forms of Action.

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 detained the property, and the action was therefore called replevin in the detinet. In the former the plaintiff, having obtained possession 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.

This mode of procedure was afterwards abolished because of its disadvantages, and by the statute of Marlbridge, c. 21, another mode of proceeding was substituted. Under this practice the plaintiff, instead of proceeding by a writ issuing out of the court of chancery, made a complaint, or, as it was called, a plaint, directly to the sheriff, who seized the property, or rather caused it to be seized by his bailiff, and delivered it to the plaintiff on the latter's giving the security to prosecute his action and for the return of the property and payment of damages. At the time of the seizure the action itself was also commenced by summoning the defendant to appear and answer the plaintiff's declaration, which was generally made out before it could be ascertained whether the goods could be replevied or not. Under this practice the declaration was always framed in the detinuit, and what was formerly known as re-

plevin in the detinet became obsolete. The two actions were never different except in form. In both forms the possession of the goods was sought to be recovered. If they were seized and replevied, damages for the detention only were recovered, while if they were not seized and replevied, their full value was recovered. There was no distinct action of replevin to recover damages only. Both forms sought to recover possession.[294] After the form of replevin in the detinet became obsolete, the measure of recovery remained the same.

In this country, as far as the pleadings are concerned, the action is generally in form in the detinet. The action itself is commenced by the proceedings to obtain possession, and it is alleged that the defendant detains (not detained) the property, and though the possession is obtained under the writ, the action is still called replevin in the detinet.

Perhaps in all of our states the mode of procedure is regulated by statute. In Michigan, for instance, which is a common-law state, the statute provides for the commencement of the action by a writ of replevin, the form of which is prescribed by the statute.[295] Before the writ can be executed by the officer, an affidavit must be annexed to the writ, stating the facts showing the plaintiff's right, and that the goods "are" unlawfully detained, etc.[296] The writ is then executed by a seizure of the property by the officer, and after appraising it, and taking a proper bond from the plaintiff, he delivers the property to him.[297] If the property specified in the writ is not found, or is not delivered to the plaintiff, he may nevertheless proceed in the action for the recovery of the same, or the value thereof.[298] In Illinois, it is provided by statute that an affidavit shall be filed with the clerk of the court in which the action is brought, or with the justice of the peace before whom it is commenced, showing the plaintiff's right, and that the property "is" unlawfully detained, etc.[299] The writ is then issued to the proper officer, the form of the same being prescribed by the statute.[300] Before the execution of the writ by seizure of the property (and not after seizure

[294] McKelvey, Pl. 46–52.
[295] 2 How, Ann. St. § 8320.
[296] Id. § 8321.
[297] Id. §§ 8322–8324.
[298] Id. § 8325.
[299] Rev. St. c. 119, § 4.
[300] Id. § 7.

as in Michigan), the plaintiff must give a proper bond.[301] A declaration is filed as in other cases.[302] When the property or any part thereof has not been found or delivered, the plaintiff declares in trover for so much as has not been so found or delivered.[303]

When 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.[304] 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.[305]

Title to Land Involved.

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.[306]

Replevin will not lie for timber, crops, or minerals severed and

[301] Id. § 10. [302] Id. § 17.

[303] Id. § 18; Yott v. People, 91 Ill. 11. In so far as the action is in trover under the statute, the measure of damages is that which controls in actions of trover. McGavock v. Chamberlain, 20 Ill. 219.

[304] 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 Dep. Bank, 19 Pa. St. 71; Huebschman v. McHenry, 29 Wis. 655.

[305] Ogden v. Stock, 34 Ill. 522; Cresson v. Stout, 17 Johns. (N. Y.) 116; 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; Ortmann v. Sovereign, 42 Mich. 1, 3 N. W. 223; Marquette, H. & O. R. Co. v. Atkinson, 44 Mich. 166, 6 N. W. 230; Stearnes v. Raymond, 26 Wis. 74; Harlan v. Harlan, 15 Pa. St. 507; Snyder v. Vaux, 2 Rawle (Pa.) 423; Green v. Ashland Iron Co., 62 Pa. St. 97; Young v. Herdic, 55 Pa. St. 172; Coomalt v. Stanley, 3 Clark (Pa.) 389; Lehman v. Kellerman, 65 Pa. St. 489.

[306] 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 arise, if the action was not brought to try the title. Green v. Ashland Iron Co., 62 Pa. St. 97.

removed from land by one who is in the adverse possession of the land under a claim of title.[307]

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.[308] 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.[309]

[307] Brown v. Caldwell, 10 Serg. & R. (Pa.) 114; Powell v. Smith, 2 Watts (Pa.) 126; Cromelien v. Brink, 29 Pa. St. 522.

[308] 1 Chit. Pl. 145b; Thomas v. Spofford, 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; Walpole v. Smith, 4 Blackf. (Ind.) 304; Wilson v. Royston, 2 Pike (Ark.) 315; Lester v. McDowell, 18 Pa. St. 91; and cases hereafter cited.

[309] 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. St. 91; Weed v. Hall, 101 Pa. St. 592; Belden v. Laing, 8 Mich. 500; Chinn v. Russell, 2 Blackf. (Ind.) 174; Smith v. Williamson, 1 Har. & J. (Md.) 147. 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. Post, p. 113, note 311. 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. Wren, 50 Ill. 222; 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. 281. A vendor may replevy goods sold by him, where possession was obtained from him by the perpetration of a fraud. Bush v. Ben-

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.[310]

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.[311]

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

der, 113 Pa. St. 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.

[310] Powell v. Bradlee, 9 Gill & J. (Md.) 220; Bostic v. Brittain, 25 Ark. 482; Baker v. Fales, 16 Mass. 147; Pratt v. Parkman, 24 Pick. (Mass.) 42; Miller v. Warden, 111 Pa. St. 300, 2 Atl. 90; Midvale Steel Works v. Hallgarten, 15 Wkly. Notes Cas. 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.

[311] Mead v. Kilday, 2 Watts (Pa.) 110; Woods v. Nixon, Add. (Pa.) 131; Harris v. Smith, 3 Serg. & R. (Pa.) 20; Young v. Kimball, 23 Pa. St. 193; Miller v. Warden, 111 Pa. St. 300, 2 Atl. 90; 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. St. 341; Reichenback v. McKean, 95 Pa. St. 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; 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

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.[312] 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 peaceable possession, by one who has not title or authority, the mere prior possession will support the action against the latter.[313]

A tenant in common cannot maintain replevin against his co-tenant.[314] 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.[315] "Replevin," said the Massachu-

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.

[312] 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; Miller v. Adsit, 16 Wend. (N. Y.) 335.

[313] 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.

[314] 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.

[315] Hart v. Fitzgerald, 2 Mass. 509; Gardner v. Dutch, 9 Mass. 427; Ladd v. Billings, 15 Mass. 15; Scudder v. Worster, 11 Cush. (Mass.) 573. But when a number of similar, specific, and integral 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,

setts 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 abatement that the property is in the plaintiff and another." [816] 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.[817]

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." [818]

Nature of the Injury.

Though, as we have seen, replevin was originally limited to cases in which property had been illegally taken in distress, it is not so limited now, but it will lie in any other case where goods have been illegally taken and are wrongfully detained, provided, of course, the plaintiff is entitled to their possession.[819]

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 es-

though they have never been separated, and have no distinguishing marks. Gardner v. Dutch, supra.

[816] Hart v. Fitzgerald, supra.

[817] 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.

[818] Cobbey, Repl. § 25; Cary v. Hewitt, 26 Mich. 228; Moriarty v. Stafferan, 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.

[819] 1 Chit. Pl. 184; Ilsley v. Stubbs, 5 Mass. 283; Pangburn v. Patridge, 7 Johns. (N. Y.) 140; Haythorn v. Rushforth, 19 N. J. Law, 160. 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.

sential; and this is still the rule in some of our states.[320] 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 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.[321] Replevin for goods lawfully acquired but unlawfully detained is called "replevin in the detinet," as distinguished from "replevin in the cepit."[322]

The defendant must in all cases have actual or constructive 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.[323] But if the defendant has been in the unlawful possession of the property, and the plaintiff

[320] Woodward v. Grand Trunk Ry. Co., 46 N. H. 524; Dame v. Dame, 43 N. H. 37; Farley v. Lincoln, 51 N. H. 579; Wright v. Armstrong, Bre. Beech. (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; Allen v. Crary, 10 Wend. (N. Y.) 349; Marshall v. Davis, 1 Wend. (N. Y.) 109.

[321] Page v. Crosby, 24 Pick. (Mass.) 215; Simpson v. M'Farland, 18 Pick. (Mass.) 427; Dugan v. Nichols, 125 Mass. 576; Sexton v. McDowd, 38 Mich. 148; Weaver v. Lawrence, 1 Dall. (Pa.) 156. 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; Willis v. Banister, 36 Vt. 220; Marshall v. Davis, 1 Wend. (N. Y.) 109.

[322] Strictly, all actions of replevin are replevin in the detinet, whether the original taking was unlawful or not. In all cases, whether the original taking was lawful or a trespass, there must be a detention of the goods at the time of suit. Where goods have been tortiously taken, the party entitled to them, instead of bringing replevin in the cepit, may waive the trespass and bring replevin in the detinet under the statute, setting up the unlawful detention only. Cummings v. Vorce, 3 Hill (N. Y.) 282.

[323] Mitchell v. Roberts, 50 N. H. 486; Gildas v. Crosby, 61 Mich. 413, 28 N.

brings replevin without reason to know of any change in the circumstances, the defendant 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.[224]

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.[225]

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.[226] Where, on the other hand, the posses-

W. 153; Richardson v. Reed, 4 Gray (Mass.) 441, 444; Gaff v. Harding, 48 Ill. 148; Hall v. White, 106 Mass. 599.

[224] 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.

[225] 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. 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. 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.

[226] Trudo v. Anderson, 10 Mich. 357; Ballou v. O'Brien, 20 Mich. 304; LeRoy

sion was lawfully 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.[327]

EJECTMENT.

22. 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 a legal title and the right to possession at the time the action is commenced. Prior possession, however, 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.

23. 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.

The writ of ejectment was not originally designed for trying the title to land, but has been adapted to this object by means of legal

v. East Saginaw C. R. Co., 18 Mich. 233; Bertwhistle v. Goodrich, 53 Mich. 457, 19 N. W. 143; Clark v. Lewis, 35 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; Farley v. Lincoln, 51 N. H. 577; Jones v. Smith, 123 Ind. 585, 24 N. E. 368; Denton v. Smith, 61 Mich. 431, 28 N. W. 160.

[327] Ohio & M. Ry. Co. v. Noe, 77 Ill. 513; Hamilton v. Singer Manuf'g Co., 54 Ill. 370; Adams v. Wood, 51 Mich. 411, 16 N. W. 788; Cadwell v. Pray, 41

fictions. At first, it was only used by the lessee of land who had been ousted therefrom by a stranger, to recover damages for the ouster, and did not result in a recovery of the possession of the land itself. After a while the courts of chancery undertook to compel the restitution of the land, and in this they were soon followed by the courts of law, though without change in the form of action. To authorize this relief it was necessary for the lessee to show a better title than the ejector, and, as he could have no better title than his lessor, the lessor's title was incidentally brought up for examination. "In this state of things, it was perceived by the lawyers that, by recourse to several fictions, the trial of the lessor's title might be made the direct and main object of the action, instead of being an incidental circumstance. 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 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 is made to effect its purpose." [328]

Mich. 307, 2 N. W. 52; Lynch v. Beecher, 38 Conn. 490; Chandler v. Colcord, 1 Okl. 260, 32 Pac. 330; Chapin v. Jenkins, 50 Kan. 385, 31 Pac. 1094.

[328] Walk. Am. Law, 620. See, for a history of the action of ejectment, 3 Bl. Comm. 199.

By statute in most states this fictitious mode of procedure has been swept away, and the action is made a simple and direct remedy for the trial 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,[329] 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." [330] The same is true in Michigan,[331] and other states.

Statutory Substitutes for Ejectment.

The action of ejectment, in its old common-law form, 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.

Same—Trespass to Try Title.

In Texas, and perhaps in other states, an action called "trespass to try title" has been 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, like 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.[332] In Texas this is the only form of action to try a controversy as to the title of land.[333]

[329] Rev. St. c. 45, §§ 1–8.

[330] Rev. St. c. 45, § 8.

[331] 2 How. St. §§ 7788–7793.

[332] Titus v. Johnson, 50 Tex. 224. It lies against a tenant holding over after expiration of his term. Thurber v. Conners, 57 Tex. 96.

[333] In Texas it is provided by statute as follows: "All fictitious proceedings

The action is intended as a substitute for ejectment, and is governed by substantially the same rules,[334] though there are exceptions.[335]

When Ejectment Lies—For What Property.

Ejectment will only lie for the recovery 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.[336] It will not lie to recover property which, in legal

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. 1879, art. 4784. "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. 4785.

[334] 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 title as it existed at the commencement of the action. Collins v. Badlow, 72 Tex. 330, 10 S. W. 248.

[335] 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; Wright v. Dunn, 73 Tex. 293, 11 S. W. 330.

[336] 1 Chit. Pl. 210; Doe v. Musgrave, 1 Man. & G. 639; Black v. Hepburne, 2 Yeates (Pa.) 331; Nichols v. Lewis, 15 Conn. 137; White v. White, 16 N. J. Law, 202; Jackson 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.) 297. 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 case of an ouster. Hill v. Hill, 43 Pa. St. 521. One entitled to the right of mining on land may maintain ejectment. Turner v. Reynolds, 23 Pa. St. 19.

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.[337]

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.[338] The plaintiff must have such an estate as entitles him to the possession.[339] 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.[340]

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 the possession must therefore establish a legal title.[341]

[337] 1 Chit. Pl. 210; 3 Bl. Comm. 206; Grand Rapids v. Whittlesey, 33 Mich. 109; Bay County v. Bradley, 39 Mich. 163; Taylor v. Gladwin, 40 Mich. 232; Black v. Hepburne, 2 Yeates (Pa.) 331. Payment of a ground rent reserved upon a conveyance in fee cannot be enforced by ejectment. Kenege v. Elliott, 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.

[338] 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; Carson v. Smart, 12 Ired. (N. C.) 369. Or tenants in common may sue jointly. Hicks v. Rogers, 4 Cranch, 165; 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. Note 345, infra, and cases there cited.

[339] Batterton v. Yoakum, 17 Ill. 288; Heffner v. Betz, 32 Pa. St. 376.

[340] Rex v. Inhabitants of Mellor, 2 East, 190; Goodtitle 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.

[341] Goodtitle v. Baldwin, 11 East, 488; 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 v. Coulter, Add. (Pa.) 390; Johnston v. Jackson, 70 Pa. St. 164; Schauber v.

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.[342]

The plaintiff must have a strict legal right. 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.[343]

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, 2 Har. & J. (Md.) 112; Campbell v. Fletcher, 37 Md. 430; Stehman v. Crull, 26 Ind. 436; Huddleston v. Garrott, 3 Humph. (Tenn.) 629; Boylan v. Meeker, 28 N. J. Law, 274. If either the plaintiff or 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; Hunter v. Cochran, 3 Pa. St. 105; Jackson v. Givin, 8 Johns. (N. Y.) 107; Peck v. Carmichael, 9 Yerg. (Tenn.) 325; Massengill v. Boyles, 11 Humph. (Tenn.) 112; Atkins v. Lewis, 14 Grat. (Va.) 30.

[342] 1 Chit. Pl. 212; Doe v. Cooke, 7 Bing. 346; Doe v. Dyeball, Moody & M. 346; Wimberly v. Hurst, 33 Ill. 166; Bates v. Campbell, 25 Wis. 613; Woods v. Lane, 2 Serg. & R. (Pa.) 53; Shumway v. Phillips, 22 Pa. St. 151; Hovey v. Fumain, 1 Pa. St. 295; Reed v. Shepley, 6 Vt. 602; Russell v. Erwin, 38 Ala. 44; Leport v. Todd, 32 N. J. Law, 124; Jackson v. Hazen, 2 Johns. (N. Y.) 22; Jackson v. Harder, 4 Johns. (N. Y). 202; Smith v. Lorillard, 10 Johns. (N. Y.) 338; Whitney v. Wright, 15 Wend. (N. Y.) 171.

[343] Doe v. Wharton, 8 Term R. 2; Childs v. Davis, 58 Ill. 411; Rountree v Little, 54 Ill. 323; 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; Leonard v. Diamond, 31 Md. 536; Egleston 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. St. 479; Mulford v. Tunis, 35 N. J. Law, 256. 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. 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. Nor can the defendant set up an equitable estoppel against the plaintiff's legal title. Ryder v. Flanders, 30 Mich. 336.

The plaintiff must have the right of possession at the time the action is commenced.[344] A remainder-man or reversioner cannot bring the action while the right of possession is in another.

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);[345] and further than this the defendant must be in the adverse and illegal possession of the land at the time the action is

Nor can the defendant interpose the merely equitable defense that the plaintiff's title was fraudulently obtained. Harrett v. Kinney, 44 Mich. 457, 7 N. W. 63. The legal title can be set up by a trustee in an action by the cestui que trust. Doe v. Wroot, 5 East, 138; Brolaskey v. McClain, 61 Pa. St. 146; Jackson v. Case, 2 Johns. (N Y.) 84; Jackson v. Sisson, Id. 321. A trustee may maintain ejectment against his cestui que trust. Beach v. Beach, 14 Vt. 28. "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 v. Slade, 4 Term R. 683; Sinclair v. Jackson, 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; Presbyterian Cong. v. Johnston, 1 Watts & S. (Pa.) 9; Caldwell v. Lowden, 3 Brewst. (Pa.) 63.

[344] Doe v. Telling, 2 East, 277; Right v. Beard, 13 East, 210; 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; Wilson v. Inloes, 11 Gill & J. (Md.) 351; Whitley v. Bramble, 9 B. Mon. (Ky.) 143; Laurissini v. Doe, 25 Miss. 177; Jackson v. Schoonmaker, 4 Johns. (N. Y.) 390.

[345] 3 Bl. Comm. 199; 1 Chit. Pl. 213; Deuchatell v. Robinson, 24 La. Ann. 176; Chamberlin v. Donahue, 41 Vt. 306; Jackson 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.

brought.[346] 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, and under the early English statutes which are a part of the common law in some of our states or which have been substantially re-enacted, 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 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

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; Buchanan v. King, 22 Grat. (Va.) 414; Lundy v. Lundy, 131 Ill. 138, 23 N. E. 337; Lawrence v. Ballou, 37 Cal. 518; Valentine v. Northrop, 12 Wend. (N. Y.) 494; Shaver v. McCraw, Id. 562; Cumberland V. R. Co. v. McLanahan, 59 Pa. St. 23.

[346] Right v. Beard, 13 East, 210, 212; Goodright v. Rich, 7 Term R. 327; Reed v. Tyler, 56 Ill. 288; Whitford v. Drexel, 118 Ill. 600, 9 N. E. 268; Lockwood v. Drake, 1 Mich. 14; White v. Hapeman, 43 Mich. 267, 5 N. W. 313; Wallis v. Doe, 2 Smedes & M. (Miss.) 220; Smith v. Walker, 10 Smedes & M. (Miss.) 584; Jackson v. Hakes, 2 Caines (N. Y.) 335; Cooley v. Penfield, 1 Vt. 244; Kribbs v. Downing, 25 Pa. St. 399; McIntyre v. Wing, 113 Pa. St. 67, 4 Atl. 197; Corley v. Pentz, 76 Pa. St. 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. 671. And see Anderson v. Courtright, 47 Mich. 161, 10 N. W. 183; Heinmiller v. Hatheway, 60 Mich. 391, 27 N. W. 558; Banyer v. Emple, 5 Hill (N. Y.) 48.

waste or dilapidations, if any, committed or suffered by him, and prays judgment for the damages thereby sustained.[347]

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.[348] In other states the statutory remedy does not fall strictly under either of these forms.[349]

WRIT OF ENTRY.

24. 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 otherwise wrongfully dispossessed. It is still in use in a few states as a mixed action, but in England and in most of our states it has been abolished.

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 otherwise 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

[347] 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; Jackson v. Loomis, 4 Cow. (N. Y.) 168; Poindexter v. Cherry, 4 Yerg. (Tenn.) 305; Cutts v. Spring, 15 Mass. 135; Murphy v. Guion, 2 Hayw. (N. C.) 580; Hylton v. Brown, 2 Wash. 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. St. 456; Whittington v. Christian, 2 Rand. (Va.) 363.

[348] 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.

[349] 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 How. St. §§ 7829–7844. The practice in Illinois is substantially the same. Rev. St. c. 45, §§ 33, 43–57.

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 process, the praecipe 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." [350]

The remedy by 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. It 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.[351] There must also have been a disseisin of the demandant by the tenant, or by one under whom the latter claims.[352]

[350] 3 Bl. Comm. 180.

[351] "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. Pettengell v. Boynton, 139 Mass. 244, 29 N. E. 655.

[352] Wyman v. Brown, 50 Me. 143. Where all the deeds under or through which a demandant claims are merely releases and quitclaim conveyances, and it does not appear that any of the grantors were ever in possession, the demandant upon such title cannot recover. Rand v. Skillin, 63 Me. 103.

FORCIBLE ENTRY AND DETAINER.

25. 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.

The action of forcible entry and detainer was not a common-law action. It was first given by the statute of 8 Hen. VI. c. 9. Under that 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 to forthwith 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.[353]

This summary remedy is given by statute in most of our states. It is purely a statutory remedy, and the cases in which it will lie must 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. In certain cases, when the title cannot be brought into controversy, and without a resort to the action of ejectment, the remedy in general applies to cases in which exist the relation of landlord and tenant, vendor and vendee, grantor and grantee, mortgagor and mortgagee, where the possession is withheld by one of the parties after the right to hold it has expired or been disposed of. 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

[353] 3 Bl. Comm. 179.

of possession, leaving the question of title to be settled in the action of ejectment." [854]

[854] Newell, Eject. 855, 856. 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 otherwise; (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. Rev. St. Ill. 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). 2 How. St. § 8285. 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.

CHAPTER III.

PARTIES TO ACTIONS.

26. In General.
27–29. Actions in Form ex Contractu.
30–31. Actions in Form ex Delicto.
32–33. Consequences of Misjoinder or Nonjoinder of Parties Plaintiff.
34–35. Consequences of Misjoinder or Nonjoinder of Parties Defendant.

IN GENERAL.

26. An action should be brought in the name of the party whose legal right has been affected, against the person who caused or committed the injury, or by or against his personal representatives.

This rule is one of long standing, and is to be accepted as the legal standard in force to-day, though many distinctions and modifications have been necessarily made by the courts in applying it to widely varying states of fact, in order to render substantial justice to litigants. It is by reason of this difficulty in applying its principles to given controversies that a large number of subordinate and particular rules have been framed, covering conditions of death, assignment of interest, or the various cases of statutory or natural disability; but, while a knowledge of these is necessary to a complete understanding as to who should be plaintiff or defendant in any given case, it is impossible here to give more than a brief summary of the most important rules. The principles upon which these rest will be found applicable to the majority of cases.

ACTIONS IN FORM EX CONTRACTU.

27. Actions upon contracts, express or implied, must generally be brought in the name of the person or persons holding the legal interest, against the person or persons expressly liable, or upon whom the duty is imposed by law.

28. Persons jointly interested must sue together; and those liable must be sued jointly or severally, according to the nature of the undertaking, the intention of the parties, or the express words of the contract.

29. As to both plaintiffs and defendants, the contract must be treated as wholly joint or wholly several.

In the case of plaintiff or defendant, the legal status of the parties is always regarded in actions at law, to the exclusion of beneficial rights or liabilities.[1] This is necessary to preserve the fundamental distinctions between courts of law and equity and the remedies peculiar to each, and for the further reason that it would be unjust to subject a person to the expense and annoyance of defending two separate actions upon the same contract, and manifestly improper to proceed against one only having a beneficial interest, thus disregarding the person obtaining credit upon the strength of his express agreement or the one legally subject to the duty from the violation of which the liability results. In the case of the plaintiff, the person to whom the promise was made and from whom the consideration moved is the proper one to sue;[2] and, of the defendant, the liability should be enforced against him who expressly promised, or upon whom the law imposes the performance of the legal duty.[3] If the action is not really for the benefit of the one holding the legal interest, it must still be brought in his name,[4] and generally with his knowledge and consent,[5] unless absolutely essential to preserve the rights of a person beneficially interested, who is here called the "use plaintiff"; and in such cases it is generally necessary that

[1] Arkansas v. Ball, Hempst. 541, Fed. Cas. No. 530. See Goodtitle v. Jones, 7 Term R. 50; Townsend v. Townsend, 5 Har. (Del.) 127; Treat v. Stanton, 14 Conn. 445.

[2] Hall v. Huntoon, 17 Vt. 244; Weathers v. Ray, 4 Dana (Ky.) 474; Commercial Bank v. French, 21 Pick. (Mass.) 491. And see De Cordova v. Atchison, 13 Tex. 372; Taylor v. The Robert Campbell, 20 Mo. 254.

[3] Jenkins v. Tucker, 1 H. Bl. 93.

[4] Dawes v. Peck, 8 Term R. 332; Dickinson v. Burr, 7 Ark. 34. But see Commercial Bank v. French, 21 Pick. (Mass.) 489.

[5] See Mosher v. Allen, 16 Mass. 451; Hodges v. Holland, 19 Pick. (Mass.) 43.

indemnity for costs be given the former, except where statute or practice renders the latter liable for their payment.[6]

Whether Parties are Named in the Contract.

So far as defendants are concerned, it is obvious that, in case of an implied contract, the persons who are to bear the responsibility must be those made liable by law upon the presumption of a subsisting legal duty, and if the contract is an express one, whether under seal or in writing only, it clearly indicates the person to be sued in him who made it, whether in person or by agent; and, in thus expressly contracting and permitting credit to be given him, he is still liable, though not the legal owner of the property to which the contract relates, nor beneficially interested in its performance.

With regard to plaintiffs, however, some explanation is necessary. It is the rule in most jurisdictions that, if an instrument under seal expressly describes and denotes who are the parties to it,—that is, if it be inter partes,—a person not named cannot sue thereon, though the contract purport to be made for his sole advantage, and even contains an express covenant with him to perform an act for his benefit.[7] But, where the contract is not under seal, the party for whose sole benefit it appears to have been made can, by the weight of authority, sue thereon in his own name, although the engagement be not directly with him.[8] The reason is that, in the first case, the

[6] Spicer v. Todd, 2 Tyrw. 172. See Lamb v. Vice, 8 Dowl. 366.

[7] Strohecker v. Grant, 16 Serg. & R. (Pa.) 237; Hinckley v. Fowler, 15 Me. 285; Spencer v. Field, 10 Wend. (N. Y.) 87; Harms v. McCormick, 132 Ill. 104, 22 N. E. 511; Hendrick v. Lindsay, 93 U. S. 143; Seigman v. Hoffacker, 57 Md. 321. Contra, Bassett v. Hughes, 43 Wis. 319. See, on this point, Clark, Cont. 521. A person who, though named in the contract, does not sign it, and has no interest in it, is not a necessary party to an action upon it. Harrisburg Car Manuf'g Co. v. Sloan, 120 Ind. 156, 21 N. E. 1088.

[8] Edwards v. Golding, 20 Vt. 30; Pitts v. Mower, 18 Me. 361; Rider v. Ocean Ins. Co., 20 Pick. (Mass.) 265; Lawrence v. Fox, 20 N. Y. 268; McDowell v. Laev, 35 Wis. 171; Bassett v. Hughes, 43 Wis. 319; Bristow v. Lane, 21 Ill. 194; Harms v. McCormick, 132 Ill. 104, 22 N. E. 511; Mason v. Hall, 30 Ala. 599; Wood v. Moriarity, 15 R. I. 518, 9 Atl. 427. With certain exceptions this doctrine is not held in England, nor in some of our states, but it is there held that "a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and therefore,

right of suit is given and governed by the deed itself, and a person not expressly named is a stranger to it, the instrument being taken as a complete and final expression of the intention of the parties, avoiding all contrary presumptions; and, in the last, the covenant or stipulation creates an express privity between the one from whom the consideration moved and him for whose benefit the covenant was made, considering him, in effect at least, a party to the contract.

Contracts by and with Agents.

As the act of an authorized agent is in law the act of the principal, a mere servant or agent, with whom a contract is expressed to be made on behalf of another, cannot sue thereon in his own name, unless he has a beneficial interest in its performance, or a special property or interest in the subject-matter of the agreement.[9] Upon the same principle, an agent cannot in general be sued, when known as such to the party with whom he contracts, for the nonperformance of such contract.[10] If, however, the contract is under seal, and entered into with or by the agent personally, in a manner within the scope of his authority, the right or liability of the principal merges in the higher security taken, and the agent must sue or be sued in his own name.[11]

that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter." Exchange Bank v. Rice, 107 Mass. 37; Wheeler v. Stewart, 94 Mich. 445, 54 N. W. 172; Linneman v. Moross' Estate, 98 Mich. 178, 57 N. W. 103; Pipp v. Reynolds, 20 Mich. 88; Woodland v. Newhall, 31 Fed. 434; Adams v. Kuehn, 119 Pa. St. 76, 13 Atl. 184; Wilbur v. Wilbur, 17 R. I. 295, 21 Atl. 497. This is a question more properly for a work on the law of contracts; and a full treatment and collection of the cases will be found in Clark, Cont. 515–522.

[9] See Fisher v. Marsh, 6 Best & S. 411; Buckbee v. Brown, 21 Wend. (N. Y.) 110; Garland v. Reynolds, 20 Me. 45; Commercial Bank v. French, 21 Pick. (Mass.) 846; Borrowscale v. Bosworth, 99 Mass. 378. But see Colburn v. Phillips, 13 Gray (Mass.) 64.

[10] Paterson v. Gandasequi, 15 East, 62; Bowen v. Morris, 2 Taunt. 387; Hopkins v. Mehaffy, 11 Serg. & R. (Pa.) 128; Carew v. Otis, 1 Johns. (N. Y.) 418; Mann v. Chandler, 9 Mass. 335.

[11] This is not true, however, where the agent is a public officer, Unwin v. Wolseley, 1 Term R. 674; Gidley v. Lord Palmerston, 3 Brod. & B. 275; Randall v. Van Vechten, 19 Johns. (N. Y.) 60; Ogden v. Raymond, 22 Conn. 379; Parks v. Ross, 11 How. (U. S.) 362; though such an agent might be per-

Assignment of Interest.

The general rule of the common law was that choses in action could not be assigned so as to include the right of an assignee to sue in his own name,[12] and that the transfer of the interest in personal contracts could not be made so as to carry with it the liability.[13] So far as defendants are concerned, this is generally true at the present time, and a creditor will not be taken as accepting a substituted debtor except by express agreement of all parties; thus creating, in effect, a new contract.[14] As to the transfer of choses in action, both statute and recognized custom have greatly modified the former rule, and, whenever a contract is now completely assignable, the action should be brought in the name of the assignee; if not, in that of the assignor.[15]

Coplaintiffs.

Where the contract was made with several persons whose legal interest is joint, all of such persons as are living must join in an action for its breach;[16] but, if the interest of each is several and dis-

sonally held upon his express promise, Gill v. Brown, 12 Johns. (N. Y.) 385; Swift v. Hopkins, 13 Johns. (N. Y.) 313; Brown v. Rundlett, 15 N. H. 360; Simonds v. Heard, 23 Pick. (Mass.) 120. And an agent will always be personally liable if he acts as principal, and credit is expressly given him. See 1 Chit. Pl. (16th Am. Ed.) pp. 8, 9, 40–45, and cases cited.

[12] See Splidt v. Bowles, 10 East, 281; Wade v. Tinkler, 16 East, 36; Moore v. Coughlin, 4 Allen (Mass.) 335; Winchester v. Hackley, 2 Cranch (U. S.) 342; McKinney v. Alvis, 14 Ill. 33; Brigham v. Clark, 20 Pick. (Mass.) 43; Halloran v. Whitcomb, 43 Vt. 306.

[13] See Bally v. Wells, 3 Wils. 27; Saville v. Robertson, 4 Term R. 720.

[14] See Reed v. White, 5 Esp. 122; Gouthwaite v. Duckworth, 12 East, 421; Fairlie v. Denton, 8 Barn. & C. 395; Warren v. Batchelder, 15 N. H. 129; Hall v. Marston, 17 Mass. 575; Phalan v. Stiles, 11 Vt. 82; Smith v. Rogers, 17 Johns. (N. Y.) 340. See, also, 2 Chit. Cont. (11th Am. Ed.) 1371, and cases cited.

[15] The statutes of the different states relative to the persons who are to sue in an action generally provide that the action must be brought in the name of "the real party in interest," and thus do not, it seems, increase or diminish what was assignable at common law, but only relieve the assignee from the necessity of acting in the name of the assignor.

[16] 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; Dobs v. Halsey, 16 Johns. (N. Y.) 34; Darling v.

tinct, each must sue alone.[17] 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,[18] who, though thus excluding the executors or administrators 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.[19] The rule as to joinder or severance of parties is always to be applied in connection with another of long standing, which requires that the remedy pursued must be exclusive; that is, all must be joined, or all sue alone.

Codefendants.

The rule as to joinder of defendants where the contract is expressly joint or clearly intended so to be is the same as in the case of plaintiffs, and separate actions must be maintained where the responsibility is clearly several and distinct. The contract may, however, afford an option as to the method of procedure, by the use of express words, making it both joint and several, though the general rule is

Simpson, 15 Me. 175; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456. A contract will be joint when the legal interest is joint, though several, or joint and several, in its terms.

[17] James v. Emery, 8 Taunt. 245; Pickering v. De Rochemont, 45 N. H. 76. See, as to the test in such case, Capen v. Barrows, 1 Gray (Mass.) 376, per Metcalf, J. See, also, Bradburne v. Botfield, 14 Mees. & W. 559. But while the interest is clearly several as between themselves, covenantees must join if the contract is expressly joint in its terms. See, further, as to the rule of construction, Sorsbie v. Park, 12 Mees. & W. 146; Evans v. Saunders, 10 B. Mon. (Ky.) 291; Wright v. Post, 3 Conn. 142. As to recovery of money paid by two or more, see Osborne v. Harper, 5 East, 225. As to partners, see English v. Blundell, 8 Car. & P. 332; Halliday v. Doggett, 6 Pick. (Mass.) 359; Gould v. Gould, 6 Wend. (N. Y.) 264; Wilson v. Wallace, 8 Serg. & R. (Pa.) 55. As to tenants in common, see Harrison v. Barnby, 5 Term R. 249; Bullock v. Hayward, 10 Allen (Mass.) 460; Gilmore v. Wilbur, 12 Pick. (Mass.) 120; Wall v. Hinds, 4 Gray (Mass.) 268. As to joint tenants, see Decharnes v. Harwood, 10 Bing. 529.

[18] See Barnard 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 v. Branch Bank, 5 Ala. 421; Peters v. Davis, 7 Mass. 257.

[19] See The King v. Collector of Customs, 2 Maule & S. 225.

that it will be regarded in the former character, unless express words of severance are present.[20] As in the case of plaintiffs, the method pursued must be exclusive.

ACTIONS IN FORM EX DELICTO.

30. Actions for torts, whether to the person, relative rights, or property of another, should be brought in the name of the person whose legal right or interest has been affected, against the person who committed or caused the injury.

31. If an injury be joint to several persons, or, while not joint, if it causes a joint damage, all who are injured must sue; but, as torts are joint and several in their nature, all persons liable, or a part, or one only, may be sued.

It will be fully stated elsewhere what facts are necessary to the statement of the plaintiff's right in the different common-law actions in form ex delicto, and, wherever such facts exist in one person, he will be the plaintiff.[21] If the tortious act is an invasion of the absolute rights of personal security or personal liberty, the party injured is, of course, the one to sue, as well as the one who suffers loss of service by a violation of his relative right as husband, landlord, or master. Again, if the tort is to property, he who is impliedly injured by the wrongful act affecting it is the one entitled to demand compensation from the party in fault. The interest or right contemplated must always be the legal one, as equitable rights are seldom enforceable at law. It may be one of ownership, general or special, coupled with the right of possession,[22] or actual possession alone;[23] and, in the latter case, where the injury is committed by a mere stranger or one who cannot show a better title, it is immaterial

[20] See May v. Woodward, Freem. 248; Robinson v. Walker, 1 Salk. 393.

[21] Ante, c. 1.

[22] Thorp v. Burling, 11 Johns. (N. Y.) 285; Bird v. Clark, 3 Day (Conn.) 272. And see Holly v. Huggeford, 8 Pick. (Mass.) 73; Boynton v. Willard, 10 Pick. (Mass.) 166; Dillenback v. Jerome, 7 Cow. (N. Y.) 294.

[23] Nicolls v. Bastard, 2 Cromp., M. & R. 659. See Dillenback v. Jerome,

whether such possession be lawful or not. As a general rule, rights of action arising from torts are not enforceable after the death of the injured party, except in case of injuries done to property in the lifetime of the deceased, where they survive to his personal representatives.[24] Actions purely personal die with the person, as in the case of an assault and battery, or false imprisonment. This has to some extent been changed by statute in various jurisdictions.

The Liability and Its Duration.

The responsibility imposed by law upon a wrongdoer arises directly from the commission of the injury, and rests upon the party or parties who are guilty, who are therefore made defendants. The maxim "qui facit per alium facit per se" applies in many cases, and one will be directly held as principal for the tortious acts of his agent or servant, if committed by his express command or with his sanction, or in the regular course of an authorized employment,[25] though not where the act is clearly that of the servant alone. So far as its duration is concerned, the general rule is that the liability, if not previously reduced to a judgment, dies with the person, except in cases of injuries to property, which may be maintained against the personal representatives of the deceased.

Assignment of the Right or Liability.

At common law, the rule was that neither the right of action[26] nor the liability could be transferred; and, in the absence of statutory modification, this rule is conceived to be in force at the present time, though there are sometimes transfers in fact or colorable assignments which render it difficult to decide who shall be made parties. An apparent exception also exists in case of the commission of a nuisance which continues after the transfer, where the assignee may sue and the wrongdoer be liable for the whole injury; but it seems that this can only be because the continuance of the nui-

supra; and the cases cited as to the nature of the plaintiff's right in actions of tort, ante, c. 1.

[24] These exceptions to the rule of common law were made by the statutes of 4 Edw. III. c. 7, and 3 & 4 Wm. VI. c. 42.

[25] Intermediate agents are generally not liable. See Stone v. Cartwright, 6 Term R. 411; Bush v. Steinman, 1 Bos. & P. 404.

[26] But see Clowes v. Hawley, 12 Johns. (N. Y.) 484.

sance is really a fresh injury, and, as the continuous wrong is in its nature entire, the right of action arising upon the last continuance must include and cover the whole from the beginning.[27]

Coplaintiffs.

Whether injured parties are to join in the action for redress seems to depend upon two things: (1) An injury to a joint right of several; or (2) a joint resulting damage to them all, though the wrong may be strictly a separate injury to each. If both the entirety of interest and the joint damage are wanting, the parties must sever, as a wrong done to one person only cannot in law be a prejudice to another; nor would there be any standard, in such case, by which an entire sum could be assessed as damages. If one of several having a joint right of action dies, it remains in the survivors, passing finally to the last, and then to his personal representatives; that is, of course, if the cause of action is one that survives.

Codefendants.

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 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. Defendants in actions ex delicto can generally be sued jointly only when the wrongful act is the joint act of all.

CONSEQUENCES OF MISJOINDER OR NONJOINDER OF PARTIES PLAINTIFF.

32. In actions ex contractu, misjoinder or nonjoinder of plaintiffs may be taken advantage of by demurrer, mo-

[27] See Some v. Barwith, Cro. Jac. 231.

tion 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.

33. In actions ex delicto, unconnected with contract, misjoinder may be remedied by demurrer, motion in arrest of judgment, or writ of error, or, if not an apparent defect, by motion for nonsuit; nonjoinder only by plea in abatement or by apportionment of damages on the trial.

The above propositions, it is conceived, sufficiently state the consequences of the misjoinder or nonjoinder of parties plaintiff at common law; distinctions being made between cases where the defect appears on the face of the declaration and those where it does not, and also as to the method of procedure where the fault is one of omission only, in an action for a tort unconnected with contract, the defendant not being permitted in the latter case to give the nonjoinder in evidence under the general issue as a ground of nonsuit, or to pursue the other remedies by demurrer, arrest of judgment, or writ of error,[28] even where the declaration shows that another party should have been joined.[29]

CONSEQUENCES OF MISJOINDER OR NONJOINDER OF PARTIES DEFENDANT.

34. 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.

[28] See Cooper v. Grand Trunk Ry. Co., 49 N. H. 209; Lothrop v. Arnold, 25 Me. 136; Phillips v. Cummings, 11 Cush. (Mass.) 469; Chandler v. Spear, 22 Vt. 388; Johnson v. Richardson, 17 Ill. 302. And see Hart v. Fitzgerald, 2 Mass. 509.

[29] Sedgworth v. Overend, 7 Term R. 279; Mainwaring v. Newman, 2 Bos. & P. 123. But see Thompson v. Hoskins, 11 Mass. 419; Gerry v. Gerry, 11 Gray (Mass.) 381; Wilson v. Gamble, 9 N. H. 74. See, also, Broadbent v.

35. In actions ex delicto, unconnected with contract, if the tort could not, in point of law, be joint, misjoinder will be open to demurrer, motion in arrest of judgment, or writ of error; otherwise, as the plaintiff may join all or not, at his election, no objection can be taken.

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,[30] 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.[31] 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[32] (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;[33] 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.[34] This rule, however, 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

Ledward, 11 Adol. & El. 209; Bloxam v. Hubbard, 5 East, 407; Bigelow v. Rising, 42 Vt. 678.

[30] See 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. St. 458; Bledsoe v. Irwin, 35 Ind. 203.

[31] See Scott v. Godwin, 1 Bos. & P. 73; McGregor v. Balch, 17 Vt. 562. But see Nealley v. Moulton, 12 N. H. 485.

[32] See Russell v. Tomlinson, 2 Conn. 206; Franklin Fire Ins. Co. v. Jenkins, 3 Wend. (N. Y.) 130.

[33] See Govett v. Radnidge, 3 East, 62; Nicoll v. Glennie, 1 Maule & S. 589; Hayden v. Nott, 9 Conn. 367; Jackson v. Woods, 5 Johns. (N. Y.) 280.

[34] 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.

be proved and is thus the basis of the suit, different rules apply, and the mere form of the action will not govern.[35] The application of the proper rule, however, will depend upon the statement of the gist of the action, as shown by the declaration.

[35] 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.

CHAPTER IV.

THE PROCEEDINGS TO AN ACTION.

36. Order of Proceeding.
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83–87. The Judgment.
88. Proceedings after Judgment.
89. Audita Querela.
90. Certiorari.
91–92. Writ of Error.
93–94. The Writ of Execution.

ORDER OF PROCEEDING.

36. The regular successive steps in an action at common law are:

(a) The process.
(b) The appearance of the defendant.
(c) The pleadings.
(d) The trial.
(e) The judgment.
(f) The execution.

PROCESS.

37. "Process," as the term is here used, is any writ or judicial means by which a defendant is called upon or brought into court to answer the plaintiff's declaration. The usual forms of process are:

(a) The writ of summons.
(b) The writ of capias ad respondendum.
(c) The writ of attachment.

38. SUMMONS—The summons is a writ commanding the sheriff to summon the defendant, if within his jurisdiction, to appear in court on a certain day to answer the declaration of the plaintiff.

39. CAPIAS AD RESPONDENDUM — This is a writ commanding the sheriff to take the defendant, and have his body before the court on a certain day, to answer the declaration.

40. ATTACHMENT—The writ of attachment is a writ commanding the seizure of the property of the defendant to satisfy the demand of the plaintiff.

As we have explained in another place, actions at common law were commenced by an original writ, issuing out of the court of chancery, containing a summary statement of the cause of complaint, and requiring the sheriff 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; or in some cases, omitting the former alternative, and simply requiring the sheriff to enforce the appearance. One object of the original writ, therefore, was to compel the appearance

of the defendant in court. It was also necessary, as we have seen, as authority for the institution of the suit.

After the issuance and execution of the original writ, it was next to be returned. By the writ itself the sheriff was required to have it in court on a certain day, namely, on the day on which the defendant was directed to appear there. 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 it.[1]

If the defendant did not appear in obedience to the original writ, other writs were issued, called "writs of process." These writs were also returnable on some general return day in the term, and their object was to enforce the appearance of the defendant, either by summoning him, or by arrest of his person, or by attachment or distress of his property, according to the nature of the case. These writs differed from the original writ in several particulars. They issued, not out of chancery, as did the original writ, but out of the court of common law, into which the original writ was made returnable, and they were not under the great seal, but under the private seal of the court, and they bore teste (that is, concluded with an attesting clause) in the name of the chief justice of that court, and not in the name of the king himself. In common with all other writs issuing from the court of common law during the progress of the suit, they were described as judicial writs, by way of distinction from the original one obtained from the chancery. The principal writs of mesne process, or judicial writs, were the writ of summons, the writ of capias ad respondendum, and the writ of attachment.

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; though in some of our states the term

[1] Steph. Pl. (Tyler's Ed.) 54, 55.

is retained to designate the process that has taken its place. No writ at all is necessary as authority for instituting suits, and the place of the original writ as a means of notifying the defendant of the suit, and ordering him to appear in court, has been supplied by writs corresponding with the judicial writs above referred to. The practice is very generally, if not entirely, regulated by statutes, varying somewhat in the different states.[2]

[2] 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. Rev. St. Ill. c. 110, § 1. In Rev. St. Ill. c. 16, § 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 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." 2 How. Ann. St. § 7291. 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. 298. "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." 2 How. Ann. St. § 7295. "The style of all process from courts of record in this state shall be 'In the name of the people of the State of Michigan,' and such process shall be tested in the name of the chief justice, or presiding justice or judge, or one of the judges of the court from which the same shall issue, be sealed with the seal of the court, and before the delivery thereof to any officer to be executed, shall be subscribed or indorsed with the name of the attorney, solicitor, or other officer,

Summons.

The "summons," as it is commonly called, is the form of process now almost universally used in this country, upon the institution of an action, to notify the defendant to appear in court.[3] Its form is generally regulated by statute, and the statutes vary in the different states. It issues from the court in which the action is brought, in the name of the sovereign power,—the "state," the "commonwealth," or "the people,"—as the constitution or laws of the particular state may provide. It is always in writing, and is generally required to be attested by the presiding judge of the court, and to be under its seal,[4] and to be signed by the clerk or prothonotary of the court.[5] It must contain a proper description of the parties and the cause of action, and be dated,[6] and should be directed to the officer who is to serve it,[7] and state the return day or day when the defend-

by whom the same shall be issued. Provided, that in case of vacancy in the office of chief justice, or presiding justice, or judge of the court from which such process issues, the same may be tested in the name of the chief justice, or one of the associate justices of the supreme court of the state of Michigan." 2 How. Ann. St. § 7290. Although the commencement of a suit by filing declaration, entering rule to plead, and serving copy with notice is statutory, and must conform to the statute, yet it stands on no different footing from other process. Granger v. Superior Court Judge, 44 Mich. 384, 6 N. W. 848. Service of declaration, etc., being a substitute for process, service before filing is void, and the proceedings cannot be amended so as to save the jurisdiction. Ellis v. Fletcher, 40 Mich. 321. The rule to plead should be entered before service of a copy of the declaration, but when both acts are done on the same day, and within a short time, and the defendant is not misled by the omission to enter the rule, until after service, he has no right to have the declaration stricken from the files. Blanck v. Ingham Circuit Judge, 44 Mich. 98, 6 N. W. 204.

[3] U. S. v. Noah, 1 Paine, 368, Fed. Cas. No. 15,894. In the United States there are two classes of writs generally provided for by the several state constitutions,—original and final; but the former are what were called "mesne writs" in England.

[4] State v. Dozier, 2 Speers (S. C.) 211; Frosch v. Schlumpf, 2 Tex. 422. The seal is essential, and the want of it cannot be cured by amendment. Williams v. Vanmeter, 19 Ill. 293. But see Johnston v. Hamburger, 13 Wis. 195.

[5] Stevens v. Ewer, 2 Metc. (Mass.) 74.

[6] McLanen v. Thurman, 8 Ark. 313; Smith v. Winthrop, 1 Minor (Ala.) 378; Jackson v. Bowling, 10 Ark. 578.

[7] Vaughn v. Brown, 9 Ark. 20; Hearsey v. Bradbury, 9 Mass. 95.

ant is to appear.[8] If the cause is begun in a federal court, the summons is directed to the marshal, but, if in a state court, generally to the sheriff.

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.

Service and Return of Summons.

In order to give the court jurisdiction over the person or property of a defendant, the process must be served in the manner provided for by statute, as he will not be bound in a personal action, without such service to notify him of the object of the suit, unless he waive it by an appearance. 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.[9] Sometimes, also, the summons may be issued to any sheriff, and run throughout the state. If the defendant resides out of the state, a common provision allows service to be made, in certain cases, by advertisement in a newspaper under an order of court. Wherever the service is thus constructive only, the statutory requirements must be strictly followed, or the proceeding will be void.[10] Perhaps in all the states 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

[8] The omission of the proper direction is not fatal. Parker v. Barker, 43 N. H. 35. But it is a fatal error to fix the return day in the wrong term. Hildreth v. Hough, 20 Ill. 331.

[9] See Bimeler v. Dawson, 4 Scam. (Ill.) 536; Hopkinson v. Sears, 14 Vt. 494; Vaughn v. Brown, 9 Ark. 20. And see Ewer v. Coffin, 1 Cush. (Mass.) 23.

[10] Zecharie v. Bowers, 1 Smedes & M. (Miss.) 584. See Scott v. Coleman, 5 Litt. (Ky.) 349; Blight v. Banks, 6 T. B. Mon. (Ky) 192; Dearing v. Bank of Charleston, 5 Ga. 497.

use due diligence in serving it, and is liable for neglect or a false return.[11] 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."[12]

Capias ad Respondendum.

The writ of capias ad respondendum directs the sheriff to enforce the appearance of the defendant by arrest of his person. It lay at common law in all the most usual personal actions, but in our practice its use is very much more limited. It is generally allowed only in cases of fraud, breach of trust, or other wrong.[13]

Attachment.

The writ of attachment is a writ commanding the seizure of property of the defendant to satisfy 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. It is also different in that the property attached cannot be sold without another process. In some states it can be issued only against absconding debtors or persons concealing themselves, so that a summons or capias cannot reach them; 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 exigency of the writ and satisfy 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 suit goes on.[14]

[11] Stewart v. Stringer, 41 Mo. 400.

[12] Wyer v. Andrews, 13 Me. 168.

[13] See 2 How. Ann. St. Mich. §§ 7302–7307; Rev. St. Ill. c. 16.

[14] The attachment may be in different forms, according to the laws of the

"If the defendant appears in court, the cause becomes mainly a suit in personam, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff." [15]

Amendment of Process.

Process, or the return thereon, may be amended in matter of form, or in case of the return, to conform to the fact, at any time during the trial, or even after judgment; [16] and this power to cure errors and irregularities by amendment applies as well to writs of attachment as to other writs.[17] The power to amend does not extend to jurisdictional defects.[18]

Waiver of Objection to Process.

If the defendant has any objection to urge to the form or manner of service or return of process, he must raise the objection at the

respective states. One kind in use is called the "foreign attachment," by which the creditor proceeds against the property of the debtor, where the latter is out of the jurisdiction or not an inhabitant of the state. Another is the "domestic attachment," which may be issued against an absconding resident debtor, and by which the goods attached are divided among his creditors. 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.

[15] Cooper v. Reynolds, 10 Wall. 308.

[16] Johnson v. Donnell, 15 Ill. 97. Correcting mistake in name of plaintiff, Final v. Backus, 18 Mich. 218; Barber v. Smith, 41 Mich. 138, 1 N. W. 992. Correcting date of constable's return to writ of attachment, Kidd v. Dougherty, 59 Mich. 240, 26 N. W. 510; Nicolls v. Lawrence, 30 Mich. 395. Inserting omitted direction to proper officer, who in fact served the writ, Hearsey v. Bradbury, 9 Mass. 95. Showing delivery of copy, Noleman v. Weil, 72 Ill. 502. Other amendments of return to conform to fact, Moore v. People, 3 Gilman (Ill.) 349.

[17] Barber v. Smith, supra; Drew v. Dequindre, 2 Doug. (Mich.) 93.

[18] Denison v. Smith, 33 Mich. 155; Haynes v. Knowles, 36 Mich. 407.

proper time and in the proper manner, or he may be held to have waived it. It is always too late to raise such an objection after appearing generally, and pleading to the merits.[19]

THE APPEARANCE.

41. The appearance of the defendant is the act or proceeding by which he is brought or places himself before the court, in order to answer the action.

42. It may be either:

(a) Voluntary; or

(b) When the defendant is compelled to appear by special process.

43. If voluntary, it may be

(a) General.

(b) Special.

Appearance is the next step in the course of the action after the service of the writs before mentioned. Formerly, in England, both parties actually appeared in open court in term time, on the return day of the writ, and all pleadings and proceedings then took place in court and during the term. To obtain a clear idea of the manner in which the parties now appear and plead, it is necessary to understand the ancient practice. It is thus explained by Stephen:

"As now, so formerly, the defendant was made to appear by original writs and process founded upon them. These, as now, were returnable in term time; and it may be here observed that, as these writs were returnable always in term, so the appearance of the parties, the pleading, and all proceedings whatever in open court took place in term time only, and never in vacation. The appearance of the parties might be either in person or by attorney; but actual and personal appearance in open court, either by the attorney or his principal, was requisite. Upon such appearance followed the allegations of fact, mutually made on either side, by which the court received information of the nature of the controversy. These, described at first by the rude term of 'loquela,' have been, in more

[19] Miller v. Rosier, 31 Mich. 475.

modern times, denominated the 'pleading' or 'pleadings.' As the appearance was an actual one, so the pleading was an oral altercation in open court, in presence of the judges. This method of pleading viva voce, universally in use among the early European judicatures, and, indeed, the natural practice of all countries where the arts of civilization have made little progress, certainly prevailed in the English courts in the reign of Henry III., and is generally supposed to have been retained there to a much later era. 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 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.

"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." [20]

In modern practice the appearance of the parties is no longer by actual presence in court, either by themselves or their attorneys. If the defendant has not been arrested, an appearance on his part is effected by making certain formal entries in the proper office of the court, expressing his appearance, or by serving a written notice of the fact of appearance upon the attorney for the plaintiff. When the defendant is arrested under a capias, the giving of bail is a sufficient appearance. And, generally, taking part in the proceedings

[20] Steph. Pl. (Tyler's Ed.) 58–61.

in court in an action, except for some special object which falls short of an indication of an intention to defend the action on its merits, will be considered an appearance sufficient to entitle the plaintiff to proceed.[21] The appearance, when voluntary, may be either general, which is a waiver of all such objections as misnomer, want of service of process, etc.;[22] or special, when the defendant expressly appears only for a special object, as above stated, in which case, objections to the process are not necessarily waived.

With regard to the plaintiff, no formality is necessary to express his appearance, but, on the appearance of the defendant, both parties are considered to be in court.

PLEADINGS.

44. 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 demurrer or plea of the defendant.
(c) The demurrer or replication of the plaintiff.
(d) The demurrer or rejoinder of the defendant.
(e) The demurrer or surrejoinder of the plaintiff.
(f) The demurrer or rebutter of the defendant.
(g) The demurrer or surrebutter of the plaintiff.

The pleadings, as we have seen, were formerly delivered orally, and in open court; but this practice has long since ceased. The present practice in this country is to draw the pleadings up on paper, 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 un-

[21] See Hayes v. Shuttuck, 21 Cal. 51; Stockdale v. Buckingham, 11 Iowa, 45; Knight v. Low, 15 Ind. 374; Scott v. Hull, 14 Ind. 136.

[22] See Payne v. Farmers' & Citizens' Bank, 29 Conn. 415; Abbott v. Semple, 25 Ill. 107; Schenley v. Com., 36 Pa. St. 29. 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.

der 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 English practice was somewhat different when Mr. Stephen wrote. "The present practice," it was said by him, "is to draw them [the pleadings] up, in the first instance, on paper, and the attorneys of the opposite parties either mutually deliver them to each other out of court, or (according to the course of practice in the particular case) file them in the office of the proper officer of the court, from whence a copy of each pleading is furnished to the party by whom it is to be answered. These paper pleadings, at a subsequent period, are entered on record (according to a course of practice that will be afterwards stated) by transcribing them on a parchment roll. At what exact period, and by what gradations, these alterations of the ancient system took place, has not been accurately determined. The most probable opinion seems to be, that the mode of departure from the old practice of making verbal statements in open court and entering them contemporaneously on record was, that the pleader (through an allowed relaxation of that proceeding) began to discontinue the oral delivery, and in lieu of it entered his statement, in the first instance, upon the parchment roll on which the record used to be drawn up; that the pleader of the other party had access to this roll, in order to concert his answer, which he afterwards entered in the same manner, and that the roll thus formed both the primary statement and the record; that this method being attended with some inconveniences, the expedient was at length adopted of putting the pleadings first on paper, delivering them in that form to either party, or filing them in the proper office of the court, and deferring the entry of them on record till a subsequent stage of the cause. It is supposed that the mode of entering in the first instance on the roll continued at least as late as the reign of Edward IV. When it began, that is, when the oral pleading was first abandoned, is a point of some uncertainty; but the probability seems to be that it took place in the middle of the reign of Edward III.

"If the method of written pleading was introduced in the manner here described, a satisfactory explanation is thus afforded of a cir-

cumstance which it would be otherwise difficult to account for, viz., that the paper pleadings thus filed or delivered between the parties pursue the style in which the record itself was drawn up. Like it, they are expressed in the third person: 'A B complains,' 'C D comes and defends,' etc., and state the form of action, the appearance of the parties, and sometimes the continuances and other acts and proceedings in court. They are framed, in short, as if they were extracts from the record, though the record is, by the present practice, not drawn up till a subsequent period, and is then a transcript from them. Important effects belong to this peculiarity of style. Being conceived as copies from the record, the pleadings consequently imply previous statements by legal fiction, supposed to be still verbally made in open court and contemporaneously recorded, according to the ancient practice. The effect of this is, that they are framed upon the same principles as those which belonged to the method of oral allegation. The parties are made to come to issue exactly in the same manner as when really opposed to each other in verbal altercation at the bar of the court; and all the rules which the judges of former times prescribed to the actual disputants before them are, as far as possible, still enforced with respect to these paper pleadings.

"As the oral pleading could formerly be delivered by none but regular advocates, so at the present day it is necessary that each paper pleading should be signed by a barrister (some few of the most ordinary and simple kind and all declarations excepted); and in the common pleas no barrister can sign a pleading but one who has attained the degree of sergeant; but in the other courts there is no such restriction. On this head it may be further observed, that the pleadings, though thus signed, and sometimes, in fact, drawn by barristers, are also often drawn by the attorneys or by persons of learning who have not been admitted to the degree of barrister, but are employed by the attorneys in that department of practice exclusively, and are known by the name of 'special pleaders.'" [23]

[23] Steph. Pl. (Tyler's Ed.) 62.

THE DECLARATION OF THE PLAINTIFF.

45. The first pleading in an action is the plaintiff's declaration. This is a statement, in a methodical and legal form, of all the material facts constituting the plaintiff's cause 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.

The form and requisites of the declaration will be shown in a separate chapter.[24]

THE DEMURRER.

46. If, as a matter of law, the statement of the cause of action in the declaration is on its face insufficient in substance to support the action, or is defective in form, the defendant should demur.

47. 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 declarations, for insufficiency in substance or 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 to be 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, and this by defect either in the substance, or the form

[24] Post, p. 199. See Append. Forms Nos. 1–18.

of the declaration, that is, as disclosing a case insufficient on the merits, or as framed in violation of any of the rules of pleading, the defendant may except to the declaration on this ground. In doing so he is said to demur, and the objection itself is called a "demurrer."[25] 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.[26] The demurrer raises a question of law for the determination of the court. If the decision thereon is against him, the defendant is 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 will be presently explained at length.[27]

THE PLEA OF THE DEFENDANT.

48. 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.

[25] See Append. Forms Nos. 19, 20, for forms of demurrer.

[26] Steph. Pl. (Tyler's Ed.) 82; Stout v. Keyes, 2 Doug. (Mich.) 184; Wallace v. Holly, 13 Ga. 389; post, p. 260.

[27] Post, p. 260.

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."

Pleas are divided into pleas dilatory and pleas peremptory. Subordinate to this is another division. Pleas are either to the jurisdiction of the court, in suspension of the action, in abatement of the writ or action, or in bar of the action. The first three are dilatory pleas; the last, peremptory.

PLEAS TO THE JURISDICTION.

49. A plea to the jurisdiction is one by which the defendant excepts to the jurisdiction of the court to entertain the action.

This plea [28] denies that the court has jurisdiction of the cause,[29] 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,[30] 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.[31] Courts of general jurisdiction have no authority to try cases of a local nature arising in a foreign country or in any place where

[28] See Append. Form No. 21, for form of plea to the jurisdiction.

[29] Bac. Abr. "Pleas," E, 1, 2. See Lawrence v. Smith, 5 Mass. 362; Badger v. Towle, 48 Me. 20; Ames v. Winsor, 19 Pick. (Mass.) 247; Drake v. Drake, 83 Ill. 526; Kenney v. Greer, 13 Ill. 432; Greer v. Young, 17 Ill. App. 106; Id., 120 Ill. 184, 11 N. E. 167.

[30] See U. S. v. Benner, Baldw. 240, Fed. Cas. No. 14,568.

[31] No fact necessary to confer jurisdiction upon these 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; Bouv. Law Dict.

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.[32] A plea to the jurisdiction, except where there is no 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.[33] 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.[34]

A plea to the jurisdiction must be certain to every intent. Being a dilatory plea, the highest degree of certainty is required.[35] A plea to the jurisdiction of a court of general jurisdiction must negative every fact from which a presumption of jurisdiction might arise.[36]

PLEAS IN SUSPENSION.

50. 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

[32] Black v. Black, 34 Pa. St. 354.

[33] De Wolf v. Raband, 1 Pet. 498; Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807.

[34] Brady v. Richardson, 18 Ind. 1.

[35] Diblee v. Davison, 25 Ill. 486.

[36] Diblee v. Davison, supra. In this case it was held that a plea to the jurisdiction which alleged that the promises were not to be performed within the jurisdiction was bad, as being equivalent to an averment that "all" were not there to be performed, and therefore as admitting that some were. To the same effect, see Dunlap v. Turner, 64 Ill. 47.

with the action is removed, the plaintiff may go on with it, and need not bring a new action.

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.[87]

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." [88]

PLEAS IN ABATEMENT.

51. A plea in abatement is one that shows some ground for abating or defeating the particular suit, without destroying the right of action itself. Matter in abatement must be pleaded in abatement, and not in bar.

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,

[87] 1 Chit. Pl. 463; Steph. Pl. (Tyler's Ed.) 84. See Append. Form No. 22, for form of plea in suspension.

[88] Hutchinson v. Brock, 11 Mass. 119. See Le Bret v. Papillon, 4 East, 502. So of a plea of excommunication of the plaintiff in old English law. Sturton v. Pierpont, 2 Lev. 208.

he should plead such matters in abatement.[39] 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.[40] 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:

"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

[39] As to the nature and effect of, and the necessity for, pleas in abatement, see Pitt's Sons Manuf'g Co. v. Commercial Bank, 121 Ill. 582, 13 N. E. 156. See Append. Forms Nos. 23, 24, for forms of pleas in abatement.

[40] Post, p. 260. 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.

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. Even in this case, however, the plea is now out of use, in consequence of a change 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. Pleas of this latter kind have been very anciently divided into such as relate to the form of the writ and such as relate to the action of the writ; and those relating to its form have been again subdivided into such as are founded on objections apparent on the writ itself, and such as are founded on matter extraneous.

"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 matter of abatement; or, if the objection were to disability of the person, he may bring a new action when that disability is removed.

"Such is, in principle, the doctrine of pleas in abatement; but the

actual power of using these pleas has been much abridged, and the whole law of original writs consequently rendered of less prominent importance than formerly, by a rule of practice laid down in modern times. With respect to such pleas in abatement as were founded on facts that could only be ascertained by examination of the writ itself, as, for example, variance between the writ and declaration, or erasure of the writ, it was always held a necessary matter of form, preparatory to pleading them, to demand oyer of the writ,—that is, to demand to hear it read,—which, in the days of oral pleading, was complied with by reading it aloud in open court, and, after the establishment of written pleadings, by exhibiting and (if required) delivering a copy of the instrument to the party who makes the demand. The court of common pleas, however, in 11 & 12 Geo. II., and the king's bench, in 19 Geo. III., thought fit to establish it as a rule that thenceforth oyer should not be granted of the original writ; and the indirect effect of this has consequently been to abolish in practice all pleas in abatement founded on objections of the kind here stated. But there are pleas in abatement which do not require any examination of the writ itself. For example, if in the declaration one only of two joint contractors is named defendant, this is sufficient to show that the same nonjoinder exists in the writ; for, as a variance between the writ and declaration is a fault, the defendant is entitled to assume that they agree with each other, and he may consequently, without production of the writ, plead this nonjoinder as certainly existing in the latter instrument. So the plea that the writ was sued out pending another action, or pleas to the person of the plaintiff or defendant, require no examination of the writ itself; and there are many others to which the same remark applies. In all such cases no oyer is necessary; and, therefore, pleas of this latter description may be and are, in fact, still pleaded, notwithstanding the rule of practice which denies oyer of the writ." [41]

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."

As we have no original writs, the modern grounds for abatement of an action are much more limited than they were formerly. They

[41] Steph. Pl. (Tyler's Ed.) 85–89.

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;[42] the pendency of another action for the same cause;[43] some disability incapacitating the plaintiff from suing;[44] the fact that the plaintiff or one of several plaintiffs was a fictitious person, or dead, when the action was brought;[45] the death of a sole plaintiff, or one of several plaintiffs, since the action was commenced,[46] 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;[47] where the plaintiff or the defendant is misnamed;[48]

[42] Archibald v. Argall, 53 Ill. 307; Palmer v. Gardiner, 77 Ill. 143.

[43] Smith v. Atlantic Ins. Co., 22 N. H. 21; Lowry v. Kinsey, 26 Ill. App. 309; Buckles v. Harlan, 54 Ill. 361. But the pendency of an action in another state is not ground for plea in abatement. Hatch v. Spofford, 22 Conn. 485; Maule v. Murray, 7 Term R. 466; Imlay v. Ellefson, 2 East, 457; Bowne v. Joy, 9 Johns. (N. Y.) 221; Stanton v. Embrey, 93 U. S. 554; Smith v. Lathrop, 44 Pa. St. 328; 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.

[44] Infancy of plaintiff, Schemerhorn v. Jenkins, 7 Johns. (N. Y.) 373. 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 Rick. (Mass.) 115.

[45] Com. Dig. "Abatement," F; Doe v. Penfield, 19 Johns. (N. Y.) 308; Camden v. Robertson, 2 Scam. (Ill.) 507.

[46] Mills v. Bland, 76 Ill. 381; Stoetzell v. Fullerton, 44 Ill. 108.

[47] Addison v. Overend, 6 Term R. 766; Roberts v. McLean, 16 Vt. 608; Chicago, etc., R. Co. v. Todd, 91 Ill. 70; Deal v. Bogue, 20 Pa. St. 228; Edwards v. Hill, 11 Ill. 22; Southard v. Hill, 44 Me. 92; Johnson v. Richardson, 17 Ill. 302; Shockley v. Fisher, 21 Mo. App. 551.

[48] Moss v. Flint, 13 Ill. 570; Pond v. Ennis, 69 Ill. 341; 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

where several persons should be joined as defendants, and some of them are omitted;[49] where persons are joined as defendants who should not be joined;[50] or where a married woman is sued as a feme sole, when it is not allowed by statute.[51]

In pleas in abatement the greatest degree of certainty is required. They can never be aided by implication or intendment.[52] And it is the rule that such a plea must always give the plaintiff a better writ, as it is expressed, by so clearly stating the grounds of objection that the plaintiff may avoid them in a new action.[53] For instance, a plea in abatement for misnomer of the defendant must give the defendant's right name.

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.[54]

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.

[49] McGregor v. Balch, 17 Vt. 562; Southard v. Hill, 44 Me. 92; Goodhue v. Luce, 82 Me. 222, 19 Atl. 440; Metcalf v. Williams, 104 U. S. 93.

[50] Shufeldt v. Seymour, 21 Ill. 524; Harlem v. Emmert, 41 Ill. 319; Lurton v. Gilliam, 1 Scam. (Ill.) 577.

[51] See Streeter v. Streeter, 43 Ill. 155; Huftalin v. Misner, 70 Ill. 205.

[52] Parsons v. Case, 45 Ill. 296; Roberts v. Moon, 5 Term R. 488; Fowler v. Arnold, 25 Ill. 284; Gould v. Smith, 30 Conn. 90; Scott v. Sanford, 19 How. 393; 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. 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.

[53] American Exp. Co. v. Haggard, 37 Ill. 465.

[54] Pitt's Sons Manuf'g Co. v. Commercial Bank, 121 Ill. 582, 13 N. E. 156; Jenkins v. Pepoon, 2 Johns. Cas. 312; Ilsley v. Stubbs, 5 Mass. 280; Moore v. Spiegel, 143 Mass. 413, 9 N. E. 827.

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.[55]

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."[56]

PLEAS IN BAR.

52. 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.

[55] Pitt's Sons Manuf'g Co. v. Commercial Bank, 121 Ill. 582, 13 N. E. 156.

[56] Pitt's Sons Manuf'g Co. v. Commercial Bank, supra; Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; Ilsley v. Stubbs, 5 Mass. 280.

53. 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.

54. 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 progress of the suit by any of the dilatory pleas mentioned, or the defendant does not wish to so contest it, 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 [57] 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.

The principal form of traverse is called the "general issue," being used when the defendant intends a general denial of the whole or the principal part of the charge against him; 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

[57] "'Traverse' is the most proper and ancient term. In the modern language of pleading, however, 'deny' is often substituted for it; and 'pleas in denial' is a term often used, instead of 'pleas by way of traverse.'" Steph. Pl. Append. note 26.

will fully test the plaintiff's right. These pleadings are fully considered hereafter.[58]

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.[59] 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."[60]

Name of Pleadings in Replevin.

The action of replevin differs from other actions in the names of pleadings. If the defendant pleads some matter confessing the taking, but showing lawful title or excuse, such pleading is not, as it would be in other actions, called a "plea in bar," but it is called an "avowry" or a "cognizance"; the former term applying to the case where the defendant sets up right or title in himself, and the latter term applying where he alleges the right or title to be in another person by whose command he acted. 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.

THE REPLICATION AND SUBSEQUENT PLEADINGS.

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

[58] Post, c. 6, p. 257, "Production of the Issue." See Append. Forms Nos. 25–30, for forms of pleas in bar.

[59] As said in Withers v. Greene, 9 How. 233, pleas in bar are to receive, if not a liberal, certainly not a narrow and merely technical, construction. They are always construed according to their entire subject-matter, and will not be determined by a disjoining of their members, or by laying stress on what may be immaterial.

[60] Attwood v. Davis, 1 Barn. & Ald. 173. And see Withers v. Greene, 9 How. 233; Rex v. Shakespeare, 10 East, 87; Rowles v. Lusty, 4 Bing. 428.

56. It may contain matter of estoppel, a denial of the plea, a confession and avoidance of the plea, or a new assignment of the cause of action.

57. The pleadings subsequent to the replication are the rejoinder and rebutter of the defendant, and the surrejoinder and surrebutter 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." [61]

If the replication be by way of traverse, it is generally necessary (as in case of the plea) that it should tender issue; and the issue thus tendered must be accepted, by the defendant, unless the replication is deemed insufficient in law, in which case he may demur.

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, and subject to the same law of proceeding, namely, that of demurring, or traversing, or pleading in confession and avoidance, is conducted all the subsequent allegations to which the nature of the case may lead. The order and denominations of the alternate allegations of fact or pleadings throughout the whole series are as follows: Declaration of the plaintiff, plea of the defendant, replication of the plaintiff, rejoinder of the defendant, sur-

[61] Greene v. Jones, 1 Saund. 290c; post, p. 327.

rejoinder 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.[62]

COLLATERAL PLEAS AND INCIDENTS.

58. Either party may obtain sufficient time to plead by an imparlance, and the defendant may plead matter constituting a new defense by a plea puis darrein continuance, or demand oyer of a written instrument supporting the plaintiff's case; and both parties, until trial or judgment signed, may generally correct mistakes in their respective pleadings by amendment, upon proper cause shown, and where prejudice will not result to an opponent.

IMPARLANCE.

59. 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.[63] In modern practice the term is rarely used, as 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.[64] As formerly used, an imparlance was either general, which was a prayer for an allowance

[62] Steph. Pl. (Tyler's Ed.) 93, 94.

[63] See Tidd, Prac. 418, 419; Gould, Pl. c. 2, §§ 16-20.

[64] See McCormick v. Rusch, 15 Iowa, 127.

of time to plead, without reserving any benefit of an exception, such as to plead to the jurisdiction of the court or in abatement;[65] or special, when all exceptions were reserved save to the jurisdiction; or general—special, when the defendant reserved all exceptions whatsoever.[66]

PLEA PUIS DARREIN CONTINUANCE.

60. 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.

61. 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."[67]

In the same cases as occasioned a continuance in the ancient law, but in no other, a continuance still takes place. At the time when pleadings are filed and delivered no record exists, and there is therefore no entry at that time made on the record of the award of a continuance; but the parties are from the day when, by the ancient

[65] A general appearance, at present, has this effect of a general imparlance: that the defendant, after entering it, cannot plead in abatement. A special appearance, as has been before stated, is entered where the defendant intends to plead in abatement or other dilatory pleas.

[66] See Black, Law Dict. tit. "Imparlance."

[67] Steph. Pl. (Tyler's Ed.) 97.

practice, a continuance would have been entered, supposed to be out of court, and the pleading is suspended till the day arrives to which, by the ancient practice, the continuance would extend. At that day the defendant is entitled, if any new matter of defense has arisen in the interval, to plead it according to the ancient plan,—puis darrein continuance.[68] If matter of defense arises after the commencement of the action, but before plea or continuance, it must be pleaded to the "further maintenance of the action," and, if it has arisen after plea or issue joined, it must be pleaded "puis darrein continuance." In neither case can it be pleaded in bar of the action generally.[69]

The plea puis darrein continuance may be either in abatement or in bar, like other pleas, according to the matter. It must be

[68] Steph. Pl. (Tyler's Ed.) 97, 98; Lowes, Pl. 173; Bull. N. P. 310.

[69] Le Bret v. Papillon, 4 East, 502; Evans v. Prosser, 3 Term R. 186; Fitzpatrick v. Fitzpatrick, 6 R. I. 74; Rowell v. Hayden, 40 Me. 582; Southwick v. Ward, 7 Jones (N. C.) 64; Hendrickson v. Hutchinson, 29 N. J. Law, 180; Costar v. Davis, 8 Ark. 213; Gibson v. Bourland, 13 Ill. App. 352; Ross v. Nesbitt, 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, 304; Leggett v. Humphreys, 21 How. 66; Mount v. Scholes, 120 Ill. 394, 11 N. E. 401; Smith v. Carroll, 17 R. I. 125, 21 Atl. 343; Yeaton v. Lynn, 5 Pet. 224; Bowne v. Joy, 9 Johns. (N. Y.) 221; Hendrickson v. Hutchinson, 29 N. J. Law, 180; Wade v. Emerson, 17 Mo. 267. "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 the cases cited supra and infra.

certain and definite in every particular, the greatest degree of strictness being required.[70]

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.[71]

PROFERT AND DEMAND OF OYER.

62. Profert of a deed must be made by the plaintiff or defendant whenever he founds his action or defense upon it, or the declaration or plea will be demurrable.

63. 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.

By a rule of pleading to be hereafter further noticed, a party is always required to make what is called "profert" of a deed when his

[70] Note 69, supra; Mount v. Scholes, 120 Ill. 394, 11 N. E. 401; Cummings v. Smith, 50 Me. 568; City of Augusta v. Moulton, 75 Me. 551; Vicary v. Moore, 2 Watts (Pa.) 451; Henry v. Porter, 29 Ala. 619; Gibson v. Bourland, 13 Ill. App. 352; Ross v. Nesbitt, 2 Gilman (Ill.) 252; Kenyon v. Sutherland, 3 Gilman (Ill.) 99.

[71] Note 69, supra; Mount v. Scholes, 120 Ill. 394, 11 N. E. 401; Adams v. Filer, 7 Wis. 306; Lincoln v. Thrall, 26 Vt. 304; Wallace v. M'Connell, 13 Pet. 151; Dinet v. Pfirshing, 86 Ill. 83; Kimball v. Huntington, 10 Wend. (N. Y.) 679. "It is laid down in Bacon's Abridgement (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. 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. M'Connell, supra.

action or defense is founded upon it. 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.[72] 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.[73] A failure to comply with this rule renders the declaration or plea demurrable.

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. 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.

Profert is unnecessary, and oyer, therefore, cannot be demanded, when it is not and cannot be within the party's power to produce the instrument,[74] or where it is a private writing, not under seal.[75]

In all cases where profert is necessary, and is made, the opposite party has a right, if he pleases, to demand oyer;[76] but, if it be unnecessarily made, this does not entitle to oyer.[77] If profert is

[72] "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." Steph. Pl. (Tyler's Ed.) 100.

[73] See Append. Forms Nos. 5, 6, 9, for manner of making profert. That setting out an instrument in full is a sufficient profert, see Regents of University of Michigan v. Detroit Young Men's Soc., 12 Mich. 138.

[74] Judge v. Merrill, 6 N. H. 256.

[75] Gatton v. Dimmit, 27 Ill. 400. Where, however, an action is based on an instrument not under seal, the defendant may obtain an order from the court requiring its production for his inspection. See Whitaker v. Izod, 2 Taunt. 115.

[76] Judge v. Merrill, 6 N. H. 256; Rand v. Rand, 4 N. H. 278.

[77] Steph. Pl. (Tyler's Ed.) 102.

omitted when it ought to have been made, the other party cannot demand oyer, but must demur.[78]

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.[79]

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.[80]

AMENDMENT.

64. 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, pro-

[78] Steph. Pl. (Tyler's Ed.) 102; Archb. 164.

[79] Steph. Pl. (Tyler's Ed.) 102.

[80] Steph. Pl. (Tyler's Ed.) 102, 103; Stibbs v. Clough, 1 Strange, 227.

viding 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.[81] 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.

It would, of course, be foreign to the theory of all pleading to permit a litigant to change his form of action or introduce new grounds of complaint when he has once placed himself upon record, as such a course would tend to endless confusion, and cause protracted litigation, besides placing the other party where he would not know what he might be called upon to oppose. It is the rule, therefore, in many 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.[82] Nor will an amendment be allowed if it changes the cause of action, or introduces a new cause of action.[83] An amendment should never be allowed if it would result in prejudice to the adverse party.[84] 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

[81] 1 Am. & Eng. Enc. Law, 546; Blenkhorn v. Penrose, 43 Law T. 668.

[82] Mahan v. Smitherman, 71 Ala. 563. In some states this rule is changed by statute, or is not recognized. See Redstrake v. Insurance Co., 44 N. J. Law, 294 (where an amendment was allowed, changing the form of action from assumpsit to covenant).

[83] Silver v. Jordan, 139 Mass. 280, 1 N. E. 280; Farmers' & M. Bank v. Israel, 6 Serg. & R. (Pa.) 293; Royse v. May, 93 Pa. St. 454; Shenandoah V. R. Co. v. Griffith, 76 Va. 913; Peck v. Still, 3 Conn. 157; Ward v. Patton, 75 Ala. 207; Snyder v. Harper, 24 W. Va. 206. In some states such an amendment is allowed by statute, if no prejudice will result.

[84] Kille v. Ege, 82 Pa. St. 102.

costs of the application, and, in some cases, costs of the whole suit up to the time of the amendment.[85]

The court will generally allow an amendment to correct mistakes in the names of parties,[86] or to strike out parties improperly joined,[87] or bring in parties improperly omitted, or who have become necessary parties since commencement of the suit,[88] or to correct the pleading as to the capacity in which a party sues or is sued.[89] 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 in most cases refuse to allow an amendment after that time.[90] A party cannot insist upon a right to amend if he has been guilty of laches.[91] 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,[92] and some amendments, as amendments to conform to the proof, may be allowed after verdict, and even after judgment.[93]

THE CAUSE AT ISSUE.

65. An issue in pleading is a single specific point of controversy, affirmed on the one side and denied on the other.

[85] Keeler v. Sears, 6 Wend. (N. Y.) 540; Mobley v. Mobley, 7 Rich. Law, 431.

[86] Porter v. Hildebrand, 14 Pa. St. 129.

[87] Miller v. Pollock, 99 Pa. St. 202.

[88] Steed v. McIntyre, 68 Ala. 407; Braswell v. McDaniel, 74 Ga. 819.

[89] Sick v. Michigan Aid Ass'n, 49 Mich. 50, 12 N. W. 905; Hines v. Rutherford, 67 Ga. 606.

[90] Ritchie v. Van Gelden, 9 Welsb. H. & G. 762.

[91] Jones v. Welling, 16 Fed. 635; Dawes v. Gooch, 8 Mass. 488; Fowble v. Rayberg, 4 Ohio, 45; Elder v. Harris, 76 Va. 187; Sackett v. Thompson, 2 Johns. (N. Y.) 206.

[92] Barker v. Justice, 41 Miss. 240; Hill v. Chipman, 59 Wis. 211, 18 N. W. 160.

[93] McKinney v. Jones, 55 Wis. 39, 11 N. W. 606, and 12 N. W. 381.

66. An action is at issue when a positive affirmative allegation of fact or a demurrer refers the case for trial or decision, and this tender is accepted by the adverse party.

67. Issues may be either:

(a) In law.

(b) In fact.

Tender of Issue.

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 a single material question or point presented, affirmed on the one side and denied on the other, beyond which they do not extend.[94] The attainment of this 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. This end is attained in two ways. 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.[95] 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."[96] We shall

[94] While it is a rule that the issue must be upon a single and certain point, it is not necessary that such point should consist only of a single fact. As to immaterial issues, see Stearns v. Stearns, 32 Vt. 678; Garland v. Davis, 4 How. (U. S.) 131; and post, p. 190, "Repleader."

[95] Bac. Abr. "Pleas," G 1. See post, p. 261.

[96] See post, p. 278. See Com. Dig. "Pleader," H.

consider these matters fully in treating in a separate chapter of the rules governing the production of the issue.

Acceptance of the Issue Tendered.

The issues of fact or law thus tendered are here subject to different rules, which will be discussed hereafter. In the former case the issue must be accepted by the opposing party only if well tendered; that is, if the pleading opposing it is sufficient both in substance and form,[97] and the acceptance is made by a formal writing or entry upon the record, called the "similiter."[98] The issue in law tendered by a demurrer, however, is always considered well tendered, and must therefore always be accepted, which is done by a form called the "joinder in demurrer." In either case, when accepted, the issue is thus complete, and the question presented is ready for decision by the court, or trial by the court and a jury, as the case may be. The decision on an issue of law may not necessarily end the pleadings, except for the time being, as, 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 attainment of this object.

THE DECISION OF THE ISSUE.

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

69. The decision of an issue in fact is by the 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.

The decision of an issue of law is always by the court, without the intervention of a jury; and the court also decides cases such as

[97] See post, p. 335.

[98] Gould, Pl. c. 6, § 20; post, p. 336.

those when the action is alleged to be 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,[99] or in a proceeding in quo warranto.[100] The cause is placed on the argument list or 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.

When the parties have mutually referred the case to trial by jury,[101] and are ready, a jury of 12 men is selected or "drawn" from the body or "panel" of jurors who have been summoned for the term by the sheriff;[102] and the trial proceeds under the superintendence of the presiding judge or judges, who decide all questions as to the admissibility of evidence, and direct the jury on all such points of law, arising on the evidence, as are necessary for their guidance in appreciating its legal effect and drawing the correct conclusions in their verdict.[103] The case is generally opened by the plaintiff,[104] but always by the party upon whom the burden of proof rests. This is generally the party holding the affirmative,[105] and if the plaintiff have one affirmative to prove, and the defendant one or more, the former still has the preference.[106] After his opening statement, defining the nature of the case and the facts embraced in the declaration, and which must be a fair and correct one, not cal-

[99] See Callahan v. Patterson, 4 Tex. 61.

[100] State v. Lupton, 64 Mo. 415. And see Grinder v. Nelson, 9 Gill (Md.) 299; Anderson v. Caldwell, 91 Ind. 451.

[101] The right of trial by jury is secured by the constitution of the United States and by the various state constitutions. See Trees v. Rushworth, 9 Gray (Mass.) 47.

[102] See Orcutt v. Carpenter, 1 Tyler (Vt.) 250; Sutton v. Fox, 55 Wis. 531, 13 N. W. 477, as to qualifications of jurors; and Tillman v. Ailles, 5 Smedes & M. (Miss.) 373, as to a greater number than 12.

[103] See Eastman v. Amoskeag Manuf'g Co., 44 N. H. 143; Table Mountain. G. & S. M. Co. v. Wallers' Defeat S. M. Co., 4 Nev. 218.

[104] Benham v. Rowe, 2 Cal. 387.

[105] This is the rule in most of the states. See Marshall v. American Exp. Co., 7 Wis. 1; Harvey v. Ellithorpe, 26 Ill. 418; Beatty v. Hatcher, 13 Ohio St. 115; Yingling v. Hesson, 16 Md. 112. But in some it rests in the discretion of the court.

[106] Jackson v. Hesketh, 2 Starkie, 521.

culated to mislead either the jury or court, the plaintiff introduces his evidence and rests his case. He has now put in what is called his "principal case," and can thereafter offer no evidence except to rebut or overcome that presented by the defendant. The defendant then makes his opening statement, following it with his evidence, and rests. The plaintiff may now introduce testimony in rebuttal, if he have any; and the defendant may in turn offer evidence in opposition to this, but nothing which should have been proved as part of his main defense.[107] The mode of offering testimony is generally by witnesses who are present and testify orally before the jury, though in all the states there 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. These forms of evidence are called "depositions."[108] 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." After the evidence is closed, and before the arguments and the charge of the court, counsel for each side, if he desires, may present to the court his requests that the jury be instructed according to certain legal propositions which he offers.[109] The counsel then proceed with their addresses to the jury, in the order fixed by the local statutes or the rules of the court, and it is important here to have the closing address.[110] After the addresses of counsel, the judge delivers his charge, instructing the jury as to the law applicable to the particular case, and generally stating a summary of the evidence given. The jury then retire to consider the case and find a verdict.[111]

[107] See Graham v. Davis, 4 Ohio St. 362; Foye v. Leighton, 22 N. H. 71.

[108] See Murray v. Hay, 1 Barb. Ch. (N. Y.) 59; Pingry v. Washburn, 1 Aiken (Vt.) 264.

[109] See Siegel v. Robinson, 56 Pa. St. 19; Sidensparker v. Sidensparker, 52 Me. 481.

[110] As to the rule applicable, see Benham v. Rowe, 2 Cal. 387; Marshall v. American Exp. Co., 7 Wis. 1; Overton v. Davisson, 1 Grat. (Va.) 211.

[111] See Boofter v. Rogers, 9 Gill (Md.) 44; Sidwell v. Evans, 1 Pen. & W. (Pa.) 383; Hutchinson v. Lord, 1 Wis. 286.

As stated above, the parties may waive a jury trial, if they choose, and submit an issue of fact to the court. This is now common practice.

DEMURRER TO EVIDENCE.

70. 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, or its admissibility in point of law.

71. It questions the relevancy 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.

72. Evidence is relevant to an issue which tends in any degree to prove it.

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 solely upon the test of the relevancy of testimony,—a matter often difficult of determination. This is the effect of a demurrer to the evidence. When used, it is analogous to the demurrer in pleading, raising a question of law for the decision of the court, and suspending all other proceedings in the action until it is decided.[112] 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;[113] and the effect of the proceeding is a determination of the issue of fact in the action by the decision of the question of law, as a finding for or against the relevancy of the evidence is a finding upon the issue of fact.[114]

[112] See Fowle v. Common Council, 11 Wheat. (U. S.) 320.

[113] But see Hart v. Calloway, 2 Bibb. (Ky.) 460.

[114] See Obaugh v. Finn, 4 Ark. 110.

THE VERDICT.

73. The verdict is the unanimous decision made by the jury, and reported to the court, upon matters lawfully submitted to the jurors in the course of the trial of a cause.

74. A verdict must always correspond with the issue, and must be positive and certain; but a special verdict may be in the alternative.

Upon the evidence submitted to them, the jury, under the charge of the court and after consultation, render their decision or verdict, as it is called, which is usually in general terms "for the plaintiff" or "for the defendant," and including, if for the former, the damages to which they consider him entitled. Certain principles are required by law to be observed by the jury in thus forming their decision, as follows:

(1) They are to take no matter into consideration but the question in issue.[115]

(2) They are bound to give their verdict for the party who, upon the proof, appears to them to have succeeded in establishing his side of the issue.[116]

(3) The burden of proof generally is upon the party who, in the pleadings, has maintained the affirmative of the issue, as a negative is in general incapable of proof. Consequently, unless he succeed in proving his affirmative, the jury are to consider the opposite or negative proposition established.

(4) The agreement must be unanimous.[117]

The verdict, when given, is now generally in writing, and is thereupon entered in the record of the court. It may be general, as when the jury pronounce for either party in the terms of the issue on both the fact and the law;[118] or special, when they find the facts

[115] Stafford v. King, 30 Tex. 257.

[116] See Settle v. Alison, 8 Ga. 201.

[117] See Campbell v. Wooldredge, Ga. Dec. pt. 2, p. 132.

[118] Beal v. Cunningham, 42 Me. 362; Sutliff v. Gilbert, 8 Ohio, 405.

only, leaving the application of the law to the court.[119] They may find either form of verdict at their option, but a special verdict will generally be directed by the court on request of either party.[120]

PROCEEDINGS AFTER VERDICT.

75. After the verdict and before the entry of judgment, the unsuccessful party may prepare a bill of exceptions, or move for a new trial, for a repleader, in arrest of judgment, or for judgment notwithstanding the verdict.

BILL OF EXCEPTIONS.

76. A bill of exceptions is a particular statement, in writing, 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.

We have before seen that it is the peculiar province of the judge who presides at the trial to decide upon the admissibility of the evidence offered by the parties, and that, in his charge or instructions to the jury, he is required to state to them the rules of law which are to guide them in making up their verdict. If a judge, either through ignorance or corruption, allowed the admission of testimony clearly improper for the jury to consider, or misstated the law, and a verdict was found accordingly, the party against whom the ruling or instruction was given would certainly suffer an injustice, and might be without a remedy had not the law provided one by the use of the bill of exceptions. At the time of the ruling upon a question of evidence, the party against whom it is made takes a specific objection or exception to the decision, stating the grounds upon which it is taken, and this exception is noted on the record at the time.[121] Again, when the charge of the court is unsatis-

[119] See Brown v. Ralston, 4 Rand. (Va.) 504; Suydam v. Williamson, 20 How. (U. S.) 427; Hilliard v. Outlaw, 92 N. C. 266.

[120] Michigan, S. & N. I. R. Co. v. Bivens, 13 Ind. 263.

[121] See Parke v. Foster, 26 Ga. 465; McKnight v. Dunlop, 5 N. Y. 537; Iaege v. Bossieux, 15 Grat. (Va.) 83; James v. Dexter, 113 Ill. 654.

factory in its statement of the law, and the requests to charge, or some of them, are refused, exceptions may also be taken, which are entered on the record as in the former case.[122] From these exceptions, together with a statement of the case and the evidence or instructions excepted to, the bill of exceptions is made up.[123] The bill must also show and set forth an error by the court to the prejudice of the party excepting, and that such error was material,[124] and must be signed by the judge who acted, and sealed with the seal of the court. When thus completed, it presents a complete record of the case, which is afterwards considered in the higher or appellate court under a writ of error.[125]

NEW TRIAL.

77. 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.

78. 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.

The origin of the practice of granting new trials is of great antiquity. They were formerly only obtained with difficulty, the verdict of a jury upon an issue in fact being generally held conclusive. The modern practice is more liberal, and they are now

[122] Fletcher v. Howard, 2 Aiken (Vt.) 115; Smith v. Carrington, 4 Cranch (U. S.) 62.

[123] See Ewing v. Ewing, 2 Leigh (Va.) 340.

[124] Watson v. Brown, 14 Ohio, 473.

[125] See Patterson v. Phillips, 1 How. (Miss.) 572. All exceptions must be specific, pointing out the particulars objected to, and stating fully the ground of the objection. A general exception will usually be disregarded, as presenting nothing definite which the appellate court can properly consider. Dodge v. Alger, 53 N. Y. Super. Ct. 107. And see Smith v. Dunklin Co., 83 Mo. 195; Sumner v. Candler, 92 N. C. 634; Lockard v. Chicago, St. P., M. & O. Ry. Co., 66 Iowa, 259, 23 N. W. 653.

frequently granted, though only for substantial reasons, which must amount to more than a reasonable doubt that justice has not been done.[126] Probably the most frequently occurring grounds upon which they are asked are matters occurring before or during the progress of a trial, which have operated to the substantial prejudice of either party. These are generally the want of proper notice of some step or fact;[127] irregularities in the impaneling of the jury, or misconduct on their part at the trial, or misconduct of the prevailing party, tending to influence the verdict; the improper admission or rejection of evidence;[128] or misdirection by the judge in delivering his charge. When any of these are shown, a new trial will generally be ordered, provided other conditions exist. If objections to the manner of selection or the competency of jurors are not formally taken before the jury is impaneled, they are generally held to be waived,[129] and a motion for a new trial will not be entertained for errors in the admission or rejection of evidence or in instructing the jury, unless objections, or, as they are generally called, "exceptions," are taken at the particular time.[130] And it is a general rule in all such cases, founded in reason and sound sense, that, whatever errors may have occurred, they must have actually or necessarily caused injustice to the complaining party, or a new trial will not be granted.[131]

There are other grounds upon which this motion can be successfully made, as that the verdict was directly contrary to the instructions of the court on a matter of law, or was clearly and plainly against the evidence; but courts are slow to act upon the latter

[126] Cowperthwaite v. Jones, 2 Dall. (Pa.) 56.

[127] Bull. N. P. 327; Jamieson v. Pomeroy, 9 Pa. St. 230.

[128] Eddy v. Baldwin, 32 Mo. 369; Kaul v. Brown, 17 R. I. 14, 20 Atl. 10; Mobile & O. R. Co. v. Davis, 130 Ill. 146, 22 N. E. 850; Boyce v. Aubuchon, 34 Mo. App. 315.

[129] Unless some valid excuse is shown for the delay. Cannon v. Bullock, 26 Ga. 431.

[130] See Hinton v. State, 24 Tex. 454. The evidence offered in such case must have been such as would elucidate some issue made, and must have been legally admissible for that purpose. Patterson v. Ramspeck, 81 Ga. 808, 10 S. E. 390. See, also, Rencher v. Aycock, 104 N. C. 144, 10 S. E. 132.

[131] Mansfield v. Wheeler, 23 Wend. (N. Y.) 79; Selleck v. Sugar Hollow Turnpike Co., 13 Conn. 453; Ruffin v. Overby, 105 N. C. 78, 11 S. E. 251.

cause, and it must clearly appear that the finding is at variance with testimony that is competent, uncontradicted, and unimpeached.[182] Mere doubtful questions of fact, especially upon circumstantial evidence, will be left as the jury decide. To these matters no formal precedent objection or exception can well be taken, and it is therefore not required. The same is true as to evidence discovered since the trial, or newly-discovered evidence, as it is called, for which a retrial is often granted. This evidence, however, must be such as would have been material, and not merely cumulative, and such as would probably have caused a different verdict if it had been discovered and presented in season, and there must also have been due diligence used to procure it for the former trial.[183]

Another matter for which new trials are often granted is surprise, where a party using all diligence and care is placed in a situation injurious to his interests, without his own default.[184] 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

[182] Robertson v. Dodge, 28 Ill. 161; Morgan v. Giddings (Tex. Sup.) 1 S. W. 369; Shepherd v. Inhabitants of Camden, 82 Me. 535, 20 Atl. 91. When the evidence is conflicting in every material point, see Shumway v. Leakey (Cal.) 11 Pac. 839.

[183] See Baker v. Joseph, 16 Cal. 173; Klein v. Gibson (Ky.) 2 S. W. 116; Wingfield v. Rhea, 77 Ga. 84; State v. Stain, 82 Me. 472, 20 Atl. 72.

[184] Ruggles v. Hall, 14 Johns. (N. Y.) 112. See State v. Morgan, 80 Iowa, 413, 45 N. W. 1070; Solomon v. Norton (Ariz.) 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.

opportunity and neglected it, he cannot take the chances of a verdict in his favor, and afterwards claim the benefit of a rehearing.[185]

New trials are also frequently granted where excessive damages have been awarded by a jury, either by going beyond the amount claimed in the declaration or by disregarding fixed rules and principles in estimating the amount, where there is reason to believe that their action was dictated by passion or some undue influence; but a mere inadequacy in the sum awarded will be disregarded, unless it is clearly apparent that it is a case of mistake in the proper amount, as might occur in an action on contract.[186]

MOTION IN ARREST OF JUDGMENT.

79. 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.

80. 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.

The refusal of the court to enter judgment under the circumstances above indicated is based upon the principle that, as such judgment is a conclusion of law from all the facts ascertained and spread upon the record, so this conclusion must rest upon the whole record, and a party who does not thereby appear entitled to it cannot have it, though one of the intermediate steps above mentioned

[185] See McClure v. King, 15 La. Ann. 220; Grant v. Popejoy, 15 Ind. 311; Klein v. Gibson (Ky.) 2 S. W. 116.

[186] See McIntire v. Clark, 7 Wend. (N. Y.) 330. Jacobs v. Bangor, 16 Me. 187; Shaw v. Boston & W. R. Corp., 8 Gray (Mass.) 45; Tynberg v. Cohen, 76 Tex. 409, 13 S. W. 315; Steinbuchel v. Wright, 43 Kan. 307, 23 Pac. 560. The cases where damages have been considered excessive have taken a wide range as to amount, and a comparison will be interesting to the student as showing the tendency of courts to vary upon given states of fact.

has been determined in his favor.[137] 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; and it is equally apparent that the same must be true when a verdict has not been a finding upon the issue presented.

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,[138] 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.[139] 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.[140]

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 issue presented, it must conform to and include all matters of substance covered by such issue; and that if it varies substantially from it, or is inconsistent with or repugnant to it, or

[137] See 5 Reeves, Eng. Law, 20; Ayrey v. Fearnsides, 4 Mees. & W. 168; Empson v. Griffin, 11 Adol. & E. 186; Burnett v. Ballund, 2 Nott & McC. (S. C.) 435; Slack v. Lyon, 9 Pick. (Mass.) 62; Bedell v. Stevens, 28 N. H. 118. And see Franklin v. State, 29 Ala. 14; Sawyer v. Boston, 144 Mass. 470, 11 N. E. 711; Dollman v. Munson, 90 Mo. 85, 2 S. W. 134. But the relief must be applied for before final judgment. Keller v. Stevens, 66 Md. 132, 6 Atl. 533. See Miller v. Gable, 30 Ill. App. 578. And the errors must be apparent on the record. Jordan v. State, 22 Fla. 528.

[138] 3 Shars. Bl. Comm. 394; Machon v. Randle, 66 Tex. 282, 17 S. W. 477.

[139] See post, c. 4, rule 1, §§ 207–209. See, also, Lane v. Maine M. F. Ins. Co. 12 Me. 44; Avery v. Tyringham, 3 Mass. 160; Read v. Chelmsford, 16 Pick. (Mass.) 128.

[140] The same extension extends to defects in the plea or in other parts of the pleadings.

omits to find upon a material fact, it is defective.[141] 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.[142]

REPLEADER.

81. 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 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.[143] 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.[144]

JUDGMENT NON OBSTANTE VEREDICTO.

82. Where a plea is good in form, but shows no valid answer to the merits of the action, the court will order

[141] Bac. Abr. "Verdict," O; Moody v. Keener, 7 Port. (Ala.) 218; Potter v. Hiscox, 30 Conn. 508.

[142] See White v. Bailey, 14 Conn. 272; Patterson v. U. S., 2 Wheat. 221.

[143] See Staple v. Heydon, 2 Salk. 579; Gerrish v. Train, 3 Pick. (Mass.) 124.

[144] 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.

judgment for the plaintiff, notwithstanding a verdict for the defendant.

The granting of judgment non obstante veredicto is another instance of the application of the general principle in pleading that a judgment can only be given for one who, upon the record, is entitled to it. 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. 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.[145] 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.

THE JUDGMENT.

83. A judgment is the decision or sentence of the law, pronounced by a court of justice or other competent tribunal, upon the issue or question presented for determination.

84. As to the nature of the proceedings, judgments may be upon:

(a) Questions of law alone.
(b) Questions of fact alone.
(c) Both law and fact by confession.
(d) Default of either party.

[145] Bac. Abr. "Pleader," R 18; Archb. Civ. Pl. 358; Lambert v. Taylor, 4 Barn. & C. 138. See Buckley v. Duff, 111 Pa. St. 223, 3 Atl. 823; Inquirer

85. As to their effect they may be:

(a) Interlocutory.

(b) Final.

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

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

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.[146] The same form of judgment is also rendered in overruling a demurrer.[147]

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 in a dilatory plea, either on an issue of fact or law, the judgment is generally that the writ be quashed or action dismissed. On demurrer, if for the plaintiff, it is quod recuperet; if for the defendant, quod eat sine

Printing & Pub. Co. v. Rice, 106 Pa. St. 623; Adams v. Munter, 74 Ala. 338. And see Wilkes v. Broadbent, 1 Wils. 63.

[146] 2 Archb. Prac. 3.

[147] See Randolph v. Singleton, 20 Miss. 439; Bauer v. Roth, 4 Rawle (Pa.) 83. And see post, c. 4, § 201, and cases cited.

die. And, on an issue in fact, the form depends upon the particular action.[148]

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, in a real action, 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.[149] 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.

PROCEEDINGS AFTER JUDGMENT.

88. Where a judgment is erroneous, or it is unjust that it be enforced, the unsuccessful party may apply for a reversal or modification of the judgment, or a revision of the proceedings upon which it is based. Such an application may be by:

(a) Audita querela.

(b) Certiorari.

(c) Writ of error.

(d) Writ of review.

[148] 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, 66 Tex. 115, 18 S. W. 224. See Truett v. Legg, 32 Md. 147; Aetna Ins. Co. v. Swift, 12 Minn. 437 (Gil. 326).

[149] See Moore v. Fields, 42 Pa. St. 467.

AUDITA QUERELA.

89. The writ of audita querela is a remedial process whose object is to relieve a party from the consequences of a judgment, because of some wrongful or improper act of the party who obtained it which could not have been pleaded in bar of the action.

This writ is seldom used at the present time, since relief in such cases, in modern practice, is generally afforded in a more direct and simple manner, by motion or otherwise.[150] It is a proceeding in the nature of an equitable suit, in which there must be proper parties, an allowance of the writ, pleadings, and a judgment. All parties aggrieved have a right to this writ, and the parties to the judgment sought to be vacated, or their legal representatives, must be made parties to the suit;[151] but it bears only on the wrongful acts of the adverse party, and not on the erroneous judgments or acts of the court,[152] and the party must have been injured, or in danger of injury, to maintain it.[153] In this writ, which answers to a declaration, the whole of the case is set out, and the judgment is for damages against the party in fault, and to redress the grievance of which the plaintiff complains.

Instances of the use of this remedy are to set aside and annul an execution issued irregularly, or without authority of law;[154] to enforce a tender or compromise;[155] to set aside a judgment irregularly entered after a discontinuance, or in contravention of an agree-

[150] As by motion. See Harper v. Kean, 11 Serg. & R. (Pa.) 290; Brackett v. Winslow, 17 Mass. 153.

[151] Herrick v. Orange Co. Bank, 27 Vt. 584.

[152] See School Dist. in Alburgh v. Rood, 27 Vt. 214.

[153] See Hopkins v. Hayward, 34 Vt. 474; Faxon v. Baxter, 11 Cush. (Mass.) 35.

[154] Johnson v. Harvey, 4 Mass. 485; Wilson v. Fleming, 16 Vt. 649; Hovey v. Niles, 26 Vt. 541; Stanley v. McClure, 17 Vt. 253; Hicks v. Murphy, Walker (Mich.) 66; Skillings v. Coolidge, 14 Mass. 48; 1 Am. & Eng. Enc. Law, 1005, 1006.

[155] Perry v. Ward, 20 Vt. 92; Keen v. Vaughan, 48 Pa. St. 477; 1 Am. & Eng. Enc. Law, 1006.

ment for a continuance;[156] or to set aside a judgment rendered against an infant or insane person, who was not represented by guardian.[157]

CERTIORARI.

90. 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.

This is a proceeding, more frequently in use than the one just mentioned, for the review or examination of the proceedings in a suit in the court below, generally where a writ of error is not the proper remedy, and there is no other mode of proceeding.[158] It is granted by the court at its discretion, upon motion or petition,[159] 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 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,[160] and is generally the only thing

[156] Crawford v. Cheney, 12 Vt. 567; Pike v. Hill, 15 Vt. 183; 1 Am. & Eng. Enc. Law, 1006.

[157] Judd v. Downing, Brayt. (Vt.) 27; Starbird v. Moore, 21 Vt. 529; Lincoln v. Flint, 18 Vt. 247. The subject is very fully treated, and many cases are collected, in 1 Am. & Eng. Enc. Law, 1003–1009.

[158] People v. Supervisors of El Dorado Co., 8 Cal. 58; In re Robinson's Estate, 6 Mich. 137; Auditor v. Woodruff, 2 Ark. 73. See Davis Co. v. Horn, 4 G. Greene (Iowa) 94; Lees v. Drainage Com'rs, 24 Ill. App. 487; Logue v. Clark, 62 N. H. 184.

[159] See Farrell v. Taylor, 12 Mich. 113; Adams v. Abram, 38 Mich. 302; People v. Cummings, 88 Mich. 249, 50 N. W. 310.

[160] Starr v. Trustees of Rochester, 6 Wend. (N. Y.) 564; Low v. Galena & C. U. R. Co., 18 Ill. 324; Central Pac. R. Co. v. Board, etc., of Placer Co., 46 Cal. 668.

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 ERROR.

91. 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 revoke or reverse such judgment for error of fact or law in the proceedings as recorded.

92. It is only issued after final judgment, and the validity of such judgment is the only question in controversy.

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.[161] 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,[162] 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.[163] 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.[164] But if the court has committed an error in law of a substantial nature,

[161] 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.

[162] See King v. Jones, 2 Ld. Raym. 1525; Wiscart v. D'Auchey, 3 Dall. (Pa.) 321.

[163] 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.

[164] See Fellows v. Griffin, 9 Smedes & M. (Miss.) 362.

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.[165] 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;[166] and the right must appear from the record itself, as it cannot be supplied by proof.[167] The proceeding corresponds to the appeal in code practice.

THE WRIT OF EXECUTION.

93. A writ of execution is a process, issued from a court in which a final judgment has been rendered, for the purpose of carrying such judgment into effect.

94. 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.

As an execution can only be effectively issued when the right of the plaintiff to obtain the fruits of his litigation has not been suspended as mentioned above, it is considered here as the last step to be noticed in the progress of the action. This seems to be the more proper, as to obtain and enforce this process is the object of all previous proceedings in an action at law, and through its means the plaintiff, if the successful party, obtains a satisfaction of his demand. In its most common form, which is the only one that need be considered here, it is called a "fieri facias,"[168] and is directed to the sheriff or other officer designated by law, commanding him to make satisfaction of the plaintiff's claim from the goods or property

[165] Gregg v. Bethea, 6 Port. (Ala.) 9. And see Baptist Missionary Union v. Peck, 9 Mich. 445.

[166] See Porter v. Rummery, 10 Mass. 64; Finney v. Crawford, 2 Watts (Pa.) 294; Johnson v. Thaxter, 12 Gray (Mass.) 198.

[167] Townsend v. Davis, 1 Ga. 495. See Watson v. Willard, 9 Pa. St. 89.

[168] See 2 Reeves, Eng. Law, 187.

of the defendant.[169] 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.[170] 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.[171] Other forms are in use, such as the writ of seisin, the analogous writ of possession (both relating to land), the writ of retorno habendo, which is an execution in replevin, and the writ of distringas, which is sometimes used to enforce a compliance with what is required of a party by a distress of his goods and chattels; but the one first mentioned sufficiently illustrates this final step in the proceedings in an action.

[169] Co. Litt. 290b. It must be signed by the proper officer of the court, and be under its seal, Boal v. King, 6 Ohio, 11; though it seems that the latter alone may suffice. But see Corwith v. State Bank, 18 Wis. 560.

[170] See Keightley v. Birch, 3 Camp. 521; Young v. Smith, 23 Tex. 598.

[171] See Williams v. Babbitt, 14 Gray (Mass.) 141; Chalmers v. Moore, 22 Ill. 359. In some states the official return of the sheriff's proceedings under the execution constitutes the title of the purchaser, though it seems that a failure to return will not defeat such title in fact. See Cloud v. El Dorado Co., 12 Cal. 128.

CHAPTER V.

THE DECLARATION.

95. In General.
96–97. Statement of Cause of Action.
98–103. Special Assumpsit.
104–110. General Assumpsit or Common Counts.
111–117. Debt.
118–122. Covenant.
123–126. Account or Account Render.
127–133. Action on the Case.
134–138. Detinue.
139–144. Trover and Conversion.
145–151. Trespass.
152–157. Replevin.
158–161. Ejectment.
162–165. Trespass for Mesne Profits after Ejectment.

IN GENERAL.

95. 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]

Title Court. In the Circuit Court of ——— County.

Venue. County of ———, to wit:

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. 18—, 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. 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

Promise. 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, to wit, sixty cents for each bushel thereof.

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, etc.

X. Y.,
Attorney for Plaintiff.

[1] 1 Shinn, Pl. & Prac. 442.

Title of Court.

Every declaration should be entitled in the proper court, and if the title is omitted, or merely indorsed, the court will set aside the declaration for irregularity,[2] unless it may be and is amended.

Time of Filing or Delivery.

It was the rule in England that every declaration in a personal action, commenced in either of the superior courts, should be intitled as of the day of the month and year when actually filed and delivered;[3] but failure to comply with this rule was merely an irregularity, and not even ground for a special demurrer.[4] The rule applied only to personal actions, and to such only as were commenced in the superior courts. The declaration in ejectment was entitled as of the preceding term;[5] and when an action was removed from an inferior court the title was as of the term in which the removing process was returnable.[6]

Venue in the Margin.

Immediately after the title, follows a statement in the margin of the declaration of the venue or county in which the facts are alleged to have arisen, and in which the cause is to be tried.

Actions are either local or transitory. An action is local when all the principal facts on which it is founded are of a local nature; as where possession of land is to be recovered, or damages for an actual trespass, or for waste affecting land, because in such case the cause of action relates to some particular locality.[7] An action is transitory when the facts on which it is founded are of a transitory kind, and might be supposed to have happened anywhere; and therefore all actions founded on debts, contracts, and other matters relating to the person, or to personal property, come under this denomination.[8] If the action is local, the venue must be laid, and the cause tried, in the county in which the cause of action arose,

[2] Rippling v. Watts, 4 Dowl. 290.

[3] 1 Chit. Pl. 279.

[4] Neal v. Richardson, 2 Dowl. 89; Hodson v. Pennell, 7 Dowl. 208, 4 Mees. & W. 373; Dougherty v. Edwards, 25 Ark. 84.

[5] Doe v. Roe, 3 Moore & S. 370; 1 Chit. Pl. 279.

[6] 1 Chit. Pl. 279.

[7] Black, Law Dict. tit. "Local Action"; post, p. 383.

[8] Black, Law Dict. tit. "Transitory Action"; post, p. 384.

or the injury was really committed.[9] If, on the other hand, the action is transitory, the venue may be laid, and the cause tried, in any county wherein jurisdiction of the person of the defendant can be obtained.[10] In most states the place where an action must be tried is regulated by statute.

The Commencement.

What is termed the commencement of the declaration follows the venue in the margin, 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, and a statement that the defendant had been summoned, etc., as shown in the form given above.

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.

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 thereupon he brings his suit, etc." [11]

[9] The following actions are local, and within this rule: Ejectment, Daulson 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; Roach v. Damron, 2 Humph. (Tenn.) 425; Putnam v. Bond, 102 Mass. 370; Sumner v. Finegan, 15 Mass. 284; 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 Pike (Ark.) 63; post, p. 383.

[10] Actions for injuries ex delicto to the person, or to personal property, are transitory, as in case of assault and battery, false imprisonment, libel and slander, trespass de bonis asportatis, etc. 1 Chit. Pl. 282; Glen v. Hodges, 9 Johns. (N. Y.) 67; Genin v. Grier, 10 Ohio, 209; Watts v. Thomas, 2 Bibb (Ky.) 458; Smith v. Bull, 17 Wend. (N. Y.) 323; Shaver v. White, 6 Munf. (Va.) 112. Actions upon contracts are transitory. 1 Chit. Pl. 282; Egler v. Marsden, 5 Taunt. 25; Henwood v. Cheeseman, 3 Serg. & R. (Pa.) 500; Low v. Hallett, 2 Caines (N. Y.) 374; post, p. 384.

[11] Post, p. 487.

STATEMENT OF CAUSE OF ACTION.

96. The declaration must state distinctly and with certainty every fact that is essential to the plaintiff's right of action. 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 injury to that right.

(c) The consequent damages.

97. If the bare statement of the facts constituting the cause of action is not sufficient to clearly show the right of action, it is necessary to introduce

(a) An inducement. This is a preliminary statement of facts necessary to a correct understanding of the allegations of fact constituting the cause of action.

(b) An innuendo. This is a statement showing the application or meaning of matter previously expressed, the application or meaning of which would not otherwise be clear.

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.

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 that right; 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. 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.

Inducement.

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.

In the form of declaration given above, the paragraph commencing, "For that whereas," etc., is the inducement.

The best illustration of an inducement will be found in a declaration on the case for libel or slander. Where the writing set out in a declaration for libel is not necessarily libelous, it is necessary to introduce a preliminary statement of the facts going to show its libelous character.[12]

[12] See Append., Form 15.

Innuendo.

Whenever the application or meaning of matter expressed in a declaration is material to a showing of the right of action, and it is not clear from the matter itself as expressed, an explanatory statement is necessary. Such a statement is called an "innuendo." The innuendo is principally used in declarations for libel or slander. We have just shown the necessity for an inducement in a declaration for libel, where the matter alleged to have been published is not itself prima facie libelous. If, after the inducement, the matter alleged is not obviously libelous, or applicable to the plaintiff, it is necessary to show that it is so by explaining its real meaning. Such a statement is called an "innuendo." This will be explained in treating particularly of declarations for libel.[13]

An innuendo, as we shall see, can only explain some matter already sufficiently expressed. It cannot add to, enlarge, or change the sense of previous words.

SPECIAL ASSUMPSIT.

98. The essential allegations of the declaration are:[14]

(a) The statement of the contract.

(b) The performance by the plaintiff, including the performance of all conditions precedent.

(c) The breach by the defendant.

(d) The damages.

SAME—THE STATEMENT OF THE CONTRACT.

99. The declaration must state with certainty and precision all those parts of the contract which are material, either for the purpose of showing that a valid contract has been made, upon which the plaintiff is entitled to sue, or of enabling the court to ascertain the true intent and meaning of the parties, or of furnishing the jury with a criterion for the assessment of damages.

[13] Append., Form 15.

[14] For forms, see Append., Forms Nos. 2, 3.

The statement of the contract is the first important requisite in stating 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.[16]

Inducement.

Where the mere allegation of the consideration and the promise will not alone show the contract in an intelligible manner, it is necessary to set forth, more properly, but not necessarily, in the nature of a preamble, the circumstances under which the contract was made, or to which the consideration has reference.[17] This explanatory statement is what we have explained as an "inducement." The extent to which it is carried depends upon the necessity for explanatory matter in the particular case.[18]

Thus, in assumpsit on an award, the existing difficulties between the parties, resulting in the sumbission to arbitration, are concisely stated by way of inducement, as that "certain differences had existed and were depending";[19] 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.[20] 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

[16] Cotterill v. Cuff, 4 Taunt. 285; Bristow v. Wright, 2 Doug. 667; Stearns v. Barrett, 1 Pick. (Mass.) 443; Favor v. Philbrick, 7 N. H. 326. And see Smith v. Boston, C. & M. R. Co., 36 N. H. 485; Ferguson v. Tucker, 2 Har. & G. (Md.) 183.

[17] Johnson v. Clark, 5 Blackf. (Ind.) 564.

[18] As to the mode of alleging matter of inducement, and the degree of certainty required, see ante, p. 204. As to the effect of a variance between the allegations and the proof, see post, p. 340.

[19] 1 Chit. Pl. 297.

[20] Id.

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.[21]

Where the mere statement of the consideration and promise will be sufficiently intelligible without showing further facts or circumstances, an inducement is not necessary or proper.[22]

Consideration.

Except in the case of bills of exchange and promissory notes, and certain other contracts that import a consideration,[23] it is always necessary for the declaration to expressly 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 therefore void.[24] And it is equally essential that the consideration alleged shall appear to be legally sufficient to support the promise.[25] The question as to what is a sufficient consideration relates to the substantive law of contract, and not to our subject.[26] 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

[21] Dartnall v. Howard, 4 Barn. & C. 345.

[22] 1 Chit. Pl. 297.

[23] 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. 300.

[24] 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; Beverleys v. Holmes, 4 Munf. (Va.) 95; Moseley v. Jones, 5 Munf. (Va.) 23; Curley v. Dean, 4 Conn. 265; Bailey v. Bussing, 29 Conn. 1; Shelton v. Bruce, 9 Yerg. (Tenn.) 24; Benden v. Manning, 2 N. H. 289; New Market F. Co. v. Harvey, 23 N. H. 406.

[25] 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.

[26] Clark. Cont. 147-209.

declaration would be as defective as if the consideration were defective in fact. It could 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.[27] 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.[28]

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;[29] but a defective statement will be aided by a verdict for the plaintiff if it sufficiently appear, upon a reasonable construction of the declaration, that there was in fact a consideration capable of supporting the promise.[30]

In all cases the statement should be accurate, for the considera-

[27] 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.

[28] 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.

[29] 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; Mitchinson v. Hewson, 7 Term R. 348; Dartnall v. Howard, 4 Barn. & C. 345; Benden v. Manning, 2 N. H. 289; Winston v. Francisco, 2 Wash. (Va.) 187.

[30] Ward v. Harris, 2 Bos. & P. 265; Shaw v. Redmond, 11 Serg. & R. (Pa.) 27; post, p. 273.

tion is essential to the contract, and if it is misdescribed the contract is misdescribed.[31]

The consideration must be shown with certainty. 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. Considerations are executed or executory.[32]

Same—Executed Consideration.

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.[33] 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.[34] It must, however, be shown that the consideration had previously occurred, as "before then," etc.[35]

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.[36] 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;[37] or each may have been required to perform concurrently with the other;[38] or the plaintiff may have

[31] White v. Wilson, 2 Bos. & P. 116; Bulkley v. Landon, 3 Conn. 76; post, p. 341.

[32] Clark, Cont. 23, 196.

[33] 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.) 295; 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.

[34] 1 Chit. Pl. 302; Andrews v. Whitehead, 13 East, 105, 116, 117; Sexton v. Miles, Salk. 22; Lampleigh v. Braithwait, Hob. 106.

[35] 1 Chit. Pl. 302, note z.

[36] Clark, Cont. 23, 165, 196.

[37] Clark, Cont. 665.

[38] Clark, Cont. 664.

been required to continue to do or forbear some act. Executory considerations may therefore be divided into precedent, concurrent, and continuing considerations.

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.[39] "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." [40]

A concurrent consideration occurs 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.[41] The promises must be concurrent or obligatory on both at the same time, to render the promise of either binding,[42] and must be so stated in pleading.[43] In these cases the plaintiff must always allege a performance or a readiness to perform on his part.[44]

[39] 1 Chit. Pl. 302; 1 Saund. 264, note 1.

[40] 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. 265.

[41] Clark, Cont. 664.

[42] Clark, Cont. 168.

[43] Payne v. Cave, 3 Term R. 148; Cooke v. Oxley, Id. 653; Livingston v. Rogers, 1 Caines (N. Y.) 583.

[44] Morton v. Lamb, 7 Term R. 125; Clark, Cont. 665; 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

In the case of a continuing consideration, the declaration must, in addition to stating the consideration, show its continuance. Thus, in assumpsit by a lessor against his tenant for breach of his contract to use the premises in a tenantlike manner, the declaration alleges that, in consideration that the defendant had become and was tenant to the plaintiff of certain land, he undertook during the continuance of the tenancy to use the premises in a tenantlike manner, and then avers the continuance of the tenancy and the breach.[45]

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.[46] Formal words need not be used if it sufficiently appear from the whole declaration that a promise has actually been made.[47] 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 ac-

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 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. See form given above, p. 200.

[45] 1 Chit. Pl. 304; Pawley v. Walker, 5 Term R. 373; Mussen v. Price, 4 East, 150.

[46] 1 Chit. Pl. 308; Cooper v. Landon, 102 Mass. 58, 60. And see the cases cited in the following note. See form given above, p. 200.

[47] Avery v. Inhabitants of Tyringham, 3 Mass. 160; Sexton v. Holmes, 3 Munf. (Va.) 566; Peasley v. Boatwright, 2 Leigh (Va.) 198; Cook v. Sims, 2 Call (Va.) 39; McGinnity v. Laguerenne, 10 Ill. 101; Booth v. Farmers'.Bank, 1 Thomp. & C. 40; 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. Wegerslofe v. Keene, 1 Strange, 224. And see Dole v. Weeks, 4 Mass. 451; Mountford v. Horton, 2 Bos. & P. (N. R.) 62.

cording to its legal effect.[48] Only such parts need be set out as show the entire act required to be done by the defendant.[49]

It is not necessary to state that the promise was in writing, even when a writing is required by statute,[50] 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,[51] the time when it was made,[52] 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.[53] "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." [54]

[48] Lent v. Padelford, 10 Mass. 230; Stroud v. Garrard, 1 Salk. 8; Salinas v. Wright, 11 Tex. 572; Smith v. Webb, 16 Ill. 105.

[49] 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.

[50] 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. Jameson, 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, Id. 694.

[51] 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. Douglass, 4 Barn. & Ald. 374; Belton v. Fisher, supra; Shepard v. Palmer, 6 Conn. 95; post, p. 340. A failure to state the name of the parties, or a misdescription, may be aided by verdict. 1 Chit. Pl. 309; Rolte v. Sharpe, Cro. Car. 77; Blackwell v. Irvin, 4 Dana (Ky.) 187; post, p. 273.

[52] Ring v. Roxbrough, 2 Tyrw. 468; 1 Chit. Pl. 309; Stephens v. Graham, 8 Serg. & R. (Pa.) 405. But the exact time alleged need not be proved. 1 Chit. Pl. 309.

[53] 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. 488; Rennyson v. Reifsnider, 11 Pa. Co. Ct. R. 157; Bridge v. Austin, 4 Mass. 115; Walker v. Tyrrell, 101 Mass. 257; Curley v. Dean, 4 Conn. 265.

[54] 1 Chit. Pl. 310.

SAME — PERFORMANCE AND FULFILLMENT OF CONDITIONS.

100. The declaration must also allege the performance or fulfillment of all conditions precedent to the defendant's liability to perform his promise. It must allege due performance by the plaintiff of everything on his part to be done under the contract, including performance of all conditions precedent, or aver a sufficient excuse for the nonperformance.

101. 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.[55]

When, however, the consideration of the defendant's promise was a promise by the plaintiff which was required to be performed as a

[55] If the day appointed in the contract for the doing of any act by the defendant falls 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. See Clark, Cont. 653–663; Cunningham v. Morrell, 10 Johns. (N. Y.) 204; Robb v. Montgomery, 20 Johns. 15; Gould v. Banks, 8 Wend. (N. Y.) 562; Kane v. Hood, 13 Pick. (Mass.) 281; Boone v. Eyre, 1 H. Bl. 273, note; Pepper v. Haight, 20 Barb. (N. Y.) 429; Bennett v. Pixley, 7 Johns. (N. Y.) 249; Obermeyer v. Nichols, 6 Bin. (Pa.) 159; Morford v. Mastin, 6 T. B. Mon. (Ky.) 609; Norris v. School Dist., 12 Me. 293; McGehee v. Hill, 4 Port. (Ala.) 170.

condition precedent to performance by the defendant,[56] or if the defendant was not required to perform before the happening of some subsequent event,[57] as the act of a third person, the lapse of a certain time,[58] or notice,[59] or a request or demand by the plaintiff,[60] the dec-

[56] Clark, Cont. 663; 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 (Cal.) 31 Pac. 612; Goodwin v. Lynn, 4 Wash. C. C. 714, Fed. Cas. No. 5,553; People v. Glann, 70 Ill. 232; Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242; 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; Smith v. Christmas, 7 Yerg. (Tenn.) 565; 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.

[57] 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.) 374.

[58] Worsley v. Wood, 6 Term R. 710.

[59] Thus, in assumpsit upon an award, it was held that a declaration containing no allegation that the award was published, or made known to the defendant, except by bringing the action, is bad. Kingsley v. Bill, 9 Mass. 198. It would seem, however, that, this being a matter equally in the knowledge of the defendant, the averment should be unnecessary. See cases hereafter cited. Where the promise sued upon was that the defendant should pay the plaintiff as much for a commodity as another person had given or should give, notice of the proper amount to be paid must be alleged. 1 Chit. Pl. 337; 2 Saund. 62a, note 4. But where the matter does not lie more properly within the knowledge of the plaintiff than of the defendant, notice need not be averred. Therefore, if the defendant contracted to do a thing on the performance of an act by a stranger, notice of the performance of such act need not be alleged, for it lies in the defendant's knowledge as much as in the plaintiff's, and he ought to take notice at his peril. 1 Chit. Pl. 337; Lent v. Padelford, 10 Mass. 230. "When the matter alleged lies peculiarly in the knowledge of the plaintiff, he must aver that the defendant had notice; but when it lies equally in the knowledge of the defendant, such averment is unnecessary." Lent v. Padelford, supra. And see 2 Saund. 62a, note 4; Ilsley v. Jones, 12 Allen (Mass.) 260; Clough v. Hoffman, 5 Wend. (N. Y.) 500; Kemble v. Wallis, 10 Wend. (N. Y.) 374; Keys v. Powell, 2 A. K. Marsh. (Ky.) 253.

[60] 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, 69; 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

laration 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.[61]

And 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.[62]

In averring the excuse for nonperformance by the plaintiff of a

time after demand. Thorpe v. Booth, 1 Ryan & M. 388; Greenwood v. Curtis, 6 Mass. 634; Carter v. Ring, 3 Campb. 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.

[61] 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. Collins v. Gibbs, 2 Burrows, 899; Parker v. Parmelee, 20 Johns. (N. Y.) 130. 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. 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; Clark, Cont. 606 et seq. 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; Clark v. Crandall, 27 Barb. (N. Y.) 73; Home Ins. Co. 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.

[62] Lester v. Jewett, 11 N. Y. 453; Bank of Columbia v. Hagner, 1 Pet. 455; Tinney v. Ashley, 15 Pick. (Mass.) 552; Adams v. O'Connor, 100 Mass. 515; Allen v. Hartfield, 76 Ill. 358; Hodgson v. Barrett, 33 Ohio St. 63; Henderson v. Lauck, 21 Pa. St. 359; Smith v. Lewis, 26 Conn. 110; Clark v. Weiss, 87 Ill. 438. 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. Clark, Cont. 664, 665; Morton v. Lamb, 7 Term R. 125 (note 44, supra); Metz v. Albrecht, 52 Ill. 491; How v. Rawson, 17 Ill. 588. See form, p. 200.

condition precedent, the particular circumstances which constitute the excuse must be stated.[63]

It is sufficient to set out the performance of a condition precedent in the language of the condition,[64] 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 be shown. An exact performance must be stated.[65]

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;[66] 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.[67]

SAME—THE BREACH.

102. 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.[68] The manner of its allegation must necessarily be governed by the nature of the promise or stipulation broken.[69] It should be assigned in the

[63] 2 Saund. 129, 132.

[64] Smith v. Lloyd, 16 Grat. (Va.) 205.

[65] 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.

[66] Collins v. Gibbs, 2 Burrows, 899.

[67] Post, p. 273; Ferry v. Williams, 8 Taunt. 62; Colt v. Root, 17 Mass. 230; Bailey v. Clay, 4 Rand. (Va.) 346; Leffingwell v. White, 1 Johns. Cas. (N. Y.) 99.

[68] Garrett v. Hitchcock, 77 Ga. 427; Benden v. Manning, 2 N. H. 289. See form, p. 200.

[69] Withers v. Knox, 4 Ala. 138; Patterson v. Jones, 13 Ark. 69.

words of the contract, either negatively or affirmatively, or in words which are coextensive with its import and effect.[70] Though the express 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.[71] "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

[70] Wilcox v. Cohn, 5 Blatchf. 346, Fed. Cas. No. 17,640; Juliand 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 v. Moxley, 2 Metc. (Ky.) 309; Atlantic Mut. Fire Ins. Co. v. Young, 38 N. H. 451. 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 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.

[71] Warn v. Bickford, 7 Price, 550; Baxter v. Jackson, 1 Sid. 178; Williams v. Statton, 5 Smedes & M. (Miss.) 347.

may prepare his plea and defense and evidence in answer." [72] "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." [73]

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; [74] and, if the contract is in the alternative or the disjunctive, it is obvious that the assignment should be in corresponding form.[75]

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.[76] But, if a breach is assigned, a defect in assigning it must be taken advantage of by demurrer, and will be cured by verdict.[77]

SAME—THE DAMAGES.

103. 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. Their amount is indicated by the contract itself.

[72] 1 Chit. Pl. 343; Knight v. Keech, Skin. 344.

[73] 1 Chit. Pl. 343.

[74] Serra v. Wright, 6 Taunt. 45; McGehee v. Childress, 2 Stew. (Ala.) 506.

[75] 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. Howe, 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.

[76] 1 Chit. Pl. 347; Brickhead v. Archbishop of York, Hob. 198; Heard v. Baskerville, Id. 223.

[77] Post, p. 273, Anon., 1 Salk. 140; Knight v. Keech, Skin. 344; Charnley v. Winstanley, 5 East, 270, 271; Weigley v. Weir, 7 Serg. & R. (Pa.) 310; Harrel v. McAlexander, 3 Rand. (Va.) 94; Thomas v. Roosa, 7 Johns. (N. Y.) 461.

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.[78] 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.[79] 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 above indicated, and is noticed hereafter; 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,[80] though it may be less.[81]

[78] Com. Dig. "Pleader," C, 84.

[79] Post. p. 487, where the distinction between general and special damages and the modes of pleading each are fully noticed. Where damages are only incidental, it need not be alleged that they are due and unpaid. Riley v. Walker, 6 Ind. App. 622, 34 N. E. 100.

[80] 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; Sedg. 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; Duncan v. Markley, 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. See Warner v. Bacon, 8 Gray (Mass.) 397, per Metcalf, J.

[81] Gardiner v. Croasdale, 2 Burrows, 904; Van Rensselaer's Ex'rs v. Plat-

GENERAL ASSUMPSIT OR COMMON COUNTS.

104. The essential allegations of a declaration in general assumpsit are: [82]

(a) A statement of the consideration.

(b) A promise by the defendant.

(c) A breach of the promise.

(d) The damages.

105. This form of declaration is also called "the common counts." These counts are as follows: [83]

(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.

ner's Ex'rs, 2 Johns. Cas. (N. Y.) 18; Sayer, Dam. 45. See Covington v. Lide, 1 Bay (S. C.) 158.

[82] See Append., Form No. 3.

[83] The first five counts are called "money counts," because they relate to money transactions.

(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.

(b) Quantum meruit counts, 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.

(c) Quantum valebant counts, 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. This we have shown at length in another place.[84]

SAME—STATEMENT OF THE CONSIDERATION.

106. The declaration must allege a consideration coextensive with and legally sufficient to support the promise as laid, and in accordance with the actual facts. It must consist of something either of benefit to the defendant or detriment to the plaintiff.

[84] Ante, p. 11.

107. If the consideration is a past or executed one, a request by the defendant must also be alleged.

The statement of the consideration consists of all facts necessary to show the debt which the defendant owes to the plaintiff, either by reason of the performance by the latter of an original contract calling for the payment of a specific sum, or the doing of any other act by him for which the law implies a promise to pay the reasonable worth and value where no specific sum is agreed upon. It must disclose the whole consideration for the promise the plaintiff seeks to enforce, and this, as in special assumpsit, must be something which will legally support the promise and is coextensive with it. The method of framing it in the counts commonly used in this action is practically the same, except in the case of an insimul computassent or account stated, but with the important qualification, as we shall hereafter see, that the statement in each count must on its face appear to be that of a distinct and separate cause of action, and not a mere repetition.

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 furnished at the special instance and request of the defendant.[85] 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;[86] 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.[87] The statement of the

[85] 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.

[86] See Langer v. Parish, 8 Serg. & R. (Pa.) 134, and cases cited; post, p. 392.

[87] This is in addition to the statement of the county as a venue. Thornton

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.[88] 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.[89]

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, the latter promised to pay him so much therefor as he deserved, and then states how much he deserves for such service.[90]

In the quantum valebant count the plaintiff declares that, in consideration of his having sold and delivered real or personal property to the defendant, he promised to pay him so much as the goods or land was worth, and then states what the value was.

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.[91] But it is not necessary to state the particular descrip-

v. Smith, 1 Wash. (Va.) 81; Wetmore v. Baker, 9 Johns. (N. Y.) 307; Briggs v. Nantucket Bank, 5 Mass. 96.

[88] 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. See Edwards v. Nichols, 3 Day (Conn.) 16, Fed. Cas. No. 4,296.

[89] The allegation of a request is always necessary where the express or implied terms of the contract impose upon the plaintiff the duty of making it before commencing his action. Greenwood v. Curtis, 6 Mass. 358; Lobdell v. Hopkins, 5 Cow. (N. Y.) 516.

[90] Lawes, Pl. § 504. See Parcell v. McComber, 11 Neb. 209, 7 N. W. 529; Lee v. Ashbrook, 14 Mo. 378; Wadleigh v. Town of Sutton, 6 N. H. 15.

[91] 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.

tion 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.[92]

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.[93] As the consideration for the promise is here the statement of the account ascertaining and fixing the sums due which constitute the debt, and not the existence of the debt itself, the original cause of the indebtedness need not be stated.[94]

SAME—THE PROMISE.

108. 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 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.[95]

[92] 1 Chit. Pl. 353; Ambrose v. Roe, Skin. 217, 218; Story v. Atkins, 2 Ld. Raym. 1429; Lewis v. Culbertson, 11 Serg. & R. (Pa.) 49.

[93] 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. St. 207, 24 Atl. 191; Warren v. Caryl, 61 Vt. 331, 17 Atl. 741.

[94] Milward v. Ingram, supra; Fitch v. Leitch, 11 Leigh (Va.) 471; Montgomerie v. Ives, 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.

[95] Booth v. Farmers' & Mechanics' Nat. Bank, 1 Thomp. & C. 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

SAME — THE BREACH.

109. 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.

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.[96]

SAME — THE DAMAGES.

110. 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 specific sum due for what was done under the contract, 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.[97]

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.) 566; Wingo v. Brown, 12 Rich. (S. C.) 279; ante, p. 206.

[96] But two breaches of the same specific stipulation cannot be assigned in the same count without causing duplicity. Taft v. Brewster, 9 Johns. (N. Y.) 335. And see post, p. 349.

[97] Post, p. 487. And see ante, p. 218, "The Damages in Special Assumpsit," and cases cited thereunder.

DEBT.

111. The necessary allegations of the declarations are:[88]

(a) In debt on simple contract:
  (1) A statement of the debt.
  (2) The breach.
  (3) The damages.

(b) In debt on specialty:
  (1) A statement 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.

112. If on simple contract, the declaration must allege the consideration, that is, the facts, on which the debt arises. The statement must show either a legal liability or an express agreement, but not a promise to pay.

113. 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.

114. If on a judgment, it must be described with sufficient accuracy and detail to fully identify it, and, if the

[88] See Append., Forms Nos. 4–8.

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.

115. 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, as in assumpsit, according to the contract or matter declared on, which may, as we have seen, be either a simple contract, a specialty, a judgment, or a statute. The method of statement is considered here with reference to the instances before mentioned of the use of this action, as sufficiently illustrating the mode of pleading, though the action may also lie in some other cases.

On Simple Contracts.

Where the action is brought on a simple contract, express or implied, to pay money in consideration of a precedent debt or duty, the declaration must show the consideration on which such contract was founded precisely as in the action of assumpsit, and it must appear that there is a liability established either by law or by an express agreement of the defendant.[99] 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 contract, and not, as in assumpsit, the promise.[100]

On Specialties.

In debt on sealed instruments the declaration usually states the specialty only, and makes profert of it,[101] without any mention of the consideration on which the contract was founded, as the circumstances under which a deed was made are in general immate-

[99] Emery v. Fell, 2 Term R. 28. But no profert need be made of a writing not under seal.

[100] Metcalf v. Robinson, 2 McLean, 363, Fed. Cas. No. 9,497.

[101] See post, p. 497; Cleveland v. Rodgers, 1 A. K. Marsh. (Ky.) 193; Bender v. Sampson, 11 Mass. 42; Scott v. Curd, Hardin (Ky.) 69.

rial, and the statement of a consideration is therefore seldom essential.[102] It is necessary, however, where performance of the consideration by the plaintiff is a condition precedent to his right to sue, and must then be stated in the manner heretofore noticed.[103] 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.[104] If not set out in verba, it must be stated according to its legal operation and effect.[105] 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.[106]

On Judgments.

If the action is on a judgment, no statement of the consideration on which the record was founded is necessary, for the reason that the validity of a judgment cannot be affected or impeached by any supposed defect or illegality in the consideration or transaction on which it was founded, nor can there be any allegation against its validity, except by writ of error.[107] 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.[108] 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

[102] Dorr v. Munsell, 13 Johns. (N. Y.) 430; Grubb v. Willis, 11 Serg. & R. (Pa.) 107.

[103] Ante, p. 221. "Consideration." See Whitney v. Spencer, 4 Cow. (N. Y.) 39; Nash v. Nash, 16 Ill. 79.

[104] 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.

[105] See post, p. 459; Scott v. Leiber, 2 Wend. (N. Y.) 479; Lent v. Padelford, 10 Mass. 235; White v. Thomas, 39 Ill. 227; Barrett v. Carden, supra.

[106] Bender v. Sampson, 11 Mass. 42. And see Conwell v. Clifford, 45 Ind. 392.

[107] Green v. Ovington, 16 Johns. (N. Y.) 55; Biddle v. Wilkins, 1 Pet. (U. S.) 686.

[108] See Denison v. Williams, 4 Conn. 402.

been held unnecessary to allege that such judgment is still in force, it would seem the better practice to do so.[109] 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 or another state, the allegation of such jurisdiction is always necessary;[110] and, in declaring upon a justice's judgment of a sister state, the statute conferring jurisdiction upon the justice must also be pleaded.[111]

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 elements of the statute, and 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 precise words of the statute need not be used.[112] 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

[109] If the judgment has been assigned, the assignment must be set forth. Brookshire v. Lomax, 20 Ind. 512. In debt on an appeal bond it is improper to allege in the declaration that the judgment was affirmed on appeal when in fact an original judgment was entered for the plaintiff; but it should be averred that defendant failed to prosecute his appeal with effect, and that plaintiff had judgment. O'Neil v. Nelson, 22 Ill. App. 531. And see Beekman v. Hamlin, 20 Or. 352, 25 Pac. 672.

[110] See Henry v. Allen, 82 Tex. 35, 17 S. W. 515.

[111] Sheldon v. Hopkins, 7 Wend. (N. Y.) 435. See, also, Hubbard v. Davis, 1 Aiken (Vt.) 296; Stiles v. Stewart, 12 Wend. (N. Y.) 473.

[112] 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., 9 Fost. (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 (Ala.) 11 South. 753; Gunter v. Dale Co., 44 Ala. 639.

defense only.[113] 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.[114]

SAME—THE BREACH.

116. 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.

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.[115] 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.[116] If the action be on a bond, whether a common money bond or a special bond for the performance of covenants, within the statute,[117] the penalty is the debt at law, and the breach by non-payment 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.

SAME—THE DAMAGES.

117. The damages in this action are only incidental, and not the principal object of the suit; but a nominal sum should always be alleged.

[113] Jones v. Axen, 1 Ld. Raym. 120; Hart v. Cleis, 8 Johns. (N. Y.) 33; Smith v. U. S., 1 Gall. 261, Fed. Cas. No. 13,122; Smith v. Moore, 6 Greenl. (Me.) 278, and cases there cited.

[114] 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.

[115] See Gale v. O'Bryan, 12 Johns. (N. Y.) 216.

[116] The allegation of a demand is necessary, though the omission is cured by verdict. Lusk v. Cassell, 25 Ill. 209.

[117] St. 8 & 9 Wm. III. c. 11, which has been substantially adopted into the common law of this country.

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.[118] 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, in accordance with a rule to be hereafter noticed.[119]

COVENANT.

118. The essential allegations of the declaration in covenant are:[120]

(a) A statement of the covenant.

(b) The breach.

(c) The damages.

SAME—THE STATEMENT OF THE COVENANT.

119. 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 statement may be according to the express words or the legal operation and effect.

120. 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.

What has been before stated regarding the allegations preliminary to the breach in assumpsit and debt applies equally to the method of framing this part of the declaration in covenant, and may

[118] It is held to be reversible error, in an action of debt, to render judgment, not only for the debt sued on, but for damages, as in assumpsit, and for interest on the judgment. Reece v. Knott, 3 Utah, 451, 24 Pac. 757.

[119] Post, p. 487.

[120] See Append. Form No. 9.

be referred to here.[121] The deed or contract, or some particular covenant or stipulation which it contains or which is implied from its terms, constitutes the subject-matter of the plaintiff's right, for the violation of which the action is brought, and must be pleaded. 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.[122] Only such portions need be mentioned as are essential to the cause of action,[123] 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.[124] The deed or contract should also be stated as being under seal,[125] and its delivery should be alleged,[126] and profert made, or an excuse shown for the omission.[127] 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 constituted a condition precedent to the right of the plaintiff to bring the action, it should be stated as in assumpsit, and performance alleged or excused as in that action.[128]

[121] This includes of course the allegation of performance of all conditions precedent. 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.

[122] Lent v. Padelford, 10 Mass. 230; 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. 459, and cases there cited.

[123] Sandford v. Halsey, 2 Denio (N. Y.) 235. And see Eddy v. Chace, 140 Mass. 471, 5 N. E. 306.

[124] Grannis v. Clark, 8 Cow. (N. Y.) 36.

[125] Moore v. Jones, 2 Ld. Raym. 1536; Bilderback v. Pouner, 7 N. J. Law, 64.

[126] Perkins v. Reeds, 8 Mo. 33.

[127] Read v. Brookman, 3 Term R. 151. And see post, p. 497, and cases cited.

[128] Horner 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. 213.

SAME—THE BREACH.

121. 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 infraction of the legal right of the plaintiff by a violation by the defendant of the conditions of his covenant; and the form in which it is to be assigned may be by a statement in the negative words of the covenant itself, where such general assignment amounts to a legal violation of its terms, and enough will thereby appear on the face of the statement to show such violation and a resulting cause of action in the plaintiff.[129] It may also be assigned according to the substance, instead of the letter, of the covenant;[130] 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.[131]

[129] Randel v. 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; Knepper v. Kurtz, 58 Pa. St. 480; Beddoe 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. 419.

[130] 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. 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.

[131] 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.

122. 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 at the time, 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.[132] 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.

ACCOUNT OR ACCOUNT RENDER.

123. The essential allegations of the declaration in account or account render are:

(a) A statement of the facts showing the plaintiff's right to an accounting.

(b) The breach.

(c) The damages.

SAME—THE STATEMENT.

124. The declaration must allege privity between the plaintiff and defendant, the plaintiff's property or right in the thing demanded, the manner in which the defendant received it, and the special character in which the defendant is charged. The privity alleged may be either of contract or in law. 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.

[132] 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. Seidel, 147 Pa. St. 232, 23 Atl. 560.

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 between the parties,[133] either of contract or in law, is essential, and such privity must therefore be alleged. 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.[134] 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;[135] and in actions between tenants in common, under the statute of Anne,[136] 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.[137]

SAME—THE BREACH.

125. 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

[133] 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 derivative interest or connection growing out of a contract to which one is not directly a party. Parties and privies are held clearly distinguishable; thus, an heir is privy to the conveyance of his ancestor, or an executor to the contract of his testator. The relationship subsisting between the immediate parties to a contract is called "privity of contract," but it is not properly within the definition if the above distinction is to be regarded.

[134] Barnum v. Landon, 25 Conn. 137; Carnes v. Irving, 31 Vt. 604; Hughes v. Woosley, 15 Mo. 492; Wright v. Guy, 10 Serg. & R. (Pa.) 227.

[135] McMurray v. Rawson, 3 Hill (N. Y.) 59.

[136] 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.

[137] Griffith v. Willing, 3 Bin. (Pa.) 317.

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.

SAME—THE DAMAGES.

126. 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;[138] 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.

ACTION ON THE CASE.

127. The essential allegations of the declaration are:[139]

(a) The inducement.

(b) The injury.

(c) The damages.

SAME—THE INDUCEMENT.

128. The declaration must state the matter or thing affected and the plaintiff's right thereto.

129. The statement must be sufficiently comprehensive to disclose facts showing a legal duty upon the defendant, either positive or negative, the neglect or violation of which would cause the actionable injury.

[138] Gratz v. Phillips, 5 Bin. (Pa.) 564. And see post, p. 488.

[139] See Append. Form No. 15.

From the great number and variety of the cases in which this action is the proper remedy, it is impossible, in the space here allowed, to say much more than that the form of this portion of the declaration will depend mainly upon the particular circumstances on which the action is founded, always including the above essentials, and that these must be clearly stated.[140] In describing the matter or thing affected, whether it be personal or real property, the terms used should be those commonly employed in law as importing a definite technical meaning, and the degree of certainty should be such as is required by the rules which are fully considered in another part of this work.[141] The matter or thing affected must be described in all material particulars. If the injury is to chattels, their quantity, quality, and value should be stated; and, if it is to land, its nature, quality, value, etc., should be given.[142]

The Plaintiff's Right.

The plaintiff's right or interest in the thing affected must be clearly stated. It may arise from a particular duty of the defendant, expressly assumed, for a consideration moving from the plaintiff; or it may be implied by law, as in case of the absolute rights of persons. In the last case such right need only be generally stated, and, if the right is implied, it need not be mentioned.[143] When the right of the plaintiff consists in an obligation on the part of the defendant to perform some particular duty, the nature of such duty must be

[140] Post, cc. 7, 8, 10, and the rules there given. See Taylor v. Day, 16 Vt. 566; Webster v. Hodgkins, 25 N. H. 128; Cooper v. Landon, 102 Mass. 58; Towne v. Wiley, 23 Vt. 355; Chiles v. Drake, 2 Metc. (Ky.) 146; Buzzell v. Laconia Manuf'g Co., 48 Me. 113; Hanley v. Balch, 94 Mich. 315, 53 N. W. 954; and see Barnes v. Hurd, 11 Mass. 57. Trespass on the case, in its most comprehensive sense, includes assumpsit, as well as an action in form ex delicto, and a declaration thereon need not contain the words "on promises." See Albert v. Blue, 10 B. Mon. (Ky.) 92. But the gist of the action must be directly and positively alleged. Moore v. Dawney, 3 Hen. & M. (Va.) 127; Houghton v. Davenport, 23 Pick. (Mass.) 235.

[141] See the rules, post, c. 9.

[142] See Thorneton v. Bernard, 2 Ld. Raym. 991; Van Dyk v. Dodd, 6 N. J. Law, 129; Palmer v. Tuttle, 39 N. H. 486.

[143] 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.

alleged; and, when such right arises from a breach of duty in respect of the defendant's particular character or situation, the peculiar character or situation must be alleged.[144] Generally speaking, in actions of this kind, for injuries to chattels, the plaintiff's right to or interest in them, whether absolute or limited, will be sufficiently described by an averment that they were his goods or chattels, or that he was lawfully possessed of them as his own property;[145] but if the interest is reversionary only, without the possessory right, it must be expressly so described. And the same is substantially true where the injury was to corporeal or incorporeal hereditaments.[146]

SAME—THE INJURY.

130. The declaration must also allege the tortious act or injury by which the plaintiff has been damaged.

131. The statement should include not only the injury, which may be alleged in general terms, but also the motive, and sometimes the knowledge of the defendant.

132. It should show a violation of the plaintiff's right, according to the particular facts.

The form of alleging the injury is usually by a general statement that the defendant committed or permitted the particular act, without specifying the details of his misconduct.[147] It should also be alleged as wrongfully done when not prima facie actionable; and, though it is generally unnecessary to state the motive or intent of the defendant where the act was in itself unlawful, it is better to do so when it can be proved, in aggravation of damages.[148] If the act was

[144] Low v. Tilton, 19 N. H. 271.

[145] Smith v. Hancock, 4 Bibb (Ky.) 222; Donaghe v. Roudebousb, 4 Munf. (Va.) 251.

[146] As regards the declaration in pleading, title or interest is generally mere inducement in personal actions, but in real actions it forms a prominent subject of the inquiry. See post, p. 402, as to showing title or interest in the pleadings.

[147] Jones v. Stevens, 11 Price, 235; Scheibel v. Fairbain, 1 Bos. & P. 388; post, p. 459.

[148] Price v. Woodburne, 6 East, 433. See Marshall v. Bussard, Gilmer (Va.) 9, and cases cited; Graham v. Noble, 13 Serg. & R. (Pa.) 233. And see Co-

lawful in itself, the intent must always be alleged. It may also happen, from the circumstances of the case, that the scienter or knowledge of the defendant is a material fact, and in such a case it must be alleged and proved.[149] In stating the scienter or knowledge as well as in stating the unlawful motive or intent, it is seldom necessary to set them out in terms, but it is generally sufficient that they be substantially shown. The manner of framing this part of the declaration will be better understood from an examination of the forms in common use in this action.[150]

SAME—THE DAMAGES.

133. The declaration must state the damages resulting as the legal and natural consequences of the injury done. These may be general or special, and should be alleged according to their nature.

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 in this action, 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. As in other actions, they may be general or special, and the method of alleging them must depend upon their nature. This has already been noticed in treating of the action of special assumpsit, and will be again mentioned when we consider the rules relative to framing the declaration.[151]

DETINUE.

134. The essential allegations of the declaration are:[152]

(a) The inducement.

(b) The unlawful detention.

(c) The damages.

hen v. Morgan, 6 Dowl. & R. 8, and the remarks of Lord Ellenborough in Rex v. Phillips, 6 East, 473.

[149] See Mahurin v. Harding, 28 N. H. 128, and cases cited; Salem India Rubber Co. v. Adams, 23 Pick. (Mass.) 256.

[150] See Append. Form 15.

[151] Post. p. 487.

[152] See Append. Form No. 10.

SAME—THE INDUCEMENT.

135. The declaration must describe the thing detained sufficiently for purposes of identification, the plaintiff's property and right, and the possession of the defendant.

136. A demand before suit brought should be alleged if necessary from the character of the defendant's 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 other actions; and it must be such as to particularly identify them as the goods in question.[153] 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.[154]

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, and, in addition, that he must have a right to the immediate possession of them.[155] 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.

[153] Taylor v. Wells, 2 Saund. 74a, 74b; Haynes v. Crutchfield, 7 Ala. 189. And see post, p. 303.

[154] 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. 377, 16 S. E. 602.

[155] Ante, p. 103.

SAME—THE DETENTION.

137. The declaration must also show a positive act of detaining by the defendant, contrary to the legal right of the plaintiff.

The unlawful act of the defendant which is the gist of this action is, as we have seen,[156] 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.[157]

SAME—THE DAMAGES.

138. 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.[158] 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.[159] The manner of alleging them

[156] Ante, p. 103.

[157] See and compare, as to what constitutes a conversion in trover, ante, p. 68.

[158] See Arthur v. Ingels, 34 W. Va. 639, 12 S. E. 872.

[159] See White v. Sheffield & T. St. Ry. Co., 90 Ala. 253, 7 South. 910; Grand Island Banking Co. v. First Nat. Bank, 34 Neb. 93, 51 N. W. 596.

is merely formal, except in the latter instance, when the special damage must be particularly stated, as in other cases, or evidence of it will not be received.[160]

TROVER AND CONVERSION.

139. The essential allegations of the declaration are:[161]

(a) The inducement.

(b) The conversion.

(c) The damages.

SAME—THE INDUCEMENT.

140. The declaration must describe the property converted and the plaintiff's right thereto.

141. The description of the property must be sufficient for purposes of identification, but the plaintiff's property or right may be generally stated.

The Property Converted.

The description of the property should in all cases be sufficiently certain to identify it. This much is essential, as the thing affected is specific, and a foundation must be laid for proving its nature and character in order to provide a standard for the assessment of damages by the jury.[162] The price or value should be stated, though it has been held that the omission to do so will not be fatal.[163] The time should also be alleged, though it seems that it is only essential to show a time before suit brought.[164] It is usual to state that the

[160] See post, p. 489. As to liability on a delivery bond given by the defendant in this action, see Heard v. Hicks, 101 Ala. 102, 13 South. 256.

[161] See Append. Form No. 14.

[162] See post, p. 393; Taylor v. Morgan, 3 Watts (Pa.) 333; Edgerley v. Emerson, 23 N. H. 555; Colebrook v. Merrill, 46 N. H. 160; Ball v. Patterson, 1 Cranch, C. C. 607, Fed. Cas. No. 814; Henry v. Sowles, 28 Fed. 521; Strinchfield v. Twaddle, 81 Me. 273, 17 Atl. 66.

[163] Connoss v. Meir, 2 E. D. Smith (N. Y.) 314. And see Pearpoint v. Henry, 2 Wash. (Va.) 192; Fry v. Baxter, 10 Mo. 302; Iasigi v. Shea, 148 Mass. 538, 20 N. E. 110.

[164] Dietus v. Fuss, 8 Md. 148; Glenn v. Garrison, 17 N. J. Law, 1.

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.[165]

The Plaintiff's Right.

We have already shown in another place 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.[166] 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, certainty to a common intent being all that is required.[167]

SAME—THE CONVERSION.

142. The declaration should also allege a conversion of the property by the defendant, to his own use, contrary to the right of the plaintiff.

We have fully discussed this in showing when this form of action will lie. In showing when the action of trover or trover and conversion is a proper remedy, we have seen that a conversion is necessary, and have also considered the various acts which will constitute a conversion.[168] Unless there has been a conversion by the defendant the action cannot be maintained, and therefore a declaration is fatally defective if it does not set forth facts showing a conversion.

[165] See Peters v. Johnson, Minor (Ala.) 100.

[166] Ante, p. 68.

[167] See post, p. 417. And see Baals v. Stewart, 109 Ind. 371, 9 N. E. 403, as to the statement under the Indiana Code.

[168] Ante, p. 68.

The manner of alleging the conversion is not by setting out the 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.

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.[169] In these cases the fact of demand must be alleged in the declaration, or no conversion will be shown.

SAME—THE DAMAGES.

143. The declaration must state the damages which are the legal and natural consequence of the conversion, and the amount laid should cover the actual loss.

144. The damages should be alleged according as they are general or special.

The amount of damages which are recoverable in this action is usually measured by the value of the goods at the time of the conversion, with interest;[170] but the plaintiff is entitled to include also any other loss that is its legal and natural consequence, if not too remote, and the statement should therefore be large enough to cover the actual damage inflicted.[171] 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

[169] Ante, p. 69.

[170] Waller v. Bowling, 108 N. C. 289, 12 S. E. 990. See Leoncini v. Post (Com. Pl. N. Y.) 13 N. Y. Supp. 825.

[171] 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. 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. 592; Ramsey v. Hurley, 72 Tex. 194, 12 S. W. 56.

allegation of the declaration must still be made.[172] As in other actions, the form of laying damages will depend upon whether they are general or special.[173]

TRESPASS.

145. The essential allegations of the declaration in trespass are:[174]

(a) For injuries to the person:

(1) The injury.

(2) The damages.

(b) For injuries to real or personal property, or to relative rights:

(1) The inducement.

(2) The injury.

(3) The damages.

SAME — INDUCEMENT.

146. 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 absolute rights no statement of the right is necessary.

147. The statement must show such possession, actual or constructive, as is sufficient to sustain the action.

148. The property must be described sufficiently for identification, but the plaintiff's title or interest may be generally stated.

The Property Affected.

In stating all of the plaintiff's cause of action which is preliminary to the injury, it is necessary, as in other actions of this character, to describe the property affected, whether real or personal,

[172] Stirling v. Garritee, 18 Md. 468. And see Yale v. Saunders, 16 Vt. 243; Hart v. Skinner, Id. 138; Green v. Sperry, Id. 390; Dahill v. Booker, 140 Mass. 308, 5 N. E. 496; Morton v. Frick Co., 87 Ga. 230, 13 S. E. 463.

[173] See post, p. 489.

[174] See Append., Forms Nos. 11–13.

in such a manner as to clearly identify it, and to lay a proper foundation for the assessment of damages. And, where the action is per quod servitium amisit, the nature and existence of the service of which the plaintiff has been deprived must appear.[175]

The Plaintiff's Right.

We have already shown in another place [176] what right the plaintiff must have had at the time of the defendant's act in order to support the action of trespass. We have seen that he must have had, in the case of injury to real or personal property, a general or special property in, and the actual or constructive possession of, the property at the time of the injury. Such a right and possession must therefore be alleged in the declaration.[177]

In some jurisdictions, as we have seen, it is held that, while a person may maintain trespass for an injury to personal property of which he had the constructive possession, he cannot maintain trespass for an injury to real property unless he had the actual possession; but in most jurisdictions no such distinction is made, and a constructive possession will support the action in either case.[178] Where the distinction is recognized, the declaration in an action for injury to real property must show actual possession.

SAME—THE INJURY.

149. The declaration must state the wrong or injury contrary to 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 injury complained of, whether to the person or property of the

[175] See the requirements as to description in the other actions of tort; and the "Rules as to Certainty," post, p. 379. See, also, Wolf v. Holton, 61 Mich. 550, 28 N. W. 524.

[176] Ante, p. 50.

[177] Dauvet v. Collingdell, 2 Show. 395; Burser v. Martin, Cro. Jac. 46.

[178] Ante, p. 65.

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;[179] and it must show that the injury was direct and immediate, and not merely consequential.

These questions have already been fully discussed in showing when the action of trespass will lie.[180] It is only necessary to state the injury in a general manner. The particular circumstances of the defendant's misconduct need not be set out.

SAME—THE DAMAGES.

150. The declaration must also allege the damages which are the legal and natural consequences of the injury.

151. The form of statement must be according to their nature, as general or special.

As this is one of the actions whose main object is the recovery of damages, the declaration must 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, and, to recover them, they must be pleaded.[181] They will be generally or particularly stated, as we shall see elsewhere, according as they are general or special.[182]

[179] Day v. Muskett, 2 Salk. 640.

[180] Ante, p. 50.

[181] 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 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. 541, 44 N. W. 1027; Moore v. Baylies, 56 Hun, 647, 10 N. Y. Supp. 62.

[182] See post, p. 489.

REPLEVIN.

152. The essential allegations of the declaration where a declaration is used in the particular practice are:

(a) The inducement.

(b) The unlawful taking and detention; or, by statute in some states, an unlawful detention only.

(c) The damages.

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 the writ takes its place. In these cases the writ must comply with the rules above stated, for it must, like a declaration, show facts constituting a cause of action.

SAME—THE INDUCEMENT.

153. The declaration must state the matter or thing taken and detained, or (by statute) merely detained, and the plaintiff's right thereto.

154. 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, it is obvious that 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.[183] The plaintiff should count on the identical chattels replev-

[183] 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.

ied, 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;[184] and the declaration should also state their value correctly, though the strictness formerly necessary is not now required.[185] 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.[186]

The Plaintiff's Right.

As we have seen in another connection, it is essential, in order to support this action, that the plaintiff shall have, at the time of suit, a general or special property in the chattel, entitling him to the immediate possession.[187] Such a right being essential, it must appear in the declaration, or in the writ in those jurisdictions where the writ takes the place of a declaration.

SAME—THE INJURY.

155. The declaration must show such an injury 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,[188] 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

447; Crum v. Elliston, 33 Mo. App. 591; Lockhart v. Little, 30 S. C. 326, 9 S. E. 511; Hall v. Durham, 117 Ind. Sup. 429, 20 N. E. 282.

[184] See Root v. Woodruff, 6 Hill (N. Y.) 418. And see Sanderson v. Marks, 1 Har. & G. (Md.) 252.

[185] See Pomeroy v. Trimper, 8 Allen (Mass.) 398; Thomas v. Spofford, 46 Me. 408. And, as to the effect of the statement, see Bailey v. Ellis, 21 Ark. 488.

[186] See the "Rules as to Certainty," post, p. 379.

[187] Ante, p. 107.

[188] Ante, p. 107.

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,[189] 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.

At common law this action was a local one, and the place of taking was a material fact, to be truly laid and proved.[190] 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 an 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.[191]

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.[192] 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.[193]

189 Ante, p. 107.
190 Gardner v. Humphrey, 10 Johns. (N. Y.) 53.
191 Abercombie v. Parkhurst, 2 Bos. & P. 481.
192 Ante, p. 117.
193 Ante, p. 118.

SAME—THE DAMAGES.

156. The declaration must also state the damages which are the legal and natural consequences of the wrongful act.

157. The allegation 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.[194] An allegation of some damage is always essential,[195] 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. The amount claimed should therefore be governed by the general rule.[196]

EJECTMENT.

158. The essential allegations of the declaration are: [197]

(a) The inducement.

(b) The wrongful dispossession.

(c) The damages.

SAME—THE INDUCEMENT.

159. 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.

[194] See Washington Ice Co. v. Webster, 62 Me. 341.

[195] Faget v. Brayton, 2 Har. & J. (Md.) 350.

[196] Post, p. 487.

[197] See Append. Form No. 17.

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.[198]

The Plaintiff's Right.

As we have shown in another connection, the plaintiff, to maintain ejectment, must have a legal title, and the 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.

SAME—THE INJURY.

160. 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

[198] Seeley v. Howard, 23 Mich. 11; Barclay v. Howell, 6 Pet. (U. S.) 498; 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; post, p. 393, as to "Certainty." And see Lazar v. Caston, 67 Miss. 275, 7 South. 321.

ouster or dispossession, and such adverse possession or claim, as is necessary in the particular jurisdiction to a maintenance of the action.

SAME—THE DAMAGES.

161. 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 possession;[199] and in such case the damages alleged must include a sum sufficient to cover these.[200] 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.[201]

TRESPASS FOR MESNE PROFITS AFTER EJECTMENT.

162. The essential allegations of the declaration are:

(a) The inducement.

(b) The ejectment.

(c) The damages.

[199] Garner v. Jones, 34 Miss. 505. And see Danziger v. Boyd, 54 N. Y. Super. Ct. 365; Herreshoff v. Tripp, 15 R. I. 92, 23 Atl. 104.

[200] See Battin v. Bigelow, Pet. C. C. 291, Fed. Cas. No. 1,108; Bayard v. Inglis, 5 Watts & S. (Pa.) 465.

[201] Post, p. 487.

SAME—THE INDUCEMENT.

163. 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,[202] as the defendant might otherwise compel him to make what is called a new assignment, or restatement of the grounds of his action,[203] by pleading "liberum tenementum" or the common bar.[204] 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 must be correctly alleged.[205] 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,[206] 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 com-

202 See Higgins v. Highfield, 13 East, 407; post, c. 8.

203 See post, p. 327.

204 See post, p. 411.

205 See Higgins v. Highfield, 13 East, 407.

206 Chirac v. Reinicker, 11 Wheat. (U. S.) 280; Lion v. Burtis, 5 Cow. (N. Y.) 408; Whittington v. Christian, 2 Rand. (Va.) 363.

pelled to prove his title as in any action.[207] 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.

164. 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;[208] 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.

165. 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 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;[209] but the plaintiff may add to

[207] Aslin v. Parkin, 2 Burrows, 665; Jackson v. Randall, 11 Johns. (N. Y.) 405; West v. Hughes, 1 Har. & J. (Md.) 574.

[208] See Higgins v. Highfield, 13 East, 407.

[209] See Jackson v. Loomis, 4 Cow. (N. Y.) 168; Green v. Biddle, 8 Wheat. (U. S.) 1; Den v. McShane, 13 N. J. Law, 35.

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.[210] And this case is also an instance within the general rule that the recovery cannot exceed the damages laid.

[210] Post, p. 489. And see Stewart v. Camden & A. R. Co., 33 N. J. Law, 115; New Orleans v. Gaines, 15 Wall. (U. S.) 624; Huston v. Wickersham, 2 Watts & S. (Pa.) 308.

CHAPTER VI.

PRODUCTION OF THE ISSUE.

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THE RULES GENERALLY.

166. The essential object of pleading is the formation of an issue between the parties. Without an issue there can be no valid trial. The following may be stated as fundamental rules by which the production of an issue is effected:

(a) RULE I. After the declaration, the parties must at each stage demur, or plead by way of traverse or by way of confession and avoidance.

(b) RULE II. Upon a traverse issue must be tendered.

(c) RULE III. Issue, when well tendered, must be accepted.

The pleadings, as we have seen, are so conducted as always to evolve some question, either of law or fact, disputed between the parties, and mutually proposed and accepted by them 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,

[1] Hubler v. Pullen, 9 Ind. 273. And see Munday v. Vail, 34 N. J. Law, 418; Israel v. Reynolds, 11 Ill. 218. See Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773.

where the parties proceed to trial, will be cured by a verdict, as it will be presumed that the issue was accepted.[2]

RULE I.

167. 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.

EXCEPTIONS—(a) Where a dilatory plea is proper.

(b) Where an estoppel may be pleaded.

(c) Where a new assignment is necessary.

168. A demurrer tenders an issue in law, which must always be accepted. The formation of the issue is thus completed, and judgment is rendered upon it.

169. A pleading tenders an issue in fact, to be accepted, demurred to, or pleaded to by the opposing party. The continuation of the proceedings in the above form ultimately results in the complete production of the issue upon which a trial is had.

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]

(2) If the party pleads, it must either be by way of traverse or by way of confession and avoidance. If his pleading amount to neither

[2] Everitt v. De Groff, 1 Cow. (N. Y.) 213; Gillespie v. Smith, 29 Ill. 476; Hazen v. Pierson, 83 Ill. 241; Whiting v. Cochran, 9 Mass. 532; Shaw v. Redmond, 11 Serg. & R. (Pa.) 27.

[3] Steph. Pl. (Tyler's Ed.) 156.

of these modes of answer, or if it amounts to both, it is open to demurrer on that ground.[4] This branch of the rule is subject to exceptions, which we shall presently explain, in cases where a dilatory plea is proper,[5] where an estoppel may be pleaded,[6] and where a new assignment is necessary.[7]

To understand the effect of this rule, it is necessary to consider at some length the doctrines that relate both to demurrers and to pleadings.

THE DEMURRER.

170. 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.

171. 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.

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,[8] 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.[9] It may be taken by either party,

[4] Post, p. 354; Landis v. People, 39 Ill. 79.

[5] Post, p. 325.

[6] Post, p. 326.

[7] Post, p. 327.

[8] Bac. Abr. "Pleas," N 1; Halton v. Jeffreys, 10 Mod. 280.

[9] 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 to any part of the pleadings, until issue joined;[10] 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.[11] It may be remarked here, generally, that a violation of any of the rules of pleading which are hereinafter stated 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 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.

Joinder in Demurrer.

The tender of an issue in law by demurrer is necessarily accepted by the other party; for he has no ground of objecting either to the question itself or to the proposed mode of decision.[12] A question on the legal sufficiency of the declaration, for instance, raised by a demurrer thereto, cannot be declined by the plaintiff without abandoning his own form of proceeding; and with respect to the mode of decision, that is, the judgment of the court, there is, in matters of law, no other method. The opposite party is therefore bound to accept, or join in the issue of law. This he does by a set form of words, called "joinder in demurrer."[13]

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 Hicok v. Coates, 2 Wend. (N. Y.) 419. And compare Gillespie v. Wesson, 7 Port. (Ala.) 454; Auditor v. Woodruff, 2 Ark. 73.

[10] Co. Litt. 72a; Bac. Abr. "Pleas," N 1.

[11] Colt v. Bishop of Coventry, Hob. 164; Stout v. Keyes, 2 Doug. (Mich.) 184; Wallace v. Holly, 13 Ga. 389. See Append. Forms Nos. 19, 20.

[12] Steph. Pl. (Tyler's Ed.) 92; Brown v. Jones, 10 Gill & J. (Md.) 334, 345.

[13] See Append., Form No. 40, for form of joinder in demurrer.

FORM OF DEMURRER.

172. A demurrer, as to its form, may be either
(a) General, or
(b) Special.

173. 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.

174. 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.[14] But by two English statutes[15] 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 the objections must be specifically stated.[16] These statutes do not apply where the demurrer is to a

[14] 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.

[15] 27 Eliz. c. 5; 4 Anne, c. 16.

[16] King v. Rotham, Freem. 38; Heard v. Baskerville, Hob. 232; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630; Steffe v. Old Colony R. Co., 156 Mass. 262,

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." [17]

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." [18] It therefore follows that, unless the objection be clearly of a substantial kind, the safer course is to demur specially in all cases.[19] 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.[20]

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.

30 N. E. 1137; Gordon v. Bankard, 37 Ill. 147; Cover v. Armstrong, 66 Ill. 267; Cook v. Scott, 1 Gilm. (Ill.) 333. For general demurrer, see Append., Form 19. For special demurrer, see Form No. 20.

[17] Walden v. Holman, 2 Ld. Raym. 1015.

[18] See State v. Peck, 60 Me. 498.

[19] 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. And see post, p. 375. 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.

[20] See, as to general demurrers, Tresham v. Ford, Cro. Eliz. 830; Cole v. Maunder, 2 Rolle, Abr. 548; Hodges v. Steward, 3 Salk. 68; George v. Thomas, 16 Tex. 74; Lumpkin Co. 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.

A demurrer may be taken either to the whole or to a part of the declaration. Where a declaration contains several counts or statements of causes of action, or several breaches of the contract or 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.[21] The rule applies with equal force to a single count, a part only of which is bad, where the matters alleged are divisible in their nature.[22] 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.[23]

EFFECT OF DEMURRER—AS AN ADMISSION.

175. 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 strict meaning of the rule that a demurrer admits all matters of fact that are sufficiently pleaded is that, as the party has had his option to plead or demur, he shall be taken, in adopting the latter alternative, to admit that he has no ground for a denial or traverse. The demurrer is consequently an admission that the facts alleged are true,[24] and the only question for the court therefore is

[21] 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.

[22] Benbridge v. Day, 1 Salk. 218; Greathouse v. Dunlap, 3 McLean, 303, Fed. Cas. No. 5,742.

[23] Foxwist v. Tremaine, 2 Saund. 210a; Fankboner v. Fankboner, 20 Ind. 62.

[24] J. S. of Dale v. J. S. of Vale, Jenk. Cent. 133; Barber v. Vincent, Freem. 531; Lamphear v. Buckingham, 33 Conn. 237; 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.

whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged.[25]

The rule is subject, however, to the qualification that the matter of fact must be sufficiently pleaded.[26] It is said that, if the facts are not alleged in a formal and sufficient manner, a demurrer does not operate as an admission,[27] 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.[28] A demurrer only admits the facts that are pleaded. It does not admit conclusions, either of law or of fact, which the adverse party may have seen fit to draw in his pleading.[29] Nor will it admit an averment contrary to what before appears certain on the record,[30] or an averment which the pleader was estopped to make;[31] nor an averment which the court can judicially know to be impossible or untrue;[32] nor an immaterial averment.[33]

Though a demurrer is thus held to admit facts well pleaded, its operation in this respect is only in view of the proposed determina-

[25] 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.

[26] 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.

[27] Com. Dig. "Pleader," 2, 6.

[28] 1 Archb. N. P. 318.

[29] Millard v. Baldwin, 3 Gray (Mass.) 484; Rex 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. San Jose, 24 Cal. 602. And see People v. Hatch, 33 Ill. 9; Compher v. People, 12 Ill. 290.

[30] Com. Dig. "Pleader," 2, 5, 6; Tresham v. Ford, Cro. Eliz. 830.

[31] Lowes, Pl. 170.

[32] 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.

[33] Scovill v. Seeley, 14 Conn. 238.

tion 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.[34]

SAME—AS OPENING THE RECORD.

176. 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) The right will be considered in regard to substance, and not form.

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.[35] Thus, on demurrer to the rep-

[34] Stinson v. Gardiner, 33 Me. 94; Tompkins v. Ashby, Moody & M. 32; Pease v. Phelps, 10 Conn. 62; Scovill v. Seeley, 14 Conn. 238; 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.

[35] Piggot's Case, 5 Rep. 29a; Anon., 2 Wils. 150; Ridgeway's Case, 3 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; Bishop v. Quintard, 18 Conn. 395; Claggett v. Simes, 31 N. H. 22; Bates v. Cort, 2 Barn. & C. 474; Townsend v. Jennison, 7 How. 706; 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; Dupee v. Blake, 148 Ill. 453, 35 N. E. 867; Mount Carbon Coal Co. v. Andrews, 53 Ill.

lication, 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.[36] The demurrer, 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.[37]

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.[38]

(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

176; McFadden v. Fortier, 20 Ill. 509; Snyder v. State Bank, Beech. Breese (Ill.) 161; Illinois Fire Ins. Co. v. Stanton, 57 Ill. 354; Haynes v. Lucas, 50 Ill. 436.

[36] Piggot's Case, 5 Rep. 29a, and other cases cited above.

[37] Steph. Pl. (Tyler's Ed.) 160.

[38] Bellasyse v. Hester, 2 Lutw. 1592; Routh v. Weddell, Id. 1667; Hastrop v. Hastings, 1 Salk. 212; Ryan v. May, 14 Ill. 49; Hunter v. Bilyeu, 39 Ill. 367; Knott v. Clements, 13 Ark. 335; Ellis v. Ellis, 4 R. I. 110; Crawford v. Slade, 9 Ala. 887; Price v. Grand Rapids & I. R. Co., 18 Ind. 137.

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 maintain his action if he had alleged, by way of breach, that the defendant had prevented the arbitrators from making their award.[39]

(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.[40]

(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.[41]

[39] Marsh v. Bulteel, 5 Barn. & Ald. 507. And see Head v. Baldrey, 6 Adol. & E. 468.

[40] 32 Hen. VIII. c. 30. See Tippet v. May, 1 Bos. & P. 411.

[41] Humphreys v. Bethily, 2 Vent. 198-222; Com. Dig. "Pleader," E, 1; Id. F, 4.

JUDGMENT ON DEMURRER.

177. The judgment rendered upon a demurrer is the judicial determination by the court, without a jury, of an issue of law only.

178. 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.

179. 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.[42] 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.[43] In modern practice, however, and under the statutes, it is otherwise, and he is very generally allowed to plead over. The common-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

[42] Humphreys v. Bethily, 2 Vent. 222; State v. Peck, 60 Me. 498; Martin v. Iron Works, 35 Ga. 320; Brown v. Jones, 10 Gill & J. (Md.) 334; Little v. Perkins, 3 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.

[43] State v. Peck, supra.

new action. If sustained, the defendant was allowed to plead over. The judgment was "respondeat ouster." [44]

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.[45] 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.

PLEADING OVER WITHOUT DEMURRER.

180. 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.

[44] Walden v. Holman, 2 Ld. Raym. 1015; Nowlan v. Geddes, 1 East, 634; Casey v. Cleveland, 7 Port. (Ala.) 444; 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.

[45] See the cases above cited. 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.

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.[46] 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,[47] motion for judgment non obstante veredicto,[48] or writ of error,[49] 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.

181. 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.

182. 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.

183. The defect may be thus supplied either—

(a) Expressly, or

(b) By implication.

[46] Ante, p. 266. [47] Ante, p. 188. [48] Ante, p. 190. [49] Ante, p. 196.

Faults in pleading 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.[50] As to objections 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;"[51] 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. No such implied admission, however, will be sufficient to cure a defect in substance.[52] An omission of that character must be expressly supplied.[53]

[50] 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; 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; McNeill v. Arnold, 17 Ark. 154; Barrow v. Burbridge, 41 Miss. 622; Mills v. Carpenter, 10 Ired. (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.

[51] Per Holt, C. J., Anon., 2 Salk. 519.

[52] White v. Delaven, 21 Wend. (N. Y.) 26; Roberts v. Dame, 11 N. H. 226.

[53] See Slack v. Lyon, 9 Pick. (Mass.) 62; Wallace v. Curtiss, 36 Ill. 156; Elliott v. Stuart, 15 Me. 160.

AIDER BY VERDICT.

184. 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.[54] 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

[54] Lightfoot v. Brightman, Hut. 54; 1 Saund. 228b. And see Merrick v. Trustees of the Bank of the 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; 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; 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. 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.

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 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.[55] 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." [56]

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

[55] Jackson v. Pesked, 1 Maule & S. 234. And see Smith v. Eastern R. Co., 35 N. H. 363; Flanders v. Stewartstown, 47 N. H. 549; Wallace v. Curtiss, 36 Ill. 156; Helman v. Schroeder, 74 Ill. 158; Ladd v. Pigott, 114 Ill. 647.

[56] 1 Saund. 228a.

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.[57]

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.[58]

FORMAL DEFECTS CURED BY STATUTE.

185. 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.

[57] Rushton v. Aspinwall, 2 Doug. 683; Jackson v. Pesked, 1 Maule & S. 234; Nerot v. Wallace, 3 Term R. 25; Weston v. Mason, 3 Burrows, 1725; White v. Concord R. Co., 30 N. H. 188; Colebrook v. Merrill, 46 N. H. 160; Miles v. Oldfield, 4 Yeates (Pa.) 423; Richardson v. Farmer, 36 Mo. 35; Roper v. Clay, 18 Mo. 383; 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. Compare Abrahams v. Jones, 20 Ill. App. 83. Statement of a wrong venue, Barlow v. Garrow, Minor (Ala.) 1; a defective consideration, Hendrick v. Sceley, 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. See, also, Andros v. Childers, 14 Or. 447, 13 Pac. 65; McCune v. Norwich City Gas Co., 30 Conn. 521; 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. And see W. U. Tel. Co. v. Longwill (N. M.) 21 Pac. 339.

[58] Easton v. Pratchett, 4 Tyrw. 472.

In addition to the two 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,[59] the cumulative effect of which is to provide that neither after verdict, judgment by confession, nil dicit, nor non sum informatus, can 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.

186. 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

[59] 27 Eliz. c. 5; 4 Anne, c. 16. These statutes form a part of our common law.

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.[66]

THE PLEADINGS.

187. If the declaration or other oppposing 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—

(a) By way of traverse, or

(b) By way of confession and avoidance.

EXCEPTIONS—(1) Where a dilatory plea is proper.

(2) Where an estoppel may be pleaded.

(3) Where a new assignment is necessary.

[66] Steph. Pl. (Tyler's Ed.) 165, 166.

This rule has already been stated in another place, but we must take it up here, and go into it more at length. If the party pleads, instead of demurring, it must, as a general rule, be either by way of traverse, or by way of confession and avoidance. If his pleading amounts to neither of these modes of answer, or if it amounts to both, it is open to demurrer on that ground.[61] This rule, as has been once before stated, is subject to exceptions, which we shall presently explain, in cases where a dilatory plea, as a plea to the jurisdiction or in abatement, may be interposed;[62] where an estoppel may be pleaded;[63] and where a new assignment is necessary.[64] We will first take up and explain the plea by way of traverse, and its several forms, and then we will consider pleas by way of confession and avoidance.

THE TRAVERSE.

188. A traverse in pleading is a direct denial on one side of some material matter of fact before alleged on the other. Its office is to bring the parties to an issue by reducing the mutual allegations, as far as possible, to the single affirmative and negative which produces such issue. It may be taken to any part of the pleadings, and regularly consists of a tender of issue.

Where a pleading 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 (thus,

[61] Steph. Pl. (Tyler's Ed.) 156; Landis v. People, 39 Ill. 79; Conger v. Johnston, 3 Denio (N. Y.) 96.

[62] Post, p. 325.

[63] Post, p. 326.

[64] Post, p. 327.

for instance: "And of this he puts himself upon the country"), proposing either a trial by the country,—that is, by a jury,—or such other method of decision as belongs to that particular point.[65] 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 effect of this demurrer, however, would only be to postpone the acceptance of issue by a single stage, for by the demurrer an issue in law is tendered, which must be accepted.

FORMS OF TRAVERSE.

189. The different forms of traverse now in use 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.

[65] Steph. Pl. (Tyler's Ed.) 90. See Append. Forms Nos. 25–29, 36, 39, for forms of traverse, and tender of issue.

THE COMMON OR SPECIFIC TRAVERSE.

190. 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. Thus, it may be used in special assumpsit, either to deny the breach by the defendant,[66] or to deny the happening of a condition precedent to the plaintiff's right to sue.[67] So in general assumpsit it is the proper method to deny the breach, and in trover or in trespass for injuries to property, to deny the possession.[68] 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,

[66] De Pinna v. Polhill, 8 Car. & P. 78.

[67] Smith v. Parsons, 8 Car. & P. 199.

[68] See Jones v. Chapman, 18 L. J. Exch. 456. And so where the action in trespass is per quod servitium amisit. See Torrence v. Gibbins, 5 Q. B. 297.

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.

191. The general issue is the proper method of denial where a contradiction of the whole or the principal part of the allegations of the declaration is intended.

192. It denies by a general form of expression, instead of in the terms of the allegation traversed, and enables the defendant to contest in evidence, and without specific averments of the defense to be asserted, all allegations which the plaintiff may be required to prove to sustain his action.

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 notice. It is that of the general issues. In most of the usual actions there is, at common law, an appropriate form of the plea fixed by ancient usage, as the proper method of traversing the declaration in such actions where the defendant means to deny the whole or the principal part of its allegations.[66] This form of the traverse is called the "general issue" in

[66] 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 extended in its scope, and 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.

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 usually tendered by a common traverse. While it tenders issue, like the common traverse, it differs from the common traverse in that it denies by a general form of expression, instead of in the terms of the allegation traversed.

The effect attending the use of this plea is an important one, 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 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. It is one of the most noticeable instances of the tendency of the system of pleading towards simplicity and brevity in the arrangement of the mutual allegations of the parties for the trial. It is the most common form of the traverse in use at the present time.

FORM AND EFFECT OF THE GENERAL ISSUE.

193. The general issue may be pleaded in all forms of common-law actions save that of account render, though its scope in each will depend upon the particular action.

194. In actions ex contractu it denies only the inducement or statement of the plaintiff's right, but in actions ex delicto the denial is of the injury committed.

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, according to the principle on which it is based, an allowed relaxation in modern practice having given it a much more extended application than at common law. To do this, it is necessary to examine the language of the different general issues in the particular actions.

SAME—IN ASSUMPSIT.

195. "Non assumpsit" is the general issue in assumpsit, whether special or general, and is a formal denial of the express promise or contract alleged, or of the facts from which such promise may be legally implied. It denies only the inducement or statement of the plaintiff's right, and not the breach.*

In the use of this traverse in this form of action, an innovation has been introduced, which extends its scope and application considerably beyond that which belongs to it in principle. As has been seen,[70] the action of assumpsit may be founded upon a promise, either express or implied, the latter being one raised by law in consideration of an existing debt or liability. The rule has always been that when the promise relied on was implied, and the defendant pleaded the general issue, he was at liberty to show any circumstances by which the debt or liability was disproved; as, for example, performance or a release. But this was only in the case of implied assumpsit. Where an express promise was shown, the defendant, in conformity with the language and strict principle of his plea, was only permitted to contest, under this issue, the fact of the promise, or at most to show that it was a promise void in law by reason of some illegality.[71] The application of the rule was later, however, extended to express promises also; and at length, in all actions of assumpsit, the defendant was permitted to show, not only that no promise was in fact made or that it was illegal, but generally to prove any matter of defense whatever tending to show that the plaintiff never had a cause of action, or any subsisting one at the time of suit brought.[72] The practice became firmly established, and

* See Append. Form No. 26.

[70] Ante, p. 11.

[71] Fits v. Freestone, 1 Mod. 210.

[72] See Falconer v. Smith, 18 Pa. St. 130. The exceptions to this were tender, set-off when notice was not given with the plea, bankruptcy, or insolvency, and the statute of limitations, which were and are required to be specially pleaded.

is followed at the present time, though the deviation from principle is noticeable, since many of the matters of defense thus allowed under the general issue really confess and avoid the plaintiff's allegations, and should, strictly, be so pleaded. This would be the case where the defense was a release or performance, which are plainly of that nature;[73] and, even when such matters have rather the effect of a traverse than of confessing and avoiding, they are almost always inconsistent with the form and language of the general issue in this action, which purports to deny no part of the declaration but the promise.[74]

In Special Assumpsit.

As what has been above stated may be too general to be of practical use to the reader, a more particular statement of what is placed in issue by this plea in the two forms of assumpsit will be proper here. Where the action is in special assumpsit, as its theory contemplates an express contract, including the express promise of the defendant, the general denial of "non assumpsit" is a denial of the contract as alleged, covering all that, as we have before seen, is covered by what is termed the "inducement" or "statement" of the plaintiff's right.[75] Under it, any proof is proper showing that no such contract as is stated was in fact made;[76] 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;[77] or that the promise of the defendant is not the agreement pleaded; or that he made no promise at all.[78] The denial

[73] 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.

[74] See Lyall v. Higgins, 4 Q. B. 528.

[75] Ante, p. 206.

[76] 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. St. 130; Hunt v. Test, 8 Ala. 713.

[77] Craig v. Missouri, 4 Pet. (U. S.) 436; Hilton v. Burley, 2 N. H. 193; Talbert v. Cason, 1 Brev. (S. C.) 298.

[78] See Metzner v. Bolton, 9 Exch. 518; Latham v. Rutley, 8 Dowl. & R.

does not, however, extend to deny the breach [79] 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.

In General Assumpsit.

So, in general assumpsit, though the form of declaring is upon the debt resulting from the contract, instead of upon the contract itself, the theory is the same, and the general form of denial includes in its scope the facts which constitute the debt, the implied promise, an unexpired credit, which would negative the implication of a promise, or conditions affecting the debt, all of which are included in the inducement, and as to all of which proof is admissible.[80] But, as in special assumpsit, it extends no further, and does not deny any of the matters excluded above, which require a specific denial.

SAME—IN DEBT ON SIMPLE CONTRACTS AND STATUTES.

196. The proper general issue in debt on simple contracts and statutes is "nil debet," which is a formal denial of the facts from which the debt may be imposed by law. It denies only the inducement, and does not extend to the breach.*

This is the general form of traverse in this action, where it is not founded on a specialty or a record; and it is applicable alike whether the debt arises as a simple contract right 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

211; Wailing v. Toll, 9 Johns. (N. Y.) 141; Vasse v. Smith, 6 Cranch (U. S.) 231; Stansbury v. Marks, 4 Dall. (Pa.) 130; Wilt v. Ogden, 13 Johns. (N. Y.) 56; Baylies v. Fettyplace, 7 Mass. 325; Britton v. Bishop, 11 Vt. 70; Carvill v. Garrigues, 5 Pa. St. 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.

[79] Smith v. Parsons, 8 Car. & P. 199.

[80] See Bussey v. Barnett, 9 Mees. & W. 312; Broomfield v. Smith, 1 Mees. & W. 542; Gardner v. Alexander, 3 Dowl. 146; and the cases cited under the general issue in "Special Assumpsit."

* See Append. Form No. 26.

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 general issue of a narrower kind—for example, that of non est factum—would in its appropriate actions 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.[81] The plea is restricted to such matters. It will not, for instance, allow proof of matters confessing and avoiding the liability, and it does not deny the breach.[82] 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.

SAME—IN DEBT ON SPECIALTY.

197. 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 matters of the inducement only, and not the breach alleged.†

[81] Fidler v. Hershey, 90 Pa. St. 363; Stilson v. Tobey, 2 Mass. 521; Burnham v. Webster, 5 Mass. 266; Bullis v. Giddens, 8 Johns. (N. Y.) 64; Bussey v. Barnett, 9 Mees. & W. 312; Dartmouth College v. Clough, 8 N. H. 22; Lindo v. Gardner, 1 Cranch (U. S.) 343. And see McKyring v. Bull, 16 N. Y. 298.

[82] Phelps v. Becker, 10 Mass. 267. See the cases cited in note 81, supra.

† See Append. Form No. 28.

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.[83] Under "non est factum" the defendant may show either that he never executed the deed in point of fact, or that it is absolutely void in law,[84] but not matters which show that it was merely voidable. Facts of the latter class must be specially pleaded.[85] 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.[86] The general issue here also traverses only the inducement or statement of the plaintiff's right, and does not include the breach; but, as the latter is now only a formal allegation, even a specific traverse would seem to be unnecessary.[87]

If the action is not founded upon the deed, "nil debet" is the proper form of the general issue, as the latter then would not involve the prohibited contradiction of a person's deed by the person himself.[88]

SAME—IN DEBT ON JUDGMENTS.

198. The proper general issue in debt on judgments is "nul tiel record," which denies the existence of the record alleged. The denial extends only to the inducement, and not to the breach.

Although in a different form, the general denial here is really of the fact from which the debt is imposed by law; and under it may

[83] Boynton v. Reynolds, 3 Mo. 79. See Warren v. Consett, 2 Ld. Raym. 1500; Russell v. Hamilton, 3 Ill. 56.

[84] Yates v. Boen, 2 Strange, 1104; Piggot's Case, 11 Coke, 26b; Anthony v. Wilson, 14 Pick. 303; Van Valkenburgh v. Rouk, 12 Johns. (N. Y.) 337.

[85] ~~Collins v. Blantern, 2 Wils. 347.~~ See Marine Ins. Co. v. Hodgson, 6 Cranch, 219.

[86] Whelpdale's Case, 5 Coke, 119a.

[87] See People v. Rowland, 5 Barb. (N. Y.) 449; Utter v. Vance, 7 Blackf. (Ind.) 514.

[88] 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.) 64.

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.[89] 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;[90] 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.

SAME—IN COVENANT.

199. The general issue in covenant is "non est factum," which is a formal denial that the deed is the deed of the defendant. It is a denial of matter of the inducement only, and not of the breach.*

The general issue of "non est factum" in covenant only puts the deed in issue in the same manner as in debt on specialty, and admits the same proof only.[91] 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.[92]

[89] See Bennet 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.) 64; Warren v. Flagg, 2 Pick. (Mass.) 448, and cases cited; Starbuck v. Murray, 5 Wend. (N. Y.) 148; Mills v. Duryee, 7 Cranch, 481.

[90] Cardesa v. Humes, 5 Serg. & R. (Pa.) 65; McFarland v. Irwin, 8 Johns. (N. Y.) 61. And see Gray v. Pingry, 17 Vt. 419; Gay v. Lloyd, 1 G. Greene (Iowa) 78; Cannon v. Cooper, 39 Miss. 784.

* See Append. Form No. 26.

[91] It only puts in issue the fact of the sealing and execution, and, when pleaded, admits all material averments in the declaration. 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.

[92] The special pleas most common in covenant are:

"Non infregit conventionem," which denies the breach, but not the deed. It is not the general issue, therefore, but a plea in bar. Phelps v. Sawyer, 1

SAME—IN DETINUE.

200. "Non detinet" is the general issue in detinue, and is a formal denial of the detention. It denies the detention only, and not the inducement.†

In this action, 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 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,[93] but not evidence in justification, as that the goods were pledged to the defendant,[94] or to establish a lien upon them in his favor,[95] as the detention would be thereby admitted. The latter are special defenses, but it seems that the statute of limitation is not.[96]

SAME—IN TRESPASS.

201. "Not guilty" is the general issue in trespass, and is a formal denial of the trespasses alleged. It denies only the acts alleged, and not the inducement.*

Alk. (Vt.) 150; Roosevelt v. Fulton, 7 Cow. (N. Y.) 71. But this will not be a good plea unless the breach is in the affirmative. Bac. Abr. "Covenant," L.

"Omnia performavit," which is a good plea in bar when all the covenants are in the affirmative. Reed v. Hobbs, 3 Ill. 297.

"Covenants performed" is pleaded in some states. See the decisions of Pennsylvania, Alabama, and Illinois as to its effect.

† See Append. Form No. 26.

[93] 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.

[94] Com. Dig. "Pleader," 2, X, 3; Richards v. Frankum, 6 Mees. & W. 420.

[95] Phillips v. Robinson, 4 Bing. 106; Richards v. Frankum, supra.

[96] Morrow v. Hatfield, 6 Humph. (Tenn.) 108; Elam v. Bass' Ex'rs, 4 Munf. (Va.) 301.

* See Append. Form No. 26.

In trespass, the general issue, "not guilty," amounts to a denial of the trespasses alleged, and no more. Under it, therefore, the defendant can show such matters only as directly controvert the fact of his having committed the acts complained of.[97] Matter of justification and excuse would admit them, and must therefore be specially pleaded.[98] 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.[99] 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.[100] If the defense is

[97] See Gibbons v. Pepper, 1 Ld. Raym. 38; Pearcy v. Walter, 6 Car. & P. 232; Fuller v. Rounceville, 29 N. H. 554.

[98] Waters v. Lilley, 4 Pick. 147; Butterworth v. Soper, 13 Johns. (N. Y.) 443; Gambling v. Prince, 2 Nott & McC. (S. C.) 138.

[99] Badkin v. Powell, Cowp. 478. In case of trespass to the person, the defendant must always plead his justification, specially when the fault is his own, Knapp v. Salsbury, 2 Camp. 500; 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.

[100] Badkin v. Powell, Cowp. 478; Hyatt v. Wood, 4 Johns. (N. Y.) 152; Proprietors of Monumoi Great Beach v. Rogers, 1 Mass. 160. 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 describ-

of any other kind, the general issue will not apply; as, for instance, where the defendant intends to show a justification or excuse, or a discharge.[101]

SAME—IN TROVER.

202. The general issue in trover, as in trespass and case, is "not guilty," which is a formal denial of the wrongful conversion. It denies the conversion only, and not the inducement.*

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 such as affect the plaintiff's possession or right of possession, or a release; or the bar of the statute of limitations.[102] 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.[103] Since the adoption of the Hilary Rules in England, the position of the defendant is practically reversed, 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, subject to the exceptions noted.

ing 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.

[101] Coles v. Carter, 6 Cow. (N. Y.) 691; Senecal v. Labadie, 42 Mich. 126, 3 N. W. 296; Finch v. Alston, 2 Stew. & P. (Ala.) 83; Hahn v. Ritter, 12 Ill. 80; Ruggles v. Lesure, 24 Pick. (Mass.) 187.

* See Append. Form No. 26.

[102] 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.) 463. 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, Rotan 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.

[103] 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.

SAME—IN THE ACTION ON THE CASE.

203. "Not guilty" is the proper general issue in an action on the case, and is a formal denial of the facts alleged. It denies the breach or wrongful act only, and not the inducement or statement of the right infringed.†

The form and effect of this plea being, as we have seen, the same as in trespass vi et armis,—a mere denial or traverse of the facts alleged,—the plea should, on principle, be applied only to cases where the defense rests on a denial of that character. A relaxation has taken place in its use, however, which is not found in trespass, and which is similar to that in the action of assumpsit before mentioned, by which the defendant may now 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."[104] The action on the case is in its nature and effect similar to a bill in equity, and 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.[105] This, in effect, may 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.[106] It may also be that the act and its consequences were not as alleged, or that a necessary element, such as the scienter or motive of the defendant, did not exist, or that any one of the mate-

† See Append. Form No. 26.

[104] Per Lord Mansfield, Bird v. Randall, 3 Burrows, 1353. See Birch v. Wilson, 2 Mod. 276; Bradley v. Wyndham, 1 Wils. 44; Greenwalt v. Horner, 6 Serg. & R. (Pa.) 76.

[105] 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; Taylor v. Robinson, 29 Me. 323.

[106] See the cases above cited. 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.

rial allegations in an action for deceit is untrue. 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, unless upon a forced analogy with the innovation introduced in that action with regard to express promises.

SAME—IN REPLEVIN.

204. "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 inducement. 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 inducement.*

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.[107] It admits the allegation of property in the plaintiff, and therefore under it the defendant cannot have a return of the goods.[108] 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.[109] Where the wrongful act of the defendant consists

* See Append. Form No. 26.

[107] 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, 3 Ill. 227; Williams v. Smith, 10 Serg. & R. (Pa.) 202.

[108] Simpson v. M'Farland, 18 Pick. (Mass.) 427; Whitwell v. Wells, 24 Pick. (Mass.) 25.

[109] 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; 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.

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. To obtain a return of the goods, he must plead by avowry or cognizance, justifying the taking or detention either in his own right or through that of another.

THE REPLICATION DE INJURIA.

205. 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.†

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, and debt, and such plea is untrue.[110] 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 traverse is proper where the defendant, in any of the above actions, pleads matter in excuse,[111] provided such matter does not consist of a justification under the process of a court of record,[112]

† See Append. Form No. 27.

[110] 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.

[111] 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; Strong v. Smith, 3 Caines (N. Y.) 164; Hannen v. Edes, 15 Mass. 347. And see Allen v. Crofoot, 7 Cow. (N. Y.) 46.

[112] Crogate's Case, 8 Coke, 66.

or a claim of title or interest in land in the defendant,[113] or title or authority which the latter derives from the plaintiff.[114] 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.[115]

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.[116] 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 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.[117] It can never be used when the matter set forth in the plea is insisted on as conferring a positive right.[118] 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

[113] Cockerill v. Armstrong, Willes, 99; Jones v. Kitchin, 1 Bos. & P. 76; Hyatt v. Wood, 4 Johns. (N. Y.) 150; Great Falls Co. v. Worster, 15 N. H. 412.

[114] 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.

[115] See Penn v. Ward, 2 Cromp. M. & R. 338.

[116] Crogate's Case, 8 Coke, 66.

[117] Com. Dig. "Pleader," F 19; Coburn v. Hopkins, 4 Wend. (N. Y.) 577.

[118] Plumb v. McCrea, 12 Johns. (N. Y.) 491.

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."

THE SPECIAL TRAVERSE.

206. A special traverse is a denial, preceded by introductory affirmative matter, of material opposing allegations, and does not tender issue, but concludes with a verification.* Its essential parts are:

(a) The inducement.

(b) The denial.

(c) The conclusion by verification.

207. The inducement in a special traverse is that part which alleges affirmative matter, introductory to or explanatory of the denial. It is itself an 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.

208. 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.

209. The special traverse does not tender issue, but concludes with a verification, thus: "And this the said ——— is ready to verify."

210. Where a special traverse is sufficient, the other party must tender issue, to be accepted by the party traversing.

211. The inducement cannot be traversed unless it is bad, for it is a rule that there can be no traverse upon a

* See Append. Forms Nos. 28a, b, and c.

traverse, unless the first one is bad. Nor, subject to the same exception, can it be answered by a pleading in confession and avoidance.

In completing the summary of the different methods by which matters adversely pleaded may be traversed, it is necessary to examine the nature and use of that form of traverse 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.[119]

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.

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

[119] See, as to this form of traverse, Brudnell v. Robert, 2 Wils. 143; Palmer v. Ekins, 2 Ld. Raym. 1550; Blake v. Foster, 8 Term R. 487; Wilcox v. Kinzie, 3 Scam. (Ill.) 218; Thomas v. Black, 8 Houst. (Del.) 507, 18 Atl. 771; Breck v. Blanchard, 20 N. H. 323.

———, 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. 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.[120] 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 inducement need not necessarily contain new affirmative matter.[121]

The regular method of pleading in answer to a special traverse is to tender issue upon it, with a repetition of the allegation traversed. Thus, to the plea heretofore given by way of illustration,

[120] 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.

[121] For form see Append. Form No. 28c.

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 is 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,[122] 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;[123] 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.[124] In a case, therefore,

[122] Append. Form No. 28a.

[123] Blake v. Foster, 8 Term R. 487.

[124] Id.

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 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. This may be illustrated by the example of special traverse given in the Appendix, Form No. 28b. In that case it would seem that a lease, not expressing any certain term of demise, had been brought to the ordinary for his confirmation; that he had accordingly confirmed it in that shape under his seal; and that the instrument was afterwards filled up as a lease for 50 years. The party relying upon this lease states that the demise was to the defendant for the term of 50 years, and that the ordinary "ratified, approved, and confirmed his estate and interest in the premises." If the opposite party were to traverse in the common form, "that the ordinary did not ratify, approve, and confirm his estate and interest in the premises," etc., and so tender issue in fact on that point, it is plain that there would be involved in such issue the following question of law, viz. whether the confirmation by the ordinary of a lease in which the length of the term is not at the time expressed be valid? This question would, therefore, fall under the decision of the jury to whom the issue in fact is referred, subject to the direction of the judge presiding at nisi prius, and the ultimate revision of the court in bank. 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. As the whole facts thus appear on the face of the pleading, if his adversary means to contend that the confirmation was, under the circumstances, valid in point of law, he is enabled by this plan of special traverse to raise

the point by demurring to the replication; on which demurrer an issue in law arises for the adjudication of the court.

By these reasons, and sometimes by others also, which the reader, upon examination of different examples, may, after these suggestions, readily discover for himself, the ancient pleader appears to have been actuated in his frequent adoption of an inducement of new affirmative matter, tending to explain or qualify the denial. 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.[125] Thus, to allege, as in the example already referred to,[126] that E. B. was seised for life, would be to deny by implication, but by implication only, that the reversion belonged to him in fee; and therefore, to avoid argumentativeness, a direct denial that the reversion belonged to him in fee is added, under the formula of absque hoc. 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

[125] 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.

[126] Ante, p. 297; Append. Form No. 28a.

setting forth new matter makes a verification necessary, in conformity with that rule.

The special traverse, having, with these views and in this manner, been introduced into the system of pleading, grew so much into fashion as to be frequently adopted even in cases to which the original reasons of the form were inapplicable, that is, to cases where the intended denial was in its nature simple and absolute, and connected with no new matter. This will be illustrated by the example given in the Appendix, Form No. 28c. In this, the defendant having pleaded a right of way, the object of the replication is merely to deny that the right of way existed. And there is no reason why this should not be done in the simple form of a common traverse, viz. "that the said W. F., and all those whose estate, etc., have not had and used, etc., a certain way, etc., in manner and form as alleged"; concluding to the country. But the fashion of traversing specially led the ancient pleaders, in such a case as this also, to use the inducement, the absque hoc, and the verification. And because the nature of the case afforded no allegation of new matter, as introductory to the denial, in lieu of this a kind of inducement was adopted, containing, in fact, no new matter, but a mere repetition of the original complaint, viz. "that the defendant, of his own wrong, broke and entered the close, etc., without this, that," etc.

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.[127] 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

[127] Horne v. Lewin, 1 Ld. Raym. 641.

to occur, it is now no longer practiced. This relates principally to that species of it which is illustrated by Form 28c, in the Appendix. 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.[128] Afterwards they appear to have gone further, and to have established in favor of the common plan of traverse, in cases where there is no allegation of new matter, the following rule of distinction: That where the whole substance of the last pleading is denied, the conclusion must be to the country, or, in other words, the traverse must be in the common form; but where one of several facts only is the subject of denial, the conclusion may be either to the country or with a verification; that is, the traverse may be either common or special, at the option of the pleader.[129] Thus, in the example in the Appendix (Form 28c), the special traverse would apparently now be no longer allowable; because the replication, denying the right of way, denies the whole substance of the plea. It is not easy to trace either the original authority, or even a very satisfactory reason, for this distinction. It does not appear to coincide with the practice at a former period, which certainly allowed special traverses, though without an inducement of new matter, in many cases where the whole substance of the pleading was denied; and its true origin is perhaps to be referred very much to the inclination of the courts to discourage this formula. From the time that the special traverse thus fell into disrepute it has been much neglected, even in cases where legally allowable; and it now rarely oc-

[128] Robinson v. Raley, 1 Burrows, 320.

[129] See 1 Saund. 103, a, b, note 3; Bac. Abr. "Pleas," etc., p. 381, note; Smith v. Dovers, 2 Doug. 430.

curs in any instance where there is no inducement of new matter, although the denial relate to one out of several facts only. This change of practice, however, is very recent, having been effected within the memory of many living practitioners. With respect to the other kind of special traverse, viz. that which is attended with an inducement of new matter, as illustrated in the examples given in the Appendix (Forms 28a and 28b), the case is very different. This was originally devised, as has been shown, for certain reasons of convenience or necessity; and those reasons still occasionally operate the same way. However, in the general decline of the method of special traverse there is felt in practice a great disinclination to adopt in any case whatever, without a clear reason for doing so, this discredited form; and this more particularly in a view to the disadvantages with which it is attended. These disadvantages consist not only in prolixity and delay, but in the additional inconvenience 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 otherwise guides him in his further proceedings. For these reasons the special traverse is perhaps daily becoming more rare. 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 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. Accordingly, it is apprehended that in the examples given in the Appendix (Forms 28a and 28b), a special traverse would be as proper at the present day as it was at the period when the precedents first occurred.

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.[130] Thus, in the example above given,[131] 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 concluded to the country, without the absque hoc, and judgment was given accordingly for the plaintiff.[132] 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.[133] Thus, if the defend-

[130] Com. Dig. "Pleader," G, 20; Bac. Abr. H, 1; Dike v. Ricks, Cro. Car. 336; Thorn v. Shering, Id. 586; Anon., 3 Salk. 353; Fowler v. Clark, 3 Day (Conn.) 231; Van Ness v. Hamilton, 19 Johns. (N. Y.) 371.

[131] Ante, p. 297; Append. Form No. 28a.

[132] Hughes v. Phillips, Yelv. 88.

[133] Com. Dig. "Pleader," G, 3; Lambert v. Cook, 1 Ld. Raym. 238; Helier v. Whytier, Cro. Eliz. 650.

ant 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.[134] Thus, in the example we have given above,[135] if the replication, instead of taking issue on the traverse,[136] 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 clear and satisfactory. 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 pleading and retarding the issue by resorting to a new traverse. However, this rule is open to an important exception, viz. that there 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.[137] Thus, in an action of prohibition, the plaintiff declared that he was elected and admitted one of the common

[134] 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.

[135] Ante, p. 297.

[136] Ante, p. 298.

[137] 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; Huish v. Phillips, Cro. Eliz. 754; Breck v. Blanchard, 20 N. H. 323; Richardson v. Mayor, etc., of Oxford, 2 H. Bl. 186.

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 sufficient, 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.

GENERAL REQUISITES OF TRAVERSE.

212. 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 now explained, it will be proper next to advert to certain principles which belong to traverses in general.

Form of Denial.

The first of these that may be mentioned is that it is the nature of 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, for 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 imma-

terial 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.[139]

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.[140] 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 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.[141] Upon the same principle, if a matter be alleged in pleading, "by reason where-

[139] Com. Dig. "Pleader," G, 1; Nevil & Cook's Case, 2 Leon. 5.

[140] 1 Saund. 23, note 5; Kenicot v. Bogan, Yelv. 200; Priddle & Napper's Case, 11 Coke, 10b; Richardson v. Mayor of Oxford, 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. Rich, 2 Hill (N. Y.) 247.

[141] Richardson v. Mayor, etc., of Oxford, supra.

of" (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.[142]

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.[143] 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." [144] 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." [145] 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.[146]

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.[147] The meaning of this rule will be sufficiently explained by 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 declara-

142 Doct. Plac. 351; Priddle & Napper's Case, supra.

143 1 Saund. 23, note 5; Beal v. Simpson, 1 Ld. Raym. 412; Grocers' Co. v. Archbishop of Canterbury, 3 Wils. 234; Lucas v. Nockells, 4 Bing. 729; Drewe v. Lainson, 11 Adol. & E. 538.

144 Beal v. Simpson, supra.

145 Grocers' Co. v. Archbishop of Canterbury, supra.

146 Id.

147 1 Saund. 312d, note 4; Crosse v. Hunt, Carth. 99; Powers v. Cook, 1 Ld. Raym. 63, 1 Salk. 298; Worley v. Harrison, 3 Adol. & E. 669; Bird v. Holman, 9 Mees. & W. 761.

tion 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.[148] 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." [149]

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.[150] 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 dam-

[148] Crosse v. Hunt, supra.

[149] Powers v. Cook, supra.

[150] 1 Saund. 312d, note 4; Gilbert v. Parker, 2 Salk. 629, 6 Mod. 158; Merton v. Briggs, 1 Ld. Raym. 39.

age feasant. The plaintiff pleaded in bar that he himself was seised of 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.[151] 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.[152] 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. Thus, any confession or admission made in pleading in a court of record, whether it be express or implied from pleading over without a traverse, will forever preclude the party from afterwards contesting the same fact, in any subsequent suit, with the same 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 that bond will be precluded from afterwards denying, in an action brought upon the 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.

151 Gilbert v. Parker, supra.

152 Ante, p. 288; Robinson v. Corbett, Lutw. 662; Taylor v. Needham, 2 Taunt. 278.

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.;[153] the reason of which seems to be that estoppels do not hold with respect to strangers.

PLEADINGS IN CONFESSION AND AVOIDANCE.

213. 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.*

214. Pleading in confession and avoidance is admitting the truth of opposing allegations, and avoiding their legal effect by alleging other and inconsistent facts.

215. 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 plain-

[153] Taylor v. Needham, 2 Taunt. 278. * See Append. Form No. 30.

tiff, but shows that it has been discharged by some matter subsequent, either of fact or of law.

216. Pleadings in confession and avoidance do not tender issue, but conclude with a verification and prayer of judgment.

217. COLOR—Every pleading by way of confession and avoidance must give color. Color is the admission, in the pleading, of an apparent right in the opposite party, and may be—

(a) Express or

(b) Implied.

218. Express color is 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 actually has only an appearance or color of cause.

219. Implied color is where the confession of the plaintiff's claim discloses the apparent right without the addition of fictitious matter in the plea.

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 acts 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.

Pleas in confession and avoidance are divided into pleas in justification or excuse, and pleas in discharge. The division applies to pleas only. Replications and subsequent pleadings in confession and avoidance are not subject to any such classification.

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.[154] 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.[155] Pleas in justification or excuse generally include all pleas in confession and avoidance which are not in discharge of the defendant's liability.

Pleas in Discharge.

A plea in discharge shows that the plaintiff once had a right of action, but that it is discharged or released by some matter subsequent, either of fact or law. The most common pleas in discharge

[154] See Smart v. Hyde, 8 Mees. & W. 723; Wise v. Hodsall, 11 Adol. & E. 816; Glazer v. Clift, 10 Cal. 303; Tomlinson v. Darnall, 2 Head (Tenn.) 538; Briggs v. Mason, 31 Vt. 433.

[155] 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.

are payment; release; tender; set-off; bankruptcy; the statute of limitations.[156]

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.[157]

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.[158]

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

[156] 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. 363; Nill v. Comparet, 15 Ind. 243; a release, Brooks v. Stewart, 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; Hines v. Barnitz, 8 Watts (Pa.) 39; McAllister v. Reab, 4 Wend. (N. Y.) 483; bankruptcy, Gould v. Lasbury, 1 Cromp., M. & R. 254.

[157] Goodchild v. Pledge, 1 Mees. & W. 363. See Append. Forms Nos. 30-35.

[158] 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; 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.) 218; McPherson v. Daniels, 10 Barn. & C. 263; Davis v. Matthews, 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. Hodsall, 11 Adol. & E. 816.

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 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.[159] In such a case the usual and regular course would

[159] 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

be, not to plead in confession and avoidance, but to plead the general issue, not guilty, which, as we have seen,[160] puts the plaintiff's possession of the close in issue, as well as the mere fact of the trespass.

The kind of color which we have just been considering, being a latent quality naturally inherent in the structure of all regular pleadings in confession and avoidance, 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."

In the latter sense, 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."[161] It occurs at pres-

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. Hodsall, 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.

[160] Ante, p. 290.

[161] 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.

ent 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 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.[162] 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.[163]

PLEADINGS AS AN ANSWER.

220. Every pleading must be an answer to the whole of what is adversely alleged.

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.

[162] Bac. Abr. "Pleas," etc., I, 8; Com. Dig. "Pleader," 3, M, 41; Anon., Keilw. 103b.

[163] Radford v. Harbyn, Cro. Jac. 122.

If it fails in this, it is bad.[164] 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 discontinued.[165] 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.[166] 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 de-

[164] Steph. 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; Nevins v. Keeler, 6 Johns. (N. Y.) 63; Boyd v. Weeks, 5 Hill (N. Y.) 393; Goodrich v. Reynolds, 31 Ill. 490; Carpenter v. Briggs, 15 Vt. 34; Mitchell v. Sellman, 5 Md. 376.

[165] Steph. Pl. (Tyler's Ed.) 215; Com. Dig. "Pleader," E 1, F 4; 1 Saund. 28, note 3; Herlakenden's Case 4 Coke, 62a; Flemming v. City of Hoboken, 40 N. J. Law, 270.

[166] Cro. Jac. 353; Steph. 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. Steph. Pl. supra, note b.

fectively answered, but to demur to the whole plea.[167] 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.[168]

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.[169]

PLEADINGS AS AN ADMISSION.

221. 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.[170] 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 re-

[167] 1 Saund. 28, note 3; Steph. Pl. (Tyler's Ed.) 216. See Harpham v. Haynes, 30 Ill. 404; Snyder v. Gaither, 3 Scam. (Ill.) 91; Bonham v. People, 102 Ill. 434; Illinois Cent. R. Co. v. Leidig, 64 Ill. 151; People v. McCormack, 68 Ill. 226; Hinton v. Husbands, 3 Scam. (Ill.) 187.

[168] Sterling v. Sherwood, 20 Johns. (N. Y.) 204; Riggs v. Denniston, 3 Johns. Cas. (N. Y.) 205; Bullythrope v. Turner, Willes, 475, 480; Hicok v. Coates, 2 Wend. (N. Y.) 419.

[169] 1 Saund. 28, note 3.

[170] 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., 1 Dana (Ky.) 358; Dana v. Bryant, 1 Gilm. (Ill.) 104; McCormick v. Huse, 66 Ill. 315; People v. Gray, 72 Ill. 343.

pair, a plea traversing the want of repair admits the indenture. The effect of such an admission is very strong; for, first, it concludes 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;[171] and, in the next place, the confession operates by way of estoppel of record to prevent the fact admitted from being afterwards brought into question, either in the same suit or in any subsequent action between the same parties.

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.[172]

PROTESTATION.

222. 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.

The practice of protestation in pleading arises from the rule last stated, and is therefore considered with reference to the effect of a pleading as an admission. It is 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.[173] This declaration is called a "protestation." 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.

Suppose, in an action of assumpsit for goods sold, the defendant pleads that he gave the plaintiff certain goods in full satis-

[171] Bac. Abr. "Pleas," etc., 322; Wilcox v. Servant of Skipwith, 2 Mod. 4.

[172] King v. Bishop of Chester, 2 Salk. 561.

[173] Com. Dig. "Pleader," N; Co. Litt. 124b, 126; Young v. Rudd, Carth. 347; State v. Beasom, 40 N. H. 372; Briggs v. Dorr, 19 Johns (N. Y.) 96; Dills v. Stoble, 81 Ill. 202.

faction and discharge, etc., and that the plaintiff accepted them in full satisfaction and discharge; and the ~~defendant~~ plaintiff, 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 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.[174]

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.[175]

A protestation ought not to be repugnant to the pleading which it accompanies,[176] nor ought it to be taken on such matter as the

[174] Dills v. Stoble, 81 Ill. 202; note 170, supra.

[175] 2 Saund. 103a, note 1.

[176] Com. Dig. "Pleader," N; 2 Saund. 103a, note 1.

pleading itself traverses.[177] The rules, however, with respect to the form of a protestation, becomes the less material, because it has been decided that neither a superfluous nor repugnant protestation is sufficient ground for demurrer;[178] the protestation itself having in view another suit only, and its faults of form being, therefore, immaterial in the present action.

It has been already observed, that the necessity of the protestation arises from the rule, "that every traversable fact not traversed is confessed." But it has been seen that an answer in fact is no admission of the sufficiency in point of law of the matter answered. It follows, therefore, that it is not necessary, in passing over an insufficient pleading without demurrer, and answering in point of fact, to make any protestation of the insufficiency in law of such pleading; for, even without the protestation, no implied admission of its sufficiency arises. In practice, however, it is not unusual, in such case, to make a protestation of insufficiency in law, the form having apparently been adopted by analogy to the proper kind of protestation, viz. that against the truth of a fact.

EXCEPTIONS TO RULE I.

223. There are certain cases, as we have stated,[179] in which the party, though he cannot demur, may oppose the declaration other than by a traverse or a pleading in confession and avoidance. These exceptions are:

(a) Where a dilatory plea is proper.

(b) Where an estoppel may be pleaded.

(c) Where a new assignment is necessary.

SAME—DILATORY PLEAS.

224. Dilatory pleas, as already shown, 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.

[177] Com. Dig. "Pleader," N. [178] Id. [179] Ante, p. 259.

The form and qualities of dilatory pleas have been fully considered elsewhere,[180] and it is only necessary here to point out the principle on which they are excepted from the operation of the rule we have just been considering. This lies in the nature and object of the pleas themselves, which are remedies available to the defendant where matters exist which are not such as constitute a defense to the merits of the action, nor yet defects properly within the scope of a demurrer, but which present some ground by which the right of action may be defeated in the pending suit without either denying or confessing and avoiding the allegations of the declarations. They are thus steps which, if taken, are preliminary to the substantial defense of the action, and in no way affect the legal right of the plaintiff to recover, save by suspending it, if they prevail, so far as the present action is concerned.[181]

SAME—PLEADINGS IN ESTOPPEL.

225. A plea in estoppel is one which neither confesses nor avoids, but pleads a previous inconsistent act, allegation, or denial of the plaintiff which estops him from maintaining his action.*

A man, as we have already seen, 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 confession or admission made in pleading in a court of record, whether it be express, or implied from pleading over without a traverse, 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 in-

[180] Ante, p. 157.

[181] See Bac. Abr. "Pleas," E. 1, 2; Archb. Civ. Pl. 290; Harman v. Kingston, 3 Camp. 152; Badger v. Towle, 48 Me. 20; 3 Shars. Bl. Comm. 300. And see Morton v. Sweetser, 12 Allen (Mass.) 137, per Gray, J.; Pattee v. Lowe, 35 Me. 121.

* See Append. Form No. 31.

stance 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.

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 of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before did or said.[182] 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.[183]

SAME—NEW ASSIGNMENT.

226. 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.†

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,

[182] Plummer v. Woodburne, 4 Barn. & C. 625; Eastmure v. Laws, 5 Bing. N. C. 444; Doe v. Wright, 10 Adol. & E. 763.

[183] See Dana v. Bryant, 1 Gilman (Ill.) 104.

† See Append. Form No. 38.

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.[184] 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.[185] 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 generality of the plaintiff's declara-

[184] The following explanation of new assignment is taken substantially from Steph. Pl. (Tyler's Ed.) 225. 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. 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; Spencer v. Remis, 46 Vt. 29; Troup v. Smith, 20 Johns. (N. Y.) 43.

[185] Append. Form No. 38. 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 with much regard to the true state of fact.

tion. 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.[188]

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

[188] Steph. Pl. (Tyler's Ed.) 225; 1 Chit. Pl. 602; Vin. Abr. "Novel Assignment," 4, 5; 3 Vent. 151; Batt v. Bradley, Cro. Jac. 141.

this upon the same principle by which the first new assignment was required.[189]

A new assignment is said to be in the nature of a new declaration.[190] 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.[191] 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, 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.[192]

DEDUCTION FROM RULE I.

227. As the proceeding must generally be by demurrer, traverse, or confession and avoidance, any one of these forms of opposition to the last pleading is in itself sufficient.

EXCEPTION—In debt on bond conditioned for the performance of an award.

The above deduction follows naturally from the rule that parties must either demur or plead by one of the methods given, but it is subject to one exception, which is considered anomalous and solitary. In debt on bond conditioned for the performance of an award, where the defendant pleads that no award was made, it is held that the plaintiff, in his replication, must allege, not only the making of the award, but also a breach by the defendant.[194] This, as has been

[189] Steph. Pl. (Tyler's Ed.) 226; 1 Chit. Pl. 614; 1 Saund. 299c.

[190] Bac. Abr. "Trespass," 1, 4; 1 Saund. 299c.

[191] Steph. Pl. (Tyler's Ed.) 226.

[192] Steph. Pl. (Tyler's Ed.) 226.

[194] 1 Saund. 103; Steph. Pl. (Tyler's Ed.) 227; Meredith v. Alleyn, 1 Salk. 138, Carth. 116.

observed, is an anomaly; for, as by alleging and setting forth the award, he fully traverses the plea which denied the existence of an award, the replication would seem according to the general rule under consideration, to be sufficient without the specification of any breach. In all other cases it is laid down that, "if the defendant pleads a special matter that admits and excuses a nonperformance, the plaintiff need only answer and falsify the special matter alleged; for he that excuses a nonperformance supposes it, and the plaintiff need not show that which the defendant hath supposed and admitted." [195]

RULE II.

228. Upon a traverse, issue must be tendered.

229. 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.[196] Wherever, therefore, a denial or contradiction of fact occurs in pleading, issue ought at the

[195] Meredith v. Alleyn, 1 Salk. 138. But see Gayle v. Betts, 1 Mod. 227.

[196] 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.

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 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.[197] 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." [198]

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

[197] Hayman v. Gerrard, 1 Saund. 103, note 1; Chandler v. Roberts, 1 Doug. 60; Henderson v. Withy, 2 Term R. 576.

[198] Steph. Pl. (Tyler's Ed.) 230; 3 Shars. Pl. Comm. 309.

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 verification.[199] 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.[200] 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

[199] See Gainsford v. Griffith, 1 Saund. 54.

[200] See Richards v. Hodges, 2 Saund. 82.

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.[201]

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.[202]

RULE III.

230. Issue, when well tendered, must be accepted. The rule applies both to issues

(a) In fact, and

(b) In law.

SAME—ISSUES IN FACT.

231. Where the tender of an issue of fact is sufficient, both in substance and form, the opposing party must accept it.

[201] Vere v. Smith, 2 Lev. 5, Vent. 121.

[202] Hayman v. Gerrard, 1 Saund. 102.

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.[203]

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, may be added for him to complete the record, as, when the issue is well tendered, he has no option but to accept it.[204] 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 mutual consent of both the parties, it appears to have been formerly used only to indicate an expression of such consent.

SAME—ISSUES IN LAW.

232. 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.[205] A party cannot decline a question on the legal sufficiency of his own pleading without abandoning it. The acceptance is therefore as imperative as in the case of an issue in fact. The method of accepting

[203] Steph. Pl. (Tyler's Ed.) 233; Bac. Abr. "Pleas," etc., 363; Digby v. Fitzharbert, Hob. 104; Dawes v. Winship, 16 Mass. 291; Hapgood v. Houghton, 8 Pick. (Mass.) 451.

[204] 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.

[205] Halton v. Jeffreys, 10 Mod. 280: Brown v. Jones, 10 Gill & J. (Md.) 334; Clay Fire & Marine Ins. Co. v. Wusterhausen, 75 Ill. 285.

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,[200] 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.

[200] Bac. Abr. "Pleas," N 2; Halton v. Jeffreys, 10 Mod. 280; Campbell v. St. John, 1 Salk. 219.

CHAPTER VII.

MATERIALITY IN PLEADING.

233. The General Rule.
234. Pleadings in General.
235–236. Variance.
237. Materiality of the Traverse.
238. Option of the Pleader.
239. Limitation of the Traverse.

THE GENERAL RULE.

233. All pleadings must contain matter pertinent and material.

PLEADINGS IN GENERAL.

234. A pleading must allege every substantive fact which is essential to the cause of action or defense in the particular action. It need not allege:

EXCEPTIONS—(a) Facts or circumstances which are necessarily inferred from those pleaded.

(b) Facts presumed by law from the nature of conditions previously existing.

(c) Matters of which the courts will take judicial notice.

This is one of the most comprehensive and fully recognized rules in pleading. The principle on which it rests seems to need no explanation. Its full meaning and extent is that the party relying upon either complaint or defense must, subject to the exceptions above noticed, allege every fact necessary in law to the maintenance of his suit or defense; and that his pleading, in stating such facts, must contain those only which are material for the purpose in that action.[1] Thus, if to an action of assumpsit against an

[1] Bac. Abr. "Pleas," H 5; Anon., 2 Vent. 196; Jones v. Powell, 5 Barn. & C. 647; Hall v. Tapper, 3 Barn. & Adol. 655; Strong v. Smith, 3 Caines (N. Y.) 160; Austin v. Walker, 26 N. H. 456.

administratrix, laying promises by the intestate, she pleads that she, the defendant (instead of the intestate), did not promise, the plea is obviously immaterial and bad.[2] So where, in replevin for taking cattle, the defendant avowed taking them in the close in which, etc., for rent in arrear, and the plaintiff pleaded, in bar to the avowry, that the cattle were not levant and couchant on the close in which, etc., the plea was holden bad on demurrer; for it is a general rule that all things upon the premises are distrainable for rent in arrear, and the levancy and couchancy of the cattle is immaterial, unless under special circumstances, such as did not appear by the plea in bar to have existed in this case.[3]

The effect of this rule is to confine the pleadings to the allegation of facts pertinent to the present action only, to avoid surplusage, and to insure the production of a clear and concise issue. Pleading is in itself only the formal method of placing on the record that which must be the support or defense of the party in evidence, and what is to be alleged must therefore depend upon what it will be necessary to prove in order to sustain or oppose the particular action.[4]

As we have seen at length in treating of the declaration, and what it must allege in the particular actions,[5] it is necessary for the plaintiff, to maintain his action, to present a statement of his claim showing himself as a party claiming a right, and, if such claim is by him in a representative capacity, the character in which he advances it. His statement must also disclose the actual right itself, according to the facts of the particular case, and, if explanation of its nature or origin is necessary, the circumstances under which it arose. It is also a material requisite that the infringement or violation of the right be shown, as well as a resulting damage, since there can be no recovery upon the mere fact of the existence of such right alone, whatever may be its nature, without some act done in violation of it and a consequent damage to its holder, though such

[2] Anon., 2 Vent. 196.

[3] Jones v. Powell, 5 Barn. & C. 647.

[4] See the remarks of Buller, J., in Read v. Brookman, 3 Term R. 159, and The King v. Mayor, etc., of Lyme Regis, Doug. 149. See, also, Rex v. Horne, Cowp. 672.

[5] Ante, p. 203.

damage may often be merely nominal. The statement of the right may also involve the mention, not only of conditions affecting or limiting its exercise, but also of the performance or waiver or justification of a nonperformance of such conditions. And the injurious act or infringement of the right may be actionable only by reason of the motive with which it was done, or the knowledge of the person in fault as to the inevitable consequences of what might, in the absence of such knowledge, be entirely defensible.

To maintain his defense, the defendant must answer everything in the plaintiff's statement which the latter would be called on to prove in order to sustain his action, by matter of fact, and such matter must be not only what the opposing allegations call for, but the defense must be one available with regard to the character in which the defendant is sued, as well as one which is proper at the time of making it.

The rule does not require the statement of facts which are to be inferred as the necessary result of those stated, nor where there is a general presumption of law that certain conditions, previously known, exist until the contrary is proven, nor where matters become involved which are of such a public or general nature that the law takes notice of their existence without either allegation or proof. These exceptions are hereafter noticed under particular rules.[6]

VARIANCE.

235. A variance, in pleading, is a disagreement or difference between two parts of the same legal proceeding, which should agree, as between the declaration and the writ, in the names of the parties or the nature of the action.

236. In its practical use, the term generally refers to a disagreement between the allegation and proof in some matter which, in point of law, is essential to the claim or defense.

The common-law rule in regard to variance has been so modified, and courts are so liberal in allowing amendments, that it is not so

[6] Post, c. 9.

important at the present day as it was formerly. As to its application to the strict form of pleading, it will hereafter be noticed.[7] Of its more practical sense, as above given, a brief notice is proper here, as showing the importance of the preceding rule as to materiality, since it is by the test of the evidence to be offered at the trial that a pleader must decide upon the facts he should allege. The general rule, in all cases, is that the evidence must be confined to the point in issue, and that proof of the substance of such issue is sufficient. A distinction is made between matters of substance and those of essential description; the first requiring substantial proof only, while the latter must be accurately established.[8] Thus, in an action of trespass to the person, the material fact is the assault and battery, and the time and place, though necessary to be stated, need not be proved as alleged; but, in an action on a bill of exchange, the date is descriptive, and must generally be proved as stated. So, also, the consideration of a contract must be proved as alleged, and it is for this reason, as has been before noticed in the statement of the consideration in special assumpsit, that the pleader must not only describe it accurately, but must state the whole consideration.[9] The cases illustrating this rule are too numerous for extended notice here, but in all it will be seen that the distinction above mentioned is observed.[10]

MATERIALITY OF THE TRAVERSE.

237. 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.

[7] Post, p. 487.

[8] 1 Greenl. Ev. § 56.

[9] Ante, p. 205. See Bulkley v. Landon, 3 Conn. 404; Robertson v. Lynch, 18 Johns. (N. Y.) 451.

[10] The following cases furnish instances of material variances: Sheehy v. Mandeville, 7 Cranch (U. S.) 208; Page v. Bank of Alexandria, 7 Wheat. (U. S.) 35; Williams v. Kinnard, Minor (Ala.) 196; Ohio & M. R. Co. v. Palm,

This rule prohibits a pleader from traversing on matter that is either irrelevant or insufficient in law.[11] 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.[12] 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.[13] 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.[14]

The rule also prohibits a pleader from traversing on matter which, though not immaterial to the case, is prematurely alleged.[15] Thus, if, in debt on bond, the plaintiff should declare that, at the

18 Ill. 22; Cox v. McKinney, 32 Ala. 461; Foster v. Pennington, 32 Me. 178; Dewey v. Williams, 43 N. H. 384; Woodstock Bank v. Downer, 27 Vt. 482. And the following illustrate instances where the variance was disregarded: Ferguson v. Harwood, 7 Cranch (U. S.) 408; White v. Word, 22 Ala. 442; Dickens v. Howell, 24 Ark. 230; Harbison v. Shook, 41 Ill. 142.

[11] 1 Lev. 32; Hob. 113; Bridgwater v. Blythway, 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.

[12] 1 Lev. 32.

[13] Hob. 113.

[14] Bridgwater v. Blythway, 3 Lev. 113.

[15] Sir Ralph Bovy's Case, 1 Vent. 217; Ricketts v. Loftus, 14 Q. B. 482; Middleton v. Graveley, 12 Price, 513.

time of 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.[16]

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.[17]

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.[18] It is otherwise, however, when such matter is not merely explanatory. If essential, though in the nature of inducement, it may still be traversed.[19]

SAME—OPTION OF THE PLEADER.

238. Where there are several allegations, all of which are material, the party may traverse which he pleases.

[16] See Sir Ralph Bovy's Case, 1 Vent. 217.

[17] Leech v. Widsley, 1 Vent. 54; 1 Lev. 283.

[18] 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.

[19] 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.

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.[20] 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.[21] 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.[22] 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.[23]

LIMITATION OF THE TRAVERSE.

239. 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, it is said to be too large; if less, too narrow.

Traverse too Large.

In the first place, it must not be too large.[24] It may thus be too large by involving in the issue circumstances of time, place, quan-

[20] 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. 657; Hopkins v. Medley, 97 Ill. 402; Read's Case, 6 Coke, 24; Young v. Ruddle, Salk. 627; Baker v. Blackman, Cro. Jac. 682.

[21] Moor v. Pudsey, supra; Com. Dig. "Pleader," G 10.

[22] Doct. Plac. 365.

[23] Toland v. Sprague, 12 Pet. 335.

[24] Colborne v. Stockdale, 1 Strange, 493, 8 Mod. 58; Lane v. Alexander, Cro.

tity, etc., which are immaterial to the merits of the particular case, though 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.[25] 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.[26]

Again, a traverse may be too large by being taken in the conjunctive instead of the disjunctive, where it is not material that

Jac. 202, Yel. 122; Goram v. Sweeting, 2 Saund. 206; Osborne v. Rogers, 1 Saund. 267; Id. 268, note 1; Id. 269, 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. Saunders, 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 Fire Marine Ins. Co., 22 Wis. 412; Thurman v. Wild, 11 Adol. & E. 453; Davison v. Powell, 16 How. Prac. (N. Y.) 467.

[25] Colborne v. Stockdale, supra.

[26] Lane v. Alexander, supra.

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 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." [27]

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.[28] 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

[27] Goram v. Sweeting, supra. And see Stubbs v. Lainson, 1 Mees. & W. 728; Richardson v. Smith, 29 Cal. 529.

[28] 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. Rose, 4 Hurl. & N. 111; Smith v. Dixon, 7 Adol. & E. 1.

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.[29] 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 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." [30]

Traverse too Narrow.

A traverse must not be too narrow.[31] 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

[29] Sir Francis Leke's Case, supra.

[30] Wood v. Budden, supra.

[31] 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.

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.[82] 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.[83]

[82] Osborne v. Rogers, supra.

[83] Morewood v. Wood, supra.

CHAPTER VIII.

SINGLENESS OR UNITY IN PLEADING.

240-241. The Rules in General.
242-243. Rule I.—Duplicity in General.
244. Several Answers.
245. Immaterial Matter.
246. Matter Ill Pleaded.
247. Matters Forming Connected Proposition.
248. Inducement.
249. Protestation.
250. Duplicity in the Declaration.
251. Several Demands.
252-254. Several Counts.
255. Joinder of Different Causes of Action.
256. Different Statements of the Same Cause of Action.
257. Duplicity in Pleadings Subsequent to the Declaration—Several Pleas.
258. Consequences of Duplicity.
259. Consequences of Misjoinder.
260-262. Rule II.—Plea and Demurrer.

THE RULES IN GENERAL.

240. RULE I. The pleadings must not be double.

241. RULE II. It is not allowable both to plead and demur to the same matter.

RULE I.—DUPLICITY IN GENERAL.

242. 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.

243. 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.[1] 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.

The Declaration.

The following is an illustration of the rule as applied to the declaration: The plaintiff declared in debt on a penal bill,[2] by which the defendant was to pay ten shillings on the 11th of June, and ten shillings upon the 10th of July next following, and ten shillings every three weeks after, till a certain total sum was satisfied by such several payments; and by the said bill the defendant bound himself for the true payment of the said several sums in the penal sum of seven pounds, and the plaintiff alleged that the defendant did not pay the

[1] 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, 3 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. 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. Cary, 37 Wis. 232; Brown v. Nichols, Shepard & Co., 123 Ind. 492, 24 N. E. 339.

[2] Bills penal are instruments not now in use, having been superseded by bonds with conditions. The example in the text, therefore, would not occur in modern practice; but it serves equally well for illustration.

said total sum, or any part thereof, upon the several days aforesaid, whereby an action had accrued to him to demand the said penalty of seven pounds. This was held bad for duplicity; for, if the defendant had failed in payment of any one of the sums, such failure would alone be a breach of the condition, and sufficient to entitle the plaintiff to the penalty he claimed; and the plaintiff ought therefore to have confined himself to the allegation of the nonpayment of one of those sums only.[3] So, where the plaintiff declared in assumpsit that the defendant was indebted to him in such a sum for nourishing one E. L., at the request of the defendant, which the latter promised to pay, and also that the defendant promised to pay him so much as he reasonably deserved to have for nourishing the said E. L. during the same time, this was bad for duplicity, and, indeed, also for repugnancy (another fault in pleading that will be hereafter considered), as the two promises—to pay a sum certain, and to pay quantum meruit—were inconsistent, and could not stand together.[4]

Pleadings Subsequent to Declaration.

Of duplicity in pleadings, subsequent to the declaration, the following example occurs in a plea in abatement: The defendant pleaded, in disability of the person of the plaintiff, ten different outlawries adjudged against him, and it was held that the plea was ill for duplicity, because the plaintiff was disabled as well by one outlawry as by the whole ten.[5] The following is an instance of duplicity in a plea in bar: In trespass for breaking a close and depasturing the herbage with cattle, if the defendant pleads that A. had a right of common, and B. also a right of common, in the close, and

[3] Humphreys v. Bethily, 2 Vent. 198, 222.

[4] Hart v. Longfield, 7 Mod. 148. As to duplicity in the declaration, see, also, Cornwallis v. Savery, 2 Burrows, 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 a breach of contract, Noetling v. Wright, 72 Ill. 390.

[5] Trevelian v. Seccomb, Carth. 8. "In the report of this case in Carthew it seems to be supposed the duplicity is in general no objection to pleas in abatement; but this is not law. The mistake probably originated in a misapprehension of what is said by Lord Coke (Co. Litt. 304a); but what he says evidently applies, not to duplicity in its proper sense, but to the use of several dilatory pleas successively in their proper order, which, as will be hereafter seen, the rules of pleading allow." Steph. Pl. Append. note 56.

that the defendant, as their servant and by their command, entered and turned in the cattle, in exercise of their rights of common, the plea is bad for duplicity,[6] because the title of either one or other of the commoners, and the authority derived as his servant, would have alone constituted a sufficient answer to the declaration. Duplicity in the replication may be thus exemplified: The plaintiff declared in trespass for breaking and entering his stable, cutting asunder a beam, and throwing down the tiles of the roof. The defendant justified, as servant to Sir H. G., and pleaded that Sir H. G. was seised of a wall in demesne as of fee, and, because the beam was placed in the wall of the said Sir H. G. without his consent, the defendant, as his servant, in order to remove this nuisance, did enter the stable, and cut the beam as near to the wall as he could, doing as little damage as possible, and thereby the tiles were thrown down. The plaintiff replied, traversing that the wall was Sir H. G.'s; and then, with a protestation that the wall was not his, further pleaded that the defendant, of his own wrong, did throw down the tiles, for the cutting the beam as aforesaid. The court held that, the first traverse being a complete answer to the whole, the second made the replication double.[7]

Limitations of the Rule.

The object of this rule being to enforce a single issue, upon a single subject of claim, admitting of several issues, where the claims are distinct, the rule is, accordingly, carried no further than this in its application. The declaration, therefore, may, in support of several demands, allege as many distinct matters as are respectively applicable to each. Thus, let one of the examples above given, with respect to the declaration, be so far varied as to substitute, for the case of an action in debt on a penal bill for the penalty accrued in consequence of nonpayment of a sum by several installments, the case of an action of covenant on a covenant to pay that sum by similar installments. In this latter case the plaintiff might, without duplicity, declare that the defendant "did not pay the said total sum, or any part thereof, upon the several days aforesaid." For he does not, as in the action upon the penal bill, found upon

[6] Vin. Abr. tit. "Double Pleas," A, 114, citing 15 Hen. VII. c. 10.

[7] Humphreys v. Churchman, Rep. temp. Hard. 289.

such nonpayments a single claim, viz. the claim to the penalty of seven pounds. There being no penalty in question, his claims are multiplied in proportion to the number of nonpayments; that is, he is entitled to ten shillings in respect of the first default, and ten shillings more upon each of the rest. The allegation of several defaults is, therefore, in this case, the allegation of so many distinct demands, and consequently allowable.[8] So the plea, though it must not contain several answers to the whole of the declaration, may nevertheless make distinct answers to such parts of it as relate to different matters of claim or complaint.[9] Thus, in the preceding example of duplicity in a plea in bar, if the case were a little varied, and the defendant, being charged with putting five beasts on the common, had pleaded that A and B had respectively rights of common there, and that he, as the servant of A put in two of the beasts in respect of his common right, and, as the servant of B, put in three in respect of his common right, there would no longer be duplicity; for he pleads the several titles, not as several answers to the same subject of claim or complaint, but as distinct answers to different matters of complaint, arising in respect of different cattle.[10] So, in the replication and other subsequent parts of the series, a severance of pleading may take place in respect of several subjects of claim or complaint. Thus, if an action be brought for trespasses in closes A and B, and the defendant pleads a single matter of defense applying to both closes, the plaintiff is still at liberty, in his replication, to give one answer as to so much of the plea as applies to close A, and another answer as to so much of the plea as applies to close B.[11] The power, however, of alleging in a plea distinct matters, in answer to such parts of the declaration as relate to different claims, seems to be subject to this restriction: that neither of the matters so alleged be such as would alone be a sufficient answer to the whole. Thus, if an action be brought on two bonds, though the defendant may plead, as to one, payment, and as to the other, duress, yet if he pleads as to one a release of all actions, and as to the other duress,

[8] Bac. Abr. "Pleas," etc., 446.
[9] Com. Dig. "Pleader," E, 2; Co. Litt. 304a.
[10] Vin. Abr. tit. "Double Pleas," A, 115.
[11] See Johns v. Whittey, 3 Wils. 132.

it will be double; for the release is alone a sufficient answer to both bonds.[12]

Again, if there be several defendants, the rule against duplicity is not carried so far as to compel each of them to make the same answer to the declaration. Each defendant is at liberty to use such plea as he may think proper for his own defense, and they may either join in the same plea or sever, at their discretion.[13] But, if the defendants have once united in the plea, they cannot afterwards sever at the rejoinder or other later stage of the pleading.[14]

Where, in respect of several subjects or several defendants, a severance has thus taken place in the pleading, this may, of course, lead to a corresponding severance in the whole subsequent series, and, as the ultimate effect, to the production of several issues. And where there are several issues, they may, respectively, be decided in favor of different parties, and the judgment will follow the same division.

Such being in general the nature of duplicity, the following rules or points of remark will tend to its further illustration:

SEVERAL ANSWERS.

244. 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,[15] or by containing one of each character.[16] The same

[12] Doct. Plac. 136; Vin. Abr. tit. "Double Pleas," D.

[13] Co. Litt. 303a; Essington v. Bourcher, Hob. 245.

[14] Steph. Pl. (Tyler's Ed.) 247.

[15] Com. Dig. "Pleader," E, 2; Trevelian v. Seccomb, Carth. 8; Calhoun v. Wright, 3 Scam. (Ill.) 74; Burrass v. Hewitt, Id. 224; ante, p. 260, and illustrations there given.

[16] Com. Dig. "Pleader," E, 2; Bleeke v. Grove, 1 Sid. 176; McConnell v. Stettinus, 2 Gilman (Ill.) 707.

would be true in joining several matters in confession and avoidance, or several answers by way of traverse, or a traverse with a plea of the former kind.[17]

IMMATERIAL MATTER.

245. 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.[18] 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

[17] 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.

[18] 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 Grenelife, Dyer, 42b; Penton v. Holland, 17 Johns. (N. Y.) 92; Comstock v. McEvoy, 52 Mich. 324, 17 N. W. 931; Hereford v. Crow, 3 Scam. (Ill.) 423.

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 of entry without admission, the averment of such entry was mere surplusage, and could not, therefore, avail to make the plea double.[19] 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.[20]

MATTER ILL PLEADED.

246. 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.[21] 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 re-

[19] Executors of Grenelife, Dyer, 42b. [20] Bac. Abr. "Pleas," etc., K, 2.
[21] See Bleeke v. Grove, 1 Sid. 175.

leased 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.[22]

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.[23] That object 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.

MATTERS FORMING CONNECTED PROPOSITION.

247. 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.[24] This qualification of the rule against duplicity applies, not

[22] Bac. Abr. "Pleas," etc., K 2; Bleeke v. Grove, supra.

[23] Ante, p. 350.

[24] See, in support of this rule, Vin. Abr. "Double Pleas," A 7; Robinson v. Raley, 1 Burrows, 316; Clearwater v. Meredith, 1 Wall. 25; Russell v. Rogers, 15 Wend. (N. Y.) 351; Gaffney v. Colwell, 6 Hill (N. Y.) 567; Palmer v. Gooden, 8 Mees. & W. 890; Calhoun v. Wright, 4 Ill. 74; Holland v. Kibbe, 16 Ill. 133; Dent v. Coleman, 18 Miss. 83; Tucker v. Ladd, 7 Cow. (N. Y.) 450.

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.[25] 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 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.[26]

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

[25] Robinson v. Raley, 1 Burrows, 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.

[26] Robinson v. Raley, 1 Burrows, 316.

one would be sufficient to defeat or maintain the action.[27] 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.[28] There is a restriction upon the use of this form, however, as has been before noticed,[29] where the opposing allegations include matter of title, authority, etc., and in such case matter of that character must be denied separately; or, if the plaintiff wishes to disregard these and deny other matters in the plea, such other matters must be separately traversed.[30]

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 dis-

[27] See Tebbets v. Tilton, 24 N. H. 120.

[28] See O'Brien v. Saxon, 2 Barn. & C. 908.

[29] Ante. p. 294.

[30] See Bull. N. P. 93.

puting, 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.[31]

INDUCEMENT.

248. 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.[32] This exception to the general rule is prescribed by an evident prin-

[31] Steph. Pl. (Tyler's Ed.) 253.

[32] Bac. Abr. "Pleas," etc. K 2; Com. Dig. "Pleader," E 2.

ciple 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.

PROTESTATION.

249. 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.[88]

DUPLICITY IN THE DECLARATION.

250. A declaration will be double in which two or more distinct matters are alleged in aid of a single demand, by any one of which such demand is sufficiently upheld as a cause of action; but

QUALIFICATION—Several demands allow the allegation of distinct matters respectively applicable to each; and

[88] Ante, p. 325; Steph. Pl. (Tyler's Ed.) 253.

DISTINCTION—The use of several counts in the same declaration does not constitute the fault.

What has been before stated in this chapter as to the scope and effect of the general rule covers nearly all that need be said in regard to the manner in which a declaration may be rendered liable to objection on this ground, and the declaration is separately considered here only for a convenient division of the subject, to show the limits of the application of the rule by the statement of the nature of an evasion allowed by the use of several counts, as well as to notice the qualification to which the rule itself is subject. The plaintiff must, as we have noticed, confine himself to the allegation of some one sufficient ground of action to enforce his right of recovery, to the exclusion of others, either of the same or different natures, which would be effective for the same purpose; and his pleading, in order to be objectionable, must not only show the misjoinder upon its face, but must also indicate, in the same manner, his intention to rely upon more than one in the present action.[34] At common law, an allegation of a single breach in the condition of a bond works as complete a forfeiture of the penalty as the statement of any number of such breaches,[35] and one promise to pay a specific sum precludes the joining of another to pay what the same article is worth.[36] An essential difference exists, however, between the misjoinder of causes of action, which is a radical fault, and is hereafter noticed,[37] and duplicity, which is a fault in form only.

SAME—SEVERAL DEMANDS.

251. Where the plaintiff's claim rests upon several demands, he may allege as many distinct matters as are respectively applicable to each.

[34] Ante, p. 350, where duplicity in the declaration is considered and illustrated. And see Raymond v. Sturges, 23 Conn. 134. Compare Starr v. Henshaw, 1 Root (Conn.) 242; Hotchkiss v. Butler, 18 Conn. 287; Darrow v. Langdon, 20 Conn. 288; Sturdivant v. Smith, 29 Me. 387.

[35] See Trevelian v. Seccomb, Carth. 8; Jarman v. Windsor, 2 Har. (Del.) 162.

[36] Hart v. Longfield, 7 Mod. 148.

[37] Post, p. 376.

We have already seen that, as the object of the rule against duplicity is to enforce a single issue upon a single subject of claim, admitting of several issues where the claims are distinct, the rule is accordingly carried no further in its application, and the declaration may allege in support of several distinct demands as many distinct matters as are applicable to each respectively, since this amounts only to a proper support of each single point or demand. This is best explained by the instance of an action on a covenant to pay a sum by installments. Here an allegation that the defendant "did not pay the said total sum, or any part thereof, upon the several days" when the installments became due, would be proper, since the statement of the several defaults is an allegation of distinct demands, all properly the subject of the particular action.[38]

SAME—SEVERAL COUNTS.

252. 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

253. A count may be either:

(a) Special, or

(b) General.

254. 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 dis-

[38] Bac. Abr. "Pleas" (5th Ed.) 446; ante, p. 357, where this principle is considered.

tinct trespasses have been committed, these may all form the subject of one action in trespass. 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. 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. Forms of declarations containing several counts will be found in the Appendix.[39]

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.[40] One count, however, may refer to another for matter without repeating it.

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.

SAME—JOINDER OF DIFFERENT CAUSES OF ACTION.

255. 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.

[39] Append., Form No. 18.

[40] Porter v. Drennan, 13 Ill. App. 362.

The joinder of distinct causes of action is permissible under the conditions stated in the above proposition, though it seems that the first, or nature of the cause of action, is the best criterion,[41] 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.[42] 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.[43] So several distinct trespasses, both to the person and property, may be joined in the same declaration in trespass,[44] and several takings at different days and places in replevin,[45] and several causes of action in case may be joined with trover.[46] But where the causes of action are of a different nature, and the same judgment could not be rendered, they cannot be joined.[47] Actions ex contractu cannot be joined with those in form ex delicto,[48] though

[41] Tidd, Prac. (9th Ed.) 12. See Whipple v. Fuller, 11 Conn. 582; Chicago W D. Ry. Co. v. Ingraham, 131 Ill. 659, 23 N. E. 350; Brady v. Spurck, 27 Ill. 478.

[42] 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 the forms and instances of the general issue, ante, c. 4, § 224 et seq.

[43] See Smith v. First Congregational Meetinghouse, 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.

[44] 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. 659, 23 N. E. 350.

[45] Fitzh. Nat. Brev. 68, note a; Bull. N. P. 54.

[46] 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.

[47] Selby v. Hutchinson, 4 Gilman (Ill.) 319; Toledo, etc., R. Co. v. Building Co., 63 Ill. 308.

[48] Stoyel v. Westcott, 2 Day (Conn.) 418; 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.

the case of debt and detinue seems to be an exception,[49] and assumpsit cannot be joined with covenant, or debt or account,[50] or trespass with case,[51] 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.[52]

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, as we have seen, is to prevent several issues in respect of the same demand only; there being no objection to several issues where the demands are several.

SAME—DIFFERENT STATEMENTS OF THE SAME CAUSE OF ACTION.

256. 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 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

[49] See Tidd. Prac. 11, note b.

[50] Pell v. Lovett, 19 Wend. (N. Y.) 546; Canton National Bldg. Ass'n v. Weber, 34 Md. 669; Cruikshank v. Brown, 10 Ill. 75.

[51] Cooper v. Bissell, 16 Johns. (N. Y.) 146; Sheppard v. Furniss, 19 Ala. 760.

[52] Kennedy v. Stallworth, 18 Ala. 263; Patrick v. Rucker, 19 Ill. 428; Albin v. Talbott, 46 Ill. 424.

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.[58]

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 which he brings the action; but, if he states them both in the same count, the declaration, as we have seen, 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

[58] Steph. Pl. (Tyler's Ed.) 258; Ward v. Bell, 2 Dowl. 76.

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 the recovery of money only, 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. If, on the other hand, the defendant does not think proper to demur, but takes issue in fact on both, the plaintiff will have no occasion at the trial to rely at all upon the former count, but will succeed by merely proving the latter.

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.[54]

DUPLICITY IN PLEADINGS SUBSEQUENT TO THE DECLARATION—SEVERAL PLEAS.

257. 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.

(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.

[54] Steph. Pl. (Tyler's Ed.) 261; Hart v. Longfield, 7 Mod. 148; West v. Troles, 1 Salk. 213.

As we have already seen, the rule is well settled that no plea or traverse can be good which embraces different matters, and cannot be brought within the scope of one issue.[55] 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.[56] 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,[57] 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.[58]

As has already been stated, 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.[59] 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. The rule applies equally to the replication and other subse-

[55] Com. Dig. "Pleader," E 2.

[56] 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, 30 Ill. 333; Star Brick Co. v. Ridsdale, 34 N. J. Law, 428.

[57] See, as to the test of duplicity, People v. River Raisin & L. E. R. Co., 12 Mich. 390.

[58] Robinson v. Raley, 1 Burrows, 316. 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.

[59] Steph. Pl. (Tyler's Ed.) 267.

quent 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.[60]

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 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.[61] 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.[62]

When several pleas are pleaded, either to different matters, or,

[60] Vin. Abr. "Double Pleas," D.

[61] See dictum in Auburn & O. Canal Co. v. Leitch, 4 Denio (N. Y.) 65.

[62] Steph. Pl. (Tyler's Ed.) 263. See Append., Form No. 35.

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,[63] is, in practice, carried much further. For 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

[63] Steph. Pl. (Tyler's Ed.) 264; Clinton v. Morton, 2 Strange, 1000.

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.[64] In modern practice, however, such pleas, notwithstanding the apparent repugnancy between them, are permitted,[65] and the only pleas, perhaps, which have been uniformly disallowed, on the mere ground of inconsistency, are those of the general issue and a tender.[66]

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, 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,

[64] Com. Dig. "Pleader," E 2.

[65] 1 Sell. Prac. 299; 2 Chit. Pl. 582; Chitty v. Hume, 13 East, 255; Tidd. Prac. (9th Ed.) 656; Gordon v. Pierce, 11 Me. 213; Jackson v. Stetson, 15 Mass. 54; Peters v. Ulmer, 74 Pa. St. 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.

[66] Steph. Pl. (Tyler's Ed.) 265. But see Shaw v. Lord Alvanley, 2 Bing. 325.

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.[67]

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,[68] 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.

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 can-

[67] Steph. Pl. (Tyler's Ed.) 266.

[68] Jackson v. Stetson, 15 Mass. 48; Watriss v. Pierce, 36 N. H. 236; Clay Fire & Marine Ins. Co. v. Wusterhausen, 75 Ill. 285; Millikin v. Jones, 77 Ill. 372.

not be taken in to help or destroy another, but every plea must stand or fall by itself.[69] 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.[70]

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.[71] 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.

CONSEQUENCES OF DUPLICITY.

258. 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

[69] Grills v. Mannell, Willes, 378. See Harington v. Macmorris, 5 Taunt. 228; Potter v. Earnest, 45 Ind. 416; Clarke v. Holt, 16 Ark. 257.

[70] See Bartlett v. Prescott, 41 N. H. 499.

[71] Co. Litt. 303a; Essington v. Bourcher, Hob. 245. See Cuppledick v. Terwhit, Id. 250; Stilwell v. Hasbrouck, 1 Hill (N. Y.) 561.

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.[72] 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.[73] 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.

CONSEQUENCES OF MISJOINDER.

259. Misjoinder of causes of action is an incurable defect, and not one of form only, and can therefore be objected to by a general demurrer.

The rule before noticed, requiring the demurrer for duplicity to be special, finds no application here, 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.[74]

[72] Humphreys v. Bethily, 2 Vent. 198; Saunders v. Crawley, 1 Rolle, 112; Seymour v. Mitchell, 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, (Ill.) 302; Kipp v. Bell, 86 Ill. 577.

[73] See Bolton v. Cannon, 1 Vent. 272; Reynolds v. Blackburn, 7 Adol. & E. 161. And see Gould v. Ray, 13 Wend. (N. Y.) 633.

[74] See Cooper v. Bissell, 16 Johns. (N. Y.) 146; Bodley v. Roop, 6 Blackf. (Ind.) 158; Pharr v. Bachelor, 3 Ala. 237. But a demurrer for misjoinder must be to the whole declaration, and not merely to the defective count or breach. Post, p. 470; 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

RULE II.—PLEA AND DEMURRER.

260. It is not allowable both to plead and demur to the same matter.

261. An issue in fact and an issue in law cannot be produced, at the same time, with reference to the same subject of controversy.

262. 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, heretofore mentioned, can a party both plead and demur to one and the same matter.[75] 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, and it is clearly allowable, on the principles heretofore stated with regard to the application of the rule against duplicity, that different statements or defenses may be separately opposed in such manner as the pleader may see fit. A party may therefore plead to one count or one plea, and demur to another.

out the objectionable counts may be allowed, Jennings v. Newman, 4 Term R. 348; Fernald v. Garvin, 55 Me. 417; Noble v. Laley, 50 Pa. St. 281.

[75] Auburn & O. Canal Co. v. Leitch, 4 Denio (N. Y.) 65; 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.

CHAPTER IX.

CERTAINTY IN PLEADING.

263–269. The Rules in General.
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272–277. Local and Transitory Actions.
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280. Consequence of Mistake or Omission.
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282. When the Time must be Truly Stated.
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284. Time to be Alleged in the Plea.
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286. Rule III.—Quantity, Quality, and Value.
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THE RULES IN GENERAL.

263. RULE I. Pleadings must have certainty of place.

264. RULE II. Pleadings must have certainty of time.

265. RULE III. Pleadings must specify quantity, quality, and value.

266. RULE IV. Pleadings must specify the names of persons.

267. RULE V. Pleadings must show title.

268. RULE VI. Pleadings must show authority.

269. RULE VII. In general, whatever is alleged in pleading must be stated with certainty.

RULE I.—PLACE OR VENUE.

270. In all pleadings, some certain place must be alleged for every affirmative traversable fact, which place is called the "venue" in the action.

271. 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.

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 required 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.

The ancient practice, and its modification by statute in England, is thus explained by Mr. Stephen:

"The most ancient practice, as established at the period when juries were composed of persons cognizant of their own knowledge of the fact in dispute, was, of course, to summon the jury from that venue which had been laid to the particular fact in issue, and from the venue of parish, town, or hamlet, as well as county. Thus, in an action of debt on bond, if the declaration alleged the contract to have been made at Westminster, in the county of Middlesex, and the defendant, in his plea, denied the bond, issue being joined

[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] Steph. Pl. (Tyler's Ed.) 268.

[3] Steph. Pl. (Tyler's Ed.) 270.

on this plea, it would be tried by a jury from Westminster. Again, if he pleaded an affirmative matter, as, for example, a release, he would lay this new traversable allegation with a venue; and, if this venue happened to differ from that in the declaration, being laid, for example, at Oxford, in the county of Oxford, and issue were taken on the plea, such issue would be tried by a jury from Oxford, and not from Westminster. And it may here be incidentally observed that as the place or neighborhood in which the fact arose, and also the allegation of that place in the pleadings, was called the 'venue,' so the term was often applied to the jury summoned from thence. Thus it would be said in the case last supposed that 'the venue was to come from Oxford.' With respect to the form of the venire at this period, it was as follows: 'Venire facias duodecim liberos et legales homines, de vicineto de W. [or O.] [i. e. the parish, town, or hamlet] per quos rei veritas melius sciri poterit,' etc.

"While such appears to have been the most ancient state of practice, it soon sustained very considerable changes. When the jury began to be summoned no longer as witnesses, but as judges, and, instead of being cognizant of the fact on their own knowledge, received the fact from the testimony of others judicially examined before them, the reason for summoning them from the immediate neighborhood ceased to apply, and it was considered as sufficient if, by way of partial conformity with the original principle, a certain number of the jury came from the same hundred in which the place laid for venue was situate, though their companions should be of the county only, and neither of the venue, nor even of the hundred. This change in the manner of executing the venire did not, however, occasion any alteration in its form, which still directed the sheriff, as in former times, to summon the whole jury from the particular venue. The number of hundredors which it was necessary to summon was different at different periods. In later times no more than two hundredors were required in a personal action.

"In this state of the law was passed the statute 16 & 17 Car. II. c. 8. By this act (which is one of the statutes of jeofails) it is provided 'that after verdict judgment shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county or place where the action is laid.' This pro-

vision was held to apply to the case (among others) where issue had been taken on a fact laid with a different venue from that in the action, but where the venire had improperly directed a jury to be summoned from the venue in the action, instead of the venue laid to the fact in issue. This had formerly been matter of error, and, therefore, ground for arresting or reversing the judgment; but by this act (passed with a view of removing what had become a merely formal objection) the error was cured, and the staying or reversal of the judgment disallowed. While such was its direct operation, it has had a further effect, not contemplated, perhaps, by those who devised the enactment. For what the statute only purported to cure as an error, it has virtually established as regular and uniform practice; and issues taken on facts laid with a different venue from that in the action have, for a long time past, been constantly tried, not by a jury of the venue laid to the fact in issue, but by a jury of the venue in the action.

"Another change was introduced by the statute 4 Anne, c. 16, § 6. This act provides that 'every venire facias for the trial of any issue shall be awarded of the body of the proper county where such issue is triable,' instead of being (as in the ancient form) awarded from the particular venue of parish, town, or hamlet. From this time, therefore, the form of the venire has been changed, and directs the sheriff to summon 12 good and lawful men, etc., 'from the body of his county'; and they are accordingly, in fact, all summoned from the body of the county only, and no part of them necessarily from the hundred in which the particular place laid for venue is situate.

"On the whole, then, by the joint effect of these two statutes, the venire, instead of directing the jury to be summoned from that venue which had been laid to the fact in issue, and from the venue of the parish, town, or hamlet, as well as county, now directs them, in all cases, to be summoned from the body of the county in which the action is laid, whether that be the county laid to the fact in issue or not, and without regard to the parish, town, or hamlet." [4]

Subject to the distinctions hereafter noticed as to local and transitory actions, and to such provisions as have been made by the statutes in the different states, the rule of the common law,

[4] Steph. Pl. (Tyler's Ed.) 272.

as modified by the statutes above referred to, is in force in this country. 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.[5] 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.[6]

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.

SAME—LOCAL AND TRANSITORY ACTIONS.

272. LOCAL ACTIONS—A local action is one where all the facts upon which it is founded are local, and may be either for—

(a) The direct recovery of a local subject; or

(b) The establishment or maintenance of a right arising out of a local subject, or the recovery of damages for its violation.

273. In all local actions, place is material, and the venue must be laid according to the fact.

[5] Briggs v. Nantucket Bank, 5 Mass. 94. And see, to the same effect, Pullen v. Chase, 4 Ark. 210.

[6] Slate v. Post, 9 Johns. (N. Y.) 81. And see County Com'rs of Hartford Co. 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.

274. Where the action is brought for the recovery of lands or tenements, the venue must be laid in the county in which such lands or tenements are situated.

275. Where the action is not brought for the direct recovery of lands and tenements, but arises out of some local subject or the violation of some local right or interest, the true venue must still be laid.

276. TRANSITORY ACTIONS — A transitory action is one where the facts which constitute its subject-matter have no natural locality.

277. In transitory actions, place is not material, and the venue may be laid at the option of the pleader, without regard to the situation of the subject-matter of the controversy.

Before the change in the constitution of juries above mentioned, the venue was, of course, always to be laid in the true place where the fact arose; for so the reason of the law of venue evidently required. But when, in consequence of that change, this reason ceased to operate, the law began to distinguish between cases in which the truth of the venue was material, or of the substance of the issue, and cases in which it was not so. A difference began now to be recognized between local and transitory matters. The former consisted of such facts as carried with them the idea of some certain place, comprising all matters relating to the realty, and hardly any others. The latter consisted of such facts as might be supposed to have happened anywhere, and, therefore, comprised debts, contracts, and generally all matters relating to the person or personal property. With respect to the former, it was held that if any local fact were laid in pleading at a certain place, and issue were taken on that fact, the place formed part of the substance of the issue, and must, therefore, be proved as laid, or the party would fail as for want of proof. But as to transitory facts, the rule was that they might be laid as having happened at one place, and might be proved on the trial to have occurred at another.[7]

[7] Vin. Abr. "Trial," M, f; Co. Litt. 282a; Steph. Pl. (Tyler's Ed.) 273.

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, no action will lie in any one sovereign state for the recovery of lands or tenements situated in another.[8]

Actions are also local where, while they do not involve the direct recovery of the local subject, they are brought to establish and maintain certain rights arising out of it, or to recover pecuniary damages for the violation of such rights, for they are therefore as much local in their nature as if brought for the recovery of the thing itself;[9] and the reason for the rule is the same, since rights based upon or arising out of a local subject can generally be determined only by the court having jurisdiction over that subject, though if a tortious act, committed in one county, occasions damage to land or any local subject situated in another, the venue may be laid in either.[10]

[8] See Doulson v. Matthews, 4 Term R. 504; Mostyn v. Fabrigas, Cowp. 176; Thomson v. Locke, 66 Tex. 383, 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.

[9] Instances of actions of this character are trespass for injuries to land, or case for nuisances, waste, etc., or replevin. See Jefferies v. Duncombe, 11 East, 226; Sumner v. Finegan, 15 Mass. 284; Putnam v. Bond, 102 Mass. 370; Loeb v. Mathis, 37 Ind. 306; Deacon v. Shreve, 23 N. J. Law, 204; Brown v. Irwin, 47 Kan. 50, 27 Pac. 184. 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.

[10] Scott v. Brest, 2 Term R. 241; Mayor, etc., of London v. Cole, 7 Term R. 583; Hale v. Lawrence, 21 N. J. Law, 714. And see Bogert v. Hildreth, 1 Caines (N. Y.) 2; Marshall v. Hosmer, 3 Mass. 23.

Generally speaking, all actions which are called "personal," whether they sound in tort[11] or contract,[12] 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 jurisdiction.[13] 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.[14] 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;[15] but the fiction by which matters happening out of the jurisdiction are thus laid as

[11] 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; Shaver v. White, 6 Munf. (Va.) 112; Watts v. Thomas, 2 Bibb (Ky.) 458; Smith v. Bull, 17 Wend. (N. Y.) 323.

[12] 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 local. See White v. Sanborn, 6 N. H. 220; Clarkson v. Gifford, 1 Caines (N. Y.) 5. But see Corporation of New York v. Dawson, 2 Johns. Cas. 335.

[13] See Hale v. Lawrence, 21 N. J. Law, 714; McDuffee v. Portland & R. R. Co., 52 N. H. 430; Read v. Walker, 52 Ill. 333.

[14] Henwood v. Cheeseman, 3 Serg. & R. (Pa.) 501. Compare University of Vermont v. Joslyn, 21 Vt. 52.

[15] 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

occurring within it cannot be used, even in transitory actions, to give a court jurisdiction in matters which are essentially beyond its cognizance.[16]

SAME—LOCAL FACTS—VENUE IN PLEADINGS SUBSEQUENT TO THE DECLARATION.

278. Local facts must always be truly laid, both in the declaration and subsequent pleadings, whether the action be local or transitory.

279. 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.[17] 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;[18] but in practice it is still usual to lay a venue in these as

example, "and the said A. B. afterwards, to wit, on the 1st day of June, 1892," etc. See Gould, Pl. c. 3, §§ 36–41.

[16] See Vermilye v. Beatty, 6 Barb. (N. Y.) 429, to the effect that an allegation contrary to the plain fact will not aid in conferring jurisdiction.

[17] Com. Dig. "Pleader," E 4.

[18] See Ilderton v. Ilderton, 2 H. Bl. 145, per Eyre, Ld. C. J.

well as in the declaration, and, in point of form, is the proper course.

SAME—CONSEQUENCES OF MISTAKE OR OMISSION.

280. 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 misdescription of the subject-matter of the suit,[19] and its omission, when necessary, an incurable defect.[20] 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;[21] 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.[22] 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,[23] or by a judgment by default,[24] or by verdict;[25] but even in transitory actions, as it is necessary that some venue be laid, the omission remains fatal on demurrer.

[19] Santler v. Heard, 2 Wm. Bl. 1033; Bruckshaw v. Hopkins, Cowp. 410.

[20] Com. Dig. "Action," N 6; Bac. Abr. "Venue," c.

[21] Dumont v. Lockwood, 7 Blackf. (Ind.) 576.

[22] See Haskell v. Woolwich, 58 Me. 535.

[23] Anon., 3 Salk. 381. And see Mellor v. Barber, 8 Term R. 387.

[24] Remington v. Tayler, Lutw. 72.

[25] By the express provisions of the statute of 16 & 17 Car. II. c. 5.

RULE II.—TIME.

281. 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.[26] 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.[27] It has been laid down as a general principle that, wherever it is necessary to lay a venue, it is also necessary to mention time.[28]

SAME—WHEN THE TIME MUST BE TRULY STATED.

282. 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.

[26] Com. Dig. "Pleader," c. 19; Halsey v. Carpenter, Cro. Jac. 359; Denison v. Richardson, 14 East, 291; Ring v. Roxbrough, 2 Tyrw. 473; Andrews v. Thayer, 40 Conn. 157; Wellington v. Milliken, 82 Me. 58, 19 Atl. 90.

[27] See Swift v. Crocker, 21 Pick. (Mass.) 241; Maynard v. Talcott, 11 Barb. (N. Y.) 569; 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 Bemis v. Faxon, 4 Mass. 263; 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.

[28] The King v. Hollond, 5 Term R. 620; Denison v. Richardson, supra. See Pharr v. Bachelor, 3 Ala. 237.

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.[29] 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.[30] 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.[31] 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 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.

Where time is not prima facie material, as in the above instances, it may sometimes be made so by the subsequent pleading of the ad-

[29] See Pope v. Foster, 4 Term R. 590; Carlisle v. Trears, Cowp. 671; Stafford v. Forcer, 10 Mod. 313; Tate v. Wellings, 3 Term R. 531; Atlantic 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.

[30] Carlisle v. Trears, supra.

[31] Johnson v. Picket, cited Grimwood v. Barritt, 6 Term R. 463.

verse party, and the allegation of the true time by the defendant will oblige the plaintiff to state it correctly in his replication. This deviation is allowed upon the same principle as the laying of the true venue in a transitory action, when the nature of the defense requires it; and here the defendant must, of course, allege the time correctly.

SAME—WHEN TIME NEED NOT BE TRULY STATED.

283. Wherever the time to be alleged does not constitute a material point in the cause, and is not of the substance of the issue, 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.[32] 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,[33] or a parol contract made,[34] 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.[35] As the plaintiff is

[32] See Mathews v. Spicer, 2 Strange, 806; 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.

[33] Time is not material in trespass. Co. Litt. 283a. And see Pierce v. Pickens, 16 Mass. 472; Folger v. Fields, 12 Cush. (Mass.) 93.

[34] See The Lady Shandois v. Simson, Cro. Eliz. 880.

[35] See Ring v. Roxbrough, 2 Tyrw. 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

not generally confined in 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.

284. 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.

time in code pleading, see Backus v. Clark, 1 Kan. 303; People v. Ryder, 12 N. Y. 433. The rule still applies, and time, when material, must be strictly laid and proved.

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 or discharge must, from its nature, have occurred 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.

285. 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.[38]

RULE III.—QUANTITY, QUALITY, AND VALUE.

286. 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

[38] See Johnson v. Long, 3 Ld. Raym. 260; Monkton v. Pashley, 2 Salk. 638; Earl of Manchester v. Vale, 1 Saund. 24, note 1; Hume v. Oldacre, 1 Starkie, 351.

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, lands, or other hereditaments.[37] 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.[38] 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.[39] 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.[40] 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.[41] 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.[42] So, in ejectment, the plaintiff declared for five closes of land, arable and pasture, called

[37] Steph. Pl. (Tyler's Ed.) 281; Bract. Rom. Law, 431a; Harpur's Case, 11 Coke, 25b; Knight v. Symms, Carth. 204; Doe v. Plowman, 1 East, 441; Goodtitle v. Otway, 8 East, 357; Andrew v. Whitehead, 13 East, 102; 1 Saund. 333, note 7; 2 Saund. 74, note 1; and cases hereafter cited.

[38] Playter's Case, 5 Coke, 34b.

[39] Dale v. Phillipson, 2 Lutw. 1374.

[40] Bertie v. Pickering, 4 Burrows, 2455; Wiatt v. Essington, Ld. Raym. 1410.

[41] Pope v. Tillman, 7 Taunt. 642.

[42] Lawly v. Gattacre, Cro. Jac. 498.

"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.[43]

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 capacity, 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.[44] 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.[45] 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.[46] The degree of certainty requisite in stating matters of the kind mentioned seems to be such

[43] Knight v. Symms, Carth. 204.
[44] 2 Saund. 94b, note 1.
[45] Layton v. Grindall, 2 Salk. 643.
[46] Chamberlain v. Greenfield, 3 Wils. 292.

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,[47] and minuteness of description being required where a complete identification might be essential to a recovery.[48]

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.[49] 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, 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 10l. 4s., and other sums, the defendant pleaded, as to all but 4l. 7s. 6d., the general issue, and, as to the 4l. 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 4l. 7s. 6d., which the defendant refused to pay; and on issue joined it was proved that the plaintiff had demanded not 4l. 7s. 6d., but the whole 10l. 4s. This proof was held not to support the issue.[50] 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.[51] 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.[52]

There are some kinds of actions, such as debt and indebitatus

[47] Layton v. Grindall, 2 Salk. 643; Cryps v. Boynton, 3 Bulst. 31; Shum v. Farrington, 1 Bosw. & P. 640. And see Smith v. Boston, C. & M. R. Co., 36 N. H. 485; Hughes v. Smith, 5 Johns. (N. Y.) 173; and the cases cited in chapter 5, as to the description of property in the different actions.

[48] Dale v. Phillipson, Lutw. 440; Bertie v. Pickering, 4 Burrows, 2455; Pope v. Tillman, 7 Taunt. 642.

[49] Crispin v. Williamson, 8 Taunt. 107. And see Ruberg v. Stevens, 4 Barn. & Adol. 241.

[50] Rivers v. Griffiths, 5 Barn. & Ald. 630.

[51] See Foster v. Pennington, 32 Me. 178.

[52] See Knight v. Symms, Carth. 204.

assumpsit, in which quality, quantity, and value need not be stated, but even in such actions the sum claimed must be shown.

SAME—QUANTITY AND VALUE AS AFFECTING AMOUNT OF RECOVERY.

287. Although quantity and value need not generally be truly stated, a verdict cannot, in general, be obtained for more than is alleged.

This is a rule to be borne in mind in stating the amount of the recovery claimed, as the rights of the plaintiff may otherwise result in less than should have been the case. It is well settled that a party may recover less than he asks for or shows to be due him, but in no case can he obtain a verdict or judgment for more in any common-law action, save that of account render.[53] Where the main object of the action is the recovery of unliquidated damages, as well as when a specified sum is claimed, the pleader must state the full amount necessary to cover his demand; and, even where the damages are incidental, enough must be alleged to fulfill the same requirement.[54]

RULE IV.—NAMES OF PERSONS.

288. 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.

289. The names of all persons mentioned in the pleadings, though not parties to the suit, must be correctly stated.

[53] The reason is that the object of the action of account render is to ascertain the amount of the sum actually due.

[54] See Morton v. McClure, 22 Ill. 257; Russell v. Chicago, Id. 283; and the cases cited under the discussion of the damages in special assumpsit, ante, p. 218; and see post, p. 487.

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.[55] If, in pleading a contract made by James Smith, the name is incorrectly given as 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.[56] 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.[57] 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.[58] 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

[55] See Harvey v. Stokes, Willes, 5; Acerro v. Petrone, 1 Starkie, 100; Mayelstone v. Lord Palmerston, 1 Moody & M. 6; Finch v. Cocken, 3 Dowl. 678. Compare Forman v. Jacob, 1 Starkie, 46.

[56] Tweedy v. Jarvis, 27 Conn. 42; In re Jones' Estate, 27 Pa. St. 336; City Council v. King, 4 McCord (S. C.) 487; Kenyon v. Semon, 43 Minn. 180, 45 N. W. 10; Kemp v. McCormick, 1 Mont. 420.

[57] 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.

[58] 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; Bratton v. Seymour, 4 Watts (Pa.) 329; Keene

idem sonans.[59] 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.[60]

SAME—PARTIES TO THE ACTION.

290. 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.

291. 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.[61] An error in this respect, however, can now generally be cured by amending the defective pleading. A liberal construction of the rule al-

v. Meade, 3 Pet. 1; McKay v. Speak, 8 Tex. 376; Ahitbol v. Beneditto, 2 Taunt. 401; Williams v. Ogle, 2 Strange, 889.

[59] The following names have been held idem sonans: "Segrave" for "Seagrave," Williams v. Ogle, supra; "Benedetto" for "Beneditto," Ahitbol v. Beneditto, 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.

[60] De Kentland v. Somers, 2 Root (Conn.) 437; Kincaid v. Howe, 10 Mass. 205; Cobb v. Lucas, 15 Pick. (Mass.) 7; Brainard v. Stilphin, 6 Vt. 9; Padgett v. Lawrence, 10 Paige (N. Y.) 170; Headley v. Shaw, 39 Ill. 354; Jameson v. Isaacs, 12 Vt. 611; Clark, Cr. Proc. 235. But see Jackson v. Prevost, 2 Caines (N. Y.) 164; State v. Vittum, 9 N. H. 519.

[61] See Lebannon v. Griffin, 45 N. H. 558; Flanders v. Stewartstown, 47 N. H. 549; Herf v. Shulze, 10 Ohio, 262; Brent v. Shook, 36 Ill. 125. And the

lows, as we have seen, the use of the names by which such parties are generally known,[62] though not strictly correct, and though the designation thus habitually used includes the person's initials only.[63] 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.[64]

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.[65]

Descriptive Words.

If a person sues or is sued in a representative capacity, as agent, executor, trustee, etc., while the representative character in which he appears may be gathered from the body of the pleadings,[66] 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.[67] It is not generally sufficient to state simply, "A. B., executor," or "agent," 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

names of all parties should be disclosed. Wolf v. Binder (Pa. Com. Pl.) 10 Pa. Co. Ct. R. 108.

[62] See In re Jones' Estate, 27 Pa. St. 336.

[63] City Council 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.

[64] See Lowell v. Morse, 1 Metc. (Mass.) 473; Commercial Bank v. French, 21 Pick. (Mass.) 486.

[65] Mayor of Stafford v. Bolton, 1 Bos. & P. 40; Medway Cotton Manufactory v. Adams, 10 Mass. 360; Reid v. Lord, 4 Johns. (N. Y.) 118.

[66] See Knox v. Metropolitan El. Ry. Co., 58 Hun, 517, 12 N. Y. Supp. 848.

[67] Henshall v. Roberts, 5 East, 150; Stilwell v. Carpenter, 62 N. Y. 639; and cases hereafter cited.

individual only for the purpose of the particular action.[68] 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.[69] 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 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.[70]

[68] 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. 297; 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 descripto personæ. Grew v. Burditt, 9 Pick. (Mass.) 265; George v. English, 30 Ala. 582; Higgins v. Halligan, 46 Ill. 173.

[69] See Bentley v. Smith, 3 Caines (N. Y.) 170; Brubaker v. Poage, 1 T. B. Mon. (Ky.) 123.

[70] See Polland v. Lock, Cro. Eliz. 267. And see Hildreth v. Harvey, cited in 3 Caines (N. Y.) 170.

RULE V.—SHOWING TITLE.

292. 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.

293. 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.[71] 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.[72]

294. 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.

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.

[71] Com. Dig. "Pleader," 3 M, 9; Bract. Rom. Law, 372b, 373b.

[72] Post, p. 415.

(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 in respect of which the right is 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.[78] 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, ac-

[78] Wilbraham v. Snow, 2 Saund. 47a, note 1.

cording to the fact, and upon the 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,[74] 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

[74] 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 Burrows, 440; Langford v. Webber, 3 Mod. 132; Carnaby v. Welby, 8 Adol. & El. 872; Skevill v. Avery, Cro. Car. 138.

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.[75] 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, 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.[76]

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.[77] According to some of the cases, however, the rule applies also to replevin.[78]

The rule has little or no application in real or mixed actions; for in these an injury to the possession is seldom alleged; the question in dispute being, for the most part, on the right of possession, or the right of property.

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

[75] Skevill v. Avery, Cro. Car. 138; ante, p. 65.

[76] 1 Saund. 221, note 1; Id. 346e, note 2; 2 Saund. 285, note 3; Anon., 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.

[77] Hawkins v. Eckles, 2 Bos. & P. 359, 361, note a; Dovaston v. Payne, H. Bl. 530; 1 Saund. 346e, note 2; 2 Saund. 285, note 3; Saunders v. Hussey, 2 Lutw. 1231, 1 Ld. Raym. 333.

[78] See Adams v. Cross, 2 Vent. 181.

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.[79]

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, for instance, without showing whether in fee, or for life, etc., would not be sufficient.[80]

As stated in the black-letter text, there is an exception in certain cases where a general freehold title may be alleged. These cases will be presently explained.[81]

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.

SAME—ALLEGING DERIVATION OF TITLE.

295. 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.

[79] Steph. Pl. (Tyler's Ed.) 290.

[80] Saunders v. Hussey, Carth. 9; 2 Lutw. 1231; 1 Ld. Raym. 333.

[81] Post, p. 411.

SAME—ESTATES IN FEE SIMPLE.

296. 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.

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 "seised 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;[82] 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.[83]

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 seised in fee and made the lease, must proceed to show how the fee passed to himself, viz. by descent.[84] 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

[82] Co. Litt. 303b; Scavage v. Hawkins, Cro. Car. 571.

[83] Steph. Pl. (Tyler's Ed.) 291; Doct. Pl. 287.

[84] Steph. Pl. (Tyler's Ed.) 291.

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.[85]

SAME—PARTICULAR ESTATES.

297. 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.[86] 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 execu-

[85] Id. See, as to this exception, Cuthbertson v. Irving, 4 Hurl. & N. 742.

[86] Co. Litt. 203b; Scilly v. Dally, 2 Salk. 562; Searl v. Bunion, 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.

tor 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.[87]

SAME—TITLE BY INHERITANCE.

298. 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, whether in the direct or collateral line, he must not plead that he is a nephew, which is only the statement of a legal conclusion, but must set out the facts of his title.[88]

SAME—TITLE BY ALIENATION OR CONVEYANCE.

299. When a party claims title by conveyance or alienation, the nature of the conveyance or alienation must, in general, be stated.

Thus, as in showing a title by inheritance, he must state the facts which constitute his title, as by showing whether it be by devise, feoffment, etc.[89]

SAME—MANNER OF PLEADING CONVEYANCE.

300. The nature of the conveyance or alienation should be stated according to its legal effect, rather than its form of words.

[87] Com. Dig. "Pleader," E 19, c. 43; Blockley v. Slater, Lutw. 120; Searl v. Bunion, 2 Mod. 70; Scilly v. Dally, 2 Salk. 562; Skevill v. Avery, Cro. Car. 138; Lodge v. Frye, Cro. Jac. 52.

[88] Dumsday v. Hughes, 3 Bos. & P. 453; Brickborough v. Davis, 12 Mod. 619. And see Heard v. Baskerville, Hob. 232.

[89] Com. Dig. "Pleader," E 23, E 24.

This rule depends upon the more general one, hereinafter considered, that "things are to be pleaded according to their legal effect or operation." [90] 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.[91]

SAME—WRITTEN CONVEYANCE.

301. 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.[92] 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.[93] 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.[94]

[90] Post, p. 459.

[91] Co. Litt. 9a.

[92] Steph. Pl. (Tyler's Ed.) 295; Porter v. Gray, Cro. Eliz. 245; Lathbury v. Arnold, 1 Bing. 217.

[93] 1 Saund. 276a, note 2.

[94] Vin. Abr. tit. "Grants," G (a); Porter v. Gray, Cro. Eliz. 245; 1 Saund. 234, note 3.

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.[95] 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.[96]

SAME—GENERAL FREEHOLD TITLE.

302. In some cases, where a title of possession is not applicable or sufficient, a general freehold title may be alleged, in lieu of stating title in its full and precise extent.

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.[97] This is called the plea or avowry of liberum tenementum.[98] This allegation of a general freehold title will be sustained by proof of any estate

[95] Steph. Pl. (Tyler's Ed.) 295.

[96] 2 Saund. 180b; Wiscot's Case, 2 Rep. 61b, Dyer, 91b; Bateman v. Allen, Cro. Eliz. 438; Childes v. Wescot, Id. 482.

[97] Steph. Pl. (Tyler's Ed.) 296; 1 Saund. 347d, note 6; Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272; Martin v. Kesterton, 2 W. Bl. 1089; Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 531; Tribble v. Frame, 7 J. J. Marsh. (Ky.) 599; Wilsons v. Bibb. 1 Dana (Ky.) 7.

[98] See Append., Form No. 32.

of freehold, whether in fee or for life only, and whether in possession or expectant on the determination of an estate for years.[99] 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.

SAME—WHERE A PARTY ALLEGES TITLE IN HIS ADVERSARY.

303. 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.[100]

SAME—WHAT IS A SUFFICIENT ALLEGATION OF LIABILITY.

304. 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 pre-

[99] See Doe v. Wright, 10 Adol. & E. 763; Ryan v. Clark, 14 Q. B. 65.

[100] 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.

cisely 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 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,[101] 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.[102] 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.[103] 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

[101] Com. Dig. "Pleader," c. 42.

[102] Plake v. Foster, 8 Term R. 487.

[103] 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.

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.[104] 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.[105] 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,[106] but if a party entitle himself by inheritance, we have seen that the mode of descent must be alleged.

SAME—PROOF OF TITLE AS ALLEGED.

305. 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

[104] 1 Saund., supra; Attorney General v. Meller, supra.
[105] 1 Saund. supra; Pitt v. Russel, 3 Lev. 19.
[106] Denham v. Stephenson, 1 Salk. 355.

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.[107]

SAME—ESTOPPEL OF ADVERSE PARTY.

306. 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 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.[108]

[107] See Cudlip v. Rundle, Carth. 202.

[108] See Cuthbertson v. Irving, 4 Hurl. & N. 742; Smith v. Scott, 6 C. B. (N. S) 771.

RULE VI.—SHOWING AS TO AUTHORITY.

307. 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.[109] 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.[110] In all cases, therefore, where the defendant justifies under judicial process, he must set forth the facts in detail, though there 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.[111] (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;[112] but

[109] 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.

[110] See Lamb v. Mills, supra.

[111] Rowland v. Veale, Cowp. 18; Belk v. Broadbent, 3 Term R. 183.

[112] See Andrews v. Marris, 1 Q. B. 3.

if such justification is by any one except such officer, even a party to the action, the judgment must be set forth as well.[113] (3) Where an officer thus justifies, he must show that the writ was duly returned, if a return is legally necessary.[114] (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.[115] (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.[116] In general, in pleadings 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.[117]

RULE VII.—CERTAINTY IN GENERAL.

308. In general, whatever is alleged in pleading must be alleged with certainty.

309. 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 they

[113] Britton v. Cole, Carth. 443; Turner v. Felgate, 1 Lev. 95. And see Morse v. James, Willes, 122.

[114] See Middleton v. Price, 2 Strange, 1184; Cheasley v. Barnes, 10 East, 73; Shorland v. Govett, 5 Barn. & C. 485.

[115] See 9 Went. Pl. 22, 53, 120, 351.

[116] 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.

[117] Mathews v. Cary, 3 Mod. 138.

may be fully understood by the adverse party, the jury, and the court, and a definite and certain issue produced for decision.

The rule above mentioned covers the general mode of stating facts in all pleadings, irrespective of the nature of the cause of action or defense, as instanced in the rules previously discussed in this chapter. Its object is, not only to place the matter in controversy in all cases in such form that it may be properly understood, and a complete and simple issue formed for decision, but also, so far as the declaration is concerned, to enable a defendant to plead the judgment which may be rendered in bar of any subsequent action for the same cause.[118] The degree of certainty required has been variously stated and commented upon by different writers and courts, and, while the classification laid down by Lord Coke has been both criticised and in some instances rejected, it would seem to still remain as the foundation, at least, of the distinctions commonly observed. Under this 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.[119] 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.[120] 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[121] which do not appear except by inference

[118] Wiatt v. Essington, 2 Ld. Raym. 1411; Bertie v. Pickering, 4 Burrows, 2456; Phelps v. Sill, 1 Day (Conn.) 315.

[119] Dovaston v. Payne, 2 H. Bl. 530; Royalton v. Royalton & W. Turnpike Co., 14 Vt. 311.

[120] Rex v. Horne, Cowp. 682; The King v. Lyme Regis, Doug. 158; Oystead v. Shed, 12 Mass. 509; Washburne v. Mosely, 22 Me. 160.

[121] Dovaston v. Payne, 2 H. Bl. 530; Spencer v. Southwick, 9 Johns. (N. Y.) 317.

or argument,[122] and is what is required in declarations,[123] replications, and indictments (in the charge or accusation), and in returns to writs of mandamus.[124] 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 by argument, inference, or presumption, and no supposable answer wanting.[125] 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.[126] It may be added, with respect to all points in which certainty of allegation is required, that the allegation in general, when brought in issue, requires to be proved as laid, and that the relaxation allowed with respect to time, place, quantity, and value does not, generally speaking, extend to other particulars.

No pleading is certain unless it contains a clear, distinct, and complete statement of the facts which constitute the cause of action or ground of defense.[127] We have already partially considered this rule in showing the necessary allegations of the declaration; but it may be well to here illustrate it further, and without limiting its application to declarations.

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.[128] Thus, in debt on bond,

[122] Fuller v. Hampton, 5 Conn. 423.

[123] See Hilldreth v. Becker, 2 Johns. Cas. (N. Y.) 339; Coffin v. Coffin, 2 Mass. 363.

[124] The King v. Lyme Regis, Doug. 158; Andrews v. Whitehead, 13 East, 107; Dovaston v. Payne, 2 H. Bl. 530.

[125] Lawes, Pl. 54, 55.

[126] Lawes, Pl. 56, 107, 134; Dovaston v. Payne, 2 H. Bl. 530; The King v. Lyme Regis, Doug. 158; Casseres v. Bell, 8 Term R. 167.

[127] Com. Dig. "Pleader," C, 17, C, 22, E, 5, F, 17.

[128] Com. Dig. "Pleader," E, 25, E, 26, 2 W, 33; 1 Saund. 116, note 1; Halsey v. Carpenter, Cro. Jac. 359; Wimbleton v. Holdrip, 1 Lev. 303; Wood-

conditioned for the payment of £30 to H. S., I. S., and A. S., tam cito as they should come to the age of 21 years, the defendant pleaded that he paid those sums tam cito as they came of age, and the plaintiff demurred, because it was not shown when they came of age, and the certain times of the payment. "And for this cause all the court held the plea to be ill. For although it be a good plea, regularly, to the condition of a bond, to pursue the words of the condition, and to show the performance, yet Coke said there was another rule that he ought to plead in certainty the time and place and manner of the performance of the condition, so as a certain issue may be taken; otherwise it is not good. Wherefore, because he did not plead here in certainty, it was adjudged for the plaintiff. And between the same parties, in another action of debt upon an obligation, the condition being for performance of legacies in such a will, he pleaded performance generally, and, not showing the will, nor what the legacies were, it was adjudged for the plaintiff."[128] So, in debt on a bond conditioned for the performance of several specific things, "the defendant pleaded performavit omnia, etc. Upon demurrer it was adjudged an ill plea; for, the particulars being expressed in the condition, he ought to plead to each particularly, by itself."[129]

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. It is open also to the following exceptions: Where the condition is for the performance of matters set forth in another instrument, and these matters are in an affirmative and absolute form, and neither in the negative nor the disjunctive, a general plea of performance is sufficient. And where a bond is conditioned for indemnifying the plaintiff from the consequences of a certain act, a general plea of non damnificatus, viz. that he has not been damnified, is proper, without showing how the defendant has indemnified him.

cock v. Cole, 1 Sid. 215; Stone v. Bliss, 1 Bulst. 43; Fitzpatrick v. Robinson, 1 Show. 1; Austin v. Jervoise, Hob. 69, 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.

[128] Halsey v. Carpenter, Cro. Jac. 359.

[129] Wimbleton v. Holdrip, 1 Lev. 303.

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.[181]

Not only on the subject of performance, but in a variety of other cases, the books afford illustration of this general rule. Thus, in debt on bond, the defendant pleaded that the instrument was executed in pursuance of a certain corrupt contract, made at a time and place specified, between the plaintiff and defendant, whereupon there was reserved above the rate of £5 for the forbearing of £100 for a year, contrary to the statute in such case made and provided. To this plea there was a demurrer, assigning for cause that the particulars of the contract were not specified, nor the time of forbearance, nor the sum to be forborne, nor the sum to be paid for such forbearance. And the court held that the plea was bad, for not setting forth particularly the corrupt contract and the usurious interest; and Bayley, J., observed that he "had always understood that the party who pleads a contract must set it out, if he be a party to the contract."[182]

To an action on the case for a libel, imputing that the plaintiff was connected with swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons, the defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned with, and was one of, a gang of swindlers and

[181] Plomer v. Ross, 5 Taunt. 386; Sayre v. Binns, Cowp. 577; Com. Dig. "Pleader," F 14.

[182] Hill v. Montagu, 2 Maule & S. 377; Hinton v. Roffey, 3 Mod. 35.

common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had had dealings and transactions. To this plea there was a special demurrer, assigning for cause, inter alia, that the plea did not state the particular instances of fraud; and, though the court of common pleas gave judgment for the defendant, this judgment was afterwards reversed upon writ of error, and the plea adjudged to be insufficient, on the ground above mentioned.[133]

In an action of trespass for false imprisonment, the defendants pleaded that before the said time when, etc., certain persons unknown had forged receipts on certain forged dividend warrants, and received the money purporting to be due thereon, in Bank of England notes, among which was a note for £100, which was afterwards exchanged at the bank for other notes, among which was one for £10, the date and number of which were afterwards altered; that afterwards, and a little before the said time, when, etc., the plaintiff was suspiciously possessed of the altered note, and did in a suspicious manner dispose of the same to one A. B., and afterwards, in a suspicious manner, left England, and went to Scotland; whereupon the defendants had reasonable cause to suspect, and did suspect, that the plaintiff had forged the said receipts, and so proceeded to justify the taking and detaining his person, to be dealt with according to law. Upon general demurrer, this plea was considered as clearly bad, because it did not show the grounds of suspicion with sufficient certainty to enable the court to judge of their sufficiency; and it was held that the use of the word "suspiciously" would not compensate that omission.[134]

In an action of trover for taking a ship, the defendant pleaded that he was captain of a certain man of war, and that he seized the ship mentioned in the declaration as prize; that he carried her to a certain port in the East Indies; and that the admiralty court there gave sentence against the said ship as prize. Upon demurrer, it was resolved that it was necessary for the plea to show some special cause for which the ship became a prize, and that the defendant ought to show who was the judge that gave sentence, and

[133] J'Anson v. Stuart, 1 Term R. 748.

[134] Mure v. Kaye, 4 Taunt. 34.

to whom that court of admiralty did belong. And for the omission of these matters the plea was adjudged insufficient.[135]

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.[136]

Where the defendant justified an imprisonment of the plaintiff, on the ground of a contempt committed tam factis quam verbis, the plea was held bad upon demurrer, because it set forth the contempt in this general way, without showing its nature more particularly.[137]

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.

SUBORDINATE RULES.

Such are the principal rules which tend to certainty. But it is to be observed that these receive considerable limitation and restriction from some other rules of a subordinate kind, to the examination of which it will now be proper to proceed.

SAME—MATTER OF EVIDENCE.

310. RULE I. It is not necessary in pleading to state that which is merely matter of evidence.

It is a well-settled rule of pleading that it is never necessary to set forth mere matter of evidence.[138] In other words, although a

[135] Beak v. Tyrrell, Carth. 31.

[136] Lewis v. Preston, 1 Show. 290, Skin. 303.

[137] Collet v. Bailiffs of Shrewsbury, 2 Leon. 34.

[138] Dowman's Case, 9 Coke, 9b; Eaton v. Southby, Willes, 131; Jermy v.

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.

This rule may be illustrated by the following case: In an action of replevin, for 70 cocks of wheat, the defendant avowed under a distress for rent arrear. The plaintiff pleaded in bar, that before the said time, when, etc., one H. L. had recovered judgment against G. S., and sued out execution; that G. S. was tenant at will to the defendant, and had sown 7 acres of the premises with wheat, and died possessed thereof as tenant at will; that, after his death, the sheriff took the said wheat in execution, and sold it to the plaintiff; that the plaintiff suffered the wheat to grow on the locus in quo till it was ripe and fit to be cut; that he afterwards cut it, and made it into cocks, whereof the said 70 cocks were parcel; that, the said cocks being so cut, the plaintiff suffered the same to lie on the said 7 acres until the same, in the course of husbandry, were fit to be carried away; and that, while they were so lying, the defendant, of his own wrong, took and distrained the same, under pretense of a distress, the said wheat not then being fit to be carried away, according to the course of husbandry, etc. The defendant demurred, and, among other objections, urged that it ought to have been particularly shown how long the wheat remained on the land after the cutting, that the court might judge whether it were a reasonable time or not. But the court decided against the objection. "For though it is said (in Co. Litt. 56b) that, in some cases, the court must

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; Fidler v. Delavan, 20 Wend. (N. Y.) 57; State v. Leonard, 6 Blackf. (Ind.) 173; Hartman v. Keystone Ins. Co., 21 Pa. St. 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.

judge whether a thing be reasonable or not, as in case of a reasonable fine, a reasonable notice, or the like, it is absurd to say that, in the present case, the court must judge of the reasonableness; for, if so, it ought to have been set forth in the plea, not only how long the corn lay on the ground, but likewise what sort of weather there was during that time, and many other incidents, which would be ridiculous to be inserted in a plea. We are of opinion, therefore, that this matter is sufficiently averred, and that the defendant might have traversed it, if he had pleased, and then it would have come before a jury, who, upon hearing the evidence, would have been the proper judges of it." [139]

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, in the above example, if we suppose issue joined, whether the 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.

This is a rule so elementary in its kind, and so well observed in practice, as not to have become frequently the subject of illustration by decided cases; and for that reason, probably, is little, if at all, noticed in the digests and treatises. It is, however, a rule of great importance, from the influence which it has on the general character of English pleading; and it is this, perhaps, more than any other principle of the science, which tends to prevent that minute-

[139] Eaton v. Southby, Willes, 131.

ness and prolixity of detail, in which the allegations, under other systems of judicature, are involved.

SAME—MATTERS JUDICIALLY NOTICED.

311. RULE II. It is not necessary to state matter of which the court takes notice ex officio.

312. Matters judicially noticed may be either matters of law or facts of a public or general nature.

Another rule of pleading, equally well established, is that it is not necessary to state in the pleading matters of which the court must take judicial notice.[140] 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.[141] 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;[142] and it is only necessary to allege facts which will appear to the court to be affected by the statute,[143] 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 refer-

[140] 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.

[141] King v. Mayor & Burgesses, Lyme Regis, Doug. 148.

[142] 1 Bl. Comm. 85; Boyce v. Whitaker, 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 Me. 54, as to what is a public or private statute.

[143] 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.

ence to the statute, showing the intention to bring the case within it.[144] 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,[145] and foreign statutes, as those of other states, must also be pleaded.[146]

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 committed 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.

As it is unnecessary to allege matter of law, so, if it be alleged, it is improper, as we have seen, to make it the subject of traverse.[147]

Besides points of law, there are many other matters of a public

[144] See Wells v. Iggulden, 3 Barn. & C. 186.

[145] Platt v. Hill, 1 Ld. Raym. 381; Boyce v. Whitaker, Doug. 97, note 12.

[146] 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.

[147] Ante, p. 308.

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,[148] 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.[149]

SAME—MATTERS IN KNOWLEDGE OF ADVERSARY.

313. RULE III. It is not necessary to state matter which would come more properly from the other side.

314. 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 the plea of alien enemy must meet and remove, by anticipation, every possible answer.

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.[150] This, ac-

[148] Co. Litt. 303b; King v. Knollys, 1 Ld. Raym. 13.

[149] 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.

[150] Steph. Pl. (Tyler's Ed.) 314; Com. Dig. "Pleader," C 81; Stowel v. Lord Zouch, Plow. 376; Walsingham's Case, Id. 564; St. John v. St. John, Hob. 78; Hotham v. East India Co., 1 Term R. 638; Weeding v. Aldrich, 9 Adol. & E.

cording to Hale, C. J., is "like leaping before one comes to the stile." [151] 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.[152] 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.[153] 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." [154] 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 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,

861; Goshen & S. T. Co. v. Sears, 7 Conn. 92; Hughes v. Smith, 5 Johns. (N. Y.) 168; Wolfe v. Howes, 20 N. Y. 197; Smalley v. Bristol, 1 Mich. 153; Sands v. St. John, 36 Barb. (N. Y.) 628; Rockford Ins. Co. v. Nelson, 65 Ill. 415.

[151] Sir Ralph Bovy's Case, 1 Vent. 217.

[152] Stowel v. Lord Zouch, Plow. 376.

[153] Walsingham's Case, Plow. 564; Sir Ralph Bovy's Case, supra.

[154] St. John v. St. John, Hob. 78.

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.[155]

But where the matter is such that its affirmation or denial is essential to the apparent or prima facie right of the party pleading, there 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. Thus, in an action of trespass on the case, brought by a commoner against a stranger, for putting his cattle on the common, "per quod communiam in tam amplo modo habere non potuit," the defendant pleaded a license from the lord to put his cattle there, but did not aver that there was sufficient common left for the commoners. This was held, on demurrer, to be no good plea, for, though it may be objected that the plaintiff may reply that there was not enough common left, yet, as he had already alleged in his declaration that his enjoyment of the common was obstructed, the contrary of this ought to have been shown by the plea.[156]

There is an exception to the rule in question in the case of certain pleas which are regarded unfavorably by the courts, as having the effect of excluding the truth. Such are all pleadings in estoppel,[157] and the plea of alien enemy. It is said that these must be certain in every particular, which seems to amount to this: that they must meet and remove, by anticipation, every possible answer of the adversary. Thus, in a plea of alien enemy, the defendant must state not only that the plaintiff was born in a foreign country, now at enmity with the king, but that he came here without letters of safe conduct from the king, whereas, according to the general rule in question, such safe conduct, if granted, should be averred by the plaintiff in reply, and need not, in the first instance, be denied by the defendant.[158]

[155] Hotham v. East India Co., 1 Term R. 638.

[156] Smith v. Feverell, 2 Mod. 6; Greenhow v. Ilsley, Willes, 619.

[157] Co. Litt. 352b, 303a; Dovaston v. Payne, 2 H. Bl. 530.

[158] Casseres v. Bell, 8 Term R. 166.

SAME—MATTERS IMPLIED.

315. RULE IV. It is not necessary to allege circumstances necessarily implied.

316. Necessary circumstances implied by law from facts alleged are traversable without being pleaded, and need not therefore be alleged.

The fourth subordinate rule is that it is not necessary to allege circumstances necessarily implied from facts that are alleged.[159] 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 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."[160] So, if a feoffment be pleaded, it is not necessary to allege livery of seisin, for it is implied in the word "enfeoffed."[161] So, if a man plead that he is heir to A., he need not allege that A. is dead, for it is implied.[162]

[159] Vynior's Case, 8 Coke, 81b; Bac. Abr. "Pleas," etc., I, 7; Com. Dig. "Pleader," 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.

[160] Vynior's Case, 8 Coke, 81b; Marsh v. Bulteel, 5 Barn. & Ald. 507.

[161] Co. Litt. 303b; Doct. Plac. 48, 49; 2 Saund. 305a, note 13.

[162] 2 Saund. 305a, note 13; Com. Dig. "Pleader," E, 9; Dal. 67.

SAME—PRESUMPTIONS.

317. RULE V. It is not necessary to allege what the law will presume.[163]

318. 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.[164] 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.[165] 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.[166] 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.[167]

[163] Wilson v. Hobday, 4 Maule & S. 125; Chapman v. Pickersgill, 2 Wils. 147.

[164] Co. Litt. 78b.

[165] Williams v. East India Co., 3 East, 192; King v. Inhabitants of Haslingfield, 2 Maule & S. 561.

[166] Wilson v. Hobday, supra.

[167] Chapman v. Pickersgill, supra.

SAME—WHEN GENERAL MODE OF PLEADING PROPER.

319. RULE VI. A general mode of pleading is allowed when great prolixity is thereby avoided.

320. 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,[168] 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

[168] 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. Boynton, 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. 485; Hughes v. Smith, 5 Johns. (N. Y.) 173.

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.[169] So, in assumpsit 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.[170] 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.[171]

In an action on a bond, conditioned that W. W., who was appointed agent of a regiment, should pay all such sum and sums of money as he should receive from the paymaster general for the use of the regiment, and faithfully account to and indemnify the plaintiff, the defendant pleaded a general performance, and that the plaintiff was not damnified. The plaintiff replied that W. W. received from the paymaster general, for the use of the said regiment, several sums of money, amounting in the whole to £1,400, for and on account of the said regiment and of the commissioned and non-commissioned officers and soldiers of the same, according to their respective proportions, and that he had not paid a great part thereof among the colonel, officers, and soldiers, etc., according to the several proportions of their pay. Upon demurrer the court said that: "There was no need to spin out the proceedings to a

[169] Cryps v. Boynton, 3 Bulst. 31. [170] Huggins v. Wiseman, Carth. 110.
[171] Church v. Brownwick, 1 Sid. 334.

great prolixity, by entering into the detail, and stating the various deductions out of the whole pay, upon various accounts, and in different proportions."[172] So, in debt on bond, conditioned that R. S. should render to the plaintiff a just account, and make payment and delivery of all moneys, bills, etc., which he should receive as his agent, the defendant pleaded performance. The plaintiff replied that R. S. received, as such agent, divers sums of money, amounting to £2,000, belonging to the plaintiff's business, and had not rendered a just account, nor made payment and delivery of the said sum, or any part thereof. The defendant demurred specially, assigning for cause that it did not appear by the replication from whom, or in what manner, or in what proportions, the said sums of money, amounting to £2,000, had been received. But the court held the replication "agreeable to the rules of law and precedents."[173]

SAME—WHERE GENERAL PLEADING IS SUFFICIENT.

321. RULE VII. A general mode of pleading is often sufficient when the allegations on the other side must reduce the matter to certainty.[174]

322. 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

[172] Cornwallis v. Savery, 2 Burrows, 772.

[173] Shum v. Farrington, 1 Bos. & P. 640; Barton v. Webb, 8 Term R. 459.

[174] Co. Litt. 303b; Mints v. Bethil, Cro. Eliz. 739; 1 Saund. 117, note 1; 2 Saund. 410, note 3; Church v. Brownwick, 1 Sid. 334; Grey v. Friar, 15 Q. B. 901.

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.

Of the first case, namely, that where the condition itself sets forth the matters to be performed, the following is an example: In debt on bond conditioned that the defendant should at all times, upon request, deliver to the plaintiff all the fat and tallow of all beasts which he, his servants or assigns, should kill or dress before such a day, the defendant pleaded that upon every request made unto him he delivered unto the plaintiff all the fat and tallow of all beasts which were killed by him or any of his servants or assigns before the said day. On demurrer it was objected "that the plea was not good in such generality, but he ought to have said that he had delivered so much fat or tallow, which was all, etc., or that he had killed so many beasts, whereof he had delivered all the fat." But the court adjudged for the defendant.[175]

Another illustration is afforded by the plea of non damnificatus in an action of debt on an indemnity bond, or bond conditioned "to keep the plaintiff harmless and indemnified," etc. This is in the nature of a plea of performance, being used where the defendant means to allege that the plaintiff has been kept harmless and indemnified, according to the tenor of the condition; and it is pleaded in general terms without showing the particular manner of the indemnification. Thus, if an action of debt be brought on a bond conditioned that the defendant "do from time to time acquit, discharge, and save harmless the churchwardens of the parish of P., and their successors, etc., from all manner of costs and charges by reason of the birth and maintenance of a certain child," if the de-

[175] Mints v. Bethil, Cro. Eliz. 749. And see Church v. Brownwick, 1 Sid. 334.

fendant means to rely on the performance of the condition he may plead in this general form, "that the churchwardens of the said parish or their successors, etc., from the time of making the said writing obligatory, were not in any manner damnified by reason of the birth and maintenance of the said child";[176] and it will then be for the plaintiff to show in the replication how the churchwardens were damnified.

While thus it is often sufficient to plead performance in general terms, it is said, on the other hand, that this generality is only allowed "where the subject comprehends multiplicity of matters"; and that, if there be anything specific in the subject, though consisting of a number of acts, they must all be enumerated; for example, that, if the defendant be bound to "pay all the legacies in a will," he must specify them all and aver payment of each.[177] And, with respect to the plea of non damnificatus in particular, the following distinctions have been taken: First, if, instead of pleading in that form, the defendant alleges affirmatively that he "has saved harmless," etc., the plea will in this case be bad, unless he proceeds to show specifically how he saved harmless.[178] Again, it is held that if the condition does not use the words "indemnify," or "save harmless," or some equivalent term, but stipulates for the performance of some specific act, intended to be by way of indemnity, such as the payment of a sum of money by the defendant to a third person, in exoneration of the plaintiff's liability to pay the same sum, the plea of non damnificatus will be improper; and the defendant should plead performance specifically, as "that he paid the said sum," etc.[179] It is also laid down that, if the conditions of the bond be to "discharge" or "acquit" the plaintiff from a particular thing, the plea of non damnificatus will not apply, but the defendant must plead performance specially, "that he discharged and acquitted," etc., and must also show the manner of such acquittal and discharge.[180] But, on the other hand, if a bond be conditioned to "discharge and

[176] Richards v. Hodges, 2 Saund. 84; Hays v. Bryant, 1 H. Bl. 253; Com. Dig. "Pleader," E, 25, 2 W, 33; Manser's Case, 2 Coke, 4a.

[177] 1 Saund. 117, note 1; 1 Bulst. 43; 1 Lutw. 419.

[178] 1 Saund. 117, note 1.

[179] Holmes v. Rhodes, 1 Bos. & P. 638.

[180] 1 Saund. 117, note 1; Bret v. Audars, 1 Leon. 71; Strange, 422; White

acquit the plaintiff from any damage" by reason of a certain thing, non damnificatus may then be pleaded, because that is in truth the same thing with a condition to "indemnify and save harmless,"etc.[181]

Next is to be considered the case where the condition is for performance of covenants or other matters contained in an indenture or other instrument collateral to the bond and not set forth in the condition. In this case also, the law often allows, upon the same principle as in the last, a general plea of performance, without setting forth the manner.[182] Thus, in an action of debt on bond, where the condition is that T. J., deputy postmaster of a certain stage, "shall and will truly, faithfully and diligently do, execute, and perform all and every the duties belonging to the said office of deputy postmaster of the said stage, and shall faithfully, justly, and exactly, observe, perform, fulfill, and keep all and every the instructions, etc., from his majesty's postmaster general," and such instructions are in an affirmative and absolute form, as follows: "You shall cause all letters and packets to be speedily and without delay, carefully and faithfully delivered, that shall from time to time be sent unto your said stage to be dispersed there or in the towns and parts adjacent, that all persons receiving such letters may have time to send their respective answers," etc., it is sufficient for the defendant to plead, after setting forth the instructions, "that the said T. J., from the time of the making the said writing obligatory, hitherto, hath well, truly, faithfully, and diligently done, executed, and performed all and every the duties belonging to the said office of deputy postmaster of the said stage, and faithfully, justly, and exactly observed, performed, fulfilled, and kept all and every the instructions, etc., according to the true intent and meaning of the said instructions," without showing the manner of performance, as that he did cause certain letters or packets to be delivered, etc., being all that were sent.[183] So, if a bond be conditioned for ful-

v. Cleaver, Id. 681; Leneret v. Rivet, Cro. Jac. 503; Harris v. Pett, 5 Mod. 243.

[181] 1 Saund. 117, note 1; Carth. 375.

[182] 1 Saund. 117, note 1; 2 Saund. 410, note 3; Com. Dig. "Pleader," 2 V, 13; Mints v. Bethil, Cro. Eliz. 749; Bac. Abr. "Pleas," etc., I, 3; Earl of Kerry v. Baxter, 4 East, 340.

[183] 2 Saund. 403b, 410, note 3.

filling all and singular the covenants, articles, clauses, provisos, conditions, and agreements comprised in a certain indenture on the part and behalf of the defendant, which indenture contains covenants of an affirmative and absolute kind only, it is sufficient to plead, after setting forth the indenture, that the defendant always hitherto hath well and truly fulfilled all and singular the covenants, articles, clauses, provisos, conditions, and agreements comprised in the said indenture on the part and behalf of the said defendant.[184]

But the adoption of a mode of pleading so general as in these examples will be improper where the covenants or other matters mentioned in the collateral instrument are either in the negative or the disjunctive form;[185] and with respect to such matters the allegation of performance should be more specially made, so as to apply exactly to the tenor of the collateral instrument. Thus, in the example above given, of a bond conditioned for the performance of the duties of a deputy postmaster and for observing the instructions of the postmaster general, if, besides those in the positive form, some of these instructions were in the negative, as, for example, "you shall not receive any letters or packets directed to any seaman, or to any private soldier, etc., unless you be first paid for the same, and do charge the same to your account as paid," it would be improper to plead merely that T. J. faithfully performed the duties belonging to the office, etc., and all and every the instructions, etc. Such plea will apply sufficiently to the positive but not to the negative part of the instructions.[186] The form, therefore, should be as follows: "That the said T. J., from the time of making the said writing obligatory, hitherto, hath well, truly, faithfully, and diligently executed and performed all and every the duties belonging to the said office of deputy postmaster of the said stage, and faithfully, justly, and exactly observed, performed, fulfilled, and kept all and every the instructions, etc., according to the true intent and meaning of the said instructions. And the said defendant further says that the said T. J.,

[184] Gainsford v. Griffith, 1 Saund. 117, note 1; Earl of Kerry v. Baxter, 4 East, 340.

[185] Earl of Kerry v. Baxter, 4 East, 340; Oglethorpe v. Hyde, Cro. Eliz. 233; Lord Arlington v. Merricke, 2 Saund. 410, and note 3; Sanders v. Coward, 15 Mees. & W. 48.

[186] Lord Arlington v. Merricke, supra.

from the time aforesaid, did not receive any letters or packets directed to any seaman or private soldier, etc., unless he, the said T. J., was first paid for the same, and did so charge himself in his account with the same as paid," etc.[187] And the case is the same where the matters mentioned in the collateral instrument are in the disjunctive or alternative form, as where the defendant engages to do either one thing or another. Here, also, a general allegation of performance is insufficient, and he should show which of the alternative acts was performed.[188]

The reasons why the general allegation of performance does not properly apply to negative or disjunctive matters are that in the first case the plea would be indirect or argumentative in its form, in the second, equivocal; and would in either case, therefore, be objectionable in reference to certain rules of pleading, which we shall have occasion to consider in the next section.

It has been stated in a former part of this work[189] that where a party founds his answer upon any matter set forth by his adversary, but contained in a deed, of which the latter makes profert, he must demand oyer of such deed, and set it forth. In pleading performance, therefore, 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.[190] 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;[191] and, in that case, the general plea of performance of the matters therein contained would, as above shown, be improper.

[187] Id.

[188] Oglethorpe v. Hyde, Cro. Eliz. 233.

[189] Ante, p. 175.

[190] 2 Saund. 410, note 2.

[191] See Earl of Kerry v. Baxter, 4 East, 340.

SAME—WHAT PARTICULARITY IS GENERALLY REQUIRED.

323. RULE VIII. No greater particularity is required than the nature of the thing pleaded will conveniently admit.

324. 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.[192] Thus, though generally, in an action for injury to goods, the quantity of the goods must be stated,[193] 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."[194] 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.[195] So, in an

[192] 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, Plow. 85. The above rule is one of necessity, applicable in all pleading. See Bliss, Code Pl. (2d Ed.) 309.

[193] Ante, p. 393.

[194] Bac. Abr. "Pleas," etc., B 5.

[195] Bac. Abr. "Pleas," etc., 409.

action of debt brought on the statute 23 Hen. VI. c. 15, against the sheriff of Anglesea, for not returning the plaintiff to be a knight of the shire in parliament, the declaration alleged that the plaintiff "was chosen and nominated a knight of the same county," etc., "by the greater number of men then resident within the said county of Anglesea, present," etc., "each of whom could dispend 40s. of freehold by the year," etc. On demurrer it was objected that the plaintiff "does not show the certainty of the number; as to say that he was chosen by 200, which was the greater number, and thereupon a certain issue might arise, whether he was elected by so many or not." But it was held that the declaration was "good enough without showing the number of electors; for the election might be made by voices, or by hands, or such other way, wherein it is easy to tell who has the majority, and yet very difficult to know the certain number of them." And it was laid down that to put the plaintiff "to declare a certainty where he cannot, by any possibility, be presumed to know or remember the certainty, is not reasonable nor requisite in our law."[196] So, in an action for false imprisonment, where the plaintiff declared that the defendant imprisoned him until he made a certain bond, by duress, to the defendant "and others unknown," the declaration was adjudged to be good, without showing the names of the others, "because it might be that he could not know their names, in which case the law will not force him to show that which he cannot."[197]

SAME—FACTS IN KNOWLEDGE OF ADVERSARY.

325. RULE IX. Less particularity is required when the facts lie more in the knowledge of the adverse party than of the party pleading.

326. In some cases, where the facts which constitute the alleged cause of action are supposed to lie in the knowledge of the defendant, but not of the plaintiff, less particularity of statement is required in the declaration than would otherwise be necessary.

196 Buckley v. Thomas, Plow. 118.

197 Id. And see Wimbish v. Tailbois, Plow. 54, 55; Partridge v. Strange, Id. 85.

This rule is exemplified in the case of alleging title in an adversary, where, as we have seen, a more general statement is allowed than when it is set up in the party himself.[198]

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 has 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."[199] 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

[198] See ante, p. 412, and cases cited. See, also, 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.

[199] Bradshaw's Case, 9 Coke, 60b.

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.[200]

SAME—INDUCEMENT OR AGGRAVATION.

327. RULE X. Less particularity is necessary in the statement of matter of inducement or aggravation than in the main allegations.

328. 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.

The reason and effect of this rule appear sufficiently from the proposition above stated under it. As "matter of inducement," as the term is generally used, is that 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.[201] 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.[202] So where, in assumpsit, the plaintiff declared that in consideration

200 Gale v. Reed, 8 East, 80.

201 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. 283; Chamberlain v. Greenfield, 3 Wils. 292; Alsope v. Sytwell, Yel. 18; Woolaston v. Webb, Hob. 18b.

202 Ante, p. 408.

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.[203] 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.[204]

SAME—ACTS REGULATED BY STATUTE.

329. RULE XI. 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.

330. 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 with-

[203] Riggs v. Bullingham, supra. [204] Chamberlain v. Greenfield, supra.

out alleging writing.[205] 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.[206] 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.[207]

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 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." [208]

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

[205] Anon., 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; Mullaly v. Holden, 123 Mass. 583. See Bliss, Code Pl. (2d Ed.) 312.

[206] 1 Saund. 276, note 1.

[207] 1 Saund. 211, note 2; Anon., 2 Salk. 519.

[208] Duppa v. Mayo, 1 Saund. 276d, 276e, note 2.

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."[209]

[209] Case v. Barber, T. Raym. 450.

CHAPTER X.

CONSISTENCY AND SIMPLICITY IN PLEADING.

331-339. The Rules in General.
340. Rule I.—Insensibility.
341. Repugnancy.
342-343. Rule II.—Ambiguity or Doubt.
344. Negatives and Affirmatives Pregnant.
345. Rule III.—Argumentative Pleadings.
346. Rule IV.—Pleadings in Alternative.
347. Rule V.—Statements to be Positive.
348. Rule VI.—Pleading According to Legal Effect.
349. Rule VII.—Conformance to Precedent.
350. Rule VIII.—Commencement and Conclusion.
351. Rule IX.—Pleading Bad in Part is Bad Altogether.

THE RULES IN GENERAL.

331. RULE I. Pleadings must not be insensible nor repugnant.

332. RULE II. Pleadings must not be ambiguous or doubtful in meaning; and, when two different meanings are presented, that construction should be adopted which is most unfavorable to the party pleading.

333. RULE III. Pleadings must not be argumentative.

334. RULE IV. Pleadings must not be in the alternative.

335. RULE V. Pleadings must be positive in their form, and not by way of recital.

336. RULE VI. Matters must be pleaded according to their legal effect or operation.

337. RULE VII. Pleadings should observe known and ancient forms of expression, as contained in approved precedents.

338. RULE VIII. Pleadings should have their proper formal commencements and conclusions.

339. RULE IX. A pleading bad in part is bad altogether.

RULE I.—INSENSIBILITY.

340. A pleading will be vitiated by the omission of material words, by which it is rendered unintelligible.

This rule sufficiently explains itself. It is obvious that if a pleading is so incomplete, through the omission of words necessary to render it intelligible, as to convey no definite idea of anything, it must be rejected as of no effect whatever.[1] The fault may be distinguished from that of repugnancy, which is next to be considered, though the distinction seems of little practical importance; as a pleading, if repugnant, is in one sense quite as unintelligible on its face as if merely a collection of words stating nothing.

SAME—REPUGNANCY.

341. 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 showing, neither a legal cause of action nor defense.[2] 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

[1] Com. Dig. "Pleader," C, 23; Wyat v. Aland, 1 Salk. 324; Sibley v. Brown, 4 Pick. (Mass.) 137.

[2] 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.

the building of a house already built.[3] 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.[4] Where the repugnancy is in a material point, it vitiates the pleading, which is ill in special demurrer.[5] 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."[6]

RULE II.—AMBIGUITY OR DOUBT.

342. 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.

343. 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 face, it will be uncertain what he means to allege.[7] Thus, if, in trespass quare clausum fregit, the defendant pleads that the locus

[3] Nevil v. Soper, 1 Salk. 213.

[4] Butt's Case, 7 Coke, 25a.

[5] 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.

[6] Co. Litt. 303b; Rex v. Stevens, 5 East, 244; Wyat v. Aland, supra.

[7] Co. Litt. 303b; Purcell v. Bradley, Yel. 36; 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.

in quo was his freehold, he must allege that it was his freehold at the time of the trespass; otherwise, the plea is insufficient.[8] 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.[9] In trespass quare clausum fregit, and for breaking down two gates and three perches of hedges, the defendant pleaded that the said close was within the parish of R., and that all the parishioners there, from time immemorial, had used to go over the said close, upon their perambulation in rogation week; and, because the plaintiff had wrongfully erected two gates and three perches of hedges in the said way, the defendant, being one of the parishioners, broke down those gates and those three perches of hedges. On demurrer, it was objected that, though the defendant had justified the breaking down two gates and three perches of hedges, it does not appear that they were the same gates and hedges in respect of which the plaintiff complained; it not being alleged that they were the gates and hedges "aforesaid," or the gates and hedges "in the declaration mentioned." "And thereto agreed all the justices, that this fault in the bar was incurable. For Walmsley said that he thereby doth not answer to that for which the plaintiff chargeth him." And he observed that the case might be that the plaintiff had erected four gates and six perches of hedges, and that the defendant had broken down the whole of these, having the justification mentioned in the plea in respect of two gates and three perches only, and no defense as to the remainder, and that the action might be brought in respect of the latter only.[10]

A pleading, however, is not objectionable as being ambiguous or obscure, if it is certain to a common intent; that is, if it is clear enough according to reasonable intendment or construction, though it may not be worded with absolute precision.[11] Thus, in an action

[8] Com. Dig. "Pleader," E. 5.

[9] Id.; Manser's Case, 2 Coke, 3.

[10] Cro. Eliz. 441.

[11] Com. Dig. "Pleader," E, 7, F, 17; Long's Case, 5 Coke, 121a; Rex v. Stevens, 5 East, 244; Dovaston v. Payne, 2 H. Bl. 530; Hamond v. Dod, Cro. Car. 6; Harlow v. Wright, Id. 195; Spencer v. Southwick, 9 Johns. (N. Y.) 314; Oystead v. Shed, 12 Mass. 509; Weiss v. Whittemore, 28 Mich. 366;

of debt on a bond conditioned to procure A. S. to surrender a copyhold to the use of the plaintiff, a plea that A. S. surrendered and released the copyhold to the plaintiff, in full court, and the plaintiff accepted it, without alleging that the surrender was to the plaintiff's use, was held sufficient; as this should be intended.[12] So, in debt on a bond, conditioned that the plaintiff should enjoy certain land, etc., a plea that after the making of the bond, until the day of exhibiting the bill, the plaintiff did enjoy, was held good, though it was not said, that always after the making, until, etc., he enjoyed; for this should be intended.[13]

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.[14] 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.[15]

SAME—NEGATIVES AND AFFIRMATIVES PREGNANT.

344. 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 that the doctrine of negatives and affirmatives pregnant appears most properly to range itself. A

Merkle v. Bennington Tp., 68 Mich. 133, 35 N. W. 846; Parker v. Burgess, 64 Vt. 442, 24 Atl. 743.

[12] Hamond v. Dod, supra.

[13] Harlow v. Wright, supra.

[14] Co. Litt. 303b; Fuller v. Hampton, 5 Conn. 422; Halligan v. Chicago & R. I. R. Co., 15 Ill. 558; Ware v. Dudley, 16 Ala. 742; President, etc., of Natchez v. Minor, 9 Smedes & M. (Miss.) 544; Green v. Covillaud, 10 Cal. 317; 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.) 476.

[15] Rex v. Stevens, 5 East, 244; Amhurst v. Skynner, 12 East, 263; Foster v. Elliott, 33 Iowa, 216.

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.[16] 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 ambiguous. 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.[17] 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.[18] 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.[19] If the plaintiff had replied that the defendant immoderately

[16] Blackmore v. Tidderley, 2 Ld. Raym. 1099, Macfadzen v. Olivant, 6 East, 387.

[17] Myn v. Cole, Cro. Jac. 87.

[18] Steph. Pl. (Tyler's Ed.) 335; Slade v. Drake, Hob. 295.

[19] Auberie v. James, Vent. 70, 1 Sid. 444, 2 Keb. 623. For other illustrations, see Rock Springs 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. "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

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 pursu-

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 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.

ing the words of the covenant, good, being in the negative, and that the plaintiff ought to have replied, and assigned a breach; and therefore judgment was given against him.[20]

RULE III.—ARGUMENTATIVE PLEADINGS.

345. As a pleading is a statement of facts, and not of argument, it must set forth its positions 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.[21]

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

[20] Pullin v. Nicholas, 1 Lev. 83; Steph. Pl. (Tyler's Ed.) 336.

[21] Hodgson v. East India Co., 8 Term R. 278; Boone v. Eyre, 2 W. Bl. 1312.

there were ten yards, and that it was so found upon the measuring thereof."[22] 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."[23] 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.[24] 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 denial 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.[25] 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;[26] 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.

[22] Ledesham v. Lubram, Cro. Eliz. 870.

[23] Doct. Plac. 41; Dyer, 43a.

[24] Wood v. Butts, Cro. Eliz. 260. For other illustrations and statements of the rule, see Bac. Abr. "Pleas," etc., I, 5; Com. Dig. E, 3; 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.) 313; Baynes v. Brewster, 1 Gale & D. 674; Watriss v. Pierce, 36 N. H. 230; Goshen & Sharon Turnpike Co. v. Sears, 7 Conn. 92; Dyett v. Pendleton, 8 Cow. (N. Y.) 728; Misner v. Granger, 4 Gilman (Ill.) 78; Spurck v. Forsyth, 40 Ill. 440; Clark v. Leneberger, 44 Ind. 223; Hale v. Dennie, 4 Pick. (Mass.) 503; Fidler v. Delavan, 20 Wend. (N. Y.) 57; Board of Com'rs v. Hill, 122 Ind. 215, 23 N. E. 779; Fletcher v. Peck, 6 Cranch, 87.

[25] Com. Dig. "Pleader," R, 3; Co. Litt. 126a; Chandler v. Roberts, Doug. 69; Zouch and Bamfield's Case, 1 Leon. 77; Doct. Plac. 43, 349, 360; Y. B. 5 Hen. VII. 11, 12.

[26] Doct. Plac. 349; Y. B. Hen. VII. 11, 12.

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.[27] 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.[28] 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.[29]

Another branch of the rule against argumentativeness is that two negatives do not make a good issue.[30] 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.[31]

RULE IV.—PLEADINGS IN ALTERNATIVE.

346. 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.

[27] Ante, p. 301; Bac. Abr. "Pleas," etc., H, 3; Courtney v. Phelps, Sid. 301; Herring v. Blacklow, Cro. Eliz. 30; Y. B. Hen. VI. 7, pl. 21.

[28] Doct. Plac. 349.

[29] Co. Litt. 126a, Reg. Plac. 297, 298; Tomlin v. Burlace, 1 Wils. 6.

[30] Com. Dig. "Pleader," R, 3; Ryan v. Vanlandingham, 25 Ill. 128; Martin v. Smith, 6 East, 557.

[31] Martin v. Smith, supra.

Hypothetical or alternative pleading is always bad.[32] While it is competent for a defendant, in a case where he is required to perform several affirmative acts, to plead generally the due performance of all,[33] 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."[34] 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.[35]

Alternative or hypothetical pleading is a defect in form, objectionable on special demurrer only.[36]

RULE V.—STATEMENTS TO BE POSITIVE.

347. 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.

[32] Griffiths v. Eyles, 1 Bos. & P. 413; King v. Brereton, 8 Mod. 330; Lord Arlington v. Merricke, 2 Saund. 410, note 3; Cook v. Cox, 3 Maule & S. 114; Zeidler v. Johnson, 38 Wis. 335.

[33] Earl of Kerry v. Baxter, 4 East, 340.

[34] Griffiths v. Eyles, supra.

[35] King v. Brereton, supra.

[36] Oglethorpe v. Hyde, Cro. Eliz. 233; Hodgson v. East India Co., 8 Term R. 280; Taylor v. Needham, 2 Taunt. 278.

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.[37] 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;[38] and, further than this, it may now generally be remedied by amendment. It was formerly considered a defect in substance.

RULE VI.—PLEADING ACCORDING TO LEGAL EFFECT.

348. Matters 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 or form.

EXCEPTIONS—In actions for libel and slander, the specific actionable words must be stated.

Things are to be pleaded according to their legal effect or operation.[39] The meaning of the rule is that, in stating an instrument

[37] 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, Ld. Raym. 1413; Wilder v. Handy, Strange, 1151, 1162. Matter of inducement may be so alleged.

[38] Hore v. Chapman, 2 Salk. 636. But see Coffin v. Coffin, 2 Mass. 358.

[39] 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. &

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.[40] 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.[41] 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.[42]

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,

Ald. 66; Stroud v. Lady Gerard, 1 Salk. 8; Howell v. Richards, 11 East, 633; Hosby v. Black, 28 N. Y. 438; Lent v. Padelford, 10 Mass. 230; Grannis v. Hooker, 29 Wis. 65; Commercial Bank v. French, 21 Pick. (Mass.) 489; 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.

[40] 2 Saund. 97; Barker v. Lade, 4 Mod. 150, 151.

[41] Barker v. Lade, 4 Mod. 151.

[42] Moore v. Earl of Plymouth, 3 Barn. & Ald. 66.

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.[43] In all cases, care must be taken that the legal effect 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.[44] 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.[45]

But there is an exception in the case of a declaration for written or verbal slander, where, as the action turns on the words themselves, the words themselves must be set forth; and it is not sufficient to allege that the defendant published a libel, containing false and scandalous matters, in substance as follows, etc., or used words to the effect following, etc.[46]

RULE VII.—CONFORMANCE TO PRECEDENT.

349. Pleadings should observe the known and ancient expressions as contained in approved precedents. When there has been a long-established form of pleading, con-

[43] Waugh v. Bussell, 1 Marsh. 216.

[44] Stroud v. Lady Gerard, 1 Salk. 8.

[45] Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242; North v. Kizer, 72 Ill. 172; Binz v. Tyler, 79 Ill. 248; Smith v. Webb, 16 Ill. 105.

[46] Wright v. Clements, 3 Barn. & Ald. 503; Cook v. Cox, 3 Maule & S. 110; Newton v. Stubbs, 2 Show. 435.

taining 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.

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 modern 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." [47]

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 ad-

[47] 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.

mirably adapted to the investigation of truth, and ought, consequently, to be very cautiously touched by the hand of innovation." [48] On writ of error, this decision was reversed on the ground that the defect was aided or cured by verdict.[49]

RULE VIII.—COMMENCEMENT AND CONCLUSION.

350. 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.[50]

This rule refers to certain formulæ occurring at the commencement of pleadings subsequent to the declaration, and to others occurring at the conclusion. A formula of the latter kind, inasmuch as it prays the judgment of the court for the party pleading, is often denominated the "prayer of judgment," and occurs (it is to be observed) in all pleadings that do not tender issue, but in those only. The following forms are taken from Stephen on Pleading:

A plea to the jurisdiction has usually no commencement of the kind in question.[51] 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;" [52] 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." [53]

A plea in suspension seems also to be in general pleaded without a formal commencement.[54] Its conclusion, in the case of a plea of

[48] Bayard v. Malcolm, 1 Johns. (N. Y.) 453, 471.

[49] Bayard v. Malcolm, 2 Johns. (N. Y.) 550. And see, to the same effect, Beebe v. Knapp, 28 Mich. 53.

[50] See Co. Litt. 303b; Com. Dig. "Pleader," E 27, E 28, E 32, E 33, F 4, F 5, G 1; Id., "Abatement," I 12; 2 Saund. 210; Bowyer v. Cook, 5 Mod. 146.

[51] 1 Chit. Pl. 450.

[52] 1 Went. 49; 3 Bl. Comm. 303; Powers v. Cook, 1 Ld. Raym. 63. See Drake v. Drake, 83 Ill. 526.

[53] 1 Went. 41, 49; Bac. Abr. "Pleas," etc., E 2; Bowyer v. Cook, 5 Mod. 146; Powers v. Cook, 1 Ld. Raym. 63.

[54] 2 Chit. Pl. 472; Plasket v. Beeby, 4 East, 485.

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.[55]

A plea in abatement is also usually pleaded without a formal commencement, within the meaning of this rule.[56] 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";[57] in case of plea to the person, "* * * prays judgment if the said A. B. ought to be answered to his said declaration."[58]

A plea in bar has this commencement: "* * * says that the said A. B. ought not to have or maintain his aforesaid action against him, the said C. D., because, he says," etc. This formula is commonly called "actio non." The conclusion is: "* * * prays judgment if the said A. B. ought to have or maintain his aforesaid action against him."

A replication to a plea to the jurisdiction has this commencement: "* * * says that, notwithstanding anything by the said C. D. above alleged, the court here ought not to be precluded from having further cognizance of the plea aforesaid, because, he says," etc.[59] Or this: "* * * says that the said C. D. ought to answer to the said plea here in court, because, he says," etc.[60] And this conclusion: "Wherefore he prays judgment, and that the court here may take cognizance of the plea aforesaid, and that the said C. D. may answer over," etc.[61]

A replication to a plea in suspension (in the case of a plea of nonage) has this commencement: "* * * says that, notwithstanding anything by the said C. D. above alleged, the parol ought not further to demur [or the said plea ought not further to stay, or be respited],

[55] 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; ante, p. 159.

[56] 2 Saund. 209a, note 1.

[57] Powers v. Cook, 1 Ld. Raym. 63; 2 Saund. 209a, note 1; Com. Dig. "Abatement," I 12.

[58] Co. Litt. 128a; Com. Dig. "Abatement," I 12; 1 Went. Pl. 58, 62.

[59] 1 Went. Pl. 60; Lib. Pl. 348.

[60] 1 Went. Pl. 39.

[61] Lib. Pl. 348; 1 Went. Pl. 39.

because, he says," etc.[62] And (if there be any case in which such replication does not tender issue) it should probably have this conclusion: "Wherefore he prays judgment if the parol ought further to demur [or, if the said plea ought further to stay, or be respited], and that the said C. D. may answer over."

A replication to a plea in abatement has this commencement: Where the plea was to the writ,—"* * * says that his said writ and declaration, by reason of anything in the said plea alleged, ought not to be quashed, because, he says," etc.;[63] where the plea was to the person,—"* * * says that, notwithstanding anything in the said plea alleged, he, the said A. B., ought to be answered to his said declaration, because, he says," etc.[64] The conclusion, in most cases, is thus: Where the plea was to the writ,—"Wherefore he prays judgment, and that the said writ and declaration may be adjudged good, and that the said C. D. may answer over," etc.; where the plea was to the person, "Wherefore he prays judgment, and that the said C. D. may answer over," etc.[65]

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 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

[62] Steph. Pl. (Tyler's Ed.) 346.

[63] 2 Chit. 589; Rast. Ent. 126a; Sabine v. Johnstone, 1 Bos. & P. 60.

[64] 1 Went. Pl. 42; 1 Archb. 309.

[65] 1 Went. Pl. 43, 45, 54; 1 Archb. 309; Rast. Ent, 126a; Bisse v. Harcourt, 3 Mod. 281, 1 Salk. 177.

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.[66]

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.

These forms are subject to the following variations:

First, with respect to pleas in abatement. Matters of abatement, in general, only render the writ abatable upon plea; but there are others, such as the death of the plaintiff or defendant before verdict, or judgment by default, that are said to abate it de facto,—that is, by their own immediate effect, and before plea,—the only use of the plea, in such cases, being to give the court notice of the fact.[67] Where the writ is merely abatable, the forms of conclusion above given are to be observed; but, when abated de facto, the conclusion must pray, "whether the court will further proceed," for the writ being already, and ipso facto, abated, it would be improper to pray "that it may be quashed." [68]

Again, when a plea in bar is pleaded puis darrein continuance, it has, instead of the ordinary actio non, a commencement and conclusion of actio non ulterius.[69]

So, if a plea in bar be founded on any matter arising after the commencement of the action, though it be not pleaded after a previous plea, and therefore not puis darrein continuance, yet it pursues, in that case also, in its commencement and conclusion, the same form of actio non ulterius, instead of actio non generally,[70] for the actio non is taken to refer, in point of time, to the commencement

[66] See Forms, 2 Chit 615, 628, 630, 641; 1 Archb. 410, 442.

[67] Bac. Abr. "Abatement," K, G, F; Com. Dig. "Abatement," E 17; 2 Saund. 210, note 1.

[68] Com. Dig. "Abatement," H 33, I 12; 2 Saund. 210, note 1; Hallowes v. Lucy, 3 Lev. 120. See Ross v. Nesbitt, 2 Gilman (Ill.) 252.

[69] See Append., Form No. 33.

[70] Le Bret v. Papillon, 4 East, 502; 2 Chit. 421.

of the suit, and not to the time of plea pleaded, and would, therefore, in the case supposed, be improper.[71]

Again, all pleadings by way of estoppel have a commencement and conclusion peculiar to themselves. A plea in estoppel has the following commencement: "Says that the said A. B. ought not to be admitted to say" (stating the allegation to which the estoppel relates); and the following conclusion: "Wherefore he prays judgment if the said A. B. ought to be admitted, against his own acknowledgment, by his deed aforesaid" (or otherwise, according to the matter of the estoppel), "to say that" (stating the allegation to which the estoppel relates).[72] A replication by way of estoppel to a plea, either in abatement or bar, has this commencement: "Says that the said C. D. ought not to be admitted to plead the said plea by him above pleaded; because he says," etc.[73] Its conclusion, in case of a plea in abatement, is as follows: "Wherefore he prays judgment if the said C. D. ought to be admitted to his said plea, contrary to his own acknowledgment, etc., and that he may answer over," etc.[74] In case of a plea in bar: Wherefore he prays "judgment if the said C. D. ought to be admitted, contrary to his own acknowledgment, etc., to plead that" (stating the allegation to which the estoppel relates).[75] Rejoinders and subsequent pleadings follow the forms of pleas and replications respectively.[76]

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.[77]

Another variation occurs in the action of replevin. Avowries and cognizances, instead of being pleaded with actio non, commence thus: an avowry, that the defendant "well avows"; a cognizance, that he "well acknowledges" the taking, etc.; and conclude thus: that the defendant "prays judgment, and a return of the said goods and chattels, together with his damages, etc., according to the form

[71] Le Bret v. Papillon, supra; Evans v. Prosser, 3 Term R. 186.
[72] 1 Archb. 202; Veale v. Warner, 1 Saund. 325; Y. B. 3 Edw. III. 21.
[73] Took v. Glascock, 1 Saund. 257; 2 Chit. Pl. 590, 592.
[74] 2 Chit. Pl. 590.
[75] 2 Chit. Pl. 592.
[76] Veale v. Warner, 1 Saund. 325.
[77] Weeks v. Peach, 1 Salk. 179.

of the statute in such case made and provided, to be adjudged to him," etc. And the subsequent pleadings have correspondent variations.[78]

Lastly, when, in an action of debt on bond, some matter is pleaded in bar, tending to show that the plaintiff never had any right of action, and not matter in discharge of a right once existing,—as, for example, when it is pleaded that the bond was void for some illegality,—the plea in that case, instead of actio non, has the following commencement, commonly called "onerari non": "Says that he ought not to be charged with the said debt, by virtue of the said supposed writing obligatory, because he says," etc. And the conclusion is thus: "Wherefore he prays judgment if he ought to be charged with the said debt by virtue of the said supposed writing obligatory."[79]

While pleadings have thus, in general, the 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.[80] Pleadings which tender issue have, however, the formal commencements, with the exception of the general issues, which have neither formal commencement nor conclusion, in the sense to which the present rule refers.

In general, a defect or impropriety in the commencement and conclusion of a pleading is ground for demurrer.[81] But if the commencement pray the proper judgment, it seems to be sufficient, though judgment be prayed in an improper form in the conclusion.[82] And the converse case, as to a right prayer in the conclusion, with an

[78] 8 Went. Pl. 106, 107, 109, 112.

[79] Com. Dig. "Pleader," E 27; Brown v. Cornish, 2 Salk. 516; Bennet v. Filkins, 1 Saund. 14b; Id. 290, note 3.

[80] Ante, p. 332.

[81] Nowlan v. Geddes, 1 East, 634; Wilson v. Kemp, 2 Maule & S. 549; Le Bret v. Papillon, 4 East, 502; Com. Dig. "Pleader," E 27; Weeks v. Peach, 1 Salk. 179; Powell v. Fullerton, 2 Bos. & P. 420; Waterman v. Holmes, 62 Vt. 463, 20 Atl. 729.

[82] Street v. Hopkinson, Lee t. Hard. 345.

improper commencement, has been decided the same way.[83] So, if judgment be simply prayed, without specifying what judgment, it is said to be sufficient; and it is laid down that the court will, in that case, ex officio award the proper legal consequence.[84] It seems, however, that these relaxations from the rule do not apply to pleas in abatement; the court requiring greater strictness in these pleas, with a view to discourage their use.[85]

It will be observed that the commencement and conclusion of a plea are in such form as to indicate the view in which it is pleaded, and to mark its object and tendency, as being either to the jurisdiction, in suspension, in abatement, or in bar. It is therefore held, as we have already seen, that the class and character of a plea depend upon these its formula parts, which is ordinarily expressed by the maxim, "Conclusio facit placitum."[86] Accordingly, if it commence and conclude as in bar, but contain matter sufficient only to abate the writ, it is a bad plea in bar, and no plea in abatement.[87] And, on the other hand, it has been held, that if a plea commence and conclude as in abatement, and show matter in bar, it is a plea in abatement, and not in bar.[88]

As the commencement and conclusion have this effect of defining the character of the plea, so they have the same tendency in the replication and subsequent pleadings. For example, they serve to show whether the pleading be intended as in confession and avoidance or estoppel, and whether intended to be pleaded to the whole or to part. From these considerations it is apparent that they are forms which, on the whole, materially tend to clearness and precision in pleading; and they have, for that reason, been considered under this section.

[83] Talbot v. Hopewood, Fortes, 335.

[84] 1 Chit. 445, 539; Le Bret v. Papillon, 4 East, 502; 1 Saund. 97, note 1.

[85] Rex v. Shakespeare, 10 East, 83; Attwood v. Davis, 1 Barn. & Ald. 172.

[86] Street v. Hopkinson, Lee t. Hard. 346; Medina v. Stoughton, 1 Ld. Raym. 593; Talbot v. Hopewood, Fortes. 335; ante, p. 166.

[87] Ante, p. 166; Nowlan v. Geddes, 1 East, 634; Wallis v. Savil, 1 Lutw. 41; 2 Saund. 209d, note 1; Y. B. 30 Hen. VI. 18; Medina v. Stoughton, 1 Ld. Raym. 593.

[88] Ante, p. 166; Medina v. Stoughton, supra; Godson v. Good, 6 Taunt. 587.

RULE IX.—PLEADING BAD IN PART IS BAD ALTOGETHER.

351. 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 as an entire answer to the whole of that which last preceded. If it fails in any material part, or as to any material fact, it fails altogether.[89] 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.[90] 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.[91]

[89] 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; Sherman v. Fellows, Id. 459.

[90] Webb v. Martin, 1 Lev. 48.

[91] Hedges v. Chapman, 2 Bing. 523; Bradley v. Powers, 7 Cow. (N. Y.) 330.

This rule seems to result from that which requires each pleading 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.[92]

It is obvious that the rule does not apply where the objectionable matter is surplusage, but only to allegations which are material.[93]

[92] See Webb v. Martin, 1 Lev. 48; Perkins v. Burbank, 2 Mass. 81.

[93] Duffield v. Scott, 3 Term R. 374.

CHAPTER XI.

DIRECTNESS AND BREVITY IN PLEADING.

352–354. The Rules Generally.
355–357. Rule I.—Departure.
358. Rule II.—Pleas Amounting to General Issue.
359. Rule III.—Surplusage.

THE RULES GENERALLY.

352. RULE I. There must be no departure in pleading.

353. RULE II. When a plea amounts to the general issue, it should be so pleaded.

354. RULE III. Surplusage is to be avoided.

RULE I.—DEPARTURE.

355. 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.

356. 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.

357. 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.[1] Its most frequent occur-

[1] 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.

rence is in the rejoinder by the defendant, and the fault may be either in the substance 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.[2] Matter which maintains, explains, and fortifies the declaration or plea is not a departure;[3] 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.[4] "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."[5] 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 letters 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

Patterson, 14 Johns. (N. Y.) 132; Andrus v. Waring, 20 Johns. (N. Y.) 100; 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, 3 Humph. (Tenn.) 104; Tarleton v. Wells, 2 N. H. 308; McGavock v. Whitfield, 45 Miss. 452.

[2] Co. Litt. 304a; Rex v. Larwood, Carth. 306; Mole v. Wallis, 1 Lev. 81; Fulmerston v. Steward, Plow. 102.

[3] 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. Haukshead, Yelv. 14; Fisher v. Pimbley, 11 East, 188.

[4] Gledstane v. Hewitt, 1 Cromp. & J. 565; Leg v. Evans, 6 Mees. & W. 36; Thompson v. Fellows, 1 Fost. (N. H.) 425; Lee v. Rogers, 1 Lev. 110; Cole v. Hawkins, 10 Mod. 348

[5] Smith v. Nicolls, 5 Bing. N. C. 208.

accrue to themselves as executors.[6] 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.[7] 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."[8] So, in debt on a bond condi-

[6] Hickman v. Walker, Willes, 27.

[7] Roberts v. Marlett, 2 Saund. 188.

[8] Cutler v. Southern, 1 Saund. 116.

tioned 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.[9]

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.[10] 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." [11]

To show more distinctly the nature of a departure, it may be use-

[9] Dyer, 253b.

[10] Mole v. Wallis, 1 Lev. 81.

[11] Fulmerston v. Steward, Plow. 102.

ful, 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 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.[12] 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."[13] 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.[14] 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

[12] Vere v. Smith, 2 Lev. 5, 1 Vent. 121.

[13] Owen v. Reynolds, Fortes. 341.

[14] Woods v. Haukshead, Yelv. 14.

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.[15]

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.[16]

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 sub-

[15] Fisher v. Pimbley, 11 East, 188; Dudlow v. Watchorn, 16 East, 29.

[16] Lee v. Rogers, 1 Lev. 110; Cole v. Hawkins, 10 Mod. 348.

stance.[17] 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.[18]

RULE II.—PLEAS AMOUNTING TO GENERAL ISSUE.

358. When a plea amounts to a general issue, it should be so pleaded. In other words, where the matter of defense is constructively and in effect a denial of the whole or the principal part of the declaration, it must be pleaded under the form of the general issue.

QUALIFICATION—Pleas giving express or implied color. Where express color is given, the plea will not amount to the general issue; and, where sufficient implied color is given, the objection will not arise, even though the plea consists of matter which should, by a relaxation of practice, be given in evidence under the general issue.

It has already been explained that in most actions there is an appropriate form of plea called the "general issue," fixed by ancient usage as the proper method of traversing the declaration, when the pleader means to deny the whole or the principal part of its allegations.[19] As a general rule, whenever a plea amounts to the general issue, it must be so pleaded.[20] The meaning of the present rule is

[17] Sterns v. Patterson, 14 Johns. (N. Y.) 132; Andrus v. Waring, 20 Johns. (N. Y.) 160; Tarleton v. Wells, 2 N. H. 306; Keay v. Goodwin, 16 Mass. 1. But see Reilly v. Rucker, 16 Ind. 303.

[18] Lee v. Raynes, T. Raym. 86; Richards v. Hodges, 2 Saund. 84d.

[19] Ante, p. 281.

[20] J. S. of Dale v. J. S. of Vale, Jenk. Cent. Cas. 133; Co. Litt. 303b; Com. Dig. "Pleader," E 14; Bac. Abr. "Pleas," etc., 370-376; 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; 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; Quincy v. Warfield, 25 Ill. 317; Cushman v. Hayes,

that if, instead of traversing the declaration in this form, the party pleads in a more special way matter which is constructively and in effect the same as the general issue, such plea will be bad; and the general issue ought to be substituted. A plea giving express or implied color is not within the rule. There are two reasons for this rule: First, such special plea, if considered as a traverse, tends to needless prolixity and expense, and is an argumentative denial and a departure from the prescribed forms of pleading the general issue; and, second, if viewed as a plea in confession and avoidance, it does not give color or a plausible ground of action to the plaintiff.

Thus, to a declaration in 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." [21] So, in trespass for depasturing the plaintiff's herbage, "Non depascit herbas" is no plea; it should be "Not guilty." [22] 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.[23] 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.[24] 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,"

46 Ill. 155; Wadhams v. Swan, 109 Ill. 54; 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.

[21] Y. B. 10 Hen. VI. 16.

[22] Doct. Plac. 42; Y. B. 22 Hen. VI. 37.

[23] Vin. Abr. A 15; Y. B. 22 Edw. IV. 29.

[24] Saunder's Case, 12 Mod. 513, 514.

and the court gave judgment for the plaintiff.[25] 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."[26] So, in debt on a bond, the defendant, 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.[27]

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.[28] 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,[29] 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

[25] Lynner v. Wood, Cro. Car. 157.

[26] Jaques' Case, Style, 355; Hallet v. Byrt, 5 Mod. 253.

[27] Gifford v. Perkins, 1 Sid. 450, 1 Vent. 77.

[28] Ante, p. 456.

[29] Ante, p. 314.

such title he has no color to maintain an action of trespass.[30] 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.[31] Thus, in the example of express color given, in a former part of this work,[32] 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, by a relaxation of practice, be given in evidence under the general issue. The relaxation here referred to is that formerly noticed, by which 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.[33]

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.[34] It is also said that, as the court has such

[30] Holler v. Bush, Salk. 394.

[31] Anon., 12 Mod. 537; Saunder's Case, Id. 513, 514; Lynner v. Wood, Cro. Car. 157; Birch v. Wilson, 2 Mod. 274; Horne v. Lewin, 3 Salk. 273.

[32] Ante, p. 319.

[33] Holler v. Bush, Salk. 394; Hussey v. Jacob, Carth. 356; Carr v. Hinchcliff, 4 Barn. & C. 552; ante, p. 283.

[34] Bac. Abr. "Pleas," etc., 374; Birch v. Wilson, 2 Mod. 274.

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.[35] 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.[36]

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 argumentativeness, 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, and that it is therefore properly classed under the present section; 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." [37]

RULE III.—SURPLUSAGE.

359. 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:

[35] Warner v. Wainsford, Hob. 127; Ward v. Blunt, 1 Leon. 178; Whittlesey v. Wolcott, 2 Day (Conn.) 431.

[36] See the cases cited in notes supra. And see Sinclair v. Hervey, 2 Chit. 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.

[37] Warner v. Wainsford, Hob. 127; Com. Dig. "Pleader," E, 13.

(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;[38] 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.[39]

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 it require proof, but it will be entirely rejected.[40] If, however,

[38] Dundass v. Lord Weymouth, Cowp. 665; Price v. Fletcher, Id. 727; Phillips v. Fielding, 2 H. Bl. 131.

[39] Bristow v. Wright, 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.

[40] Broom, Leg. Max. 627; Bristow v. Wright, 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

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.[41] 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.[42] 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.[43]

When the surplus matter is wholly irrelevant, it may be stricken out on motion;[44] but it is no ground for demurrer, since, as we have just seen, it does not vitiate the pleading.[45] 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.[46]

v. Lasselle, 5 Blackf. (Ind.) 443; Murphy v. McGraw, 74 Mich. 318, 41 N. W. 917; Perry v. Maish, 25 Ala. 659; Shipherd v. Field, 70 Ill. 438; Knoebel v. Kircher, 33 Ill. 308.

[41] 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. Solomon, 5 Term R. 497; Leke's Case, Dyer, 365; Gridley v. City of Bloomington, 68 Ill. 47.

[42] See Commissioners v. Brevard, 1 Brev. (S. C.) 11.

[43] Dorne v. Cashford, 1 Salk. 363.

[44] See Wyat v. Aland, 1 Salk. 324.

[45] Ante, p. 483.

[46] Gilb. Ch. Prac. 131, 132.

CHAPTER XII.

MISCELLANEOUS RULES.

360–369. The Rules Generally.
370. Rule I.—Conformance to Process.
371. Rule II.—Alleging Damages and Production of Suit.
372. Damages.
373–375. Form of the Statement.
376. Production of Suit.
377–378. Rule III.—Order of Pleading.
379. Rule IV.—Defense.
380. Rule V.—Plea in Abatement.
381. Rule VI.—Dilatory Pleas.
382–383. Rule VII.—Conclusion of Affirmative Pleadings.
384–385. Rule VIII.—Profert.
386. Rule IX.—Entitling Pleadings.
387. Rule X.—Pleadings to be True.

THE RULES GENERALLY.

360. RULE I. The pleadings must be conformable to the writ or process.

361. RULE II. The declaration should, in conclusion, lay damages, and allege production of suit.

362. RULE III. Pleas must be pleaded in due order.

363. RULE IV. Pleas must be pleaded with defense.

364. RULE V. Pleas in abatement must give the plaintiffs a better writ or declaration.

365. RULE VI. Dilatory pleas must be pleaded at a preliminary stage of the suit.

366. RULE VII. All affirmative pleadings which do not conclude to the country must end with a verification.

367. RULE VIII. In all pleadings, when a deed is alleged under which the party claims or fortifies, profert of such deed must be made.

368. RULE IX. All pleadings should be properly entitled of the court and term.

369. RULE X. All pleadings ought to be true.

RULE I.—CONFORMANCE TO PROCESS.

370. 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.

QUALIFICATION—But may vary from it in stating the cause of action more specifically.

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, 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,[1] 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.[2] (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.[3] (3) As to the character in

[1] See Fitch v. Heise, Cheves (S. C.) 185; Willard v. Missani, 1 Cow. (N. Y.) 37.

[2] Willard v. Missani, 1 Cow. (N. Y.) 37; Donnelly v. Foote, 19 Wend. (N. Y.) 148.

[3] Rogers v. Jenkins, 1 Bos. & P. 383.

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 generally, though, if he styles himself executor simply, without showing that he sues as such, he may do so as in the last case, the demand being still the same.[4] (4) As to the cause of action, both as to its character and the extent of the demand.[5] (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,[6] which is generally considered as the time of the commencement of the action.[7]

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 taken advantage of by plea in abatement,[8] 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.

RULE II.—ALLEGING DAMAGES AND PRODUCTION OF SUIT.

371. The declaration should, in conclusion, lay damages, and allege production of suit.

SAME—DAMAGES.

372. 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

[4] Rogers v. Jenkins, 1 Bos. & P. 383, and note b.

[5] Stamps v. Graves, 4 Hawks (N. C.) 102; Weld v. Hubbard, 11 Ill. 573.

[6] Bemis v. Faxon, 4 Mass. 263.

[7] 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.

[8] Bradley v. Jenkins, 3 Brev. (S. C.) 42; Prince v. Lamb, 1 Breese (Ill.) 378. And see, contra, Stamps v. Graves, 4 Hawks (N. C.) 102.

of that damage must be specified. The recovery cannot, in general, exceed the amount thus stated, though it may be less.

This rule applies in personal and mixed actions.[9] The distinction observed in regard to the former between those which sound in damages and those which do not[10] does not affect its application, as in either case it is equally the practice to allege them. There is this difference, however: that, in the former case, damages are the main object of the suit, and are always laid high enough to cover the whole demand; but in the latter, the liquidated debt or the chattel demanded being the main object, damages are claimed in respect to the detention only of such debt or chattel, and are therefore usually laid at a small sum.

In these 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.[11] If a verdict should be for a greater amount, the surplus must be remitted before judgment entered,[12] 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.[13] 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

[9] Com. Dig. "Pleader," c. 84; Pilford's Case, 10 Coke, 116b, 117a, 117b. And see the essential allegations of the declaration in the different common-law actions, ante, c. 5.

[10] Actions are said to sound in damages when their recovery is the main object of the action, as in assumpsit, covenant, case, trespass, and trover, and not when they are incidental merely, as in debt or replevin. See the gist of the different actions as given in chapters 1 and 2.

[11] 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; Dennison v. Leech, 9 Pa. St. 164.

[12] Tennant v. Gray, 5 Munf. (Va.) 494; Harris v. Jaffray, 3 Har. & J. (Md.) 546; Holt v. Molony, 2 N. H. 322; Grist v. Hodges, 3 Dev. (N. C.) 203.

[13] Van Rensselaer v. Platner's Ex'rs, 2 Johns. Cas. (N. Y.) 18.

the plaintiff having any right of action, and the jury gives entire damages, judgment will be arrested.[14]

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.

SAME—FORM OF THE STATEMENT.

373. Damages must be alleged according as they are
(a) General, or
(b) Special.

374. General damages are such as the law presumes to have resulted directly from the wrong complained of, and are to be stated in a general manner.

375. Special damages are those which the law does not imply as the necessary consequences of the wrongful act, though actually occurring, 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

[14] See Gordon v. Kennedy, 2 Bin. (Pa.) 287; Wilson v. Bowens, 2 T. B. Mon. (Ky.) 87; Mayne, Dam. 33, 38; Warner v. Bacon, 8 Gray (Mass.) 406; Pierce v. Woodward, 6 Pick. (Mass.) 206.

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 to be alleged 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 presumptions of law are not in general to be pleaded as facts.[16] But, when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage, called "special damages," be shown with particularity.[17] Such damages are what really took place, though not implied by law, and 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 words become actionable only by reason of the special damage ensuing.[18]

The reason for the requirement that special damages shall be specially pleaded arises from their nature, in being something which is not the inevitable and necessary result of its wrongful act, and therefore something which the defendant could not foresee and provide for. As it is one of the objects of all good pleading to state facts in such a manner as to apprise the adversary of what he must oppose, the rule thus protects him from surprise regarding matters which he could not and is not expected to anticipate, by excluding

[16] 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.

[17] See Adams v. Barry, 10 Gray (Mass.) 361; Willey v. Paul, 49 N. H. 397; Hunter v. Stewart, 47 Me. 419; Gilbert v. Kennedy, 22 Mich. 117; Olmstead v. Burke, 25 Ill. 86; Milles v. Weston, 60 Ill. 361; Adams v. Gardner, 78 Ill. 568; Woodworth v. Woodburn, 20 Ill. 184.

[18] Westwood v. Cowne, 1 Starkie, 172; Beach v. Ranney, 2 Hill (N. Y.) 309; Joannes v. Burt, 6 Allen (Mass.) 236; Cook v. Cook, 100 Mass. 194.

evidence of such matters unless set forth in the pleading in support of which such evidence is offered.[19]

SAME—PRODUCTION OF SUIT.

376. In all classes of actions the declaration should conclude with the production of suit,—"and therefore he brings his suit."

This is one of the instances, frequently noticeable in common-law pleading, where a rule 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 simultaneous production of his secta, —that is, a number of persons 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 this suit."[20]

RULE III.—ORDER OF PLEADING.

377. Pleas must be pleaded in due order. A natural order must be followed by the defendant in presenting pleas, so that his right or defense may still be preserved, if he is unsuccessful in preliminary stages, until he asserts matter of defense upon the merits of the cause.

378. The order of pleading is as follows:

(a) To the jurisdiction of the court.

(b) To the disability of the person—

(1) Of the plaintiff.

(2) Of the defendant.

(c) To the count or declaration.

(d) To the writ.

[19] De Forest v. Leete, 16 Johns. (N. Y.) 122; 1 Chit. Pl. (16th Am. Ed.) 386, and cases cited.

[20] Walter v. Laughton, 10 Mod. 253.

(1) To the form of the writ.

First. For matter apparent on the face of it.

Second. For matter dehors the writ.

(2) To the action of the writ.

(e) To the action itself in bar thereof.

The law has prescribed and settled the order of pleading which the defendant should pursue, and although, in some respects, the division has been objected to as more subtle than useful, the arrangement given above is still adhered to.[21] 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.[22]

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.

[21] See Longueville v. 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.

[22] Com. Dig. "Abatement," C, 23, I, 24. See Palmer v. Evertson, 2 Cow. (N. Y.) 417; Potter v. McCoy, 26 Pa. St. 458; Carlisle v. Weston, 21 Pick. (Mass.) 537; De Wolf v. Raband, 1 Pet. 498; Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807. For qualifications as to this rule in regard to pleas to the jurisdiction, see ante, p. 159.

RULE IV.—DEFENSE.

379. Pleas must be pleaded with defense. Defense is a form of words by which the plea is introduced, constituting a general denial of the truth or validity of the complaint. It is used in almost all actions, and in almost any description of plea in the actions in which it obtains.

This formal part of a plea is another instance, like that of alleging production of suit,[23] 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 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.[24] 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.[25] 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.

[23] Ante, p. 491.

[24] Co. Litt. 127b; Tamplam v. Newsam, Yelv. 210; Hampson v. Bill, 3 Lev. 240.

[25] 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; 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.

RULE V.—PLEA IN ABATEMENT.

380. Pleas in abatement 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.[26] 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.[27] Thus, if a misnomer in the Christian name of the defendant be pleaded in abatement, the defendant 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.

RULE VI.—DILATORY PLEAS.

381. Dilatory pleas must be pleaded at a preliminary stage of the suit. Matters of defense which tend only to

[26] See Wadsworth v. Woodford, 1 Day (Conn.) 28; Clark v. Warner, 6 Conn. 355; Haywood v. Cheney, 13 Wend. (N. Y.) 495; ante, p. 165.

[27] 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. And see Brown v. Gordan, 1 Greenl. (Me.) 165; Wadsworth v. Woodford, supra; Hoffman v. Birch, 22 W. Va. 537; American Exp. Co. v. Haggard, 37 Ill. 465. This rule is not recognized save at common law, pleas in abatement not being used in code or equity pleading.

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.

The above rule seems to carry its own explanation, since it is apparent that, where the defendant once puts himself on record as ready to defend the action on its merits, his right to interpose technical objections to delay the suit or throw the plaintiff out of court has been waived.[28]

RULE VII.—CONCLUSION OF AFFIRMATIVE PLEADINGS.

382. All affirmative pleadings which do not conclude to the country must conclude with a verification.

383. When there is a complete issue between the parties, the plea should conclude to the country; but, when new matter is introduced, it must conclude with a verification.

In different ways this rule has been elsewhere considered, as well as the form of both the conclusions mentioned.[29] Its application depends upon the character of the denial made by the defendant in being either the general issue or a specific traverse,[30] by which a complete issue is formed by the direct affirmative and negative, or a denial accompanied by new explanatory matter which the opponent has the right to answer in his turn. In the first case, the conclusion refers the cause directly to a trial,[31] there being no use for further delay; but, in the latter, it simply states the readiness of the pleader to prove what he has alleged, the completion of the issue then depending upon his opponent.[32]

[28] This rule is not recognized under the codes, but its principle is applied in equity, pleading to the merits of the cause being a waiver of all preliminary objections.

[29] See ante, p. 332.

[30] See Manhattan Co. v. Miller, 2 Caines (N. Y.) 60; Snyder v. Croy, 2 Johns. (N. Y.) 428; Gazley v. Price, 16 Johns. (N. Y.) 267.

[31] Sampson v. Henry, 11 Pick. (Mass.) 379; McClure v. Erwin, 3 Cow. (N. Y.) 313.

[32] See Goodchild v. Pledge, 1 Mees. & W. 363; Hooper v. Jellison, 22 Pick. (Mass.) 250; McClure v. Erwin, supra. A plea concluding with a verification,

Where an issue is tendered to be tried by jury, it has been shown that the pleading concludes to the country. In all other cases, pleadings, if in the affirmative form, must conclude with a formula of another kind, called a "verification" or an "averment." The verification is of two kinds, common and special. The common verification is that which applies to ordinary cases, as in the following form: "And this the said A. B. [or C. D.] is ready to verify." The special verifications are used only where the matter pleaded is intended to be tried by record, or by some other method than a jury. They are in the following forms: "And this the said A. B. [or C. D.] is ready to verify by the said record;" or: "And this the said A. B. [or C. D.] is ready to verify, when, where, and in such manner as the court here shall order, direct, or appoint."

The origin of this rule is as follows: It was a doctrine of the ancient law, little, if at all, noticed by modern writers, that every pleading affirmative in its nature must be supported by an offer of some mode of proof; and the reference to a jury, who, as formerly explained, were in the nature of witnesses to the fact in issue, was considered as an offer of proof within the meaning of that doctrine. When the proof proposed was that by jury, the offer was made, in the viva voce pleading, by the words "prest d'averrer," or "prest, etc.," which in the record was translated, "Et hoc paratus est verificare." On the other hand, where other modes of proof were intended, the record ran, "Et hoc paratus est verificare per recordum," or "Et hoc paratus est verificare quocunque modo curia consideraverit." But while these were the forms in general observed, there was the following exception, that, on the attainment of an issue to be tried by jury, the record marked that result by a change of phrase, and substituted for the verification the conclusion, "ad patriam" ("to the country"). The written pleadings still retain the same formulæ in these different cases, and with the same distinctions as to their use. They preserve the conclusion to the country, to mark the attainment of an issue triable by jury, but in other cases conclude with a translation of the old Latin phrase, "Et hoc paratus,"

which ought to conclude to the country, will be stricken out on motion. Copperthwaite v. Dummer, 18 N. J. Law, 258. And see Hord v. Dishman, 2 Hen. & M. (Va.) 600; Bailey v. Smith, 1 Root (Conn.) 243. The rule is not applicable, except at common law.

etc.; and hence the rule that an affirmative pleading that does not conclude to the country must conclude with a verification.

As the ancient rule requiring an offer of proof extended only to affirmative pleadings, those of a negative kind being in general incapable of proof, so the rule now in question now applies to the former only, no verification being, in general, necessary in a negative pleading, but it is nevertheless the practice to conclude with a verification all negative as well as affirmative pleadings that do not conclude to the country.[33]

RULE VIII.—PROFERT.

384. 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.

385. 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,[34] unless in the case of letters testamentary or of administration,[35] 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 over, or an inspection of it, if required.[36] 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.[37] This rule has already been considered in another place.[38]

[33] Steph. Pl. (Tyler's Ed.) 378.

[34] Gould, Pl. (5th Ed.) 411; Mason v. Buckmaster, 1 Ill. 27; Magee v. Fisher, 8 Ala. 320.

[35] Brown v. Jones, 10 Gill & J. (Md.) 334; Thatcher v. Lyman, 5 Mass. 260; Judge of Probate v. Merrill, 6 N. H. 256.

[36] 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.

[37] See Gould, Pl. (5th Ed.) 415; Barbour v. Archer, 3 Bibb (Ky.) 8; Powers

[38] Ante, p. 174.

RULE IX.—ENTITLING PLEADINGS.

386. All pleadings should be properly entitled of the 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. 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.

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 it, is provided for by special provisions in all the codes.

RULE X.—PLEADINGS TO BE TRUE.

387. 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.

This rule needs no comment. Its force is recognized in every system of pleading, and the practice of making what are called "sham pleas" is everywhere condemned; the party indulging in that respect generally being called on to respond by the payment of costs, and his plea being disregarded.[39] It is a rule which can hardly be enforced until the trial, as up to that time the truth or falsity of a pleading cannot well be known. An exception is allowed, however, in the case of certain fictions allowed in pleading, such as the finding in trover, which is almost always contrary to the actual facts of the case. Aside from these, the rule still holds; for, as it has been quaintly said, "truth is the goodness and virtue of pleading, as certainty is the grace and beauty of it."

[39] See Slade v. Drake, Hob. 295; Smith v. Yeomans, 1 Saund. 316, 317; Shadwell v. Berthoud, 5 Barn. & Ald. 750; Bell v. Alexander, 6 Maule & S. 133; Oakley v. Devoe, 12 Wend. (N. Y.) 196; Tucker v. Ladd, 4 Cow. (N. Y.) 47; People v. McCumber, 18 N. Y. 315; Piercy v. Sabin, 10 Cal. 27; Fletcher v. Byers, 55 Minn. 419, 57 N. W. 139. And see 1 Chit. Pl. (16th Am. Ed.) 567–569, and cases cited in the notes as to the application of the rule as to sham pleading.

APPENDIX.

Form 1. Skeleton Form of Declaration.

In the —— Court, —— County.

—— Term, A. D. 18—.

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*).[1]

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

X. Y.,
Attorney for Plaintiff.

Form 2. Declaration in Special Assumpsit.

(*Commence as in Form* 1.)

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 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.

[1] Post, Forms 2 to 18.

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.

(*Conclude as in Form* 1.)

Form 3. Declaration in General Assumpsit.

See post, in Form 18 (second form there given).

Form 4. Declaration in Debt on Simple Contract.

(*Commence as in Form* 1.)

For that whereas the said defendant, on the —— day of ——, A. D. 18—, at ——, in the county aforesaid, was indebted to the said plaintiff, in the sum of —— dollars, for divers goods, wares, and merchandise, by the plaintiff before that time sold and delivered to the defendant, at his special instance and request, to be paid by the defendant to the plaintiff, when the defendant should be thereto afterwards requested; whereby and by reason of the said sum being and remaining wholly unpaid, an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of —— dollars above demanded. Yet the defendant, although often requested so to do, hath not as yet paid the said sum of —— dollars above demanded, or any part thereof, to the plaintiff, but so to do hath hitherto wholly refused, and still refuses.

(*Conclude as in Form* 1.)

Form 5. Declaration in Debt on Common Money Bond.

(*Commence as in Form* 1.)

For that whereas the said defendant, on the —— day of ——, A. D. 18—, at ——, in the county aforesaid, by his 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.

(*Conclude as in Form* 1.)

Form 6. Declaration in Debt on Bond with Conditions.

(*Commence as in Form* 1.)

For that whereas the said defendants, on the —— day of ——, A. D. 18—, 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 ——, 18—, 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. 18—, 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.

(*Conclude as in Form* 1.)

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.

Form 7. Declaration in Debt on a Judgment.

(*Commence as in Form* 1.)

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. 18—, 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,[2] 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.

(*Conclude as in Form* 1.)

[2] 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.

Form 8. Declaration in Debt on a Statute to Recover a Penalty or Forfeiture.

(*Commence as in Form* 1.)

For that whereas the said defendant, on the —— day of ——, A. D. ——, 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.

(*Concludes as in Form* 1.)

Form 9. Declaration in Covenant on an Indenture of Lease for not Repairing.

(*Commence as in Form* 1.)

For that whereas, on the —— day of ——, A. D. 18—, 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. 18—, 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 condition 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. 18—, 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.

(*Conclude as in Form* 1.)

Form 10. Declaration in Detinue.

(*Commence as in Form* 1.)

For that whereas the plaintiff, on the —— day of ——, A. D. 18—, 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. 18—, 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.

(*Conclude as in Form* 1.)

Form 11. Declaration in Trespass for Assault and Battery.

(*Commence as in Form* 1.)

For that the defendant, on the —— day of ——, A. D. 18—, 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 in Form* 1.)

Form 12. Declaration in Trespass de Bonis Asportatis, or for Injury to Personal Property.

(*Commence as in Form* 1.)

For that the defendant, on the ——— day of ———, A. D. 18—, 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 ——— (*as in Form* 11.)

(*Conclude as in Form* 1.)

Form 13. Declaration in Trespass Quare Clausum Fregit.

(*Commence as in Form* 1.)

For that the defendant, on the ——— day of ———, A. D. 18— (*or on the ——— day of* ———, *A. D. 18—, 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 ——— (*as in Form* 11).

(*Conclude as in Form* 1.)

Form 14. Declaration in Trover.

(*Commence as in Form* 1.)

For that whereas the plaintiff, on the ——— day of ———, A. D. 18—, at ———, in the county aforesaid, was lawfully possessed, as of his own property, of certain goods and chattels, to wit, twenty tables and twenty chairs, of the value of ——— dollars; and, being so possessed thereof, he, the said plaintiff, afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, to wit, on the day and year aforesaid, at ———, aforesaid, in the county aforesaid, came to the possession of the defendant by finding; yet the defendant, well knowing the said goods and chattels to be property of the plaintiff, and of right to belong and appertain to him, but contriving and fraudulently intending to defraud and deceive the

plaintiff in this behalf, hath not as yet delivered the said goods and chattels, or any part thereof, to the plaintiff, although often requested so to do; but so to do hath hitherto wholly refused, and still refuses; and afterwards, to wit, on the —— day of ——, A. D. ——, at ——, aforesaid, in the county aforesaid, converted and disposed of the said goods and chattels to his, the defendant's, own use.

(*Conclude as in Form* 1.)

Form 15. Declaration in Action on the Case for Libel.

(*Commence as in Form* 1.)

For that whereas the said plaintiff, until the committing of the grievance hereinafter mentioned, was always reputed to be a person of good fame and credit, and hath never been guilty, nor, until the committing of the said grievance, been suspected to have been guilty of perjury, or any other such crime; by means of which said premises he, the said plaintiff, before the committing of the said grievance, had deservedly obtained the good opinion of all his neighbors and of all other persons to whom he was known, to wit, at ——, in the county of ——; and whereas, before the committing of the said grievance, a certain action had been depending in the —— court of ——, wherein one E. F. was the plaintiff and one G. H. was the defendant; which said action had been then lately tried in said court, and on such trial the said plaintiff had been examined on oath, and had given his evidence as a witness on the part of the said E. F., aforesaid; yet the said defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the said plaintiff in his good fame and credit, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that he had been and was guilty of perjury, heretofore, to wit, on the —— day of ——, A. D. 18—, at —— aforesaid, in the county last aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published, of and concerning the plaintiff, and of and concerning the said action, and the evidence so given by the plaintiff, a certain false, scandalous, malicious, and defamatory libel, containing, among other things, the false, scandalous, defamatory, and libelous matter following, of and concerning the said plaintiff, and of and concerning the said action, and the evidence so given by the said plaintiff; that is to say, he (meaning the plaintiff) was forsworn on the trial (meaning the said trial, and thereby then and there meaning that the plaintiff, in giving his evidence as aforesaid, had committed willful and corrupt perjury). In consequence of the committing of which grievances he, the plaintiff, hath been and is greatly injured in his said good fame and credit and brought into public scandal, infamy, and disgrace, insomuch that divers persons have, by reason of the committing of the said grievance, suspected and believed, and still do suspect and believe, the plaintiff to have been guilty of perjury; and have, by reason of the committing of

the said grievance, from henceforth hitherto wholly refused to have any transaction or acquaintance with the plaintiff, as they otherwise would have had.

(*Conclude as in Form* 1.)

Form 16. Declaration in Replevin (Where Declaration is Used).

(*Title and Venue as in Form* 1.)

A. B., plaintiff, by X. Y., his attorney, complains of C. D., defendant, of a plea of replevin, wherefore he took the cattle of the plaintiff, and unjustly detained the same against sureties and pledges, until, etc.: For that whereas the said defendant, to wit, on the ——— day of ———, A. D. 18—, at ———, in the county aforesaid, took the cattle, described in the writ of replevin in this cause, to wit, one mare of the said plaintiff, of great value, to wit, of the value of ——— dollars, and unjustly detained the same, against sureties and pledges, until, etc. Wherefore the plaintiff saith that he is injured, and hath sustained damage to the value of ——— dollars; and therefore he brings his suit, etc.

Form 17. Declaration in Ejectment.

(*Commence as in Form* 1.)

For that whereas the said plaintiff, on the ——— day of ———, A. D. 18—, 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. 18—, entered into the said premises, and ejected the plaintiff therefrom, and unjustly withholds from the plaintiff the possession thereof.

(*Conclude as in Form* 1.)

This 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.[3] 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:[4]

[3] Ante, p. 120.

[4] Steph. Pl. (Tyler's Ed.) 71.

(*Title of court and venue as in Form* 1.)

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 coach-houses, 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 —— pounds; and therefore he brings his suit, &c.

Form 18. Several Counts.

The following are illustrations of declarations containing several counts:

TRESPASS FOR ASSAULT AND BATTERY.

(*Commence as in Form* 1.)

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.

ASSUMPSIT FOR GOODS SOLD, WORK DONE, MONEY LENT, ETC.

(*Commence as in Form* 1.)

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 pay him the said sum of money when he, the said C. D., should be thereto afterwards requested.

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.

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.

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.

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, after-

wards, 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.

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.

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.

Form 19. General Demurrer (For Matter of Substance Only).

A. B., Plaintiff, *vs.* 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.

Form 20. Special Demurrer to Declaration (For Matter of Form.)

(*Title of court and cause as in Form* 19.)

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, 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.*)

Form 21. Plea to the Jurisdiction.

(*Title of court and cause as in Form* 19.)

And the said C. D., defendant in the above-mentioned action, in his own proper person.[5] comes and defends the wrong (or force) and injury, and says that this court ought not to have or take further cognizance of the aforesaid action against him, because he says that (*here state the grounds showing want of jurisdiction*). And this he is ready to verify. Wherefore he prays judgment if the court here will or ought to have further cognizance of the aforesaid action.

Form 22. Plea in Suspension—Parol Demurrer.

(*Title of court and cause as in Form* 19.)

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.

[5] A plea to the jurisdiction must be by the defendant in person, and not by attorney. Pleading by attorney admits jurisdiction. See 1 Chit. Pl. 444; Mineral Point R. Co. v. Keep, 22 Ill. 9, 19. But it is otherwise with a plea by a corporation. It must plead to the jurisdiction by attorney, for it is incapable of appearing personally. Nispel v. Western Union R. Co., 64 Ill. 311.

Form 23. Plea in Abatement to the Person of the Plaintiff.

ALIENAGE.

(*Title of court and cause as in Form* 19.)

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 be answered to his writ and declaration aforesaid, because he says that the plaintiff is an alien, born, to wit, at ——, in the kingdom of ——, in parts beyond the seas, under the allegiance of the king of ——, an enemy of the United States, born of father and mother adhering to the said enemy; and that the said plaintiff entered this country without the safe conduct of the government of the United States. And this the defendant is ready to verify. Wherefore he prays judgment if the plaintiff ought to be answered to his writ and declaration aforesaid, etc.

SAME—INFANCY.

(*Commence as above.*) * * * Because he says that the plaintiff is an infant under the age of twenty-one years, to wit, of the age of —— years, and that no guardian ad litem has been appointed herein. And this he is ready to verify. (*Conclude as above.*)

Form 24. Plea in Abatement to the Writ and Declaration.

FOR NON-JOINDER OF PARTIES.

(*Title of court and cause as in Form* 19.)

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. 18—, 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.*)

Form 25. Pleas in Bar by Way of Traverse—Common or Specific Traverse.

TO DECLARATION GIVEN IN FORM 9.

(*Title of court and cause as in Form* 19.)

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 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 plaintiff hath above complained against him, the said defendant. And of this he puts himself upon the country.

Form 26. General Issue.

IN DEBT ON BOND OR OTHER SPECIALTY, OR IN COVENANT—NON EST FACTUM.

(*Title of court and cause as in Form* 19.)

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.

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.

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.

IN TRESPASS—NOT GUILTY.

(*Commence as above, using the word "force," instead of "wrong."*) * * * Says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in manner and form as the plaintiff hath complained. And of this the defendant puts himself upon the country.

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.

IN CASE OR TROVER—NOT GUILTY.

(*Commence as above.*) * * * And says that he is not guilty of the premises above laid to his charge, in manner and form as the plaintiff hath complained. And of this the defendant puts himself upon the country.

IN REPLEVIN—NON CEPIT.

(*Commence as above.*) * * * And says that he did not take the said cattle (*or "goods and chattels," according to the subject of the action*) in the said declaration mentioned, or any of them, in manner and form as the plaintiff hath complained. And of this the defendant puts himself upon the country.

In some states, as we have seen,[6] by statute replevin lies where there is an unlawful detention, though there may have been no unlawful taking. This is virtually a substitute for the action of detinue, and in such a case the general issue is non detinet as above.

Form 27. Replication De Injuria.

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 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,

[6] Ante, pp. 115, 116.

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 al'eged*, 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.

Form 28a. Special Traverses.

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 ex-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. 18—, 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. 18—, 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.

Form 28b.

Again, suppose the following plea in an action of trespass quare clausum fregit:

And for a further plea, as to the breaking and entering the said close, in which, etc., and the treading down, trampling upon, consuming, and spoiling the said grass and herbage, as above supposed to have been done, the said C. D., 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 A. B. ought not to have or maintain his aforesaid action thereof against him, because he says that before the said time, when, etc., to wit, on the —— day of ——, in the year ——, one I. N., clerk, prebendary of the prebend of N., in the cathedral church of H., was seised in his demesne, as of fee, in right of the said prebend, of and in certain tenements, whereof the said close, in which, etc., then and from thenceforth hitherto hath been parcel; and being so seised, before the said time, when, etc., to wit, on the day and year last aforesaid, at ——, aforesaid, in the county aforesaid, by a certain indenture, sealed with the seal of the said I. N. (and now shown to the court here, the date whereof is the day and year last aforesaid), the said I. N. demised the said tenements, with the appurtenances (among other things), to the said C. D., by the name of all his prebend of N. aforesaid, etc., to have and to hold to the said C. D. and his assigns, from the —— day of —— then next, to the end and term of fifty years thence next following, yielding and paying therefor yearly during the said term, to the said prebendary and his successors, the sum of —— pounds, at the feasts of —— and ——, by equal portions. By virtue of which demise the said C. D. was possessed (among other things) of the said tenements, with the appurtenances; and, being so possessed, one I. H., bishop of ——, then being true and undoubted patron and ordinary of the said prebend of N., afterwards, to wit, on the —— day of ——, in the year ——, at ——, by his writings, sealed with his common seal (and now shown to the court here, the date whereof is the day and year last aforesaid), ratified, approved, and confirmed the said estate and interest of the said C. D. in the premises. And afterwards one I. E., master of arts, dean of the said cathedral church and the chapter of the said church for the time being, to wit, on the —— day of ——, in the year ——, at ——, by their writing, sealed with their common seal (and now shown to the court here, the date whereof is the day and year last aforesaid), ratified, approved, and confirmed the said estate and interest of the said C. D. in the premises. And the said A. B., claiming the said tenements, with the appurtenances, by color of a certain charter of demise to him thereof made for the term of his life by the said I. N., long before the said demise to the said C.

D., in form aforesaid made (whereas nothing of the said tenements, with the appurtenances, ever passed into the possession of the said A. B. by that charter), before the said time, when, etc., entered into the said tenements, with the appurtenances; upon whose possession whereof the said C. D., at the said time, when, etc., entered into the said tenement, with the appurtenances, and broke and entered the said close, in which, etc., and trod down, trampled upon, consumed, and spoiled the grass and herbage there growing and being, as it was lawful for him to do, for the cause aforesaid; which are the same trespasses in the introductory part of this plea mentioned, and whereof the said A. B. hath above complained; 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, etc.

The following replication would be a special traverse:

And as to the said plea by the said C. D. last above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, 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 thereof against him, because, protesting that the said I. N. did not demise the said tenements, with the appurtenances, to the said C. D., as the said C. D. hath above alleged, for replication, nevertheless, in this behalf, the said A. B. says that the said C. D., on the said —— day of ——, in the year ——, at ——, aforesaid, in the county aforesaid, brought to the said bishop a certain writing of demise of the said tenements by the said I. N. to the said C. D., and then and there desired the said bishop to confirm the said writing, sealed with the seal of the said I. N., in which writing no number of years was then written which the said C. D. was to have in the said tenements; which said writing of demise the said bishop then and there confirmed, and sealed the said writing with his seal. And before the said time, when, etc., to wit, on the —— day of ——, in the year ——, at ——, aforesaid, in the county aforesaid, the said I. N. died. After whose death, and before the said time, when, etc., the said bishop, as the true and undoubted patron and ordinary of the said prebend so being vacant by the death of the said I. N., collated the same on his clerk, the said A. B., and caused him to be justly instituted and inducted and put in corporeal possession of the said prebend. Whereby the said A. B. was seised of the said tenements, with the appurtenances, in his demesne, as of fee, in right of his said prebend, until the said C. D., on the —— day of ——, in the year ——, with force and arms, broke and entered the close of the said A. B., at ——, aforesaid, and trod down, trampled upon, consumed, and spoiled the grass and herbage therein to value of —— pounds, as he hath above complained. *Without this, that* the said bishop, by his said writing, ratified, approved, and confirmed the estate and interest of the said C. D. in the premises, in manner and form as the said C. D. hath in his said last-mentioned plea alleged; and this the said A. B. is ready to verify. Where-

fore he prays judgment, and his damages by him sustained by reason of the said trespasses in the introductory part of that plea mentioned, to be adjudged to him, etc.

Form 28c.

Again, suppose the following plea 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., and with feet in walking, treading down, trampling upon, consuming, and spoiling the said grass, as above supposed to have been done, the said C. D., 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 A. B. ought not to have or maintain his aforesaid action thereof against him, because he says that one W. F., before and at the same time, when, etc., was and yet is seised in his demesne, as of fee, of and in a certain messuage, or tenement and lands, with the appurtenances, situate and being at ——, in the county aforesaid. And that the said W. F., and all those whose estate he hath, and at the same time when, etc., had of and in the said messuage, or tenement and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of right ought to have and use, for himself and themselves, and his and their farmers and tenants, occupiers of the said messuage, or tenement and lands, with the appurtenances, for the time being, a certain way from the said messuage, or tenement and lands, with the appurtenances, into, through, and over the said close, in which, etc., unto a certain place called ——, and so from thence back again, into, through, and over the said close, in which, etc., unto the said messuage, or tenement and lands, with the appurtenances, to go, return, pass and repass, on foot, at all times of the year, at his and their free will and pleasure, as to the said messuage, or tenement and lands, with the appurtenances belonging and appertaining. Wherefore the said C. D., as the servant of the said W. F., and by his command, at the said several times when, etc., having occasion to use that way, broke and entered the said close, in which, etc., and passed and repassed on foot through and over the said way there, using the said way for the purpose and on the occasion aforesaid, as it was lawful for him to do for the cause aforesaid; and in so doing the said C. D. necessarily and unavoidably, at the said time when, etc., with his feet in walking, trod down, trampled upon, consumed, and spoiled a little of the grass then growing and being in the said way there; doing as little damage as he possibly could to the said A. B. on that occasion. Which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said A. B. hath above complained; 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 thereof against him, etc.

The following replication would be a special traverse:

And as to the said plea by the said C. D. last above pleaded, as to the several trespasses in the introductory part of that plea mentioned, 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 thereof against him; because the said A. B. says that he, the said C. D., of his own wrong, broke and entered the said close, in which, etc., and with feet in walking, trod down, trampled upon, consumed, and spoiled the grass there then growing and being as the said A. B. hath above complained. *Without this, that* the said W. F., and all those whose estate he hath, and at the said several times when, etc., had of and in the said messuage, or tenement and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of right ought to have and use, for himself and themselves, and his and their farmers and tenants, occupiers of the said messuage, or tenement and lands, with the appurtenances, for the time being, a certain way from the said messuage, or tenement and lands, with the appurtenances, into, through, and over the said close, in which, etc., unto a certain place called ——, and so from thence back again into, through and over the said close, in which, etc., unto the said messuage, or tenement and lands, with the appurtenances, to go, return, pass and repass on foot at all times of the year, at his and their free will and pleasure, as to the said messuage, or tenement and lands, with the appurtenances, belonging and appertaining, in manner and form as the said C. D. hath in his said last-mentioned plea alleged. And this the said A. B. is ready to verify. Wherefore he prays judgment, and his damages by him sustained by reason of the said trespasses, in the introductory part of that plea mentioned, to be adjudged to him, etc.

FORM 29. PROTESTATION.

Suppose the following plea in assumpsit for goods sold and delivered:

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 making of the said promises and undertakings, and before the commencement of this suit, to wit, on the —— day of ——, in the year ——, at —— aforesaid, in the county aforesaid, he, the said C. D., gave and delivered to the said A. B. a certain pipe of wine, in full satisfaction and discharge of the said promises and undertakings, and of all the sums of money in the said declaration mentioned; which said pipe of wine, so given in full satisfaction and discharge as aforesaid, the said A. B. then and there accepted in full satisfaction and discharge of the said promises and undertakings, and of all the sums of money in the said declaration mentioned.

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 following replication contains a protestation:

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 pipe of wine, 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 pipe of wine in full satisfaction and discharge of the said promises and undertakings, and of all the sums of money in the said declaration mentioned, 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.

Form 30. Plea in Bar by Way of Confession and Avoidance.

TO DECLARATION GIVEN IN FORM 9.

(*Title of court and cause as in Form* 19.)

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. 18—, 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.

PLEA OF STATUTE OF LIMITATIONS—IN ASSUMPSIT.

(*Title of court and cause as in Form* 19.)

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, 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.

Form 31. Pleading Matter in Estoppel.

Suppose the following plea in abatement for misnomer:

And C. D., against whom the said A. B. hath exhibited his bill, by the name of E. D., in his own person comes and says, that he was baptized by the name of C., to wit, at ——, aforesaid, and by the Christian name of C. hath always, since his baptism, hitherto been called and known. *Without this, that* the said C. D. now is, or at the time of exhibiting the said bill was, or ever before had been, called or known by the Christian name of E., as by the said bill is supposed; and this the said C. D. is ready to verify. Wherefore he prays judgment of the said bill and that the same may be quashed.

The following replication pleads matter in estoppel:

And the said A. B. saith that the said person against whom he hath exhibited his said bill, by the name of E. D., *ought not to be admitted or received* to plead the plea by him above pleaded for quashing the bill of him the said A. B., because he saith that the said person against whom he, the said A. B., hath exhibited his said bill, by the name of E. D., heretofore, to wit, in the term of ——, last past, came into this court here and put in bail, at the suit of the said A. B., in the plea aforesaid, by the name of E. D., as by the record thereof remaining in the said court of our said lord the king, before the king himself, at Westminster, aforesaid, more fully appears; and this he, the said A. B., is ready to verify by that record. Wherefore he prays judgment if the said person against whom he hath exhibited his said bill, by the name of E. D., *ought to be admitted or received to his said plea* for quashing the said bill, contrary to his own acknowledgment and the said record, and that he may answer over to the said bill.

Form 32. 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.

Form 33. Plea Puis Darrein Continuance.

(*Title of court and cause as in Form* 19.)

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. 18—, 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, as in Form* 30), 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.

Form 34. Demand of Oyer, and Setting Forth Deed in Plea.

PLEA TO DECLARATION IN FORM 5.

(*Title of court and cause as in Form* 19.)

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.

Form 35. Several Pleas.

To Several Counts (In Trespass for Assault and Battery).

(*Title of court and cause as in Form* 19.)

And the said C. D., defendant, by X. Y., his attorney, comes and defends the force and injury, when, etc.; and, *as to the first count* of the said declaration, the said defendant says that he is not guilty of the said trespasses therein mentioned, or any part thereof, in manner and form as the plaintiff hath above thereof complained. And of this the defendant puts himself upon the country.

And *as to the second count* of the said declaration the defendant says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that he, the said defendant, was not, at any time within four years next before the commencement of this suit, guilty of the said trespasses in the said second count mentioned, or any part thereof, in manner and form as the 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.

To Same Claim, by Leave of Court.

(*Commence as above.*) * * * And says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in manner and form as the said plaintiff hath above thereof complained. And of this the defendant puts himself upon the country.

And for a further plea in this behalf, 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 against him, because he says that he, the said defendant, was not, at any time within four years next before the commencement of this suit, guilty of the said trespasses in the said declaration mentioned, or any part thereof, in manner and form as the 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 against him.

Form 36. Replication by Way of Traverse.

To Plea Given in Form 24.

(*Title of court and cause as in Form* 19.)

And the said A. B., plaintiff in the above-mentioned action, says that his said writ and declaration, by reason of anything in the said plea alleged, ought not to be quashed, because he says that the said promises and undertakings were made by the defendant alone, in manner and form as the said

plaintiff hath above complained, and not by the said defendant jointly with the said G. H., in manner and form as the said defendant hath above in his said plea alleged. And this the plaintiff prays may be inquired of by the country.

To Plea Given in Form 30 (Second Form).

(*Title of court and cause as in Form* 19.)

And the said A. B., plaintiff in the above-mentioned action, 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 defendant, because he says that the defendant did within six years next before the commencement of this suit, undertake and promise, in manner and form as he, the said plaintiff, hath complained. And this he prays may be inquired of by the country.

Form 37. Replication by Way of Confession and Avoidance.

To Plea Given in Form 30.

(*Title of court and cause as in Form* 19.)

And the said A. B., plaintiff in the above-mentioned action, 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 defendant, because he says that he, the said plaintiff, at the time of the making of the said supposed deed of release, was unlawfully imprisoned and detained in prison by the defendant, until, by force and duress of that imprisonment he, the said plaintiff, made the said supposed deed of release, as in the said plea mentioned. And this the plaintiff is ready to verify. Wherefore he prays judgment and his damages by him sustained by reason of the said breach of covenant to be adjudged to him.

Form 38. 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. 18—, with force and arms, at —— aforesaid, in the county aforesaid, upon another and dif-

ferent 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 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.

Form 39. Rejoinder by Way of Traverse.

To Replication Given in Form 37.

And the said C. D., plaintiff in the above-mentioned action, saith that, by reason of anything in the said replication alleged, the plaintiff ought not to have or maintain his aforesaid action against him, the said defendant, because he says that the plaintiff freely and voluntarily made the said deed of release, and not by force and duress of imprisonment, in manner and form as by the said replication alleged. And of this the defendant puts himself upon the country.

Form 40. Joinder in Demurrer.

(*Title of court and cause as in Form* 19.)

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.

Form 41. Joinder in Issue, or Similiter.

(*Title of court and cause as in Form* 19.)

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.

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